

REFUGEE CRISIS IN GERMANY AND THE RIGHT TO A SUBSISTENCE MINIMUM: DIFFERENCES THAT OUGHT NOT BE

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Georgia’s Journal of International and Comparative Law has ensured all citations are in the proper Blue Book Format. However, due to a large portion of the Author’s sources being in German, the Journal was unable to verify the substantive nature of the sources and their respective citations. Therefore, all substantive assertions made and their corresponding citations are the responsibility of the Author.

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I. INTRODUCTION

A. "Refugee Crisis"

In the summer and fall of 2017, the time of writing this article, Germany was in the wake of what had been termed the "Flüchtlingskrise" (refugee crisis) in 2015.¹ The unfolding of the refugee crisis was intensely covered by the media as it took place. Some pictures of the coverage still stick in mind: In the summer and the fall of 2015, hundreds of thousands of desperate people—men, women, children—literally marched through parts of Europe to escape dire circumstances, such as civil war in Syria and unrest and insecurity in Afghanistan, Iraq, or Iran. Many people simply walked for miles and miles along railway tracks leading northwest once they reached the Balkan countries, after surviving a very dangerous crossing-over from Turkey to Greece.² The German media called the passage through southeast Europe the "Balkan route" or the "Western Balkans route."³ After the refugees had left Greece, they proceeded to the Former Yugoslav Republic of Macedonia and Serbia, then to Hungary (or Croatia and Slovenia), Austria, and, eventually, Germany.⁴

Clearly, the refugees expected the European Union (EU) to help. But many EU member states were reluctant to give in to that expectation. The countries most affected by the crisis—Greece, Hungary, Italy—offered little support in the summer of 2015.⁵ Hungary even turned to outright hostility in the fall of 2015.⁶ Greece, Hungary, and Italy were happy to see the refugees move on, even though EU law demanded that they evaluate the refugees'

¹ See, e.g., Marc Brost et al., *Jetzt prallt die Politik auf die Wirklichkeit* [Now, Politics Clashes with Reality], DIE ZEIT, Aug. 27, 2015, at 2; Anthony Faiola, *European Refugee System Overwhelmed*, WASH. POST, Apr. 22, 2015, at A01.

² See, e.g., Fritz Habekuß & Ulrich Ladurner, *Ach, das ist also Europa. Tod auf den Bahngleisen, Raubüberfälle im Wald, hunderte Kilometer Fußmarsch – wie sich Kriegsflüchtlinge in Griechenland und auf dem Balkan durchschlagen* [Oh, This is What Europe Means. Death on Railway Tracks, Being Robbed in the Woods, Hundreds of Kilometers of Walking – How Refugees from War Zones Eke out an Existence in Greece and in the Balkan Countries], DIE ZEIT, June 11, 2015, at 8.

³ See, e.g., Norbert Mappes-Niediek, *Von guten und schlechten Flüchtlingen* [On Good and Evil Refugees], FRANKFURTER RUNDSCHAU, Nov. 20, 2015, at 6.

⁴ *Id.*

⁵ See, e.g., Andre Tauber, *Zuhause für 60.000 Menschen gesucht; EU-Kommission will Flüchtlinge aus Syrien verteilen, um Italien und Griechenland zu entlasten* [A Home for 60,000 Migrants Wanted; Commission of the EU Wants to Resettle Syrian Refugees to Ease the Burden on Italy and Greece], DIE WELT, May 28, 2015, at 6.

⁶ See, e.g., Michael Birnbaum & Griff Witte, *Migrant Crisis Widens E.U. Rifts*, WASH. POST, Sept. 4, 2015, at A01.

claims and provide the means necessary for a decent living.⁷ The Dublin System, created by the EU in the 1990s with the intention to shift all responsibilities towards the member states issuing entry documents or failing to prevent illegal border crossings,⁸ had broken down.⁹ The Eastern European countries to the north, such as the Czech Republic, Poland, and Slovakia, strongly resisted any enactment by the EU of quota-based programs designed to help countries on the periphery through relocation or resettlement.¹⁰

⁷ See, e.g., Steven Erlanger & Alison Smale, *Deaths Expose Lack of E.U. Plan in Refugee Crisis*, N.Y. TIMES, Aug. 29, 2015, at A1.

⁸ See first, [Dublin] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C 254) 1, then Council Regulation 343/2003, 2003 O.J. (L 50) 1, now Regulation 604/2013, 2013 O.J. (L 180) 31 (recast). For an overview on the Dublin System, see Agnès Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, 11 INT'L J. REFUGEE L. 646 (1999); Constantin Hruschka, *From the Dublin Convention to the Dublin Regulation. The Impact on EU Third Country Cases in the UK Jurisdiction*, 13 JAHRBUCH FÜR RECHT UND ETHIK [JRE] 473 (2005).

⁹ See, e.g., Jeffrey Marcus, *An Escalating Crisis and an Intensifying Search for Solutions*, N.Y. TIMES, Sept. 1, 2015, at A6. On the responsibilities created by the Dublin System for the member states on the periphery of the European Union and the member states in which the application for asylum has been eventually lodged, see Case C-490/16, A.S. v. Republika Slovenija, ECLI:EU:C:2017:585 (July 26, 2017). On the distributive effects of the Dublin System, see also Daniel Fröhlich, *Zuständigkeitsallokation im Gemeinsamen Europäischen Asylsystem [Allocation of Responsibilities under the Common European Asylum System]*, ZEITSCHRIFT FÜR GESETZGEBUNG [ZG] 215, 221-22 (2016) (emphasizing the particular burden to be shouldered by southern and southeastern European countries, given the whereabouts and the direction of most of the migratory movements toward the EU).

¹⁰ See, e.g., James Kanter, *E.U. Nations Urged to Accept 160,000 Migrants*, N.Y. TIMES, Sept. 10, 2015, at A1; Rick Lyman, *Eastern Europe Balking at Aid for Migrants*, N.Y. TIMES, Sept. 13, 2015, at A1 (quoting a source stressing that the refugees were culturally different from the people living in Eastern Europe: “[T]his wave of refugees from another continent . . . has no precedent, so people don’t know what to think.”) For the legal background of the debate see Commission Recommendation (EU) 2015/914, 2015 O.J. (L 148) 32 (proposing a European resettlement scheme); Council Decision 2015/1523, 2015 O.J. (L 239) 146 (establishing provisional measures in the area of international protection for the benefit of Italy and Greece, involving the relocation of 40,000 persons and the setup of a relocation procedure based on voluntary indications by member states regarding the number of applicants who could be relocated swiftly to their territories); Council Decision 2015/1601, 2015 O.J. (L 248) 80 (establishing provisional measures in the area of international protection for the benefit of Italy and Greece, involving the relocation of 120,000 persons under a quota system; the decision was adopted by majority vote only, with the Czech Republic, Hungary, Romania, and the Slovak Republic voting against). The legality of Council Decision 2015/1601 has been contested before the ECJ by Hungary and the Slovak Republic. The ECJ (Grand Chamber) dismissed the appeals. Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631 (Sept. 6, 2017).

Within a few weeks, Germany had become the country of choice for most of the refugees reaching European soil.¹¹ In mid-August 2015, German officials expected the number of incoming refugees to reach 800,000 by the end of the year¹²—a number without precedent. At the end of August 2015, a deserted truck carrying the decayed bodies of seventy-one people, suspected to be illegal migrants, was found close to Austria's eastern border.¹³ The truck had been passing through Hungary before entering Austrian territory.¹⁴ Federal Chancellor Angela Merkel was “deeply shaken by the news.”¹⁵ At that point in time, Germany had already decided to allow any Syrian refugee reaching Germany to apply for asylum, i.e., it no longer relied on Greece, Hungary, or Austria regarding the processing of asylum applications under to the Dublin System.¹⁶ On September 5, 2015, against the background of persistent violent protests orchestrated by right-wingers,¹⁷ Angela Merkel decided to relinquish border controls altogether,¹⁸ a measure that lasted de facto well into the spring of 2016.¹⁹ In the summer of 2016, the Balkan route was basically sealed off again. Turkey had agreed to resume stricter border controls in March 2016 (promising to stop crossings-overs to the Greek islands).²⁰

¹¹ See, e.g., Alison Smale, *Migrants Race North as Hungary Builds a Fence*, N.Y. TIMES, Aug. 25, 2015, at A1 (quoting a source describing Germany as the refugees' “promised land.”).

¹² See, e.g., Karsten Kammholz & Daniel Friedrich Sturm, *Regierung rechnet jetzt mit 800.000 Flüchtlingen* [Government Expects the Number of Refugees to Reach 800,000], DIE WELT, Aug. 20, 2015, at 1.

¹³ See, e.g., Anthony Faiola, *Decayed Bodies Found in Truck*, WASH. POST, Aug. 28, 2015, at A01; Marcus, *supra* note 9.

¹⁴ See Marcus, *supra* note 9.

¹⁵ Editorial Board, *A Refugee Tragedy in Austria*, N.Y. TIMES, Aug. 28, 2015, at A22.

¹⁶ Melissa Eddy, *Merkel Tries to Counter Backlash Against Migrants as Violence Flares*, N.Y. TIMES, Aug. 27, 2015, at A06.

¹⁷ Anthony Faiola & Stephanie Kirchner, *Merkel Seeks to Calm Anti-Refugee Fury*, WASH. POST, Aug. 27, 2015, at A08.

¹⁸ Rick Lyman, Anemona Hartocollis & Alison Smale, *Migrants Cross Austria Border from Hungary*, N.Y. TIMES, Sept. 5, 2015, at A01.

¹⁹ See Liz Alderman, *Greece Becomes a Migrant Choke Point as Neighbors Shut Their Gates*, N.Y. TIMES, Mar. 3, 2016, at A5; Anthony Faiola, *Europe Has Blocked a Popular Land Route for Refugees. Now What?*, WASH. POST, Mar. 13, 2016, at A16.

²⁰ For details on the so-called “EU-Turkey deal,” see Council of the EU Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016). For a legal assessment of the “deal,” see Rainer Hofmann & Adela Schmidt, *Die Erklärung EU-Türkei vom 18.3.2016 aus rechtlicher Perspektive* [The EU-Turkey Statement of March 18, 2016, from a Legal Perspective], NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 743, 744 (2016). The legality of the EU-Turkey Statement has been challenged under Article 263 of the Consolidated Version of the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU], before the General Court of the EU. The General Court held that the statement could not be seen as an act attributable to an institution of the EU as required by art. 263(1) TFEU. Case T-193/16, NG v. European Council, ECLI:EU:T:2017:129. The case is now pending before the ECJ.

The countries along the Balkan route started closing their borders.²¹ Many refugees turned again to the much more dangerous route that leads from Northern Africa (often from Libya) to Italy, the so-called Mediterranean route.²²

B. Public Opinion Turns

In mid-August 2015, public opinion sided with Angela Merkel when she responded to verbal attacks in the small town of Heidenau in Eastern Germany, saying “There is no tolerance for those who are not willing to help where legal and human help is required.”²³ A few months later, public opinion had changed. The change was triggered by events taking place in Cologne on New Year’s Eve 2015 and by ensuing events also involving crimes supposedly committed by non-nationals whose presence was covered by the legal regime governing asylum applicants.

On the last day of 2015, the square between the railway station and the dome of Cologne was the venue of massive sexual assaults on women.²⁴ More than 1,000 complaints were filed afterwards.²⁵ The assaults were orchestrated by young men; allegedly, many of the young men had come to Germany from Northern Africa or the Middle East.²⁶ The men attacked women in groups, forming circles around the women; this left the women and their male companions helpless and humiliated.²⁷ Authorities soon tied the attacks to Algerians, Moroccans, Syrians, Iranians, and Iraqis, some of whom had recently arrived in Germany and registered as asylum seekers.²⁸ Shortly before Christmas 2016, a heavy truck hijacked by a Tunisian national was driven into one of Berlin’s most popular Christmas markets, leaving twelve people dead and

²¹ See, e.g., Sewell Chan, *Balkan Nations Block Migrants’ Path to Europe*, N.Y. TIMES, Mar. 10, 2016, at A07.

²² See, e.g., James McAuley, *Death Toll Mounts in Mediterranean*, WASH. POST, June 5, 2016, at A09.

²³ See Eddy, *supra* note 16.

²⁴ See, e.g., Melissa Eddy, *Attacks on German Women Inflammate Debate on Migrants*, N.Y. TIMES, Jan. 6, 2016, at A01.

²⁵ See *Geschändete Fakten [Defiled Facts]*, FRANKFURTER RUNDSCHAU, Apr. 2, 2016, at 2.

²⁶ Eddy, *supra* note 24 (quoting German officials saying that the men had “a North African or Arabic” appearance).

²⁷ See, e.g., Alison Smale et al., *Cologne Attacks Highlight Clash Among Cultures*, N.Y. TIMES, Jan. 15, 2016, at A01.

²⁸ See Anthony Faiola, *Germany Targets a Surge of Vitriol*, WASH. POST, Jan. 7, 2016, at A01; Alison Smale et al., *18 Asylum Seekers Tied to Attacks in Germany*, N.Y. TIMES, Jan. 9, 2016, at A06.

forty-eight injured.²⁹ The driver had entered Germany in the summer of 2015, after having spent some time in Italy. He applied for asylum in the spring of 2016.³⁰ In the early morning of December 25, 2016, the ensuing manhunt across Europe ended at a bus station in Northern Milan, where the suspect was asked to show his papers and was eventually shot dead after he opened fire.³¹

Between the end of December 2015 and the end of December 2016, Germany was the site of numerous crimes. To give but a few examples: In July 2016, media reported an attack committed by a young refugee (initially thought to be an Afghan national, then believed to be a Pakistani national) who injured several passengers in a local train close to Wuerzburg with an ax and a knife.³² Media also reported a suicide bomb initiated by a twenty-seven-year-old Syrian close to the entrance of an open-air music festival in Southern Germany (Ansbach), wounding fifteen people.³³ In October 2016, law enforcement officers discovered explosives in the apartment of a Syrian refugee in Chemnitz who was, so the stories ran, set to attack a Berlin airport; the suspect hung himself in police custody shortly after his arrest.³⁴ From October through December 2016, the attention of the media was time and again drawn to the rape and murder of a nineteen-year-old medical student volunteering for a private aid organization. Eventually, in early December 2016, an Afghan migrant was arrested as a suspect in the case.³⁵ The Afghan had been convicted of attempted murder in Greece before his arrival in Germany; German officials had no knowledge of the conviction.³⁶ On the night of December 25, 2016, a group of seven youths ages fifteen to twenty-one years old, mainly from Syria, set a homeless person resting in a Berlin underground station on fire; all of them had recently registered as refugees.³⁷

²⁹ See *Horror in Berlin*, FRANKFURTER RUNDSCHAU, Dec. 20, 2016, at 1; *Terrorakt belastet Regierung [Act of Terror Puts Strain on Government]*, FRANKFURTER RUNDSCHAU, Dec. 30, 2016, at 1.

³⁰ See, e.g., Melissa Eddy et al., *Suspect Hunted in Berlin Attack Was Well Known*, N.Y. TIMES, Dec. 22, 2016, at A01.

³¹ Elisabetta Povoledo et al., *Berlin Manhunt Ends in Gunfire in Italian Plaza*, N.Y. TIMES, Dec. 24, 2016, at A01.

³² See, e.g., Peter Issig, *Er rief "Allahu akbar" und stach sofort zu [He Shouted "Allahu akbar" and Started Hitting]*, DIE WELT, July 20, 2016, at 4; Melissa Eddy, *Police Kill Ax Wielder on Train in Germany*, N.Y. TIMES, July 19, 2016, at A07.

³³ Melissa Eddy, *Suicide Bomber in Germany Pledged Loyalty to ISIS, Officials Say*, N.Y. TIMES, July 26, 2016, at A10.

³⁴ See Melissa Eddy, *Germans Seize Bomb Plot Suspect in Raid*, N.Y. TIMES, Oct. 11, 2016, at A09; Alison Smale, *Suicide in Jail Puts Scrutiny on Officials in Germany*, N.Y. TIMES, Oct. 14, 2016, at A06.

³⁵ See, e.g., Melissa Eddy, *Migrant's Murder Case Grows More Tangled*, N.Y. TIMES, Dec. 16, 2016, at A12.

³⁶ *Id.*

³⁷ See, e.g., Claudia Becker & Michael Behrendt, *Sie waren nicht betroffen über das, was passiert ist [They Didn't Care About What Had Happened]*, DIE WELT, Dec. 28, 2016, at 28.

Against that background, anti-immigrant sentiments gained strength. Surveys showed that, in the minds of many people, the refugee crisis and terrorism seemed closely intertwined; people feared that the presence of refugees would increase the likelihood of terrorism in the country.³⁸ A new political party representing and fueling those fears entered the scene forcefully in 2016: Alternative für Deutschland (AfD).³⁹ In the national elections taking place in September 2017, the AfD cast 12.6% of the votes.⁴⁰

C. Lawmakers Respond

German lawmakers did not stand idle in 2016, as the country went through a period of insecurity and discontent.⁴¹ The lawmakers—assembled in the Bundestag and the Bundesrat—responded to the attacks of 2016 by amending the German Penal Code, the law regarding expulsion, and the asylum law; the new provisions inserted into the Penal Code in November 2016⁴² accounted for the assaults in Cologne on New Year’s Eve 2015.⁴³ The provisions of the German Aufenthaltsgesetz (AufenthG),⁴⁴ the Residence Act, regarding

³⁸ Alison Smale & Stephen Castle, *Attack Builds Political Power of Anti-Immigrant Movements in Europe*, N.Y. TIMES, July 17, 2016, at A12.

³⁹ In 2016, the AfD scored well in the state elections held in Baden-Württemberg, Rhineland-Palatinate, Saxony-Anhalt, and Mecklenburg-West Pomerania. The AfD received 15% of the votes in Baden-Württemberg, 13% in Rhineland-Palatinate, 24% in Saxony-Anhalt, and 21% in Mecklenburg-West Pomerania. See *Abstimmungen in drei Ländern. Die Ergebnisse der Landtagswahlen im Überblick [Election Polls in Three States. Overview on States’ Elections]*, SPIEGEL ONLINE (Mar. 14, 2016), <http://www.spiegel.de/politik/deutschland/wahlen-2016-die-ergebnisse-der-landtagswahlen-im-ueberblick-a-1082093.html>.

⁴⁰ *Wahl 2017 [Election 2017]*, SPIEGEL ONLINE (Oct. 13, 2017), <http://www.spiegel.de/politik/deutschland/bundestagswahl-2017-alle-ergebnisse-im-ueberblick-a-1167247.html>.

⁴¹ See Nadine Ahr et al., *Schaffen die das? Wähler wenden sich von der Kanzlerin ab, Bürgermeister schreiben Protestbriefe nach Berlin, treue Anhänger der Union geben auf [Can They Do It? Voters Turn away from the Federal Chancellor, Mayors Write Letters of Protest to Berlin, Faithful Supporters of the Union Give up]*, DIE ZEIT, Mar. 3, 2016, at 13.

⁴² Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches – Verbesserung des Schutzes der sexuellen Selbstbestimmung [Fiftieth Amendment to the Penal Code Strengthening Sexual Self-Determination], Nov. 4, 2016, BUNDESGESETZBLATT TEIL I [BGBl I] at 2460 (art. 1) (Ger.).

⁴³ See Sasan Abdi-Herrle, *Sexualstrafrecht: Ein Nein reicht aus [Penal Code on Sexual Crimes: One No is Enough]*, ZEIT ONLINE (July 7, 2016), <http://www.zeit.de/gesellschaft/2016-07/sexualstrafrecht-ueberblick-vergewaltigung-sexuelle-belaestigung-ab-schiebung>.

⁴⁴ Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [AufenthG] [Act Regarding the Stay, the Employment and the Integration of Non-Nationals in Germany], July 30, 2004, BGBl I at 1950 (art. 1), repromulgated Feb. 25, 2008, BGBl I at 162, as amended (Ger.).

expulsion, were amended twice in 2016 in order to expand the powers of authorities with respect to the deportation of non-nationals who had committed crimes, be they asylum seekers or not.⁴⁵ The amendments to the Asylgesetz (AsylG),⁴⁶ the Asylum Act, were partly a reversal of the policies implemented by a coalition government between Conservatives (CDU/CSU) and Social Democrats (SPD) that was formed following the national elections in September 2013.⁴⁷ Under the 2013 coalition's contract,⁴⁸ Social Democrats were bound to add a number of Balkan states to the list of "safe countries of origin" (and thus to open the door to fast-track procedures for applicants coming from those countries). The Conservatives agreed to an upgrading of the legal status of asylum seekers who had good chances of being granted some form of protection.⁴⁹ The list of safe countries of origin annexed to the AsylG was indeed quickly amended in the fall of 2014.⁵⁰ The ban on the employment of asylum seekers and non-nationals, whose stays were merely tolerated⁵¹, was also quickly reduced to a period covering the first three months of residence (formerly, employment was prohibited for twelve months).⁵² Eventually, in December 2014, the restrictions on the free movement of asylum seekers was tied to a period of three months following their entry (prior to that, there was

⁴⁵ Gesetz zur erleichterten Ausweisung von straffälligen Ausländern und zum erweiterten Ausschluss der Flüchtlingsanerkennung bei straffälligen Asylbewerbern [Act to Facilitate the Deportation of Non-Nationals who Committed a Crime and to Exclude Asylum Seekers from Refugee Status when they Committed a Crime], Mar. 11, 2016, BGBl I at 394 (art. 1) (Ger.); Fünzigstes Gesetz zur Änderung des Strafgesetzbuches, *supra* note 42, at art. 2.

⁴⁶ Gesetz zur Neuregelung des Asylverfahrens [Act to Make New Provision on the Procedure for Granting Asylum], June 26, 1992, BGBl I at 1126 (art. 1), repromulgated Sept. 2, 2008, BGBl I at 1798, and eventually renamed "Asylgesetz" [Asylum Act] by Asylverfahrenbeschleunigungsgesetz [Act Making Provision for Speeding-Up Asylum Procedures], Oct. 20, 2015, BGBl I at 1722 (art. 1), as amended (Ger.) [hereinafter AsylG].

⁴⁷ See, e.g., Melissa Eddy, *Germany: Defeated Social Democrats Mull Coalition with Victorious Merkel*, N.Y. TIMES, Sept. 28, 2013, at A07.

⁴⁸ Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD [Working for Germany's Future. Coalition Contract Between CDU, CSU, and SPD], <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf> (last visited May 30, 2018).

⁴⁹ *Id.* at 109.

⁵⁰ Gesetz zur Einstufung weiterer Staaten als sichere Herkunftsstaaten und zur Erleichterung des Arbeitsmarktzugangs für Asylbewerber und geduldete Ausländer [Act to Add Further States to the List of Safe Countries of Origin in the Annex of the Asylum Act and to Ease the Requirements Relating to the Employment of Asylum Seekers and Non-Nationals whose Stay is Merely Tolerated], Oct. 31, 2014, BGBl I at 1649 (art. 1) (Ger.) [hereinafter Gesetz zur Einstufung weiterer Staaten]. The newly added safe countries of origin included Bosnia and Herzegovina, The Former Yugoslav Republic of Macedonia, and Serbia. *Id.*

⁵¹ On the acquisition of the status as an "asylum seeker" and the peculiar concept of an unlawful yet tolerated presence in the country, see *infra* Part II.E.i and ii.

⁵² Gesetz zur Einstufung weiterer Staaten, *supra* note 50, at art. 2.

no time limit attached to the obligation to stay within the administrative district of the authority responsible for assessing the asylum application).⁵³ This step-by-step policy of making the status of an “asylum seeker” less onerous came to a halt in 2015. For designated classes of asylum seekers, the status became more precarious than ever. In October 2015, Annex II of the AsylG, naming the countries deemed to be safe countries of origin, was once more amended, with a view to extending the applicability of the fast-track procedure.⁵⁴ In March 2016, lawmakers created special facilities for the processing of applicants eligible for fast-track procedures—in particular, asylum seekers coming from safe countries of origin.⁵⁵ Applicants eligible for fast-track procedures were obliged to remain in the designated facilities until the authority responsible for the decision-making had reached its decision on the case (due within one week’s time after the lodging of the application).⁵⁶ The thrust of the March 2016 amendment was to speed up decision-making and removal from the country.

Yet there is another side to German politics regarding asylum seekers, a policy that is less noticed by the public. Under German statutory law, asylum seekers are entitled to social benefits while staying on German soil. The main legal source defining the access to and the substance of what is termed the “Existenzminimum” (subsistence minimum) is the Asylbewerberleistungsgesetz (AsylbLG), the Asylum Seekers’ Benefits Act.⁵⁷ Ensuring social benefits for asylum seekers through statutory law is, however, not merely an act of discretion for which German lawmakers may or may not opt. Under the German constitution (GG),⁵⁸ it is incumbent on parliament to make a provision with respect to securing the subsistence minimum. Article 1 of the GG reads: “Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.”⁵⁹ According to a recent judgment of the

⁵³ Gesetz zur Verbesserung der Rechtsstellung von asylsuchenden und geduldeten Ausländern [Act to Improve the Status of Asylum Seekers and Non-Nationals Who Are Merely Tolerated], Dec. 23, 2014, BGBL I at 2439 (art. 2 amending the AsylG).

⁵⁴ Asylverfahrensbeschleunigungsgesetz, *supra* note 46, at art. 1, no. 35 (amending Annex II of the AsylG). Albania, Kosovo, and Montenegro were added to the list of safe countries of origin. *Id.*

⁵⁵ Gesetz zur Einführung beschleunigter Asylverfahren [Act to Introduce Fast-Track Asylum Procedures], Mar. 11, 2016, BGBL I at 390 (art. 1 amending the AsylG) [hereinafter Gesetz zur Einführung beschleunigter Asylverfahren].

⁵⁶ *Id.*

⁵⁷ Asylbewerberleistungsgesetz [Asylum Seekers’ Benefits Act] [AsylbLG], art. 1 of Gesetz zur Neuregelung der Leistungen an Asylbewerber [Act Making New Provisions Regarding the Social Benefits for Asylum Seekers], June 30, 1993, BGBL I at 1074, repromulgated Aug. 5, 1997, BGBL I at 2022, last amended by Gesetz [G], July 17, 2017, BGBL I at 2541, (art. 4) [hereinafter AsylbLG].

⁵⁸ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], *translation* at https://www.gesetze-im-internet.de/englisch_gg/.

⁵⁹ *Id.* at art. 1(1).

Bundesverfassungsgericht (BVerfG), the Federal Constitutional Court, the dignity clause of the GG is deemed to imply a state duty to provide a subsistence minimum (and a corresponding individual right) when individuals are not able to provide for themselves.⁶⁰ On July 18, 2012, the BVerfG held that the constitutional right to be provided with a subsistence minimum and the corresponding duty of the state were not preserved for certain classes of long-term residents, and should be extended to non-nationals seeking protection in Germany as well.⁶¹ Some provisions of the AsylbLG, adopted in 1993, were declared unconstitutional because lawmakers had failed to fulfill the constitutional promise.⁶² Late in 2014, lawmakers responded to the criticism voiced by the BVerfG, *inter alia*, by upgrading the benefits for asylum seekers.⁶³ In 2015 and 2016, at the height of the crisis, the benefits to be accorded to asylum seekers were the subject of major changes, all of which introduced further conditions for eligibility and other curtailments.⁶⁴ These conditions and curtailments are the focus of this Article.

D. Preview

This Article comes in three parts. Part II of the Article presents numbers and facts. Throughout the crisis peaking in 2015 and 2016, parliamentary decision-making was informed by numbers and facts, such as the numbers of applications lodged, the numbers of the decisions granting protection and the form of protection, or the case load pending before the Bundesamt für Migration und Flüchtlinge (BAMF), the Federal Office for Asylum and Migration.⁶⁵ Those numbers mattered. Part II also gives details on the legal framework for the processing of asylum applications⁶⁶ and the legal status of the claimants

⁶⁰ See BVerfG, Feb. 9, 2010, 1 BvL 1/09, at marginal no. 134, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html. For a detailed discussion on the constitutional foundation of the right to a subsistence minimum, see *infra* Part III.A.i.b.

⁶¹ See BVerfG, July 18, 2012, 1 BvL 10/10, at marginal no. 62, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html.

⁶² *Id.* For a detailed discussion of the reasoning of the BVerfG, see *infra* Part III.B.i.b.

⁶³ See Gesetz zur Änderung des Asylbewerberleistungsgesetzes und des Sozialgerichtsgesetzes [Act Amending the Asylum Seekers' Benefits Act and the Act Concerning the Tribunals Adjudicating in Matters of Social Law], Dec. 10, 2014, BGBl I at 2187.

⁶⁴ See Asylverfahrensbeschleunigungsgesetz, *supra* note 46, at art. 2; Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, at art. 3; Integrationsgesetz [Act on Integration, hereinafter IntegrationsG], July 31, 2016, BGBl I at 1939 (art. 4) (Ger.). See also Gesetz zur Änderung des Bundesversorgungsgesetzes und anderer Vorschriften [Act Amending the Act on State-Provided Compensation for the Victims of War and Further Acts], July 17, 2017, BGBl I at 2541 (art. 4) (Ger.).

⁶⁵ On those numbers and facts, see *infra* Parts II.A., II.B., II.C.

⁶⁶ See *infra* Part II.D.

pending the decision-making and the time thereafter.⁶⁷ In general, social benefits are the only means available to the asylum seekers for securing a living.⁶⁸ Part III deals with the statutory law implementing the constitutional right to a subsistence minimum. I shall first describe what I call the “general regime” for the provision of the subsistence minimum, a regime applicable to all cases that are not covered by the particular regime.⁶⁹ Then I shall give an outline of the particular regime, the regime exclusively designed for asylum seekers and non-nationals whose stays are merely tolerated.⁷⁰ Part IV elaborates on the differences between the general and the particular regime,⁷¹ mainly from the angle of the right to the respect of human dignity, enshrined in Article 1(1) of the GG,⁷² but also from the angle of EU law,⁷³ in particular Directive 2013/33, laying down the standards member states must comply with when they admit asylum seekers into their territories.⁷⁴ I shall argue the provisions defining the asylum seekers’ benefits are inconsistent with the human dignity clause of the German constitution and with the standards laid down by the Charter of Fundamental Rights of the EU (the Charter).⁷⁵ It will be seen, though, that my case against the recent changes regarding the asylum seekers’ benefits is easier to make from the perspective of the GG than it is from the perspective of EU law. Part V summarizes my findings.

II. REFUGEE CRISIS: NUMBERS, FACTS, AND LEGAL FRAMEWORKS

A. *Applications for Asylum*

The first year that signaled the numbers of non-nationals seeking international protection were on the rise was 2014. In 2014, the total number of applications for asylum reached almost 203,000.⁷⁶ That was nearly double the total in 2013.⁷⁷ In 2014, the main countries of origin of the applicants

⁶⁷ See *infra* Part II.E.

⁶⁸ See *infra* Part II.E.iv.

⁶⁹ See *infra* Part III.A.

⁷⁰ See *infra* Part III.B.

⁷¹ See *infra* Part IV.A.

⁷² See *infra* Part IV.B.

⁷³ See *infra* Part IV.C.

⁷⁴ See *generally* Directive 2013/33, 2013 O.J. (L 180) 96 (EU).

⁷⁵ See *generally* Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202) 393 [hereinafter Charter] (cataloguing certain political, civil, economic and social rights).

⁷⁶ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, ASYLGESCHÄFTSSTATISTIK FÜR DEN MONAT DEZEMBER 2014 [FEDERAL OFFICE FOR MIGRATION AND REFUGEES, STATISTICS ON ASYLUM CASES FOR THE MONTH OF DECEMBER 2014] (2014) at 2 (Ger.) [hereinafter BUNDESAMT Dec. 2014].

⁷⁷ In 2013, the number of applications lodged was 127,023. *Id.*

were Syria, closely followed by the Balkan region (Serbia, Kosovo, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, and Albania), again followed by Eritrea, Afghanistan, and Iraq.⁷⁸

In 2015, the total number of asylum applications lodged with the responsible authority, the BAMF, was about 480,000.⁷⁹ That number was, in fact, not unique. Germany had a similar experience in 1992, when the number of applications lodged reached 440,000.⁸⁰ Before 1992 and thereafter, numbers were much lower.⁸¹ In 2015, when numbers reached a first peak, the main countries of origin were, again, Syria and countries of the Balkan region; Afghanistan and Iraq had climbed upward in the list of the top ten countries of origin and surpassed Eritrea.⁸² In 2016, the numbers were unique. The number of applications lodged reached the threshold of 745,000.⁸³ However, the increase in 2016 was not so much due to new cross-border movements. In early 2016, borders along the Balkan route were sealed again.⁸⁴ The increase rather indicated that many refugees who had entered Germany in 2015 had not been able to lodge their application in 2015.⁸⁵ In 2015, the BAMF had simply been overwhelmed.⁸⁶ The top ten countries of origin remained the

⁷⁸ *Id.*

⁷⁹ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, ASYLGESCHÄFTSSTATISTIK FÜR DEN MONAT DEZEMBER 2015 [FEDERAL OFFICE FOR MIGRATION AND REFUGEES, STATISTICS ON ASYLUM CASES FOR THE MONTH OF DECEMBER 2015] (2015) at 2 (Ger.) [hereinafter BUNDESAMT Dec. 2015].

⁸⁰ See Stefan Tomik, *Der Höchststand der neunziger Jahre ist längst überschritten [The Peak of the 1990s Has Long Been Surpassed]*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 19, 2015), <http://www.faz.net/aktuell/politik/inland/asylbewerber-zahlen-der-hoehchststand-der-neunziger-jahre-ist-laengst-ueberschritten-13756692.html>.

⁸¹ To give but a few examples: in 1990, the total was 193,000; in 1988, it was 103,000; in 1986, it was 99,700. *Id.* In 1994, the total was 127,000; in 1996, it was 149,000; in 1998, it was 143,500; in 2000, it was 117,700; in 2008, it was 28,000. *Id.*

⁸² BUNDESAMT Dec. 2015, *supra* note 79, at 2. The total number of the applications lodged by Syrian nationals was 162,510; the total number of the applications lodged by nationals from a country of the Balkan region was 132,933; the total number of the applications lodged by Afghan nationals was 31,902; the total number of the applications lodged by Iraqi nationals was 31,379. Eritrean nationals had lodged 10,990 applications. *Id.*

⁸³ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, ASYLGESCHÄFTSSTATISTIK FÜR DEN MONAT DEZEMBER 2016 [FEDERAL OFFICE FOR MIGRATION AND REFUGEES, STATISTICS ON ASYLUM CASES FOR THE MONTH OF DECEMBER 2016] (2016) at 2 (Ger.) [hereinafter BUNDESAMT Dec. 2016].

⁸⁴ On the “EU-Turkey deal” and its consequences see *supra* note 20 and accompanying text.

⁸⁵ MIGRATIONSBERICHT DES BUNDESAMTES FÜR MIGRATION UND FLÜCHTLINGE IM AUFTRAG DER BUNDESREGIERUNG: MIGRATIONSBERICHT 2015 [REPORT ON MIGRATION BY THE FEDERAL OFFICE FOR MIGRATION AND REFUGEES, COMMISSIONED BY THE FEDERAL GOVERNMENT], at 9 (2016).

⁸⁶ *Id.* at 10.

same: Syria, Afghanistan, Iraq, and Iran ranked highest.⁸⁷ Yet, the countries of the Balkan region had basically disappeared from the ranking,⁸⁸ a striking effect of the amendments to the AsylG, listing the Balkan countries among the countries deemed safe countries of origin and the ensuing applicability of fast-track procedures.⁸⁹

B. Protection Granted

The chances for asylum seekers from Syria, Afghanistan, Iraq, or Iran to receive protection were quite high throughout the crisis, from 2014 through 2016. For Syrian claimants, the protection rate was almost 100%; from 2012 until the fall of 2014, Syrian nationals were regularly granted subsidiary protection.⁹⁰ In November 2014, the policy changed.⁹¹ For the rest of 2014⁹² and in 2015,⁹³ asylum seekers from Syria were granted the legal status provided for by the 1951 Convention relating to the Status of Refugees,⁹⁴ or formal “refugee status,” even without being called in for a personal hearing.⁹⁵ In March 2016, personal hearings resumed.⁹⁶

Following March 2016, many asylum seekers from Syria were granted subsidiary protection again.⁹⁷ The differences between those two kinds of protection seem subtle, yet the consequences are palpable. Under the AsylG, “international protection” can be either protection through “refugee status” or

⁸⁷ BUNDESAMT Dec. 2016, *supra* note 83, at 2. Syrian nationals had lodged 269,000 applications in 2016, Afghan nationals 128,000 applications, Iraqi nationals 97,000 applications, and Eritrean nationals 19,000 applications. *Id.*

⁸⁸ *Id.*, except for Albania (17,000 applications).

⁸⁹ See Gesetz zur Einstufung weiterer Staaten, *supra* note 50; and Asylverfahrensbeschleunigungsgesetz, *supra* note 46, and accompanying text.

⁹⁰ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, DAS BUNDESAMT IN ZAHLEN 2014: ASYL, MIGRATION UND INTEGRATION [FEDERAL OFFICE FOR MIGRATION AND REFUGEES: THE OFFICE IN NUMBERS 2014] 48 (2015).

⁹¹ *Id.*

⁹² *Id.*

⁹³ BUNDESAMT Dec. 2015, *supra* note 79, at 2.

⁹⁴ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

⁹⁵ Kai von Appen, *Syrer ziehen vor Gericht [Syrians go to Court]*, DIE TAGESZEITUNG (TAZ), Oct. 28, 2016, at 26.

⁹⁶ *Id.*

⁹⁷ See Barbara Dribbusch, *Im Zwischenreich [In Limbo]*, TAZ (Aug. 22, 2016), <http://www.taz.de/Archiv-Suche/!5326419&s=&SuchRahmen=Print/>. About 166,500 asylum seekers from Syria were granted refugee status in 2016; 121,500 Syrians received subsidiary protection status. BUNDESAMT Dec. 2016, *supra* note 83, at 2.

protection through “subsidiary protection status.”⁹⁸ Being granted refugee status generally presupposes that the applicant’s fears are due to well-founded reasons—that he or she will be persecuted in the country of origin on account of race, religion, nationality, political opinion, or membership of a particular social group.⁹⁹ Applicants need to show that, upon return, they are likely to suffer harm that is linked to one of the characteristics listed in the definition of “refugeehood.”¹⁰⁰ To be granted subsidiary protection status, the applicant needs to show “stichhaltige Gründe” (substantial grounds) for believing that he or she will, upon return, suffer “ernsthaften Schaden” (serious harm) inflicted through capital punishment, through inhuman or degrading treatment or punishment, or through indiscriminate violence in situations of armed conflict.¹⁰¹ The harm believed to be inflicted after the return to the country needs not be linked to a particular personal characteristic of the applicant.¹⁰²

Prior to March 2016, the BAMF was willing to concede that Syrians would suffer harm linked to their political opinion (they would be treated as traitors by the regime), whereas after March 2016, the harm expected was deemed to be caused by indiscriminate violence related to war.¹⁰³ The shift in assessment coincided with an amendment to the AufenthG that suspended the right to family reunion for all persons who were granted subsidiary protection status after March 17, 2016.¹⁰⁴ Obviously, the BAMF sought to end an additional influx of Syrian nationals through granting a status that did—for a limited time—not give rise to further claims with respect to family members who had not yet reached German territory.¹⁰⁵

⁹⁸ AsylG, *supra* note 46, at §§ 3–4. Those sections of the AsylG implement Directive 2011/95, 2011 O.J. (L 337) 9 (EU). On the various statuses defined by the directive, see Directive 2011/95, *infra* note 537.

⁹⁹ AsylG, *supra* note 46, at § 3(1) no. 1. The AsylG echoes the definition given by the Refugee Convention, art. 1(A).

¹⁰⁰ See, e.g., Ralph Göbel-Zimmermann & Constantin Hruschka, *AsylG § 3 marginal nos. 10, 13 in AUFENTHALTSGESETZ, FREIZÜGIGKEITSGESETZ/EU, ARB 1/80 UND §§ 2–4 ASYLG [RESIDENCE ACT, FREEDOM OF MOVEMENT ACT/EU, DECISION NO. 1/80 OF THE ASSOCIATION COUNCIL AND ASYLG, §§ 2–4]* (Berthold Huber ed., 2d ed. 2016).

¹⁰¹ AsylG, *supra* note 46, at § 4(1). For doctrinal details, see Thorsten Masuch & Constantin Hruschka, *AsylG § 4 marginal nos. 39–41 in AUFENTHALTSGESETZ, FREIZÜGIGKEITSGESETZ/EU, ARB 1/80 UND §§ 2–4 ASYLG [RESIDENCE ACT, FREEDOM OF MOVEMENT ACT/EU, DECISION NO. 1/80 OF THE ASSOCIATION COUNCIL AND ASYLG, §§ 2–4]* (Berthold Huber ed., 2d ed. 2016).

¹⁰² Masuch & Hruschka, *supra* note 101, at marginal no. 31.

¹⁰³ For an overview, see Max Putzer, *Nur subsidiärer Schutz für syrische Asylbewerber? [Only Subsidiary Protection Status for Asylum Seekers from Syria?]*, NVwZ 1176 (2017).

¹⁰⁴ AufenthG, *supra* note 44, at § 104(13), as amended by Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, art. 2, no. 4. According to § 104(13), the suspension was supposed to last until March 16, 2018.

¹⁰⁵ See, e.g., Paul Nehf, *Integration gelingt nicht ohne Familie [Integration Fails without Presence of Family]*, DIE WELT (Apr. 1, 2016), <https://www.welt.de/debatte/kommentare/article153866254/Integration-gelinkt-nicht-ohne-Familiennachzug.html>. The legality

For Afghan nationals, the chance of being granted some form of protection was about 50% throughout the refugee crisis.¹⁰⁶ Most Afghan nationals who were granted protection under the AsylG were given refugee status in 2014 and 2015.¹⁰⁷ In 2016, the numbers of Afghan nationals who received subsidiary protection status only started to climb.¹⁰⁸ For asylum seekers from Iraq, the picture was similar, though their protection rates were much higher. From 2014 through 2016, the rate was between 70% and 90%.¹⁰⁹ While Iraqi nationals were regularly granted refugee status in 2014 and 2015,¹¹⁰ a considerable number of them merely received subsidiary protection status in 2016.¹¹¹

C. Decision-Making and Removal

Decision-making in asylum cases is centralized in Germany. Decision-making is in the hands of one single authority, the BAMF, located in Nuremberg.¹¹² However, the BAMF operates numerous branch offices across the country; it is present in each of the *Länder* (states).¹¹³ When the numbers of asylum applications started to climb in 2014, the BAMF responded accordingly. The numbers of decisions issued per year also started to climb, from

of the BAMF's re-assessment was soon contested among the administrative courts of the *Länder*. For a critical analysis of the administrative courts' case law backing the reevaluation of the BAMF, see Putzer, *supra* note 103; Torben Ellerbrok & Lucas Hartmann, *Flüchtlingsstatus statt subsidiärer Schutz für syrische Staatsangehörige? [Refugee Status instead of Subsidiary Protection Status for Syrian Nationals?]*, NVwZ 522 (2017).

¹⁰⁶ For 2014, see BUNDESAMT Dec. 2014, *supra* note 76, at 2 (47%); for 2015, see BUNDESAMT Dec. 2015, *supra* note 79, at 2 (48%); for 2016, see BUNDESAMT Dec. 2016, *supra* note 83, at 2 (56%).

¹⁰⁷ See BUNDESAMT Dec. 2014, *supra* note 76, at 2; and BUNDESAMT Dec. 2015, *supra* note 79, at 2. The ratio of Afghan nationals granted subsidiary protection status was about 15%.

¹⁰⁸ See BUNDESAMT Dec. 2016, *supra* note 83, at 2. The ratio of Afghan nationals receiving subsidiary protected status was about 30% in 2016.

¹⁰⁹ For 2014, see BUNDESAMT Dec. 2014, *supra* note 76, at 2 (74%); for 2015, see BUNDESAMT Dec. 2015, *supra* note 79, at 2 (89%); for 2016, see BUNDESAMT Dec. 2016, *supra* note 83, at 2 (70%).

¹¹⁰ See BUNDESAMT Dec. 2014, *supra* note 76, at 2; and BUNDESAMT Dec. 2015, *supra* note 79, at 2. The ratio of Iraqi nationals granted subsidiary protection status was between 2% and 3%.

¹¹¹ See BUNDESAMT Dec. 2016, *supra* note 83, at 2. The ratio of Iraqi nationals receiving subsidiary protected status was about 30% in 2016.

¹¹² AsylG, *supra* note 46, at § 5.

¹¹³ See BAMF, *Branch Offices / Regional Offices*, FED. OFFICE FOR MIGRATION AND REFUGEES, http://www.bamf.de/DE/DasBAMF/Aufbau/Standorte/Au%C3%9FenRegionaleStellen/aussen-regionalstellen-node.html?gtp=7723424_Dokumente%253D (last visited May 30, 2018).

81,000 in 2013, to 130,000 in 2014,¹¹⁴ to more than 283,000 in 2015,¹¹⁵ and to almost 700,000 in 2016.¹¹⁶ Still, the case-load was rising. In September 2016, there were about 580,000 applications pending before the BAMF.¹¹⁷ In December 2016, the number of applications pending was still more than 433,000.¹¹⁸ Also, the number of actual removals did not catch up with the number of applications rejected or struck from the list of pending applications for reasons specified by law (such as renunciation or going into hiding). Throughout the crisis, the gap between the number of removals and the number of applications rejected or declared obsolete was considerable: in 2014, protection was denied in about 88,000 cases,¹¹⁹ and the number of forced removals was 10,884.¹²⁰ In 2015, protection was denied in about 141,000 cases,¹²¹ and the number of forced removals was 20,888.¹²² In 2016, protection was denied in 261,813 cases,¹²³ and the number of forced removals was 25,375.¹²⁴

D. Processing of Claims

Non-nationals seeking protection in Germany are usually picked up by or reported to the police, at the border or somewhere in the territory. Upon contact, they usually ask—in one way or another—for protection from

¹¹⁴ BUNDESAMT Dec. 2014, *supra* note 76, at 5.

¹¹⁵ BUNDESAMT Dec. 2015, *supra* note 79, at 6.

¹¹⁶ BUNDESAMT Dec. 2016, *supra* note 83, at 6.

¹¹⁷ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, ASYLGESCHÄFTSSTATISTIK FÜR DEN MONAT SEPTEMBER 2016 [FEDERAL OFFICE FOR MIGRATION AND REFUGEES, STATISTICS ON ASYLUM CASES FOR THE MONTH OF SEPTEMBER 2016], at 7.

¹¹⁸ BUNDESAMT Dec. 2016, *supra* note 83, at 7.

¹¹⁹ BUNDESAMT Dec. 2014, *supra* note 76, at 2.

¹²⁰ See Antwort der Bundesregierung auf Kleine Anfrage: Abschiebungen im Jahr 2014 [Response by the Federal Government to a Parliamentary Question: Forced Removals in the Year 2014], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT-DRS.] 18/4025, at 1, 9.

¹²¹ BUNDESAMT Dec. 2015, *supra* note 79, at 2.

¹²² See Antwort der Bundesregierung auf Kleine Anfrage: Abschiebungen im Jahr 2015 [Response by the Federal Government to a Parliamentary Question: Forced Removals in the Year 2015], BT-DRS. 18/7588, at 2, 8.

¹²³ BUNDESAMT Dec. 2016, *supra* note 83, at 2.

¹²⁴ See Antwort der Bundesregierung auf Kleine Anfrage: Abschiebungen im Jahr 2016 [Response by the Federal Government to a Parliamentary Question: Forced Removals in the Year 2016], BT-DRS. 18/11112, at 2, 9. In addition to the forced removals, there have been about 37,000 voluntary departures (facilitated through publicly funded programs) in 2015 and about 54,000 such departures in 2016. SACHVERSTÄNDIGENRAT DEUTSCHER STIFTUNGEN FÜR INTEGRATION UND MIGRATION, FAKTEN ZUR ASYLPOLITIK, 1. HALBJAHR 2017 [THE EXPERT COUNCIL OF GERMAN FOUNDATIONS ON INTEGRATION AND MIGRATION: FACTS REGARDING ASYLUM POLICY, FIRST HALF OF 2017] at 3.

persecution or other serious harm.¹²⁵ Legally, that plea is an informal request, often called “Asylgesuch” in scholarly literature in order to mark the difference between the informal request and the formal one.¹²⁶ A formal “Asylantrag” (application for asylum) may be lodged only with the BAMF.¹²⁷ Up to 2015, the processing of those claims were comprised of two steps. First, after raising their informal request, details concerning the non-nationals seeking protection were fed into a database called EASY (short for “Erstaufnahmesystem,” a system for the initial admission of asylum seekers).¹²⁸ EASY has only one function: to distribute the claimants among the German *Länder* (and the reception centers run by them) according to a quota system agreed upon by the *Länder*.¹²⁹ Second, upon arrival at the reception center, the claimants were provided accommodation and other necessities of life, and they were expected to lodge their formal application for asylum with the branch office of the BAMF affiliated with the reception center.¹³⁰ At the branch office of the BAMF, the claimants were registered, photographed, fingerprinted, and given the opportunity to apply for asylum, usually in person.¹³¹

In 2016, the mode of processing new claims was significantly restructured in order to enhance the efficiency of decision-making.¹³² Since the summer of 2016, the processing of claims comprises three steps. The first step is preliminary registering in EASY, now aided by “Bearbeitungsstraßen” (processing lanes) and “Warteräume” (waiting rooms), which are facilities close to the border equipped to deal with huge numbers of claimants for quick

¹²⁵ See AsylG, *supra* note 46, at § 13(1) (defining “Asylantrag” (asylum application) as any utterance by a non-national in writing, through words, or other means expressing that he or she is willing to seek protection (from political persecution or serious harm) in Germany).

¹²⁶ Jan Bergmann, *AsylG § 13 marginal no. 3*, in *AUSLÄNDERRECHT* [LAW ON NON-NATIONALS] (Jan Bergmann & Klaus Dienelt eds., 12th ed. 2018).

¹²⁷ See AsylG, *supra* note 46, at § 14(1).

¹²⁸ See *Initial Distribution of Asylum-Seekers (EASY)*, FED. OFFICE FOR MIGRATION AND REFUGEES, <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/Erstverteilung/erstverteilung-node.html> (last visited May 30, 2018) (describing the EASY database).

¹²⁹ *Id.* The quota system agreed upon by the *Länder* equals the system of quotas used for the purpose of burden-sharing among German *Länder* more generally, called the Königstein quota (“Königsteiner Schlüssel”). *Id.* Reception centers are staffed and financed by the *Länder*. See AsylG, *supra* note 46, at § 44.

¹³⁰ AsylG, *supra* note 46, at § 23(1).

¹³¹ BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE [FEDERAL OFFICE FOR MIGRATION AND REFUGEES], *THE STAGES OF THE GERMAN ASYLUM PROCEDURE* 11–12 (2016).

¹³² See BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE, *LEITFADEN ZUM AUFBAU EINES ANKUNFTSZENTRUMS* [FEDERAL OFFICE FOR MIGRATION AND REFUGEES, *GUIDELINES ON THE STRUCTURE OF AN ARRIVAL CENTER*] (2016) (elaborating on and explaining the main ideas underlying the restructuring of the application process).

identification of the responsible reception center.¹³³ Second, new claimants are asked to proceed to an “Ankunftszentrum” (arrival center), where they are accommodated, handed an “Ankunftsnachweis” (arrival certificate), and given the opportunity to lodge their formal application for asylum.¹³⁴ Applications lodged are classified according to the complexity of the case.¹³⁵ Cases of low complexity (i.e., if the propensity for receiving protection is either very high or very low) are meant to be decided within forty-eight hours.¹³⁶ Applicants granted protection are free to leave the arrival center.¹³⁷ If protection is denied based on fast-track procedures, the claimants are obliged to stay at the arrival center awaiting their removal.¹³⁸ Cases of complex decision-making (i.e., cases involving difficult questions of law or fact) are referred to the branch office of the BAMF.¹³⁹ Applicants are asked to proceed to a reception center where they are obliged to stay for at least six weeks.¹⁴⁰ Third, the complex case is forwarded to the “Entscheidungszentrum” (decision-making center), a facility that wholly concentrates on putting together the text for the written decisions notified in asylum cases.¹⁴¹

Against that backdrop, the time asylum seekers stay in Germany primarily depends on the complexity of the case and, if the application is eventually rejected, the time needed for the voluntary departure or the enforcement of the

¹³³ *Id.* at 5. The BAMF operates five processing lanes, located in Freilassing, Greven, Niederaußem/Bergheim, Passau, and Rosenheim. For the time being, there is only one waiting room; it is located in Erding, Bayern. See BAMF, *Standorte des Bundesamtes [Locations of the Federal Office]*, <http://www.bamf.de/DE/DasBAMF/Aufbau/Standorte/standorte-node.html> (last visited May 30, 2018).

¹³⁴ *Id.* at 6. For details regarding the arrival certificate, see AsylG, *supra* note 46, at § 63a. The asylum seekers’ stay in the territory is deemed legal as soon as they have received the arrival certificate. See *id.* at § 55.

¹³⁵ BUNDESAMT, *supra* note 132, at 6.

¹³⁶ *Id.*

¹³⁷ Non-nationals who are granted protection are, nonetheless, subject to limitations with respect to their free movement in the territory. See AufenthG, *supra* note 44, at § 12a. Non-nationals granted protection are, by law, obliged to remain in the *Land* that has been responsible for their accommodation so far for a period of three years, following the granting of protection. *Id.* In addition to that, non-nationals granted protection may, by administrative act, be mandated to stay at a certain place or, in contrast, to not move to a certain place. *Id.*

¹³⁸ See AsylG, *supra* note 46, at § 30a, § 47(1a). This provision applies, in particular, to applicants coming from countries deemed “safe countries of origin,” such as most of the Balkan countries. See SACHVERSTÄNDIGENRAT, *supra* note 124, at 3.

¹³⁹ BUNDESAMT, *supra* note 132, at 7.

¹⁴⁰ AsylG, *supra* note 46, at § 47(1). Upon the expiry of the obligation to stay in the reception center, the asylum seekers are usually accommodated in other sites used for collective housing. See *also id.* at § 53 (“Gemeinschaftsunterkünfte”).

¹⁴¹ BUNDESAMT, *supra* note 132, at 15. The BAMF operates four decision-making centers: Bonn, Nuremberg, Mannheim, and Berlin. *Id.*

obligation to leave the country.¹⁴² In 2016, decision-making took two or three months for new cases of low complexity; for complex cases, decision-making took seven months on average.¹⁴³ Decisions of the BAMF are subject to judicial review.¹⁴⁴ Rejected claimants may turn to the Verwaltungsgericht (administrative court) and ask for a revision of the BAMF's decision.¹⁴⁵ Bringing a lawsuit against the BAMF does not automatically entail a stay of execution.¹⁴⁶ But a stay of execution may be granted in individual cases by the administrative court.¹⁴⁷ In recent years, it took the administrative courts between seven and ten months on average to decide on judicial review.¹⁴⁸ Further judicial review is limited.¹⁴⁹ Hence, on average, it takes one and a half years to reach a final decision upon an asylum application if the case is a more complex one, and the claimants seek judicial review against the rejection of the claim.

E. Status of Claimants

i. Legality of Presence

Non-nationals seeking protection from persecution or other serious harm acquire the status of “Asylbewerber” (asylum seekers) the moment they communicate to a German official in one way or another that they seek protection from persecution or serious harm, i.e., the moment they raise their informal

¹⁴² The asylum seekers' stay in the country ceases to be legal once the rejection of the application has become final. AsylG, *supra* note 46, at § 67(1), sentence 1, no. 6.

¹⁴³ Bundesamt für Migration und Flüchtlinge, Jahresbilanz 2016: Presseunterlage [Federal Office for Migration and Refugees, Annual Balance 2016: Press release] 4 (2017).

¹⁴⁴ AsylG, *supra* note 46, at §§ 74–83c.

¹⁴⁵ *Id.* at § 74(1).

¹⁴⁶ *Id.* at § 75.

¹⁴⁷ See Verwaltungsgerichtsordnung [Order for the Administrative Courts], Jan. 21, 1960, BGBl I at 17, repromulgated Mar. 19, 1991, BGBl I at 686, as amended, § 80(5) (authorizing the administrative court, when a suit is brought contesting the legality of the BAMF's decision, to grant a stay of execution if—on balance—the interests of the applicant prevail over the public interests).

¹⁴⁸ See STATISTISCHES BUNDESAMT, FACHSERIE 10 REIHE 2.4 RECHTSPFLEGE: VERWALTUNGSGERICHTE 2015 [FEDERAL OFFICE FOR STATISTICS, SERIES 10 SUBSERIES 2.4 ADMINISTRATION OF JUSTICE: ADMINISTRATIVE COURTS] 22–23 (2016). In the last fifteen years, the (average) time period for decision-making by the courts has become shorter and shorter. In 2001, the time asylum cases were pending before the courts was more than 21 months on average; in 2015, the time was 7.8 months on average. *Id.*

¹⁴⁹ See AsylG, *supra* note 46, at § 78.

requests.¹⁵⁰ Their stays in the territory are “permitted” by law (“gestattet”)¹⁵¹ and, hence, legal until the decision of the BAMF has become final.¹⁵² If the claimants opt for judicial review and judicial review entails a stay of execution, their stays remain permitted until the decision of the administrative court has become final. Upon finality of the decision, the claimants may have acquired refugee status or subsidiary protection status, according to their claims, and will be issued residence permits based on humanitarian grounds.¹⁵³ If, on the other hand, protection is denied, the claimants become ordinary non-nationals whose stays are illegal and who are, in general, obliged to leave the country.¹⁵⁴ If an application for asylum is turned down and judicial review does not entail a stay of execution, the BAMF may, right away, proceed with an order announcing its intention to remove the claimant.¹⁵⁵ Once the order is executed,¹⁵⁶ the permission to stay in the territory under the AsylG is terminated.¹⁵⁷ Again, the claimants have become illegal immigrants who are obliged to leave the country and may be removed by force.

ii. *Toleration*

Even if an application for protection has been rejected, there is one more option for claimants to avoid forced removal. The claimants may request a declaration (by the BAMF) that they are protected under the clauses of the AufenthG that extend the prohibition of removal—part and parcel of refugee status and subsidiary protection status¹⁵⁸—to defined additional classes of removals. The classes include removals that violate the European Convention

¹⁵⁰ On the informal “Asylgesuch,” see Bergmann, *supra* note 126, and accompanying text.

¹⁵¹ AsylG, *supra* note 46, at § 55(1).

¹⁵² *Id.* at § 67(1), sentence 1, no. 6.

¹⁵³ See AufenthG, *supra* note 44, at §§ 25(1) and 25(2) (mandating that a residence permit be given to non-nationals who have been granted asylum under Article 16a of the GG, to non-nationals granted refugee status, and to non-nationals granted subsidiary protection status).

¹⁵⁴ *Id.* at § 50(1).

¹⁵⁵ AsylG, *supra* note 46, at § 34(1).

¹⁵⁶ The law requires that the order be “vollziehbar.” AsylG, *supra* note 46, at § 67(1), sentence 1, no. 4. The BAMF’s order announcing the intention to remove the claimant is an administrative act that can be challenged in court; the order becomes “vollziehbar,” i.e., the order may in fact be executed, as soon as it has become final. See AufenthG, *supra* note 44, at § 59; and Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz [General Administrative Instruction regarding the implementation of the AufenthG], at 59.0.1. (Oct. 26, 2009), http://www.verwaltungsvorschrifteninternet.de/bsvwvbund_26102009_MI31284060.htm.

¹⁵⁷ AsylG, *supra* note 46, at § 67(1), sentence 1, no. 4.

¹⁵⁸ AufenthG, *supra* note 44, at § 60(1)–(2).

on Human Rights and Fundamental Freedoms.¹⁵⁹ The classes also include removals to a country where the claimants face any individualized serious harm to life, limb, and freedom that is not related to persecution as defined in Section 3 of the AsylG or to harm resulting from capital punishment, torture or other inhuman treatment, or a theater of war as defined in Section 4 of the AsylG.¹⁶⁰ If the claimants succeed and the BAMF issues such a declaration, the execution of the order announcing the intention to remove will—temporarily—be suspended.¹⁶¹ The claimants’ further stay in the country will be “tolerated,” and the authorities will issue a paper called “Duldung” (toleration).¹⁶² The toleration does not touch upon the individual obligation to leave the country; the obligation remains intact.¹⁶³ A toleration may also be issued in cases where the removal proves impossible for more practical reasons, such as the lack of means of transport; the lack of proof regarding the identity of the claimant; an unwillingness of the country of origin to cooperate in the removal; or the illness of the non-national liable for removal.¹⁶⁴ Hence, there are many legally accepted reasons why non-nationals may stay in Germany as merely tolerated claimants, and many non-nationals do so for lengthy periods of time. According to data released by the German federal government, there were 153,047 non-nationals staying in Germany as merely tolerated claimants on December 31, 2016; almost 50,000 of them had been staying in Germany for more than three years, more than 28,154 for more than six years, and more than 20,000 for more than ten years.¹⁶⁵

iii. *Other Status*

Pending their applications for asylum, asylum seekers are subject to numerous restrictions. First, the permit to stay as an asylum seeker in the country

¹⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, as amended [hereinafter ECHR].

¹⁶⁰ *AufenthG*, *supra* note 44, at §§ 60(5), 60(7). *AufenthG* § 60(5) covers, for instance, removals that violate the right to respect of family life under ECHR art. 8(1); *AufenthG* § 60(7) covers, for instance, removals to a country where the claimant lacks access to medical treatment necessary for survival. For details, *see, e.g.*, Jan Bergmann, *AufenthG*, § 60 marginal nos. 45–50, 52–55, in *AUSLÄNDERRECHT, [LAW ON NON-NATIONALS]* (Jan Bergmann & Klaus Dienelt eds., 12th ed. 2018).

¹⁶¹ *AufenthG*, *supra* note 44, at § 60a(2).

¹⁶² *Id.* at § 60a(4).

¹⁶³ *Id.* at § 60a(3); Ina Bauer, *AufenthG*, § 60a marginal nos. 3, 16, in *AUSLÄNDERRECHT, [LAW ON NON-NATIONALS]* (Jan Bergmann & Klaus Dienelt eds., 12th ed. 2018).

¹⁶⁴ *See* Bauer, *supra* note 163, at marginal nos. 18–33.

¹⁶⁵ Antwort der Bundesregierung auf Kleine Anfrage: Zahlen in der Bundesrepublik lebender Flüchtlinge zum Stand 31. Dezember 2016 [Response by the Federal Government to a Parliamentary Question: Numbers of Refugees living in Germany on December 31, 2016] BT-DRS. 18/11388, 34–35 (Ger.).

is valid only for the district of the Ausländerbehörde (authority dealing with non-nationals), which is, according to the location of the reception center, responsible for administering the AufenthG in the individual case (territorial restriction).¹⁶⁶ If they want to leave the district, asylum seekers need an additional permit.¹⁶⁷ The territorial restriction of an asylum seeker's permit to stay in the country generally expires after three months.¹⁶⁸ Second, asylum seekers are obliged to reside in the reception center, that is, under the Königstein quota system¹⁶⁹ responsible for their admission.¹⁷⁰ The obligation extends at least six weeks, and it may be extended to a maximum of six months.¹⁷¹ The obligation primarily serves the purposes of the asylum procedure. Applicants are supposed to be available on short notice.¹⁷² An applicant coming from a country of origin that is deemed safe¹⁷³ is an exception to the rule. Such an applicant must, by law, remain in the reception center responsible for the applicant's admission until a decision has been made on the application.¹⁷⁴ An asylum seeker who must, to secure a livelihood, rely on public means is another exception to the rule. Such an applicant remains liable to territorial limitations.¹⁷⁵ Third, asylum seekers must not take up employment for as long as they are obliged to reside in the reception center responsible for their admission.¹⁷⁶ If asylum seekers are no longer obliged to reside in their respective reception centers (the obligations extend to at least six weeks and may extend to six months), employment may, by administrative decision, be permitted after a period of three months (commencing with the permit to stay in the country as an asylum seeker).¹⁷⁷ However, the administrative authority will permit such employment only if there are no other persons available for that particular employment and the conditions of employment are not less

¹⁶⁶ AsylG, *supra* note 46, at § 56(1).

¹⁶⁷ *Id.* at § 57(1), § 58(1).

¹⁶⁸ *Id.* at § 59a(1).

¹⁶⁹ On the quota system, see *Initial Distribution of Asylum-Seekers (EASY)*, *supra* note 128.

¹⁷⁰ AsylG, *supra* note 46, at § 47(1).

¹⁷¹ *Id.*

¹⁷² *Id.* at § 47(3).

¹⁷³ See Gesetz zur Einstufung weiterer Staaten, *supra* note 50; and Asylverfahrensbeschleunigungsgesetz, *supra* note 54, at art. 1 no. 35; and GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 16a(3).

¹⁷⁴ AsylG, *supra* note 46, at §§ 30a, 47(1a).

¹⁷⁵ *Id.* at § 60. Under this statute, asylum seekers may, through administrative order, be mandated to stay in a particular city or in a particular housing facility, for instance, a facility used for collective housing, located in the district of the Ausländerbehörde responsible for the non-nationals housed in the reception center.

¹⁷⁶ *Id.* at § 61(1).

¹⁷⁷ *Id.* at § 61(2).

favorable than the conditions in other comparable cases.¹⁷⁸ After a stay of fifteen months, the authority will no longer inquire whether there are other persons available for the particular employment.¹⁷⁹ After a stay of four years, employment is no longer subject to limitations.¹⁸⁰

Non-nationals who are merely tolerated in the country are liable to similar restrictions. They must stay within the borders of the *Land* responsible for administering the AufenthG vis-à-vis the non-nationals concerned.¹⁸¹ The obligation does not expire after three months if a non-national relies on public means to secure livelihood.¹⁸² A non-national whose presence is tolerated is, after a period of three months, no longer subject to a strict prohibition of employment; based on an administrative permit, the non-national may be employed.¹⁸³ But the permit will not be issued if other persons are available for the employment in question or the working conditions do not comply with the usual standards.¹⁸⁴ After fifteen months, the authority will no longer inquire into the availability of other persons;¹⁸⁵ after four years of stay, employment is not restricted.¹⁸⁶

iv. *Reliance on Social Benefits*

Given the fact that most non-nationals seeking protection in Germany have no means to provide for their own living, and given the restrictions on their employment, many asylum seekers must rely on social benefits administered by the *Länder*.¹⁸⁷ Statistical data detailing the benefits under the AsylbLG and its recipients clearly reflect the crisis of 2015 and 2016. In 2013, a year where numbers were not yet interpreted as foreboding a crisis, about 225,000 non-nationals received basic benefits under the AsylbLG. Of those, 127,700

¹⁷⁸ *Id.* No permit is needed for vocational training or employment requiring high qualifications. See also Verordnung über die Beschäftigung von Ausländerinnen und Ausländern [BeschV] [Regulation on the Employment of Non-Nationals], June 6, 2013, BGBl I at 1499, as amended, § 32(2) nos. 1–4 [hereinafter BeschV].

¹⁷⁹ BeschV, *supra* note 178, at § 32(5) no. 2.

¹⁸⁰ *Id.* at § 32(2) no. 5.

¹⁸¹ AufenthG, *supra* note 44, at § 61(1).

¹⁸² *Id.* at § 61(1d).

¹⁸³ BeschV, *supra* note 178, at § 32(1).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at § 32(5) no. 2.

¹⁸⁶ *Id.* at § 32(2) no. 5.

¹⁸⁷ See, e.g., SOZIALVERBAND DEUTSCHLAND NORDRHEIN-WESTFALEN E.V., “DIE WÜRDE DES MENSCHEN IST UNANTASTBAR” [“HUMAN DIGNITY IS INVIOLEABLE”] 6 (2017) (emphasizing the detrimental impact of the various restrictions on the ability of the persons concerned to care for themselves).

were asylum seekers, and 50,400 were tolerated non-nationals.¹⁸⁸ In 2014, the overall number was 362,900 (249,000 asylum seekers and 56,000 tolerated non-nationals).¹⁸⁹ In 2015, the overall number was 975,000 (709,000 asylum seekers and 80,000 tolerated non-nationals).¹⁹⁰ In 2016, the number of recipients dropped slightly, yet expenditures increased considerably. In 2016, the overall total of recipients was 728,000 (551,000 asylum seekers and 68,000 tolerated non-nationals).¹⁹¹ Expenditures had increased from 5.3 billion Euros in 2015 to 9.4 billion Euros in 2016.¹⁹²

The numbers detailing the recipients under the AsylbLG and the expenditures demonstrate the burden the German *Länder* had to shoulder as the crisis unfolded.¹⁹³ However, the numbers also signal that many people—about 14% of all people receiving benefits securing the subsistence minimum—were subject to a regime that differed greatly from the regime designed to ensure the subsistence minimum in all other cases.¹⁹⁴ In order to understand the

¹⁸⁸ STATISTISCHES BUNDESAMT, ASYLBEWERBERLEISTUNGEN – EMPFÄNGERINNEN UND EMPFÄNGER VON REGELLEISTUNGEN, REGELLEISTUNGEN NACH AUFENTHALTSRECHTLICHEM STATUS AB 2002 IN DEUTSCHLAND [FEDERAL OFFICE FOR STATISTICS, BENEFITS FOR ASYLUM SEEKERS – RECIPIENTS OF BASIS BENEFITS, BASIS BENEFITS ACCORDING TO STATUS UNDER THE AUFENTHGH FROM 2002 ONWARDS], https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Soziales/Sozialleistungen/Asylbewerberleistungen/Tabellen/4_3_ZV_AufenthaltsrechtlStatus.html (last visited May 30, 2018). Expenditures under the AsylbLG reached 1.5 billion Euros in 2013. BUNDESAMT FÜR STATISTIK, STATISTISCHES JAHRBUCH 2015 [FEDERAL OFFICE FOR STATISTICS, STATISTICAL YEARBOOK 2015], at 234 (2015).

¹⁸⁹ STATISTISCHES BUNDESAMT, *supra* note 188. Expenditures under the AsylbLG stood at 2.4 billion Euros in 2014. BUNDESAMT FÜR STATISTIK, STATISTISCHES JAHRBUCH 2016 [FEDERAL OFFICE FOR STATISTICS, STATISTICAL YEARBOOK 2016], at 237 (2016).

¹⁹⁰ STATISTISCHES BUNDESAMT, *supra* note 188. In 2015, 308,000 recipients were Syrian nationals, 114,500 were Afghan nationals, and 82,200 were Iraqi nationals (a total of 504,700). STATISTISCHES BUNDESAMT, FACHSERIE 13 REIHE 7: SOZIALLEISTUNGEN: LEISTUNGEN AN ASYLBEWERBER 2015 [FEDERAL OFFICE FOR STATISTICS, SERIES 13 SUBSERIES 7: SOCIAL BENEFITS: BENEFITS FOR ASYLUM SEEKERS 2015], at 13 (2016). About 162,000 were nationals of a Balkan country (considered safe countries of origin), such as Serbia, Kosovo, Montenegro, Albania, or the Former Yugoslav Republic of Macedonia. *Id.* Expenditures reached 5.3 billion Euros. *Id.* at 22.

¹⁹¹ STATISTISCHES BUNDESAMT, FACHSERIE 13 REIHE 7: SOZIALLEISTUNGEN: LEISTUNGEN AN ASYLBEWERBER 2016 [FEDERAL OFFICE FOR STATISTICS, SERIES 13 SUBSERIES 7: SOCIAL BENEFITS: BENEFITS FOR ASYLUM SEEKERS 2016], at 11 (2017).

¹⁹² *Id.* at 28.

¹⁹³ The *Länder* received subsidies from the federal government throughout the crisis. In 2015, the subsidies reached 2 billion Euros; in 2016, the subsidies stood at 5.5 billion Euros. For details see BUNDESMINISTERIUM DER FINANZEN, MONATSBERICHT DES BMF: JANUAR 2017 [FEDERAL MINISTRY OF FINANCE, MONTHLY REPORT: JANUARY 2017], at 13, 15 (2017).

¹⁹⁴ The number of recipients liable to the general regime providing a subsistence minimum has been quite stable in the last decade. Between 2006 and 2015, the number of recipients was constantly roughly seven million people. See Statistisches Bundesamt, Tabelle B 1.3: Empfängerinnen und Empfänger von sozialen Mindestsicherungsleistungen

differences between the regimes, we need to turn to the regimes first: What does the subsistence minimum look like when provided under the general regime, and what does it look like when provided under the AsylbLG? Why is there a general and a particular regime?

III. DEFINING THE SUBSISTENCE MINIMUM

A. *The General Regime: Social Assistance and Basic Security*

i. *History*

a. *A State-Provided Minimum*

Germany has a longstanding tradition of legal mechanisms mandating public authorities to provide a minimum of subsistence for residents. The tradition reaches back to the eighteenth century. In 1794, Prussia (then an independent German kingdom) adopted a codification of laws—called “Allgemeines Landrecht für die Preußischen Staaten”¹⁹⁵—that became famous, *inter alia*, because the codification contained, for the first time ever, a statement affirming the responsibility of the state to provide aid to Prussian citizens who were not able to provide for themselves.¹⁹⁶ The denomination used to specify the aid provided by the state has changed over time. In the nineteenth century, the aid was termed “Armenpflege” or “Armenwesen” (poor relief).¹⁹⁷ In the early twentieth century, the aid was called “Fürsorge”

nach Leistungssystemen und Ländern am Jahresende 2006 bis 2015 [Federal Office for Statistics, Table B 1.3: Recipients of Benefits Securing the Subsistence Minimum, According to Regimes and *Länder* from the End of the Year 2006 Through the End of the Year 2015], <http://www.amtliche-sozialberichterstattung.de/B1mindestsicherungsquote.html> (last visited May 30, 2018). Compared with the total number of people receiving benefits meant to secure the subsistence minimum, the number of non-nationals liable to the particular regime established by the AsylbLG has always been minimal. The portion reached 5% in 2014, a first peak. In 2015, the portion was 14%, an all-time high. *Id.* (calculation by the author).

¹⁹⁵ *Allgemeines Landrecht für die Preußischen Staaten* [ALR] [General Laws Applicable in the Prussian States], OPINIO IURIS (June 1, 1794), <https://opiniojuris.de/quelle/1621>.

¹⁹⁶ ALR Part II, Title 19, § 1 read: “It is incumbent on the state to provide food and care for those citizens who cannot provide for themselves, and who do not receive aid from other private persons who are obliged by law to do so” (translation by the author). On the relevance of the ALR for the emergence of the German welfare state, *see, e.g.*, EBERHARD EICHENHOFER, SOZIALRECHT [SOCIAL LAW] 15 (10th ed. 2017).

¹⁹⁷ On the various statutes applicable in German states and in some European countries, *see* ARWED EMMINGHAUS, DAS ARMENWESEN UND DIE ARMENGESETZGEBUNG IN EUROPÄISCHEN STAATEN [POOR RELIEF AND POOR LAWS IN EUROPEAN STATES] (A. Emminghaus ed., 1870).

(welfare).¹⁹⁸ In the 1960s, the denomination changed to “Sozialhilfe” (social assistance).¹⁹⁹ Recently, lawmakers used the term “Grundsicherung” (basic security).²⁰⁰

Some characteristics of the state-provided aid changed alongside its denomination. The change to *Fürsorge* marked the political wish to end the stigmatizing effects of the former *Armenpflege*.²⁰¹ Yet, even at the beginning of the twentieth century, the provision of aid was still in the broad discretion of the authorities; recipients of welfare were not conceived of as right-holders.²⁰² The change to *Sozialhilfe* by the 1961 BSHG signaled the political consensus that public aid should be provided by the authorities as a response to an individual right of the beneficiaries and that the law should expressly say so.²⁰³ Also, from the perspective of standards, the early mechanisms for state-provided aid were aimed simply at securing the bare physical minimum such as food, housing, clothing, and necessary medical care.²⁰⁴ In the 1960s, reforms introduced a higher standard for state-provided aid, adding a culturally determined minimum that included aspects of inclusion into society and participation in societal activities such as access to information, mobility,

¹⁹⁸ See, e.g., Verordnung über die Fürsorgepflicht [FürsorgepflichtV] [Regulation Concerning the Obligation to Provide Welfare], Feb. 13, 1924, RGBL I at 100.

¹⁹⁹ See formerly Bundessozialhilfegesetz [BSHG] [Federal Act on Social Assistance], June 30, 1961, BGBl I at 815, and currently SOZIALGESETZBUCH (SGB) ZWÖLFTES BUCH (XII) SOZIALHILFE [SGB XII] [Social Code Twelfth Book Social Assistance], art. 1 of G, Dec. 27, 2003, BGBl I at 3022, as amended [hereinafter SGB XII].

²⁰⁰ See Sozialgesetzbuch (SGB) Zweites Buch (II) Grundsicherung für Arbeitsuchende [SGB II] [Social Code Second Book Basic Security for Jobseekers], art. 1 of G, Dec. 24, 2003, BGBl I at 2954, as amended [hereinafter SGB II].

²⁰¹ On the stigmatizing effects of the nineteenth century poor relief, see Georg Simmel, *Der Arme*, in SOZIOLOGIE: UNTERSUCHUNGEN ÜBER DIE FORMEN DER VERGESELLSCHAFTUNG [*The Poor*, in SOCIOLOGY: INQUIRIES INTO THE FORMATIONS OF SOCIETIES] 345 (5th ed. 1968) (describing the debasing effects resulting from having to rely on poor relief from a sociological perspective).

²⁰² See, e.g., WALTER SCHELLHORN, HANS JIRASEK & PAUL SEIPP, DAS BUNDESSOZIALHILFEGESETZ [THE FEDERAL ACT ON SOCIAL ASSISTANCE] 4, 7 (8th ed. 1974) (quoting jurisprudence and scholarly literature prior to the 1950s and asserting that recipients of “Fürsorge” were merely the “object” of public policy aiming at the maintenance of public order and security and, hence, no holders of individual rights). The legal status of welfare recipients was reconceptualized when the Bundesverwaltungsgericht (BVerwG), the Federal Administrative Court, ruled in 1954 that, under the constitutional order established by the GG, recipients of public welfare ought to be seen as “subjects” and—per implication—as right-holders even in the realm of public welfare. See BVerwG, June 24, 1954, V C 78.54, <https://www.jurion.de/urteile/bverwg/1954-06-24/bverwg-v-c-7854/>.

²⁰³ See Entwurf eines Bundessozialhilfegesetzes [Bill on Social Assistance], Apr. 20, 1960, BT-Drs. 3/1799, at 32.

²⁰⁴ See Reichsgrundsätze über Voraussetzung, Art und Maß der öffentlichen Fürsorge [RGr] [Federal Principles Determining the Conditions, the Form and the Extent of Public Welfare], Dec. 4, 1924, RGBL I at 765, § 6 (Ger.).

meeting with friends and family, or going to the movies.²⁰⁵ The minimum has been coined the “socio-cultural minimum” by scholars and the judiciary.²⁰⁶ However, one characteristic of state-provided aid did not change throughout time: public aid is, and has always been, means-tested.²⁰⁷ The aid is provided only if the claimants are not able to provide for themselves through work, other income, the use of assets, or the help of others, particularly, family members (principle of subsidiarity). State-provided aid is meant to “jump in” last.²⁰⁸

*b. A Constitutional Right to a Subsistence Minimum:
Human Dignity*

Under Germany’s post-World War II constitution—the GG—adopting a legal framework for public aid is not simply the choice of the lawmakers. In the late nineteenth century, lawmakers have been free to deliberate on whether or not to enact laws concerning the provision of a subsistence minimum. Under the GG, lawmakers are no longer free. Following a judgment of the BVerfG of 2010,²⁰⁹ providing public aid is obligatory under Article 1(1) of the GG, reading, “Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.”²¹⁰ Prior to the 2010 judgment of the BVerfG, scholarly literature was split on the question of whether the constitution ought to be understood as implying an individual right (*vis-à-vis* the state) to a subsistence minimum and, if so, where such a right was to be found in the text of the constitution.²¹¹ Some authors thought that the dignity clause

²⁰⁵ See BSHG, *supra* note 199, at § 12 (introducing the category of “personal needs of quotidian life,” comprising expenditures with respect to maintaining relationships with others and to participating in cultural life).

²⁰⁶ See, e.g., Ulrich-Arthur Birk, § 1 *marginal no. 16*, in BUNDESSOZIALHILFEGESETZ [FEDERAL ACT ON SOCIAL ASSISTANCE] (1985); Volker Wahrendorf, § 1 *SGB XII marginal no. 8*, in SGB XII SOZIALHILFE. KOMMENTAR [Social Assistance. Commentary] (Christian Grube & Volker Wahrendorf eds., 2005); OVG Hamburg, Mar. 2, 1990, Bf IV 43/89, *marginal no. 28* (Ger.), available at JURIS by subscription.

²⁰⁷ See ALR, *supra* note 195, at Part II, Title 19, § 1; RGr, *supra* note 204, at § 5; BSHG, *supra* note 199, at § 2; SGB XII, *supra* note 199, at § 2; and SGB II, *supra* note 200, at § 9(1).

²⁰⁸ In scholarly literature, public aid is often classified as “das Netz unter dem sozialen Netz” (the final safety net). See, e.g., EICHENHOFER, *supra* note 196, at 304.

²⁰⁹ BVerfGE, 1 BvL 1/09, Feb. 9, 2010.

²¹⁰ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 1(1) sentences 1 and 2.

²¹¹ For details, see Ulrike Davy, *Soziale Gleichheit: Voraussetzung oder Aufgabe der Verfassung?* [Social Equality: Prerequisite or Mission of the Constitution?], in 68 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 122, 142 (2009).

of the constitution was pertinent.²¹² Other authors considered the right to equality (Article 3 GG)²¹³ or the right to life (Article 2(2) GG)²¹⁴ to include such a right. And a third group of authors held the constitutional clause that refers to the welfare state (Article 20(1) GG) implied at least a responsibility for the state to care for the destitute.²¹⁵ The 2010 judgment of the BVerfG resolved the issue. According to the BVerfG, the dignity clause under Article 1(1), sentence 1 of the GG also grants an individual right to a “menschenwürdiges Existenzminimum,” i.e., to a subsistence minimum defined by human dignity.²¹⁶ For the court, that minimum comprises all amenities necessary to lead a life in dignity,²¹⁷ from physical needs to needs regarding participation in societal activities (socio-cultural minimum).²¹⁸ That right, the BVerfG further held, corresponds with a duty on the side of the state, namely, the duty to ensure that the subsistence minimum was indeed available.²¹⁹ Yet, the court added, the constitution would not give details regarding that right and duty; under Article 20(1) of the GG, it was left to the discretion of the lawmakers to define the “subsistence minimum” and to elaborate on what exactly was to be accorded under Article 1(1), sentence 1 of the GG.²²⁰ For the BVerfG, the proper textual location of the right to be provided with a

²¹² For references, see Horst Dreier, *Art. 1 I marginal no. 158*, in GRUNDGESETZ: KOMMENTAR [BASIC LAW: COMMENTARY] (Horst Dreier ed., 2d ed. 2004).

²¹³ Volker Neumann, *Menschenwürde und Existenzminimum* [Human Dignity and Subsistence Minimum], NVwZ 426, 429 (1995) (making a strong argument that the right to equality under Article 3 of the GG, rather than the right to respect of human dignity under Article 1[1] of the GG, be the yardstick for assessing whether or not the subsistence minimum had indeed been provided in a particular case).

²¹⁴ See, e.g., Udo Di Fabio, *GG Art. 2 Abs. 2 Satz 1 marginal no. 45*, in GRUNDGESETZ: KOMMENTAR [BASIC LAW: COMMENTARY] (Theodor Maunz & Günter Dürig former eds., Roman Herzog et al. eds., 57th ed. 2010); Dietrich Murswiek, *Art. 2 marginal no. 224*, in GRUNDGESETZ: KOMMENTAR [BASIC LAW: COMMENTARY] (Michael Sachs ed., 4th ed. 2007).

²¹⁵ See, e.g., Ernst-Wilhelm Luthe & Falko Dittmar, *Das Existenzminimum der Gegenwart* [The Subsistence Minimum of the Present], SOZIALGERICHTSBARKEIT [SGB] 272, 273 (2004) (stressing the idea of a social duty incumbent on the state to protect [*soziale Schutzpflicht*] under Article 20[1] of the GG). Article 20(1) of the GG contains one brief sentence saying: “Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat” [The Federal Republic of Germany is a democratic and social federal state]. The word “social” used in Article 20(1) is meant to encapsulate one of the fundamental principles of the constitution, namely, the principle declaring that Germany be a welfare state, in German terminology rather a “social state.” On the welfare or “social” state established under the GG, see the seminal contribution by Hans F. Zacher, *Social Policy in the Federal Republic of Germany: The Constitution of the Social*, in 3 GERMAN SOCIAL POLICY 23 (Lutz Leisering ed., 2013).

²¹⁶ BVerfG, 1 BvL 1/09, Feb. 9, 2010, marginal no. 132.

²¹⁷ *Id.* at marginal no. 133.

²¹⁸ *Id.* at marginal no. 135.

²¹⁹ *Id.* at marginal no. 134.

²²⁰ *Id.* at marginal no. 133.

subsistence minimum was, therefore, Article 1(1), sentence 1 of the GG read in conjunction with Article 20(1) of the GG (the welfare state clause).²²¹ Still, under the BVerfG, the lawmakers' discretion with regard to defining the subsistence minimum was not unbound, even though the right under Article 1(1) of the GG was a positive one.²²² The court insisted that the right was "absolute" in character.²²³ For the BVerfG, the question as to whether the subsistence minimum was to be provided for by the state had been answered in the affirmative by the GG in Article 1(1).²²⁴ In that regard, Article 1(1) granted an inviolable right (ein "unverfügbares" Recht), a right that was to be honored under all circumstances.²²⁵ And, according to the BVerfG, the custodian of that inviolable right was the BVerfG itself, the lawmakers' discretion and the corresponding judicial restraint notwithstanding. The 2010 judgment announced in no uncertain terms that the BVerfG would intervene in politics when the outcome of the lawmaking was—with respect to the requirements under Article 1(1) of the GG—"evidently insufficient."²²⁶ The court signaled that it would, for instance, intervene when the data used by the lawmakers for making their determinations was not reliable or the methods used were not sufficiently transparent.²²⁷

²²¹ *Id.*

²²² *Id.* at marginal no. 134.

As a fundamental right, [Article 1(1)] is not only a defensive right against encroachments on the part of the state. The state must also protect human dignity in positive terms If a person does not have the material means to guarantee an existence that is in line with human dignity . . . the state is obliged . . . to protect human dignity and to ensure . . . that the material prerequisites for this are at the disposal of the person in need of assistance.

Id.

²²³ *Id.* at marginal no. 133 (stressing that the fundamental right deriving from Article 1(1) of the GG had "an absolute effect" ("einen absolut wirkenden Anspruch")).

²²⁴ *Id.*

²²⁵ *Id.* For a discussion on the absolute character of the various rights encapsulated in the human dignity clause, see Ralf Poscher, "Die Würde des Menschen ist unantastbar" ["Human Dignity is Inviolable"], JURISTEN ZEITUNG [JZ] 756 (2004).

²²⁶ *Id.* at marginal no. 141.

²²⁷ *Id.* at marginal no. 143.

The Federal Constitutional Court . . . examines whether the legislature has covered and described the goal to ensure an existence that is in line with human dignity in a manner doing justice to Article 1.1 in conjunction with Article 20.1 of the Basic Law, whether within its margin of appreciation it has selected a calculation procedure that is fundamentally suited to an assessment of the subsistence minimum, whether, in essence, it has completely and correctly ascertained the necessary facts and, finally, whether it kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles.

ii. *Beneficiaries*

The general regime for the state-provided subsistence minimum comprises two distinct legal systems, addressing different categories of beneficiaries. Both systems are laid down by the Sozialgesetzbuch (SGB), the Social Code, yet in different books: the SGB II²²⁸ and the SGB XII.²²⁹

The SGB II (on the basic security for jobseekers) addresses able-bodied adults.²³⁰ Under the heading “beneficiaries,” the SGB II preserves the right to basic security for jobseekers who fall into a defined age-bracket (they must be older than fifteen and younger than sixty-seven),²³¹ who are able to work,²³² who cannot provide for themselves (through income or assets of their own, through work, or through the help of others),²³³ and who reside regularly in Germany.²³⁴ Non-nationals are not generally exempted from the right to a basic security for jobseekers. However, some specified groups of non-nationals are indeed expressly excluded from the category of potential beneficiaries.²³⁵ Moreover, non-nationals will not qualify as being able to work unless they are in possession of a work permit or they are eligible for a work permit under the pertinent provisions.²³⁶

The SGB XII (on social assistance) addresses persons who are not among the target groups of SGB II. Social assistance under the SGB XII addresses two specified groups and one unspecified group.²³⁷ The specified groups are comprised of (1) persons who, on account of sickness or disability, are indefinitely unable to participate in the labor market,²³⁸ and (2) persons who have reached the age of sixty-seven.²³⁹ The benefit meant to cover the needs of the two target groups is called “Grundsicherung im Alter und bei

Id.

²²⁸ SGB II, *supra* note 200.

²²⁹ SGB XII, *supra* note 199.

²³⁰ SGB II, *supra* note 200, at § 7(1), sentence 1.

²³¹ *Id.* at sentence 1, no. 1.

²³² *Id.* at § 7(1), sentence 1, no. 2 (read in conjunction with § 8).

²³³ *Id.* at § 7(1), sentence 1, no. 3 (read in conjunction with § 9(1)).

²³⁴ *Id.* at § 7(1), sentence 1, no. 4. “Regular residence” is defined by law in a negative manner. “Regular residence” (“gewöhnlicher Aufenthalt”) is to be presumed when the presence in the country of a particular person is not just a temporary one. *See* Sozialgesetzbuch (SGB) Erstes Buch (I) Allgemeiner Teil [SOCIAL CODE FIRST BOOK GENERAL PROVISIONS], Dec. 11, 1975, BGBL I at 3015, as amended, § 30(3) (Ger.) [hereinafter SGB I] (defining “regular residence”).

²³⁵ *See* SGB II, *supra* note 200, at § 7(1), sentence 2 (encompassing, for instance, non-nationals staying unlawfully in the country, certain categories of EU-nationals, and asylum seekers).

²³⁶ *Id.* at § 8(2).

²³⁷ *See* SGB XII, *supra* note 199, at §§ 27, 41.

²³⁸ *Id.* at § 41(1) (first target group) (read in conjunction with § 41(3)).

²³⁹ *Id.* at § 41(1) (second target group) (read in conjunction with § 41(2)).

Erwerbsminderung” (basic security in case of old age and lack of earning capacity). The unspecified group encompasses, more generally, all persons who, for whatever reasons, do not qualify for the basic security for jobseekers, for instance, because they have not yet reached the age of fifteen and do not share a household with their parents, or because their inability to work is only temporary.²⁴⁰ The benefit for the unspecified group is called “Hilfe zum Lebensunterhalt” (aid securing a livelihood). In any case, the pertinent provisions of the SGB XII require that the beneficiaries cannot provide for themselves through income or assets²⁴¹ and that they reside in Germany.²⁴² Again, non-nationals are not generally excluded from the right to social assistance, though some groups are.²⁴³ Still, for non-nationals, access to benefits is subject to additional conditions resulting from their statuses under various forms of residence permits.²⁴⁴

iii. Benefits

The benefits under the SGB II (on the basic security for jobseekers) and the benefits under the SGB XII (on social assistance) are equal in form and amount. Under both systems of the general regime, the aid aims to secure the “notwendigen Lebensunterhalt” (livelihood regarded as necessary) encompassing food, clothing, housing, and participation in societal and cultural activities (the so-called “socio-cultural minimum of subsistence”).²⁴⁵ Under both regimes, the beneficiaries are, exceptions notwithstanding, entitled to receive cash transfers, i.e., monthly allowances.²⁴⁶ Case law and scholarly literature assume that cash transfers are more attuned to the constitutional right

²⁴⁰ *Id.* at § 27(1) (read in conjunction with § 21 and with § 19(2), sentence 2).

²⁴¹ *Id.* at § 27(1)–(2), § 41(1).

²⁴² The benefit called “basic security in case of old age and lack of earning capacity” is preserved to people who reside regularly in the country. *Id.* at § 41(1). Access to the benefit called “aid providing a livelihood” is not tied to the requirement of a “regular” residence. *Id.* at § 27(1) (read in conjunction with § 98(1)). A temporary stay in Germany suffices to qualify for the benefit. *Id.* For the legal definition of “regular residence,” see SGB I, *supra* note 234.

²⁴³ See *id.* at § 23(2)–(3) (enumerating groups that mirror the list of exemptions given in SGB II § 7(1) sentence 2).

²⁴⁴ For details, see *id.* at § 23. The conditions have no relevance in the context of this Article.

²⁴⁵ SGB II, *supra* note 200, at § 20(1); SGB XII, *supra* note 199, at § 27a(1).

²⁴⁶ See SGB II, *supra* note 200, at § 4(1), no. 2, § 19(1). Measures enhancing the employability of the beneficiaries usually take the form of benefits in kind (services); benefits regarding education or participation in societal or cultural activities take, in defined cases, the form of coupons or vouchers. *Id.* at §§ 14, 19(2), 28. See also SGB XII, *supra* note 199, at §§ 10, 27a, 42. Again, benefits regarding education or participation in societal or cultural activities may take the form of coupons or vouchers. *Id.* at § 34.

to the respect of human dignity than benefits in kind.²⁴⁷ The amount of the benefits depends primarily on how beneficiaries fare with respect to work, income, or assets. The benefits are subject to a means-test²⁴⁸: if recipients have income or assets, the income or assets will be offset against the benefit and, therefore, reduce the amount of the benefit the recipient is entitled to.²⁴⁹ In addition, the recipients of benefits under SGB II and SGB XII receive aid in kind (medical care) in according to the rules that govern social health insurance in general.²⁵⁰ The right to receive cash benefits and medical care is not restricted in time. If the legal requirements are met, the beneficiaries will receive the cash transfers as well as medical care.

Following the February 2010 judgment of the BVerfG,²⁵¹ lawmakers introduced an empirically grounded mechanism for determining and adjusting the amounts of money deemed necessary to live a life in dignity.²⁵² Under that mechanism, the amount of the monthly flat rate varied according to personal status and age.²⁵³ In 2016, the flat-rate amount for a single person was

²⁴⁷ Under the RGr, *supra* note 204, at §11, it was expressly left to the discretion of the authorities to determine whether aid should be provided in kind or in cash. Yet, even in the 1920s, scholars noted that, in practice, state-provided aid usually took the form of cash benefits, at least in the major cities. *See e.g.*, HANS MUTHESIUS, FÜRSORGERECHT [SOCIAL WELFARE LAW] 65–66 (1928). In the 1950s, cash benefits clearly dominated the scene. *See, e.g.*, HEINZ KEESE, DIE ÖFFENTLICHE FÜRSORGE [PUBLIC WELFARE] 41–42 (3d ed. 1951). In the 1960s, administrative courts adjudicating under the BSHG began to hold that aid with respect to food, clothing, and housing should, as a matter of principle, take the form of a cash transfer. *See, e.g.*, OVG Berlin, Jan. 24, 1963, VI B 12.61, Fürsorgerechtliche Entscheidungen der Verwaltungs- und Sozialgerichte [Decisions Concerning Welfare Law by Administrative and Social Courts] 11 FEVS 139, 140–141 (relying on the “Wesen” [essence] of welfare and social assistance when holding that recipients of public aid should have the same freedom of choice as anyone else when covering their needs; otherwise poverty would place them in an inferior position).

²⁴⁸ SGB II, *supra* note 200, at § 7(1), sentence 1, no. 3 (read in conjunction with § 9(1)); SGB XII, *supra* note 199, at § 2(1).

²⁴⁹ SGB II, *supra* note 200, at § 9(1) (read in conjunction with §§ 11–12); SGB XII, *supra* note 199, at § 19(1)–(2) (read in conjunction with §§ 41(1), 43, 82–84, 90–91).

²⁵⁰ For recipients under the SGB II, *see* Sozialgesetzbuch (SGB) Fünftes Buch (V) Gesetzliche Krankenversicherung [SGB V] [Social Code Fifth Book Social Health Insurance], art. 1 of G, Dec. 20, 1988, BGBl I at 2477, as amended, § 5(1) no. 2a [hereinafter SGB V]. For recipients under the SGB XII, *see id.* at § 5(1), no. 13, and SGB XII, *supra* note 199, at §§ 48, 52.

²⁵¹ BVerfG, 1 BvL 1/09, Feb. 9, 2010.

²⁵² For the period starting on January 1, 2011, *see* Gesetz zur Ermittlung der Regelbedarfe nach § 28 des Zwölften Buches Sozialgesetzbuch [RBEG 2011] [Act Concerning the Determination of Regular Needs under SGB XII, § 28], Mar. 24, 2011, BGBl I at 453. For the period starting on January 1, 2017, *see* Gesetz zur Ermittlung der Regelbedarfe nach § 28 des Zwölften Buches Sozialgesetzbuch [RBEG 2016] [Act Concerning the Determination of Regular Needs under SGB XII, § 28], Dec. 22, 2016, art. 1 of G, BGBl I at 3159.

²⁵³ Bekanntmachung über die Höhe der Regelbedarfe nach § 20 Absatz 5 des Zweiten Buches Sozialgesetzbuch für die Zeit ab 1. Jan. 2016 [Promulgation Concerning the Amounts Pertaining to Regular Needs under SGB II, § 20(5), starting from January 1,

404 Euros.²⁵⁴ For a couple, it was 364 Euros per person (lawmakers expect a couple to achieve savings that a single person cannot achieve).²⁵⁵ The flat-rate cash benefit for children depended on the age bracket the children fell into.²⁵⁶ In addition to the monthly flat rate, the beneficiaries received an amount of money that covered the actual costs of accommodation, provided that the actual costs were “angemessen” (adequate).²⁵⁷ For a single person living in a moderate neighborhood, the adequate costs of accommodation amounted to about 250 Euros in 2016. Hence, under the general regime of state-provided aid used to secure the subsistence minimum, a single person received a total of about 654 Euros in 2016, depending on the actual costs of accommodation and the outcome of the means-test.

2016, onward] [BRB 2016], Oct. 22, 2015, BGBl I at 1792. For the amounts granted under the SGB XII, see Regelbedarfsstufen-Fortschreibungsverordnung 2016 [RBSFV 2016] [Regulation adjusting the amounts pertaining to regular needs], Oct. 22, 2015, BGBl I at 1788. From January 1, 2017, onward, all relevant needs under the SGB II and the SGB XII have been reevaluated based on more recent empirical data. See RBEG 2016, *supra* note 252; SGB II, *supra* note 200, at § 20(1a)–(4); SGB XII, *supra* note 199, at §§ 28, 28a, and Annex to § 28.

²⁵⁴ BRB 2016, *supra* note 253, at no. 1; RBSFV 2016, *supra* note 253, at § 2. In 2017, the amount was adjusted to 409 Euros. RBEG 2016, *supra* note 252, at § 8(1), sentence 1, no. 1. The RBEG 2016 also introduced a new requirement. The benefit granted to single persons now presupposes that the claimant is living in a qualifying accommodation, and a qualifying accommodation is defined by law as a unit consisting of several rooms which are separated from other units and comprise all amenities and appliances necessary for keeping a household. RBEG 2016, *supra* note 252, at § 8(1), sentence 2.

²⁵⁵ BRB 2016, *supra* note 253, at no. 4; RBSFV 2016, *supra* note 253, at § 2. In 2017, the amount was adjusted to 368 Euros. RBEG 2016, *supra* note 252, at § 8(1), sentence 1, no. 2.

²⁵⁶ For a child younger than seven years, the amount was 237 Euros in 2016; for a child aged between seven and fifteen years, it was 270 Euros, and for a child aged between fifteen and eighteen years, it was 306 Euros. BRB 2016, *supra* note 253, at nos. 2, 5, 6, 7; RBSFV 2016, *supra* note 253, at § 2. Again, the amounts have been adjusted in 2017. RBEG 2016, *supra* note 252, at § 8(1), sentence 2, nos. 4–6.

²⁵⁷ SGB II, *supra* note 200, at § 22(1); SGB XII, *supra* note 199, at § 35(1)–(2). The “adequacy” of the costs of accommodation depends, of course, on the location. In some areas of Germany, such as Munich, accommodation is more expensive than in other areas. On average, adequate costs for an accommodation range between four and six Euros per square meter. For a single person, a size of fifty square meters is deemed adequate.

B. The Particular Regime: Asylum Seekers' Benefits

i. History

a. The Introduction of the Regime

Non-nationals subject to the AsylbLG²⁵⁸ are among the classes that are exempt from the general regime.²⁵⁹ For them, the subsistence minimum is determined by the AsylbLG only.²⁶⁰ The AsylbLG was introduced in the early 1990s, when Germany went through a crisis similar to the one endured in 2015 and 2016.²⁶¹ After the fall of the Iron Curtain in 1989, the number of asylum seekers started to climb until the number reached 440,000—a number unheard of at that point in time.²⁶² In December 1992, the Conservatives and the Social Democrats reached a compromise, which was coined in public discourse the “Asylkompromiß” (compromise on asylum). The compromise was a political agreement opening the door to several legal measures aimed at reducing the number of asylum applicants.²⁶³

First, the wording of the constitutional right to asylum was amended to no longer extend to non-nationals who reached German territory after passing through a safe third country.²⁶⁴ However, asylum seekers could, even after passing through a safe third country prior to their arrival in Germany, qualify for the status under the Refugee Convention (refugee status).²⁶⁵ Second, the constitutional right to asylum was curtailed with respect to asylum seekers coming from a country that had been classified by law as a “safe country of

²⁵⁸ See AsylbLG, *supra* note 57.

²⁵⁹ SGB II, *supra* note 200, at § 7(1), sentence 2, no. 3; SGB XII, *supra* note 199, at § 23(2).

²⁶⁰ On the various groups of non-nationals subject to the AsylbLG, *see* Part III.B.ii.

²⁶¹ For details on the legislative history of the AsylbLG, *see, e.g.*, Karl-Heinz Hohm, *II Entstehungsgeschichte [Legislative History] marginal nos. 15–38 in ASYLBEWERBERLEISTUNGSGESETZ (ASYLBLG) GEMEINSCHAFTSKOMMENTAR* (Karl-Heinz Hohm ed., Jan. 2018).

²⁶² *See* Tomik, *supra* note 80, and accompanying text.

²⁶³ Regarding the “asylum compromise” *see, e.g.*, Jürgen Haberland, *Der Asylkompromiß vom 6. Dezember 1992 – ein Jahr danach [The Compromise on Asylum – One Year After]*, ZAR 3–9, 51–59 (1994) (reproducing the text of the compromise and the initial steps taken towards the implementation of the compromise). The compromise on asylum led to amendments to the GG that then needed to be implemented through statutory law. For the amendments to the GG, *see* Gesetz zur Änderung des Grundgesetzes [Act amending the Basic Law], June 28, 1993, BGBL I at 1002 (Ger.).

²⁶⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 16a(2), as amended.

²⁶⁵ *See, e.g.*, KAY HAILBRONNER, ASYL- UND AUSLÄNDERRECHT 407 (4th ed. 2017).

origin.”²⁶⁶ The amendments to the GG allowed lawmakers to introduce procedural rules shifting the burden of proof towards the claimants if the claimants’ country of origin had been classified “safe.”²⁶⁷ Under these rules, it was (and still is) up to the asylum seekers to rebut the legal presumption that they would not be persecuted when they returned to their country of origin. They were (and are) supposed to do so through accelerated procedures.²⁶⁸ Third, relating to social benefits, asylum seekers were denied access to the general regime of state-provided social assistance, though not through amending the text of the constitution, but by changing the then-existing rules contained in statutory law.²⁶⁹ The political compromise reached in early 1993 was based on the premise that the benefits granted under the general regime then in force were so generous that the regime per se attracted asylum seekers who could, while waiting for the rejection of their applications, secure more money than if they remained in their countries of origin.²⁷⁰ Hence, a particular regime of social assistance was introduced, designed to deter more asylum applicants.²⁷¹ The AsylbLG relinquished a principle that had been upheld for decades in the general regime, namely that benefits meant to secure a decent livelihood

²⁶⁶ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 16a(3), as amended. The GG does not give a list of the countries deemed to be safe countries of origin. To establish such a list is left to the lawmakers, and it takes further compromising among lawmakers to reach the majorities necessary for amending the AsylG. In 2014 and 2015, such a compromise was indeed forged with respect to several Balkan countries. See Gesetz zur Einstufung weiterer Staaten, *supra* note 50; and Asylverfahrensbeschleunigungsgesetz, *supra* note 54, at art. 1, no. 35.

²⁶⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], art. 16a(3), as amended.

²⁶⁸ These fast-track procedures, first introduced in 1993 by the Gesetz zur Änderung asylverfahrens-, ausländer- und staatsangehörigkeitsrechtlicher Vorschriften [Act Amending the Provisions Concerning the Processing of Asylum Applications, the Provisions Regarding Entry and Stay of Non-Nationals, and the Provisions Regarding German Nationality], June 30, 1993, BGBL I at 1062, art. 1 (Ger.) were streamlined further in 2014, 2015 and 2016. See Asylverfahrensbeschleunigungsgesetz, *supra* note 46; and Gesetz zur Einstufung weiterer Staaten, *supra* note 50; and Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55.

²⁶⁹ See Gesetzentwurf der Fraktionen der CDU/CSU und F.D.P.: Entwurf eines Gesetzes zur Neuregelung der Leistungen an Asylbewerber [Bill Submitted by the Parliamentary Parties of CDU/CSU and F.D.P.: Making New Provisions Regarding the Social Benefits for Asylum Seekers], Mar. 2, 1993, BT-Drs. 12/4451 [hereinafter Gesetzentwurf]; and the ensuing Gesetz zur Neuregelung der Leistungen an Asylbewerber, *supra* note 57, at art. 2.

²⁷⁰ See, e.g., Gesetzentwurf der Fraktionen der CDU/CSU und F.D.P.: Entwurf eines Gesetzes über Leistungen der Sozialhilfe an Ausländer [Bill Submitted by the Parliamentary Parties of CDU/CSU and F.D.P.: Providing Social Assistance for Non-Nationals], Nov. 10, 1992, BT-Drs. 12/3686 at 5 (stressing the new provisions would reduce the incentives for non-nationals, claiming to seek protection under the pretense of being persecuted, from coming to Germany).

²⁷¹ *Id.*

(food, clothing, housing) ought to be provided in cash.²⁷² Under the AsylbLG, asylum seekers were to be provided primarily with benefits in kind, not only with respect to accommodation (e.g., in reception centers), but also with respect to food, clothing, or other personal necessities of life.²⁷³ Also, the AsylbLG lowered the benefits to be provided. The amounts of the cash benefits, if available, were considerably lower than under the general regime: in 1993, the benefits for a single person under the AsylbLG reached about 85% of the benefits for a single person under the general regime.²⁷⁴ Finally, asylum seekers were granted access to medical care.²⁷⁵ However, access to medical care was restricted to conditions of acute illness and pain.²⁷⁶ All these various curtailments notwithstanding, lawmakers believed that the AsylbLG would still ensure a standard of living consistent with the human dignity clause of Article 1(1) GG.²⁷⁷

b. The Challenge Before the BVerfG: Human Dignity

When the BVerfG ruled in 2010²⁷⁸ that the dignity clause of the GG also comprised an individual right to a subsistence minimum and that right needed to be elaborated by parliament in a transparent and consistent manner,²⁷⁹ doubts regarding the constitutionality of the particular regime of the AsylbLG gained new ground in academic circles.²⁸⁰ In July and November 2010, the Landessozialgericht (LSG) Nordrhein-Westfalen, the Higher Social Court of North Rhine Westphalia, initiated proceedings before the BVerfG.²⁸¹ The

²⁷² See *supra* Part III.A.iii.

²⁷³ AsylbLG, as enacted in 1993, *supra* note 57, at § 3(1).

²⁷⁴ In North Rhine Westphalia, a single person liable to the general regime of social assistance was, in 1993, entitled to a cash benefit of 514 DM [263 Euros]. *Verordnung über die Regelsätze der Sozialhilfe* [Regulation on Regular Benefits], June 29, 1993, NW GVBL. at 314. For asylum seekers liable to the particular regime of the AsylbLG, the comparable amount was 440 DM [225 Euros].

²⁷⁵ AsylbLG, *supra* note 57, at § 4.

²⁷⁶ *Id.*

²⁷⁷ See *Gesetzentwurf*, *supra* note 269, at 6.

²⁷⁸ BVerfG, 1 BvL 1/09, Feb. 9, 2010.

²⁷⁹ On the procedural safeguards established and reviewed by the BVerfG, *see id.*

²⁸⁰ See, e.g., Constanze Janda & Florian Wilksch, *Das Asylbewerberleistungsgesetz nach dem "Regelsatz-Urteil" des BVerfG* [The Asylum Seekers' Benefits Act after the SGB II-Judgment of the BVerfG], SGB 565 (2010); and Thorsten Kingreen, *Schätzungen "ins Blaue hinein"* [Estimates "in the Dark"], NVwZ 558 (2010); and Christoph Görisch, *Asylbewerberleistungsrechtliches Existenzminimum und gesetzgeberischer Gestaltungsspielraum* [The Subsistence Minimum Under the AsylbLG and the Lawmakers' Discretion], NEUE ZEITSCHRIFT FÜR SOZIALRECHT [NZS] 646 (2011).

²⁸¹ Landessozialgericht [LSG] [Higher Social Court] Nordrhein-Westfalen, July 27, 2010, 1 20 AY 13/09, JURIS; Landessozialgericht [LSG] [Higher Social Court] Nordrhein-Westfalen, Nov. 22, 2010, L 20 AY 1/09, JURIS.

LSG Nordrhein-Westfalen challenged the constitutionality of the AsylbLG, in particular the amounts of cash benefits granted to asylum seekers once they were no longer obliged to stay in a reception center.²⁸²

In 2012, pivotal parts of the particular regime—namely, the provisions of the AsylbLG determining the cash benefits available in regular cases²⁸³—were declared unconstitutional by the BVerfG.²⁸⁴ Without hesitating, the BVerfG presumed that non-nationals were right-holders under Article 1(1) of the GG.²⁸⁵ According to the BVerfG, Article 1(1) of the GG was to be read as enshrining a “Menschenrecht” (a human right); that is, in the understanding of the court, the right was not preserved for German nationals but also extended to non-nationals.²⁸⁶ On the merits, the BVerfG took issue with the amounts of the cash benefits granted under the AsylbLG.²⁸⁷ The court’s main concern was that the amounts fixed by the lawmakers in 1993 had never been upgraded afterwards, even though price levels had risen by more than 30%.²⁸⁸ To “illustrate” the “evident insufficiency,” the BVerfG referred to the cash benefits granted under the general regime and the considerable gaps in the amounts caused by the idleness of the lawmakers.²⁸⁹ The benefits available to a single person under the AsylbLG amounted only to 65% of the equivalent benefit under the general regime, leaving a gap of 35%.²⁹⁰ The ratio was even worse with regard to the benefits available to children and juveniles; in the case of children below the age of six, the benefits under the AsylbLG reached only 25% of the benefits available under the general regime.²⁹¹ Against that backdrop, the BVerfG concluded that the benefits provided by the AsylbLG, set in 1993, were evidently not in accordance with what was demanded by Article 1(1) GG.²⁹² The BVerfG also took issue with the main motif underpinning the AsylbLG.²⁹³ The BVerfG held, again in no uncertain terms, that considerations pertaining to migration policy, i.e., the wish to reduce the number of foreign nationals seeking protection in Germany, could not justify the

²⁸² *Id.* (arguing that the amounts granted under the AsylbLG were “evidently insufficient”).

²⁸³ For details on the “Grundleistungen” (regular benefits) under the AsylbLG, *see infra* Part III.B.iii.a.

²⁸⁴ BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 61.

²⁸⁵ *Id.* at marginal no. 62.

²⁸⁶ *Id.* at marginal no. 63 (“Because [Article 1(1)] is a human right, both German and foreign nationals who reside in the Federal Republic of Germany are entitled to this fundamental right.”)

²⁸⁷ *Id.* at marginal nos. 81–89.

²⁸⁸ *Id.* at marginal nos. 82–84.

²⁸⁹ *Id.* at marginal no. 85.

²⁹⁰ BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 87.

²⁹¹ *Id.* at marginal no. 88.

²⁹² *Id.* at marginal no. 81.

²⁹³ *Id.* at marginal nos. 90–95.

withholding of what was owed under the dignity clause of the GG:²⁹⁴ “Human dignity, guaranteed in Article 1.1 of the Basic Law, may not be modified in light of migration-policy considerations.”²⁹⁵ The July 2012 judgment of the BVerfG prompted major amendments to the AsylbLG in late 2014.²⁹⁶ The refugee crisis led to more adjustments in 2015 and 2016.²⁹⁷

ii. Beneficiaries

Even though the title of the act explicitly refers to “asylum seekers,” the scope of the AsylbLG is not, and never was, confined to non-nationals who are actually seeking international protection from persecution in Germany and who qualify as asylum seekers.²⁹⁸ Non-nationals seeking protection and awaiting the decision of the BAMF are just one major group covered by the AsylbLG.²⁹⁹ Non-nationals who have been granted certain humanitarian residence titles are another.³⁰⁰ Non-nationals who have no right to remain in Germany, but whose further stay is nonetheless tolerated,³⁰¹ constitute a third group.³⁰² And, more generally, non-nationals who are bound to leave the country constitute a fourth group.³⁰³ Clearly, many non-nationals who find themselves among one of the defined classes of beneficiaries might, at one point during their stay in Germany, have been asylum seekers in an informal or a formal sense. But that is not necessarily so.

iii. Benefits

²⁹⁴ *Id.* at marginal no. 95.

²⁹⁵ *Id.*

²⁹⁶ See Gesetz zur Änderung des Asylbewerberleistungsgesetzes und des Sozialgerichtsgesetzes, *supra* note 63.

²⁹⁷ See Asylverfahrensbeschleunigungsgesetz, *supra* note 46, at art. 2; Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, at art. 3; Integrationsgesetz, *supra* note 64, at art. 4.

²⁹⁸ On the notion of “asylum seeker” and the related status, see *supra* Part II.E.i. and iii.

²⁹⁹ See AsylbLG, *supra* note 57, at § 1(1), no. 1 (referring to non-nationals whose stay is “permitted” [“gestattet”] under the AsylG).

³⁰⁰ See *id.* at § 1(1), no. 3 (referring to non-nationals who have been issued a temporary residence permit because their country of origin is torn by war, or on account of weighty personal reasons, or because their factual removal is prohibited by law).

³⁰¹ On the concept of “Duldung” (toleration) under the German AufenthG, see *supra* Part II.E.ii.

³⁰² See AsylbLG, *supra* note 57, at § 1(1), no. 4 (referring to non-nationals in possession of a “Duldung”).

³⁰³ See *id.* at § 1(1), no. 5 (referring to non-nationals who are legally obliged to leave the country).

The benefits provided under the AsylbLG to secure a livelihood may take three forms: the AsylbLG establishes a system of regular benefits,³⁰⁴ a system of downgraded benefits,³⁰⁵ and a system of upgraded benefits.³⁰⁶ Access to medical care is still restricted to conditions of acute illness or pain.³⁰⁷ Regular benefits and downgraded benefits were at the center of the lawmakers' response to the crisis of 2015 and 2016.

a. Regular Benefits

The regular benefits (“Grundleistungen”) are meant to cover, for one, essential needs (“notwendiger Bedarf”) and, for another, essential personal needs (“notwendiger persönlicher Bedarf”).³⁰⁸ Essential needs are defined by the AsylbLG to comprise needs regarding food, housing, clothing, minor medical care and hygiene, and household commodities.³⁰⁹ Essential personal needs are defined to encompass all quotidian personal necessities.³¹⁰ Obviously, needs regarding societal and cultural activities (the so-called socio-cultural minimum), such as communication, mobility, or educational training, are part of what is called the essential personal needs.³¹¹

Whether regular benefits are provided in kind or in cash depends on where the beneficiaries are accommodated. When and if the beneficiaries are accommodated in reception centers (they must stay in reception centers for at least six weeks, or they may be ordered to stay there for up to six months),³¹² the essential needs are to be covered in kind.³¹³ Essential personal needs are, in principle, also provided in kind.³¹⁴ When the beneficiaries are accommodated in other facilities, some of the essential needs and the essential personal needs are to be covered by providing cash transfers.³¹⁵ For example, under

³⁰⁴ See *infra* Part III.B.iii.a.

³⁰⁵ See *infra* Part III.B.iii.b.

³⁰⁶ See *infra* Part III.B.iii.c.

³⁰⁷ See AsylbLG, *supra* note 57, at § 4.

³⁰⁸ *Id.* at § 3(1).

³⁰⁹ *Id.* at § 3(1) sentence 1.

³¹⁰ *Id.* at § 3(1) sentence 5 (referring to “persönliche Bedürfnisse des täglichen Lebens”).

³¹¹ For the general regime, see SGB XII, *supra* note 199, at § 27a; and SGB II, *supra* note 200, at § 20(1).

³¹² See *supra* notes 169–171 and accompanying text.

³¹³ AsylbLG, *supra* note 57, at § 3(1), sentences 1–2.

³¹⁴ *Id.* at § 3(1), sentence 6.

³¹⁵ *Id.* at § 3(2), sentence 1.

the rules applicable in 2016,³¹⁶ a single person received 219 Euros (essential needs) plus 135 Euros (essential personal needs), i.e., a total of 354 Euros in cash.³¹⁷ Accommodation and household commodities may still be provided in kind.³¹⁸ The relevant amounts were the same in 2017 and have not been adjusted.³¹⁹

b. Downgraded Benefits

Downgraded benefits are meant to cover merely some of the essential needs but no essential personal needs.³²⁰ Downgraded benefits cover needs with respect to food, housing, and minor medical care and personal hygiene, but no needs with respect to clothing.³²¹ Downgraded benefits ought to be provided in kind.³²² Downgraded benefits are due for numerous classes of non-nationals. Downgraded benefits are due for non-nationals who are bound to leave the country (because they lack titles legalizing their stays), provided the dates for their departures are already set and departure proves possible.³²³ Moreover, downgraded benefits are due for non-nationals who are bound to

³¹⁶ *Id.* at § 3(1), sentence 8 and § 3(2), sentence 2, as amended by Bekanntmachung, *supra* note 253 and by Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, art. 3.

³¹⁷ *Id.*

³¹⁸ *See id.* at § 3(2), sentence 4.

³¹⁹ In October 2016, the federal government suggested to once more reassess the amounts due under the AsylbLG. *See* Gesetzentwurf der Bundesregierung, Entwurf eines Dritten Gesetzes zur Änderung des Asylbewerberleistungsgesetzes [Bill Submitted by the Federal Government: A Third Bill Amending the AsylbLG], Oct. 17, 2016, BT-Drs. 18/9985 [hereinafter Entwurf eines Dritten Gesetzes]. The bill proposed to lower the regular benefits considerably for beneficiaries who were (still) accommodated in some form of collective accommodation and would, therefore, not live in a “qualifying accommodation” as defined by the RBEG 2016, *supra* note 252. On the characteristics of a “qualifying accommodation,” *see* RBEG 2016, *supra* note 252, at § 8(1) sentence 2 and *supra* note 254. Under the rules suggested by the bill, a single person housed in collective accommodation would be granted 299 Euros instead of 354 Euros. Entwurf eines Dritten Gesetzes, at § 3a. The proposal was contested among political actors. The bill was adopted by the Bundestag, yet not the Bundesrat. *See* DEUTSCHER BUNDESTAG-PLENARPROTOKOLLE [BT-PLPROT.] 18/206 at 20580–20581 (Dec. 1, 2016); and DEUTSCHER BUNDES RAT-PLENARPROTOKOLLE [BR-PLPROT.] 952, at 514 (Dec. 12, 2016). The bill became mute when a new parliament was formed following the general elections of September 24, 2017.

³²⁰ *See* AsylbLG, *supra* note 57, at § 1a (defining “Anspruchseinschränkungen” (curtailment of entitlement)).

³²¹ *Id.* at § 1a(2), sentence 2.

³²² *Id.* at § 1a(2), sentence 4 (reading “Die Leistungen sollen als Sachleistungen erbracht werden.”) The German word “sollen” leaves room for exceptions from the principle announced in sentence 4. Under exceptional circumstances, downgraded benefits might be provided in cash.

³²³ *Id.* at § 1a(2), sentence 1.

leave the country and who hamper the execution of the expulsion order,³²⁴ for instance, through concealing their identities.³²⁵ Asylum seekers do not belong to any of these classes yet rejected asylum seekers may. Asylum seekers, in an informal or formal sense, are liable for any downgraded benefits given under the AsylbLG if they violate provisions requiring that they cooperate in the decision-making regarding their asylum applications, such as the duty to hand papers over to the BAMF or the duty to show up for a hearing before the BAMF.³²⁶ Finally, downgraded benefits are owed as long as asylum seekers have not yet received a certificate of arrival issued by the responsible arrival center.³²⁷ The last class comprises asylum seekers at a very early stage of the procedure, namely, asylum seekers who have been registered in EASY but have not yet lodged their formal applications.³²⁸

Clearly, all the classes of non-nationals given downgraded benefits have one common feature: one way or another, they do not (or might not) comply with the law. Downgraded benefits are in response to non-compliance.

c. Upgraded Benefits

Upgraded benefits are meant to cover all the elements of the subsistence minimum defined by the SGB XII on social assistance.³²⁹ Hence, upgraded benefits cover the whole range of the so-called socio-cultural minimum of subsistence provided under the general regime, such as food, clothing, personal hygiene, household commodities, household energy, and the quotidian personal needs, including needs with respect to participation in societal and cultural activities.³³⁰ Like the benefits under the general regime, the upgraded benefits under the AsylbLG are to take the form of cash transfers.³³¹ Upgraded benefits are due when the beneficiaries under the AsylbLG have been staying in Germany for fifteen months, without major interruption and without unduly manipulating the lengths of their stays.³³²

³²⁴ *Id.* at § 1a(3).

³²⁵ Dagmar Oppermann, § 1a, marginal no. 63; AsylbLG in JURISPK-SGB XII [COMMENTARY ON SGB XII AND OTHER STATUTES] (Rainer Schlegel & Thomas Voelzke eds., 2d ed. 2014).

³²⁶ AsylbLG, *supra* note 57, at § 1a(5).

³²⁷ *Id.* at § 11(2a), sentence 1.

³²⁸ For details regarding the early stage of an asylum procedure, *see supra* Part II.D.

³²⁹ *See* AsylbLG, *supra* note 57, at § 2(1) (demanding that the SGB XII be applied “entsprechend” (in an analogous manner) if claimants qualify under § 2).

³³⁰ *See* SGB XII, *supra* note 199, at § 27a(1); *supra* Part III.A.iii.

³³¹ AsylbLG, *supra* note 57, at § 2(1). *But see id.* at § 2(2) (providing for an exception if and when asylum seekers are still housed in some form of collective accommodation).

³³² *Id.* at § 2(1).

IV. DIFFERENCES BETWEEN THE GENERAL AND THE PARTICULAR REGIME:
WHY THEY OUGHT NOT EXIST

A. *The Differences*

The particular regime under the AsylbLG deviates in two significant respects from the general regime established by the SGB II and the SGB XII. The differences relate to the amounts of benefits and to their form of provision. First, if and when cash benefits are granted, the amounts granted under the AsylbLG are less than the amounts handed out under the general regime; that is even true for the regular benefit under the AsylbLG.³³³ For a single person, for instance, the amount provided under the AsylbLG in 2016 was about 90% of the comparable amount provided under the general regime.³³⁴ If handed out in cash,³³⁵ downgraded benefits are not meant to cover essential personal needs and clothing; apart from accommodation, downgraded benefits cover food and products for minor medical care and personal hygiene.³³⁶ In 2016, the amount due to a single person receiving downgraded benefits reached about 150 Euros,³³⁷ roughly 37% of the amount granted under the general regime (404 Euros). Second, regarding form, the benefits granted under the general regime are, as a rule, provided in cash.³³⁸ Under the AsylbLG, benefits are primarily granted in kind. If asylum seekers are obliged to stay in a reception center, all essential needs must be and all essential personal needs ought to be covered in kind.³³⁹ Downgraded benefits are, whenever feasible, to be covered in kind.³⁴⁰

The differences in amounts and in form raise questions under German constitutional law as well as under EU law: Are the differences compatible with Article 1(1) of the GG?³⁴¹ Are the differences compatible with EU Directive 2013/33 and the Charter?³⁴²

³³³ For details on “regular benefits,” *see supra* Part III.B.iii.a.

³³⁴ In 2016, single persons were entitled to receive 354 Euros in cash, once they were no longer obliged to reside in a reception center. *Supra* text accompanying note 317 and accompanying text. Under the general regime, single persons were entitled to receive 404 Euros. BRB and RBSFV, *supra* note 254 and accompanying text.

³³⁵ Under exceptional circumstances, downgraded benefits may take the form of cash transfers. *See* AsylbLG, *supra* note 57, at § 1a(2), sentence 4.

³³⁶ *See* Part III.B.iii.b.

³³⁷ *See* RBEG 2011, *supra* note 252, at § 5; RBEG 2016, *supra* note 252, § 5. Calculation by the author.

³³⁸ *See supra* notes 246–247, and accompanying text.

³³⁹ *See supra* notes 313–314 and text accompanying.

³⁴⁰ *See* AsylbLG, *supra* note 57, at § 1a(2), sentence 4.

³⁴¹ *See* Part IV.B.

³⁴² *See* Part IV.C.

B. The Perspective of the Grundgesetz

i. Why the AsylbLG as of 2011 Undercuts Human Dignity

The main focus of the July 2012 judgment of the BVerfG (declaring parts of the AsylbLG, as amended in 2011, unconstitutional) was on the amounts due under regular benefits.³⁴³ The BVerfG ruled those amounts were “evidently insufficient” from the perspective of the constitutional clause on human dignity.³⁴⁴ When giving reasons, the court concentrated on the amounts granted (and the negligence on the side of the lawmakers).³⁴⁵ The purpose of the AsylbLG (to treat asylum seekers less favorably than other residents) and the differences in treatment had no place in the court’s thrust of arguments. At one point, the BVerfG briefly noted that there were “gaps” between the amounts granted under the general and the particular regimes.³⁴⁶ But the court did so simply to “illustrate” the “evident insufficiency” of the benefits granted under the particular regime.³⁴⁷ Even so, the July 2012 judgment contains two statements that provide guidance for the assessment of the current regime established by the AsylbLG and its deviations from the general regime.

With prospective amendments to the AsylbLG in mind, the July 2012 judgment of the BVerfG did reflect on the constitutionality of legal provisions that would treat people differently regarding their access to a state-provided subsistence minimum.³⁴⁸ The BVerfG did not rule out altogether as unconstitutional that lawmakers treat certain classes of non-nationals less favorably than nationals or other defined classes of long-term residents. But less favorable treatment was tied to a test: different treatment was declared permissible by the BVerfG if, and only if, lawmakers could show in court that the needs of the persons treated less favorably differed significantly from the needs of other persons (treated more favorably) and certain procedural requirements were met.³⁴⁹ In the words of the court:

If the legislature wishes to consider the particular characteristics of specific groups of individuals when determining the dignified minimum existence . . . it may not . . . differentiate across the board in light of the recipients’ residence status. Such differentiation is only possible if their need for existential

³⁴³ See *supra* Part III.B.i.b.

³⁴⁴ BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 81.

³⁴⁵ *Id.* at marginal nos. 82–89.

³⁴⁶ *Id.* at marginal no. 88.

³⁴⁷ *Id.* at marginal no. 86.

³⁴⁸ *Id.* at marginal nos. 73–76.

³⁴⁹ *Id.* at marginal no. 73.

benefits significantly deviates from that of other persons in need, and if this can be substantiated consistently based on the actual needs of this specific group, in a procedure that is transparent in terms of its content.³⁵⁰

In the case of non-nationals whose stays were presumably short-term, so the court continued, the constitutionality of less favorable treatment depended “solely on whether one can comprehensibly ascertain and calculate specifically lower needs precisely because of a short time of staying in the country.”³⁵¹ The act of ascertaining and calculating the “lower needs” of short-term residents was not conceived of as being a simple task. For the BVerfG, the task was quite a complex one, as lawmakers were asked to also consider “whether, as a result of a short-term nature of residence, lower needs are compensated for by greater needs which typically arise particularly when residence is only temporary.”³⁵² In any case, so the BVerfG asserted, lawmakers had to make sure that the subsistence minimum granted would cover physical as well as social and cultural needs.³⁵³ Even for short-term residents, the minimum was conceived of as a socio-cultural one.

The second statement of the BVerfG that is of importance here is concerned with the form of benefits intended to secure the subsistence minimum. The statement is very brief. When asserting that, under the welfare state clause of Article 20(1) of the GG, it was for the lawmakers to specify the “dignified” subsistence minimum, to set the conditions for granting the benefits, and to decide on the character and the elements of the benefits,³⁵⁴ the BVerfG remarked: “Whether [parliament] guarantees the [subsistence minimum] in cash, kind or services, is in principle subject to the legislature’s discretion.”³⁵⁵ The same statement is already found in the court’s February 2010 judgment.³⁵⁶ Obviously, the lawmakers’ leeway is conceptualized by the BVerfG as extending to the form of provision. Still, neither the July 2012 judgment nor the February 2010 judgment engaged in giving details on what the statement would imply, for the lawmakers on the one hand or for a constitutional assessment on the other.

³⁵⁰ *Id.*

³⁵¹ *Id.* at marginal no. 74.

³⁵² *Id.*

³⁵³ *Id.* at marginal no. 94.

³⁵⁴ *Id.* at marginal no. 67.

³⁵⁵ *Id.*

³⁵⁶ BVerfG, 1 BvL 1/09, Feb. 9, 2010, at marginal no. 138.

ii. *Why the AsylbLG Still Undercuts Human Dignity*

To build my case against the constitutionality of the current regime established under the AsylbLG, I shall first deal with the differences in the amounts of the benefits. The amounts of these benefits differ depending on whether the beneficiaries under the AsylbLG are granted regular benefits or downgraded benefits.³⁵⁷ Then I shall turn to the differences regarding the form of the provision of the benefits (benefits in cash versus benefits in kind).³⁵⁸

a. *Differing Amounts of Benefits*

1. *Regular Benefits Under the AsylbLG*

The provisions of the AsylbLG defining the regular benefits (354 Euros for a single person in 2016 compared to 404 Euros under the general regime) violate the right to respect of human dignity under Article 1(1) of the GG if two conditions are met: First, the general regime, established by the SGB II and the SGB XII, is not so generous as to provide more than what is required by the dignity clause under Article 1(1) of the GG. Only then does a seemingly rather minor difference of 50 Euros per months possibly matter from the perspective of the human dignity clause. If the general regime is an almost exact implementation of the requirements under Article 1(1) of the GG, even a minor difference might undercut what is demanded by the clause. Second, the difference in the amounts fails the test of constitutionality outlined by the 2012 judgment of the BVerfG regarding different, i.e., less favorable, treatment when lawmakers define what constitutes the relevant minimum.³⁵⁹

I strongly suggest the difference in the amounts matters, although the difference seems minor. The general regime established by the SGB II and the SGB XII is not over-generous. The parliamentary debates that followed the February 2010 judgment of the BVerfG and eventually led to a new empirically-based general regime³⁶⁰ give no indication whatsoever that lawmakers intended to grant more than what was demanded by the dignity clause under Article 1(1) of the GG. The majority in the Bundestag—then comprised of the Conservatives (CDU/CSU) and the Liberals (FDP)—wanted to attune the general regime to the demands of the BVerfG no more.³⁶¹ And the majority

³⁵⁷ *Infra* Part IV.B.ii.a. For details regarding the amounts, *see supra* notes 333–337.

³⁵⁸ *Infra* Part IV.B.ii.b.

³⁵⁹ *See* BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 73.

³⁶⁰ *See supra* Part III.A.iii.

³⁶¹ Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zur Ermittlung von Regelbedarfen und zur Änderung des Zweiten und Zwölften Buches Sozialgesetzbuch [Bill Submitted by the Parliamentary Parties of CDU/CSU and FDP: Concerning the Determination of Regular Needs and Amending the Second and the Twelfth

did so facing persistent critique voiced by minority parties, in particular *Die Linke* (The Left), *Bündnis 90/Die Grünen* (The Greens), and the Social Democrats, contending the newly defined benefits under the general regime would fall short of what was required by the constitutional clause on human dignity.³⁶² Political criticism during decision-making was backed by scholarly criticism soon after enactment.³⁶³ It was no wonder then that the BVerfG was, in 2012, asked again to rule on the constitutionality of the benefits provided under the general regime.³⁶⁴ In a July 2014 ruling,³⁶⁵ the BVerfG decided not to intervene in politics, although expert statements submitted to the court contended the calculation underlying the amendments to the AsylbLG were flawed in many ways.³⁶⁶ However, important for my argument, the BVerfG signaled it had serious doubts regarding the constitutionality of the new regime. After weighing numerous arguments, the BVerfG finally held that the benefits under the general regime were, at the moment, just (“derzeit noch”) in line with what the constitution demanded.³⁶⁷ The BVerfG asked lawmakers to consider a number of adjustments.³⁶⁸ Against that background, the general regime cannot be considered over-generous. The general regime simply

Book of the Social Code], Oct. 26, 2010, BT-DRS. 17/3404, at 42. For the debates on second and third reading see Deutscher Bundestag, Stenografischer Bericht, 79. Sitzung [German Bundestag, Verbatim Records, 79th Session], Dec. 3, 2010, [BT-PLPROT] 17/79, at 8739–80.

³⁶² See Deutscher Bundestag, *supra* note 361, at 8742, 8744, 8746–47 (statement by Elke Ferner, member of SPD) (statement by Gregor Gysi, member of *Die Linke*) (statement by Markus Kurth, member of *Bündnis 90/Die Grünen*).

³⁶³ See, e.g., Irene Becker, *Bewertung der Neuregelungen des SGB II [Evaluation of the Newly Adopted Amendments to the SGB II]*, 2011, SOZIALE SICHERHEIT [SOZSICH] Special Issue 7–62 (Ger.) (criticizing the methods applied by the lawmakers for translating needs into amounts of money); see also Johannes Münder, *Verfassungsrechtliche Bewertung des Gesetzes zur Ermittlung von Regelbedarfen und zur Änderung des Zweiten und Zwölften Buches Sozialgesetzbuch vom 24.3.2011 – BGBl. I S. 4453 [Constitutional Assessment of the Act Concerning the Determination of Regular Needs and Amending the Second and the Twelfth Book of the Social Code of Mar. 24, 2011, BGBl. I at 4453]*, 2011, SozSICH Special Issue 63–94 (Ger.) (holding the empirical data underpinning the various calculations and the value judgments involved in determining anew the benefits due under the SGB II and the SGB XII were highly questionable from the perspective of the constitutional clause on human dignity).

³⁶⁴ The proceedings were initiated by Sozialgericht [SG] [Social Court] Berlin, Apr. 25, 2012, S 55 AS 9238/12 (Ger.), available at JURIS by subscription; SG Berlin, Apr. 25, 2012, S 55 AS 29349/11 (Ger.), available at JURIS by subscription.

³⁶⁵ BVerfG, 1 BvL 10/12, July 23, 2014 (Ger.), translation at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/07/lS20140723_1bvl001012en.html (last visited May 30, 2018).

³⁶⁶ *Id.* at marginal no. 53 (German version only)

³⁶⁷ *Id.* at marginal no. 73 (German version only).

³⁶⁸ *Id.* at marginal nos. 143–48 (English version) (the adjustments deemed necessary by the BVerfG relate to taking account of the effects on prices of inflation, to the needs regarding mobility, and to the varying needs of household members).

provides what was, at the time given, the subsistence minimum envisioned and guaranteed by the constitutional clause on human dignity.³⁶⁹

I equally suggest the difference in amounts (in 2016, 404 Euros under the general regime and 354 Euros under the AsylbLG) be deemed unconstitutional. I have two arguments to back my suggestion.

Regarding the methods used to translate needs into amounts of money, the July 2012 judgment of the BVerfG asserted that lawmakers, when opting to treat certain classes of non-nationals less favorably than nationals or long-term residents, were allowed to do so only if and when certain specified conditions were met.³⁷⁰ The BVerfG demanded that lawmakers, if they decided to provide lower benefits for non-nationals seeking international protection, produce evidence showing that the needs of these non-nationals were in fact different from the needs of others and that the lack of needs in one area was not outweighed by additional needs in other areas.³⁷¹ In September 2014, when the lawmakers were eventually set to comply with the demands of the July 2012 judgment,³⁷² they did not abide by the demands laid down in the judgment. The lawmakers did not even try to do so: As the lawmakers engaged in calculating the needs of non-nationals liable to the regime established by the AsylbLG, they simply relied on empirical data they had already used for the calculation of the benefits under the general regime.³⁷³ The only aspect the lawmakers were specifically interested in was whether the data related to needs that were, for non-nationals liable to the particular regime, covered by benefits in kind or not necessary to lead a life of dignity.³⁷⁴ Needs covered in kind or deemed irrelevant from the perspective of human dignity were discarded.³⁷⁵ In the spring of 2016, the lawmakers decided to revise some of their 2014 value judgments.³⁷⁶ Under review, a number of needs accepted as essential in the context of the general regime were additionally discarded as

³⁶⁹ See also Reimund Schmidt-De Caluwe, *Comment on BSG, Mar. 9, 2016, B 14 AS 20/15 R*, 521, 522 SGB 2017.

³⁷⁰ See *supra* Part IV.B.i.

³⁷¹ See BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 73–74.

³⁷² See Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Änderung des Asylbewerberleistungsgesetzes und des Sozialgerichtsgesetzes [Bill submitted by the Federal Government: Amending the Asylum Seekers' Benefits Act and the Act Concerning the Tribunals Adjudicating in Matters of Social Law], Sept. 22, 2014, BT-DRS. 18/2592, at 1 (Ger.).

³⁷³ *Id.* at 20–22.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ See Gesetzentwurf der Fraktionen der CDU/CSU und SPD: Entwurf eines Gesetzes zur Einführung beschleunigter Asylverfahren [Bill Submitted by the Parliamentary Parties of CDU/CSU and SPD: Introducing Fast-Track Asylum Procedures], Feb. 16, 2016, BT-DRS. 18/7538 at 2, (discussing a “normative Neubewertung” (normative re-evaluation), with a view toward lowering the amount of the benefits due under the AsylbLG).

irrelevant from the calculation underlying the AsylbLG, such as needs relating to television, computer and software, sports equipment, hobbies, or out-of-school lessons.³⁷⁷ Yet, the mere discarding of needs deemed relevant in the context of the general regime fails the method advanced by the BVerfG in its July 2012 judgment. The lawmakers' approach leaves no room at all for factoring in additional needs non-nationals, depending on a particular regime, typically might have.

Moreover, and regarding the intentions of the lawmakers, I doubt that, in 2015 and 2016, lawmaking was about ensuring a dignified standard of living for non-nationals depending on the regime established by the AsylbLG. Between March 2015—when the amendments implementing the July 2012 judgment of the BVerfG entered into force³⁷⁸—and the end of 2016, lawmakers moved three times to adjust the regular benefits granted under the AsylbLG: once in October 2015, once in January 2016, and once in March 2016.³⁷⁹ The first two adjustments brought small upgrades balancing inflation. In March 2016, lawmakers decided to reevaluate the needs of the beneficiaries under the AsylbLG.³⁸⁰ Regular benefits were reduced for a single person from 364 Euros to 354 Euros.³⁸¹ In December 2016, the Bundestag adopted a bill submitted by the federal government proposing to further reduce the regular benefits for all beneficiaries under the AsylbLG who were housed in collective accommodation,³⁸² a condition met by most asylum seekers even if they were no longer obliged to live in a reception center. The December 2016 proposal to further reduce the regular benefit for a single person to 299 Euros became moot after the national election of September 2017. But my argument still stands: The pendulum of politics swung when public opinion turned against the asylum policy of the ruling coalition, coinciding with popular contentions that the benefits granted under the AsylbLG would by far exceed what was granted under the general regime.³⁸³ In 2016, policies seemed driven by the

³⁷⁷ *Id.* at 11–12, 21; Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, at art. 3.

³⁷⁸ Gesetz zur Änderung des Asylbewerberleistungsgesetzes und des Sozialgerichtsgesetzes, *supra* note 63, at art. 3. When granted in cash, the regular benefit was set at 352 Euros for a single person.

³⁷⁹ See Asylverfahrensbeschleunigungsgesetz, *supra* note 46, at art. 2, no. 3 (359 Euros); and Bekanntmachung, *supra* note 253 (364 Euros); and Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, at art. 3, no. 1 (354 Euros, effective Mar. 17, 2016).

³⁸⁰ See *supra* text accompanying notes 376–377.

³⁸¹ Gesetz zur Einführung beschleunigter Asylverfahren, *supra* note 55, at art. 3, no. 1.

³⁸² See *supra* note 319.

³⁸³ The debate on the adequacy of the cash benefits handed out to asylum seekers started in the fall of 2015. The federal minister for the interior questioned publicly the amount then due to asylum seekers for the satisfaction of essential personal needs (at that point in time, 143 Euros). See Matthias Thibaut et al., *Wie viel Geld bekommt ein Flüchtling in Europa?* [How Much Money Does a Refugee Receive in European Countries?],

will to appease critics, not the will to define the needs of people asking for international protection in Germany.³⁸⁴

2. Downgraded Benefits Under the AsylbLG

The case of the downgraded benefits is special because these benefits are certainly not meant to secure the subsistence minimum guaranteed by Article 1(1) of the GG.³⁸⁵ For one, downgraded benefits are not intended to cover so-called essential personal needs (including needs pertaining to the participation in societal or cultural activities).³⁸⁶ According to the July 2012 judgment of the BVerfG, the withholding of a minimum defined in socio-cultural terms is, in general, a violation of the guarantee under Article 1(1).³⁸⁷ For another, downgraded benefits are not even intended to cover the whole range of physical needs; the need for clothing has deliberately been disregarded.³⁸⁸ With respect to downgraded benefits, the pertinent question hence is whether it is permissible under the GG that the right to be provided with a subsistence minimum be, in certain circumstances, left unfulfilled.

HANDELSBLATT (Aug. 18, 2015), <http://www.handelsblatt.com/politik/international/fluechtlinge-in-europa-wie-viel-geld-bekommt-ein-fluechtling-in-europa/12199754.html>. At the beginning of 2016, the focus shifted to a particular kind of expenditures, namely the expenditures for food. The debate climaxed when the Berliner Journal published an article comparing expenditures for food per day across the board of the various German *Länder* and across various classes of beneficiaries. See Max Wolf, *Flüchtlinge erhalten Essen für 16 Euro, Hartz IV Empfänger für 4,72 Euro* [Expenditures for Food Amount to 16 Euros for Refugees, Recipients of Hartz IV Transfers Need to Get Along with 4.72 Euros], BERLINER J. (Jan. 6, 2016), <https://www.berlinjournal.biz/fluechtlinge-erhalten-essen-bis-16-euro-pro-tag-hartz-iv-empfaenger-nur-472-euro/>. The message was quickly used by right-wingers for fundamentally criticizing the government's policy. The right-wingers' allegation was: German law establishes a two-tiered society when providing a subsistence minimum; German poor are treated as less worthy than asylum seekers. See, e.g., Karel Meissner, *Flüchtlinge erhalten doch mehr Geld als Hartz IV. Aber wieso?* [Refugees Indeed Get More Money than Hartz IV recipients. How Come?], COMPACT ONLINE (Jan. 17, 2016), <https://www.compact-online.de/fluechtlinge-erhalten-doch-mehr-geld-als-hartz-iv-empfaenger-aber-wieso/>.

³⁸⁴ On the government's policy of curbing asylum seekers' or refugees' benefits when confronting right-wing criticism, see Ulrike Davy, *Sozialleistungen für Nicht-Deutsche: Zugang durch globale Gleichheitsrechte* [Social Benefits for Non-Germans: Access to Benefits through Global Equality Rights], in *MIGRATION UND SOZIALSTAAT 9* (Christian Rolfs ed., 2018) (arguing some of the laws enacted in the course of 2016 violated Germany's obligations under the Refugee Convention and the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 212).

³⁸⁵ For details on downgraded benefits under the AsylbLG, see *supra* Part III.B.iii.b.

³⁸⁶ *Id.*

³⁸⁷ BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 94.

³⁸⁸ See *supra* Part III.B.iii.b.

I suggest the answer is this: it is doubtful that the deliberate withholding of the subsistence minimum is acceptable under the GG, even in defined circumstances. Even if it were, that would not render the downgraded benefits under the AsylbLG constitutionally legitimate.

For the BVerfG, the right to be provided with a subsistence minimum under Article 1(1) of the GG is certainly not unconditional. When the BVerfG summarized, in its February 2010 judgment, the content of Article 1(1) from the perspective of the state's duty, the sentence started with an "if."³⁸⁹ The BVerfG said:

If a person does not have the material means to guarantee an existence that is in line with human dignity because he or she is unable to obtain it either out of his or her gainful employment, or from [his or her] own property or by benefits from third parties, the state is obliged within its mandate to protect human dignity and to ensure, in the implementation of its social welfare state mandate, that the material prerequisites for this are at the disposal of the person in need of assistance.³⁹⁰

The sentence reflects a traditional characteristic of state-provided aid which has been coined the "principle of subsidiarity."³⁹¹ The right to be granted aid (and the corresponding state duty) has always been conceived of as being dependent on need for help. The right was and is activated only if the individual in need is not able to provide for him or herself and does not receive help from someone else, such as a family member obliged to support or a social security provider (lack of self-help, lack of help from others).³⁹² The flipside of the principle is, of course, that the state's duty and the individual right are not activated if the claimant can use income or assets to cover their needs (hence the means-test) or if the claimant is able to provide for him or herself through work.³⁹³

When the BSHG entered into force in 1962, the principle of subsidiarity was bolstered by "sanctions," i.e., provisions allowing authorities to reduce or withhold benefits if the beneficiaries were able though not willing to resort to self-help.³⁹⁴ However, the tradition of deliberately withholding the minimum

³⁸⁹ BVerfG, 1 BvL 1/09, Feb. 9, 2010, marginal no. 134.

³⁹⁰ *Id.*

³⁹¹ *See supra* Part III.A.i.a.

³⁹² Currently, the principle of subsidiarity is laid down in the SGB II and the SGB XII. *See* SGB II, *supra* note 200, at § 9(1); *and* SGB XII, *supra* note 199, at § 2(1).

³⁹³ *See also* BVerfG, 1 BvR 371/11, July 27, 2016, at marginal no. 39 (holding, under the order of the welfare state established by the GG, it is to be assumed people may turn to authorities administering public aid only if they are really in need).

³⁹⁴ BSHG, *supra* note 199, at § 25 (repealed 2005); *see also* SGB XII, *supra* note 199, at § 26, § 39a; *and* SGB II, *supra* note 200, at § 31a.

of subsistence in cases of idleness is not as longstanding as the principle of subsidiarity.³⁹⁵ And the BVerfG has not yet ruled on the constitutionality of a mechanism attempting to make people self-reliant in order to overcome a neediness what would otherwise trigger public aid.³⁹⁶ Still, given the historical take of the BVerfG in its reading of Article 1(1), sentence 1 of the GG, one might argue that sanctions are an intrinsic part of the conditionality of public aid already accepted by the court. Even if that were correct, the withholding of benefits to incentivize self-help is very different from the concept underlying the downgraded benefits under the AsylbLG.

The downgrading of benefits under the AsylbLG responds to unwanted behavior in the context of departure (e.g., the hampering of removal) and/or in the context of the asylum procedure (e.g., the failure to show up for a hearing).³⁹⁷ Downgraded benefits also aim to make claimants do something after being registered in EASY (namely, to proceed as quickly as possible to the responsible reception center).³⁹⁸ Downgraded benefits under the AsylbLG are not intended to prompt and actualize self-reliance. Rather, downgraded benefits aim to avoid state responsibility altogether (as they bolster the removal of the claimants from the territory) or serve purposes that do not at all relate to securing the subsistence minimum (as they seek to make claimants comply with certain requirements proscribed by law for the granting of international protection). These purposes are not within the range of conditionalities envisaged by Article 1(1) of the GG. The provisions of the AsylbLG on downgraded benefits are illegitimate.³⁹⁹

³⁹⁵ See Ulrike Davy, *Sicherung des Lebensunterhalts durch das AsylbLG – ein Verfassungsproblem!* [Securing Livelihood under the AsylbLG – A Problem Under the Constitution!], in *FESTSCHRIFT FÜR KLAUS BARWIG* 133 (Stephan Beichel-Benedetti & Constanze Janda eds., 2018).

³⁹⁶ See SG Gotha, S 15 AS 5157/14, May 26, 2015 (Ger.), available at JURIS by subscription (referring to the BVerfG for a ruling on the constitutionality of the sanctions under SGB II, § 31a); and BVerfG, 1 BvL 7/15, May 6, 2016 (declaring the reference inadmissible). The SG Gotha again referred to the BVerfG in the summer of 2016. SG Gotha, S 15 AS 5157/14, Aug. 2, 2016 (Ger.), available at JURIS by subscription. The 2016 request is still pending before the BVerfG. The requests launched by the SG Gotha draw on some of the concerns raised in the scholarly literature following the February 2010 judgment of the BVerfG. See, e.g., Wolfgang Neskovic & Isabel Erdem, *Zur Verfassungswidrigkeit von Sanktionen bei Hartz IV* [On the Unconstitutionality of the Sanctions Imposed Under the Hartz IV], 59 SGB 134 (2012) (contending that the sanctions imposed under the SGB II violate the right to respect of human dignity); see also Franziska Drohsel, *Sanktionen nach dem SGB II und das Grundrecht auf ein menschenwürdiges Existenzminimum* [Sanctions Imposed under the SGB II and the Constitutional Right to a Dignified Subsistence Minimum], NZS 96 (2014) (holding that, on balance, public interests would not prevail over the interests of the right-holder under Article 1 of the GG).

³⁹⁷ See *supra* Part III.B.iii.b.

³⁹⁸ *Id.*

³⁹⁹ In 2016 and 2017, the constitutionality of AsylbLG § 1a became contested among social courts. Some of the lower social courts raised concerns from the perspective of the

b. Differing Forms of Benefits

In both the February 2010 judgment and the July 2012 judgment, the BVerfG conceded that the lawmakers had leeway when it came to deciding what form the benefits meant to secure a dignified livelihood should take.⁴⁰⁰ The court simply stated: “Whether [parliament] guarantees the [subsistence minimum] in cash, kind or services, is in principle subject to the legislature’s discretion.”⁴⁰¹ The court’s statement seems to imply that, with respect to form (benefits in cash versus benefits in kind), the lawmakers’ discretion is without limits. If that reading is correct, I want to object. There are good reasons for holding that granting benefits in kind may violate the right to respect of human dignity under Article 1(1), sentence 1 of the GG. Also, there are good reasons for holding that the lawmakers crossed the line when deciding that the regular benefits under the AsylbLG should be provided primarily in kind.⁴⁰²

Back in 1993, when the AsylbLG was adopted, German lawmakers had one reason for prescribing that regular benefits be provided primarily in kind, at least as long as asylum seekers were obliged to reside in a reception center.⁴⁰³ The lawmakers believed that providing benefits in cash served—per se—as a substantial migratory pull factor. Lawmakers assumed asylum seekers came to Germany because applying for protection in Germany paid well given the level of benefits, even if it was only for the time the German authorities needed to reject the claim.⁴⁰⁴ Moreover, handing out money meant the benefits granted could be used at will and for all sorts of purposes such as to

clause on human dignity. See, e.g., SG Leipzig, S 5 AY 13/16 ER, Dec. 2, 2016 (Ger.), available at JURIS by subscription; and SG Lüneburg, S 26 AY 10/17 ER, June 6, 2017 (Ger.), available at JURIS by subscription; see also Dagmar Oppermann, *Leistungseinschränkungen und Sanktionen als Mittel zur Bewältigung der Flüchtlingswelle* [Cuts on Benefits and Sanctions as Means to Master the Refugee Crisis], 16 ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL- UND ARBEITSRECHT [ZESAR] 55 (2017). Higher social courts were not willing to join the concerns. See, e.g., LSG for Bayern, L 8 AY 31/16 B ER, Dec. 21, 2016 (Ger.), available at JURIS by subscription (holding the constitution would not rule out sanctions responding to noncompliance on the side of the claimants); see also BSG, B 7 AY 1/16 R, May 12, 2017 (Ger.) (arguing that lawmakers were, under Article 1(1) of the GG, not required to provide aid in an unconditional manner).

⁴⁰⁰ See *supra* Part IV.B.i.

⁴⁰¹ BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 67. See also BVerfG, 1 BvL 1/09, Feb. 9, 2010, at marginal no. 138 (giving a slightly different translation of the same German sentence).

⁴⁰² On the form of regular benefits provided under the AsylbLG, see *supra* Part III.B.iii.a.

⁴⁰³ See *supra* Part III.B.i.a.

⁴⁰⁴ See Gesetzentwurf, *supra* note 270; see also Statement by Norbert Eimer, F.D.P., member of the Bundestag, BT-PLPROT. 12/160, May 26, 1993, at 13596 (contending during parliamentary debates that, under the current law, the amount of the social benefits handed out to asylum seekers were so generous that, from the perspective of the claimants, even a temporary stay in Germany seemed profitable).

pay for the services of human traffickers, a use that was publicly decried as misconduct.⁴⁰⁵ Against that backdrop, opting for benefits in kind meant making migration to Germany less attractive, since coming to Germany would no longer entail an income that implicated some sort of transferable value.

When opting for benefits in kind back in 1993, the lawmakers might have been responding to popular feelings. From the perspective of the constitutional clause on human dignity, opting for benefits in kind was (and still is) deeply flawed. Asylum seekers depending on the AsylbLG are the only class of individuals legally staying in Germany who are denied access to cash benefits intended to secure a livelihood. They are denied access to cash benefits for reasons that relate to migration policy only. Such a framework fails the test of constitutionality under Article 1(1) of the GG. The BVerfG has already said so in a different context.⁴⁰⁶ Even more to the point of human dignity, under the AsylbLG, asylum seekers are denied what is otherwise deemed self-understood and essential to fulfill the requirements of Article 1(1) of the GG.⁴⁰⁷ The denial of what is, in other cases, deemed an essential element of a dignified livelihood implies necessarily that the beneficiaries are denied equal worth. Denial of equal worth is a clear violation of the right to respect of human dignity.

C. The Perspective of EU Directive 2013/33 and the Charter of Fundamental Rights

i. The Framework of EU Law

EU law constitutes another yardstick for challenging the legitimacy of the particular regime established under the AsylbLG. Primary and secondary EU law is binding upon member states.⁴⁰⁸ According to case law, EU law takes precedence over national law (statutory law and constitutional law) in cases

⁴⁰⁵ See Gesetzentwurf, *supra* note 269, at 8.

⁴⁰⁶ See *supra* Part III.B.i.b.

⁴⁰⁷ See *supra* Part III.A.iii.

⁴⁰⁸ For secondary EU law, see TFEU, *supra* note 20, at art. 288(2)–(4) (explicitly stating that regulations, directives, and decisions “shall be binding” for the member states). For primary EU law, see Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, Declaration no. 17 Concerning Primacy, Dec. 13, 2007, 2007 O.J. (C 306) 256 [hereinafter Declaration no. 17]. Primary EU law comprises the Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU] and the TFEU (the Treaties) as well as the Charter. See TEU, art. 1(3) (stating the EU is founded on the Treaties which have “the same legal value”) and art. 6(1) (announcing the Charter to have “the same legal value as the Treaties”). The acts usually referred to as secondary EU law are listed in TFEU art. 288(1) (regulations, directives, and decisions).

of conflict.⁴⁰⁹ In case of conflict, national law is set aside and rendered inapplicable based on the principle of supremacy of EU law.⁴¹⁰ Given that EU law establishes a hierarchy of norms (primary law is hierarchically higher than secondary law), any challenge to the legitimacy of national law needs to start at the level of the more elaborated secondary law.⁴¹¹ If the national law is found to conform with the legal framework established by secondary law, regard must be given to primary EU law.⁴¹² Secondary EU law must, in any case, be interpreted so as not to conflict with primary EU law.⁴¹³ If a conflict cannot be resolved through an interpretation making secondary law conform with primary law, the validity of secondary law is in doubt.⁴¹⁴ Secondary law contradicting primary law will be declared invalid or void by the European Court of Justice (ECJ).⁴¹⁵ National courts are responsible for evaluating national laws that conform with secondary EU law, but that contradict

⁴⁰⁹ See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 4, 12; and Case 6/64, *COSTA v. ENEL*, 1964 E.C.R. 588, 594. The case law of the ECJ inspired Declaration no. 17. The declaration confirmed the Treaties and the law adopted by the EU, on the basis of the Treaties, have primacy over the law of member states.

⁴¹⁰ See LORNA WOODS, PHILIPPA WATSON & MARIOS COSTA, *STEINER & WOODS, EU LAW* 99 (13th ed. 2017) (speaking of an “obligation to disapply inconsistent national law”). However, EU law takes precedence over national law only if the requirements for direct applicability (direct effect) are met, such as clarity of the provision, unconditionality, and lack of room for the exercise of discretion. *Id.* at 116.

⁴¹¹ See Case C-333/13, *Elisabetha Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358, ¶¶ 61–62 (Nov. 11, 2014) (indicating that, in the case of judicial review, an assessment ought to start with the norm that gives a more specified meaning to a general principle laid down by the Treaties, i.e., at the level of secondary law).

⁴¹² See, e.g., Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, ECLI:EU:C:2014:350, ¶ 40 (May 22, 2014). The ECJ turned to primary EU law (and international human rights law) once it ascertained that the contested national law was simply implementing what was ordered by secondary EU law, thus challenging national law as well as secondary EU law.

⁴¹³ See, e.g., Case C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, ECLI:EU:C:2016:84, ¶ 48 (Feb. 15, 2016) (“[In] accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law” See also Case C-648/11, *M.A. v. Secretary of State for the Home Department*, ECLI:EU:C:2013:367, ¶ 58 (June 6, 2013) (stressing that a provision laid down by a regulation “cannot be interpreted in such a way that it disregards [a] fundamental right” enshrined in the Charter).

⁴¹⁴ The ECJ may be called to adjudicate upon the validity of secondary law under Article 267(1) of the TFEU (jurisdiction to give preliminary rulings) and under Article 263 of the TFEU (jurisdiction in actions brought by a member state, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of power).

⁴¹⁵ See, e.g., WOODS, WATSON & COSTA, *supra* note 410, at 247.

established primary law. National courts are required to invalidate national law that contradicts primary law, for instance, EU fundamental rights.⁴¹⁶

That basic structure for challenging national law or secondary EU law is echoed in the final part of the article. Under the Treaty on the Functioning of the European Union (TFEU), the EU is authorized to adopt measures for a common European asylum system comprising, *inter alia*, standards concerning the conditions for the reception of applicants for asylum or subsidiary protection.⁴¹⁷ When acting under Article 78(2)(f), the EU chose to adopt a directive in 2003⁴¹⁸ that was recast in 2013.⁴¹⁹ The binding force of directives is specifically qualified by primary law. Member states are bound by a directive as to the result to be achieved, but they are free to choose the forms and the methods of how to achieve the results.⁴²⁰ In other words, and with a view to the German AsylbLG, the AsylbLG must comply with the directive on the standards for the reception of asylum seekers insofar as the directive curtails the member states' discretion regarding the standards for the reception of asylum seekers, including what the directive calls the "material reception conditions," such as housing, food, and clothing.⁴²¹ If compliance with the directive can be ascertained, primary EU law comes into the picture. Under the framework constituted by EU law, challenging the AsylbLG therefore means to proceed in steps: First, I must establish what standards the member states are bound to grant under the EU directive. I shall show that, since the beginning of lawmaking at the EU level, member states were anxious to avoid setting standards that would effectively curb national policies vis-à-vis asylum seekers.⁴²² The standards laid down by the EU directive regarding material reception conditions remain utterly vague, even in its recast version.⁴²³ The second step involves challenging the AsylbLG from the perspective of primary EU law, in particular from the perspective of the Charter. That step turns to the case law of the ECJ. Yet, even the ECJ takes a cautious stance when it comes to adjudicating on reception conditions from the perspectives

⁴¹⁶ Ulrich Karpenstein, *AEUV Art. 267 marginal no. 109*, in *DAS RECHT DER EUROPÄISCHEN UNION* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2017).

⁴¹⁷ TFEU, *supra* note 20, at art. 78(2)(f).

⁴¹⁸ Directive 2003/9, 2003 O.J. (L 31) 18 (EU).

⁴¹⁹ Directive 2013/33, *supra* note 74.

⁴²⁰ TFEU, *supra* note 20, at art. 288(3).

⁴²¹ Directive 2003/9, *supra* note 418, at art. 2(i) (defining the term "reception conditions" to encompass "the full set of measures that Member States grant to asylum seekers in accordance with this Directive"). "Material reception conditions" means "the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance." *Id.* at art. 2(j). The asylum seekers' benefits dealt with in this article match the definition of "material reception conditions" given by the directive.

⁴²² *Infra* Part IV.C.ii.

⁴²³ *Infra* Part IV.C.iii.

of human dignity and equality.⁴²⁴ In a third step, I shall argue that Directive 2013/33 will not pass the test of constitutionality when human dignity and equality are taken more seriously.⁴²⁵

ii. *The Background of Directive 2003/9 on Reception Standards*

a. *Common European Asylum System*

Directive 2003/9 was “one of the building blocks of the first phase of the Common European Asylum System,”⁴²⁶ as outlined in the 1999 Tampere program.⁴²⁷ Directive 2003/9 was closely related to a number of legislative initiatives, such as initiatives determining the only member state responsible for dealing with an application for asylum, initiatives relating to asylum procedures, and initiatives concerning the standards for granting international protection (refugee status, subsidiary protection status).⁴²⁸ Against that political background, Directive 2003/9 on reception standards, and later Directive 2013/33, serve two main goals. One goal explicitly relates to the human dignity clause enshrined in the Charter.⁴²⁹ The directive “seeks to ensure full respect for human dignity.”⁴³⁰ More particularly, the directive seeks to define minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all member states.⁴³¹ Clearly, from the perspective of fundamental rights, the directive’s purpose is similar to the purpose of the SGB XII, the SGB II, and the AsylbLG.⁴³² All these norms purport to implement a higher ranking clause on human dignity. The other goal of the directive relates

⁴²⁴ *Infra* Part IV.C.iv.

⁴²⁵ *Infra* Part IV.C.v.

⁴²⁶ Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers, at 1, COM (2007) 745 final (Nov. 26, 2007) [hereinafter Comm’n of the European Communities].

⁴²⁷ From October 15–16, 1999, the European Council (i.e., the assembly of the Heads of State or Government of the member states), gathered for a special meeting at Tampere, Finland. See *Presidency Conclusions: Tampere European Council 15 and 16 October 1999*, <http://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf> (last visited May 30, 2018).

⁴²⁸ *Id.* at ¶ 14.

⁴²⁹ Charter, *supra* note 75, at art. 1 (“Human dignity is inviolable. It must be respected and protected.”).

⁴³⁰ Directive 2003/9, *supra* note 418, at recital 5; Directive 2013/33, *supra* note 74, at recital 35.

⁴³¹ Directive 2003/9, *supra* note 418, at recital 7; Directive 2013/33, *supra* note 74, at recital 11.

⁴³² On the purpose underpinning the SGB XII, the SGB II, and the AsylbLG, see *supra* Part III.A.i. and Part III.B.i.

to member states' interests. The directive aims to harmonize reception conditions, and the "harmonization of conditions for the reception of asylum seekers should help to limit secondary movements of asylum seekers influenced by the variety of conditions for their reception."⁴³³ Hence, the directive also seeks to curb secondary movements, i.e., movements prompted by differences in reception standards between member states. The rationale for wanting to dampen secondary movements was, of course, to protect member states that granted—in 2003 or 2013 respectively—higher levels of benefits than other member states, and Germany was certainly a prime candidate for a member state being affected by secondary movements.⁴³⁴ EU lawmakers believed that, as soon as the conditions for the reception of asylum seekers were, to some degree, harmonized, non-nationals seeking international protection would basically remain in the first country of reception, as there was nothing to gain from moving from one member state to another.

Chapter II of Directive 2003/9 and Chapter II of Directive 2013/33 contain "general provisions on reception conditions."⁴³⁵ The chapters start by imposing upon member states a duty to keep asylum seekers informed about their rights and duties, *inter alia*, rights regarding benefits and access to legal assistance,⁴³⁶ and a duty to provide applicants with a document certifying their status as applicants and their right to remain in the country pending the decision-making process.⁴³⁷ The chapters acknowledge and preserve the power of member states with respect to deciding the residence of applicants and the restrictions on their freedom of movement. Yet, their power is not limitless.⁴³⁸ The chapters oblige member states to grant to minors access to schooling and education⁴³⁹ and, with respect to adults, to grant access to employment and vocational training.⁴⁴⁰ Finally, and more to the point of interest in the context

⁴³³ Directive 2003/9, *supra* note 418, at recital 8; Directive 2013/33, *supra* note 74, at recital 12.

⁴³⁴ See, e.g., Commission Green Paper on the Future Common European Asylum System, at 4–5, COM (2007) 301 final (June 6, 2007). In charts showing the numbers of asylum applications per EU member state per year, Germany usually ranks highest or very high. *Id.* at 22–23.

⁴³⁵ Directive 2003/9, *supra* note 418, at 18, 20; see also Directive 2013/33, *supra* note 74 at 96, 100.

⁴³⁶ Directive 2003/9, *supra* note 418, at art. 5; later Directive 2013/33, *supra* note 74 at art. 5.

⁴³⁷ Directive 2003/9, *supra* note 418, at art. 6; later Directive 2013/33, *supra* note 74 at art. 6.

⁴³⁸ Directive 2003/9, *supra* note 418, at art. 7; later Directive 2013/33, *supra* note 74 at arts. 7–11.

⁴³⁹ Directive 2003/9, *supra* note 418, at art. 10; later Directive 2013/33, *supra* note 74 at art. 14.

⁴⁴⁰ Directive 2003/9, *supra* note 418, at arts. 11–12; Directive 2013/33, *supra* note 74, at arts. 15–16. With respect to access to employment, member states are given some leeway. Member states may "determine a period of time, starting from the date on which an

of a state-provided subsistence minimum, the chapters contain “general rules on material reception conditions and health care,”⁴⁴¹ including an article on the “modalities for material reception conditions” focusing on the standards member states are supposed to keep when providing housing.⁴⁴²

b. Discontent and Critique

Under Directive 2003/9, the European Commission (the Commission) was obliged to evaluate the implementation and the effects of the directive.⁴⁴³ When the Commission did so in 2007,⁴⁴⁴ it unmistakably expressed discontent. One point of concern was the scope of the directive’s application. Many member states had taken the position that the directive would not apply to detention centers.⁴⁴⁵ Also, member states had failed to comply with their obligation to provide applicants with proper documents⁴⁴⁶ or to provide adequate means of subsistence, in particular where asylum seekers were given benefits in cash.⁴⁴⁷ In many instances, the allowances granted were deemed too low to cover subsistence.⁴⁴⁸ Another “main deficiency” in the application of the directive, so the Commission stressed, related to the identifying and

application . . . was lodged, during which an applicant shall not have access to the labour market.” Directive 2003/9, *supra* note 18, at art. 11(1). *See also* Directive 2013/33, *supra* note 74, at art. 15(1) (restricting the leeway of the member states in terms of time (nine months from the date when the application was lodged if a first instance decision has not been taken and the delay cannot be attributed to the applicant)).

⁴⁴¹ Directive 2003/9, *supra* note 418, at arts. 13–15; Directive 2013/33, *supra* note 74, at arts. 17–19.

⁴⁴² Directive 2003/9, *supra* note 418, at art. 14; Directive 2013/33, *supra* note 74, at art. 18.

⁴⁴³ Directive 2003/9, *supra* note 418, at art. 25(1).

⁴⁴⁴ Comm’n of the European Communities, *supra* note 426.

⁴⁴⁵ *Id.* at 3 (complaining that “[as] many as seven Member States (UK, BE, IT, NL, PL, LU, CY) do not apply the Directive in detention centers. Other Member States (e.g., AT) do not apply it in transit zones.”) The European Commission objected quite vigorously to that practice: “As the Directive does not allow for exceptions . . . its provisions apply to all types of premises, including detention centers.” *Id.*

⁴⁴⁶ *Id.* at 4.

⁴⁴⁷ *Id.* at 6.

⁴⁴⁸ *Id.*

The main problems concerning application of the Directive were discovered in Member States where asylum seekers are given financial allowances. These allowances are often too low to cover subsistence (CY, FR, EE, AT, PT, SI). The amounts are only rarely commensurate with the minimum social support granted to nationals, and even when they are, they might still not be sufficient, as asylum seekers lack family and/or other informal kinds of support.

Id.

addressing the needs of vulnerable persons.⁴⁴⁹ Yet another concern was the directive's lack of clear guidance regarding standards. Time and again, the Commission stated that, with respect to a particular duty under review, it had not been able to detect substantial problems, but added that was mainly due to the broad discretion left to the member states.⁴⁵⁰ When reflecting on the shortcomings of the directive more generally, the Commission strongly argued against the breadth of discretionary powers left to the member states.⁴⁵¹ That, the Commission concluded, created a major problem from the perspective of the directive's overall goals:

[The] wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, undermines the objective of creating a level playing field in the area of reception conditions.⁴⁵²

Hence, when proposing to recast the directive, the Commission resolutely moved to limit the states' discretion in several respects.⁴⁵³ The catchphrase of the 2008 proposal was to "ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living" and to intensify the "harmonization of national rules on reception conditions" in order "to limit the phenomenon of secondary movements."⁴⁵⁴ The main goals had not changed; the proposal for recast was still about ensuring a dignified standard of living and thwarting secondary movements caused by varying reception conditions. The target of the Commission's quest for renewal was the legal framework under EU law meant to further the goals. The existing framework under Directive 2003/9 was deemed inadequate. The 2008 proposal suggested introducing new rules governing the detention of asylum seekers or the rights of persons with special needs.⁴⁵⁵ The proposal also addressed other critical issues, such as the scope of the

⁴⁴⁹ *Id.* at 9.

⁴⁵⁰ *See, e.g., id.* at 7 ("Given the broad discretion of Member States in limiting the right to free movement and residence, no substantial problems in application of the pertinent provisions were reported.")

⁴⁵¹ *Id.* at 10 (conclusions).

⁴⁵² *Id.*

⁴⁵³ *Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers (Recast)*, COM (2008) 815 final (Dec. 3, 2008) [hereinafter Proposal].

⁴⁵⁴ *Id.* at 4.

⁴⁵⁵ *Id.* at 6.

directive, the rules on the access to the labor market, and the material reception conditions.⁴⁵⁶

Eventually, the Commission succeeded in pulling through with new provisions regarding detainees and persons with special needs.⁴⁵⁷ The Commission was less successful when it came to raising and harmonizing the standards for the material reception conditions, that is, the conditions pertaining to, *inter alia*, housing, food, and clothing—the core of a person's livelihood.

iii. *Material Reception Conditions Recast: Reluctant Lawmakers*

a. *First Initiative*

The Commission's 2008 proposal for recast started from the assumption that "the lack of clear benchmarks regarding the level and form of material reception conditions that should be available to asylum seekers has led to cases where asylum seekers are left in poverty."⁴⁵⁸ The differences in conditions of reception between member states were deemed "so big . . . that they [were] not limiting secondary movements of asylum seekers who look[ed] for a more adequate level of support during the asylum procedure."⁴⁵⁹ These movements, so the Commission continued, would increase the burden of member states, which were willing to offer generous reception facilities.⁴⁶⁰ That, again, might then induce these more burdened member states to lower their standards to avoid a possible increase in asylum applications in their territories.⁴⁶¹ Against that background, the 2008 proposal of the Commission suggested specifying, at least to some extent, the notion of human dignity—the overarching standard underpinning the directive—by inserting a benchmark, with the clear aim of establishing at the EU level a harmonized standard that would be higher than the one prevailing in many member states.⁴⁶² The Commission's attention was primarily on the level, and to some extent on the form, of the material reception conditions, in particular, the level of cash transfers.⁴⁶³ As some of the practical concerns were, according to the Commission,

⁴⁵⁶ *Id.* at 4–5.

⁴⁵⁷ See Directive 2013/33, *supra* note 74, at arts. 8–11.

⁴⁵⁸ *Commission Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers*, Impact Assessment, at 21, SEC (2008) 2944 (Dec. 3, 2008) [hereinafter Working Document].

⁴⁵⁹ *Id.* at 22.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² See generally Proposal, *supra* note 453, at 4 ("The main objective of this proposal is . . . to ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living.")

⁴⁶³ Working Document, *supra* note 458, at 8, 15, 21.

caused by a “lack of clear benchmarks,”⁴⁶⁴ the introduction of a benchmark seemed the best remedy.⁴⁶⁵ The benchmark favored by the Commission was obviously equality-oriented. The Commission proposed to oblige member states, when granting financial support, to take into consideration the level of social assistance provided to nationals.⁴⁶⁶ Draft Article 17(5) of the 2008 proposal specified the idea,⁴⁶⁷ stating:

In calculating the amount of assistance to be granted to asylum seekers Member States shall ensure that the total value of material reception conditions to be made available to asylum seekers is equivalent to the amount of social assistance granted to nationals requiring such assistance. Any differences in this respect shall be duly justified.⁴⁶⁸

Clearly, “treatment of nationals” was intended to serve as a relative benchmark for the level of social benefits granted to asylum seekers, and the standard implied in the benchmark was meant to be the rule when member states turned to implementing the directive. All exceptions to the rule, i.e., less favorable treatment, were tied to the test of due justification. The Commission also proposed to delete in Article 17 any explicit reference to the member states’ discretion regarding form (benefits in kind, in cash, vouchers).⁴⁶⁹ There was, in fact, no intention to curb the member states’ discretion regarding form.⁴⁷⁰ Still, with the explicit reference deleted, cash transfers seemed more prominent than in kind benefits, at least in a symbolic manner, simply because they were explicitly discussed.

The rapporteur of the European Parliament “wholeheartedly” welcomed “the basic aim” of the Commission’s proposal.⁴⁷¹ But not even the European

⁴⁶⁴ *Id.* at 21.

⁴⁶⁵ *Id.* at 31–32.

⁴⁶⁶ Draft recital 11 was meant to remind member states that the minimum standards they were supposed to lay down at the national level were intended to ensure a “dignified standard of living” and that, when setting those standards, they ought to take “into consideration the level of social assistance available for nationals in the hosting Member State.” Proposal, *supra* note 453, at 11.

⁴⁶⁷ *Id.* at 25.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* The Commission proposed to delete the following sentence: “Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions.”

⁴⁷⁰ The proposed definition of “material reception conditions” continued to refer to all the conceivable forms benefits ensuring the subsistence minimum can take. *Id.* at 17.

⁴⁷¹ Report on the Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers (Recast), EUR. PARL. DOC. A6-0285/2009, at 22.

Parliament was willing to go along with the idea that, regarding material reception conditions, asylum seekers and nationals should—as a rule—receive equal treatment. In its legislative resolution of May 7, 2009,⁴⁷² the European Parliament insisted on deleting all references to the benchmark proposed by the Commission.⁴⁷³ All amendments adopted by the European Parliament simply restated what Directive 2003/9 said regarding reception conditions. When the members of the Council of the EU also raised numerous objections against draft Article 17,⁴⁷⁴ that was the end of the Commission's (first) initiative.

b. Second Initiative

In the summer of 2011, the European Commission launched an amended proposal for recasting Directive 2003/9.⁴⁷⁵ Regarding material reception conditions, the Commission dropped the idea of prescribing equal treatment with nationals, as political resistance was deemed too strong.⁴⁷⁶ Yet, the Commission still held that a reference to benchmarks was needed, even though it could and should be done in a more flexible manner.⁴⁷⁷ According to the amended 2011 proposal, Draft Article 17(5) was now supposed to read:

Where Member States provide material reception conditions in the form of financial allowances and vouchers, the amount thereof shall be determined on the basis of the point(s) of

⁴⁷² European Parliament Legislative Resolution of 7 May 2009 on the Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers (recast), 2010 O.J. (C 212 E) 348.

⁴⁷³ *Id.* at 350, 359.

⁴⁷⁴ *See, e.g.*, Outcome of Proceedings, submitted to the Council of the EU by the Asylum Working Party, COUNCIL DOC. 6082, at 30–32 (Mar. 10, 2009) (summarizing the Council's discussions and the delegations' comments).

⁴⁷⁵ Amended Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Asylum Seekers (Recast), COM (2011) 320 final (June 1, 2011).

⁴⁷⁶ *Id.* at 7 (conceding, with respect to healthcare, “The proposal does not include reference to equal treatment with nationals concerning access to health care, taking note of the position of the European Parliament and strong reservations in the Council.”).

⁴⁷⁷ *Id.* The Commission reminded lawmakers that an evaluation of the implementation of Directive 2003/9 had revealed deficiencies, in particular with regard to the level of material support, and then continued:

Although the current Directive stipulates the obligation of ensuring adequate standards of treatment, it has been difficult in practice to define the required level of support. It is therefore necessary to introduce points of reference that could better ‘quantify’ this obligation and can also be effectively applied by national administrations.

Id.

reference established by the Member State concerned either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance. Member States may grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified.⁴⁷⁸

The 2011 version of Article 17(5) referred vaguely to “point(s)” of reference determined under national law, openly implying there could be more than one point of reference. But that was not the only concession signaled by the wording of the new Draft Article 17(5). There were other signals too: The reference in Draft Article 17(5) to the “minimum level of social welfare assistance” was now meant to be no more than an example, leaving room for member states to opt for other points of reference. Moreover, the relevant amounts were proposed to be determined simply “on the basis” of those “points,” implicating that the connection between the nationally defined points of reference and the amount then granted to asylum seekers was not intended to be too tight. However, the text still preferred equal treatment over different treatment: “Less favourable treatment” was deemed legitimate only if it was “duly justified.”

The 2011 proposal was, again, met with resistance by the Council.⁴⁷⁹ According to the political compromise reached in October 2012,⁴⁸⁰ Draft Article 17(5) on material reception conditions was proposed to read:

Where Member States provide material reception conditions in the form of financial allowances and vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to asylum seekers compared to nationals in this respect, in particular where material support is partially provided in kind or where the above-mentioned level(s), applied to nationals, aim to ensure a

⁴⁷⁸ *Id.* at 29.

⁴⁷⁹ First reading in the Council started in late June 2011. *See* Note from the Presidency, COUNCIL DOC. 12971/11 (July 15, 2011). A political agreement on the content was reached at the end of October 2012. *See* Draft Statement of the Council’s Reasons, COUNCIL DOC. 14654/12 ADD 1 (Dec. 13, 2012).

⁴⁸⁰ “I/A” Item Note from the General Secretariat of the Council, COUNCIL DOC. 14112/1/12 REV 1 (Sept. 27, 2012).

standard of living higher than what is prescribed for asylum seekers under this Directive.⁴⁸¹

c. Outcome of Initiatives

Draft Article 17(5), agreed upon in October 2012, became law with only very slight corrections in the wording after the European Parliament's approval on second reading.⁴⁸²

When compared to the wording of the clause proposed by the Commission in 2008,⁴⁸³ the standards have been watered down considerably. Most importantly, the discretion of member states has been restored. Regarding form of provision, the 2008 proposal had some leaning towards cash transfers.⁴⁸⁴ Under Directive 2013/33, member states may choose freely among all options concerning the form of benefits (in kind, in cash, in the form of vouchers, or a combination of all these forms). The restoration of the member states' discretion is even more palpable with respect to the level of material reception conditions. Regarding the level, the 2008 proposal opted for the introduction of a straightforward benchmark based on the idea of equality between nationals and non-nationals.⁴⁸⁵ Under the proposal, the amount of benefits granted to non-nationals seeking protection was supposed to be equivalent to the amount granted to nationals; different treatment needed to be duly justified.⁴⁸⁶ The current wording of the clause on material reception standards embodies a compromise that somehow still upholds the original idea of setting a benchmark in the first sentence, but rejects the idea in the second sentence.⁴⁸⁷ The

⁴⁸¹ *Id.* at 43.

⁴⁸² See European Parliament Legislative Resolution of 12 June 2013 on the Council Position at First Reading with a View to the Adoption of a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (recast), 2016 O.J. (C 65) 208, and Directive 2013/33, *supra* note 74, art. 17(5).

⁴⁸³ See Proposal, *supra* note 453.

⁴⁸⁴ See *id.*

⁴⁸⁵ See *id.* at art. 17(5).

⁴⁸⁶ *Id.*

⁴⁸⁷ See Directive 2013/33, *supra* note 74, at art. 17(5).

Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.

Id.

original idea was to curtail the member states' discretion with respect to defining material reception conditions by prescribing a defined standard, namely the standard applicable to the nationals of the member states under their respective regimes.⁴⁸⁸ The first sentence of Article 17(5) is at least reminiscent of that idea, even though it speaks rather vaguely of "levels." The second sentence explicitly allows member states to deviate from that standard, without giving any guidance regarding the prerequisites for deviation or the standards that should still be observed in that case. The directive simply gives two examples of deviation that are seemingly accepted as legitimate. Deviation seems legitimate when member states resort to provision in kind and when the standards applicable to nationals surmount the standards established by the directive. Regarding the former case, the directive gives no indication on how benefits in kind and benefits in cash ought to be offset against each other. What sort of benefits in kind suffice and to what extent do they justify the lowering of the amount of cash benefits? The latter example is even more irritating. If the standards applicable to nationals do not serve as standards under the directive, the standards under the directive remain undetermined. In particular, courts are not provided with a yardstick for holding that a member state's law is in conflict with the directive because the standards applicable to the nationals of that member state are in fact not higher than the standards under the directive. Member states still decide freely on all relevant standards, just as some member states sitting in the Council wanted it to be.⁴⁸⁹ The Commission's main concern⁴⁹⁰ is left unresolved.

The outcome of the proceedings leading up to the adoption of Directive 2013/33 is *prima facie* good news for the German lawmakers wondering whether the AsylbLG is legitimate under Directive 2013/13. Neither the lawmakers' preference for benefits in kind nor the level of the regular benefits under the AsylbLG, or even the downgraded benefits, can be challenged under the directive's thin standards. I am bound to rehearse the sort of comment given by the Commission in 2007 when evaluating the regime established under Directive 2003/9.⁴⁹¹ Due to the considerable flexibility of the directive's clause on material reception standards, no major problems occur with respect to the German AsylbLG. However, the meager outcome of the Commission's

⁴⁸⁸ See Proposal, *supra* note 453, at art. 17(5).

⁴⁸⁹ See, e.g., Outcome of Proceedings, submitted by the Asylum Working Party, COUNCIL DOC. 14178/11, at 45 (Oct. 12, 2011) (listing numerous reservations put forward by the member states). Slovenia remained critical until the very end of the negotiations. See Addendum to the "I/A" Item Note from the General Secretariat of the Council, COUNCIL DOC. 10183/13 ADD 1 (May 31, 2013) (claiming non-nationals seeking international protection should not be subject to any material reception conditions provided for in the directive).

⁴⁹⁰ See *supra* Part IV.C.ii.b.

⁴⁹¹ See Comm'n of the European Communities, *supra* note 426, at 7.

initiatives begs the question of how the clause on material reception standards under Directive 2013/33 is to be judged when measured against primary EU law: is the clause in line with the Charter? The answer to that question must have due regard to the case law of the ECJ. The final judgment regarding the validity of secondary EU law is in the hands of the justices of the EU.

iv. Material Reception Conditions: Cautious Justices

a. The Role of the European Court of Justice

Under the TEU, the ECJ “shall ensure that in the interpretation and application of the Treaties the law is observed.”⁴⁹² That power implies, in the understanding of the court, the mandate to ensure that all secondary acts of EU law, such as regulations, directives, or decisions, are in accordance with primary law, in particular, the treaties, the Charter, and the ECHR as general principles of EU law.⁴⁹³ In case of conflict, the court may declare secondary EU law to be invalid or void.⁴⁹⁴ Yet, in order to preserve existing secondary law, the court often resorts to an interpretation that renders the legal act under scrutiny consistent with primary law, e.g., consistent with the rights recognized by the Charter.⁴⁹⁵ When doing so, the court serves as a supplementary lawmaker.⁴⁹⁶

So far, the number of ECJ judgments that touch upon issues relating to the material reception conditions of asylum seekers is rather small. Also, the cases indicate that the court is reluctant to intervene in the political quarrels underpinning Directive 2003/9 and Directive 2013/33, either as a secondary lawmaker or as a court empowered to strike down secondary law. The right to respect of human dignity⁴⁹⁷ and the right to equality⁴⁹⁸ have been considered relevant to the cases, but the court remained cautious with respect to defining more robust standards which would then bind member states when determining benefits for asylum seekers.

⁴⁹² TEU, *supra* note 408, at art. 19(1).

⁴⁹³ See, e.g., WOODS, WATSON & COSTA, *supra* note 410, at 46–48; see also Franz C. Mayer, *Art. 19 EUV at marginal nos. 1, 2, 3, 19*, in *DAS RECHT DER EUROPÄISCHEN UNION*, (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2017).

⁴⁹⁴ See *supra* Part IV.C.i.

⁴⁹⁵ See, e.g., Mayer, *supra* note 493, at marginal no. 62; see also Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)*, ECLI:EU:C:2012:233, ¶¶ 91–92 (Apr. 24, 2012).

⁴⁹⁶ The principle of supremacy of EU law over national law was based on case law before it became part of statutory law. On the principle, see *supra* Part IV.C.i.

⁴⁹⁷ Charter, *supra* note 75, at art. 1.

⁴⁹⁸ *Id.* at arts. 20, 21.

b. *The Court's Approaches to Human Dignity*

1. *Cimade and GISTI*

In *Cimade and Groupe d'information et de soutien des immigrés (GISTI)*,⁴⁹⁹ the ECJ was asked, *inter alia*, whether Directive 2003/9 (later superseded by Directive 2013/33) mandated member states to guarantee minimum reception conditions even in cases where a member state had requested another member state under the Dublin System to take back the asylum seeker because the other member state was deemed responsible for processing and determining the application for asylum.⁵⁰⁰ Under French law, asylum seekers liable to the Dublin System were explicitly excluded from the subsistence benefit generally payable to asylum seekers pending decision-making.⁵⁰¹ The benefits granted to them were even less favorable than the benefits granted to asylum seekers.⁵⁰² Before the ECJ, France denied having any responsibilities regarding the material reception conditions under Directive 2003/9 and asserted the transfer to the responsible member state would be swift.⁵⁰³ Pending the transfer, so the French government contended, France would be free to legislate at will regarding the benefits granted.⁵⁰⁴

Advocate General Eleanor Sharpston rejected all of France's arguments denying responsibility under Directive 2003/9⁵⁰⁵ and then turned to the legitimacy of reduced benefits.⁵⁰⁶ The take of the advocate general was quite straight: "It cannot . . . be permissible to provide the asylum seekers in question with a reduced level of benefits."⁵⁰⁷ When making her argument, Eleanor Sharpston relied on the dignity clause of the Charter of Fundamental

⁴⁹⁹ Case C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration*, ECLI:EU:C:2012:594 (Sept. 27, 2012) (judgment of ECJ).

⁵⁰⁰ *Id.* at ¶ 35.

⁵⁰¹ *Id.* at ¶ 33.

⁵⁰² See Case C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration*, ECLI:EU:C:2012:298, ¶ 53 (May 15, 2012) (opinion of Advocate General Sharpston).

⁵⁰³ *Id.* at ¶¶ 43–47. See also Case C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration*, ECLI:EU:C:2012:594, ¶¶ 44, 46 (Sept. 27, 2012) (judgment of ECJ).

⁵⁰⁴ Case C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration*, ECLI:EU:C:2012:298, ¶¶ 53–54 (May 15, 2012) (opinion of Advocate General Sharpston).

⁵⁰⁵ *Id.* at ¶¶ 43–52.

⁵⁰⁶ *Id.* at ¶¶ 53–56.

⁵⁰⁷ *Id.* at ¶ 54.

Freedoms quoted in the recitals of Directive 2003/9.⁵⁰⁸ The advocate general held: “[The standards laid down by Directive 2003/9] are minima that should apply throughout the Union in order to reflect the requirements of, *inter alia*, Article 1 of the Charter that human dignity be respected and protected.”⁵⁰⁹

When the ECJ delivered its judgment, the court concentrated on whether the directive was applicable to asylum seekers liable to be returned to another member state under the Dublin System, which was France’s major concern.⁵¹⁰ The legitimacy of reduced levels of benefits was not addressed. The court briefly referred to the dignity clause of the Charter and concluded:

Thus, those requirements [i.e., the requirements laid down by Directive 2003/9] apply not only with regard to asylum seekers present in the territory of the Member State responsible pending that State’s decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application.⁵¹¹

That statement certainly sufficed to reject France’s arguments in the case. But the court provides little help for assessing the measures (i.e., less favorable treatment) France had applied vis-à-vis a defined class of asylum seekers (asylum seekers liable to the Dublin System). In the court’s judgment, there is no reference to less favorable treatment, to standards, or to minima applicable to all.

2. *Saciri et al.*

In *Saciri et al.*,⁵¹² the ECJ was asked to adjudicate on the standards applicable under Directive 2003/9 in case a member state (Belgium) decided to provide the material support in the form of cash transfers.⁵¹³

⁵⁰⁸ On the references to “human dignity” in Directive 2003/9, *see supra* notes 429–431 and accompanying text.

⁵⁰⁹ Case C-179/11, *Cimade and Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’immigration*, ECLI:EU:C:2012:298, ¶ 55 (May 15, 2012) (opinion of Advocate General Sharpston).

⁵¹⁰ Case C-179/11, *Cimade and Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’immigration*, ECLI:EU:C:2012:594, ¶¶ 36–50 (May 15, 2012) (judgment of ECJ, Sept. 27, 2012).

⁵¹¹ *Id.* at ¶ 43.

⁵¹² Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri et al.*, ECLI:EU:C:2014:103 (Feb. 27, 2014).

⁵¹³ *Id.* at ¶ 30.

In 2010, a family seeking international protection in Belgium could not be offered a place in a reception facility due to saturation.⁵¹⁴ The family was referred to the general welfare system and given cash transfers.⁵¹⁵ However, the amount handed out to them proved insufficient for the family to find a suitable flat on the private rental market.⁵¹⁶ The family was left to their own devices. The question referred to the ECJ was whether Belgium was obliged to provide sufficient money to enable the family to obtain suitable accommodation.⁵¹⁷ The ECJ's answer was unequivocal, but very brief. First, the court quoted some key phrases from *Cimade and GISTI*.⁵¹⁸ Then, the court repeated the content of Article 13(5) of Directive 2003/9, the content of Article 13(2), and the content of Article 2(j) defining the term "material reception conditions."⁵¹⁹ Finally, the court quoted Recital 7 of the directive, stating that the directive is about laying down "minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States."⁵²⁰ The next sentence in the judgment was not simply a quotation, but a repetition of quotations. The sentence said: "It follows therefrom that, although the amount of the financial aid granted is to be determined by each Member State, it must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence."⁵²¹ And, so the ECJ continued, this included enabling the applicants "to obtain housing, if necessary, on the private rental market."⁵²² With such a brief conclusion, the relevant statements of the ECJ came to an end. Hence, what we learn from the judgment in *Saciri et al.* is this: The amount provided by Belgium was not enough. But we learn nothing about how "enough" is to be defined. What segment of the private rental market is relevant from the perspective of human dignity? Again, the court is silent on standards.

⁵¹⁴ *Id.* at ¶¶ 18–19.

⁵¹⁵ *Id.* at ¶ 29.

⁵¹⁶ *Id.* at ¶¶ 20, 29.

⁵¹⁷ *Id.* at ¶ 30. The answer to the question basically hinged upon the responsibilities deriving from Article 13(5) of Directive 2003/9, reading: "Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article."

⁵¹⁸ Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri et al.*, ECLI:EU:C:2014:103, ¶¶ 33–35 (Feb. 27, 2014).

⁵¹⁹ *Id.* at ¶¶ 36–38.

⁵²⁰ *Id.* at ¶ 39.

⁵²¹ *Id.* at ¶ 40.

⁵²² *Id.* at ¶ 42.

3. *Abdida*

In *Abdida*,⁵²³ the ECJ was concerned with the situation of a critically ill Nigerian national whose application for a leave to reside in the country on medical grounds had been rejected by the responsible Belgian authority in 2011.⁵²⁴ Mr. Abdida appealed the decision. According to Belgium law, Mr. Abdida was, pending the decision-making, not entitled to any form of social assistance other than emergency medical assistance.⁵²⁵ That was *prima facie* in line with Directive 2008/115⁵²⁶ which was pertinent to the case at hand.⁵²⁷ The relevant clause of Directive 2008/115 addressing illegal non-nationals reads:

Member States shall . . . ensure that [with respect to non-nationals liable to the directive] the following principles are taken into account as far as possible . . . during periods for which removal has been postponed . . . (b) emergency health care and essential treatment of illness are provided.⁵²⁸

Under the directive, member states are obviously bound to provide, to some extent, access to medical treatment (“emergency” health care, “essential treatment”). The whole range of other basic needs, however, seems irrelevant.

Advocate General Yves Bot⁵²⁹ was the first to express discontent with the legal framework created by Directive 2008/115, holding:

Mr. Abdida is excluded from the regular job market, which means that he has no income to meet his needs and, in particular, to feed, clothe and house himself. He undoubtedly has serious problems finding accommodation. . . . Such a state of affairs is clearly capable of rendering Mr. Abdida destitute and has a direct bearing on respect for his fundamental rights.⁵³⁰

⁵²³ Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2453 (Dec. 18, 2014) (judgment of ECJ).

⁵²⁴ *Id.* at ¶¶ 21–23.

⁵²⁵ *Id.* at ¶ 29.

⁵²⁶ Directive 2008/115, 2008 O.J. (L 348) 98 (EU).

⁵²⁷ The case was not covered by Directive 2003/9, because Mr. Abdida's claim was not considered to qualify as an application for international protection. Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2453, ¶ 36 (judgment of ECJ, Dec. 18, 2014).

⁵²⁸ Directive 2008/115, *supra* note 526, at art. 14(1).

⁵²⁹ Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C: 2014:2167 (Sept. 4, 2014) (opinion of Advocate General Bot).

⁵³⁰ *Id.* at ¶¶ 147–48.

Advocate General Bot suggested to read into the relevant article of the directive an obligation incumbent on member states to “ensure that the subsistence needs of those individuals [i.e., third-country nationals liable under Directive 2008/115] are met and to provide them with humane and decent living conditions.”⁵³¹

The ECJ followed up on the Advocate General’s arguments⁵³² but avoided any reference to fundamental rights or human dignity in its reasoning.⁵³³ When asserting that member states were, under Directive 2008/115, required to also make provisions with respect to “the basic needs” of third-country nationals staying illegally in the country,⁵³⁴ the ECJ simply argued: “The requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) of Directive 2008/115 may . . . be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned.”⁵³⁵

From *Abdida*, we learn (in moderately strong words) that member states are required to provide more than emergency health care and essential treatment of illness. Member states are additionally obliged to provide for the satisfaction of “basic needs.” Yet, once more, the ECJ refrains from giving substantial guidance. This time, the court refrains from elaborating on the concept of “basic needs.” Obviously, the “basic needs” comprise needs regarding food, housing, and clothing. That is what is referred to explicitly in the opinion of the Advocate General. But it is not certain that “basic needs” are indeed confined to physical needs. Regarding standards, we are still in the dark.

⁵³¹ *Id.* at ¶ 149.

⁵³² Case C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2453, ¶¶ 54–63 (Dec. 18, 2014) (judgment of ECJ).

⁵³³ That is in stark contrast to the phrasing used by Advocate General Bot in his concluding remarks. At the very end of his opinion, the advocate general contended:

In my view, the respect for human dignity and the right to life, integrity and health enshrined in Articles 1, 2, 3 and 35 of the Charter respectively, as well as the prohibition of inhuman or degrading treatment contained in Article 4 of that Charter, mean that, in a situation such as that in the main proceedings, an illegally staying third-country national whose removal has been de facto suspended must not be deprived of the means necessary to meet his basic needs pending the examination of his appeal.

Case C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2167, ¶ 155 (Sept. 4, 2014) (opinion of Advocate General Bot).

⁵³⁴ Case C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2453, ¶ 59 (Dec. 18, 2014) (judgment of ECJ).

⁵³⁵ *Id.* at ¶ 60.

c. *The Court's Approaches to Equality*

1. *International Protection Standards*

EU law regarding access to a minimum of subsistence is more resolute on standards when it comes to non-nationals who have been granted international protection under the regime of Directive 2011/95,⁵³⁶ either in the form of refugee status or in the form of subsidiary protection status.⁵³⁷

Chapter VII of Directive 2011/95, defining the “content of international protection,”⁵³⁸ lists several duties member states must bear in mind as they make provisions regarding the individual or societal legal status of the beneficiaries of international protection. Some of those duties clearly address the situation of beneficiaries of international protection only, such as the member states’ duty to respect the principle of non-refoulement,⁵³⁹ the duty to ensure

⁵³⁶ Directive 2011/95, *supra* note 98.

⁵³⁷ Under Directive 2011/95, the term “refugee status” means the recognition by a member state of a third-country national or a stateless person as a refugee. And the term “refugee” means, generally,

a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.

Id. at art. 2(d)–(e). “Subsidiary protection status,” on the other hand, means the recognition by a member state of a third-country national or a stateless person as a person eligible for subsidiary protection. And “person eligible for subsidiary protection” means

a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 [death penalty; execution; torture; inhuman or degrading treatment or punishment; serious and individual threat by reason of indiscriminate violence in situations of armed conflict], and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Id. at art. 2(f)–(g). In short, “refugee status” is preserved to non-nationals qualifying as “refugees” under the strict definition of the Refugee Convention. “Subsidiary protection status” seeks to accommodate the dire straits of non-nationals who might, upon return, suffer (defined) serious human rights violations that are not taken into account by international refugee law. The (legal) status accorded to refugees under the directive differs only marginally from the status accorded to the beneficiaries of subsidiary protection status. *Id.*

⁵³⁸ Directive 2011/95, *supra* note 98, at arts. 20–35.

⁵³⁹ *Id.* at art. 21.

that family unity is maintained,⁵⁴⁰ or the duty to issue travel documents.⁵⁴¹ Other duties listed in the directive are expressly equality-oriented, as they link the status of the directive's beneficiaries to the status enjoyed by other groups. The wording of the duty, pertaining to a certain context, introduces a group of reference and obliges member states, in the particular context, to treat the beneficiaries of international protection and the group of reference the same to ensure equal treatment. In abstract terms, the norm says in that specified context, group A should be treated like group B. Most of the member states' duties under Directive 2011/95 that relate to the socio-economic status of the beneficiaries are in that sense equality-oriented, and nationals or third-country nationals legally resident in the member state serve as the most prominent reference groups.⁵⁴²

Two duties under Directive 2011/95 are relevant to recent case law. Under Article 29, and hence in the context of social welfare, nationals are the designated group of reference. The first paragraph of Article 29 reads: "Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State."⁵⁴³ For the context of freedom of movement, Article 33 refers to "third-country nationals legally resident" as the relevant reference group. Article 33 reads: "Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories."⁵⁴⁴

2. *Alo and Osso*

In *Alo and Osso*,⁵⁴⁵ the ECJ was asked to elaborate on the duties deriving from Article 29 and Article 33 of Directive 2011/95, both of which were closely entwined in the case. In 2009, Germany moved to impose on the holders of certain humanitarian titles (mainly beneficiaries of subsidiary

⁵⁴⁰ *Id.* at art. 23.

⁵⁴¹ *Id.* at art. 25.

⁵⁴² *Id.* at art. 26 (access to employment), art. 27 (access to education), art. 29 (social welfare), art. 30 (health care), art. 32 (access to accommodation), art. 33 (freedom of movement).

⁵⁴³ *Id.* at art. 29(1). With respect to non-nationals granted subsidiary protection status, the directive allows member states to deviate from the general rule laid down in art. 29(1). For the beneficiaries of subsidiary protection status, member states may limit social assistance to "core benefits," yet even then, these core benefits must be provided "at the same level and under the same eligibility conditions" as are applicable to nationals. *Id.* at art. 29(2).

⁵⁴⁴ *Id.* at art. 33.

⁵⁴⁵ Joined Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, ECLI:EU:C:2016:127 (Mar. 1, 2016) (judgment of ECJ).

protection) the obligation to reside in a specified geographical area (a municipality or a region) in case they were in receipt of benefits granted under the SGB II or the SGB XII.⁵⁴⁶ The measure was based on a general administrative instruction which, in turn, was based on a provision of the AufenthG allowing conditions to be added to a residence permit.⁵⁴⁷ The measure did not extend to non-nationals granted refugee status, other third-country nationals legally staying in the country, or German nationals.⁵⁴⁸ Those groups were free of any obligation regarding residence. The rationale behind the policy introduced in 2009 was that German politics wanted the financial burden linked to the provision of a subsistence minimum to be evenly distributed among the local authorities of the various German *Länder*.⁵⁴⁹ German politics also claimed the condition served as an instrument supporting national integration policies.⁵⁵⁰ And indeed, there was a legal link between the duty to reside at a certain place in Germany and the right to receive benefits, securing the subsistence minimum under the SGB II and the SGB XII. Under the SGB II as well as under the SGB XII, the place where the claimant ordinarily resides (“gewöhnlicher Aufenthalt”) predetermines the authority that, at the local level, is responsible for the actual granting and handing out of the benefit.⁵⁵¹ The residence condition imposed under the AufenthG in fact determined where exactly (in a territorial sense) the holder of the residence title had access to benefits under the SGB II or the SGB XII.

In 2014, the BVerwG referred to the ECJ for a preliminary ruling.⁵⁵² The BVerwG doubted that the German practice of imposing a residence condition was legitimate under Directive 2011/95, in particular under Article 29 (promising access to social assistance on an equal footing with nationals)⁵⁵³ and/or under Article 33 (promising freedom of movement on an equal footing with other third-country nationals).⁵⁵⁴ Apparently, the BVerwG was unsure from about which of the member states’ duties under Directive 2011/95 to choose when assessing the legitimacy of the German policy. The BVerwG quoted both articles and left it to the ECJ to pick either one of them or to opt for both when adjudicating on the legitimacy of the German practice.⁵⁵⁵

⁵⁴⁶ *Id.* at ¶ 12 (giving details on the national legal background).

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ SGB II, *supra* note 200, at § 7(1), sentence 1, no. 4; *see also* SGB XII, *supra* note 199, at § 41(1).

⁵⁵² Joined Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, ECLI:EU:C:2016:127, ¶ 21 (Mar. 1, 2016) (judgment of ECJ).

⁵⁵³ On the wording *see* Directive 2011/95, *supra* note 98, at art. 29(1).

⁵⁵⁴ On the wording *see id.* at art. 33.

⁵⁵⁵ Joined Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, ECLI:EU:C:2016:127, ¶ 21 (Mar. 1, 2016) (judgment of ECJ).

The ECJ opted for an assessment under both duties. For the ECJ, Article 29 was pertinent because, of all recipients of subsistence benefits, only the beneficiaries of subsidiary protection status had to accept that a residence condition would be imposed once they applied for the benefits.⁵⁵⁶ There was no such consequence for any other group receiving those benefits. That was deemed different treatment with respect to access to social welfare (subsistence benefits).⁵⁵⁷ Article 33, again, was considered pertinent to the case, because the residence condition imposed under the *AufenthG* constituted, in the eyes of the ECJ, “a restriction of the freedom of movement guaranteed by that article.”⁵⁵⁸ In its assessment under Article 29, the court turned to investigate whether the beneficiaries of subsidiary protection status were in an “objectively comparable situation” with German nationals as “regards [to] the objective pursued” by the general administrative instruction, i.e., the objective of distributing the costs of granting subsistence benefits evenly among local authorities.⁵⁵⁹ The ECJ’s answer was clearly in the affirmative.⁵⁶⁰ The argument was simple: all recipients of subsistence cause financial burdens, and to single out but one group of recipients is precluded by Article 29.⁵⁶¹ Under Article 33, the ECJ’s main concern was whether the beneficiaries of subsidiary protection status formed, from the perspective of a policy seeking to facilitate the integration of non-nationals, a group that was not objectively comparable with the group of other third-country nationals legally resident in Germany (the pertinent reference group under Article 33).⁵⁶² In that regard, the court avoided giving a final answer but again signaled that the yardstick implied strict standards. For the ECJ, imposing residence conditions on the beneficiaries of subsidiary status, yet not on refugees or other third-country nationals, was legitimate only if it were the case that the beneficiaries of subsidiary protection status faced greater difficulties in relation to integration than other groups of third-country nationals.⁵⁶³ Without explicitly saying so, the ECJ certainly doubted the condition was met with respect to non-nationals enjoying refugee status.⁵⁶⁴

The ECJ gives no explanation for the rigorous assessment of the German measures in *Alo and Osso*. We can assume that differences in immigration status or differences in nationality have been discarded as irrelevant because the differences are not mentioned in the judgment. The silence of the court

⁵⁵⁶ *Id.* at ¶ 53.

⁵⁵⁷ *Id.* at ¶¶ 48, 54.

⁵⁵⁸ *Id.* at ¶ 42.

⁵⁵⁹ *Id.* at ¶¶ 54–55.

⁵⁶⁰ *Id.* at ¶¶ 55–56.

⁵⁶¹ *Id.* at ¶ 55.

⁵⁶² *Id.* at ¶ 61.

⁵⁶³ *Id.* at ¶ 62.

⁵⁶⁴ *Id.* at ¶ 63.

marks a striking difference to the opinion of Advocate General Pedro Cruz Villalón preceding the ECJ's judgment.⁵⁶⁵ The Advocate General drew strongly on the idea of equality and its peculiar component, the prohibition of discrimination.⁵⁶⁶ For Cruz Villalón, the obvious differences in the case at hand—differences in immigration status—were highly suspect. The legal status of a migrant, so Cruz Villalón held, was one of the “prohibited grounds of discrimination,” even though it was not explicitly mentioned in Article 21 of the Charter.⁵⁶⁷ Consequently, so the Advocate General went on, unequal treatment based on immigration status could be deemed justified only when “very strong reasons” existed for doing so.⁵⁶⁸ In case of judicial review, courts needed to apply “a strict level of scrutiny in the examination of proportionality.”⁵⁶⁹ It seems that the ECJ, quite deliberately, did not pick up on that line of thinking. The reason the court did not follow the Advocate General's line of thinking might be a strong one: the silence of the court could indicate that the court was even more skeptical than the advocate general. It might indicate that, for the ECJ, different treatment based on immigration status per se was illegitimate, no matter what reasons were put forward by the respondent member state.

v. *A Less Cautious Approach: Taking Human Dignity and Equality More Seriously*

a. *Human Dignity and Equality*

At first sight, *Alo and Osso*⁵⁷⁰ very much resonates with the approach of the BVerfG when adjudicating, under Article 1(1) of the GG, on the right of asylum seekers to be provided (by the state) with a subsistence minimum.⁵⁷¹ Under the BVerfG, lawmakers were not allowed to define and grant the subsistence minimum differently according to immigration status.⁵⁷² Only if the needs of asylum seekers were different in some significant way, and there was proof of that in empirical data, could different treatment possibly be

⁵⁶⁵ Joint Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, ECLI:EU:C: 2015:665 (Oct. 6, 2015) (opinion of Advocate General Cruz Villalón).

⁵⁶⁶ *Id.* at ¶¶ 71–105.

⁵⁶⁷ *Id.* at ¶ 75.

⁵⁶⁸ *Id.* at ¶ 76.

⁵⁶⁹ *Id.*

⁵⁷⁰ Joint Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, ECLI:EU:C:2016:127 (Mar. 1, 2016) (judgment of ECJ).

⁵⁷¹ *See supra* Part IV.B.i.

⁵⁷² *See* BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 73.

considered legitimate.⁵⁷³ Or, following the wording of the ECJ,⁵⁷⁴ only then could asylum seekers be considered as “not in an objectively comparable situation” vis-à-vis other groups of immigrants or nationals. However, the legal foundation of the arguments differs greatly, not just with respect to formal sources of law (German GG here, primary and secondary EU law there), but also with respect to the substance of the law. The BVerfG drew on the notion of human dignity under the GG, and the ECJ drew on the notion of equality under EU law. Still, the differences in sources notwithstanding, the different approaches inspire one to reflect on how human dignity and equality relate when the subsistence minimum is specified by law. Reflections on this relationship serve as the starting point for my challenging of Directive 2013/33 and, indirectly, the AsylbLG under EU law.

In its July 2012 judgment,⁵⁷⁵ the BVerfG started from the premise that the right to respect of human dignity was a universal right. From the perspective of morals common to all mankind, a universal right is usually conceptualized as a right that pertains to every human being, everywhere, at any given moment.⁵⁷⁶ From the perspective of a national constitution (which is a particular, i.e., a non-universal, source of law), a universal right is something less ambitious. In that particular context, a universal right is merely a right that pertains to every human being who happens to be within the jurisdiction of that particular state, in the case of the German GG, within the jurisdiction of German authorities.⁵⁷⁷ Universal rights have, per implication, a dimension that relates to “equality.” If every human being that is within Germany’s jurisdiction is entitled to be provided with a subsistence minimum, then all human beings present in Germany are formally equal before the law. In other words, they are treated equally by the law, and they have the same right to be granted a subsistence minimum. Having the same right is simply a side effect of the universal character of the right to respect of human dignity.

Assuming that human dignity is universal in character does not, however, imply that all human beings need to be treated the same when it comes to the actual granting of benefits intended to secure the subsistence minimum. This

⁵⁷³ *Id.*

⁵⁷⁴ See Joined Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover*, ECLI:EU:C:2016:127, ¶¶ 54–55, 61 (Mar. 1, 2016) (judgment of ECJ).

⁵⁷⁵ See *supra* Part IV.B.i.

⁵⁷⁶ The literature on the subject is vast. For an excellent introduction into natural rights thinking, combining aspects of philosophy and aspects of law, see H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 16, 26 (1945).

⁵⁷⁷ See BVerfG, 1 BvL 10/10, July 18, 2012, at marginal no. 62 (holding the GG “establishes [the right to a subsistence minimum] as a human right,” implying the right to a subsistence minimum is not preserved to Germans only). That assertion by the court comes close to saying that the constitutional clause of human dignity incorporates a universal right.

is where the idea of equality gains important prominence. Obviously, the basic needs of infants differ from the needs of adults, the needs of men differ from the needs of women, and the needs of school children differ from the needs of young mothers or dying grandfathers. Different treatment is permissible, sometimes even required, most of all from the perspective of equality.⁵⁷⁸ That is why the Commission, when proposing a recast of Directive 2003/9, rightly insisted on paying particular attention to vulnerable groups, such as detainees, unaccompanied minors, or traumatized persons.⁵⁷⁹ Yet, what is common in those varying instances of differing needs is the abstract and fundamental concept of what constitutes basic needs (for instance, physical needs, such as food, housing, and clothing; social and cultural needs; medical needs) and the abstract concept of the level at which those needs are to be satisfied (e.g., substandard housing, standard housing, high-end housing). Both needs and the level of satisfaction make up the standard for defining the measures needed in order to implement on a concrete level the abstract right to a dignified subsistence minimum and the assessment of its fulfilment.⁵⁸⁰ Ignoring some essential elements of needs constitutive for human dignity with respect to some designated groups of human beings⁵⁸¹ creates a problem under the dignity clause because human dignity is deemed universal and not particular.⁵⁸² There is also a problem under the human dignity clause if levels of satisfaction are different for different groups (e.g., substandard housing for group A and standard housing for all other groups; differing amounts of cash benefits for differing groups not justified by differing needs).⁵⁸³ Needs and levels of satisfaction, essential elements of human dignity, ought to be conceptualized the same for all human beings. Other matters, i.e., matters not

⁵⁷⁸ For the German doctrine and jurisprudence, *see, e.g.*, Paul Kirchhof, *GG Art. 3 Abs. 1 at marginal nos. 296, 298*, in *GRUNDGESETZ: KOMMENTAR* [BASIC LAW: COMMENTARY] (Theodor Maunz & Günter Dürig former eds., Roman Herzog, Matthias Herdegen, Rupert Scholz & Hans H. Klein eds., 81st ed. 2017). For the case law of the ECJ under primary EU law, *see, e.g.*, Case C-550/07 P, *Akzo Nobel Chemicals Ltd. and Akeros Chemicals Ltd.*, ECLI:EU:C:2010:512, ¶ 55 (Sept. 14, 2010) (“According to settled case-law, [the principle of equality] requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.”).

⁵⁷⁹ *See* Proposal, *supra* note 453, at 6.

⁵⁸⁰ For the German constitutional order, *see* Kirchhof, *supra* note 578, at marginal no. 301 (introducing the notion of “Basisgleichheiten” [basic equalities] when describing the core content of the constitutional clause on human dignity).

⁵⁸¹ On the needs covered and also not covered by downgraded benefits under the AsylbLG, *see supra* Part III.B.iii.b.

⁵⁸² That is why the downgraded benefits under the AsylbLG are unconstitutional from the perspective of the GG. For details *see supra* Part IV.B.ii.a.bb.

⁵⁸³ The difference in the amount of cash benefits granted under the SGB II and the SGB XII, on the one hand, and the cash benefits granted under the AsylbLG, on the other hand, is a case in point. On the differences, *see supra* Part IV.A. For a critique from the perspective of the GG, *see supra* Part IV.B.ii.a.aa.

constitutive for human dignity, may be governed by the concept of equality, allowing for (or even demanding) different treatment in case of due justification.

b. Shortcomings of Directive 2013/33

I doubt that secondary EU law conceives of “human dignity” in universal terms, and I doubt that Directive 2013/33 adheres to the principle of equality as it is supposed to do.

For one, Directive 2013/33 (reception conditions for non-nationals seeking international protection),⁵⁸⁴ Directive 2011/95 (content of refugee status and subsidiary protection status),⁵⁸⁵ and Directive 2008/115 (status of third-country nationals illegally staying in the country)⁵⁸⁶ seem to be based on a concept that allots human dignity according to residence status. The relatively secure residence status of refugees, for instance, comes along with the right of refugees to be treated like nationals regarding access to social assistance.⁵⁸⁷ For the beneficiaries of the less secure subsidiary protection status, access to social assistance may be restricted to core benefits, yet access to core benefits must be granted on an equal footing with nationals.⁵⁸⁸ The precarious immigration status of asylum seekers may be combined with less-than-equal treatment, especially in comparison to the treatment of nationals in their access to and level of social assistance.⁵⁸⁹ The non-status of illegal third-country nationals is mirrored in the complete denial of access to a state-provided subsistence minimum (with the exception of emergency medical treatment).⁵⁹⁰ The beneficiaries addressed in these provisions are obviously ranked according to immigration status. The more precarious the status, the less benefits to be accorded. Such a tiered system of access to a state-provided subsistence minimum, based on immigration status, is valid only if the notion of “human dignity” underlying the Charter (Article 1) is also conceptualized as tiered according to status. Clearly, the ECJ and the Advocate General rejected a tiered notion of human dignity in *Abdida*.⁵⁹¹ The rejection came in uncertain terms, though. In *Abdida*, much has been left open regarding relevant needs and levels of satisfaction, i.e., standards.⁵⁹² The court missed the opportunity to

⁵⁸⁴ See Directive 2013/33, *supra* note 74.

⁵⁸⁵ See Directive 2011/95, *supra* note 98.

⁵⁸⁶ See Directive 2008/115, *supra* note 526.

⁵⁸⁷ Directive 2011/95, *supra* note 98, at art. 29(1).

⁵⁸⁸ *Id.* at art. 29(2).

⁵⁸⁹ Directive 2013/33, *supra* note 74, at art. 17(5).

⁵⁹⁰ Directive 2008/115, *supra* note 526, at art. 14(1).

⁵⁹¹ See *supra* Part IV.C.iv.b.cc.

⁵⁹² *Id.*

give guidance on how to conceptualize human dignity in more concrete terms, in particular, in the context of defining the rights of asylum seekers in secondary law. These uncertainties notwithstanding, under EU law human dignity is not dependent on residence status. That much seems clear. From the perspective of human dignity and the right to a subsistence minimum, all pertinent norms under the Common European Asylum System are flawed.

For another, if taken seriously, the principle of equality casts an additional, independent shadow on the legitimacy of Article 17(5) of Directive 2013/33. In *Alo and Osso*,⁵⁹³ the advocate general contended that equal treatment was “a general principle of EU law.”⁵⁹⁴ There is no question that the contention is correct.⁵⁹⁵ In *Alo and Osso*, the advocate general further stressed that differences in immigration status could barely justify differences in treatment regarding access to and the content of nationally provided subsistence minimum.⁵⁹⁶ The ECJ seemed even more skeptical.⁵⁹⁷ If we accept the principle and its reading in *Alo and Osso*, it applies to secondary EU law just as it applies to member states acting under secondary EU law. When applied to Article 17(5) of Directive 2013/33, the directive seems to fail the test. It is the immigration status of the applicants, nothing else, that underpins the member states’ discretion regarding the form of the subsistence minimum (benefits in kind, benefits in cash, vouchers). And it is the immigration status of the applicants that inspires the idea that the standard of human dignity applicable to nationals could be different from the standard under Directive 2013/33. Hence, member states should be free to resort to unequal treatment where the standards are aimed to “ensure a standard of living higher than that prescribed for applicants under this Directive.”⁵⁹⁸ The frivolous use of immigration status as a *tertium comparationis* is ruled out by the principle of equality.

In sum, Article 17(5) of Directive 2013/33 is flawed from both perspectives, the perspective of human dignity and the perspective of equality. Once the directive is declared void or interpreted by the ECJ in a manner that conforms with human dignity or equality, the AsylbLG will face new challenges arising from EU law.

⁵⁹³ See *supra* Part IV.C.iv.c.bb.

⁵⁹⁴ Joined Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, ECLI:EU:C:2015:665, ¶ 71 (Oct. 6, 2015) (opinion of Advocate General Cruz Villalón).

⁵⁹⁵ See, e.g., WOODS, WATSON & COSTA, *supra* note 410, at 148, 178; see also PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW TEXT, CASES, AND MATERIALS* 565 (6th ed. 2015).

⁵⁹⁶ Joint Cases C-443/14 & C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, ECLI:EU:C:2015:665, ¶¶ 75–76 (Oct. 6, 2015) (opinion of Advocate General Cruz Villalón).

⁵⁹⁷ See *supra* Part IV.C.iv.c.bb.

⁵⁹⁸ Directive 2013/33, *supra* note 74, at art. 17(5).

V. CONCLUSION

This Article presented facts on what has been termed the “refugee crisis” in German politics. Unprecedented in European post-war history, numerous European countries rescinded border controls in late 2015 to allow huge numbers of people seeking international protection to enter the country. Germany led this policy and received almost one million asylum applicants in a short period of time. This Article described the political responses to the refugee crisis, in particular, the responses relating to the state-provided subsistence minimum. In the course of the crisis, lawmakers amended the AsylbLG more than once in order to cut down on benefits. The main focus of this Article was on the differences between the benefits accorded under the AsylbLG and the benefits granted under the general regime (SGB II, SGB XII). These differences relate, for one, to the form of provisions. Under the general regime, the benefits take the form of cash transfers. Under the AsylbLG, the subsistence minimum is primarily provided in kind, at least as long as the beneficiaries are obliged to reside in a reception center. For another, the differences relate to the amounts handed out if, under the AsylbLG, subsistence is secured through the provision of money. Under the AsylbLG, the amount is less than the amount under the general regime. Finally, in the case of downgraded benefits, state-provided subsistence does not cover all the needs covered by the general regime.

This Article argues that those differences matter from the perspective of the German GG and the perspective of EU law. These differences ought not exist. When building my arguments against these differences from the perspective of the GG, I drew on case law of the BVerfG, fleshing out in detail what is demanded by the human dignity clause of the GG, not only with respect to Germans or long-term residents of another nationality, but also with respect to non-nationals seeking international protection. Against the backdrop of that case law, none of the differences created by the AsylbLG passes the test of constitutionality, for various reasons. By contrast, case law at the European level is piecemeal; that is particularly true for case law relating to the right to a subsistence minimum for non-nationals whose residence statuses are utterly precarious. Also, at the European level, lawmaking is often dictated by the member states’ interests, interests that are played out in an almost unbound manner in the negotiations taking place in the Council of the EU. The clause on material reception conditions defining the member states’ duties regarding the subsistence of non-nationals seeking protection is a case in point. At the level of secondary EU law (Directive 2013/33), the will of member states to have their own saying at home prevented a compromise with “teeth.” Nonetheless, there are good reasons for holding that the relevant clause in Directive 2013/33 neglects, in a relevant manner, the right to respect of human dignity under Article 1 of the Charter and the principle of equality.

In the long run, Directive 2013/33 will not shield the AsylbLG from criticism raised under EU law. Clearly, the BVerfG and the ECJ will have the final say on all the questions asked and the answers given in this Article.

One final remark: On its surface, this Article dealt with a number of technicalities: the requirements for receiving benefits under the general regime and the AsylbLG, the specifications of the respective benefits, the comparing of benefits and amounts, and the evaluation of the differences against the yardstick of higher-ranking law. However, in the background of those technicalities, one of the most sensitive issues of our time was always looming: Why should non-nationals seeking protection in some other country, in our case Germany, be provided with a subsistence minimum by the state at all? This Article took two clauses on human dignity, one in the GG, the other in the Charter, as a given. But these clauses—assuming solidarity among human beings—can be attacked in the political realm. And the clauses are indeed attacked in real politics. “Brexit” occurred because many British people thought the EU was demanding too much solidarity. In the 2017 elections in Germany, Austria, and the Czech Republic, parties gained strength through attacking prevalent migration politics—and Chancellor Angela Merkel as the beacon of such politics—with arguments depicting migrants as a threat. They bring in an alien culture, an alien religion, diseases and parasites; they put strain on public budgets that could be used in a different manner, i.e., in a manner that favors us instead of them. The issue of migration splits families, societies, nations, and the EU. Against the backdrop of such a political climate, it is no wonder that even neutral institutions, such as the ECJ, are under political fire. It takes courage to uphold the rule of law in a judgment, when what is demanded by the rule of law is itself a matter of contention. It takes courage to give a judgment that is then not accepted by politics. Will “human dignity” and “equality” be defended by the courts and survive unharmed?