

THE DEVELOPMENT OF THE GERMAN IMMIGRATION POLICY AFTER 2015: A BALANCING ACT BETWEEN POPULISM AND EU/ Réka Friedery

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Abstract: *Germany is seen and presented by itself as a welcome country. It is a country of immigration. First, there was the "Gastarbeiter" period when within agreements made by Germany and southern European states several thousand worker arrived in Germany and most of them made the country their permanent home. The country experienced another migration wave when the former Central-European countries became members of the European Union. In 2015, similar to other European States, Germany too experienced a migration-shock which resulted in a political-social turmoil in the German society. Not only politicians, but average people faced the same never-seen-before challenge on different levels, due to the number of migrants arriving in short term onto the territory of the state: one in the everyday life of its community, one in the political and legal perspective. Irrespectively of their reactions or adaptation methods, one common point of these actors was that they had to come to terms with the fact that a huge number of irregular migrants will stay long-term in Germany. However, the wave challenged the "welcome" country attitude both at political and at societal level. The author argues that roles, namely, the country affected by the migration wave, and the country being a leading European Union Member State became contradicted because of the measures introduced after 2015. This is underlined by the normative analysis of the main measures in this article, but because migration policy overlaps other policy areas, for example integration policy, interior policy, these measures touch upon different issues.*

Key words: *Migration; populism; immigration policy; EU policy; Germany.*

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1. INTRODUCTION

For today's populism, some authors identify out four root causes: economic problems, cultural causes, the speed of change generated by globalisation and digitalisation, and last but not least the failure of policy to manage a transition to higher welfare, globally and locally (Aiginger, 2020). The distinctive trait of populism is that it claims to represent and speak for 'the people', which is assumed to be unified by a common interest. This common interest, the 'popular will', is in turn set against the

'enemies of the people'- minorities and foreigners (in the case of right-wing populists) or financial elites (in the case of left-wing populists) (Rodrik, 2019).

Germany is not an immigration country in a classical way (Chin, 2007), on the contrary, it is often classified as a typical example of a "labour recruiting country" (Gesley, 2017). Next to the resettlement of ethnic migrants, the German-Italian intergovernmental agreement was concluded in 1955, that allowed the recruitment of state-organized foreign labor, and this saw approx. 14 million guest workers arriving between 1955 and 1973 from southern European states, from the ex-Yugoslavia and Turkey (Butterwegge, 2005; Braun, 2021). This created a paradox situation seen already in 1970 that immigration happened without a "destination country" (Bade, 2000), because the Germany political sphere did not perceive Germany as a country of immigration up until 2005. The *terminus technicus* „Willkommenskultur" that appeared around this time, has no legal definition and as a matter of fact it could correlate with migration and integration policy (Bade, 2014) and can be seen more a political and cultural answer to a given situation (Heckmann, 2014).

In 2015, Germany decided to leave German borders open to refugees. The German government based its decision on humanitarian grounds, but the decision had a spill over effect on the ethnic, cultural and religious structure of the country. It triggered heated discussion in several issues like security, identity and society, both at the political and social level and were also reflected by the election results of the parliamentary elections of 24 September 2017 (Glorius, 2018).

2. BACKGROUND INFORMATION

To understand the legal and administrative challenges, first of all we shall look into the circumstances of 2015. Germany has been the most popular destination and host countries for asylum seekers in Europe in recent years, admitting approx. 1.5 million asylum seekers between 2014 and June 2017, with the vast majority of asylum seekers arriving between July 2015 and February 2016. And as over 1.2 million first-time asylum applications were lodged in the EU member states in 2015, Germany counted being the first destination country with 890 000 Asylum seekers in 2015. The number of asylum applications continued to increase in 2016 (around 722,000 first time applications), even though the number of arriving asylum seekers dropped since the closure of the Balkan route in March 2016 (Glorius, 2018). By the end of 2017, 970,364 people were recognized as refugees under the 1951 Geneva Convention (compared with 121,837 in Britain and 337,143 in France). In 2015, the main countries of origin were regions in Europe, Asia and the Middle East.

Date	Refugees Granted Asylum	Annual % Change
2015-12-31	316115	45.69
2016-12-31	669482	111.78
2017-12-31	970302	44.93
2018-12-31	1063837	9.64

Chart 1 Germany Refugee Statistics 2015-2018

Source: <https://www.macrotrends.net/countries/DEU/germany/refugee-statistics>

The net migration rate¹ in Germany is 1.5 migrant(s)/1000 population (2020 est.) that puts Germany on the 54th place on the world list (Central Intelligence Agency-CIA, 2020). In 2015, Germany and the Russian Federation hosted the second and third largest numbers of international migrants² worldwide (12 million each) (United Nations, 2016). Germany, the second top destination for migrants, has also observed an increase over the years, from 8.9 million in 2000 to 13.1 million in 2019. Germany remained the main OECD destination country in 2016, with over 1.7 million new international migrants (more than double the levels registered in 2000, but with a decrease compared with more than 2 million in 2015) arriving that year (International Organization for Migration, 2020). The country has been the most popular destination and host countries for asylum seekers in Europe in recent years, admitting approx. 1.5 million asylum seekers between 2014 and June 2017, with the vast majority of asylum seekers arriving between July 2015 and February 2016. And as over 1.2 million first-time asylum applications were lodged in the EU member states in 2015, Germany counted being the first destination country. The number of asylum applications continued to increase in 2016 (around 722,000 first time applications), even though the number of arriving asylum seekers dropped since the closure of the Balkan route in March 2016 (Glorius, 2018). By the end of 2017, 970,364 people were recognized as refugees under the 1951 Geneva Convention (compared with 121,837 in Britain and 337,143 in France). In 2015, the main countries of origin were regions in Europe, Asia and the Middle East. We shall point out that the regional distribution of the population with migration background differs as the old West German states, especially the city states of Bremen, Hamburg and Berlin, as well as the federal states of Hesse, Baden-Wurtemberg and North Rhine Westphalia have a high percentage of persons with a migration background: immigrants and their descendants represent more than 26 percent of the population of these states. The cause of this is that these are in an economically better situation. In contrast, the share of persons with migration background is less than seven percent in all the 'New Länder' (Hanewinkel and Oltmer, 2018).

Against this background, when the German borders opened in 2015 as a humanitarian necessity it had a spill over effect on every level of the country. These were also reflected by the election results of the parliamentary elections of 24 September 2017 (Glorius, 2018). The surge in asylum applications in 2015–16 and the success of the far-right Alternative for Germany (AfD)³ party in regional and in the federal election elections was obvious. There was an anti-immigrant social movement called PEGIDA⁴ that had been holding regular rallies in Dresden since 2015 and its support increased, too. The success of AfD and PEGIDA was somewhat shocking to the main political parties, but not surprising in a way that AfD and PEGIDA recognised the aftermath of the migration events, the debates at society, could reach to everyday peoples' concerns and the perfect opportunity to ride the coming wave. The election's results showed a glimpse for a harsh reality regarding differences between the former eastern and western part of Germany: AfD gained strong electoral support in the former East Germany. Besides that, differences

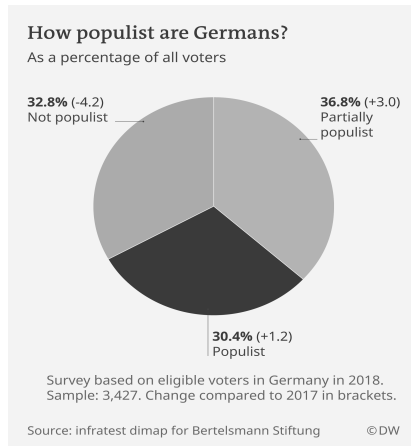
¹ The net migration rate indicates the contribution of migration to the overall level of population change. The net migration rate does not distinguish between economic migrants, refugees, and other types of migrants nor does it distinguish between lawful migrants and undocumented migrants.

² Foreign-born people.

³ The AfD was founded in February 2013 as a single-issue party, criticizing the Euro, and more generally the European Union. In the federal election of 2013, the party gained 4.7 % of the vote, reaching a near-success in such a short time since its founding, but missing the threshold of 5% to enter the parliament. After the election, the AfD began focusing to immigration.

⁴ Patriotic Europeans against the Islamization of the West.

emerged over matters of migration and integration between the so-called sister parties too, the CDU and CSU: it weakened Merkel's latest governing coalition since it was formed in March 2018 (Triadafilopoulos, 2019), whereby the CSU's Seehofer has made irregular migration a policy priority.



Graph 1: How populist are Germans?

Source: Deutsche Welle, Bertelmanns Stiftung, 2018

Apart of the government's stance in 2015, the diagram shows the stance of German voters nearly three years after the 2015 migration wave. The charts show that two-third of German voters could be seen as populist or partially populist at the end of the 2015's irregular migration wave in 2018. Also, according to the chart we can observe an increase in these two groups compared to 2017.

3. LEGAL CHANGES ON THE HORIZON

Following the elections, the Union parties, the FDP and Alliance 90/The Greens started negotiations about a so-called 'Jamaica coalition'. However, the negotiations failed by the end of the year, and no new government was formed in 2017, but the CDU/CSU and SPD started coalition talks, which led to another 'grand coalition' in March 2018. All parties represented in the Bundestag had different concepts on the directions how to handle issues related to the crises. If we look into the central coalition agreement it is quite obvious the government intended to avoid any loss of control in the future: with the aims at reinforcing efforts "to govern and to limit" migration towards Germany and Europe "so that a situation like in 2015 is not replicated" (Thym, 2018).

According to Article 16a of the German Basic Law, persons persecuted on political grounds have the right of asylum.⁵ This fundamental right is applicable only to foreigners. People can also be recognised as refugees under the Geneva Refugee

⁵ Art. 16 (a) of the Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p. 404).

Convention, which guarantees asylum to people who had to flee a war. Besides these, German authorities can issue subsidiary protection to people who could face danger in their home country or deportation bans. Germany turned to the Dublin III Regulation,⁶ when it decided about asylum claims of Syrian citizens without sending them back to the country of first entry in the middle of 2015. According to Article 17, by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Regulation. However, this was short-lived, and the country has already returned to the standard Dublin procedures in October 2015. After the new-year celebrations of 2015-16 in Cologne and other German cities,⁷ several important legislations were introduced: among others the Act on the Introduction of Fast-Track Asylum Procedures (Asylum Package II), the Act on the Faster Expulsion of Criminal Foreigners and Extended Reasons for Refusing Refugee Recognition to Criminal Asylum Seekers. The adoption of the Act was preceded by controversial discussions both within the government coalition and broader society. Especially the restriction on family reunification was widely criticised by civil society groups and by the opposition (Federal Office for Migration and Refugees, 2017). As we can see in the following, they all targeted specific topics, namely, asylum procedure, voluntary and forced returns.

The Act on the Faster Expulsion of Criminal Foreigners and Extended Reasons for Refusing Refugee Recognition to Criminal Asylum Seekers had the aim to handle failed deportation attempts: it contained the conditions for the provision which requires the foreigners authorities to find a balance between the foreigner's interest in staying in Germany and the state's interest in expelling him or her in the individual case. The act lists of typical reasons to assume a particularly serious interest in expelling the foreigner or a particularly serious interest in remaining in Germany. Under serious interest was meant foreigner sentenced for certain offences and who committed using violence, using a threat of danger to life or limb or with guile. Particularly serious interest could be seen among others when the foreigner was sentenced to a prison term or a term of youth custody of at least one year for one of these crimes, and crimes within the meaning of the amended German Criminal Code.⁸ Interestingly, a particularly serious interest was regarded the commission of serial offences against property even if the perpetrator did not use violence, threats, or guile.

The Act on the Introduction of FastTrack Asylum Procedures was part of the so-called Asyl Packet II,⁹ and introduced stricter asylum measures with the aim to shorten the length of asylum procedures through fast-track procedures. This procedure was planned to take place in special reception centres within a week, and with an appeal within two weeks. Nonetheless, we shall point to the fact that this was in line with Directive 2013/32/EU (The Asylum Procedures Directive)¹⁰ that explicitly provided for such an accelerated examination procedure. Moreover, it also contained stricter provisions

⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, pp. 31–59.

⁷ Hundreds of women experienced sexual assaults, and among the suspects there were foreign as well as German nationals and among the non-German suspects there were numerous refugees.

⁸ For example, sexual assault by use of force or threats.

⁹ BGBI 2016 Part 1 no. 12 p. 390.

¹⁰ Directive 2013/32/EU Of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

regarding benefits, namely, only those who stayed in such special centres received benefits (Die Bundesregierung, 2016) and also introduced restrictions to family reunification for certain beneficiaries of subsidiary protection (see Bick, 2018). That is to say, that those with subsidiary protection status were restricted to bring their families to join them for a period of two years. Applicants subject to subsidiary protection are initially granted a residence permit for one year, which could be extended for two additional years, as opposed to the three-year residence permits for asylees.

In 2019, there was an extensive reform of asylum and migration legislation with seven laws enacted and numerous changes were introduced to the Asylum Act, the Residence Act, the Asylum Seekers Benefits, the Skilled Workers' Immigration Act and the Act on Temporary Suspension of Deportation for Training and Employment.

The provisions for admission procedure could be found in the Asylum Procedure Act. Asylum seekers, who are permitted to enter the country or who are found in the country without a residence permit were to be transferred to the nearest reception centre of the relevant state and a nation-wide EASY distribution system were used for initial distribution, and they were assigned to reception centres of the individual German states according to a formula defined in the Asylum Procedure Act (Federal Ministry of the Interior, Building and Community, 2020). It is worth to mention, that so-called 'arrival, decision and return' (AnKER) centres were established in 2018. The main purpose was to centralise all activities at one location and to shorten the asylum procedure, with a concept that was already applied in the 'arrival centres' across Germany and in 'transit centres' set up in three locations in Bavaria. However, most Federal States have not participated in the AnKER centres scheme, and at the end of 2019 only three Federal States had agreed to establish AnKER centres, in most cases simply by renaming their existing facilities so that in many cases all that had changed was the label on such centres (Knight, 2019). In early 2019, it took an average of six months to process asylum applications, contrary to a commitment of maximum of three months. Other provisions contained that the Federal Office for Migration and Refugees provides counselling and legal assistance to asylum seekers, but we shall point out that this raised potential conflict of interests.

The main changes to the Residence Act related to the enforcement of the obligation to leave the federal territory. Overall, the introduction of the Orderly Return Law substantially facilitates the use of 'custody pending departure' under Section 62b with the aim to enforce deportations. The Orderly Return Law or 'Second Law for the Improved Execution of Deportations' reduced the barriers to imposing detention for deportees so that rejected asylum seekers cannot avoid deportation. It gave more power to authorities to apply sanctions against those who do not comply with the lengthy deportation procedures, for example people who are a flight risk can now be detained prior to their deportation or authorities could start proceedings against migrants and refugees who lie on their asylum applications. It created a new type of detention, a 'detention to obtain participation', and foreigners could be detained when they failed to comply to cooperate. The risk of absconding allowed to detain a person for the purpose of deportation.

We also shall mention the introduced possibility to hold pre-removal detainees in regular prisons until June 2022 (ECRE, 2019c) instead of specialised institutions, although detainees will be held in premises separate from inmates.

One of the main amendments regarding the Asylum Seekers' Benefits Act was the extension of the waiting period for applicants to access social benefits with additional three months. Individuals in centres were considered as constituting a 'community of destiny', presuming that they conduct common activities that allow them to save costs. Persons who have already been granted international protection in another EU Member

State, and whose obligation to leave the territory was enforceable, were excluded from all social benefits after a transition period of two weeks.

The Integration Act in 2016 has already emphasised the importance of integration, and presented important positive changes in the integration for asylum seekers and for persons whose deportation has been suspended. The Skilled Workers' Immigration Act of 2019 aimed to create a legislative framework for selective and increased immigration of skilled workers from third countries and to improve the integration of skilled non-European foreigners into the labour market. This concerned both to foreign citizens who have applied for asylum in Germany and to individuals applying for a work visa in a third country (Bathke, 2019). Skilled workers were considered university graduates and highly qualified workers from third countries outside of the EU who have a domestic, a recognized foreign, or an equivalent foreign university degree (skilled worker with academic background) or who have completed domestic or equivalent foreign qualified vocational training (skilled worker with training). The Act is in line with the demographic change and the shortage of skilled labour in some labour markets is gradually resurfacing as an alternative reference point, for which the political dynamics are different, since the general public and most political parties tend to support moderately generous entry rules. Moreover, there can be feedback loops between the rules on labour migration and the debate on asylum (Thym, 2019).

In connection with this, the Act on Temporary Suspension of Deportation for Training and Employment, on the other hand, was passed to provide certain foreigners with legal certainty regarding their residence status and create the prospect of a long-term stay but only for those whose deportation has been temporarily suspended.

4. CONFLICTS WITH EU POLICIES AND EU LAW?

As we saw in the above section, Germany tried to find its path to solve the crises internally that was generated by the permissive immigration policy of 2015. However, the policies and actions were inevitable connected to the EU policies and legislation as we shall see below. Although Germany has requested for hotspots established as a criterion for relocation, relocation numbers remained extremely low with only 272 people relocated from Greece and Italy in 2016 out of the 120,000 agreed obligation. This is partly due to the unwillingness of member states to put themselves forward for the challenge and partly due to flaws in the system (Dimitriadi, 2016).

During the crisis, asylum procedures were infamously lengthy and resulted in massive delays and quality deficits despite considerable efforts on the part of the federal asylum office to hire new staff and to increase efficiency. Moreover, swift asylum decisions are to be accompanied by more efficient return procedures, which is hardly surprising given that roughly half of all asylum applications are being rejected, if no protection status under German or European law is granted. As a result, there are more and more people in Germany which are obliged to leave the country, but do not do so, since German authorities are notoriously ineffective in complying with the EU law obligation for an effective return policy.

Because failure to carry out the obligation for deportations, the government focused on deportations which supposedly failed as a result of escaping. To improve the enforcement of the obligation to leave the country new legislation included increased powers for law enforcement authorities to access apartments for the purpose of deportation; new criteria to order detention based on an alleged risk of absconding, a new ground for detention to enforce the obligation to cooperate with the authorities' and the possibility to hold pre-removal detainees in regular prisons until June 2022. However, the

pre-removal detention place violates the Return Directive: instead, the necessary specialised institutions regular prisons can be used.

Family reunification of asylum seekers living in another Member State with family members in Germany pursuant to the provisions of the Dublin regulation constitutes another problematic issue for example in family reunification procedures with family members trying to join a beneficiary of protection in Germany. Also, the increase in the number of pending family reunification procedures, and waiting periods that can reach up to a year or more are problematic, especially in the case of unaccompanied children.

According to the provisions of the Law for Better Implementation of the Obligation to Leave the Country of 2017, people who pose a danger for life and limb of third parties can be more easily detained prior to deportation and be monitored through an electronic ankle bracelet and data can be exported from laptops and mobile phones to determine the identity and origin of the applicants. Critiques pointed out that all refugees coming to Germany were being treated like potential criminals and subjected to increasing disenfranchisement (ECRE, 2019b). In addition, everyday circumstances will serve as an indicator of a risk of absconding, such as the fact that a person has paid money to come to Germany or that they made false statements at some point, even if these have later been corrected. This is a blatant shift to the disadvantage of those affected and also contradicts the principle that detention should only be used as a last resort (ECRE, 2019a).

In 2018, the issue of “secondary movements” in the German government reached the EU level. Chancellor Angela Merkel preferred a “European solution” in cooperation with the other Member States based on agreements under Dublin III Regulation.¹¹ Article 36 allows that Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Germany concluded Administrative Arrangements with several countries for example with Greece and Spain. However, such an agreement presupposes the existence of (quasi) permanent border controls. Such controls are not only violating the main principle of the Schengen acquis the free movement within the Schengen area (Hruschka, 2019). We can say that it is rather a binding bilateral treaty establishing obligations that are not in line with the obligations established under the Dublin III Regulation, thus it violates EU law which does not allow national legislation or agreements concluded between states in policy areas of shared competence. In fact,

¹¹ Administrative arrangements:

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:

(a) exchanges of liaison officers;

(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants.

2. Member States may also maintain the administrative arrangements concluded under Regulation (EC) No 343/2003. To the extent that such arrangements are not compatible with this Regulation, the Member States concerned shall amend the arrangements in such a way as to eliminate any incompatibilities observed.

3. Before concluding or amending any arrangement referred to in paragraph 1(b), the Member States concerned shall consult the Commission as to the compatibility of the arrangement with this Regulation.

4. If the Commission considers the arrangements referred to in paragraph 1(b) to be incompatible with this Regulation, it shall, within a reasonable period, notify the Member States concerned. The Member States shall take all appropriate steps to amend the arrangement concerned within a reasonable time in such a way as to eliminate any incompatibilities observed.

5. Member States shall notify the Commission of all arrangements referred to in paragraph 1, and of any denunciation thereof, or amendment thereto.

through such agreements, Germany cooperates with Member States serving as a key point of entry in the EU by creating a "Quasi-Dublin" system creating obligations that go beyond the scope of the Dublin III and limitations that are not foreseen in the Regulation (Poularakis, 2018).

A major concern has been the recognition rates. Officials of the Federal Office for Migration and Refugees made the initial decision about asylum applications and one notices considerable differences if one extrapolates the decision to the 'länd' where they are made (Riedel and Schneider, 2017). The case officers are not only influenced by the credibility of individual requests but preferences and moods that prevail in the land guide their decisions thus decentralised decision making on asylum requests has in all likelihood a considerable discriminatory potential (Riedel and Schneider, 2017). Furthermore, the airport procedure in Germany was in contrast to the Asylum Procedures Directive: in practice e.g., asylum seekers have reduced procedures without comprehensible information and adequate interpretation, persons with disabilities are subjected to lengthy interviews with the BAMF without benefitting from adequate support guaranteed to them.

5. CONCLUSION

Although Germany is one of the most prominent advocate for harmonising several aspect of migration policy, with introducing e.g. the Skilled Immigration Act, the direction of not to leave migration policy reform to supranational harmonisation became clearer. Regarding the 2015 events and the later elections, it is clear that questions regarding social integration have increased significance. Immigration and its several elements was the single most important issue for the German population during the election and this could have played a role in the increasing of support for AfD. The German society is familiar with immigration but the sudden, huge number, and the culturally more distinct migrants from previous immigrants created a ground for anxieties. In the past, immigrants were from similar culture, and in the case of Turkish "Gastarbeiter", there were in the country for the purpose of work laid down in bilateral agreements. The welcome culture was strongly affected by the terror attacks, crimes made by immigrants, and the stabile sense of everyday security furthermore weakened with the arson attacks on refugee accommodations and anti-immigrant demonstrations. Most of the violent acts took place in the 'poorer' East Germany and there is a link between these events and the vote shares for extreme right and populist right-wing parties. Questions of national identity and the place of Islam got significance in the public discourse. On the other hand, the state steadily builds up the new direction of its migration policy and the focus is strongly on the liberal approach regarding the necessary migration of missing labour power.

The focus is more on restrictive measures and on the reduction of arrivals, welcoming skilled labour and on the integration of refugees. Germany is developing from a country that accommodated guest workers to a country with regulated immigration.

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