

The Borders of the *Rechtsstaat*

Migrant Exclusion and the Constitutional State in Post-Crisis Germany

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In memory of Matteo

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Abstract

Drawing on sixteen months of fieldwork within the migrant/refugee solidarity movement in Berlin, discourse analysis and doctrinal legal research, this thesis provides an empirically grounded account of the controversies surrounding the normative implications of the *Rechtsstaat* ideal with respect to the question of migrant exclusion in post-2015 Germany. The thesis' central argument is that these controversies were fuelled by, and therefore provide a window onto, a deeper clash between conflicting visions of justice in immigration and, more specifically, different conceptions of nationalism and cosmopolitanism. The specific and contingent vision of justice in immigration embedded in the post-war *Rechtsstaat*, I argue, is best understood as a form of moderate nationalism and/or moderate cosmopolitanism – a normative framework that places procedural and substantive constraints on the sovereign right to exclude migrants but does not fundamentally question that right and the underlying nation-statist order. Yet, many of those who participated in the politics of immigration and asylum in post-crisis Germany – including political leaders, bureaucrats, civil society actors and migrants/refugees themselves – embraced more “*radical*” conceptions of cosmopolitanism and nationalism that were not only irreconcilable with each other but also with the moderate strands of these two principles which the liberal-constitutional *Rechtsstaat* arduously tries to balance. In so doing, these actors effectively – if not always explicitly – challenged the very assumption that the *Rechtsstaat* constitutes a benchmark of political legitimacy in matters of migrant exclusion.

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List of abbreviations

AfD	<i>Alternative für Deutschland</i> (Alternative for Germany)
BAB	<i>Bürger*innen Asyl Berlin</i> (Civic Asylum Berlin)
BAMF	<i>Bundesamt für Migration und Flüchtlinge</i> (Federal Office for Migration and Refugees)
BfV	<i>Bundesamt für Verfassungsschutz</i> (Federal Office for Protection of the Constitution)
BMI	<i>Bundesministerium des Innern, für Bau und Heimat</i> (Federal Ministry of the Interior, Building and Community)
CDU	<i>Christlich Demokratische Union Deutschlands</i> (Christian Democratic Union of Germany)
CPT	European Council Committee for the Prevention of Torture
CJEU	Court of Justice of the European Union
CSU	<i>Christlich-Sozialen Union in Bayern</i> (Christian Social Union in Bavaria)
CFREU	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ECRE	European Council on Refugees and Exiles
IAM	<i>Informationsverbund Asyl & Migration</i> (Information Network Asylum and Migration)
JA	<i>Junge Alternative</i> (Young Alternative)
NSU	<i>Nationalsozialistische Untergrund</i> (National Socialist Underground)
PBL	<i>Personenbegleiter Luft</i> (aviation escort)

SPD *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany)

A note on translation

This thesis draws on many primary and secondary sources in German. Unless otherwise stated, all translations are my own.

The official English translations of the *Aufenthaltsgesetz* (Residence Act) and of the *Asylgesetz* (Asylum Act) provided by the Language Service of the Federal Ministry of the Interior are not up to date. The former only covers up to the amendments to the Act by Article 4b of the Act of 17 February 2020 and the latter the amendments to the Act by Article 2 of the Act of 11 March 2016. Both pieces of legislation were last amended on 9 July 2021, as reflected in the German version of the laws. While I relied on the official English translation of the laws whenever possible, the translations of the newest provisions are therefore also my own.

With respect to institutions such as courts and government departments, I have retained their German names, providing an English translation the first time they are mentioned. Certain German concepts that do not have an exact English equivalent, including specific administrative and policy categories, are also used in the main text, accompanied by an explanation in the footnotes.

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1. INTRODUCTION

I. The Ellwangen affair

30 April 2018, 2:30AM. The deep silence surrounding the asylum reception centre at the outskirts of Ellwangen, a sleepy town of 27,000 inhabitants in the southern German *Land* (federated state) state of Baden-Württemberg,¹ is suddenly disturbed by the arrival of two police cars. The four officers who step out of the vehicles have been entrusted with the task of picking up a 23 years-old Togolese asylum seeker awaiting “transfer” to Italy in accordance with the Dublin Regulation.² The officers enter the reception centre, apprehend the young man in his room, accord him some time to pack his belongings, and bring him – in handcuffs – back to the parking lot. What happens next remains hotly contested. In a press conference on May 3rd, local Police Vice-President Bernard Weber claims that the operation was ‘very massively hindered – indeed, violently hindered – by 150 to 200 black African refugees’, whose threatening behaviour led his subordinates to release the deportee and beat a retreat. Referring to the existence of ‘structures’ among the inhabitants of the centre ‘whose aim is to thwart the implementation of administrative decisions’, Weber warns of ‘the danger that [...] a lawless space (*rechtsfreies Raum*) will emerge’ (SWR Aktuell 2018). In their own press conference on May 9th, the inhabitants of the centre tell a rather different story. As one of them puts it, ‘the news going out about us is not quite true [...] We, the people living in this camp, are not violent. We are not bad people’ (Beobachter News 2018). But we are getting ahead of ourselves.

¹ The Federal Republic of Germany is a federal state comprising sixteen *Länder* (federated states). The cities of Berlin, Bremen and Hamburg are *Länder* in their own right. The German term *Länder* is retained throughout the text, but the English names of the *Länder* are used.

² As we shall see in more detail in chapter 3, the Dublin Regulation is a piece of European Union (EU) legislation that regulates which of its Member States is responsible for processing any given asylum application lodged within its territory, as well as the procedures to be followed when one Member State intends to “transfer” (i.e. deport) an applicant back to the responsible one.

3 May 2018, 5:15AM. Having closed off to the traffic the area surrounding the reception centre, ‘hundreds of heavily armed and balaclavaed police officers, including special force units’, storm into the reception centre (Jacob 2018). ‘Screams can be heard, [police] dogs bark’ (Völkerling and Baumann 2018). Throughout the rest of the morning, ambulances leave the centre again and again, sometimes escorted by the police (*ibid*). Reporters witness several inhabitants of the centre being brought in handcuffs to an adjacent hall that has apparently been turned into a pre-charge detention centre for the occasion (*ibid*). In the early afternoon, four police officers (including Weber), the centre chief manager, and a Red Cross spokesperson give a first bulletin of the operation (SWR Aktuell 2018). The Togolese asylum seeker whose deportation was thwarted three days earlier has been apprehended and brought into custody. Seven inhabitants of the centre have been charged with narcotics- and/or property-related offences, and another twenty-seven may be charged with resistance against a public official. Some fifteen asylum seekers will be relocated to other reception centres ‘in order to permanently clip presumed or existing structures’ (*ibid*). Three inhabitants of the centre have been hospitalised as a result of the injuries they sustained after attempting to flee by jumping out of the building’s first-floor windows (*ibid*). Another eight have been aided on site due to contusions, nausea, hyperventilation and other stress-related conditions (*ibid*). A police officer who injured himself is under observation in hospital (*ibid*).

At 9AM on the same day, as the raid in Ellwangen is still in full swing, another press conference starts. It is Horst Seehofer’s first since taking the helm of the Ministry of Interior – or, as he controversially chose to rename it, ‘Interior, Building and *Heimat*’.³ The pre-planned event primarily constitutes an occasion to draw up a balance sheet of his first six

³ Roughly translatable as “homeland”, the term “*Heimat*” has in the last decades ‘served as a battle cry for right-wing populists and extremists’ (Aghoobifarah und Aydemir 2019: 1). To take one example, ‘the three members of the NSU [Nationalist Socialist Underground] core trio belonged to a militant neo-Nazi organisation that was called “*Turingian Heimat Defence*”, before they roamed across the country to kill at least nine migrants and a police officer’ (*ibid*: 1).

weeks in office and lay out his vision for the future, including plans to restrict access to family reunification for beneficiaries of “subsidiary protection”, expand Germany’s list of “safe countries of origin”, and establish so-called “AnKER” (an acronym for “arrival, decision and return”) centres to facilitate the implementation of deportations – all of which will duly become law. However, the Minister does not miss out on the opportunity to convey his stance on the events in Ellwangen. ‘What happened there’, he states with a grave expression, is ‘an outrageous state of affairs’ and ‘a slap in the face of the law-abiding population’ (Welt 2018a). For ‘the right to hospitality (*Gastrecht*) cannot be trampled on in such a way’ and ‘[s]uch things must be prosecuted with utmost severity and consistency’ (*ibid*). Presented by the media as the highlight of the press conference, Seehofer’s condemnation of “what happened in Ellwangen” is soon overtaken by a raft of even more shrill statements, in which the notion of “*Rechtsstaat*” – an expression that ‘literally means “law-state”’⁴ but can also be translated as “rule of law” or “constitutional state”” (Rehg 2009: XXXV)⁵ – comes to play a prominent role.

The charge is led by prominent figures within Seehofer’s own Christian Social Union in Bavaria (CSU) and the Alternative for Germany (AfD) – both of which, as we shall see, have relentlessly lambasted Chancellor Merkel’s handling of the so-called “migrant/refugee crisis”

⁶ of 2015-2016, when more than a million asylum applications were lodged in Germany.⁷

According to AfD leader Alice Weidel, for instance,

⁴ MacCormick (1996: 557) opts for this literal translation. Other translations that remain close to the literal meaning of the German expression include: ‘legal state’ (Kirste 2014), ‘lawful state’ (Heuschling 2021: 68), ‘state of law’ and ‘law-governed state’ (Krygier 2014: 47). As noted by Pirie (2013: 18), in contrast to “*Gesetz*” and in parallel to the difference between “*loi*” and “*droit*” in French (and similar distinctions in many other languages), “*Recht*” carries a strong connotation of justice (in German: “*Gerechtigkeit*”).

⁵ Cf. Adams *et al.*’s (2017: 4) point that ‘the terms constitutionalism and rule of law are often used interchangeably’ and ‘[b]oth [...] play a role in efforts to translate the German [...] concept of the *Rechtsstaat*’. The relationship between these concepts is further discussed in the following section.

⁶ As I shall explain in chapter 2, the so-called “migrant/refugee crisis” is in fact best understood as a ‘crisis of the European migration and asylum regime’ (Pastore and Henry 2016).

⁷ According to the *Bundesamt für Migration und Flüchtlinge* (Federal Office for Migration and Refugees, henceforth BAMF), the number of (first and follow-up) asylum applications was 476.649 in 2015 (BAMF 2016: 2) and 722.370 in 2016 (BAMF 2018), breaking the previous all-time peak (i.e. 438,200 applications in 1992 [BAMF 2016: 8]) for two years in a row.

‘In order to restore the authority of the *Rechtsstaat*, it is not only necessary that the arrested Togolese be promptly deported, but also that all the attackers who have opposed resistance be identified and arrested. Their residence permit must be immediately terminated. Those who attack the state and their representatives forfeit their right to hospitality’ (Junge Freiheit 2018).

The head of the CSU parliamentary group Alexander Dobrindt, whose party’s prospects of retaining its majority in the upcoming Bavarian state elections seem threatened by the AfD, does not mince words either. ‘It is not acceptable’, he tells the tabloid *Bild am Sonntag* on two separate occasions, ‘that the efforts of the *Rechtsstaat* are deliberately sabotaged, and ulterior danger to the public provoked, by an aggressive anti-deportation industry’ (Braun 2018) – ‘an unspeakable alliance of violent ideologues and particular interests (*Zwangsideologen und Partikularinteressen*) that tries to prevent deportations and to sabotage the enforcement of the *Rechtsstaat* through waves of lawsuits’ (Welt 2018b). The leader of the Free Democratic Party (FDP) Christian Lindner also declares: ‘[t]he *Rechtsstaat* cannot let itself be deterred by a mob that wants to hinder deportations’ (Focus 2018).

To be sure, such shrill pronouncements do not go unchallenged. Attempting to dampen the incendiary rhetoric, for example, Federal President Frank-Walter Steinmeier stigmatises the behaviour of the asylum seekers as ‘unacceptable’, but also underlines that ‘[w]e are not faced with a failure (*Scheitern*) or a collapse (*Versagen*) of the *Rechtsstaat*, and we should not talk citizens into believing this day in and day out’ (Süddeutsche Zeitung 2018). Others insist on the contrary that a failure of the *Rechtsstaat* did take place in Ellwangen but locate it in the political and law-enforcement overreaction to the initial incident. A member of a local “refugee welcome” initiative, for instance, chastises the second police operation as ‘disproportionate’ (Handelsblatt 2018) – an accusation that will later be cast in the form of a lawsuit by the lawyer of the Togolese asylum seeker (Mfouapon 2018), and vindicated by the competent *Verwaltungsgericht* (Administrative Court) in February 2021 (Welt 2021). The suggestion that the asylum seekers involved in the first confrontation with the police had forfeited their “right to hospitality” is also rebuked by several other commentators for

obfuscating that the ‘right to asylum’ is ‘anchored in the constitution’ and cannot be summarily revoked (Utlu 2018; Pichl 2018). Emphasising that ‘the possibility of judicial review of administrative decisions is a central element of the *Rechtsstaat*’, several critics additionally contend that Dobrindt’s “anti-deportation industry” remark betrays a ‘pre-constitutional conception of the state’ and boils down to a call for ‘a state-sanctioned breach of the constitution’ (Republikanischer Anwältinnen- und Anwälteverein 2018).⁸

Finally, while the debate about what the *Rechtsstaat* demands rages on, a few voices here and there appear to suggest that this might not be the most salient issue raised by the events of Ellwangen. Thus, asked by a journalist whether she considers it acceptable for ‘refugees [to] place themselves above the applicable law’, the spokesperson on migration issues for the *Linke* (Left party) Gökay Akbulut at first replies that she does not think that ‘these people generally have a problem with the *Rechtsstaat*’, but rather that they ‘acted on the basis of their concrete situation’ (Lehmann 2018). Pressed to clarify whether she ‘deem[s] their reaction legitimate’, however, Akbulut’s makes the much more “radical” claim that ‘[e]very form of solidarity that does not involve violence is legitimate’ (*ibid*). In her view, ‘[w]hat failed is above all the Dublin system’ (*ibid*). ‘As a leftist’, she says, ‘I am generally against deportations’ because ‘[i]t is inhumane to drive families out of their homes at three in the morning’ and to push those who ‘try to go underground (*untertauchen*) [...] into illegality’ (*ibid*). ‘What’s the alternative’, the journalist probes once again, ‘should all of those who have been rejected be allowed to stay nonetheless?’ Akbulut’s reply is quite unambiguous: ‘Precisely. We [...] are for a right to stay (*Bleiberecht*) for everyone’ (*ibid*). Meanwhile on social media, hundreds of

⁸ The expression “anti-deportation industry” will later be chosen as “ugly neologism (*Unwort*) of the year” – an ironic award handed out since 1991 by an independent civil society committee composed of four linguists and a journalist – for insinuating that those who provide legal assistance to rejected asylum seekers do so out of pure economic self-interest, as well as for suggesting that ‘asylum recipients are a mere product’ of this and, thus, ‘ridicul[ing] the applicable law, which is the basis of our community of value’ (Süddeutsche Zeitung 2019).

people proudly declare to be part of the “anti-deportation industry”, effectively reclaiming Dobrindt’s epithet as a badge of honour (Hillebrand 2018).

II. The borders of the *Rechtsstaat*

When I first read about Ellwangen in the news, I was nearing the end of my first year of PhD and getting ready to start researching what I called in my proposal ‘the (dis)functioning of the Dublin system’.⁹ While the Dublin Regulation remains in many ways central to the story told in this thesis, by the fall of 2018 – that is, five months into my fieldwork – its central object of study had shifted to what I eventually came to conceptualise as ‘the borders of the *Rechtsstaat*’ (Slobodian 2013).¹⁰ In order to start unpacking this expression, this section proceeds as follows. First, since both the notion of “borders” and the concept of “*Rechtsstaat*” can be understood in many different ways, I provide a few preliminary remarks about how each of them will be used in this thesis and which aspects of them I will foreground. Second, I suggest that “the border” constitutes a uniquely intriguing site from which to explore the contestations surrounding the *Rechtsstaat*. Third, I discuss in more detail the two serendipitous fieldwork realisations that led me to shift my analytical focus onto this subject. Fourth, I conclude by providing a concise statement of the central argument of this thesis. While some readers may be used to read the latter first, my choice of presentation follows anthropologist Timothy Pachyrat’s (2018: 84) plea for ‘leaving up as much of the scaffolding in the finished ethnography as possible, to avoid [a] kind of immaculate conception fantasy of how the research question evolves’.

⁹ On this subject, see Brekke and Brochmann (2015), Kasparek (2016a), Picozza (2017), Schuster (2011) and Wyss (2019).

¹⁰ The expression is borrowed from the title of Slobodian’s (2013) article, which chronicles the legal and political contestations surrounding the deportation of close to two hundred legal Arab residents from West German territory in the wake of the fatal hostage taking by the Palestinian terrorist group Black September at the 1972 Munich Olympics.

As shown by Hess (2018: 85), over the last two decades or so, ‘how to conceptualize ‘the border’ and how to make sense of its role and function’ have become a major preoccupation for migration studies (and beyond). While I cannot do justice to this vibrant debate here, what I take away from it is the key idea that, rather than as ‘a demarcation line surrounding national territory’, the border is more productively viewed as a ‘ubiquitous, techno-social, deterritorialized apparatus’ that ‘question[s] and sometimes even remov[es] the civic status that people had at the moment of their crossing by delegitimizing the cross-border mobility as illegal or irregular’ and creating ‘new hierarchies of people’ through ‘differential inclusion’ and ‘civic stratification’ (*ibid.*: 88-89).¹¹ Crucially, this apparatus is ‘enact[ed]’ – that is, produced, sustained, but also contested and transformed – by the ‘everyday micropractices’ of a multitude of different actors, including ‘politicians, border guards, journalists, academics, judges, NGO staff’ and, of course, migrants/refugees¹² themselves (*ibid.*: 92-93). Equally crucially, however, borders ‘require laws [...] to be enacted [...] in the first place’ (*ibid.*: 87). Indeed, as many critical migration scholars have emphasised, ‘[m]igrant “illegality” is produced as an effect of the law’ and ‘a viable critical scholarship [on this subject] is frankly unthinkable without an informed interrogation of immigration law’ (De Genova 2002: 431).

As for the notion of *Rechtsstaat*, some scholars maintain that ‘it is a term peculiar to the German-speaking world’ and that the rule of law ‘is not in substance a parallel concept’

¹¹ On the notion of “differential inclusion”, see Mezzadra and Neilson (2013). On “civic stratification”, see Morris (2002).

¹² In speaking of “migrants/refugees”, I intend to problematise the widespread assumption that the two categories can be neatly separated (cf. Crawley and Skleparis 2018; Zimmermann 2011). Firstly, insofar as being outside one’s country of nationality is a constitutive element of the legal definition of “refugee” enshrined in Article 1 of the Convention relating to the Status of Refugees, all refugees are migrants. Secondly, and more importantly, until and unless an “adequate” refugee status determination procedure is carried out, there is simply no basis to rule out the possibility that someone is a refugee (i.e. someone who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’). Importantly, ‘[t]he distinction between an economic migrant and a refugee is [...] sometimes blurred’ because ‘[b]ehind economic measures affecting a person’s livelihood there may be racial, religious or political aims or intentions directed against a particular group’ (UNHCR 2019: 22).

(Böckenförde 1991: 48).¹³ In contrast to this, this thesis starts from the premise that, '[d]espite significant – national, cultural and institutional – differences', these two 'ideals' display a close 'affinity' (Frankenberg 2013: 57; cf. Grote 2014; Kirste 2014; MacCormick 1984). At bottom, the 'common denominator' between these 'political as well as legal concepts' is the aspiration 'to legally establish an authoritative and limited government as the normal state of being' (*ibid.* 57). The connection between "authoritative" and "limited" here is crucial: insofar as these ideals purport to 'limit [rulers'] functions and powers' in such a way as to 'avert arbitrary [and] unlawful interventions', they *also* 'legitimize rule' and 'lend rulers authority' (*ibid.* 57; cf. Krygier 2019). Given their 'legitimizing cachet' (Ohnesorge 2007: 109) and 'immense ideological power' (Meier 2019: 1072),¹⁴ however, the precise normative constraints that the *Rechtsstaat*/rule of law places on the exercise of political power are unsurprisingly extremely contested (Loughlin 2010: 312-314, MacCormick 1984: 66). While several scholars have even considered 'the abandonment of these concepts altogether in favour of a less-charged investigation into the nature of the relationship between state, constitution, governing, and law', most of them have ultimately concluded that this is not possible because of their sheer 'ubiquity' (Loughlin 2010: 315; cf. Shklar 1987: 1).

The border (broadly understood) is an area where disagreement about the concrete normative implications of the *Rechtsstaat* is particularly evident (cf. Motomura 2008: 147). As the chief editor of the *Verfassungsblog – On Constitutional Matters*, Maximilian Steinbeis (2018a),

¹³ While Böckenförde did not elaborate on this claim, several scholars have underlined that, unlike the rule of law, the *Rechtsstaat* takes the state as its grammatical and ontological subject (Krygier 2014: 47; MacCormick 1986: 86) While 'the greater emphasis that the German tradition places on the state' (Rehg 2009: XXXV) is undeniable, however, the contemporary (i.e. post-World War II) conception of *Rechtsstaat* emphasises the fulfilment of 'supreme constitutional demands', notably including respect for 'fundamental rights' (Kirste 2014: 35; cf. Krygier 2014: 52). More specifically, as we shall see in chapter 2, 'the concept of *Rechtsstaat* has become absorbed to a large extent by the "constitutional state", [...] with its heavy emphasis on the substantive principles of human dignity, democracy, social justice and fundamental rights' (Grote 2014: 201).

¹⁴ While the claim that the rule of law is 'the preeminent legitimating political ideal in the world today' (Tamanaha 2004: 4; emphasis in original) is exaggerated, the fact that it is 'a benchmark of political legitimacy' (Waldron 2009: 1) and 'a legitimation formula of modern politics' (Příbáň 2020: 115) seems to me undisputable.

asked in a commentary on the highly discordant reactions to the Ellwangen affair, is the *Rechtsstaat* ‘what enables us in here to keep those out there at bay’, as numerous ‘security officials, conservative MPs and [right-wing] editorialists’ vociferously asserted, or is it ‘rather what demands that we [...] keep their rights in mind’, as migrant/refugee advocates equally vigorously retorted (Steinbeis 2018a)? When I first read this question, it struck me as purely rhetorical. Of course, I thought, the *Rechtsstaat* demands respect for the rights of “those out there”! For the point of the *Rechtsstaat* is precisely that ‘the power of the state is constrained by law, right?’ (*ibid*) And surely, I thought, in ‘an age of rights’ where ‘[t]he universal discourse of human rights introduces personhood as the basis of entitlement to equal rights’ (Gündoğdu 2015: 124), “those out there” – undeniably being human – also have rights, do they not? After all, ‘[e]xpecting law-abidance, but denying rights – does that fit together?’ (Steinbeis 2018a) To explain how these seemingly rhetorical interrogatives became the central research questions of this thesis, I must go back to two divergent epiphanies that I had during those first five months of fieldwork.

On the one hand, what I realised by closely following the political debates in the news was that, rather than a mere one-off performance, the exclusionary ‘hymn to the *Rechtsstaat*’ (*ibid*) intoned by conservative MPs, security officials and right-wing editorialists in response to the events of Ellwangen was a central leitmotif of the heated debate on immigration – ‘the ultimate “wedge” issue of German politics’ ever since the “crisis” of 2015-2016 (Dostal 2017: 591). By the time I started my fieldwork, several commentators were pointing to this discourse as a serious cause for concern. In another commentary on the Ellwangen affair, for instance, legal scholar Maximilian Pichl (2018) alarmingly suggested that ‘Dobrindt and his audience’s conception of the *Rechtsstaat* is deeply authoritarian: it reduces the *Rechtsstaat* to a law-and-order enforcement machine (*Law&Order-Anwendungsmaschine*) and thereby suspends subjective rights’. And, if that wasn’t enough, sitting *Bundesverfassungsgericht* (Federal

Constitutional Court) judge Suzanne Baer (2018: 351-352) similarly warned that the conception of *Rechtsstaat* deployed by what she referred to as the ‘populist nationalists’ had ‘nothing to do with the rule of law in its constitutional sense’, but represented instead an ‘unfriendly takeover’ – an attempt to ‘occupy’ this hallowed ideal in order to ‘in fact destroy’ it. When no less than a mouthpiece of the constitution passionately exhorted everyone to ‘rise for the rule of law, stand up for human rights, and call for constitutionalism’ (*ibid.*: 367) and singled out the field of immigration as a key area of struggle, the subject seemed to me well worthy of further investigation.

As for the second realisation that led me to shift my analytical gaze onto the *Rechtsstaat*, it emerged out what I learnt during those first five months of fieldwork within the Berlin migrant/refugee “solidarity movement”¹⁵ – a loose network of actors who strive to provide legal, social, economic and political support to migrants/refugees regardless of their legal status (Baban and Rygiel 2017; Bhimji 2020; Fontanari and Ambrosini 2018), within which I had already been active the previous summer. While the nature of my fieldwork and my positionality are discussed in section IV, what I learnt was essentially that “keeping those out there at bay” and “keeping their rights in mind” were not as antithetical as I had initially assumed. For many of the migrants/refugees I met ‘venture[d] to claim rights that they [were] not entitled to within the scope of existing domestic and international laws’ (Gündoğdu 2015: 118). Above all, existing laws did *not* recognise a ‘right to stay for everyone’, but only ‘exceptional’ duties to admit migrants who can ‘invoke a special preferred status’ (Schotel 2012: 12).¹⁶ And lack of “a right to stay” in turn begot exclusion from many other supposedly

¹⁵ While the notion of “solidarity” is extensively explored in chapter 6, suffice here to say that it is routinely used by ‘anti-racist and no-border activists’ to denote forms of support toward migrants/refugees that are ‘antagonistic to the state’, often in opposition to forms of ‘humanitarian charity or helping’ that are perceived to be more ‘neutral to, or collaborative with, the state’ (Picozza 2021: 43; cf. Herrmann 2020: 209).

¹⁶ Following Schotel (2012: 12), I will use this expression to refer to ‘migrants with a right to admission (e.g. a refugee [*sensu lato*], family member of permanent resident, nationals of a party to a bi-lateral (labor) migration treaty [and EU citizens])’. Schotel uses the expression in contraposition to the notion of ‘normal migrants’ in order to emphasise that migrants lacking a preferred special status and, thus, a right to admission ‘constitute

human/fundamental rights that were in fact reserved for citizens and “lawfully staying” foreigners. Insofar as it upheld and legitimised these forms of exclusion, then, affected migrants/refugees and their supporters *did* (pace Abkulut) ‘have a problem with the *Rechtsstaat*. After all, ‘expecting law-abidance, but denying rights – does that fit together?’

Building on Motomura’s (2008: 144) point that ‘the way we think about the rule of law in immigration law is very much tied up with how we think about justice in immigration’, this thesis provides an empirically grounded account of the competing visions of *Rechtsstaat* and of justice that animated Germany’s post-crisis immigration politics. The thesis’ central argument is that these conflicts were fuelled by what political scholar Seyla Benhabib (2004: 18-19) refers to as the ‘tension’ between two ‘indispensable foundations of the democratic constitutional state’, namely, cosmopolitanism (‘expansive and inclusionary principles of moral and political universalism’) and nationalism (‘particularistic and exclusionary conceptions of democratic closure’). As Benhabib rightly notes, ‘modern constitutional democracies are based upon the faith that these two commitments can be used to limit one another’ (*ibid.* 19; cf. Walker 2019), and several political theorists agree with her that “*moderate*” conceptions of cosmopolitanism and nationalism are indeed quite compatible (Kymlicka 2006; Lenard and Moore 2012; Miller 2002; Tan 2004). Yet, many of those who participated in the politics of immigration and asylum in post-crisis Germany – including political leaders, bureaucrats, civil society actors and migrants/refugees themselves – embraced “*radical*” conceptions of cosmopolitanism and nationalism that were not only irreconcilable with each other but also with the moderate understandings of these two principles which the liberal-constitutional *Rechtsstaat* arduously tries to balance. In so doing,

the largest group of migrants seeking admission’ (*ibid.* 12). We shall return to this crucial point in chapter 2 (section V).

these actors effectively – if not always explicitly – challenged the *Rechtsstaat*'s status as a 'benchmark of political legitimacy' (Waldron 2009: 1) in matters of migrant exclusion.

III. Contributions to the existing literature

Most of the existing empirical literature on the *Rechtsstaat*/rule of law and immigration, almost all of which has been written by either lawyers or political scientists, adopts what sociologist Marc Hertogh (2004: 87-88) calls a 'top-down perspective', one that 'takes the official definition of the *Rechtsstaat* [or the rule of law] – as it is discussed and agreed upon among most lawyers – as its central reference point to study legal reality' and 'is primarily interested in measuring the impact of the *Rechtsstaat* on the actions of government officials' and in identifying 'gaps' between ideal and (border control) practice(s) (e.g. Bohman 2009, Ellermann 2014, Huber, B. 2015, Kerwin 2013, Kneebone 2008, Mitsilegas 2015, Pickering and Weber 2012, Rijpma and Cremona 2007, Schotel 2013, Slingenberg 2020). Reflecting the lack of consensus about the definition of the *Rechtsstaat*/rule of law among lawyers themselves, the way this ideal is conceptualised in these studies varies quite considerably,¹⁷ but all of them portray it as something that, in one way or another, 'supports [...] the extension of rights and legal protections' (Kerwin 2013: 327) and, thus, a key 'source of openness toward immigration' (Hampshire 2013: 13, with respect to "constitutionalism"). While the specific pieces of legislation and/or actual migration control practices examined in these studies also vary, the basic conclusion that they reach is invariably that '[t]he border [...] is an area where the rule of law has had difficulty finding root' and 'where we might hope for it to grow' (Lister 2018: 3).

¹⁷ Schotel (2013: 65), for example, focuses on the rather minimalist – if 'uncontroversial and obvious' – aspect of 'rule through law', i.e. that 'the central tool of governmental action should be legal instrument', whereas Bohman (2009: 547) goes so far as to claim that the rule of law requires 'a shared and universal status for all legal subjects'.

Identifying gaps between ideal and reality is a crucial task, which this thesis also takes up. However, the aforementioned studies suffer in my view from one major limitation, namely, they fail to properly acknowledge just how contested the notion of *Rechtsstaat*/rule of law is when the border is at stake. Some authors do mention in passing that ‘the notion “rule of law” may mean many things’ (Schotel 2013: 65) and some also note that, in the field of immigration law and policy, (self-declared) ‘[r]ule-of-law proponents typically equate this ancient concept with law and order and the imperative to obey and enforce the law, whatever its content’ (Kerwin 2013: 327). Yet, the ‘struggle between competing visions of the rule of law in immigration law’ (Motomura 2008: 147) – and the way in which this struggle is ‘tied up’ with different ways of thinking about ‘justice in immigration’ (*ibid.*: 144) – remain, all in all, at the margins of the discussion. The problem with this is not only that such struggle is ‘a key feature of current debates about immigration law’ (*ibid.*: 147), but also that this conflict points in turn to the *inherent* ‘tensions, contradictions, and negotiations that take place within the overall assemblage of rule-of-law elements’ when it comes to migrants/refugees whose ‘legal status is [...] fragmented and temporarily unstable’ (Vetters *et al.* 2017: 32).

To be sure, the struggles, tensions, contradictions and negotiations surrounding the borders of the *Rechtsstaat* have not gone entirely unnoticed. As already mentioned in the previous section, political scholar Seyla Benhabib (2004) takes the constitutional state’s conflicting commitments to nationalism and cosmopolitanism as the very starting point of her cosmopolitan theory of justice. Legal scholar Catherine Dauvergne (2004: 615) underlines that, to ‘allow the global inequities of migration to receive new scrutiny’, the rule of law would have to ‘become unhinged from the nation and its sovereignty’ – a prospect that she deems ‘so breath-taking [that] it is worth considering imaginatively and fostering through advocacy, even if its theoretical supports remain shaky’. Political scholar Matthew Lister (2018: 2) contends that ‘the problem of the border’ is ‘whether and how the rule of law can

be applied, in any consistent way, to people who are not part of the political community in question'. And anthropologist Nicole Newendorp (2011: 102) argues that, for recently arrived (mainland Chinese) migrants (in Hong Kong), the rule of law acts both 'as a vehicle of belonging' and 'as a vehicle of oppression'. Since, as we shall see in the following chapter, the post-war conception of the *Rechtsstaat* is characterised by 'a strong commitment to fundamental rights' (Krygier 2014: 52), scholarship on the internal limits and contradictions of human rights in the realm of migration will also prove very relevant to this thesis (Bosniak 2011; Dembour and Kelly 2011; Gündoğdu 2015).

While inspired and informed by these theoretical interventions, this thesis seeks to further develop them through a distinctively 'bottom-up perspective' (Hertogh 2004, 2016), one that is centred on 'what [...] people themselves consider important values with regard to [...] the law and the state' (Hertogh 2013: 5). Recent studies of migrant protest and resistance in Europe have found that migrants/refugees who 'find themselves on the wrong side of the law' alternatively – or, indeed, simultaneously – invoke 'a cosmopolitanism of law and human rights, which merely argues that all migrants should be treated with dignity' and/or mobilise 'a more radical cosmopolitanism, based on [...] freedom of movement for all and possibly claims about the need to thoroughly rethink citizenship' (Mégret 2019: 30-32; cf. Caraus 2019, Hinger *et al.* 2018, Koukouzellis 2018, Odugbesan and Schwiertz 2018). Studies of migrant/refugee supporters similarly underline that these actors alternatively – or, again, simultaneously – denounce the law's role in the production of migrant illegality and exclusion and/or mobilise 'the legal vocabulary of rights' to contest this state of affairs (Paris 2019: 238; cf. Hermann 2020, Vergnano 2020). Lastly, recent research on "street-level" migration control agents points to how these actors 'neutralize potentially disruptive affective dynamics by experiencing them as intrinsic to the law they implement' (Kalir 2019: 68; cf. Eule *et al.* 2018, Fassin 2015, Gill 2017). While these findings raise intriguing questions about the

sociological significance of the *Rechtsstaat*/rule of law within the field of immigration law, none of these studies pursues this line of enquiry.

In doing so, this thesis also contributes to what anthropologist Nick Cheesman (2018: 168-169) has characterised as ‘a kind of social scientific inquiry that does not quite yet exist’, namely: ‘interpretive and ethnographically informed social scientific work on the rule of law’. As Cheesman and others have rightly underlined, the prevalence of the top-down approach and its inherent lack of attention to how this ideal is ‘claimed, used, protected and fought over’ in actual social interaction constitutes indeed a major limitation of the literature on the rule of law/*Rechtsstaat* as a whole (*ibid.* 169; cf. Krygier 2009, 2016; Hertogh 2004, 2013, 2016). The major limitation being that law can only properly be said to rule if it actually ‘counts significantly, distinct and even in competition with other sources of influence, in the thoughts and behaviour – the normative economy – of significant sectors of a society’ (Krygier 2009: 65). In order to gauge whether the *Rechtsstaat* (and the “liberal”, “constitutional” conception of it in particular) really is as ‘hegemonic’ (Cheesman 2018: 169) as it is often said to be, then, it is necessary to consider how it fares vis-à-vis ‘rival political ideals’ that ‘make systematically different demands of the law’ (Krygier 2017: 24) – including rivals that, as Cheesman (2017: 32) has argued with respect to “law and order”, ‘oppose it by subsuming it, [...] hollowing it out semantically while replicating its verbiage’.

While I agree with Cheesman (2018: 169) that an ‘interpretive and ethnographically informed’ approach to the study of the rule of law can breathe ‘new life into old concerns’, the relatively small body of scholarship that has so far followed this approach (Cheesman 2015; Chalmers 2017; Hertogh 2006, 2016; Massoud 2013; Meierhenrich 2018; Newendorp 2011; Rajah 2012) presents in my view two main limitations. Firstly, while the above-mentioned studies must be praised for paying close attention to the ‘values and norms that dominate life itself’ (Hertogh 2004: 86), many of them fail to adequately theorise the relationship between such

values and norms and the (contextually relevant) legal-philosophical understanding of the rule of law/*Rechtsstaat*.¹⁸ Since the immense ideological power of this ideal renders it inherently prone to ‘distortion’ (Cheesman 2015: 25), this seems to me a serious shortcoming. Secondly, of all the above-mentioned studies, only one (Hertogh 2004) has so far looked at the kind of contemporary ‘Western liberal democracies’ that are typically portrayed as ‘strong legal orders’ in which ‘rule of law values’ are ‘deeply entrenched’ and ‘have exhibited considerable resilience and capacity to resist attempts to erode them’ (Krygier 2011: 96-97). Turning the ethnographic lens to the *Heimat* of the *Rechtsstaat* offers an opportunity to examine the extent to and the ways in which, when it comes to the subject of migrant exclusion, such supposedly strong legal orders really differ (or not) from the “fragile”, “transitioning”, “hybrid” or downright “authoritarian” contexts that have been studied so far.¹⁹

IV. Methodology

As already anticipated in section II, this thesis is mostly based on sixteen months (June 2018–October 2019) of ethnographic fieldwork within the Berlin refugee/migrant-solidarity network. While the notion of “ethnography” is in fact quite controversial (Hammersley 2018), I use the term here to connote a method – or, rather, a set of multiple methods – that involves at least ‘some degree of participant observation in a chosen research setting’, but also ‘draw[s] on documents, conversations, interviews, visual and material materials, and indeed any significant aspects of the culture in question’ (Delamont and Atkinson 2019: 120). In line with this, my fieldwork in Berlin included immersive, long-term participant-observation within two grassroots refugee/migrant-solidarity organisations, one of which

¹⁸ Meierhenrich’s (2018: 225) notion of ‘authoritarian rule of law’, for example, is arguably ‘oxymoronic’ (Cheesman 2017: 31). Hertogh (2004: 86) even goes so far as to claim that ‘all the values and norms that dominate life itself’ should be treated as a valid ‘social definition’ of the *Rechtsstaat*.

¹⁹ The above-mentioned “rule-of-law ethnographies” are located in Myanmar (Cheesman 2015), Liberia (Chalmers 2017), Sudan (Massoud 2013), Nazi Germany (Meierhenrich 2018), Hong Kong (Newendorp 2011), and Singapore (Rajah 2012).

will not be named for reasons of confidentiality, whereas the other one – an anti-deportation initiative called *Bürger*innen Asyl Berlin* (Civic Asylum Berlin) – will be extensively discussed in chapter 6. Being an active member of these groups enabled me to interact with dozens of migrants/refugees and supporters and to forge long-term relationships of mutual trust, reciprocity and friendship with some of them. In terms of actual data, the handwritten notes that I collected during my fieldwork interactions and typed up on my laptop at the end of each day added up to 214 single-spaced pages, covering countless conversations about my interlocutors' socio-legal predicaments, aspirations and demands, as well as their – or, insofar as I was myself an active participant, our – encounters with each other, legal professionals (lawyers; legal counsellors), and street-level migration control agents (police; asylum authorities).

While participant-observation is widely viewed as '*the* core of ethnography' (Hammersley 2018: 8; emphasis in original),²⁰ several scholars have rightly underlined that it presents two major limitations, both of which I have had to grapple with in my research. The first is that long-term immersion within a tightly circumscribed social setting only provides a very narrow and partial view onto diffuse socio-political processes unfolding across different sites and scales and partly consisting of fleeting encounters – or, indeed, indirect and mediated forms of interaction – that do not lend themselves to direct observation (Andersson 2017; Feldman 2011; Marcus 1995; Xiang 2013).²¹ The second, and partly related, problem is that 'participant observation is a research technique that does not travel well up the social structure [...] where ethnographic access is by permission of people with careers at stake, where loitering strangers

²⁰ For a critique of the widespread tendency to conflate ethnography with participant-observation, see Feldman (2011) and Hockey and Forsay (2012).

²¹ While 'multi-sited ethnography' (Marcus 1995) was born as a response to precisely this problem, various scholars have noted that, insofar as it remains wedded to the classic 'anthropological/ethnographic ideal of immersion and "being there"', and indeed requires "'being there ... and there ... and there!'", 'multi-sited fieldwork implies potentially futile (or at the very least physically exhausting) attempts at studying the relation between each instance of a transnational "community" and its corresponding "site"' (Andersson 2017: 94; cf. Hage 2005; Hannerz 2003; Falzon 2009).

with notebooks are rarely welcome, and where potential informants are too busy to chat' (Gusterson 1997: 115-116; cf. Nader 1974). Since the contestations surrounding the borders of the *Rechtsstaat* constitute a perfect example of diffuse, multi-sited, multi-scalar and heavily discursive socio-political process, and given that some of the institutional actors involved in those processes – including both policy elites and “street-level” migration control agents and bureaucrats – are usually recalcitrant to immersive, close-up study (Lindberg and Borrelli 2019; though see Eule 2014, 2018; Eule *et al.* 2018; Schultz 2020a), I therefore had to complement the participant-observation component of my project with other research techniques.

With respect to the perspectives of street-level migration control agents, I partly sought to include them in my study by arranging and conducting interviews with three spokespersons of the *Gewerkschaft der Polizei* (GdP), the largest police union in Germany, at both federal- and (Berlin) state-level. While relatively few and formal, these interviews did yield important insights into the actual workings of deportation procedures (see chapter 5). For the most part, however, the main way in which I attempted to bring actors and scales of analysis that were not amenable to immersive, long-term study within the purview of my thesis consisted in what I would (retrospectively) describe as a somewhat ad hoc mixture of political and legal “discourse analysis”. For the purposes of this thesis, legal discourse can be defined as ‘speech or writing that occurs within legal processes and practices, very broadly construed, as well as higher-level discussion about law and issues related to law – also broadly construed’, including ‘what lawyers, judges, and witnesses say and write in court cases’, as well as ‘scholarly writing about law-related topics, media accounts, public debate, and commentary, and much more’ (Conley 2015: 394). Political discourse can instead be defined as speech or text that is aimed at ‘accomplishing specific political aims and goals, such as making or influencing political decisions’ (van Dijk 1997: 14), including, ‘parliamentary debates, bills,

laws, government or ministerial regulations’, as well as ‘propaganda, political advertising, political speeches, media interviews, political talk shows on TV, party programs, [...] and so on’ (*ibid.*: 18).

With respect to political discourse, I was mostly inspired by Koopmans and Statham’s (1999a) ‘political claims analysis’, which takes ‘public acts of claims-making’ as its central ‘unit of analysis’ and examines not only their content, but also their relative levels of visibility in the public sphere, and their embeddedness in ‘coalitions, alliances and networks’ of different collective actors (*ibid.*: 214; see also Koopmans and Statham 1999b, 2010). As Koopmans and Stratham note, news reporting ‘provid[es] a continuous record of public events and visibility to the claims of actors’ and therefore constitutes ‘an important source of data for researchers interested in studying the nature of political challenges in the public domain’ (*ibid.*: 203). Since my focus was on a very specific aspect of the public debate on asylum/immigration, namely *Rechtsstaat*-related claims-making, I drew on articles published in a wide range of media, including both “right-wing” and “left-wing”, both national and local, both broadsheet- and tabloid-like newspapers, as well as blogs, party manifestos, social media output etc. Rather than attempting to build a systematic and comprehensive corpus of *Rechtsstaat*-related claims in the field of asylum/immigration policy, however, I primarily focused on claims related to the specific aspects of the migrant exclusion process that were most central to my ethnographic fieldwork (i.e. asylum reception and refugee status determination procedures, deportation, and “crimes of solidarity”), with a view to identifying ‘how policy-driven discourses intersect with local practices’, as well as the ‘discrepancies’ and ‘dissonances’ between them (Molland 2013: 312).

As for the way that I have approached legal discourse, this thesis deliberately jumps back and forth between what constitutional scholars Jack Balkin and Sanford Levinson (2001: 174) have characterised as ‘a normative and internalist approach’ and an ‘externalist, sociological’

perspective. Briefly put, the former (doctrinal) approach is primarily concerned with ‘determining what the law, “correctly understood”, requires’ and ‘whether particular examples of reasoning are good or bad, or rightly or wrongly decided [...] by reference to ostensibly “internal” norms of the law or of good legal craft’ (*ibid.*: 176-177), whereas the latter views “law” as ‘sufficiently flexible to allow the pursuit of different ideological projects through the language of constitutional and legal argument’ and, thus, primarily focuses on exploring and critiquing ‘the shaping of legal decision-making by larger political and historical trends’ (*ibid.*: 180). As Balkin and Levinson point out, although these two approaches differ significantly, ‘there is no necessary conflict’ in shifting between the standpoint of ‘a member of contemporary legal culture’ who ‘has as much right to offer an opinion as to what is a good [...] and what is a bad legal argument as anyone else’ and that of ‘a detached anthropologist of contemporary legal culture [...] who studies the evolving thrusts and parries of contending forms of legal argument’ (*ibid.*: 193-194). Ben-Naftali *et al.* (2018: 8) have similarly argued that ‘juxtaposing and/or combining’ what they call ‘critique before the law’ and ‘critique against the law’ can in fact yield ‘a multi-layered analysis, richer than would have been possible through a single perspective’.

V. Ethical issues

As a “white”²² “EU citizen”²³ with a full scholarship to study “migration”, I was implicated in and, indeed, benefitted from several axes of privilege/deprivation whenever I interacted with “illegalised migrants/refugees”²⁴ – something that I was painfully aware of throughout

²² Following Ahmed (2007: 150), “whiteness” is understood here as something that is simultaneously ‘invented’, in that it is *not* an actual ‘property of bodies or of groups’, and ‘real’, in that it ‘shapes what [...] bodies can do’.

²³ Article 9 of the consolidated version of the Treaty on European Union provides that ‘[e]very national of a Member State shall be a citizen of the Union’ and that ‘[c]itizenship of the Union shall be additional to and not replace national citizenship’. On EU citizenship, see Bauböck (2019).

²⁴ As explained by Bauder (2014: 327), the expression “‘illegalized’ refugee or immigrant [...] draws attention to the institutional and political processes rendering people illegal’ and ‘constitutes a discursive strategy to engage the negative consequences of the term “illegal immigrant” and its implied meanings and corresponding emotional responses, which can influence legal decisions, policies, legislation, as well as relations between affected migrants and civic society’.

the entire research project. While these axes of privilege/deprivation are structural, what makes them a *research* ethical issue is that they threaten the core principle of informed consent (Hugman *et al.* 2011). Though always present, the risk that ‘people might be encouraged to participate because of a type of personal gain in a way that cannot be accepted as informed consent’ (*ibid.*: 667) is especially high when, as in my case, the researcher is also an active member of the solidarity network upon which many (potential) participants depend in order to fulfil their basic needs. In such a situation, (potential) participants who ‘believe that researchers can positively influence their situation’ do not so much ‘misinterpret the role of the researcher’ (Düvell *et al.* 2010: 234) as fully grasp its duality (Toy-Cronin 2020). While I did persistently strive to convey to (potential) participants that my solidarity/support as an activist was wholly independent of their participation in my study,²⁵ ‘[c]lear statements [...] do not necessarily cure the implicit power of the researcher’s position’ (*ibid.*: 461). Accordingly, I ultimately decided to only write about those interlocutors with whom I was able to build the long-term relationships of mutual trust and reciprocity that make ongoing consent possible (Hugman *et al.* 2011).

Issues of consent also arose with respect to my research and writing in relation to fellow “supporters” within the refugee/migrant-solidarity network. Insofar as many of these research participants shared with me the privileges of “whiteness” and EU citizenship, these relationships were much less imbalanced than the ones I was able to establish with interlocutors subject to racialisation and illegalisation processes. Nevertheless, due to our shared social membership in the solidarity network, there was always a risk that fellow activists may ‘feel constrained or unable to deny the request to participate in the research’ out of concerns that ‘doing so would compromise [our] collegial relationship’ (Toy-Cronin

²⁵ In one case, an interlocutor did decide to withdraw from my research, even though he had previously agreed to participate in it. According to Hugman *et al.* (2011), this can be considered one indicator of an effective consent-seeking strategy.

2020: 456). With respect to my fellow activists within the anti-deportation initiative *Bürger*innen Asyl*, everybody was aware from the start (and regularly reminded) of my dual role as an activist and a researcher. Instead of discussing which aspects of our work I could or should include in my study on an ongoing basis, something which would have been extremely time-consuming and – given that I didn't have a clear idea from the outset of what I would end up focusing on – unnecessary, I was generally trusted to keep in mind our common good. As for my exploration of the practice of “solidarity marriage” (see chapter 6), I sought and obtained informed consent prior to each of the six semi-structured interviews upon which this part of the study is based. Drafts of relevant portion of the thesis were also shared with research participants in order to elicit their views as to whether they met their expectations regarding confidentiality.

Confidentiality was, indeed, another major ethical issue that arose with respect to my research with both illegalised migrants and fellow activists. While there are always good reasons to try to hide the identity of research participants, this is all the more ‘imperative’ where – as in my case – a study explicitly sets out to examine unlawful and even criminal conduct (Delamont and Atkinson 2018: 126), such as “illegal stay” and its “facilitation”. In order to mitigate the inherent risk that “social knowledge” might be translated into “investigative knowledge” (Düvell *et al.* 2010: 233), I strove from the earliest stages of my research to follow the customary guidelines concerning data security, including storing all my field data in an offline, encrypted folder. In addition, I sought to protect my interlocutors’ identities by using pseudonyms and omitting or altering non-essential identifying information in my writing (cf. Toy-Cronin 2020). Conscious that ‘[t]here is a history of arrested ethnographers being asked and even forced to foreclose personal data on research participants involved in illegal practices’ after the conclusion of the research, I also thought hard about the issue of ‘data retention’ (Dekeyser and Garrett 2017: 414). While I considered the possibility of imitating

anthropologist Alice Goffman's (2014) highly controversial decision to destroy all her fieldwork data, I ultimately decided against it. If I were ever to be subpoenaed, I would simply refuse to comply – even if this meant, as it sometimes does, facing prosecution and possibly incarceration (see Dekeyser and Garrett 2017: 414).

If one shares the widespread assumption that ethical obligations of reciprocity towards one's research participants only extend as far as the law allows (Düvell *et al.* 2010: 234), the latter statement will probably raise alarm. Even more alarmingly, as we shall see in chapter 6, some of my own activities as a member of *Bürger*innen Asyl* also skirted the blurry and contested boundary between lawful forms of “humanitarian” support and “crimes of solidarity” (Fekete 2009; see also Carrera *et al.*, 2018; Fekete *et al.*, 2019). In this sense, my research project can be understood as an instance of “edge ethnography”, in which the researcher engages in behaviour that is physically, legally, socially, or otherwise dangerous’ (Dekeyser and Garrett 2017: 411; internal citations omitted). In order to appreciate that such legally risky research can be ethically justified, it is necessary to acknowledge that – contrary to the widespread assumption that (research) ‘ethics and law are necessarily and unavoidably in alignment’ (*ibid.*: 411) – there are situations in which ‘the law itself can become a violent tool and [...] a shirking of ethical responsibility under the pressure of legal scrutiny can actually be an unethical position’ (*ibid.*: 415). While this argument is explored at length in chapter 6, suffices to note here that several political scholars have recently argued that some existing immigration laws, including laws that impose legal obligations upon citizens to refrain from assisting illegalised migrants, are so fundamentally unjust that they engender a moral duty to disobey them (Delmas 2018; Hidalgo 2016).

With respect to those parts of the study that focus on right-wing politicians, pundits and migration control agents, it is also important to acknowledge the difficulties involved in ‘balancing scholarly ethics of fairness to the subject with [the author’s] moral and political

interests in exposing and helping to disable the very movements' that one is studying (Blee 2007: 125; cf. Busher 2020). As noted above, except for a few qualitative interviews with police officers, this study did not involve face-to-face research on/with such actors, and consequently did not have to grapple with the ethical difficulties involved in establishing "rapport" with them (cf. Fetner and Heath 2018). Insofar as one of the thesis' goals remains nonetheless to glean the meanings that these people attribute to their social and political reality, however, 'navigating the ambiguous space between empathy – often considered a prerequisite for fruitful ethnographic encounters – and critique' (Mohr *et al.* 2019: 2) did constitute a salient challenge. In contrast to the suggestion that engaging with 'antagonistic groups' requires 'adopting the empathetic stance inherent to anthropological research to the full without "discriminating" between kinds of participants' (Andersson 2017: 101), it seems to me possible and preferable to understand "empathy" as 'a purposeful, even tactical feeling into rather than feeling with the other person' that does leave room for ethical "discrimination" (Mohr *et al.* 2019: 9). Whether my forays into the lifeworld of right-wing actors and migration control agents meet this ethical standard is something that I leave to the reader to judge.

Last but not least, I feel compelled to briefly address the 'fundamental ethical question' raised by Düvell *et al.* (2010: 228), namely: 'whether irregular migration should in fact be researched *at all* (emphasis added).²⁶ According to Düvell *et al.*, the answer to this question hinges on 'whether the potential social benefits from research outweigh the potential social harms' (*ibid.* 228). While the potential social harms involved in my research – and the measures that I have taken to mitigate them – have been discussed above, I must confess that my view of its

²⁶ As it should be quite clear by now, my thesis does not in fact focus on "irregular migration" as such, but rather on what anthropologist Nicholas De Genova (2002: 429) calls 'the legal production of migrant "illegality"'. Insofar as illegalised migrants remained nonetheless one of my main 'object[s] of ethnographic observation in a context in which there is an active political interest and investment in knowing about' them, however, I still had to grapple with the question raised by anthropologist Mayanthi Fernando (2014: 26-27) in her ethnographic study of French secularism as refracted through the predicaments of her "Muslim French" interlocutors, namely, 'whether we – whether I – should simply stop talking about' the subject altogether.

‘potential social benefits’ remains blurry and somewhat pessimistic. For Duvell *et al.*, such benefits lie in the fact that research can ‘address the misperceptions and misconceptions surrounding irregular migration’ (*ibid.*: 228). While I do hope that my thesis ticks this box, whether this sort of “awareness-raising” will translate into concrete ‘social benefits’ for the individuals who participated in my research and the broader social group(s) to which they belong remains conditional upon macro-political dynamics upon which I exercise little influence – and, in my view, ultimately quite unlikely. Wolf’s (2020: 193) suggestion that ‘feelings of catharsis and a sense of acknowledgement and purpose’ must also be counted among the potential ‘benefits of research participation’ – and, more importantly, some of my interlocutors’ reassurances that this was indeed the case as far as they were concerned – is something that provided me with a measure of comfort whenever, as it often happened in the writing of this thesis, my own sense of purpose vacillated.

VI. Overview of the thesis

Chapter 2 provides the theoretical and historical background against which the following empirical chapters unfold. After attending to the rhetoric surrounding the 70th anniversary of the *Grundgesetz* (Basic Law, the German constitution) on 23rd May 2019, I briefly trace the historical development of the *Rechtsstaat* concept within German legal thought and practice from its invention at the beginning of the 19th century to the adoption of the *Grundgesetz* in 1949. As a pendant to this, I offer a parallel history of the ‘police-state origins’ (*polizeilich[e] Herkunft*) (Thym 2009a) of German immigration law from its emergence in the early 19th century until the end of World War II. Having done that, I zoom in on the post-war conception of the *Rechtsstaat*, showing that it is characterised by a strong, substantive commitment to human dignity and fundamental rights, while also noting its receptiveness to international and supranational norms. Subsequently, I turn to examine how the shift to this specific conception of *Rechtsstaat* has influenced the development of German immigration

law in the post-war era. Shifting from the realm of legal analysis to that of political philosophy, I then tease out the specific and contingent vision of justice in immigration that is embedded in the post-war *Rechtsstaat*, arguing that it can be understood in terms of ‘moderate [liberal] cosmopolitanism *and/or* moderate liberal nationalism’ (Lenard and Moore 2012; emphasis added). Finally, I lay out two alternative conceptions of justice in immigration: “radical nationalism” and “radical cosmopolitanism”.

Chapter 3 looks at what was probably the most prominent ‘*unfriendly takeover*’ (Baer 2018) of the *Rechtsstaat* ideal within the heated political debate on immigration in post-“crisis” Germany, namely, the narrative that the German government’s decision to grant admission to the hundreds of thousands asylum seekers who showed up at the country’s border in late 2015 and early 2016 constituted a “breach of the law” (*Rechtsbruch*). After laying out the specific articulation of this thesis contained in the constitutional lawsuit lodged by the AfD in April 2018, I refute it and show that the German government was in fact not only allowed but obliged under EU law to act as it did. Having done that, I turn to examine the vision of justice in immigration that underpinned and was promoted by ‘the *Rechtsbruch* myth’ (Thym 2018a), arguing that it consisted of a type of radical (ethno)nationalism that is inherently irreconcilable with the post-war *Rechtsstaat*. The way in which the *Rechtsbruch* myth promoted this agenda, I argue, was that it enabled the AfD to stage itself as ‘a party of the *Rechtsstaat*’ and, thus, a legitimate, electorally viable political alternative (Pichl and von Dömming 2020: 299). If this ‘civic nationalist normalisation strategy’ (Halikiopoulou and Vlandas 2019: 427) was as effective as it was, I also argue, this was in no small part because powerful and influential actors on the “conservative” side of the political spectrum decisively helped to push the *Rechtsbruch* myth across ‘the boundary that demarcates the frivolous from the plausible’ (Balkin 2011: 88).

Following “the border” inside German territory, chapter 4 shifts to the subject of refugee status determination procedures and asylum reception conditions, as perceived by migrants/refugees who experienced them first-hand. Starting from my interlocutors’ troubling comparisons between being an asylum seeker in post-2015 Germany and being a slave, a prison inmate, or a herded animal, I argue that these disquieting comparisons are best understood through the lens of ‘*rightlessness*’, that is, ‘precarious legal, political, and human standing’ (Gündoğdu 2015: 94). While rightlessness may at first appear to be inherently incompatible with the heavy emphasis which the post-war *Rechtsstaat* places on the protection of fundamental and human – as opposed to citizen – rights, attending to the experiences of those who are subject to or stuck at ‘the threshold of the asylum regime’ (Picozza 2021: 108) brings into sharp relief what the liberal narrative that the *Rechtsstaat* requires “us in here” to keep the rights of “those out there” in mind tends to obscure, namely, the ‘internal contradictions’ of human rights law (Benhabib 2014: 19). More specifically, the chapter charts the yawning gap between the (moral) rights which my interlocutors ‘venture[d] to claim’ and the far more limited rights which they were ‘entitled to within the scope of existing domestic and international laws’ (Gündoğdu 2015: 118) with respect to six key areas: the right to stay; the right to asylum; the right to legal assistance, representation and aid; the right to a home; the right to internal freedom of movement; and the right to work.

Continuing this investigation, chapter 5 moves on to the next and, in many cases, last stage of the migrant exclusion process – that is, deportation – while also shifting the focus from the problem of rightlessness to that of *non-compliance*. Building on previous work that demonstrates the importance of attending to the ‘processual quality’ of deportation, it tracks the forced movement of deportees across five main stages of the ‘deportation corridor’ (Drothbohm and Hasselberg 2015: 553), namely: the issuance of removal orders; the pick-up; detention; boarding and flight; and the aftermath. With respect to each of these “stages”,

which are themselves best understood as processes, the chapter examines the international and domestic legal norms that constrain their implementation, as well as the ways in which various state actors (politicians, bureaucrats, and street-level officials) interpreted, navigated, and often sought to circumvent them. In a nutshell, the chapter argues that, due to the obsessive insistence that establishing an “effective” deportation policy represented a key precondition for regaining the population’s trust in the *Rechtsstaat* (after Chancellor Merkel’s alleged *Rechtsbruch*) and the consequently mounting political pressures on front-line officials, implementation practices that sailed ‘as close as possible to the line that separates compliance from violation of [legal] liberal norms’ (Gibney 2008: 166) – and indeed often crossed it – became increasingly common.

Radically shifting perspective once again, chapter 6 turns to explore how those of us who were active within the migrant/refugee solidarity movement in Berlin discursively and practically positioned ourselves in relation to “the law” and “the state” at a time when forms of practical support toward “illegal(ised)” migrants that hinder their removal increasingly came to be framed by immigration hardliners as an unacceptable attempt to ‘sabotage the *Rechtsstaat*’. More specifically, the chapter provides a thick description of two ‘crimes of solidarity’ with which I became familiar during my fieldwork, namely, sheltering people threatened by deportation – or “civic asylum” – and marrying them for the “sole purpose” of enabling them to obtain a residence permit – or “solidarity marriage”. After providing an account of these practices, I examine the uncertain risks of criminalisation involved in operating ‘at the very edges of the law’ (Tazzioli 2018a: 9). Having done that, I closely engage with the conception of “solidarity” that laid behind these practices, arguing that it constitutes a shorthand for a radically cosmopolitan – or, in emic terms, “no border” (Anderson *et al.* 2012) – conception of justice in immigration that entails a moral right if not a ‘duty to disobey immigration law’ (Hidalgo 2016). While civic asylum and solidarity marriages do not fit the

standard, liberal conception of civil disobedience as a ‘litmus test’ for and a ‘guardian’ of the legitimacy of the *Rechtsstaat* (Habermas 1985: 101-103), I argue that they are nonetheless morally justifiable forms of ‘*uncivil disobedience*’ (Delmas 2018).

Chapter 7 briefly concludes by summarising the findings of this thesis and raising the question whether the *Rechtsstaat*/rule of law ‘adds more in justice than it costs in the legitimation it lends to the unjust [border] regime’ (West 2011: 41).

2. HISTORICAL AND THEORETICAL BACKGROUND

I. Introduction

On 23rd May 2019, the *Grundgesetz* turned 70 years old, an anniversary that was widely celebrated across the country. Ten days earlier, Chancellor Merkel attended a “citizen dialogue” (*Bürgerdialogue*) in Wuppertal, where members of the public were invited to discuss with her what they thought about their constitution. The topics covered in the first hour and twenty minutes of discussion were wide-ranging – from freedom of expression to taxation, gender (in)equality, the environmental crisis, the arcana of constitutional amendment etc. Then, five minutes before the end of the event, a member of the public raised one final ‘question related to Article 1’ *Grundgesetz*. In short: how could that Article’s solemn proclamation that ‘[h]uman dignity shall be inviolable’ be ‘reconciled’ (*vereinbart*) with the fact that ‘people [...] who flee terrible wars that are waged with weapons exported among others by Germany²⁷ or ‘climate catastrophes [...] for which Germany and other industrialised nations are co-responsible [...] drown every day in the Mediterranean’ (Bundesregierung 2019a)? The Chancellor’s answer had two main prongs. On the one hand, she categorically stated that, ‘[i]f a person is [drowning] in the Mediterranean Sea, we must rescue her’, and even acknowledged that ‘the treatment of refugees on European territory is sometimes repugnant’ (*ibid*). On the other hand, however, she also insisted that ‘we cannot send the message that one merely needs to make it to the Mediterranean’ in order to reach Europe, as this would play into the hands of unscrupulous smugglers (*ibid*).

One day later, at a celebration for the 70th anniversary of the *Grundgesetz* held at the German Foundation for Integration, the Chancellor returned to the relationship between the constitution and the issue of migration at greater length. Praising holocaust survivor Margot

²⁷ For a recent and highly critical report on Germany’s arms exports, see Peace Research Institute Frankfurt (2020).

Friedländer, whom the Foundation had honoured with an award for her efforts for “societal cohesion”, Merkel asserted that her insistence that ‘[w]e are all human’ was ‘precisely what [the *Grundgesetz*] is about’ (Bundesregierung 2019b). With its commitment to human dignity and fundamental rights, she said, ‘[t]he *Grundgesetz* makes space for the freedom that human beings need in order to be human beings’ and ‘creates the foundations for diversity in our country, including diversity through immigration’ (*ibid*). While ‘migration has occurred here in the heart of Europe for centuries’, she continued, it ‘reached a new level after the Second World War’. The ‘German displaced people, refugees and repatriates (*Spätaussiedler*)’ who arrived in the late 1940s were followed by millions of guest workers from the 1950s onwards, and then millions of ‘war refugees from former Yugoslavia’ and, ‘since 2015, from Syria and Iraq in particular’ (*ibid*). For the Chancellor, what made ‘[o]ur *Grundgesetz* [...] a blueprint (*Programm*) for cohesion and integration in a diverse society’ such as the one produced by these multiple waves of immigration was precisely that its ‘values and rights [...] apply to everyone within the country’ (*ibid*). And this was in turn why ‘we have to oppose racism, antisemitism, hate and violence with all the means that the *Rechtsstaat* places at our disposal’ (*ibid*).

Merkel’s speech at the German Foundation for Integration, the question raised by the audience member in Wuppertal and – albeit far more ambiguous – the Chancellor’s answer to that question can all be understood as variations of one of the two discordant refrains that characterised the heated political debate on the requirements of “the *Rechtsstaat*” with respect to the question of migrant exclusion with which we are familiar from the previous chapter. Namely, the narrative that it ‘demands that we in here, instead of keeping those out there at bay, keep their rights in mind’ (Steinbeis 2018a). If this was all there was to the *Rechtsstaat*, the repeated right-wing appeals to it as a justification for migrant exclusion that we have also encountered in the previous chapter, and we shall continue to encounter in the following

ones, would really seem to have ‘nothing to do with the rule of law in its constitutional sense’ – to be nothing more than ‘unfriendly takeovers’ that insidiously attempt to ‘occupy’ this hallowed concept in order to ‘in fact destroy’ it (Baer 2018: 351). As I have already suggested in the previous chapter, however, the tendency – within both public discourse and some of the existing scholarship on the *Rechtsstaat* and immigration/asylum law – to frame this ideal as an unadulterated ‘source of openness toward immigration’ (Hampshire 2013: 13) is *as* simplistic and misleading as the antithetical narrative that it requires ‘us in here to keep those out there at bay’ (Steinbeis 2018a).

The fact of the matter is that “the *Rechtsstaat*” is ‘no less ambiguous an expression than [...] the rule of law’ (Loughlin 2012: 201). While some scholars have gone so far as to characterise these expressions as ‘essentially contested concepts’ that are ‘present to us *only* in the form of contestation’ about what they really mean (Waldron 2002: 151, emphasis added; cf. MacCormick 1984: 66), this chapter starts from the contrary premise that, [d]espite the surrounding uncertainty, it is not the case that any proposed meaning is as good as another. There is a relatively short list of plausible conceptions, each derived from a recognized historical-political context, with relatively clear elements and discernible implications’ (Tamanaha 2004: 4). Getting a good grasp of the specific conception of the *Rechtsstaat* embedded in the *Grundgesetz* and elaborated by German post-war jurisprudence is therefore essential to distinguish the normative demands that it makes with respect to the subject of migrant exclusion from mere “unfriendly takeovers”. And yet, what we will also discover in this chapter is that the *Rechtsstaat*, properly understood, remains caught in a profound and irresolvable ‘tension’ between ‘the expansive and inclusionary principles of moral and political universalism’ – or “cosmopolitanism” – and ‘the particularistic and exclusionary conceptions of democratic closure’ – or “nationalism” (Benhabib 2004: 19). Since ‘modern constitutional democracies are based upon the faith that these two commitments can be used

to limit one another' (*ibid.*: 19), the *Rechtsstaat* can only ever be a rather unreliable and limited source of openness toward immigration.

The remainder of this chapter consists of seven sections. To put things in historical context, section II offers a brief overview of the development of the *Rechtsstaat* ideal within German legal thought and practice from its invention at the beginning of the 19th century until the adoption of the *Grundgesetz* in 1949. Next to that, section III provides a brief historical account of 'the police-state origin (*polizeilich[e] Herkunft*)' (Thym 2009a) of German immigration law from its emergence at the turn of the 19th century until the adoption of the *Grundgesetz*. Having done that, section IV sketches out the specific conception of *Rechtsstaat* that came to prevail within post-war German jurisprudence, highlighting its distinctive commitment to human dignity and rights. Section V examines how the shift to this substantive, human dignity and rights-centred understanding of the *Rechtsstaat* shaped the development of German asylum and immigration policy in the post-war era. Section VI inspects the specific conception of justice in immigration that is embedded in and imperfectly realised by the *Rechtsstaat*, arguing that it can be captured in terms of 'moderate [liberal] cosmopolitanism *and/or* moderate liberal nationalism' (Lenard and Moore 2012; emphasis added). Section VII lays out two alternative conceptions of justice in immigration that we will encounter in action in the following empirical chapters, namely, "radical nationalism" and "radical cosmopolitanism". Section VIII briefly concludes.

II. A brief history of the *Rechtsstaat* until 1949

German constitutional scholar and former *Bundesverfassungsgericht* justice Ernst Böckenförde (1991: 47) has written that the notion of *Rechtsstaat* can 'be likened to a sluice' that has historically been 'open to a steady stream of shifting ideas in the realm of political and constitutional theory'. This section tracks the successive reincarnations of the *Rechtsstaat* produced by this steady stream of shifting ideas up until the adoption of the *Grundgesetz* in

1949. At the risk of some oversimplification, it distinguishes four main “phases”, including: first, its emergence as a liberal rallying cry against the monarchic police-state at the beginning of the 19th century; second, its reduction to a principle of mere legality in the work of the legal positivists of the second half of that century and the beginning of the following one; third, its contested place within Weimar-era constitutional debates; and fourth, its initial misappropriation and subsequent dismissal within Nazi legal doctrine. An important caveat: while the focus of this section is squarely on the twists and turns that this concept has undergone within German legal thought and practice, this should *not* be read as an endorsement of Böckenförde’s claims that ‘*Rechtsstaat* [...] is a term peculiar to the German-speaking world’, that ‘it has no equivalent in any other language’, and that ‘the “rule of law” in Anglo-Saxon law is not in substance a parallel concept’ (*ibid.*: 48). For this ‘narrative of antagonistic principles’ belies the significant overlaps and ‘mutual influences’ between these two traditions (Kirste 2014: 29-30; cf. von Arnould 2010: 709-712).

The neologism “*Rechtsstaat*” was coined by lawyer and professor of diplomacy Wilhelm von Placidus in his *Litteratur der Staatslehre* of 1798, which ‘set out liberal critiques of the *Polizeistaat*, the concept of the police state, that was providing the intellectual foundation for the regimes of enlightened despotism that governed most of continental Europe at the time’ (Meierhenrich 2018: 76). Originally little more than ‘a play on words’ (*ibid.*: 77),²⁸ it gradually acquired a more definite content in the works of Carl Theodor Welcker, Baron von Aretin and, above all, Robert von Mohl (Böckenförde 1991: 49). Under the influence of Kant’s natural law theory, these thinkers understood the *Rechtsstaat* as ‘the state governed by the law of reason’ – a slogan that encompassed ‘recognition of [...] fundamental civil rights (rights

²⁸ The term *Rechtsstaat* was indeed coined to mark the difference between “*Staats-Rechts-Lehrer*”, or theorists of the state for whom law was always subservient to the interests of the sovereign, a school of thought that dominated the study of public law, and “*Rechts-Staats-Lehrer*”, that is, theorists of the state according to whom law, not the state, should rank supreme in the governance of social life, a progressive school of thought that revolved around the enlightened ideas of Immanuel Kant’ (Meierhenrich 2018: 77).

of citizenship) such as civil liberty (protection of personal freedom, freedom of belief and of conscience, freedom of the press, freedom of movement, freedom of contract, and freedom of occupation), equality before the law, and the guarantee of (acquired) property’, as well as ‘an independent judiciary (reliable administration of justice, trial by jury), responsible (constitutional) government, the rule of law (in the form of statutes), and the existence of some form of parliament having a hand in the legislative process’ (*ibid*: 50). Since these were precisely the demands that animated the liberal uprisings which broke out across several German (and other European) states in 1848-1849, this first incarnation of the *Rechtsstaat* can be quite literally described as ‘an insurgent idea’ (Meierhenrich 2018: 75).

After the failure of the 1848-1849 revolutions, however, the *Rechtsstaat* was ‘increasingly redefined in purely formalist terms’ as ‘a principle of mere legality’ that ‘had nothing to do with the purpose and the content of the state but was exclusively concerned with the methods and means of their realization’ (Grote 2014: 195). While Böckenförde (1991: 54) has argued that this shift was due to the fact that ‘many of the [substantive] demands to which the *Rechtsstaat* concept had originally given expression had become reality’ as a result of the reforms that followed the failed uprisings, Meierhenrich (2018: 79) persuasively argues that ‘it is important to not gloss over the considerably more conservative orientation of influential legal thinkers’ such as Stahl, Gneist, and the legal positivists von Gerber and Laband, which must in turn be placed in the context of ‘[i]ncreased state interventionism’ and the attendant political preference for ‘authoritarian legalism’ that preceded and followed the creation of the German Empire in 1870. In line with this, both in theory and in practice, ‘fundamental rights were increasingly supplanted by the concept of “public subjective rights” which the legislature could largely fashion at will’, and the focus shifted almost entirely to ensuring ‘adequate protection against the potential abuse of the powers conferred on the administrative authorities’, including the requirement of ‘express statutory authorization for

any measure which interfered with personal liberty' and the creation of 'specialized administrative law courts' (Grote 2014: 195).

While legal positivism had already faced some criticism before the outbreak of World War I (Preuß 2016: 472), it was in the Weimar era that this paradigm – and the whole field of “the law of the state” (*Staatsrecht*) – entered a state of deep “crisis”, which was itself intimately entangled with an equally deep ‘crisis of the state’ (Jacobson and Schlink 2000: 1). After the disastrous war capitulation and the transition from monarchy to democratic republic, the key political challenges of the day included ‘transforming a wartime into a peacetime economy, demobilizing millions of soldiers, stopping the galloping inflation, paying high reparations, and enduring the occupation of the Ruhr by the French and Belgians; and all this in an overheated postrevolutionary climate in which strikes and unrest were daily events, along with putsch attempts on the right’ (*ibid.*: 11-12). As for ‘[t]he answers suggested in the theory of the law of the state’, although they were too ‘manifold’ (*ibid.*: 15) and complex to be captured here, suffice to say that, ‘[p]olitically, they can be arrayed in a spectrum [...] from the Social Democrat Hermann Heller to the future National Socialist Carl Schmitt’ – two archenemies who nevertheless agreed on the ‘rejection of constitutional formalism in favour of an approach that set questions of public law within [radically different visions of] politics and history’ (Preuß 2016: 472). While the former yearned to ‘socialise the *Rechtsstaat*’ (Meierhenrich 2018: 88), the latter saw it as intrinsically contemptible and incompatible with his preference for “democratic dictatorship” (Preuß 2016).

By the end of 1933, Heller had died as an exile in Madrid, the Weimar Republic had turned into Hitler’s *Führerstaat*, and Schmitt had become one of its most influential supporters and theorists. Contrary to popular belief, however, the Nazi seizure of power did not lead to the immediate and total demise of the *Rechtsstaat*. At the level of theory, some prominent Nazi jurists such as Otto Koellreutter, Bodo Dennewitz and Heinrich Lange initially endeavoured

– out of both instrumental and principled considerations – to re-elaborate the concept in a way that was compatible with the central tenets of Nazi legal ideology: anti-liberalism, anti-formalism and anti-semitism (Meierhenrich 2018: 98-140).²⁹ Only around 1936 were these authors and their views conclusively side-lined by fellow Nazi jurists who – like Schmitt, Ernst Forsthoff and Hans Frank – championed the outright ‘rejection of the *Rechtsstaat* as a category of practice as well as of analysis’ (*ibid.*: 140). Yet, within actual legal practice, some ‘remnants of the *Rechtsstaat* survived, at least for a while’, even after this point (*ibid.*: 155). Indeed, until its transition from authoritarian to full-blown totalitarian rule in 1942, the Nazi regime arguably remained a ‘dual state’, in which a ‘normative state’ comprising many of the formal and procedural guarantees associated with prior understandings of the *Rechtsstaat* continued to co-exist – albeit in a sub-ordinated and conditional relationship – with a ‘prerogative state’ characterised by ‘[t]he absence of boundaries’ and ‘arbitrary rule’ (*ibid.*: 182-183; cf. Fraenkel [1941] 2017).

According to one narrative, following the capitulation of the Third Reich, ‘the re-establishment of the *Rechtsstaat* constituted the main concern of both the West German public as well as the community of legal experts in the Parliamentary Council’ (Maier 2019: 1076) – an ad hoc body of 70 delegates from the state-level parliaments that was tasked by the Allied Forces to draft what was then expected to be a provisional constitution to be only valid until the end of the occupation and the reunification of the country. In fact, however, the German public was at that time ‘deeply apolitical’ and largely uninterested in the *Grundgesetz* drafting process, and ‘[t]he key points of contention in the Parliamentary Council were not the meaning of core values or how to atone for the sins of the war, but the

²⁹ The instrumental reasons included ‘curry[ing] favour with an international community in which some governments feared a return of German militarism and a renewed quest for mastery in Europe’ and ‘appeas[ing] the country’s anxious monied classes, notably those who were concerned about the right to property and related protections of commercial activity’ (Meierhenrich 2018: 106). The key principled reason to retain the *Rechtsstaat* was instead its inherent ‘ordering function’ (*ibid.*: 106).

composition of the upper house of parliament, the division of power between central government and regional governments, and the complications of fiscal federalism' (Scheppelle 2013: 32). Having said that, however, the notion of *Rechtsstaat* did appear within the debates in the Council and in the broader legal community as 'the legitimacy core' of the *Grundgesetz* and, indeed, 'the main legitimating principle of the newly forming state' (Maier 2019: 1076). Before we turn to examine this post-war conception of the *Rechtsstaat* and what gives it its 'immense ideological power' (*ibid.*: 1072), the next section will first provide a brief account of the birth and development of German immigration law prior to the adoption of the 1949 *Grundgesetz*.

III. A brief history of German immigration law until 1949

This section offers a short overview of what different scholars have tellingly characterised as the 'police-state origin' (*polizeilich[e] Herkunft*) (Thym 2009a) and the 'authoritarian-state tradition' (*obrigkeitsstaatliche Tradition*) (Groß 2014: 421) of German immigration law from its emergence in the early 19th century to the end of World War II. As these characterisations already suggest, my argument is that immigration law was viewed throughout this entire period by legal theorists and state authorities alike as a *sui generis* field, in which the constraining requirements of the various conceptions of the *Rechtsstaat* set out in the previous section did not apply and the state enjoyed a virtually absolute right to exclude foreigners from its territory and/or the enjoyment of the rights that it bestowed upon its own members (*Staatsangehörige*). To be sure, notwithstanding the steady expansion of 'state infrastructural power' (Mann 1983) that took place over the period under consideration, the gap between immigration law "in the books" and actual administrative practices "on the ground" remained chronically sizeable – albeit hard to quantify (Fahrmeir 2000; Rass 2018; Sammartino 2013). Nevertheless, understanding this long tradition of formal legal exclusion

– or, as one might also call it, ‘immigration exceptionalism’³⁰ (Rubenstein and Gulasekaram 2017) – is still of utmost importance if we are to properly assess to what extent and how things have changed after the emergence of the substantive conception of *Rechtsstaat* enshrined in the *Grundgesetz*.

The narrative that ‘[t]he nineteenth century with its emphasis on state sovereignty, legal positivism, nationalism and the society of civilised (European) states’ represented a ‘fall from the cosmopolitan heights of the previous centuries’ is certainly simplistic (Cavallar 2013: 69-70).³¹ However, it was indeed during the first half of this century that the 39 German states of the newly established (1815) German Confederation ‘made citizenship (*Staatsangehörigkeit*) a precondition for local belonging (*Ortsangehörigkeit*)’, which in turn ‘constituted the vector for essential political, economic and other rights, and thereby reserved these for natives (*Inländern*)’ (Renner 1998: 6; cf. Fahrmeir 2000: chapter 1; Schubert 2019). The increasing significance of citizenship was not only accompanied but partly made possible by the introduction of new passport requirements,³² which ‘rested on the assumption that foreigners had no right to enter any country other than their native one’ (Fahrmeir 2000: 107).³³ Under these regulations, the German states’ police forces were given wide discretionary powers to deny entry or arrest and expel foreigners on both political and purely economic grounds with

³⁰ Rubenstein and Gulasekaram (2017: 584-585) use this expression to capture the way in which the United States ‘Supreme Court’s jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms’, ‘do not apply to other regulatory fields and enable government action that would be unacceptable if applied to citizens’.

³¹ Contrary to what argued by Nafziger (1983), ‘classical [i.e pre-19th century] publicists did not support a duty to admit aliens’, except for a narrow, time-limited “right of hospitality” (Schotel 2012: 32; cf. Cavallar 2013). According to Renner (1998: 2), the idea that – except for a similarly narrow and time-limited “right of hospitality” (*Gastrecht*) – whoever ‘did not belong to the same tribe or people (*Volk*) was rightless (*rechtlos*)’ can in fact be traced all the way back to early Germanic culture.

³² According to Fahrmeir (2000: 101-102), the passport requirements that were introduced in the first decades of the 19th century differed from ‘what one might call, for brevity’s sake, pre-modern passports’ in three main respects. ‘First, the pre-modern passports were not compulsory except in times of crisis’. Second, their ‘main purpose [...] was not to certify the bearer’s nationality, but to indicate the bearer’s rank’. Third, pre-modern passports ‘were not necessarily, or even usually, issued by governments, but by the various corporations of old regime society: individual towns, guilds, universities, military commanders, or simply important persons’. On the birth of the modern passport system, see also Torpey (2000).

³³ Note that, in this context, the notion of “foreigner/alien” also included citizens of one German state who found themselves on the territory of another one.

no possibility for judicial review (*ibid.*: 111-129). As for those foreigners who were permitted to enter and stay, '[t]he general assumption' was that they 'did not have rights, only privileges which could be withdrawn at any time' (*ibid.*: 152). While the liberal von Mohl (1847) was an outspoken critic of emigration controls, the "illiberalism" of existing immigration controls and the rightlessness to which foreigners were subject were not something that exercised his critical faculties quite as much.

While the birth of a federative German Empire (in 1871) was soon followed by the introduction of internal freedom of movement for those who possessed German citizenship (Ziekow 1997: chapter 5), it also fuelled 'an ethnically exclusive nationalist policy' that, notwithstanding the dire need for foreign labour, 'strove to prevent certain migrants [Poles and Jews above all] from residing permanently in the country' (Reinecke 2009: 59; cf. Bade 1980). To this end, new regulations requiring foreign workers to obtain workplace-bound permits and to leave the country every winter were introduced, and the extensive powers regarding the admittance or deportation of foreigners which the *Länder* continued to enjoy were complemented by the creation of a new power of deportation from the *Reich* (*Reichsausweisung*) (Renner 1998: 8-12; Rass 2018). Much as before Unification, deportations were deemed to be 'generally acceptable in the interest of "public safety, peace and order"' and did not require any judicial decision (Reinecke 2009; cf. Renner 1998: 15-17; Ziekow 1997: 265-268). During their stay within the country, aliens also continued to be excluded from the enjoyment of most of the civil and social – let alone political – rights enjoyed by citizens. Although this state of affairs fell way short of even the narrow, formalistic conception of *Rechtsstaat* adopted by the legal positivists, who – as we have seen in section II – thought little of "rights" but did care about legal certainty and legal protection, such requirements were generally assumed not to apply to the realm of alien law (Ziekow 1997: 608).

While it may have ‘inaugurated a new era for the *Rechtsstaat*’ (Meierhenrich 2018: 85), the adoption of ‘the Weimar constitution did not substantially alter the legal position of foreigners in Germany’ (Renner 1998: 14). Amidst a massive influx of migrants/refugees from the newly established Eastern States and civil war-torn Russia (and the many other challenging repercussions of WWI), the passport and visa requirements that had been introduced prior to and during the war were indeed not only retained but extended (Sammartino 2013: 25-28). While insistent far-right nationalist calls for the mass internment and deportation of all illegal aliens (especially Jews) were not heeded due to insufficient administrative capacity and concerns about the international reaction that such measures would trigger (*ibid.*: 29-33), the *Länder*’s police authorities retained broad powers to deport any foreigner who appeared “burdensome” without any judicial involvement, prompting contemporaries to underline that ‘in no regard is the police so arbitrary as with the question of the deportation of foreigners’ (*ibid.*: 33) and that ‘a piece of the police-state has survived until the present day’ (Renner 1998: 14). Only in 1932 did the *preußische Ausländer-Polizeiverordnung* (Prussian Foreigner Police Ordinance) systematically and comprehensively lay down specific legal grounds for and limits on the practice of deportation (*ibid.*: 18). In addition to prohibiting the removal of aliens who were younger than 15 or had continuously lived in Germany for 10 years (*ibid.*: 18), the ordinance also for the first time recognised ‘the noble obligation of Prussia to grant asylum to political refugees’ (Oltmer 2016: 325).

While the 1932 ordinance was ‘all things considered marked by far-sighted liberality’ (Renner 1998: 18), the Nationalist-Socialist’s seizure of power in January 1933 rendered it virtually irrelevant only a few months after its adoption. Since Nazi jurists viewed ‘the regulation of immigration’ as ‘a necessary measure for maintaining the healthy racial cohesion of the *Volk*’ (Koellreutter, cited in Whitman 2017: 51), this area of law was unsurprisingly dominated by the logic of the “prerogative state”. Thus, whereas the *Reichsverweisungsgesetz* (Law on the

Removal from the Empire) of 1934 ‘still retained an external appearance of *Rechtsstaatlichkeit*, the goals of nationalist-socialist immigration policy became more clearly apparent in the *Ausländerpolizeiverordnung*’ (Foreigner Police Ordinance) of 1938 (Renner 1998: 20). Apart from reintroducing the vague and malleable requirement that aliens had to be ‘worthy of hospitality’ in order to be allowed to reside in the country, the latter also did away with the provisions of the Prussian ordinance that foresaw special protection from removal for long-term residents and aliens facing a danger of political persecution, thereby establishing ‘a broad framework for all sorts of political arbitrariness’ (*ibid.*: 20). In addition to these formal legal changes, it should also be noted that, after the beginning of WWII, Germany “hosted” an exponentially increasing number of foreign forced labourers ‘for whom deportation would have represented liberation, rather than punishment’ (*ibid.*: 19).³⁴ The latter were indeed ‘excepted from the scope of application of the *Ausländerpolizeiverordnung*’s guarantees and delivered to the security police’, which in turn often heralded ‘physical extermination’ (*ibid.*: 19).

Summing up this section, I have argued that, from its emergence at the turn of the 19th century until the end of WWII, German immigration law was a *sui generis* field where the requirements of the various conceptions of the *Rechtsstaat* that we have encountered in the previous section were generally understood not to apply, giving the state (and the police in particular) virtually unlimited discretion to exclude aliens from its territory and/or the enjoyment of the rights granted to citizens. Of course, the development of German alien law followed its own specific trajectory, with several historians emphasising that, ‘[w]ithin Europe, the German states, and Prussia in particular, were foremost in regulating the movement of foreign migrants at the borders and within the country’ (Reinecke 2009: 42; cf.

³⁴ According to Renner (1998: 19), the number of foreign forced labourer grew from 310.000 in 1939 to 7.100.000 in 1941. A vast majority of them were “prisoners of war” nationals of “enemy countries”.

Fahrmeir 2000: 245). Having said that, however, what these historians also agree about is that, specificities aside,

[t]he emergence of the modern state [generally] served as a crucial background for restrictive migration regimes in the late nineteenth and early twentieth centuries. Striving to strengthen the bonds between their citizens and the state by defining the actual benefits of belonging, nation states also defined who was to be left out – excluded in the very spatial sense of not being admitted to the country or, less literally, in being denied citizenship’ (*ibid.*: 42).

The remainder of this chapter explores whether and how the emergence of a substantive conception of *Rechtsstaat* as a ‘state of justice’ (Maier 2019: 1073) has transformed this state of affairs.

IV. A basic sketch of the post-war *Rechtsstaat*

Beginning this complex task, this section offers a basic sketch of the post-war conception of the *Rechtsstaat*, as elaborated by the *Bundesverfassungsgericht* and German constitutional scholars. Although the breadth, complexity and open-endedness of the concerns and demands for which this noun serves as a shorthand make it incapable of simple definition, its basic outline and key sub-elements are relatively uncontroversial (cf. Von Münch 1994: 169). In a nutshell, the post-war conception of *Rechtsstaat* represents a rather “thick”³⁵ incarnation of this ideal, one that – preoccupied with forestalling a repetition of the horrors of Nazism, (mistakenly) blaming these horrors on the emaciated conception of *Rechtsstaat* advanced by the legal positivists, and positivising the natural law-influenced understanding of it embraced by the early 19th century liberals³⁶ – encompasses not only formal, procedural and institutional requirements such as the separation of powers, the principle of legality, legal certainty and

³⁵ On the distinction between “thin” and “thick” conceptions of the rule of law, which basically mirrors that between “formal” and “substantive” understandings, see Bedner (2018) and Møller (2018).

³⁶ As noted by Maier (2019: 1082; cf. Paulson 1994), the ‘anti-positivism’ and ‘the renaissance of natural law in the post-war period operated under false assumptions since it can be easily shown that Nazi state was by no means operating on a positivist understanding of the law’. Although, as we have seen in section I, the atrocities perpetrated by the Nazi regime were rather marginal to (and, indeed, not yet fully known at the time of) the drafting of the *Grundgesetz*, ‘the “never again” message of human dignity, the rights provisions, and their protection’ did *subsequently* come to be generally viewed as ‘the central animating spirit of the text’ (Scheppelle 2013: 35).

judicial protection, but also a commitment to a conception of substantive justice (*materielle Gerechtigkeit*) that is ostensibly grounded in respect for “human dignity” and “fundamental rights”. While the focus of the section is again squarely on the German context, two points need to be underlined. First, the shift to a substantive conception of the rule of law is ‘by no means a development which has been restricted to Germany’ (Grote 2014: 202), but rather a general feature of post-war, “liberal constitutionalism”.³⁷ Second, as explained at the end of this section, the post-war *Rechtsstaat* ‘is receptive to supranational and international norms’ (Kirste 2014: 35).

As noted by von Münch (1994: 169), ‘the polymorphous nature (*Vielgestaltigkeit*) of the *Rechtsstaat* – a term that appears only once in the text of the *Grundgesetz*³⁸ – ‘cannot be satisfactorily pressed into a single definition’. The reason for this elusiveness has to do with the two distinct functions served by this term within the case law of the *Bundesverfassungsgericht* and constitutional scholarship. On the one hand, in its ‘declaratory’ guise, the *Rechtsstaat* serves as an ‘umbrella term’ (*Sammelbezeichnung*) for the extremely wide range of discrete and highly specific constraints on the exercise of state power that are laid down in different provisions of the *Grundgesetz* (Schmidt-Aßman 2004: 545; cf. von Arnould 2010: 703-706), with one author identifying no less than 141 distinct sub-elements, grouped under 17 core components (Sobota 1997). On the other hand, in its ‘constitutive’ guise, the *Rechtsstaat* also

³⁷ As Ginsburg *et al.* (2018: 239) note, ‘[i]n the wake of World War II, liberal constitutionalism emerged as a default design choice for political systems across Europe and North America’. While ‘its details vary from one context to another’, this ‘style of constitutionalism typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law’.

³⁸ Article 28(1) *Grundgesetz* proclaims that ‘[t]he constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law (*Rechtsstaat*) within the meaning of this Basic Law’. The adjective “*rechtsstaatlich*” also appears in Article 16(2), which establishes that German citizens can only be extradited to a ‘a member state of the European Union or to an international court, provided that the rule of law (*rechtsstaatliche Grundsätze*) is observed’, and Article 23(1), which provides that ‘the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law (*rechtsstaatlichen Grundsätzen*) and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law’.

serves as a heuristic device to ‘understand these normative contents as a system’ and to identify and address ‘regulatory gaps and conflicts of value’ between them through purposive judicial interpretation (Schmidt-Aßman 2004: 545-546). In other words, as the *Bundesverfassungsgericht* (1983: 290) has itself stated, ‘[t]he *Rechtsstaat* principle [...] does not comprise specific requirements and prohibitions that are clear in all their details’, but rather ‘necessitates specification depending on the objective circumstances’. With this important caveat in place, the remainder of this section lists and briefly discusses what are widely regarded as the *main* sub-elements of the post-war *Rechtsstaat*, starting from formal, procedural and institutional ones.

As anticipated above, four such requirements are mentioned in virtually every piece of scholarship on the post-war *Rechtsstaat*. The first is the separation of powers (*Gewaltenteilung*), which the *Bundesverfassungsgericht* has described as ‘a fundamental organisational principle of the *Grundgesetz*’ whose ‘significance lies in the distribution of political power, the intertwinement of the three branches of government, and the tempering of state power that results from it’ (*Bundesverfassungsgericht* 1953: 247). The second is the principle of legality (*Gesetzmäßigkeit*), which essentially establishes that state organs cannot act without a legal basis (*Vorbehalt des Gesetzes*), and that all their activities must respect the applicable law (*Vorrang des Gesetzes*) (Schmidt-Aßman 2004: 573-578; von Arnould 2010: 713). Third, the principle of legal certainty (*Rechtssicherheit*) demands that law should be laid out in such a way that ‘its addressee can grasp it, that it is reliable and predictable in its application’, including the (formal) sub-requirements that laws must be public, clear, sufficiently specific and non-contradictory (von Arnould 2010: 714-715; cf. Schmidt-Aßman 2006: 565-567). Fourth, and last, the principle of judicial protection (*Rechtsschutz*) requires ‘the provision of binding, public procedures of conflict resolution and the guarantee of broad and even access to such procedures’ – a principle which is given more concrete substance in numerous specific

provisions of the *Grundgesetz*, notably including the guarantee that ‘any person’ whose ‘rights [are] violated by public authority may have recourse to the courts’ enshrined under Article 19(4) *Grundgesetz* (Schmidt-Aßman 2004: 579-582; cf. von Arnould 2010: 714).

Whereas all the aforementioned formal and procedural principles have a long pedigree within German legal thought and practice (cf. section II), ‘[i]n the perspective of German post-Nazi retrospection and introspection, thin conceptions came to seem not merely inadequate, but on their own positively dangerous’ (Krygier 2014: 52). In line with this, what most commentators regard as distinctive about the post-war conception of the *Rechtsstaat* is that, in addition to the aforementioned formal, procedural and institutional requirements, it also ‘embodies a strong commitment to fundamental rights and to the dignitarian premise of its 1949 *Grundgesetz*’ (*ibid.*: 52; cf. Grote 2014: 197; Krygier 2014: 52; Tamanaha 2004: 108).³⁹ Thus, Article 1 solemnly proclaims not only, as already mentioned in section I, that ‘Human dignity shall be inviolable’, but also that ‘The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world’ and that ‘The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law’. Article 2 establishes that ‘Every person shall have the right to free development of his [sic] personality [...]’ and ‘the right to life and physical integrity’. Under Article 3, ‘All persons shall be equal before the law’ and ‘[n]o person shall be favoured or disfavoured because of inter alia ‘race’ or ‘homeland and origin’. While

³⁹ Some German constitutional scholars argue that fundamental rights should rather be viewed as separate ‘building-blocks of modern constitutional statehood (*Verfassungsstaatlichkeit*)’ (Dreier 2010: 2265). As aptly noted by Murphy (2005: 262), however, when rights have been positively laid down, respecting them ‘become[s] part of the requirements of the rule of law’ because ‘violations of those rights conflict with the requirement of congruence between written statutes and their enforcement’.

numerous additional rights are explicitly reserved for Germans,⁴⁰ several others are formulated as “everyone’s rights” (*Jedermannsrechte*).⁴¹

Lastly, and quite importantly for our sake, one right in the *Grundgesetz* is reserved for non-Germans. Under what used to be Article 16(2) and is now Article 16a(1), ‘Persons persecuted on political grounds shall have the right of asylum’. As Schuster (2003: 183) has shown, this provision was the object of a heated and prolonged debate within the Parliamentary Council, with several CSU and CDU representatives expressing ‘concerns about the state’s capacity to fulfil the obligations an unrestricted right to asylum would place on the state’ and ‘the dangers posed to national security if entry was permitted to undemocratically disposed refugees’.⁴² The view that eventually came to prevail (mostly thanks to the efforts of SPD and Communist Party members), however, was that ‘Germany, which had so recently caused so many to flee, should become a haven for all who were politically persecuted’, even though ‘this could, and should, mean that it might be necessary to accept large numbers of people’ (*ibid.*: 182). To this end, not only did the *Grundgesetz* drafters ‘deliberately [refrain] from defining ‘politically persecuted’ so that it might be interpreted as widely as necessary’, but also consciously decided to grant to those who met this open-ended criterion ‘a subjective right to asylum’ (*ibid.*: 182). Since asylum had hitherto generally been understood – and not

⁴⁰ These include: ‘the freedom of assembly [Article 8], the freedom of association [Article 9], the freedom of movement [within Germany (Article 11)], the freedom to choose a profession [Article 12(1)], the right not to be deprived of German citizenship [Article 16(1)], the right not to be extradited [Article 16(2)], the right to resist the overthrow of the government [Article 20(4)], the guarantees of equal access to the public service [Article 33(2)] and of equal status of rights in all the *Länder* [Article 33(1)]’ (Rubio-Marín 2000: 187). While this is *not* expressly reserved for Germans, ‘most scholars add the right to vote at federal, regional and local level, as a natural consequence of the principle of democracy according to which state authority emanates from the German people’ (*ibid.*: 187). While EU citizens have in the meantime gained a right to vote in local elections, all other forms foreign suffrage remain out of bounds.

⁴¹ These include: freedom of faith and conscience (Article 4), freedom of expression, arts and sciences (Article 5), rights pertaining to the protection of marriage, the family and children (Article 6), rights pertaining to the school system (Article 7), rights pertaining to the privacy of correspondence, posts and telecommunications (Article 10), limits on forced labour (Article 12(3)), rights pertaining to the inviolability of the home (Article 13), rights pertaining to property, inheritance and expropriation (Article 14), the right of petition (Article 17), and the already mentioned right of ‘recourse to the courts’ (Article 19(4)).

⁴² As underlined by Schuster (2003: 183), at the time Article 16(2) was drafted, ‘the economy was in tatters, with the state dependent on overseas aid for reconstruction’, ‘[m]ost of the housing stock had been destroyed and accommodation was needed for the indigenous population as well as returnees and newcomers’.

only in Germany but ‘everywhere else’ too – as ‘the right of the state to grant asylum’, this truly was – at the time – a kind of ‘German exceptionalism’ (Joppke 1999: 85).⁴³

Before we turn to examine how the codification of the right of asylum and of the *Jedermannsrechte* have shaped the development of German immigration law in the post-war era, one final but quite important point needs to be emphasised, namely, that the post-war conception of *Rechtsstaat* ‘is receptive to supranational and international norms’ (Kirste 2014: 35). To wit, Article 23(1) *Grundgesetz* provides that ‘Germany shall participate in the development of the European Union [...] committed to democratic, social and federal principles, to the rule of law (*rechtsstaatlichen [...] Grundsätzen*) and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by’ the *Grundgesetz*,⁴⁴ explicitly allowing a ‘transfer [of some] sovereign powers’ to the EU. Furthermore, Article 25 *Grundgesetz* states that ‘international law shall be an integral part of federal law’ and ‘shall take precedence over [domestic] laws and directly create rights and duties for the inhabitants of the federal territory’. In light of this, most commentaries on the *Rechtsstaat* unsurprisingly devote a whole section on EU law and the European Convention on Human Rights (ECHR), emphasising that ‘*Rechtsstaat*-related isolationism is certainly not in fashion’ (Schmidt-Aßman 2006: 604). As we shall in chapter 3, however, while the *Rechtsstaat* tracks ‘the presence of institutionalised power’ and is therefore ‘easily transposable onto the inter-state and supra-state level’, the claim that it ‘is not dependent on the state’ (*ist auf den Staat nicht angewiesen*) (von Arnould 2010: 736) remains much more controversial.⁴⁵

⁴³ Having said that, however, it should also be pointed out that, by 1983, a subjective right to asylum had been constitutionally recognised by at least 17 other states (Kimmich, cited in Schuster 2003: 182).

⁴⁴ Mirroring this, Article 2, Treaty on the European Union explicitly mentions ‘*Rechtsstaatlichkeit*’ – or, in the English version of the document, ‘the rule of law’ – among the ‘values’ upon which ‘the Union is founded’, alongside ‘respect for human dignity, freedom, democracy, equality, [...] and respect for human rights’

⁴⁵ To foreshadow that discussion, Article 23(1) *Grundgesetz* provides the ‘establishment of the European Union’ and the transfer of sovereign powers to it ‘shall be subject to’ Article 79(3). Known as the “eternity clause” (*Ewigkeitsklausel*), the latter rules out any amendments to the *Grundgesetz* that would affect (inter alia)

V. The constitutionalisation of German immigration and asylum law

What has the emergence of a substantive conception of *Rechtsstaat* centred on human dignity and fundamental rights and receptive to supranational and international norms meant for the development of German immigration law in the post-war era? Laying the foundations for an empirically grounded answer to this interrogative, this section provides a brief and broad-brush account of the gradual and in some crucial respects *only fledgling* process of “constitutionalisation” of this field of law over the last seven decades. Reflecting ‘the development beyond the state of certain levels of decision-making capacity that are normally associated with the demand for constitutional governance’ (Walker 2008: 519) which I have alluded to above, the notion of “constitutionalisation” is used here to encompass *both* ‘the penetration of fundamental rights law into administrative [immigration] law under the purview of the *Grundgesetz*’ and the ‘new development impulses’ provided by the ‘Europeanisation of immigration law’ (Thym 2009a: 223-224). In a nutshell, the argument advanced in this section is that ‘there is no simple story to be told here of migrant rightlessness [...] giving way to rights and protection’ (Panagiotidis 2020: 305). Although domestic, international and supranational legal developments *have* engendered many significant constraints on the state’s previously absolute right to exclude foreigners from its territory and/or the enjoyment of fundamental/human rights while they are present on its territory, such developments have stopped *far short* of establishing full-blown legal equality between citizens and non-citizens.

Starting with the constraints, for much of the post-war era, ‘the sources of rights expansion for immigrants’ were ‘mostly [...] domestic’ (Joppke 2001: 340). Without any claim to comprehensiveness, a few key points deserve to be highlighted here. First, the guarantee of

the ‘constitutional principles’ laid down in Article 20 thereof, one which is that ‘[t]he Federal Republic of Germany is a democratic and social federal state’. As we shall see, some constitutional scholars have argued that this provision requires or presupposes the protection of the Federal Republic’s “sovereign statehood” (*Eigenstaatlichkeit*).

‘recourse to the courts’ has been interpreted to also apply to foreigners subject to removal procedures from as early as 1955 (*Bundesverwaltungsgericht* [Federal Administrative Court] 1955).⁴⁶ Second, from 1966, the public interest in removing the foreign spouses of German citizens has been balanced by the courts against individuals’ ‘interest in maintaining marriage and family’ (Bonjour 2016: 337; cf. *Bundesverfassungsgericht* 1966), which ‘enjoy the special protection of the state’ under Article 6 *Grundgesetz*. Third, from 1973 onward, removal procedures in general have been subject to the requirement of proportionality (*Bundesverfassungsgericht* 1973; cf. Neumann 1990). Fourth, from the early 1970s, ‘the right to the free development of [one’s] personality’ under Article 2(1) has sometimes been used by the courts to narrow if not quite ‘close the gaps left by the exclusion of aliens from [...] constitutionally defined citizen rights’ (Rubio-Marín 2000: 189). Fifth, from 1978, the principle of legal certainty – and more specifically, the ‘protection of legitimate expectations’ (*Vertrauensschutz*) – has been interpreted to ‘limit the executive discretion’ with respect to the non-renewal of residence permits ‘after long-term and regular residence’ (*ibid.*: 190; cf. *Bundesverfassungsgericht* 1978). Sixth, on some occasions, the courts have also rectified the restrictive interpretations of the right to asylum adopted by the authorities.⁴⁷

While the European Court of Human Rights (henceforth ECtHR) only ‘opened its eyes to the human rights of migrants’ in the mid-1980s (Dembour 2015: 196) and the Court of Justice of the European Union (henceforth CJEU) only did so (with respect to non-EU

⁴⁶ According to Thym (2009a: 223), this finding pushed immigration law beyond the (apparently quite low) ‘threshold between police state and *Rechtsstaat*’. As Thym also notes, however, while subjecting it to the ‘requirement of judicial protection’, that judgment also ‘confirm[ed] the continued validity’ of the Nazi-era *Ausländerpolizeiverordnung* (*ibid.*: 223), which ‘was officially reinstated in 1951’ and remained in force until 1965 (Panagiotidis 2020: 305).

⁴⁷ To give a couple of examples, in 1988, the *Bundesverfassungsgericht* ruled that ‘a sort of pre-screening strategy’, whereby ‘[b]order authorities and the foreigner offices of the federal states (*Bundesländer*) now examined any asylum application and unfounded cases were not transferred’ to the agency responsible for examining their merits was incompatible with Article 16(2) *Grundgesetz* (Ette 2017: 98). And, in 1990, the *Bundesverfassungsgericht* also decided ‘to recognize torture in general as grounds for asylum’ (Poutrus 2014: 132).

nationals) in the late 2000s,⁴⁸ their jurisprudence on the subject has since grown so exponentially that trying to summarise it in one paragraph would be remiss. With respect to the ECtHR, its single most important contribution to the cause of migrant/refugee rights probably lies in its expansive interpretation of Article 3 ECHR as barring the removal of aliens who would thereby face a risk of ‘inhuman or degrading treatment’ – a duty of non-*refoulement* that is significantly wider than the one enshrined in international refugee law (Chetail 2014; Den Heijer 2008).⁴⁹ As for the CJEU, what needs to be emphasised here is that it now has jurisdiction over an extremely wide web of supranational binding norms – some of which lay down individual rights – with respect to: the criteria for applicants to qualify for “refugee status” *or* “subsidiary protection status” and the rights which such statuses give access to;⁵⁰ the procedures to be used to determine whether applicants qualify for such statuses;⁵¹ the reception standards to which applicants are entitled;⁵² and the procedures and safeguards to be followed if applicants are to be “transferred” to a Member

⁴⁸ Binding EU legislation on immigration and asylum was only adopted in the early 2000s. Prior to that, except for the rights contained in Association agreements with specific non-EU states and the rights afforded to family members of EU citizens, EU law did ‘not know the very concept of (non-EU) alien rights’ (Joppke 2001: 365).

⁴⁹ The leading judgment in this area, *M.S.S. v. Belgium and Greece* (ECtHR 2011), is extensively discussed in chapter 4.

⁵⁰ Qualification Directive. Reflecting the definition of “refugee” under Article 1 Geneva Convention, Article 2(d) of this Directive provides that “refugee” means 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 [...]. Under Article 2(g) of the same Directive, “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 [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’. Under Article 15 of the same Directive, [s]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. For the full text of the Directive and a commentary, see Peers *et al.* (2015a).

⁵¹ Procedures Directive. For text and overview, see Peers *et al.* (2015b).

⁵² Reception Directive. For text and overview, see Peers *et al.* (2015c).

State other than the one in which they are present;⁵³ as well as norms on “return”;⁵⁴ family reunification,⁵⁵ long-term residence⁵⁶ etc.

At both domestic and European level, however, the law and the courts have not always been on the side of migrants/refugees. Thus, starting with the domestic level, ‘very far from adopting the activist role attributed to them’ in some of the earlier literature, the German courts were in fact ‘very reticent to encroach upon the government’s sovereignty in the field of family migration’ and ‘carefully sought a middle ground, tending more often toward exclusionary rather than inclusive policy frames’ (Bonjour 2016: 340). As for the right of asylum, the German courts have largely upheld the veritable plethora of reforms that have been introduced since the late 1970s to ‘curtail this basic right by narrowing the definition of who qualifies as a refugee, restricting access to the asylum procedure and providing asylum-seekers with less favourable reception conditions’ (Ette 2017: 91).⁵⁷ Most (in)famously, in 1996, the *Bundesverfassungsgericht* (1996) effectively ‘rubber-stamp[ed]’ (Joppke 2001: 359) the “asylum compromise” of 1993.⁵⁸ Struck between the CDU-CSU-FDP government and the SPD following a massive increase in the number of asylum applications and a wave of

⁵³ Dublin Regulation. For text and overview, see Peers *et al.* (2015d).

⁵⁴ Under the Return Directive, “return” means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to: his or her country of origin, or a [non-EU] country of transit [...], or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted’ (Article 3(3)). For text and commentary, see Peers *et al.* (2012a).

⁵⁵ Family Reunification Directive. For text and commentary, see Peers *et al.* (2012b).

⁵⁶ Long-term Residence Directive. For text and commentary, see Peers *et al.* (2012c).

⁵⁷ With respect to the question of who qualifies as a refugee, for example, Lambert *et al.* (2008: 29-30) highlight that, between 1986 and 1989, the *Bundesverfassungsgericht* ‘refused to grant protection to refugees *sur place* (namely, those who retrospectively and actively changed their religion or political orientation after leaving their home country) (*Bundesverfassungsgericht* 1986); ruled that ‘oppressive measures against religious believers are not considered as political persecution [...] if the measures are directed against the public practice of religion’ (*Bundesverfassungsgericht* 1987); established that ‘asylum-seekers [...] who have not suffered persecution in the past can claim asylum only if they can demonstrate a greater than 50 per cent chance of being persecuted if removed’ (*ibid*); and ‘decided that political persecution [...] could only relate to acts of a State’ (*Bundesverfassungsgericht* 1989). Some of the limits of the *Bundesverfassungsgericht*’s jurisprudence on reception conditions – including the provision of benefits, restrictions on internal freedom of movement, and restrictions on work – are further examined in chapter 4.

⁵⁸ For some highly critical commentaries on this decision, see Frowein and Zimmermann (1996) and Marx and Lumpkin (1996).

xenophobic violence,⁵⁹ this compromise effectively ‘stripped the broad promise of the right of asylum’ (Lambert *et al.* 2008: 31) establishing that it ‘may not be invoked by a person who enters the federal territory from a member state of the European Communities’,⁶⁰ i.e. all of Germany’s neighbouring countries, as well as introducing further limitations into the very text of (what became) Article 16a(2) *Grundgesetz*.⁶¹ The implications of this constitutional amendment are further discussed in chapter 3.

The European arena has similarly been a cause of (at least) as much disappointment as celebration for migrants/refugees and their legal advocates. Thus, with respect to the ECtHR, several commentators have underlined that it usually ‘start[s] its reasoning in migrant cases with the principle that states have the prerogative to exclude migrants’ and, thus, generally ‘favours the state, making it difficult for the migrant applicant to win’ (Dembour 2015: 5-8; cf. Baumgärtel 2019; Çali *et al.* 2021; Cornelisse 2011). As we shall see in chapter 4, the Court’s jurisprudence on Article 3 itself ‘requires a high threshold of severity’, its view that ‘fair trial guarantees do not apply to procedures which have decisive consequences on the status – and thus rights – of migrant persons’ has been described as ‘unacceptable’, and its very narrow interpretation of the prohibition on discrimination can be criticised for failing to recognise that immigration law’s ‘implicit classification of human beings with ‘good’, ‘not so good’, and ‘positively suspicious’ nationalities [...] is in opposition to the idea that all

⁵⁹ As Bosswick (2000: 48) explains, as a result of the war in former Yugoslavia, ‘[t]he number of asylum seekers peaked in 1992 at a total of 438.191’ and ‘more than 5.000 violent crimes against foreigners were committed, resulting in at least 49 fatalities’, between October 1990 and mid-1993. On this massive wave of xenophobic violence and its complex links with the political debate on the “asylum compromise”, see also Koopmans (1996), Krell *et al.* (1996) and Willems (1995: 165).

⁶⁰ Article 16a(2) *Grundgesetz*. On the controversies surrounding the reform, see Haberle (1992) and Neuman (1992).

⁶¹ Thus Article 16a(3) also provides that ‘states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists’ and ‘[i]t shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds’. Under paragraph 4 of the same Article, ‘[i]n the cases specified by paragraph (3) [...] and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant’s stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded’. We shall return to the notion of “safe country of origin” in chapter 4.

human beings are equal' (*ibid.*: 506). As for the CJEU's 'attitude' toward the rights of migrants/refugees, it has recently been characterised as 'ambivalent' (Ippolito 2015: 37), with the Court striving to 'stri[k]e a balance between [...] migrants' fundamental rights and the interest of the receiving society' (Kosińska 2020: 115). Quite apart from the Court's own "attitude", EU law has largely followed an 'exclusionary logic', contributing to create even more 'complex stratifications of status and rights' when it comes to 'those from outside the EU' (Costello 2015: 4-5).

Summing up this section, what I hope to have shown is that, although it can no longer be said that migrants do 'not have rights, only privileges which could be withdrawn at any time' (Fahrmeier 2000: 152), we still have very 'good reason to doubt that we live in an era of non-discriminatory immigration, integration, and citizenship policy' (Ellermann 2020: 2464). As we shall see in more detail in chapter 4, while migrants who can 'invoke a special preferred status' – including "EU citizens", "refugees" (*sensu lato*) and "dependents" (*Familienangehörige*)⁶² of Germans or legally staying foreigners – now have a legal right to stay in Germany, those whom Schotel (2012: 12) aptly refers to as 'normal migrants'⁶³ still don't. And lack of a right to stay in turns paves the way for exclusion from many supposedly "human"/ "fundamental" rights that are in fact reserved for citizens and/or legally staying foreigners. As legal scholar Hiroshi Motomura (2008: 141) has pointed out, the 'tension [...] between equality and immigration' law raises a crucial normative question: '[h]ow [...] can we have a sense of justice in a nation committed to equality, when we start in immigration law with a premise that some people – noncitizens – aren't quite as equal as others?'⁶⁴ To

⁶² This is the term used in the *Aufenthaltsgesetz* (Part VI) to refer to non-EU migrants who are entitled to a residence permit 'for family reasons' by virtue of being spouses or minor children of a German or a regularly staying foreigner.

⁶³ As already mentioned in chapter 1, Schotel (2012: 12-13) uses this expression to denote migrants who 'do not have a legal right to admission', underlining that '[t]hey represent the normal situation or starting point in the law' and 'constitute the largest group of migrants seeking admission'.

⁶⁴ Motomura (2008: 141) is specifically speaking of the United States, but his observation that 'we speak of equality as a national value, a commitment, and an aspiration' also applies to Germany and, indeed, any liberal polity.

slightly reframe the interrogative: what peculiar conceptions of “justice” and “equality” are the ones with which the constitutionalisation of immigration law operates and towards which it strives? The next section turns to tackle this interrogative.

VI. The constitutional conception of justice in immigration

While the *Bundesverfassungsgericht* (1969: 290) has stated that ‘substantive justice (*materielle Gerechtigkeit*) is [...] part of (*gehört zu*) *Rechtsstaatlichkeit*’, the relationship between these two concepts has been a matter of considerable debate. While some German constitutional scholars go so far as to claim that ‘all the important (*maßgebliche*) principles of justice are constitutionalised in the *Grundgesetz*, [...] so that justice cannot be pitted (*ausgespielt*) against positive constitutional law’ (Schulze-Fielitz 2006: 200; emphasis added),⁶⁵ the starting point of this section is instead that the conception of justice (in immigration) embedded in the post-war *Rechtsstaat* and partly realised by the constitutionalisation of immigration law over the last seven decades is a highly *specific and contingent* one. Building on Benhabib’s (2004: 12) point that *both* ‘expansive and inclusionary principles of moral and political universalism’ *and* ‘particularistic and exclusionary conceptions of democratic closure’ must be regarded as ‘indispensable foundations of the [...] constitutional state’, the argument I advance is that this specific, contingent constitutional vision of justice in immigration can be understood equally well in terms of ‘moderate [liberal] cosmopolitanism *and/or* moderate [liberal] nationalism’ (Lenard and Moore 2012; emphasis added). Given that the constitutionalisation of immigration law – and indeed post-war constitutionalism as such – is a quintessentially

⁶⁵ As noted by Bäcker (2015: 3), according to this view, the ‘positivisation of timeless principles of justice [...] in the *Grundgesetz*’ makes ‘the question of the morality of law appear [...] in most contexts to have been answered’ – of course, in the affirmative. In response to East German opposition figure and artist Bärbel Bohley’s famous quip ‘we wanted justice, all we got is the *Rechtsstaat*’, some German constitutional scholars have acknowledged that ‘*Rechtsstaat* and justice can [...] come into conflict’, but nevertheless insisted that ‘the forms of the *Rechtsstaat* – especially the separation of powers, the administration’s legal boundedness (*Gesetzmaßigkeit der Verwaltung*), and judicial independence – are necessary for the implementation of justice’ (von Münch 1994: 174; cf. Jaeger 1995).

“liberal” project,⁶⁶ it seems apposite to start with a couple of brief remarks on how liberal political philosophy itself has addressed the issue of immigration, and then move on to look at how the concepts of nationalism and cosmopolitanism have informed this discussion.

While ‘liberalism is [...] a broad church’, it can be broadly defined as ‘a philosophical tradition’ whose ‘core elements’ are ‘[i]ndividualism, equality, and liberty’ (Bloom 2017: 6; cf. Cole 2000: 2-4). While ‘the privileging of citizens over noncitizens would seem to depend on, and to reinforce, caste-like stratification among societal groups’ and, thus, to ‘directly contravene the egalitarian norms to which liberal democratic national societies claim to adhere, [...] the fact is that, in liberal democratic societies, discrimination can be deemed impermissible or justifiable, depending on the circumstances,’ and ‘discrimination on account of alienage has often been a difficult call’ (Bosniak 2006: 37). For some liberal theorists, ‘any liberal attempt to morally justify immigration controls must fail’ because membership restrictions inherently violate liberalism’s ‘central ethical commitment to moral equality’ (Cole 2012: 121; cf. Cole 2000; Carens 1987, 1992, 2013). As these authors themselves acknowledge, however, ‘this is hardly the consensus view’ (Bosniak 2006: 37). In fact, it seems quite fair to say that most of those who call themselves liberal theorists continue to ‘defend citizenship preferences as an unavoidable and even desirable feature of national membership communities’ (*ibid.*: 37; cf. Blake 2005, 2013; Bloom 2017; Gibney 2004; Goodin 1992; Kymlicka 2001, 2006; Miller 2002, 2005, 2016; Walzer 1983). In order to understand why this remains ‘the conventional moral view on immigration’ (Carens 2013: 10) among liberals, it is useful to examine a little more closely how they position themselves vis-à-vis two other key concepts: “nationalism” and “cosmopolitanism”.

⁶⁶ To wit, the legal and judicial constraints on the state’s ability to exclude migrants are often conceptualised in terms of ‘embedded liberalism’ (Hollifield 1994).

Lenard and Moore (2012: 47) have correctly noted that, while '[i]t used to be said that cosmopolitanism and [...] nationalism were inherently incompatible', most contemporary political philosophers – on both sides of the “divide” – no longer endorse this view. With respect to the nationalist “camp”, its contemporary academic champions invariably take pains to distinguish the “liberal”, “civic” conceptions of nationalism which they favour from “illiberal”, “ethnic” ones (Kymlicka 2006, Miller 2016, Tamir 1993). While we shall return to this distinction in the next section and the following chapter, the key point here is that liberal nationalists readily endorse the ‘weak’ cosmopolitan claim that all human beings have ‘equal moral worth’ and indeed maintain that this ‘is something that can be accepted by almost anybody barring a few racists and bigots’ (Miller 2002: 82-84). What these authors have a problem with is, rather, the ‘strong’ cosmopolitan claim that we have ‘equal duties or equal responsibilities to everyone [...] without exception’ (*ibid.*: 84). Arguing that this “strong” cosmopolitan claim does not logically follow from the “weak” one, liberal nationalists criticise and reject the former for failing to recognise the special obligations that citizens owe to each other as members of the same (national) polity (*ibid.*: 82-84). What citizens and/or their states owe to non-citizens is, in their view, little more than ‘respect for [their] human rights’ – i.e. ‘the rights that people must have if they are securely to have the opportunity to meet their *basic* needs’ (Miller 2016: 30-31; emphasis added).

While we shall see in the next section that ‘idealist’ (or radical) cosmopolitans do argue that ‘differing treatment of citizens and non-citizens is always objectionable’, ‘pragmatic’ (or moderate) ones themselves accept that ‘nationality matters in the recognition of rights’ (Romeo 2014: 911). To give a couple of examples, while stressing that ‘[i]lliberal forms of nationalism, like Nazism to take an extreme case, will certainly be ruled out by cosmopolitan justice’, Tan (2004: 2-3) has suggested that ‘liberal forms of nationalism [...] ground special commitments that can be reasonably endorsed’ and that ‘cosmopolitan justice, properly

understood, can provide the limiting conditions for nationalist aspirations and patriotic commitments [...] without denying the moral significance of such particular ties and obligations'. Benhabib's (2004: 19) own 'cosmopolitan theory of justice' similarly embraces the 'modern constitutional [...] faith' that 'expansive and inclusionary principles of moral and political universalism' and 'exclusionary conceptions of democratic closure' – or, as she also puts it, 'context-transcending constitutional and international norms' and 'the will of democratic majorities' – 'can be used to *limit one another*, that they can be renegotiated, rearticulated' and ultimately '*mediated*' through 'complex processes of public argument, deliberation, and learning' (emphasis added). If there is a difference between liberal nationalism and this 'pragmatic' (Romeo 2014: 911) or 'modest' (Bloom 2017: 8) conception of cosmopolitanism, then, it is ultimately one of emphasis rather than substance, making it quite apposite to speak in one breath of 'moderate [liberal] cosmopolitanism *and/or* moderate liberal nationalism' (Lenard and Moore 2012; emphasis added).

As the passage from Benhabib underlines, the constitutional vision of justice in immigration can be neatly understood in terms of moderate (liberal) cosmopolitanism *and/or* moderate (liberal) nationalism. For, as we have seen in the previous section, the *Grundgesetz* 'has not gone as far as [requiring] the *complete cancellation* of the constitutional distinctions between citizens and resident aliens' but only established that '*some* rights are directly achieved through access into the territory while others are not' – notably including 'the right to remain' (Rubio-Marín 2000: 195, emphasis added). For all its universalist pretensions, international human rights law in general and the ECHR in particular also 'upholds the sovereignty of individual states', and thus, ultimately legitimises 'an "*inter-statal*", rather than a truly cosmopolitan order' (Benhabib 2004: 11-12, emphasis added; cf. Dauvergne 2004, Dembour 2015). And if EU (primary and secondary) law can at all be said to have a 'cosmopolitan outlook', this is a cosmopolitanism that 'rejects the traditional notion of unfettered sovereign State control,

without mandating open borders’ (Thym 2016a: 710-711, emphasis added). In fact, a closer look at the ECtHR’s and the CJEU’s immigration jurisprudence over the last two decades reveals that ‘the underlying vision of membership has shifted away from liberal conceptions of equal treatment and residence security’ towards a ‘moderately communitarian’ outlook, in which ‘[n]ationality retains its significance as a door-opener for exclusive membership rights, such as absolute protection against expulsion or unconditional equal treatment’ (Thym 2020: 12).

Summing up this section, what I have argued is that the constitutionalisation of immigration law is underpinned by a specific vision of justice that can be understood equally well in terms of ‘moderate [liberal] cosmopolitanism *and/or* moderate [liberal] nationalism’ (Lenard and Moore 2012) – a normative framework that simultaneously ‘affirms a sort of minimum content of cosmopolitan citizenship’, defined and delimited by respect for human rights, *and* insists that ‘nationality matters in the recognition of rights’ (Romeo 2014: 911). As Gibney (2013: 124) has aptly underlined, while this ‘is certainly the dominant optic’ when it comes to normatively evaluating immigration control laws and practices,⁶⁷ it ‘is hardly the only conceivable normative framework to which one might adhere’. As already mentioned, ‘cosmopolitans like Joseph Carens, for example, are committed to an international right of free movement that significantly limits state- or nation-based claims of exclusion’ (*ibid.*: 124). And ‘[t]he socialist, universalist Christian, Muslim, or anarchist frameworks’ also ‘draw the dividing line between legitimate and illegitimate [...] migration [controls] in different ways from the liberal statist one either because they have different accounts of human entitlements (e.g., prioritise socio-economic rights over civil liberties), define differently the scope of the

⁶⁷ Gibney makes this statement about what he calls ‘the liberal statist perspective’, which is roughly equivalent to what Lenard and Moore (2012) call ‘moderate cosmopolitanism and/or moderate liberal nationalism’. To wit, the statist dimension of this perspective presupposes the ‘division of the world into separate, sovereign membership units’ and the concomitant ‘division of people by citizenship into separate sovereign States’, whereas the liberal one requires the state’s prerogative to maintain these divisions by means of immigration control to be ‘constrained by [...] norms which involve the prohibition of the arbitrary use of state power’ (Gibney 2013: 123-125).

relevant human community (e.g., the global community rather than the nation-state) or because they possess a different account of what authorities may not legitimately do' (*ibid.*: 124-125). Building on this crucial point, the next section moves on to examine two alternative visions of justice in immigration.

VII. Two alternative conceptions of justice in immigration

While the “universalist Christian framework” will also make an appearance in chapter 6, the two alternative visions of justice in immigration with which this thesis is primarily concerned are what I have already referred to a few times before as “radical nationalism” and “radical cosmopolitanism”. The central aim of this section is to provide a brief preliminary sketch of these two theoretical constructs. As already hinted in the previous section, for the purposes of this thesis, radical nationalism can be defined as a form of (ethnic and illiberal) nationalism that, rather than merely asserting that ‘nationality matters in the recognition of rights’ goes so far as to reject the very idea of ‘a minimum content of cosmopolitan citizenship’ (Romeo 2014: 911) embedded in the constitutional vision of justice in immigration in the form of legally codified fundamental/human rights. At the opposite end of what is best understood as an ideological spectrum, radical cosmopolitanism can instead be defined as a form of cosmopolitanism that, rather than settling for this ‘minimum content of cosmopolitan citizenship’, goes so far as to assert that ‘differing treatment of citizens and non-citizens is always objectionable’ (*ibid.*: 911) and rejects the nation-state and its right to exclude migrants altogether. While more empirical flesh will be put onto these bare theoretical bones in the following chapters, this section sets the stage by offering a few brief remarks on the historical trajectories of these two alternative visions of justice in immigration.

As we have seen in section III, prior to the post-war shift to a substantive conception of *Rechtsstaat* centred on respect for human dignity and fundamental/human rights, what I call radical nationalism was effectively the status quo. To recall, throughout that one-and-a-half-

century-long historical phase going from the birth of the German state(s) to the end of WWII that I have called the ‘police-state origin’ and the ‘authoritarian-state tradition’ of German alien law, ‘[t]he general assumption’ among state officials and legal and political theorists alike was that ‘foreigners did not have rights, only privileges which could be withdrawn at any time’ (Farmheir 2000: 152). Rather than a historical anomaly, the Nazis’ view that ‘the regulation of immigration’ constituted a ‘necessary measure for maintaining the healthy racial cohesion of the *Volk*’ (Koellreutter, cited in Whitman 2017: 51) was at the time a well-established and broadly accepted one, including in liberal democratic polities such as the United States (*ibid*: 51). While ‘[t]he Nazis were drawing on practices that had developed in the broader historically British world’ (*ibid*: 51), they did nonetheless radicalise them to an unprecedented extent. For, in line with what Carl Schmitt (1928 [2008]: 262) had suggested before the Nazis took power, the ‘control of foreign entry and expulsion of unwanted foreign elements through immigration legislation’ became in the Third Reich only one among several other ‘methods of ensuring or realising national homogeneity’, including ‘the elimination of the alien component through suppression or exile of the heterogeneous population and other radical means’.

The capitulation of the Nazi regime, however, did *not* spell the total demise of radical (ethnic, illiberal) nationalism. For one thing, the view that Germany ‘should be inhabited exclusively by members of the native group (“the nation”) and that non-native elements [...] are fundamentally threatening to the homogeneous nation-state’, which is otherwise known as ‘nativism’,⁶⁸ has remained ‘the ultimate core feature of the ideology’ of the ‘radical right’⁶⁹

⁶⁸ As Mudde (2007: 19) underlines, ‘[i]n comparison to the broad term nationalism, nativism has the advantage of excluding liberal forms of nationalism’. While Mudde also maintains that ‘nativism could include racist arguments’, but ‘it can also be nonracist (including and excluding on the basis of culture or even religion)’ (*ibid*: 19), this underestimates the empirically quite important role that ‘racialisation [plays] in the juxtaposition of the native against the non-native’ (Newth 2021: 3) and overlooks the fact that ‘a racist ideology’ can also be articulated ‘in an indirect, coded [and] covert manner, notably by focusing on culture’ (Mondon and Winter 2020: 19).

⁶⁹ According to Mudde’s (2007: 22) canonical conceptualisation, radical right politics consists of ‘a combination of three core ideological features: nativism, authoritarianism, and populism’. Mudde defines the

(Mudde 2007: 19-29) – a party family with many offspring in post-war (West) Germany (Art 2011: 189-230). And although ‘[o]ne of the defining features of post-war German politics has been the [electoral] irrelevance of the radical right at the federal level’ (Art 2018: 77), experts in the field emphasise that this was *not* due to lack of social support for its ethnonationalist ideology, which survey research from the 1950s to the present day has indeed consistently estimated to lie ‘between 15 and 25% of the adult population’ (Rucht 2018: 227), but rather to the fact that radical right-wing parties made themselves ‘unelectable’ by remaining ‘ideologically beholden to [...] National Socialism’ *and* the fact that the CDU/CSU’s own ‘strong anti-immigration stance left little room for a radical right competitor’ (Arzheimer and Berning 2019: 2). Only after reunification was radical (ethno)nationalism re-imagined – through a highly distorting ‘modernization lens’ – as ‘a specific East German problem’ and negatively contrasted to the supposedly ‘West German standards of political and civic culture’ (Rädel 2019: 38).⁷⁰

As for ‘radical cosmopolitanism’, broadly defining it (in a way that is consistent with the more specific conception of it used in this thesis) as a political vision that ‘expresses the universal as *insurgent*, as challenging what is taken for universal in a particular time and place’, Ingram (2018: 22) has suggested that its roots can be traced all the way back to Diogenes the Cynic’s (c. 412–323 BC) famous statement that he was ‘a citizen of the world’, but it only fully came into being in the wake of the French Revolution (*ibid.*: 23).⁷¹ More specifically, Ingram sees

latter as ‘a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people’ (*ibid.*: 23). As for “authoritarianism”, Mudde conceptualises it as ‘the belief in a strictly ordered society, in which infringements of authority are to be punished severely’ (*ibid.*: 23).

⁷⁰ Of course, this is *not* to deny that East Germany has a problem in this respect. For a brief historical overview of racism and xenophobia in East Germany, see Adam (2015: 460), who points out that the ideological assumption that a ‘socialist state’ was ‘immune to fascist tendencies’ and the consequent lack of ‘anti-racist political education’ went hand in hand with ‘high levels of hostility’ towards its smaller but not insignificant foreign worker population.

⁷¹ For Ingram (2018: 23), this is linked to the idea that a truly radical cosmopolitanism presupposes ‘not only a global field of action, but also a conception of action that can aspire to radical social transformation towards universal goals’, which in turn only became possible with the (post-revolutionary) emergence of ‘a new experience of history, one that made it possible for human beings to imagine, through their own activity,

radical cosmopolitanism as having been inaugurated by the revolutionaries' (short-lived) experiment with 'extending republican citizenship to all [...] those who had spent a year on French soil – an astonishingly inclusive standard' that was only adopted (in 1793) due to pressures on the part of groups that had been left 'outside the representative system' instituted by the Revolution, including the poor, women and the insurgent slaves of the French colony of Saint-Domingue (*ibid.*: 24). Taking this episode as paradigmatic, Ingram contends that radical cosmopolitanism has been driven ever since by 'the energy and imagination of the subaltern, who, finding themselves excluded from the universal, seized and reinvented it' again and again in order to create 'opening[s] through which those that fall outside the existing order can reorder the whole' – be it via 'socialism', 'communism', 'anarchism', 'feminism', 'anti-colonialism' or 'anti-racism' (*ibid.*: 25).

While Ingram's genealogy of radical cosmopolitanism is highly evocative, the emergence of what different scholars have variously characterised as 'abject' (Nyers 2003), 'antagonistic' (Honig 2006), 'contestatory' (Koukouzellis 2019) or indeed 'radical' (Mégret 2019; Paris 2019) cosmopolitanism within the specific realm of immigration politics has more recent origins.⁷² In Germany, collective mobilisations and protests against various exclusionary immigration laws and practices, involving both migrants (with different legal statuses) and civil society actors such as worker and student unions, churches and lawyers, can be traced all the way back to the 1960s (Goeke 2014; Slobodian 2008, 2013). While these 'leftist legalist' mobilisations helped to establish 'constitutional law and human rights' as the 'primary legitimizing rhetoric for political opposition' to migrant exclusion throughout the 1970s and 1980s (Slobodian 2013: 218), the early 1990s saw the emergence of a new, complementary

stepping outside the cycles of history and initiating a *novum*, an unprecedented social, political, and moral order'.

⁷² While these concepts are not exactly equivalent, all of them require something more than the minimum content of cosmopolitan citizenship onto which moderate (liberal) nationalism and moderate (liberal) cosmopolitanism converge.

paradigm. Thus, new migrant/refugee self-organised groups and ‘pro-migrant initiatives’ started to explicitly demand ‘a right to stay for all’ and to focus less on ‘influenc[ing] policy processes’ and more on ‘counteract[ing] the consequences of these policies’ via ‘direct action and disruption’ (Kirchhoff and Lorenz 2018: 63-64; cf. Stierl 2012). This was the birth of the ‘no border’ movement, whose ‘signal demand’ is indeed ‘for every person to have the freedom to move and [...] to stay’ where she wishes and which, in contrast to ‘other immigrant-rights approaches’, thereby ‘calls into question the legitimacy of the global system of national states itself’ (Anderson *et al.* 2012: 82; cf. Bauder 2015; King 2016).

Needless to say, whereas moderate/liberal conceptions of nationalism and cosmopolitanism are quite compatible with each other, radical nationalism and radical cosmopolitanism are inherently antithetical to one another. As already anticipated in chapter 1 (section II), however, my contention is that radical nationalism and radical cosmopolitanism also ‘make systematically different demands of law than does the rule of law’ – or, more specifically, the post-war, liberal-constitutional conception of the *Rechtsstaat* – and must therefore be regarded as ‘rival political ideal[s]’ to it as well (Krygier 2017: 225; cf. Cheesman 2015, 2017). On the one hand, in its explicit rejection of the nation-state and its *constitutionally enshrined right of exclusion*, radical cosmopolitanism/no border can in some ways be viewed as the heir of a long radical left-wing tradition of deep antipathy towards the rule of law, rooted in an understanding of the just society that envisages ‘not that law fulfil any mythical essence [...], but that it disappear along with the state’ (Krygier 1990: 651; cf. Krygier 2019: 116-119). On the other hand, in its rejection of the *constitutionally anchored constraints on the sovereign right of exclusion*, notably including human/fundamental rights, radical (ethno)nationalism can in many ways be regarded as the heir of an equally long radical right-wing tradition of deep antipathy towards the rule of law, rooted in the belief that ‘a state depends upon the wilful decision of an unbound and in principle legally unbindable sovereign political decision-

maker, prepared and able to identify and define the fundamental political distinction between friend and enemy' (Krygier 2019: 116).

VIII. Conclusion

This chapter has laid out the historical and theoretical background needed to make sense of the struggle between competing visions of the *Rechtsstaat* – and of justice – in immigration that will be examined in the following ones. To begin with, I have briefly re-traced the parallel development of the *Rechtsstaat* ideal and of German immigration law from their birth in the beginning of the 19th century to the adoption of the *Grundgesetz*, showing that while the former was marked by numerous twists and turns that were deeply connected to broader transformations within the political realm, the latter was marked by a remarkable degree of continuity and authoritarianism. Having done that, I have examined the main features of the post-war conception of the *Rechtsstaat*, arguing that its distinctiveness consists in its strong commitment to human dignity and human rights and its openness to international and supranational norms, and analysed its impact on the development of post-war immigration and asylum law, arguing that its constitutionalisation has been a gradual, contested and still only fledgling process. Finally, I have teased out the specific conception of justice in immigration embedded in the post-war *Rechtsstaat*, suggesting that this is best understood as a form of moderate, liberal cosmopolitanism *and/or* moderate, liberal nationalism, and contending that, while this is the dominant normative outlook on immigration in liberal democratic states, it remains challenged by two alternative and inherently antithetical conceptions of justice in immigration: radical nationalism and radical cosmopolitanism.

As already mentioned in chapter 1, anthropologist Nick Cheesman (2015: 7) has forcefully argued that

‘to get at the rule-of-law idea scholars sometimes need to come at it through opposing ideas. To take the rule-of-law ideal seriously, there must be genuine concern not only for how it is embodied in action, [...] but also for how

opposing ideals are likewise embodied. We need to take seriously places where the rule of law is in practice and *in principle* denied, and treat them not as rule-of-law negatives, or caricatures, but as places animated by different ideas, perhaps opposing ones, to the rule of law.’

In addition to this crucial point, however, Cheesman (2017: 32) also makes a second and equally important one, namely, that – rather than frontally attacking the rule of law – some of its enemies ‘might actively oppose it by subsuming it, occupying the lexical domain of the rule of law, hollowing it out semantically while replicating its verbiage’.⁷³ Building on this crucial point, the next chapter turns to examine what was probably the most prominent ‘unfriendly takeover’ (Baer 2018: 354) – or, as Cheesman (2017: 30) puts it, ‘fraudulent misappropriation’ – of the *Rechtsstaat* ideal within the heated political debate on immigration in post-“crisis” Germany, namely, the narrative that the German government’s decision to grant admission to the hundreds of thousands asylum seekers who showed up at the country’s border in late 2015 and early 2016 constituted a “breach of the law” (*Rechtsbruch*).

⁷³ The direct target of Cheesman’s (2015: 35) remark is what he refers to as ‘law and order’ – a ‘political ideal’ whose ‘telos’ is ‘non-restlessness’, ‘quietude’ or, borrowing from Carl Schmitt, “total peace”: the elimination of any activity that the sovereign designates hostile’.

3. THE *RECHTSBRUCH* MYTH (OR: THE PROBLEM OF UNFRIENDLY TAKEOVER)

I. Introduction

The start of my fieldwork in Berlin in June 2018 coincided with the unfolding of a protracted political face-off between Chancellor Merkel and Interior Minister Seehofer, which nearly led to a historic split between their two “sister parties” (the CDU and CSU) and, thus, the collapse of the coalition government that they had formed (with the SPD) a mere four months earlier.⁷⁴ While Merkel had agreed to ‘62,5’ of the 63 points included in Seehofer’s much-awaited “Migration Masterplan”, the remaining half-a-point of discord consisted in the latter’s intransigent demand that incoming asylum seekers who had already been registered in another EU country should be turned away at the border (Gerdziunas 2018). For the Interior Minister, this measure was ‘legally not only possible but required’ (Phoenix 2018). As he candidly acknowledged, however, bringing administrative praxis in line with this putative legal requirement was not only necessary to ensure ‘the functioning (*Funktionsfähigkeit*) of the *Rechtsstaat*’, but also to rescue ‘the credibility of [his] party’ (*ibid*), whose prospects of retaining its majority in the upcoming Bavarian state election seemed threatened by the rise of the AfD. Two months earlier, the latter had already lodged a constitutional complaint aimed at vindicating what it had been shouting even more loudly and consistently than the CSU ever since the outbreak of the so-called “migration/refugee crisis” of 2015-2016, namely, that the Federal Government’s “open border” policy vis-à-vis incoming asylum seekers represented a ‘breach of the law’ (*Rechtsbruch*) and a ‘rule of lawlessness’ (*Herrschaft des Unrechts*).⁷⁵

⁷⁴ For a comprehensive account of this protracted face-off in English, see Chazan and Buck (2018).

⁷⁵ As noted by Detjen and Steinbeis (2019: 16-17), the latter expression activates powerful historical associations. For it is semantically very close to the notion of “*Unrechtsstaat*” (literally: “non-*Rechtsstaat*” or “state of lawlessness/injustice”), which was famously coined by legal philosopher Gustav Radbruch (1946) to

The “crisis” of 2015-2016 was in fact a crisis of the ‘European migration and asylum regime’, and especially the Dublin system (Pastore and Henry 2016; cf. Börzel 2016; De Genova *et al.* 2016; Den Heijer *et al.* 2016; Trauner 2016).⁷⁶ Whereas irregular onward movements to North-Western Europe – and Germany in particular – had always been the norm (Guild *et al.* 2015: 27-35; Maiani 2016: 12-16), starting from May 2015, hundreds of thousands of migrants/refugees irregularly entered Greece from Turkey and were then “waved through” along the “Balkan route” (Kasperek 2016b). After suspending all incoming Dublin transfers in June, the Hungarian government sought to halt these onward movements through increasingly violent means, including building a 175Km long barbed-wire fence at its border with Serbia; deploying tear gas-shooting soldiers at the border; and preventing migrants/refugees from boarding international trains heading West (Kallius *et al.* 2016). When, on 4 September 2015, roughly 500 of those who had gotten stuck at Budapest’s Keleti train-station – trailed by a flock of international reporters – set out to reach Austria on foot, however, president Orban suddenly announced that that they – and the other 6,000 or so who had stayed back at the station – would be bussed to the Austrian border on that same night (*ibid.*: 30). Caught by surprise, convinced that once there they ‘could only be stopped by means of violence’, and ‘wary of such images and their political impact’, Chancellor Merkel and her Austrian counterpart quickly agreed to admit them into their countries (Detjen and Steinbeis 2019: 18).

characterise the National Socialist regime and subsequently also employed with respect to the Communist dictatorship in East Germany.

⁷⁶ To put it with Den Heijer *et al.* (2016: 607-608), the ‘events in 2015 [resulted] from fundamental flaws in the design of the common European asylum policy’, including: first, the fact that ‘the allocation of asylum seekers is premised on the false idea of a level playing field, which is maintained by a system of coercion, leading to constant stress and obstructive behaviour on the part of both asylum seekers and the Member States’; second, the fact that, ‘at the external border, the focus on control and deterrence is misconceived, as it overestimates, practically as well as legally, the ability of borders to bar irregular entry or prevent secondary movements’; and third, the fact that, ‘beyond the external border, the series of prohibitive measures taken to prevent asylum seekers from arriving at the EU border has not stymied migration but incentivized migrant smuggling, potentially leading to more instead of less migration’.

While German government representatives emphasised that this was an ‘exceptional’ decision (Deutsche Welle 2015), during the following week or so, several thousand migrants/refugees kept arriving each day at Munich’s train station, warmly welcomed by large numbers of volunteers (McGuinness 2015). Within a few days, however, prominent figures within not only the AfD but also the CSU and Merkel’s CDU were already calling to revoke the constitutional right to asylum, introduce border controls and/or deny entry to all incoming asylum seekers (Neuerer 2015). Against this backdrop, and after a series of tense intra-governmental meetings (Detjen and Steinbeis 2019: 19-20), the federal government announced on 13 September 2015 that, deeming the ‘continuous large influx of persons seeking international protection’ a ‘serious threat to public policy or internal security’, it would introduce controls at the border with Austria⁷⁷ – a step that several other Member States replicated in the following days and months.⁷⁸ This legally questionable move,⁷⁹ however, was *not* accompanied by a policy of blanket rejection at the border.⁸⁰ As a result, (circa) 164,000 new asylum seekers were recorded in September 2015 (BMI 2015a), a further 181,000 in October (BMI 2015b), 206,000 in November (BMI 2015c), 127,320 in December

⁷⁷ Under the *Schengen Borders Code*, a ‘serious threat to public policy or internal security’ constitutes a legitimate ground for an EU Member State to ‘exceptionally reintroduce border control at [...] its internal borders’ for a period of ‘up to 30 days’, which may be extended for a total period of no more than 6 months (Article 25). If the “threat” is so serious as to put at risk ‘the overall functioning of the area without internal border control’, controls can be implemented for ‘a period of up to six months’, which ‘may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist’ (Article 29).

⁷⁸ Austria reintroduced border controls on 16 September 2015; Slovenia on 17 September 2015; Sweden on 12 November 2015; Malta on 9 November 2015; France on 13 November 2015; Norway on 16 November 2015; Denmark on 4 January 2016; and Belgium on 23 February 2016 (Guild *et al.* 2016: 94-112).

⁷⁹ Noting that recital 26 *Schengen Borders Code* explicitly states that ‘[m]igration and the crossing of external borders by a large number of third-country nationals *should not, per se, be considered to be a threat to public policy or internal security*’ (emphasis added), Guild *et al.* (2016: 43) have argued that ‘[n]one’ of the official justifications for the introduction of border controls offered by the Member States ‘fulfils [...] the requirement to make a reasonable claim regarding the likely impacts of any threats to public policy or internal security’.

⁸⁰ Note, however, that, after the introduction of controls in September 2015, some people ‘were immediately sent back to Austria, although it had not been clarified whether they intended to apply for asylum in Germany’ (*Informationsverbund Asyl & Migration* [henceforth IAM] 2017: 16). While ‘[t]he border police did not provide information on the number of such cases’ and ‘claimed that procedural guarantees, in particular access to an effective remedy as regulated in the Dublin Regulation, were adhered to’, critics underlined that ‘it is not clear how a proper “Dublin procedure” (including submission of take charge requests etc.) could possibly be carried out within the short period of time that asylum seekers are held at the border’ (*ibid.*: 16-17) – a point to which we shall return in section III.

(BMI 2016b), 91,671 in January 2016 and 61,428 in February (BMI 2016c).⁸¹ From March onward, the number of new arrivals starkly dropped (*ibid*)⁸² due to the “closure” of the “Balkan corridor” (Kasperek 2016b) and the “EU-Turkey deal” (Carrera *et al.* 2019), both of which were “brokered” and, indeed, aggressively pursued by the German government.

Figure 3.1: Number of asylum applications in Germany, 1992-2018

[...]

Source: BAMF (2020: 5)

As a newspaper article published one year later put it, what came to be widely characterised as “‘Merkel’s border opening’ [...] divide[d] the country’ and ‘split history into a time before and a time after’ (Blume *et al.* 2016). While internal border controls were in fact abolished on 25 March 1995,⁸³ ‘Merkel’s decision to allow a million refugees into Germany’ undoubtedly contributed ‘both to the AfD’s radicalization and to its electoral takeoff’ (Art 2018: 77; cf. Arzheimer and Berning 2019; Dostal 2017). After the federal election of September 2017, the latter became indeed not only the first party ‘to the right of the CDU/CSU’ to enter the German parliament (*Bundestag*) since the Nazis, but also ‘the third largest party grouping’ and the main opposition party in the country (Lees 2018: 295-296). The central aim of this chapter is to examine how the allegation that the German government’s policy of non-rejection at the border violated the law – or, as some of its critics dubbed it, ‘the *Rechtsbruch* myth’ (Detjen and Steinbeis 2019; Thym 2018a) and ‘the stab-in-the-back legend of our times’⁸⁴ (Steinhagen 2018) – contributed to this veritable ‘systemic shock’ (Lees 2018: 297).

⁸¹ These numbers refer to new entries in the so-called “EASY” system, which is used to determine the initial allocation of asylum seekers to the different *Länder* (see chapter 4). According to the Federal Government, due to the significant delays between initial allocation and the lodging of a formal asylum application, the number of new entries in the EASY system represented a more accurate indicator of the monthly volume of newly arriving asylum seekers than the number of asylum applications (*Bundesregierung* 2016). However, as the government itself noted, a certain amount of double counting was to be assumed (*ibid*).

⁸² March: 20,608; April: 15,941; May: 16,281; June: 16,335; July: 16,160; August: 18,143 (BMI 2016c).

⁸³ This is the date on which the *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* finally entered into force.

⁸⁴ The “stab-in-the-back legend” consisted in the false but widespread belief in post-World War I Germany that ‘the “victorious” German army had been defeated, not by the Allies, but by treason on the Home Front’

In a nutshell, the chapter's central contention is that this unfounded allegation played a central role within the AfD's sustained efforts to misrepresent itself as 'a party of the *Rechtsstaat*' and misappropriate its 'immense ideological power' (Maier 2019: 1072) to legitimise a radical form of (ethno)nationalism that is ultimately antithetical to this ideal.

In advancing this argument, the chapter seeks to contribute to a burgeoning body of scholarship on what tends to be framed as "the populist challenge" to (liberal) constitutionalism/the rule of law (e.g. Blokker 2018, Bugarcic 2019, Corrias 2016, Halmai 2019, Lacey 2019, Scheppele 2019, Walker 2019). In my view, what this framing tends to obscure is that the actors from which this threat emanates are incarnations of not just "populism" but the 'populist radical right' (Mudde 2007: 29). As mentioned in the previous chapter, however, 'the ultimate core feature of the ideology of this party family' is 'not populism' but 'nativism' (*ibid.*: 29) – or, as I call it, radical (ethno)nationalism. A focus on populism, then, risks to distract from what is most important to – and most troubling about – these "enemies of constitutionalism". In order to recalibrate the focus, the chapter draws on recent scholarship on the theoretically quite crisp but empirically rather slippery distinction between, on the one hand, "ethnic"/"illiberal"/"radical" and, on the other hand, "civic"/"liberal"/"moderate" types of nationalism, providing additional evidence for the crucial observation that '[t]hose radical right parties that enjoy relative success in mainstream electoral politics tend to be the ones' that, while not quite abandoning 'a rhetoric focused on ethnic and/or primordial elements of national identity such as race, creed, blood and kinship', *also* 'annex civic values in their discursive toolkit', notably 'including [...] respect for the rule of law' (Halikopoulou *et al.* 2013: 108; cf. Fozdar and Low 2015, Halikopoulos and Vlandas 2019).

– a narrative that 'had a profound impact on Weimar politics' and was extensively used by the Nazi propaganda machine (Vascik and Sadler 2016: 3).

The remainder of this chapter consists of six sections. Section II lays out the specific version of the *Rechtsbruch* thesis contained in the AfD's constitutional lawsuit against the federal government. Refuting the arguments advanced therein, section III contends that the German government was not only allowed but indeed *obliged* to admit incoming asylum seekers under both domestic and EU law. Having done that, section IV turns to examine the vision of justice in immigration that underpinned and was in turn promoted by the *Rechtsbruch* myth, arguing that it consisted in a form of radical (ethno)nationalism that is ultimately irreconcilable with the post-war *Rechtsstaat*. Section V investigates how the *Rechtsbruch* thesis helped the AfD to overcome the German radical right's historical electoral irrelevance, suggesting that it did so by enabling it to misrepresent itself as a party of the *Rechtsstaat* and, thus, a legitimate political alternative for that significant section of the German electorate that holds nativist views but is not comfortable voting for an *explicitly* racist and anti-constitutional party. Section VI shows that this '*mise-en-scène*' (Pichl and von Dömming 2020: 303) was only as effective as it was because powerful and influential actors on the "conservative" side of the political spectrum helped to push the *Rechtsbruch* myth across 'the boundary that demarcates the frivolous from the plausible' (Balkin 2011: 88). Section VII concludes by arguing that, although the German borders have remained "open", the *Rechtsbruch* myth and the rise of the AfD did have quite real repercussions for immigration policy.

II. The AfD's version of the *Rechtsbruch* thesis

The AfD (2018) constitutional complaint was the brainchild of Dr. Ulrich Vosgerau – a former research assistant at the University of Cologne's law faculty, who first characterised the policy of non-rejection at the border as 'rule of lawlessness' (Vosgerau 2015). Lodged in May 2018, the complaint was unanimously declared inadmissible by the *Bundesverfassungsgericht* (2018: 24) in December of the same year on the ground that, while it purported to vindicate

the AfD's rights of participation in the legislative process, its actual aim was 'instead to put a stop to a certain government policy', namely, its policy of non-rejection at the border.⁸⁵ To this inadmissible end, the complaint advanced three key arguments. First, this policy violated the 'fundamental constitutional decision enshrined in Article 16a(2) *Grundgesetz* and its statutory concretization in Section 18(2) *Asylgesetz*' (Asylum Act) (AfD 2018: 68). Second, these (alleged) domestic law obligations to refuse entry at the border did 'not contradict the responsibility allocation criteria of the Dublin Regulation but serve[d] on the contrary to ensure their implementation and efficacy' (*ibid*: 68; emphasis in original). Third, even if the *Bundesverfassungsgericht* were to disagree with the previous argument and find that the Dublin Regulation not only allowed but obliged the German government to grant access to territory to incoming asylum seekers, such an EU law obligation would itself violate 'the constitutional principles of sovereign statehood and the principle of democracy, which have primacy over EU law' (*ibid*: 81). This section briefly reviews each of these three arguments in turn.

With respect to the first argument, as already mentioned in the previous chapter, Article 16a(2) *Grundgesetz* was introduced in 1993 as part of the so-called "asylum compromise", establishing that the constitutional right of asylum 'may not be invoked by a person who enters the federal territory from a member state of the European Communities'. According to Vosgerau, this constitutional amendment finally put an end to the 'special path' (*Sonderweg*) on matters asylum taken by the Federal Republic in the wake of WWII (*ibid*: 14). Whereas the right of asylum had hitherto always been understood as a discretionary right of the state to grant admission and protection to foreign nationals, Vosgerau complains, the *Bundesverfassungsgericht* 'interpreted it right from the start [...] as a subjective, justiciable right'

⁸⁵Steinbeis (2018b) has rightly characterised the judgement as a 'missed chance' to finally put to rest the *Rechtsbruch* myth. To wit, AfD MP and chairman of the *Bundestag* Legal Affairs Committee Stephan Brandner's response to the ruling was that, 'now as ever, it is clear – for the *Bundesverfassungsgericht* has not ruled the contrary – that the Merkel government and the old parties are accountable for a million-fold breach of the law and the erosion of the *Rechtsstaat*' (*ibid*).

and thereby transformed it into a ‘lasting immigration gateway’, which ‘guaranteed to every person on earth who somehow managed (whether legally or illegally) to enter the Federal Republic and to lodge an asylum claim the right to an administrative asylum procedure’ and – due to the difficulties involved in deporting rejected asylum seekers – access to German citizenship (*ibid.*: 15-16). According to Vosgerau, finally addressing the ‘growing popular discontent about the obvious abuse of the constitutional right of asylum’, which – as already mentioned in the previous chapter – translated into a massive wave of violent crimes against foreigners and ‘at least 49 fatalities’ between 1990 and 1993 (Bosswick 2000: 48), the 1993 asylum compromise ‘starkly limited’ its personal scope of application (AfD 2018: 16).

For Vosgerau, this ‘fundamental constitutional decision’ to limit the right of asylum finds ‘statutory concretisation’ in Section 18(2) *Asylgesetz* (*ibid.*: 68), according to which a ‘foreigner *shall be refused entry* if (1) he enters from a safe third country’ or ‘(2) there are indications that another country is responsible for processing the asylum application based on European Community law’. As Vosgerau acknowledges, in an exception to this rule, Section 18(4) provides that ‘the authorities *shall refrain from refusing entry* or from removing the foreigner if 1. The Federal Republic of Germany is responsible for processing an asylum application based on European Community law [...] or if 2. The Federal Ministry of the Interior has so ordered on humanitarian grounds, for reasons of international law or in the political interests of the Federal Republic of Germany’. For Vosgerau, however, neither of these two exceptions is applicable. With respect to the former, his argument is that the Dublin Regulation assigned sole responsibility for processing asylum applications lodged at the border between Austria and Germany to the former country (see below). As for the latter exception, Vosgerau maintains that it could only be invoked ‘on a case-by-case basis’ and in the presence of a public order by the Interior Minister to this effect (*ibid.*: 72). ‘A massive executive legal exemption (*Gesetzesdispens*)’ based on ‘unwritten and unpublished secret

directives (*Geheimerlassen*) about whose exact content not even the *Bundestag* (!) is informed' was, on the contrary, 'completely inconceivable even just on rule-of-law grounds' (*ibid.*: 72).

Since, as we have just seen, Section 18(4)(2) *Asylgesetz* itself provides that the German border authorities 'shall refrain from refusing entry' if Germany 'is responsible for processing an asylum application' under EU law, the second key argument advanced in the constitutional complaint is of course that Germany was *not* responsible for processing applications lodged at its border with Austria. For Vosgerau, this is established by Article 20(4) Dublin Regulation (*ibid.*: 79), according to which, '[w]here an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present'. In his view, whoever is intercepted at the border between Germany and a neighbouring state still finds him/herself on the latter's territory, making the latter responsible for processing his/her application (*ibid.*: 80). While acknowledging that Article 17 Dublin Regulations provides that any 'Member State may examine an application for international protection lodged with it [...] even if such examination is not its responsibility', Vosgerau further contends that 'Article 16a(2) *Grundgesetz* rules out' this option, which anyway 'only ever relates to exceptional individual cases'; only allows a Member State to assume competence for examining the substance of an application (rather than for determining the state responsible for doing so); and presupposes the fulfilment of 'specific formal preconditions' that Germany never met (*ibid.*: 73-76).

As I shall argue in section IV, this interpretation of the Dublin Regulation is deeply flawed: contrary to what Vosgerau suggests, the Regulation – and, thus, Section 18(2) *Asylgesetz* too – not only allowed but *obliged* the German authorities not to turn asylum seekers away at the border. For now, however, let us continue by looking at how Vosgerau deals with one of the most glaring puzzles that his interpretation of the Dublin Regulation engenders, namely, that

– as he duly acknowledges – the Schengen Borders Code generally precludes Member States from conducting systematic controls at their internal borders (*ibid.*: 18-19). How, then, could the German authorities enforce their (alleged) duty to reject asylum seekers at the border? Vosgerau’s answer to this interrogative is effectively that, prior to the introduction of border controls on 13 September 2015, they simply couldn’t do so (*ibid.*: 19). Rather than taking this as a symptom that his interpretation of the Dublin Regulation is deeply flawed, however, Vosgerau boldly brushes it aside by launching into an all-out invective against Schengen, which he describes as a ‘surprise-attack-like’ (*handstreichartig*) move on the part of an ‘idealistic’ handful of ‘European enthusiasts’ (*ibid.*: 20). Having done that, he proceeds to assert that ‘the issue can be set aside because internal border controls have been reintroduced since 13 September 2015’ and, ‘starting from this day, the national provisions concerning the rejection of asylum seekers from safe third countries had in any case to be comprehensively applied again’ (*ibid.*: 22).

The third and last key argument advanced in the AfD lawsuit is that, even if the *Bundesverfassungsgericht* were to disagree with its (deeply flawed) interpretation of the Dublin Regulation and find that the latter obliged the German government to grant access to territory to incoming asylum seekers, doing so would still be unlawful. Since EU law generally has primacy over domestic legislation (Claes 2015), what Vosgerau needs to show is that such an EU law obligation would violate one of the very few ‘limits on the supremacy of EU law’ established by the *Bundesverfassungsgericht* in its jurisprudence on ‘constitutional identity’ (Polzin 2016: 426; cf. Faraguna 2017: 1624-1625). While we shall see in section IV that the *Bundesverfassungsgericht*’s jurisprudence on constitutional identity is highly controversial and the limits on the general principle of the primacy of EU law that it contains rather ‘elusive’ (*ibid.*: 424), suffice here to say that the Court claims competence to review whether EU legislation respects the core constitutional principles protected by Article 79(3) *Grundgesetz*, and to

declare the former inapplicable if it doesn't. Such principles include inter alia 'the democracy principle' and the principle of 'German statehood', which is 'not expressly protected by article 79(3)' but has been 'read into' it by the *Bundesverfassungsgericht* in 'an obiter dictum' (*ibid*: 428). According to Vosgerau, if the Dublin Regulation obliged Germany to grant asylum seekers access to its territory, it would violate both of these 'fundamental constitutional principles' and thus have to be 'disapplied' (AfD 2018: 81).

With respect to the principle of 'sovereign statehood' (*Eigenstaatlichkeit*), Vosgerau's argument unfolds over a mere half-page. Its starting point is that 'the application of European law meets its limit in the concomitant imperative to preserve [it]', meaning that 'Germany cannot become a mere [...] administrative province of a de facto pan-European mega-state' (*ibid*: 82). Having said that, Vosgerau goes on to assert that 'the effective control of entry at the border is certainly part of sovereign statehood' (*ibid*: 82). For, 'due to the many constitutional, human rights and international law constraints' on deportation, it is 'factually inseparable from control of the composition of the population (*Kontrolle der Bevölkerungszusammensetzung*)' (*ibid*: 82). While the latter notion and its connection to the principle of sovereign statehood remain enigmatic, it also plays a central role in Vosgerau's argument concerning the principle of democracy. Indeed, this argument effectively boils down to the claim that, '[i]f the electorate can no longer exercise thoroughgoing influence even on such a basic and fundamental factor as the composition of the population and the selection of the people with whom Germans will have to share their lives on their own soil [...], the minimum threshold of democratic legitimation required by Article 79(3) [*Grundgesetz*], including on matters falling under the scope of Union law, would be missed' (*ibid*: 83). Accordingly, 'an EU law obligation (*Rechtswang*) to grant entry to territory to asylum seekers [...] would violate the constitutional identity of the German Federal Republic and the Federal Government would have to disapply it' (*ibid*: 82).

III. Refuting the *Rechtsbruch* thesis

What are we to make of the legal arguments contained in the AfD's lawsuit? Do they correspond to 'what the law, "correctly understood", requires' (Levinson and Balkin 2001: 176)? Adopting an 'internalist approach' (*ibid.*: 174; cf. chapter 1, section IV), this section argues that the interpretation of the law advanced by Vosgerau was fundamentally mistaken and, in some respects, so unreasonable as to call into question its "good faith".⁸⁶ More specifically, building on the interventions of several immigration and constitutional law scholars and reflecting the tripartite structure of the *Rechtsbruch* myth as articulated in the AfD lawsuit, this section advances three key (counter)arguments. First, rather than demanding rejection at the border, the applicable domestic law – and Section 18 *Asylgesetz* in particular – not only allowed but *obliged* the German border authorities to act as they did, i.e. to admit incoming asylum seekers. Second, this domestic law obligation reflects and stems from the procedural norms pertaining to the "transfer" of asylum applicants enshrined in the Dublin Regulation, whose implementation presupposes at least temporary admission into the territory of the would-be-transferring Member State. Third, while it is hard to say anything certain about the elusive notions of "constitutional identity", "sovereign statehood" and "the principle of democracy", Vosgerau's claim that the duty of admission enshrined in the Dublin Regulation violates these fundamental constitutional principles is something that the *Bundesverfassungsgericht* would have been highly unlikely to endorse, had it not ruled the AfD lawsuit to be inadmissible on procedural grounds.

Starting with Article 16a(2) *Grundgesetz*, the argument that it obliged the German authorities to reject asylum seekers at the border was put to rest by University of Konstanz's Public,

⁸⁶ As noted by Pozen (2016: 886), '[t]he principles of good faith and bad faith are fundamental to more or less every legal system on a world scale'. 'Although the concept of bad faith can be slippery', Posner continues, 'its core meanings are fairly consistent throughout the law and center on dishonesty, disloyalty, and lack of fair dealing' (*ibid.*: 888).

European and International Law Professor Daniel Thym (2018a) in an article published a couple of weeks before the AfD lodged its constitutional lawsuit. In that article, Thym raised two key points. The first is that ‘it is not even clear whether [Article 16a(2)] *Grundgesetz*, considered in isolation, at all allows for direct rejection at the border’ (*ibid*). In fact, that provision explicitly refers to ‘measures to terminate an applicant’s stay’, which ‘can (and perhaps must) be read to suggest that a rudimentary administrative procedure must in any case take place before rejection at the border’ (*ibid*). Indeed, the *Bundesverfassungsgericht*’s (1996) ruling on the “asylum compromise” itself ‘point[ed] to certain procedural constraints – admittedly without further elaborating on them, as that case did not concern a border closure’ (Thym 2018a). Secondly, and more importantly, that same ruling already made clear that the “third country clause” of Article 16a(2) *Grundgesetz* ‘is subordinate’ to international agreements and ‘no longer applies’ to asylum seekers arriving from one of the Contracting Parties of the Schengen Implementing Agreement of 1996 (*Bundesverfassungsgericht* 1996: 155). In short, according to Thym (2018a), although ‘after [...] years of intensive debate in which both refugee supporters and the border-closure faction draw on the *Grundgesetz* to support their respective positions this may sound strange’, Article 16a *Grundgesetz* was ‘largely irrelevant’ to the legal issue under consideration (*ibid*).

As for the argument that the government’s policy of non-rejection at the border violated Section 18 *Asylgesetz*, by the time the AfD lodged its constitutional complaint, it had long been thoroughly debunked. Thym himself characterised the ‘rumour’ that the policy was based on a secret and ultimately unlawful order by the Interior Minister as nothing more than ‘a myth’ (*ibid*). For ‘such an order [...] would only be necessary if rejection [...] wasn’t already prohibited on other grounds’ (*ibid*). As already mentioned in section II, however, Section 18(4)(1) *Asylgesetz* explicitly provides that ‘the authorities *shall refrain from refusing entry*’ if ‘the Federal Republic of Germany is responsible for processing an asylum application based on

European Community law'. And, contrary to what Vosgerau – and, as we shall later see, many others before him – maintained, Germany *was* indeed responsible under EU law for processing the asylum applications of those who reached its border. For, although '[p]olitical and academic complaints about the inherent bias of the [Dublin] system to the detriment of Italy, Malta and Greece are legion and it cannot be disputed that its rules are conceptually one-sided' (Thym 2015),⁸⁷ the Dublin Regulation *also* lays down a complex set of legally binding procedures for “transferring” (i.e. deporting) applicants who find themselves in a country other than the responsible one⁸⁸ – procedures whose complexity and lengthiness in turn presuppose ‘provisional admission’ (Bast and Möllers 2016; cf. Brings *et al.* 2016; Hruschka 2016; Lehner 2015, 2016; Lübke 2016; Schmalz 2018; Thym 2016b, 2018).

In his constitutional complaint for the AfD (2018: 79), Vosgerau contended that ‘[t]his theory immediately raises the question why, in the context of entry from a safe third country, the issue of responsibility cannot be determined in that [...] country and why therefore entry into the federal territory is required’. Much as his alternative theory that anyone who applies for asylum at the German border still finds him/herself ‘on the territory of another Member State’, making the latter responsible for identifying the “responsible country” under Article 20(4) Dublin Regulation, however, this question betrays a profound – if not comical – misunderstanding of how border controls actually operate. For, as several scholars had pointed out after this alternative theory first emerged two years earlier (see section VI), ‘German border officials do not stand waiting on the German side of a (non-existing) fence for refugees to shout the word “asylum” across from Austrian territory’ (Brings *et al.* 2016). On the contrary, and regardless of how the notion of “entry” may be defined under national

⁸⁷ The “illegal entry” principle enshrined in Article 13 Dublin Regulation provides that, ‘[w]here it is established [...], that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection’. While this responsibility criterion is subordinated to others based on family ties and the issuance of visa and/or residence permits, it is in practice the most frequently applied one (Maiani 2016: 12).

⁸⁸ See Articles 20, 21, 22, 23, 24 and 25 Dublin Regulation.

administrative law, ‘border controls usually take place on German territory’ (Lehner 2016). Thus, Article 20(4) Dublin Regulation, which was specifically introduced to prevent asylum seekers from engaging the jurisdiction of their Member State of choice by requesting protection at its embassies or via mail, is altogether irrelevant to the situation at hand (Lübbe 2016; Thym 2018a). To reiterate: the Dublin Regulation legally *obliged* the German authorities *not* to turn asylum seekers away at the border.

Lastly, with respect to the argument that fulfilling this EU law obligation would engender a violation of ‘the constitutional principles of sovereign statehood and democracy, which have primacy over EU law’ (AfD 2018: 81), it must be acknowledged that ‘[d]iscussing the scope and implications of German constitutional identity [...] is and remains a delicate matter’ (Claes and Restmann 2015: 923). For the *Bundesverfassungsgericht*’s (1993; 2009; 2016) jurisprudence on the subject ‘give[s] only a fragmented picture’ and ‘deliberately avoids getting too specific when it comes to future consequences [...] in order to have a free hand in later cases’ (*ibid.*: 923). Moreover, while the *Bundesverfassungsgericht* has previously emphasized that these ‘are two separate review functions with different standards’, its more recent case law is characterised by a ‘blending [of] ultra vires review and constitutional identity review’, which further contributes to render ‘the scope of application, the standards of review and the legal consequences associated with the different review functions [...] far from clear’ (Payandeh 2017: 414).⁸⁹ In practice, ‘[s]o far, no instrument has [*ever*] been found to violate German constitutional identity’ (Claes and Restmann 2015: 923), leading some commentators to question whether the *Bundesverfassungsgericht*’s insistence on its competence and willingness to declare EU legislation inapplicable really ‘adds to the credibility of the Court’ (Payandeh 2017: 416). Having said all that, I would venture to suggest that, had it not dismissed the

⁸⁹ Pushing this point even further, several scholars have argued that ‘the indeterminacy of constitutional identity undermines the requirements of the rule of law’ (Scholtes 2021: 548).

AfD's complaint as inadmissible, the *Bundesverfassungsgericht* would have been quite unlikely to find a violation of the principles of sovereign statehood and democracy.

Simply put, Vosgerau's contention that the preservation of the Federal Republic's constitutional identity requires nothing short of untrammelled democratic 'control over the population's composition' through untrammelled democratic 'control of entry at the border' (AfD 2018: 82) represents a textbook case of 'abuse of constitutional identity' (Halmai 2018)⁹⁰ – a practice so common among contemporary 'populists and authoritarians on the right' that '[s]everal commentators have argued that the notion of constitutional identity is inherently dangerous' and 'should be abandoned altogether' (Scholtes 2021: 545-546). To put it in Scholtes' terms, what makes Vosgerau's reference to constitutional identity abusive is not only that '[i]t presents constitutional identity as self-legitimizing' and 'bare [of] any kind of normative limitations that would set limits to or qualify its value', but also that it effectively 'collapses it into a radicalized form of national identity' and uses it to 'advance ethnically charged, primordialised and forever fixed identities' that are imagined to exist above, before and 'outside the constitutional text in the form of [a] collective political unity' (*ibid.*: 552-555). More succinctly, the notion of "control over the population's composition" constitutes 'the arch-racist core of this whole *Rechtsbruch* myth' (Steinbeis 2018b). Admittedly, some of the *Bundesverfassungsgericht's* earlier jurisprudence on the principles of sovereign statehood and democracy has itself been criticised for its 'latent ethnic-cultural bias' (Thym 2009b: 2120).⁹¹

Yet, besides the fact that the Court has subsequently 'laid the criterion of homogeneity of

⁹⁰ Halmai (2018) uses this expression with reference to a Hungarian Constitutional Court ruling in which the notion of "constitutional identity" was (ab)used to legitimise the Hungarian government's refusal to take part in the mandatory refugee resettlement scheme introduced by the EU Commission in response to the 2015 "crisis".

⁹¹ Most (in)famously, the *Bundesverfassungsgericht* (1993: 186) stated in its "Maastricht judgment" that 'States require their own fields of competencies of sufficient importance, in which the respective *Staatsvolke* can develop and articulate itself in a process of political decision-making both legitimized and controlled by itself and thus give legal expression to those things that unite it, *relatively homogeneously, spiritually, socially and politically*' (emphasis added). For some very harsh criticisms of this passage, see Pernice (1995) and Weiler (1995), both of whom point to the parallels between it and Nazi legal theorist Carl Schmitt's conception of 'homogeneity of the *Staatsvolke*'.

the *Staatsvolk* to rest' (Hestermeyer 2013: 1; cf. Thym 2009b: 2120), the AfD's "ethnic-cultural bias" was, as we shall see, anything but latent.

Summing up this section, the thesis that the German government's policy of non-rejection at the border constituted a breach of the law was indeed a myth: the applicable law not only allowed but in fact *obliged* the German authorities to admit incoming asylum seekers, as they did. The problem with 'refut[ing] the *Rechtsbruch* myth' (Thym 2018a) at the level of legal argument, however, is that myths are never meant to be read solely – or even primarily – on that level. To wit, after the constitutional complaint he had penned for the AfD was rejected as inadmissible, Vosgerau himself candidly acknowledged that he had always estimated its chances of success as 'lower than 5%' (cited in Detjen and Steinbeis 2018: 252). What he and his client also understood very well, however, is that a 'juridically [...] senseless' action can nonetheless be highly effective as a 'political action aimed at generating media coverage, debate and public sympathy' (*ibid.*: 252). That, even where the prospects of winning in court are very low, litigation can nonetheless produce tangible 'indirect effects' in terms of 'building a movement' and 'generating public support' for it is something that socio-legal scholars have long drawn attention to (McCann 1994: 10; cf. Silverstein 1996: 201-204). But which political agenda did the AfD seek to generate media coverage and public sympathy for by propagating the *Rechtsbruch* myth? The next section turns to argue that what the AfD was peddling was a radically (ethno)nationalist vision of justice of immigration that is ultimately irreconcilable with the (weakly cosmopolitan) post-war *Rechtsstaat*.

IV. The AfD's radical (ethno)nationalism and its anti-constitutional nature

That, by Autumn 2015 at the very latest, the AfD neatly fit Mudde's (2007) canonical conceptualisation of 'the populist radical right' as an ideological family defined by populism, authoritarianism *and nativism* is something about which those who have dealt with this question unanimously agree (Arzheimer and Berning 2019; Decker 2016; Dilling 2018;

Grabow 2016; Hansen and Olsen 2019; Kim 2018; Linares 2019; Salzborn 2016; Schmitt-Beck 2017). In order to provide a thicker description of the party’s authoritarian and nativist proclivities than the one offered by these accounts and show why such proclivities are incompatible with the weakly cosmopolitan vision of justice in immigration embedded in the post-war *Rechtsstaat*, this section focuses on the dossier based on which the *Bundesamt für Verfassungsschutz* (Federal Office for Protection of the Constitution, henceforth *BfV*) – the internal security agency tasked with protecting the Federal Republic from anti-constitutional forces – concluded in January 2019 that there were ‘first indications that the AfD’s politics is directed against the free democratic basic order’,⁹² and even stronger evidence that its youth organisation *Junge Alternative* (Young Alternative, henceforth JA) and its influential faction *der Flügel* (the Wing) represented ‘extremist endeavour[s]’ (*extremistische Bestrebung[en]*) (Netzpolitik 2019: Section A.I).⁹³ Based on publicly available sources including the party programs and official documents, ‘Facebook profiles, and 182 speeches (eighty hours)’ by AfD officials at various levels of the organisation (*ibid.* B.III.1), the *BfV* dossier offers by far the most detailed examination of the party’s (anti-)constitutional profile that I am aware of.

A few contextualising remarks about the dossier and the institution which produced it need to be made at the outset. First, the *BfV* has itself been repeatedly accused of ‘inaction on’ and even ‘complicity in [right-wing] extremist violence’ (Kuras 2021).⁹⁴ While relying on its

⁹² Under Article 21(2) *Grundgesetz*, ‘[p]arties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order (*freiheitliche demokratische Grundordnung*) or to endanger the existence of the Federal Republic of Germany shall be unconstitutional’. According to the *BfV*’s interpretation of the *Bundesverfassungsgericht* jurisprudence on the subject, ‘the individual elements of the democratic basic order [...] can be traced back to [...] three basic principles’, namely, ‘the guarantee of human dignity’, ‘the principle of democracy’ and ‘the *Rechtsstaat* principle’ (Netzpolitik 2019: Section B.II.2.1).

⁹³ While, for reasons to be explained below, the *BfV* did not make the dossier publicly available, the latter was obtained and leaked by Netzpolitik (2019) – a German language news website on digital rights and digital culture. Since the report does not contain page numbers, I refer to its sections instead.

⁹⁴ These accusations have gained unprecedented intensity following the *BfV*’s failure to detect the right-wing extremist matrix behind the murders of nine immigrants and a German police officer, committed between 2000 and 2007 by the neo-Nazi terrorist group National Socialist Underground (*Nationalsozialistischer Untergrund*, NSU) (Knipp 2018). After the cases were accidentally solved, not only did it emerge that the *BfV* had ‘indirectly financed members of the group’ as informants, but ‘*BfV* agent Andreas Temme also became a suspect’ in one of the murders (but ultimately released due to lack of evidence) (*ibid.*). Files pertaining to the NSU were also “accidentally” destroyed (*ibid.*). More recently, ‘[w]hen right-wingers went on an extended

assessment of the AfD's (anti)constitutional profile may therefore seem quite fraught, the fact that even this highly controversial agency has found fault with the party's radical brand of nationalism only goes to strengthen my argument. Second, in March 2021, it transpired that the *BfV* had decided to classify the *entire* AfD as a "suspected case" (*Prüffall*) (*ibid*). While the 2019 dossier on which this section draws is therefore already outdated, the 2021 dossier has not been made public,⁹⁵ meaning that the former remains the most comprehensive evaluation of its (anti)constitutional profile that is available to date. Third, while the 2019 dossier covers a much broader range of issues, this section narrowly focuses on four aspects of the AfD's immigration and asylum policy agenda and rhetoric which the *BfV* considered to be antithetical to one or more sub-elements of the *Rechtsstaat* ideal,⁹⁶ namely: first, its endorsement of a biological-racist and/or ethno-cultural conception of "the people" (*Volk*); second, its vilification and demonisation of migrants/refugees; third, its contempt for the right of asylum and the principle of non-*refoulement*; and, fourth, its legitimisation and encouragement of "resistance" against the government's immigration policy and violence against migrants/refugees.

Firstly, the dossier provides abundant evidence that the AfD's political programme as a whole, and its stance on immigration/asylum in particular, are underpinned by what the *BfV* itself describes as a 'biological-racist or ethno-cultural conception of the *Volk*' (Netzpolitik

rampage in the east German city of Chemnitz in 2018, Hans-Georg Maaßen, then the head of the security organisation, rushed to downplay the violence, suggesting that footage showing migrants being chased through the streets by an angry mob had been faked' (Kuras 2018).

⁹⁵ Soon after the *BfV* decision was leaked to the press, the Cologne Administrative Court ruled that the agency had violated its obligation to refrain from making the decision public until the AfD's legal challenge against the decision had been heard, and consequently 'revoked the intelligence agency's right to take further action against the party, or to publicly discuss its consideration of taking action against the party, until a final ruling is handed down' (Eddy 2021). AfD Federal spokesman Jörg Meuthen described the decision as 'not only a great victory for us, but also for the rule of law, because the Administrative Court has shown that the illegal action of the Office for the Protection of the Constitution against the largest opposition party can be stopped by legal means' (*ibid*).

⁹⁶ The *BfV* report considers the guarantee of human dignity and the *Rechtsstaat* principle as separate components of "the free democratic order". As we have seen in chapter 2, however, the guarantee of human dignity is an integral part of the post-war conception of the *Rechtsstaat* and will therefore be treated as such here.

2019: Section B.II.2.1.1). Thus, the AfD's Basic Program explicitly denounces 'the ethno-cultural transformation of the population's structure' caused by 'mass immigration' (*ibid*: C.I.1.1.1) – the same “evil” that Vosgerau would later put centre-stage in his constitutional identity-based argument for the unlawfulness of the “border opening”. In addition to this, some influential AfD officials – notably including its federal party co-chairman Alexander Gauland and its Thuringian chairman Björn Höcke, both of whom played a central role within the Wing – ‘advocate an ethno-biologically or ethno-culturally based conception of the *Volk*’, according to which ‘only someone who is born as such, i.e. someone conceived by German parents, can be German’ and ‘citizenship and related privileges are exclusively linked with ethnic membership’ (*BfV* 2019: C.I.2.1.1.a). Similar views can also be found among lower-rank AfD officials and members, other AfD organisational entities at state- and district-level, JA officials and other affiliates of the Wing. For the *BfV*, insofar as these biological-racist or ethno-cultural conceptions of the *Volk* ‘seek to make the human being’s fundamental claim to respect (*Achtungsanspruch*) dependent on something else than simple membership of humankind’ and strive toward ‘a society in which certain groups of human beings are ascribed diminished legal status from the outset’, they are inherently irreconcilable with the guarantee of human dignity (*ibid*: B.I.2.1.1).

Secondly, the *BfV* dossier provides extensive evidence of public statements by leading AfD officials, other AfD officials and members, other AfD organisational entities at the state- and district-level, JA officials and members and affiliates of the Wing in which “refugees” and “migrants” are more or less indiscriminately and explicitly portrayed as: ‘per se more aggressive and more criminal, and therefore inferior’; deserving of ‘a diminished legal status’; ‘driven by instinct and dangerous by nature’; ‘naturally incapable of integration and therefore inferior’; bearers of ‘a less valuable and more dangerous culture’; and not in need of protection (*ibid*: C.I.2.1.1). Expressions such as ‘criminal scum’, ‘knife-carrying hordes’,

‘brutal rapists and murderers’, ‘rioting mobs’, ‘camel drivers’, ‘barbarians’, ‘civilisationally underdeveloped countries’, ‘medieval culture[s]’, ‘uncivilised, instinct-driven invaders’, ‘thousands upon thousands of illiterates’, ‘*Lumpenproletariat* of Africa and the Orient’, ‘Oriental and African adventurers’, ‘free-loaders and parasites’, ‘unqualified economic migrants’ etc. are probably sufficient to give an idea of the tenor of these statements.⁹⁷ As the report underlines at the outset, while the guarantee of human dignity does not prohibit a critique of minority groups, ‘the boundary is overstepped where such critique [...] conveys a categorical debasement of the members of the minorities on the sole basis of their group affiliation’ (*ibid.* B.I.2.1.1). In the view of the *BfV*, many of the above-mentioned statements either clearly or arguably overstep this boundary, and therefore also constitute – or can at least arguably be construed as – violations of the guarantee of human dignity.

Thirdly, the *BfV* contends that some of the AfD’s and/or its subsidiary organisations’ specific policy proposals concerning asylum and deportation were also unconstitutional. In particular, while making clear that the right of asylum under Article 16a *Grundgesetz* is amenable to amendment, the *BfV* maintains that JA’s calls to replace it with ‘purely charitable [acts of] grace’ is irreconcilable with both the guarantee of human dignity – because it would entail the possibility of subjecting foreigners to removal even though this could result in proscribed treatment such as torture (*ibid.* C.II.1.2.1) – and the principles of legality and legal certainty – because it would open the door to ‘arbitrary implementation practices’ (*ibid.* C.II.1.2.3). While the AfD’s electoral programs for the most part stopped short of demanding the wholesale abolition of the right of asylum,⁹⁸ some of its officials and members did call for ‘a deportation policy that exposes migrants to torture, the death penalty or other

⁹⁷ All of these expressions are taken from direct quotes of AfD-related figures that are disseminated throughout the report.

⁹⁸ The Lower-Saxonian branch of the AfD, however, did state in its electoral program that, ‘[c]ontrary to the claims of Angela Merkel and other politicians, the supposedly non-existing upper limit (*Obergrenze*) on the right of asylum actually lies at zero’ (Netzpolitik 2019: Section C.I.1.3.1).

injuries to their human dignity' (*ibid*: C.I.2.1.1.c). Gauland, for instance, unambiguously stated that 'what kind of regime is in power' in the prospective destination country was in his opinion 'entirely inconsequential' when deportation was at stake (*ibid*: Section C.I.2.1.1.c). Höcke and other officials' calls for a net migration rate of 'minus one million in the next four years' and deportations on 'a million-scale' were also irreconcilable with the guarantee of human dignity. For 'refugees enjoying protected status [...] would necessarily have to be included' in the count for such objectives to be achieved (*ibid*: Section C.I.3.1.1.c).

Fourth, and last, the *BfV* also found evidence that several figures within the AfD appeared to condone or even encourage what they framed as 'resistance' (*Widerstand*) or 'disobedience' (*Ungehorsam*) vis-a-vis the government's supposedly unlawful immigration policies, which (high-school history teacher) Höcke once put on a par with other legendary 'struggles for freedom within German history' such as 'Arminius' struggle for freedom against the Roman Empire, the Hohenstaufen Emperor's struggle against the worldly pretensions of the popes, the peasant insurrection of the 16th century, the liberation wars against Napoleon, the patriotic resistance against Hitler, the 17 June national uprising against the Soviet occupation forces and the [...] Autumn of 1989' (*ibid*: Section C.I.2.1.3). As the report stated with respect to Höcke's comment, such an 'indiscriminate call to resistance calls into question the state's monopoly on the use of violence within a democratic *Rechtsstaat*' (*ibid*: Section C.I.2.1.3). Several other AfD officials 'exalted violence as a means of political confrontation', 'condoned self-justice' and 'propagated violent fantasies' in even more explicit terms (*ibid*: Section C.I.3.1.3). To cite just one example, in the aftermath of the xenophobic rampage occurred in Chemnitz in August 2018, when several non-white foreigners were chased down the streets after two asylum seekers were arrested on suspicions of murder (Ehl 2018), AfD MP Markus Frohmaier deemed it apposite to declare that '[w]hen the state is no longer able to

protect its citizens, people go on the street to protect themselves’, adding: ‘[t]oday, it is a civic obligation to halt the deadly *Messermigration*!’ (Netzpolitik 2019: Section C.I.3.1.3).⁹⁹

Summing up this section, the vision of justice in immigration propounded by the AfD consisted of a radical form of (ethno)nationalism that is fundamentally irreconcilable with the *Rechtsstaat*. To be sure, until and unless the *Bundesverfassungsgericht* will pronounce itself on the matter,¹⁰⁰ this conclusion is bound to remain controversial. For, as a sceptical commentary on the *BfV* dossier put it, ‘the judgement that some goal of a party substantively violates the “liberal democratic basic order” [...] is hardly objectifiable because it rests on genuinely political standards of measure that are essentially non-justiciable’ and ‘whether a party merely calls for a restrictive immigration policy or fuels hateful prejudices against so-called “asylum cheats” or even maliciously calls into question the human dignity of refugees is something about which we can have an endless political disagreement’ (Meier 2019: 378). While the fact of legal indeterminacy cannot be denied, however, this highly relativistic assessment fails in my view to do justice to the wealth of evidence and reasoned analysis contained in the dossier. If, by Autumn 2015 at latest, the AfD’s politics – and its immigration and asylum policy and rhetoric in particular – had quite unmistakably ‘veered to the radical right’ (Arzheimer and Berning 2019), however, how did it subsequently manage to succeed where every previous German radical right party had failed, namely, in entering the *Bundestag* – and as the third largest party grouping and the main opposition party at that? And how did the *Rechtsbruch* myth contribute to this ‘systemic shock’ (Lees 2018: 297)?

⁹⁹ The untranslatable neologism “*Messermigration*”, which was widely used by AfD representatives, replaces the qualifier “*Massen*” (mass) with the noun “*Messer*” (knife), so as to underscore the putatively innate violence of migrants.

¹⁰⁰ In July 2021, the Cologne Administrative Tribunal before which the AfD had challenged the BfV’s decision to classify it as a “suspected case” announced that it would refrain from ruling on the matter until after the September 2021 elections out of ‘respect for voters’ decision’ (Associated Press 2021). Whatever the outcome of this (first instance) decision will be, it is likely that it will be appealed all the way up to the *BVerfG* – a process that will take several years.

V. The *Rechtsbruch* myth as a vehicle of civic nationalist normalisation

The argument of this section is that the *Rechtsbruch* myth constituted a central plank of the AfD's efforts to (mis)represent itself as 'a party of the *Rechtsstaat* and of the *Grundgesetz*' (Pichl and von Dömming 2020: 299), which in turn enabled it to 'increase [its] appeal among broader segments of the population, including voters who are uncomfortable to opt for an *explicitly* racist party' – a 'civic nationalist normalization strategy' that has recently been 'adopted by the majority of successful Western European far-right parties' (Halikopoulou and Vlandas 2019: 427). The argument proceeds in four steps. First, I argue that, whereas the CDU/CSU's traditionally 'strong anti-immigration stance left little room for a radical right competitor' (Arzheimer and Berning 2019: 2), Chancellor 'Merkel's moderate stance on immigration' widened this room by alienating CDU/CSU voters who held more radical views on the subject (Dilling 2018: 97). Second, I contend that, in order to be able to occupy this room, the AfD still had to overcome another major factor behind the historical unsuccessfulness of German radical right parties, namely, their proneness to being stigmatised and marginalised as "enemies of the constitution" and racist. Third, I point to "civic nationalist normalization" as a strategy through which radical right parties are increasingly able to overcome this obstacle. Fourth, and last, I demonstrate how the AfD deployed this strategy, pointing to the crucial role that its self-(mis)representation as a party of the *Rechtsstaat* and the *Rechtsbruch* myth in particular played within it.

As we have already seen in chapter 2 (section VII), the historical unsuccessfulness of the German radical right cannot be attributed to a lack of demand for its (ethnonationalist) views within the electorate, but must rather be sought in the 'supply-side' side of the equation (Norris 2005: 14).¹⁰¹ To reiterate, the first and probably most important of these supply-side

¹⁰¹ The notion of 'supply-side factors' encompasses both 'what [radical right-wing] parties [themselves] can do' (i.e. their 'manifestos', 'communication channels', 'styles', 'rhetorical strategies', 'financial resources', internal 'organization' etc.) and broader 'patterns of party political competition' (Norris 2005: 14-15). Mudde

factors is that the CDU/CSU's traditionally 'strong anti-immigration stance left little room for a radical right competitor' (Arzheimer and Berning 2019: 2). While a comprehensive historical account of these parties' stance on immigration lies beyond the scope of this section, suffice to say that, given its prior ideological commitment to the fiction that Germany was 'not an immigrant country', the CDU's mere and merely 'half-hearted' acknowledgement that immigration was not 'a matter of "whether", but of "who and how many"' – something that was only officially accepted after Merkel took on the leadership of the party in 1998 – represented nothing short of "radical", even "revolutionary" change' (Clemens 2009: 124-128).¹⁰² More than fifteen years later, Merkel's 'decision to allow a million refugees into Germany' undoubtedly contributed to the AfD's 'electoral take off' (Art 2018: 77). To wit, different studies of the 2017 federal election results have independently shown that 'the anti-immigrant variable ha[d] the largest substantive effect on the probability of voting for the AfD', leading to 'the unmistakable conclusion' that the latter 'pulled voters away from all other parties based on this single issue' (Hansen and Olsen 2019: 13; cf. Dilling 2018).

And yet, this is only one part of the story. For the German radical right's historical inability to challenge the CDU-CSU's "ownership" of the anti-immigrant vote had in turn always been connected to its inability to find a solution to what is arguably the main 'dilemma' confronted by the radical right in every liberal-democratic polity, namely, how to attract that 'significant proportion of voters [who] might be sympathetic to their policies, particularly

(2007: 202) refers to the former as 'internal supply-side factors' and to the latter as 'external supply-side factors'.

¹⁰² Noting that, 'between 1950 and 1993, the net migration balance has been an astounding 12.6 million, accounting for 80 per cent of the country's population growth', Joppke (1999: 62) wrote that '[t]he discrepancy between *de facto* immigration and its political denial [was] the single most enduring puzzle in the German immigration debate'. While many scholars had denounced the 'not a country of immigration' maxim as 'counterfactual ideology' (Faist 1994: 51), Joppke (1999: 62) nevertheless insisted that such critiques 'overlooked its normative character, and its grounding in national self-definition'. Even if '[t]he *kein Einwanderungsland* claim articulate[d] not a social or demographic fact but a political-cultural norm' and 'an element of national self-understanding' (Brubaker 1992: 174), however, such a "political-cultural norm" and "national self-understanding" were still at odds with reality for many decades prior to their official demise.

over immigration’, but ‘are not willing to support a party that they perceive as a threat to the democratic system’ (Halikopoulou *et al.* 2013: 111) or as ‘explicitly racist’ (Halikopoulou and Vlandas 2019: 427). In line with this, the fact that previous German radical right parties had remained quite *explicitly* ‘beholden to the legacy of National Socialism’ is routinely mentioned within the existing literature as one of the main factors that ‘rendered them unelectable and [...] irrelevant for many potential voters’ (Arzheimer and Berning 2019: 2; cf. Art 2011: 189-230). To put it with Koopmans and Stratham (1999: 239-240), ‘while the ethnocultural [sic] components of national identity offer[ed] discursive opportunities to some of the ethnocentric ideas of the extreme right, the strong identification of the large majority of the German people and the political elite with the democratic political system [...] erected a strong barrier against that part of extreme-right discourse which [was] directed against liberal democracy’, making it quite easy for its opponents to brand and dismiss its proponents as ‘enemies of the constitution’ (*ibid.*: 226).

As Halikopoulou and Vlandas (2019: 427) have argued, however, some radical right-wing parties appear to have recently found a solution to the “dilemma”, namely, the ‘civic nationalism normalization strategy’. As these authors explain, the aim of this strategy is essentially to ‘capitalise on multiple insecurities [among the electorate] by using a civic nationalist *rhetoric*, i.e. one that excludes on the basis of ideological rather than biological criteria of national belonging’ (*ibid.*: 427; emphasis added). Doing so, Halikopoulou and Vlandas contend, allows radical (ethnonationalist) right-wing parties ‘to portray their solutions to voters’ insecurities as *legitimate*’ and, thus, ‘to extend their voting base beyond the classic far-right constituency’ by increasing their appeal among ‘voters who are uncomfortable to opt for an *explicitly* racist party’ (*ibid.*: 427; emphasis added). As the previous section amply demonstrates, however, biological and quite explicitly racist criteria of national belonging do not completely disappear from the rhetorical repertoire – let alone the

underlying ideology – of these parties but are instead *complemented* by civic ones emphasising the ‘purported threats posed by those who do not share ‘our’ liberal democratic values’, notably including supposedly ‘intolerant’ Muslims (*ibid*: 428). In other words, as Pichl and von Dömming (2020: 306) have persuasively shown with respect to the AfD’s communication strategy, ‘what the representatives of [this and similar parties] say decisively depends on the context and the medium in which they say it and on which audience it is meant to address’, enabling them to thrive ‘in the twilight between respectability and the forbidden’.

Halikiopoulou and Vlandas (2019: 427-428) themselves mention ‘the AfD poster campaign during the 2017 German election’ as an example of the civic nationalism normalisation strategy. Rather than foregrounding an explicitly ethnic image of the *Volk*, these authors note, the campaign consisted instead of ‘images that depicted Islam as a threat to German values’, such as: ‘a picture of a small pig under the caption ‘Islam does not fit our kitchen’, ‘an image of two white German girls in bikinis under the caption ‘Burkas? We prefer bikinis’, and ‘a picture of three white German girls in traditional dress, drinking a glass of wine, under the caption ‘Burka? I prefer Burgundy’’. Without wanting to question the centrality of small pigs, bikinis and burgundy within the German civic nationalist pantheon, however, the AfD’s sustained efforts to misrepresent itself as ‘a party of the *Rechtsstaat* and of the *Grundgesetz*’, which Pichl and von Dömming (2020: 299) have identified as *the* core message of its entire legal politics (*Rechtspolitik*), arguably played a much bigger role in enabling it to ‘normalise itself [...] as a political force’. For, as I have already emphasised several times, “*Rechtsstaat*” is an ‘auratic’ expression that directly ties into ‘the history of German liberalism’ and which, ‘after the end of Nationalist-Socialist rule, emerged as the reference point of the federal-republican self-understanding’ (Weidenbach 2018). No wonder, then, that, as

Bundesverfassungsgericht judge Suzanne Baer (2018: 351-352) herself noted, German ‘populist nationalists claim that they are the “true defenders” of the *Rechtsstaat*’.

As for the role that the *Rechtsbruch* myth played within this civic nationalism normalization strategy, the *BfV* itself pointed out that the AfD’s self-portrayal as ‘the saviour and defender of an allegedly derailed constitutional order’ was ‘backed up *above all* with the argument that, during the refugee crisis and the resulting arrival of refugees and asylum seekers, the Federal Government has allegedly suspended the applicable law’ (Netzpolitik 2019: C.I.2.1.3; emphasis added). Given its rhetorical centrality, the suggestion that the *Rechtsbruch* myth served as a ‘false key’ (*Dietrich*) with which the AfD was able to ‘gain access to middle class (*bürgerlichen*) milieus’ that ‘thought too highly of themselves to take to the streets against refugees but were nonetheless ready to get outraged about an alleged violation of the law on the part of the government’ (Welty 2019) appears to be quite plausible. Some empirical evidence for this reading is also provided by Nachtwey and Heumann’s (2019) rare qualitative study of AfD supporters. Thus, while all research participants emphasised the ‘primacy of national interest in asylum [...] politics’ (*ibid*: 440), hardcore AfD supporters had ‘little to no faith in [...] the *Rechtsstaat*’, endorsed ‘disobedience against state institutions’, and saw foreigners as rightless, whereas more ambivalent AfD sympathisers expressed ‘faith in [...] the *Rechtsstaat*’ but viewed it as ‘imperilled by the liberal attitude of the government’ and expressed support for ‘partly unorthodox means of correction’ such as ‘a cap on the admission of migrants, stricter border controls or a stop to immigration’ (*ibid*: 444-447).

Summing up this section, I have argued that the AfD’s unprecedented electoral success was linked to its sustained efforts to portray itself as a ‘party of the *Rechtsstaat*’ and, thus, a legitimate and viable political alternative for that significant section of the German electorate that holds radically nationalist views but does not like to think of itself as beyond the constitutional pale – and that the *Rechtsbruch* myth constituted a central plank of this civic

nationalist normalisation strategy. As it should be clear from the previous two sections, this strategy was, at bottom, nothing more than a ‘*mise-en-scène*’ (*Inszenierung*) (Pichl and von Dömming 2020: 303) – an ‘unfriendly takeover’ (Baer 2018: 348), a ‘fraudulent misappropriation’ (Krygier 2006: 138), an ‘abusive borrowing’ (Dixon 2019: 462) – of the *Rechtsstaat*’s ‘immense ideological power’ (Maier 2019: 1072). For, as Pichl and von Dömming (2020: 304) have aptly put it, ‘[w]hat the party understands by “*Rechtsstaat*” is not its actual juridical and historical objective, namely, the protection of the individual from the state’s monopoly on the use of violence’, but rather ‘the protection of [a radical, ethnonationalist conception of] the *Volk*’, in the name of which ‘an alleged lack of implementation of executive decisions gets reframed as a crisis of the *Rechtsstaat*’. If the AfD’s self-portrayal as a party of the *Rechtsstaat* was nothing more than a *mise-en-scène* and the *Rechtsbruch* thesis nothing more than a myth, however, how did such a significant section of the electorate come to regard them as plausible?

VI. Moving the boundary between the frivolous and the plausible

Pointing us towards the answer to this crucial interrogative, Pichl and von Dömming (2020: 304) have underlined that, if the AfD efforts ‘to inject its narrative into the political mainstream’ were so effective, this is partly because it could ‘latch onto pre-existing discourses in the political mainstream’. More specifically, according to these authors, ‘in the context of refugee policy, the individual-protecting content of the *Rechtsstaat* concept was re-framed as law and order [...] by CDU/CSU, SPD and even Green politicians’ (*ibid.* 304). And, outside of (though never too far from) the realm of party politics, ‘several [...] prominent and traditionally influential law professors’ who ‘dislike[d] that the government around Chancellor Merkel did not close all borders to refugees in 2015’ also vociferously complained about ‘a loss of the *Rechtsstaat*’ (Baer 2018: 355). Following these leads, and building on constitutional scholar Jack Balkin’s (2011: 88) more general point that ‘the

plausibility of a legal argument is often shaped by powerful and influential people who are willing to stand up and stake their reputations as reasonable people on making the argument or defending it', this section re-traces the way in which prominent CSU-CDU politicians and law professors whose reputation as reasonable people stood beyond doubt contributed to push the *Rechtsbruch* myth across the moveable 'boundary that demarcates the frivolous from the plausible' (*ibid*: 88) – and, thus, indirectly helped normalising the AfD and the radical, anti-constitutional form of (ethno)nationalism for which it stood.

Although both AfD vice-president Gauland and then CSU leader and Bavarian Prime Minister Seehofer had previously insinuated that Chancellor Merkel had 'abrogated' (*außer Kraft gesetzt*) the Dublin Regulation (Kuhr 2015), the allegation that this constituted a breach of the law only really started to circulate within the public sphere on 9 October 2015, when the AfD announced that it had pressed criminal charges of human smuggling against the Chancellor (Hinz 2015).¹⁰³ While AfD founder and recently dethroned leader Bernd Lücke himself described the accusation as 'entirely frivolous' (*ibid*), however, the CSU leadership and some legal scholars were already busy lending it credence. Thus, on the very same day, Bavarian Interior Minister Joachim Herrmann (CSU) announced in a highly publicised press conference that, 'should the Federal Government fail to promptly implement effective measures to limit the further influx of asylum seekers, and thereby jeopardise the *Länder's* sovereign capacity to act (*eigenstaatliche Handlungsfähigkeit*), Bavaria reserve[d] for itself the possibility of bringing legal action to the *Bundesverfassungsgericht*, and had indeed already commissioned former *Bundesverfassungsgericht* justice Udo Di Fabio to prepare an expert opinion (*Gutachten*) on the legality of the Federal Government's policy of non-rejection at the border (Süddeutsche Zeitung 2015). One day later, the conservative broadsheet *Frankfurter Allgemeine Zeitung* also drew attention to a blogpost by Passau University Criminal

¹⁰³ The charges were dismissed as manifestly unfounded by the Berlin Public Prosecutor's Office two years later. For a commentary of the decision, see Müller (2017).

Law Professor Holm Putzke (2015), claiming that he endorsed the view that ‘[t]he Chancellor’s political decision of 5 September [...] to permit the unhindered entry of refugees’ made her liable to charges of human smuggling (Zenthöfer 2015).¹⁰⁴

During the following couple of months, several CDU-CSU politicians and a couple of legal scholars contributed to further enhance the plausibility of the *Rechtsbruch* myth. Thus, on 13 October, University of Konstanz Professor Emeritus of Public, European and International Law Kay Hailbronner stated in an interview for the (CSU-near) newspaper *Merkeur* that, ‘if neither the EU nor its individual Member States are able to implement Dublin, it would be Germany’s right to reject people at the border’ (Huber, T. 2015) – a view which he reiterated one month later in an op-ed for *Die Welt* (Hailbronner 2015).¹⁰⁵ One day later, 126 state- and local-level CDU officials sent an open letter to Chancellor Merkel stating that ‘the open-border policy [was] not consistent with European and German law’ (Welt 2015). On 19 November, Vosgerau (2015) first characterised the situation at the border as ‘rule of lawlessness’ in an article for the conservative magazine *Cicero*. On 27 November, a committee of CDU/CSU interior affairs spokespersons issued a statement in which they underlined that ‘the applicable national and European law must be consistently applied’ and called for a ‘temporary’ policy of rejection at the border vis-à-vis ‘male, young [migrant/refugees] travelling on their own’ (Focus 2015). And, on 30 December, extracts from a draft resolution awaiting endorsement at the forthcoming CSU annual conference, in which it was stated that ‘part of our understanding of the *Rechtsstaat* is that our borders [should] be again permanently

¹⁰⁴ While Putzke (2015) did appear to endorse this view, his blogpost rather enigmatically ended by stating: ‘[w]henever thinks that my considerations can be understood as a plea for [...] criminal charges against Angela Merkel [...] has either misrecognised or (possibly deliberately) completely misunderstood the gist of my intervention’. For a critique of Putzke’s intervention, see Müller (2015).

¹⁰⁵ Contradicting his former mentor, Thym (2015) aptly pointed out that ‘non-compliance with EU legislation by some Member States does not authorise others to disrespect their obligations, since supranational law does not accept international law-style reprisals justifying German border controls as a quid pro quo for disrespect of the Dublin and Eurodac obligations by the border states’.

secured and people who do not have a valid entry permit be turned away’, were leaked to the press (Buchsteiner 2015).

Then, scarcely a week after the mass sexual assaults of Cologne New Year’s Eve,¹⁰⁶ the Bavarian State Chancellery unveiled former *Bundesverfassungsgericht* justice Di Fabio’s expert opinion on the legality of the Federal Government’s policy of non-rejection at the border. According to Bavarian Justice Minister Bausbak, ‘in the opinion of the expert, the currently uncontrolled entry [was] not compatible (*vereinbar*) with the *Grundgesetz*’ (Maetzke 2016). Merkel’s famous reassurance “*wir schaffen das*”, Bavarian Interior Minister Hermann doubled down, could not be fulfilled at the cost of ‘a flagrant breach of the law’ (*ibid.*). In reality, Di Fabio’s (2016) conclusions were much more ambiguous than that. On the one hand, he did contend that ‘[t]he *Grundgesetz* presupposes (*voraussetzt*) control over the state’s borders’ (*ibid.*: 117).¹⁰⁷ On the other hand, however, Di Fabio also underlined that ‘what needs to be done [...] lies within the political discretion of the Federal Government, which is only limitedly justiciable’ (*ibid.*: 120). The closest the former *Bundesverfassungsgericht* judge came to asserting a “breach of the law” was the rather circumspect statement that, ‘[c]urrently, there is some evidence that the Federal Government still falls below the minimally required political efforts in this respect’ (*ibid.*: 120). In a little-noticed interview he gave in August 2017, Di Fabio explicitly stated that he had ‘*not* pronounced a clear verdict of constitutional breach, nor would [he] underwrite one’ (NZZ Standpunkte 2017). In January 2016, however, he

¹⁰⁶ For a critical account of the events of Cologne’s 2015 New Year’s Eve, following which roughly 1.200 charges of sex-, property- and/or bodily harm-related offences were filed and a nationwide panic about “Northern-African rapists” ensued, see Boulila and Carri (2017).

¹⁰⁷ In a harsh appraisal of Di Fabio’s opinion, Bast and Mollers (2016) wrote that the idea that the constitution presupposes statehood ‘belongs to an old school of thought dating back to the monarchic state theory of the 19th century, which was resurrected in certain parts of the constitutional theory of the 1980s and 1990s, but which – in the simplistic form presented in the *Gutachten* – is hardly endorsed anymore’, and emphasised that ‘border control measures are not a necessary instrument of migration management and are in practice by far not the most important one’. *Mutatis mutandis*, all of these criticisms also apply to Vosgerau’s even more simplistic use of the principle of statehood in his constitutional lawsuit for the AfD.

conspicuously failed to rectify the CSU leadership's – and many prominent media's – misrepresentation of his ambiguous opinion.

Over the next few weeks, several other prominent legal experts joined the fray. Thus, on January 13, former *Bundesverfassungsgericht* President Hans-Jürgen Papier told the newspaper *Handelsblatt* that, although 'the controversy [had] to be resolved politically' and was 'not justiciable', the federal government's policy of non-rejection at the border posed 'perils for the constitutionally grounded sovereignty' of the Federal Republic (Anger 2016).¹⁰⁸ Two days later, Emeritus Professor Josef Iseensee stated in an interview with *Focus* magazine that, while the constitutional lawsuit threatened by the Bavarian State Chancellery had little prospects of succeeding, a legal action by MPs on the basis that the government violated their rights of participation in the legislative process might stand better chances (Fietz 2016).¹⁰⁹ On January 21, the conservative broadsheet *Frankfurter Allgemeine Zeitung* (FAZ) also published an article by University of Bonn Public Law Professor Christian Hillgruber (2016), in which he reiterated that a 'secret order' by the Interior Minister did not constitute an adequate legal basis for admission at the border – something which Di Fabio (2016: 94) himself had characterised as 'doubtful'.¹¹⁰ On February 1, Erlangen University Emeritus Public Law Professor Karl Albrecht Schachtschneider filed a constitutional lawsuit against the government on behalf of the "civil society organisation" *Ein-Prozent* (CompactTV 2016).¹¹¹

¹⁰⁸ Papier (2018: 16) later published a book chapter in which he stated that 'administrative practice in Germany clearly did not and does not conform' with an understanding of the applicable law that was virtually indistinguishable from the one advanced by Vosgerau in the AfD's constitutional lawsuit – including the long-jettisoned idea that '[w]hoever enters [Germany] from a safe third country in the meaning of Article 16a(2) *Grundgesetz* [...] does not enjoy the constitutional right of asylum' and 'must be refused entry in accordance with Section 18(2)(1) *Asylgesetz*'.

¹⁰⁹ This was the strategy that was later pursued by the AfD in its constitutional lawsuit.

¹¹⁰ The (unfounded) 'rumour' (Thym 2018a) that the policy of non-rejection at the border was underpinned by nothing more than a 'secret order' to this effect by the Interior Minister can be traced back to an article published by the tabloid *Bild* in September 2015. Picking up on this, then AfD leader Frauke Petry had commented that, '[w]ith its secret decree, the Interior Minister has not only revoked (*ansgehebelt*) the *Länder's* sovereignty over the police, but also demonstrated that Chancellor Merkel's everyone-can-come-in policy continues to operate' and accused the government of 'treacherously cheat[ing] its own people' (Epoch Times 2015).

¹¹¹ Schachtschneider has been a persistent critic of the EU project and was the main applicant in both the *Maastricht* and the *Lisbon* cases. *Ein Prozent* was founded by publicist and far-right activist Götz Kubitschek and

Finally, on February 9, a quartet of legal scholars (including the aforementioned Putzke and Hillgruber) first suggested in an article for *FAZ* that those who applied for asylum at Germany's border still found themselves in Austria and therefore had to be denied entry under Article 20(4) Dublin Regulation (Peukert *et al.* 2016a).¹¹²

On that day, however, most of the media and the public's attention was monopolised by a *Passauer Neue Presse* interview with Seehofer, in which – poaching and popularising Vosgerau's catchy expression – the Bavarian Prime Minister described the existing situation at the border as 'rule of lawlessness' (Fuchs and Kain 2016). This highly controversial remark¹¹³ was part of a longer answer to the question whether he really intended to sue the coalition government of which his party was a member a mere two weeks ahead of three important state-level elections, to which Seehofer replied that he could not 'act opportunistically and forgo a lawsuit' on such a vital 'law and order' issue (*ibid.*). When, three months later, the Bavarian State Chancellery announced that it would *not* lodge a constitutional complaint,¹¹⁴ however, some observers were quick to draw a link between this sudden volte-face and the staggering results obtained by the AfD in those elections,¹¹⁵ which Chancellor Merkel herself partly blamed on the CSU's relentless criticism of her refugee policy (Morgenpost 2016). Be that as it may, from this point onward, the AfD effectively became the only political referent for all

mentioned in the *BfV*'s dossier on the AfD as an important actor within the self-stylised "resistance milieu" (Netzpolitik 2019: Section C.I.5.2.6). The allegations contained in the lawsuit, including violations of "the right to political freedom" under Article 2(1) *Grundgesetz*, the "right to democracy and the protection of constitutional identity" under Article 38(1) *Grundgesetz*, and "the right of resistance" under Article 20(4) *Grundgesetz*, were dismissed as unfounded in March 2016 (Kubitchek 2016).

¹¹² Before Vosgerau appropriated it, the argument was further developed in Peukert *et al.* (2016b) and Peukert *et al.* (2017).

¹¹³ Although it had been one of the most persistent critics of the Federal Government's handling of the "refugee crisis", for instance, the conservative newspaper *Frankfurter Allgemeine Zeitung* caustically suggested that, "[i]f Horst Seehofer wanted to experience a "rule of lawlessness", he should have stayed a couple of days longer in Russia', from which he had just returned on the day of the interview (cited in Detjen and Steibeis 2019: 21).

¹¹⁴ According to Bavarian Justice Minister Bausback, the decision was motivated by the fact that "[t]he number of refugees [was] decreasing' and Bavaria's 'sovereign statehood' was accordingly – 'at least presently' – no longer endangered (Deutsche Welle 2016). The Bavarian branch of the AfD promptly announced the filing of a lawsuit against the Bavarian cabinet for its failure to sue the Federal Government (Focus 2016).

¹¹⁵ The AfD had obtained 24,3% of the popular vote in Saxony-Anhalt, 15.1% in Baden-Württemberg, and 12,6% in Rhineland-Palatinate – up from just 3% in the national-level opinion polls of August 2015.

of those who had been persuaded that – as Depenheuer and Grabenwarter (2016: 7) wrote in their foreword to a controversial edited volume published a few days after Seehofer’s “rule of lawlessness” remark – ‘the wave of refugees [was] in the process of turning the *Rechtsstaat* itself into a refugee, as the applicable law is factually abrogated’.¹¹⁶

Summing up this section, while the AfD was the most consistent proponent and the main political beneficiary of the *Rechtsbruch* myth, prominent CSU/CDU politicians and law professors significantly contributed to push it across ‘the boundary that demarcates the frivolous from the plausible’ by lending it their ‘authority’ (Balkin 2011: 88). As Balkin rightly notes, the fact that this ‘boundary can be moved through politics or through the assertions of powerful and influential people’ has major ‘implications for the problem of legal faith’ (*ibid.*: 89). For ‘[i]f the rich and the mighty can increase their power by turning bad legal arguments into good ones through the force of their influence, what is the point of belief in law as a way for reason to constrain power?’ (*ibid.*: 89) While recognising that ‘[i]t would perhaps be simpler if the boundaries of the plausible and implausible were clearly fixed, so that one could clearly identify depredations by the powerful’, Balkin insists that this is neither possible – for ‘[t]he law is a historical product, shaped through evolving conventions’ – nor desirable – for ‘[p]rogress in constitutional law often comes from rewriting the boundaries of the reasonable and the unreasonable through assertion and protest’ as well (*ibid.*: 89-90). For Balkin, then, ‘[t]he difference between them is not that one tries to push the boundaries of legal convention and the other does not; it is that the cause of the [latter], judged in hindsight, is just, while the [former] is not’ (*ibid.*: 90).

¹¹⁶ In a caustic review of the book, Schmalz (2016: 260) wrote that ‘[s]ome of the contributions are so dominated by an alarmistic rhetoric as to become unscientific’ and pointed out that ‘the radical theses advanced in the foreword are only supported by the contributions to a very limited extent’.

VII. Conclusion

In this chapter, I have attended to what Green MP Konstantin von Notz memorably characterised as the ‘stab-in-the-back legend of our times’ (Steinhagen 2018), namely, the narrative that the German government’s policy of non-rejection at the border constituted a breach of the law. After laying out the specific articulation of this narrative contained in the constitutional complaint lodged by the AfD in April 2018, I have argued that such narrative was indeed a myth: the applicable (domestic and EU) law not only allowed but obliged the German authorities to admit incoming asylum seekers as they did. Having done that, I then argued that the AfD used the *Rechtsbruch* myth to promote a radical form of (ethno)nationalism that is fundamentally irreconcilable with the post-war *Rechtsstaat*. More specifically, the *Rechtsbruch* myth enabled the AfD to misrepresent itself as a party of the *Rechtsstaat* in a rather successful bid to conceal its radical, anti-constitutional (ethno)nationalism under a legitimising veneer of civic nationalist rhetoric that rendered it a viable political alternative for a far larger section of the electorate than the one that previous radical right parties in Germany had been able to attract. Lastly, I have shown that, if this civic nationalist normalisation strategy was as effective as it was, this was partly because influential and authoritative actors such as the CSU leadership and prominent legal scholars lent credence to the *Rechtsbruch* myth and propelled it across the boundary that separates the frivolous from the plausible.

At the end of the day, the *Rechtsbruch* myth did *not* become the law of the land. As already mentioned, the AfD constitutional complaint was unanimously dismissed by the *Bundesverfassungsgericht* as inadmissible. As for Interior Minister Seehofer’s threats to resign from his post and provoke the collapse of the governing coalition unless Chancellor Merkel bowed down to his demand that incoming asylum seekers be rejected at the border, they once again turned out to be empty. To be sure, on 2 July 2018, the two leaders announced

that they had reached an agreement on ‘a new border regime at the German-Austrian border, which ensures that we prevent asylum seekers whose asylum procedures are the responsibility of other EU countries from entering the country’ via the creation of ‘transit centres, from which asylum seekers will be sent directly to the responsible countries [...] on the basis of administrative agreements’ yet to be concluded with these (unspecified) countries (Deutsche Welle 2018). In reality, however, only two such agreements were ever signed (with Spain and Greece) and, by June 2020, a mere 44 people had been removed under them (Bundestag 2020a: 28-29). By that time, the *Verwaltungsgericht München* (Munich Administrative Court) (2019) had already expressed doubts as to whether such agreements were compatible with the Dublin Regulation – a proposition which it conclusively rejected in May 2021 (*Verwaltungsgericht München* 2021).

In light of the above, it might be tempting to conclude that ‘Western liberal democracies’ are indeed ‘strong legal orders’ in which ‘rule of law values’ are ‘deeply entrenched’ and ‘have exhibited considerable resilience and capacity to resist attempts to erode them’ (Krygier 2011: 96-97). And, especially when compared to the blatantly unlawful push-back policies adopted by several other EU Member States (Bulgaria, Croatia, France, Greece, Hungary, Italy, Malta, Poland, Romania, Slovakia, Slovenia and Spain) in the wake of the 2015-2016 crisis (Joannon *et al.* 2021), the German government’s – or rather, the CDU and the SPD’s – willingness to stick to their hugely controversial policy of non-rejection at the border was indeed quite remarkable. However, first, this apparent display of fidelity to the rule of law was quite arguably contingent on the fact that, starting from 2016, the aforementioned Member States and key neighbouring non-EU states such as Turkey and the Northern African and Balkan countries have been pressured by the EU (and Germany in particular) to resume carrying out most of the dirty work of containment, leading to a vertiginous drop in the number of asylum applications across Europe (Campesi 2018; Niemann and Zaun 2018). Second, if

‘constitutionalism [...] only survives when it is really [the] people who take [it] in their hands’ (Baer 2018: 367), the fact that – counting *both* AfD *and* CSU voters – 9.133.974 Germans cast their ballots for parties whose political agenda on asylum and immigration was quite arguably unconstitutional is hardly a cause for celebration.

In addition to this, while the AfD failed in its efforts to turn the *Rechtsbruch* myth into the law of the land, the other parties in the *Bundestag* – and especially those in government – have (to varying degrees) ‘adjusted their policy positions’ on other aspects of the migrant exclusion process ‘to reduce its electoral appeal’ (Patton 2020: 89; cf. Atzpodien 2020; Hayes and Dudek 2020). Thus, as we shall see in chapter 5, while the demand for rejection at the border gradually lost traction, the calls for a more “effective” deportation policy vis-à-vis rejected asylum seekers became ever louder, pushing the executive and the administration to adopt measures that ‘sail[ed] as close as possible to the line that separates compliance from violation of liberal norms’ (Gibney 2008: 166) and, indeed, often crossed it. And, as we shall see in chapter 6, any form of grassroots support to illegalised migrants/refugees that made their removal more difficult increasingly came to be framed by right-wing conservative politicians as – to cite once again the head of the CSU parliamentary group, Alexander Dobrindt – a dangerous endeavour to ‘sabotage the *Rechtsstaat*’ on the part of a shady ‘anti-deportation industry’. Before we turn to these developments, however, the next chapter looks at asylum procedures and reception conditions. Doing so from the perspective of those who are subject to these policies, I argue, reveals all the aporias of the (liberal) narrative that the *Rechtsstaat* requires “us in here” to keep the rights of “those out there” in mind (Steinbeis 2018).

4. THEY TREAT US LIKE SHEEP (OR: THE PROBLEM OF RIGHTLESSNESS)

I. Introduction

In an interview we recorded in October 2018, I asked Ibrahim – a young Libyan man subject to Dublin “transfer” to Spain – how he would describe his present condition. ‘I have a right to breathe, to eat, to go to the toilet, to shower, to sleep, to buy food, to buy tobacco, to buy clothes, to buy shoes – and that’s it’, he bitterly replied. Probed to say more, Ibrahim elaborated:

‘What I mean is that I only have a right to live, not to improve, to achieve something, to become someone – just to live. Like, when you have sheep, you just feed them, you just give them what they need to stay alive – their basic needs – and that’s it. You don’t have to give them any chance to improve themselves, you know?’

‘And that’s how you feel about your situation?’, I asked. ‘Yeah’, Ibrahim nodded, ‘this is actually what they are doing with us, those government motherfuckers: they are just treating us like a bunch of sheep that they have to take care of’. While not always explicitly using the language of “rights”, virtually all of my fieldwork interlocutors who were subject to or stuck at ‘the threshold of the asylum regime’ (Picozza 2021: 108) – an expression that I use to emphasise how, even after crossing the country’s border, seeking asylum in post-2015 Germany remains in many ways an obstacle course ridden with multiple ‘layer[s] of legal deflection’ (Costello 2015: 233) – described this “regime”¹¹⁷ in similarly scathing terms.

In an interview we recorded in November 2019, for instance, an Iraqi asylum seeker subject to Dublin “transfer” to Finland named Ahmed dejectedly told me that ‘life in the camp is so hard it’s not even life’, and poignantly added: ‘I feel like I am in an open jail [...] I feel like a

¹¹⁷ Following Tazzioli and Garelli (2019: 402), ‘the expression “asylum regime” is meant to resonate with analyses of the border regime that highlight both the heterogeneity of bordering policies and their contested nature – conceiving the politics of migration control as a field of struggle’. Cf. Mezzadra and Neilson (2013), Tsianos and Karakayali (2010).

slave’. An Angolan national who had “irregularly stayed”¹¹⁸ in Berlin for about half-a-year named Hugo once similarly stated that, if there were ‘other ways of getting papers’ in Germany, he was all too happy to pursue them because ‘asylum is like prison – it’s too much controls, you know?’ By the same token, when I asked an Algerian national named Yacine, who had also irregularly stayed in Berlin for more than a year, whether he had finally made up his mind to apply for asylum – which was the only way he could obtain the ‘permission to remain pending the asylum decision’¹¹⁹ (*Aufenthalts gestattet*) that he needed to be able to marry his European partner and thus acquire a residence permit on family-unity grounds – Yacine answered that, although he knew this was the only way in which he could ‘get some papers’, he still could not bring himself to ‘letting them process [him] like a fucking animal’. While Yacine did eventually overcome his reluctance and lodge an asylum application, this was rejected as inadmissible a mere week later because he had previously “transited” and been fingerprinted in the Netherlands, making the latter responsible for his application under the Dublin Regulation.¹²⁰

¹¹⁸ The expressions “irregular stay” and “irregularly staying (migrant)” are used throughout this chapter to avoid the pejorative connotations of the terms “illegal stay” and “illegally staying (migrant)”, which is ‘the terminology used by [...] EU law’ (Queiroz 2018: 8). Importantly, “irregularity” refers to a multiplicity of [...] statuses’ (Costello 2015: 66), whose sole common denominator is that they do not afford ‘a right to stay or to reside’ (Queiroz 2018: 8) – another elusive notion that will be unpacked in section II.

¹¹⁹ Under Article 55(1) *Asylgesetz*, ‘[f]oreigners seeking asylum shall be permitted to remain in the federal territory while the asylum procedure is pending’. Importantly, the *Aufenthalts gestattet* does *not* constitute a residence permit, but only ‘allows [asylum seekers] to stay for the duration of the procedure’ and, as we shall see, ‘is connected with several restrictions’ (Flüchtlingsrat Baden-Württemberg and Werkstatt Paritätische 2017: 2). While Costello (2015: 65) points out that ‘[i]t would seem right and sensible to regard asylum seekers whose claims for international protection are being processed as temporarily being regular migrants (irrespective of their means of entry)’, she also duly acknowledges that ‘that position is contested’ and that, ‘for some purposes, governments and the ECtHR accept that they may be regarded as ‘unauthorised entrants’. Her claim that ‘EU law supports’ (*ibid*: 65) the view that asylum seekers are regular migrants is itself contestable. To wit, Article 9(1) Procedures Directive provides that ‘[a]pplicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision’ on their claim, but also makes clear that ‘[t]hat right to remain shall not constitute an entitlement to a residence permit’.

¹²⁰ In line with Article 33(1) Procedures Directive, Section 29(1) *Asylgesetz* provides that ‘[a]n application for asylum shall be inadmissible if [...] another country is responsible for conducting the asylum procedure’ under the Dublin Regulation.

Starting from my interlocutors’ disturbing references to slaves, prison inmates, and herded animals,¹²¹ this chapter attends to some of the multiple forms of “rightlessness” involved in seeking “asylum” in post-2015 Germany. For the present purposes, “asylum” can be defined as ‘the protection that a State grants to an individual on its territory’, with refugees (*sensu stricto*) constituting ‘one of the categories of individuals – among others – who benefit from such protection’ (Gill-Bazo 2015: 3-4).¹²² As for “rightlessness”, I use it to denote ‘precarious legal, political, and human standing’ (Gündoğdu 2015: 94), while also distinguishing between ‘*de facto* rightlessness’ – that is, violations of legally enshrined rights – and ‘*de jure* rightlessness’ – that is, forms of precarious legal, political and human standing that are, so to speak, baked into and legitimised by the law itself (Mann 2018: 348). While the heavy emphasis that the post-war *Rechtsstaat* places on the protection of fundamental and human – as opposed to citizen – rights may at first seem to obviate the problem of *de jure* rightlessness, the key aim of this chapter is precisely to chart the wide gulf between the (moral) rights which my interlocutors ‘venture[d] to claim’ and the far more limited rights which they were ‘entitled to within the scope of existing domestic and international laws’ (Gündoğdu 2015: 118).¹²³ To return once again to Steinbeis’ (2018a) formulation, while the *Rechtsstaat* requires “us in here” to keep the rights of “those out there” in mind, this *does not* necessarily preclude keeping them at bay.

¹²¹ As noted by Vaughan Williams (2015: 2), ‘animalisation is a powerful and recurring discourse’ within ‘many “irregular” migrants’ testimonies of their embodied encounter with diverse aspects of EUropean border security’ – testimonies which frequently also refer to ‘other legacies of dehumanization, in particular those of colonialism and slavery’ (Sanyal 2017: 2).

¹²² As noted by Gil-Bazo (2015: 4), European states have invested significant efforts in ‘restricting the use of the term asylum to refugees within the meaning of the Convention Relating to the Status of Refugees [...] while developing alternative institutions for protection (such as temporary protection and subsidiary/complementary protection)’. In line with Gil-Bazo’s more capacious and historically more accurate definition, these alternative institutions for protection will be treated here as forms of asylum (*sensu lato*).

¹²³ Cf. Kennedy’s (1997: 306) concept of “outside rights”, which he defines as ‘something that a person has even if the legal order doesn’t recognize [them] and even if ‘exercising’ [them] is illegal’. Kennedy provides the following examples: ‘I have the right to engage in homosexual intercourse, even if it is forbidden by the sodomy statutes of every government in the universe’ and ‘slavery denies the right to personal freedom, which exists in spite of and above the law of slave states’. For an application of the concept of “outside rights” to the realm of immigration policy, see Myers (2021).

As was already anticipated in Chapter 1, while my fieldwork brought me into contact with dozens of people who had applied or were considering the prospect of applying for asylum, the predicaments that I foreground here are those of a few key interlocutors with whom I forged long-term relationships of trust: Ibrahim, Ahmed, Yacine and a recognised refugee from Somaliland¹²⁴ named Muuse, who will be introduced later on. As already mentioned above, with the exception of Muuse, all of them belonged to a specific category of asylum seekers whose legal position is exceptionally ‘weak’ and ‘marginal’ (Pelzer 2020: 17-18; cf. Naim- Reyhani 2019), namely, asylum seekers subject to Dublin “transfer” to a Member State other than the one in which they have lodged an application for protection. While we have seen in the previous chapter that the Dublin Regulation lays down procedural norms that preclude a policy of summary rejection at the border, it indeed largely treats ‘responsibility for determining asylum applications and responsibility for the body that goes with the application’ as ‘a burden and a punishment for the Member State which permitted the individual to arrive in the Union’ (Guild 2006: 637) – most frequently, the one that issued him/her a visa or “failed”¹²⁵ to prevent his/her unauthorised entry. By enabling asylum applications to be rejected as inadmissible and rendering those who lodge them liable to “transfer”, this regulation quite literally ‘turn[s] [potential] refugees into ‘illegal migrants’ (Schuster 2011: 1393).

Since only a relatively small – albeit far from insignificant – proportion of those who applied for asylum in post-crisis Germany were liable to Dublin “transfer” (see Figure 4.1), the experiences of my interlocutors – all of whom were moreover male, young (mid-20s to mid-30s), and quite proficient in English – cannot be considered “representative” of what it was

¹²⁴ Somaliland is an unrecognised sovereign state in the Horn of Africa, internationally considered to be part of Somalia.

¹²⁵ As noted by Costello and Mouzourakis (2016: 282), using the notion of “failure” in this context is highly problematic because ‘turning refugees away [at the EU’s external borders] without due process [...] would evidently not be legal’.

like to seek asylum in post-2015 Germany. However, on the one hand, the factors that shaped what this experience was like, including – in addition to gender, age and English proficiency – nationality,¹²⁶ family status, level of education, economic resources, health conditions etc., are so multifarious that no single ethnographic account could ever hope to provide a comprehensive picture. On the other hand, while some of the forms of rightlessness faced by those who fall under the scope of the Dublin Regulation are indeed quite specific and extreme, many others stem from national and supranational laws that apply to anyone who seeks protection in the country. Taking into account the predicaments of Muuse – who, despite having previously applied for and obtained refugee status in Malta, slipped through the meshes of the Dublin system thanks, in his view, to a glitch in the Eurodac system¹²⁷ – should help to draw out what was specific and what wasn't about the situation(s) of my other interlocutors.

Figure 4.1: Asylum applications and requested Dublin “transfers”, 2015-2019

[...]

Source: Eurostat

The remainder of this chapter consists of seven sections, each of which looks at a particular form of rightlessness with which my interlocutors had to cope. Section II links my interlocutors' decisions to apply for asylum to the very narrow way in which the “right to

¹²⁶ Asylum seekers from so-called “safe countries of origin” – a notion that is embedded in Article 16a(3) *Grundgesetz* and EU law – enjoy fewer procedural guarantees and, as we shall see, are subject to more extensive restrictions, whose reconcilability with the prohibitions against discrimination on the basis of nationality under various legal instruments has been heavily questioned (ECRE 2016: 16-17; Pelzer and Pichl 2016a; Werdermann 2018). Between 2014 and 2019, the German list of “safe countries of origin” has expanded from two (Ghana and Senegal) to twelve (now also including Albania, Algeria, Bosnia-Herzegovina, Georgia, Kosovo, Montenegro, Morocco, North Macedonia, Serbia, and Tunisia). As we shall also see, following the crisis of 2015-2016, some crucial “integration opportunities” have also been reserved for asylum seekers with a “good prospect of staying” (*gute Bleibeperspektive*) – a blurry administrative notion that is currently understood to apply to Syria, Iran, Iraq, Eritrea and Somalia and that has also attracted severe criticism (Schultz 2020b; Thym 2016c; Voigt 2016).

¹²⁷ Short for European Dactyloscopy, Eurodac is an EU-wide fingerprint database used to identify and track the movements of asylum seekers and irregular border-crossers with a view to facilitating the implementation of the Dublin Regulation. On the Eurodac Regulation, see Peers *et al.* (2015e). According to Muuse, while he openly told BAMF that he had previously obtained refugee status in Malta, BAMF desisted from requesting a transfer when his fingerprints failed to produce a “hit” on the database.

stay” is construed within the applicable legal framework. Section III looks at how the right to asylum is in turn curtailed by the Dublin system and the limited extent to which courts have been willing to mitigate its detrimental impact upon asylum seekers. Section IV turns to another key impediment to accessing asylum (and, thus, a right to stay in Germany), namely, the lack of a right to free legal assistance at all stages of the asylum procedure. Section V looks at the chasm between my interlocutors’ claim to a “right to a home” and the much more narrowly construed “dignified living conditions” to which asylum seekers are entitled under the law. Section VI examines how asylum seekers are excluded from the enjoyment of the right to choose their place of residence within Germany on account of their insecure residence status. Section VII considers various legal and practical barriers that asylum seekers face when it comes to enjoying the right to work. Section VIII concludes by examining what would need to change for “the rule of law”/“*Rechtsstaat*” to ‘allow the [...] inequities of migration to receive new scrutiny’ (Dauvergne 2004: 615) and how (un)likely this is.

II. The right to stay

On our way to *Eisenhüttenstadt*, a Brandenburger town hosting the “arrival centre”¹²⁸ where – after much dithering – Yacine was going to submit himself to the “identification procedure”¹²⁹ that all asylum seekers are required to undergo after lodging an application for protection, he told me:

‘This whole thing of getting papers somehow still feels weird to me. I mean, I hate this fucking system. I have always hated it – even before leaving Algeria. Back then, I didn’t know anything about this kind of freedom of movement ideology, but I always knew that one day I was going to just take and leave – no

¹²⁸ As explained by IAM (2017: 20), [t]he concept of arrival centres is not based in law but has been developed by business consultants under the heading “integrated refugee management”. Such centres ‘were introduced in December 2015 with the aim of fast-tracking procedures’ by bringing under one roof all the various authorities responsible for ‘the recording of personal data, medical examinations, registration of the asylum applications, interviews and decision-making’ (*ibid.*: 20). By the end of 2016, ‘24 out of approximately 65 branch offices of the BAMF were functioning as arrival centres’ (*ibid.*: 20).

¹²⁹ Part of the procedure for formally lodging an asylum claim, the identification procedure consisted in getting one’s fingerprints and photograph taken.

visa applications, no bureaucratic bullshit, no waiting. Nobody should have to prove that they have good reasons to be somewhere’.

Striking a similar chord, Ibrahim once told me: ‘I think that passports are shit. I used to have a passport, but I cut it in half and threw it away. My identity is that I am a human being’. Embracing what I have characterised as radical cosmopolitanism, Yacine and Ibrahim explicitly claimed a *universal and unconditional* right to move and stay where they wished. While my other interlocutors did not advance such a radical demand, they too claimed – as it were, “performatively”, through their efforts to avoid deportation – an individual “right to stay” in Germany. Although the latter notion can also be construed ‘narrowly’ as involving mere ‘insulation from deportation’, my interlocutors invariably understood it more ‘broadly’ as involving the ‘regularization’ of their (il)legal status(es) (Bosniak 2016: 100).¹³⁰

The reason why my interlocutors strove to secure a right to stay in Germany is, at bottom, that they regarded the few alternatives that they were presented with – that is, “voluntary return” to their home countries, forced “transfer” to the responsible Member State under the Dublin Regulation, or “illegal stay” – as “unacceptable”.¹³¹ While the reasons why my interlocutors were determined to avoid Dublin “transfer” are discussed in the next section, let us briefly consider how they viewed the other two options. With respect to “voluntary return”, despite the German government’s aggressive efforts to promote it (Mahar 2020), it was something that all my interlocutors rejected outright. While Ibrahim did not like to talk about his reasons for fleeing Tripoli (Libya), when he left it in 2017 the country was (and still is) of course engulfed in civil war.¹³² Ahmed had fled Baghdad (Iraq) in 2015 after both his

¹³⁰ Thus understood, ‘the expression ‘right to stay’ is [...] equivalent to ‘right of residence’ (Savino 2016: 71; cf. Bauder 2012: 190; Queiroz 2018: 8).

¹³¹ As Erdal and Oeppen (2018: 985-986) have underlined, what constitutes an ‘acceptable alternative’ – and, closely connected to this, ‘a reasonable quality of life’ – is an inherently ‘subjective’ (albeit always socially conditioned) assessment ‘shaped by a person’s beliefs and access to information’, and it is something about which ‘[m]igrants themselves, immigration authorities, migrant rights’ activists (and other civil society, non-governmental organisations and UNHCR) [...] each have [their own, often quite divergent] ideas’. For a normative take on what constitutes an “acceptable alternative”, see Bartram (2015).

¹³² On the situation in Libya in 2018, see Amnesty International (2019a).

brother and his best friend were killed in two separate terrorist attacks attributed to *Da'esh*.¹³³ As for Yacine, while he also belonged to the historically oppressed Amazigh minority group, his main reasons for turning his back to Algeria (after having been deported back to it from France once already), was the social ostracization which he faced on account of his looks (earrings, tattoos) and his beliefs (secularism and anarchism).¹³⁴ Finally, Muuse had left Somaliland in 2013 after receiving death threats for his regime-critical work as a journalist.

Staying in Germany “irregularly” was also something that few of the migrants/refugees whom I met were willing and/or able to do on a long-term basis. For irregular migrants who have not even obtained a ‘temporary suspension of deportation’ (*vorübergehende Aussetzung der Abschiebung*) – or, as it is also known, ‘*Duldung*’ (“toleration”)¹³⁵ – not only cannot legally work or rent an apartment but are also ineligible for social assistance. And, in contrast to the ready ‘availability of informal work opportunities’ in some other Member States, Germany’s ‘higher level of labor market regulation [...] leaves very few and highly precarious niches in which to find [irregular] employment’ (Kraler 2019: 106; Täubig 2019a). As a result of this, fulfilling one’s basic needs in terms of shelter, food, clothing, and hygiene while remaining “below the radar” is so arduous that an asylum/immigration law counsellor once told me that the primary reason why many of those who sought his advice had applied for asylum was indeed that ‘people have to somehow survive’. While the fact that Yacine has managed to “survive” below the radar for now more than three years demonstrates that this is not impossible, his

¹³³ On the situation in Iraq in 2018, see Amnesty International (2019b).

¹³⁴ On the situation in Algeria in 2018, see Amnesty International (2019c). On the repression of the Amazigh minority in Algeria, see Maddy-Weitzman (2012).

¹³⁵ See Section 60 *Aufenthaltsgesetz*. As explained by Eule (2014: 13), ‘A temporary suspension of deportation (*Aussetzung der Abschiebung*) or sufferance (*Duldung*) is, as the title implies, not actually a permission to stay in Germany, but denotes a status in which the migrant is legally bound to leave the country but cannot be forced to’ do so ‘due to [...] personal or structural reasons that hinder the departure of the migrant, such as severe personal ailment or not having a passport’. Importantly, rather than a single status, the *Duldung* can come in many different forms, some of which are connected to much more “generous” bundles of legal entitlements than others. The *Ausbildungsduldung*, for example, entitles its holder to remain in Germany until the completion of a (usually two to three years-long) vocational training and has accordingly been characterised as a ‘right to stay (*Aufenthaltsrecht*) in the guise of a *Duldung*’ (Röder and Wittman 2017: 352). Most forms of *Duldung*, however, only confer an entitlement to minimal social benefits and are connected with far-reaching restrictions on movement and access to the labour market (Scott 2018).

rather extraordinary ability to do so was and remains contingent on the availability of various equally extraordinary forms of material support on the part of relatives, friends, acquaintances and/or chronically under-resourced grassroots solidarity structures (see chapter 6).

Far from recognising the unconditional and universal right to stay invoked by some of my interlocutors, however, the applicable law presented them with very few pathways to “regularisation” – understood here as any legal provision on the basis of which an irregularly staying migrant can acquire a right to stay (*Aufenthaltsrecht*) in Germany (Hinterberger 2020: 109), including asylum.¹³⁶ As Yacine once told me, ‘if you want to become “legalised” in the eyes of the state, you basically have two options: either you get asylum or you get married with a European’. If “asylum” is understood – as Yacine understood it – as an umbrella term for all of the various forms of protection that engender a right to stay/reside, his meagre list of available regularisation pathways was quite accurate and exhaustive. Although several other regularisation pathways do exist on paper,¹³⁷ these invariably presuppose the fulfilment of conditions that my interlocutors – and the vast majority of recently arrived irregular migrants – could not satisfy, including: prior possession of a *Duldung*¹³⁸ and either a very high level of “integration” or highly specific forms of “vulnerability”. While the difficulties involved in “getting asylum” are examined in the following section and the way in which marrying an EU citizen can give rise to ‘a human right to regularise illegal stay’ (Thym 2008)

¹³⁶ While regularisation tends to be viewed as ‘an act of executive beneficence’ based on ‘discretionary assessment’, it may also ‘occur via legislative or judicial acts, rooted in domestic or supranational authority’ (Costello 2015: 74-75). Whereas Kraler (2019: 98) views ‘regularisation’ and ‘asylum’ as two ‘alternative’ ‘pathways to legality’, insofar as obtaining asylum (*sensu lato*) gives rise to a right to reside (Section 25 *Aufenthaltsgesetz*), this must be understood as a regularisation pathway in its own right.

¹³⁷ These include: the residence permit for ‘[s]killed workers with vocational training qualification’ (Section 18a *Aufenthaltsgesetz*); the residence permit ‘in case of hardship’ (Section 23(a) *Aufenthaltsgesetz*); and the residence permit ‘in the case of well-integrated juveniles and young adults’ (Section 25a *Aufenthaltsgesetz*). For a discussion of each of these regularisation pathways, see Hinterberger (2020).

¹³⁸ As noted by Kraler (2019: 105), in Germany, most regularisation pathways (other than asylum) only target people with a *Duldung*, thus, ‘in a sense following a two-step regularization procedure’. Since ‘the large majority of persons with a *Duldung*’ are ‘failed asylum applicants’ (*ibid.*: 102), access to other regularisation pathways is therefore practically conditional upon first applying (and failing to obtain) asylum.

is discussed in chapter 6, the key point here is that migrants who ‘cannot invoke [such] a special preferred status’ – i.e. ‘normal migrants’ (Schotel 2012: 12) – effectively have *no* pathway to regularisation.

Moving to the supranational level, Baumgärtel (2019: 12) has argued that ‘the effectiveness of the European courts appears to be both conditional and limited insofar as the right(s) to stay are concerned’. Though based on the ECtHR and the CJEU’s jurisprudence on the claims of migrants/refugees who *can* (at least arguably) invoke a special preferred status,¹³⁹ this assessment applies all the more to the way they have condoned the denial of a right to stay *vis-à-vis* normal migrants. To wit, the ECtHR’s jurisprudence on residence permit refusals has been characterised by Dembour (2015: 442) as its ‘darkest case law’ for its ‘indifference’ toward ‘the problem of lack of secure legal status’. While this jurisprudence is too extensive and complex to be reviewed in any detail here, the key point is that – although ‘[t]here are now occasional exceptions’ to it – ‘the general rule is and firmly remains that there is no right to a residence permit under the Convention’ (*ibid.*: 457).¹⁴⁰ The problem with this position, Dembour forcefully contends, is that – insofar as ‘lack of a residence permit [...] prevents the ability to work legally and renders access to decent housing, healthcare, and education (including of any children) either difficult or impossible’, resulting in ‘an enormous physical and emotional toll for the persons concerned’ (*ibid.*: 444) – such a position can only be described as ‘a failure to find any fault with a situation whereby human beings are denied the rights which would enable them to pursue a life in dignity’ (*ibid.*: 451).

¹³⁹ To wit, Baumgärtel (2019: 12) focuses on whether and to what extent these courts have ‘expand[ed] the right to stay’ for ‘persons fleeing from war and persecution’, ‘persons fleeing indiscriminate and general violence’, ‘refugees who claim protection from persecution on the grounds of sexual orientation’ and ‘persons demanding a permission to stay based on their family ties’.

¹⁴⁰ Some of the cases discussed by Dembour (2015: chapter 13) include ECtHR (2005, 2012a, 2012b and 2012c), all of which were brought against the Netherlands by rejected asylum seekers who could not be deported but were at the same time denied a residence permit and, thus, access to social benefits and the labour market. The few exceptions to the general rule identified by Dembour are represented by ECtHR (2006 and 2007a), both of which hinged on respect for family life (a special preferred status).

As for the CJEU, the expectation that ‘the opportunities afforded by EU instruments’ would make it ‘the better venue to litigate a right to stay’ is not borne out by the facts (Baumgärtel 2019: 44).¹⁴¹ In fact, although EU law does oblige the Member States to grant residence rights to beneficiaries of international protection,¹⁴² family members of EU citizens and a few other categories of “privileged” migrants, ‘[t]he regularisation of third-country nationals [who cannot invoke such special preferred statuses] is still part of the Member State’s discretion’ (Queiroz 2018: 168). Thus, under Article 6(4) Return Directive, the ‘Member States *may* at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory’. Reflecting ‘the EU’s anti-regularization ethos’ (Costello 2015: 98), however, this is merely a (discretionary) ‘exception to the obligation to return’ laid down in paragraph 1 of the same Article (Queiroz 2018: 169). While the CJEU ‘has not (yet) addressed the meaning of [...] Article 6(4) in its jurisprudence on the Return Directive’, the prospects that it might interpret it in a way that ‘expand[s] the regularising powers of the EU’ vis-a-vis the Member States appear to be rather ‘limited [...] due to lack of competence’ (*ibid.* 169-170).¹⁴³ While some scholars have called for the adoption of an EU “Regularisation Directive” (Acosta-Arcazaro 2015; Hinterberger 2019), the political appetite for it appears to be equally limited.

III. The right to asylum

While obtaining asylum was effectively the only way (other than marrying an EU citizen) in which my interlocutors could secure a right to stay in Germany, doing so was fraught with

¹⁴¹ Again, while Baumgärtel’s assessment is based on a comparison of how the CJEU and the ECtHR treat the claims to a right to stay articulated by migrants who can invoke a special preferred status, it is equally applicable to their jurisprudence on normal migrants.

¹⁴² Article 24(1) Qualification Directive.

¹⁴³ Indeed, Article 79(5) of the *Treaty on the Functioning of the European Union* (henceforth TFEU) expressly states that the Member States retain ‘the right of [...] to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed’.

difficulties. As we have seen in Chapter 2, the 1993 asylum compromise ‘stripped the broad promise of the right of asylum’ (Lambert *et al.* 2008: 31) under the *Grundgesetz* by establishing that it ‘may not be invoked by a person who enters the federal territory from a member state of the European Communities’,¹⁴⁴ i.e. all of Germany’s neighbouring countries. And, as we have also seen, while this move has been followed and partly offset by the development of a Common European Asylum System, the “crisis” of 2015/2016 is widely regarded to have been exacerbated – if not produced – by its inherent ‘structural shortcomings’, notably including ‘the pathologies of the Dublin System’ (Costello and Mouzourakis 2016: 265; cf. Den Heijer *et al.* 2016; Trauner 2016). Continuing the exploration of ‘rejected alternatives’ (Bartram 2015) begun in the previous section, this one focuses on why my interlocutors had moved on from the countries that were responsible for examining their asylum applications and why they resolutely refused to be “transferred” back, arguing that this was a direct consequence of ‘[t]he vast differences existing from one state to another in terms of reception and protection standards, and the insufficiency of such standards in several Member States’ (Maiani 2017: 627), and that the judiciary has only addressed these pathologies to a limited extent.

In line with what previous studies have found (Schuster 2011, Picozza 2017, Wyss 2019), my interlocutors considered the Dublin system profoundly unjust. Ahmed, for instance, once told me that, if it came down to going back to Baghdad – where his brother and his best friend had separately been killed by *Da’esh* – or to Finland – where he had been apprehended and fingerprinted in early 2016 after “irregularly” entering the EU via Turkey and “transiting” through half a dozen Member States (including Germany)¹⁴⁵ – he would certainly opt for the

¹⁴⁴ Article 16a(2) *Grundgesetz*.

¹⁴⁵ Much like Yacine, Ahmed had irregularly entered Greece by boat from Turkey and moved onward along the ‘Balkan corridor’ at the height of the 2015/2016 “crisis”. Having arrived in Germany, he immediately applied for asylum and was placed in one of the thousands of ad hoc emergency shelters that the authorities scrambled to establish to deal with the surge in arrivals. The conditions in the shelter - a requisitioned school gym - were so dismal that he soon decided to follow an acquaintance who intended to move northward to Sweden because he had heard rumours that ‘things there were better’.

former. Asked why, Ahmed launched into a fifteen-minutes-long description of the crippling social isolation, multiple episodes of xenophobia and consequent depression that he had experienced in a “camp” located in a remote region of northern Finland, from which he had ‘escaped’ two years later after his asylum application had been conclusively rejected. When we first met in August 2017 (a few months after he had arrived in Germany), Ibrahim told me instead that ‘the main reason’ he had left Spain – where he had applied for asylum after entering the country with a short-term visa – was that ‘they only gave [him] €20 a week’,¹⁴⁶ whereas the €135 a month that he received in Germany as a single adult (supposed to be) staying in an accommodation centre (IAM 2019: 68) were ‘enough to save some money for the future’. Many months later, after his benefits were curtailed on account of his having left the centre,¹⁴⁷ he told me: ‘If the economy wasn’t so bad, I would go back to Spain tomorrow’.

The ‘social and economic motivations’ that Ahmed and Ibrahim adduced for leaving the countries responsible for examining their applications under the Dublin Regulation and coming to Germany are typically portrayed by politicians and policy makers as conclusive evidence that those who harbour them are ‘bogus asylum seekers’ (Zimmerman 2011: 335). As critical migration scholars have long emphasised, however, this dominant discourse is implicitly premised on a view of “real refugees” as ‘docile supplicants’ who, ‘as an effect of their vulnerability, victimization, and presumed desperation, cannot but accept the conditionality and the limitations of the asylum regime’, with the corollary that ‘[a]ny residual manifestation of autonomy by those who petition for asylum [...] becomes suspect,

¹⁴⁶ According to Accem (2017: 37), the ‘[a]mount of the monthly financial allowance/vouchers granted to asylum seekers’ at the time Ibrahim lived there was actually even lower than what he remembered (€51,60).

¹⁴⁷ Under Section 1a Asylum Seekers’ Benefits Act (as amended in August 2016), ‘material reception conditions can be reduced to the point that only “irredeemably necessary” benefits are granted’ if a person for whom removal procedures had been scheduled could not be removed due to reason for which this person is responsible - a provision that ‘can affect asylum seekers whose application has been rejected as “inadmissible” following a “Dublin procedure”’ (IAM 2019: 69). Although, ‘[i]n the light of the decision of the Federal Constitutional Court of July 2012 on the Asylum Seekers’ Benefits Act, several courts have decided that any reduction of benefits would be unconstitutional and therefore inadmissible’, first, ‘such decisions are rare because only a few asylum seekers appeal against reductions of benefits upon rejection of their asylum application’ and, second, ‘these rulings do not represent general opinion’ (*ibid.*: 70).

presumptively indicative of a more properly “migrant” will to opportunistically “game the system” (De Genova *et al.* 2018: 247; cf. Tazzioli 2018: 2771). As forcefully argued by Gibney (2015: 459), ‘the view that the only morally relevant dimension of a refugee’s plight is her lack of physical protection is dubious’. For, ‘[w]hile their interest in integration may not be as urgent as their need for physical security, it is likely to be pivotal in refugees developing into independent, dignified and contented members of their new society’, and must therefore be considered fully ‘legitimate’ (*ibid.*: 458-459).¹⁴⁸ Gibney’s differentiation between “physical security” and “integration” needs (or interests) closely maps onto the distinction between ‘a right to (just) live’ and ‘a right to improve, to achieve something, to become someone’ drawn by Ibrahim at the beginning of this chapter.

Yet, to what extent does the applicable law recognise and protect these legitimate interests – not to say (moral) rights – when it comes to Dublin “transfers”? Since the ‘litigation saga’ (Costello and Mouzourakis 2014: 408) spurred by this question is too long and complex to be recounted here and has already been extensively examined elsewhere,¹⁴⁹ let us narrowly focus on what is generally regarded as the most ‘far-reaching’ judgment on the matter by any European court to date (Baumgärtel 2019: 72): the ECtHR’s (2011) *M.S.S. v. Belgium and Greece*. While this was a watershed ruling on many counts (Baumgärtel 2019: 53-54), what is of greatest interest to us here is the Court’s finding that, by sending an Iraqi asylum seeker back to Greece, Belgium had itself violated the prohibition on inhuman and degrading treatment under Article 3 ECHR on account of *both* ‘the deficiencies in the asylum procedure’ *and* the ‘living conditions in that State’ (ECtHR 2011: 89). What made *M.S.S.* particularly innovative (and controversial) was not only that it was the very first time that a European

¹⁴⁸ While Gibney makes this point with specific respect to “refugees”, Silga (2018: 90-91) has rightly emphasised that, ‘given the long duration of the asylum procedure and the often-distressing situation they have to face, it is essential to give greater consideration to socio-economic integration of asylum seekers as a key aspect of a more resilient long-term EU asylum policy’.

¹⁴⁹ Among many others, see Battjes and Brouwer (2015), Baumgärtel (2019: 46-80), Dembour (2015: 402-441) and Smieziek (2021).

court deemed the presumption of safety accorded to Dublin states to have been rebutted,¹⁵⁰ but also that – under the rubric of ‘living conditions’ – it brought ‘socio-economic deprivation [...] within the ambit of article 3 in expulsion cases’ (Den Heijer 2013: 278; cf. Dembour 2015: 454; Costello 2015: 262). Since this ambit had ‘traditionally’ been circumscribed to violations of civil and political rights (e.g. ‘inhuman detention conditions’ [*ibid.*: 278]), this represented a truly ‘unprecedented extension of the Convention’ (Dembour 2015: 455).

Insofar as it led to a halt of “transfers” to Greece and served as a ‘catalyst’ for further legal challenges against “transfers” to other Member States (Baumgärtel 2019: 75), *M.S.S.* undoubtedly dealt a ‘severe blow’ to the Dublin system (Dembour 2015: 440).¹⁵¹ Yet, early hopes that it might herald its ‘dismantling’ (Moreno-Lax 2012) have proven exaggerated, for ‘the bar for finding that the threshold of ill-treatment proscribed by Article 3 is met’ that was established in *M.S.S.* remained quite ‘high’ (Dembour 2015: 424). Although the ECtHR’s case-by-case approach makes it difficult – if not ‘impossible’ – to pin down this bar (*ibid.*: 423), its emphasis on the fact that the applicant had ‘spent months living in a state of the *most extreme* poverty, unable to cater for his *most basic* needs’ (ECtHR 2011: 254), already gave quite a clear sense of ‘the abysmal level to which conditions must fall before the Court is ready to step in’ (Dembour 2015: 422). Confirming this impression, ‘[s]ince *M.S.S.* the Court has shown itself inclined to distinguish the abominable conditions in Greece [...] from those pertaining in other European countries’, with the result that ‘another verdict of a violation of Article 3 due to the destitution [...] has yet to be reproduced’ (*ibid.*: 455).¹⁵² While a review

¹⁵⁰ The ‘principle of refutability’ was first formulated in ECtHR (2000a), but it had hitherto never been applied (Baumgärtel 2019: 53). The *Bundesverfassungsgericht* had started granting claims for interlocutory relief from asylum seekers subject to “transfer” to Greece as early as in 2009 (Leitsch 2009; Bohlo and Dolk 2011). While it had also ‘deliberated on the main question, whether the transfers were indeed in accordance with the German Constitution, [...] it decided not to issue a ruling as the Ministry of Internal Affairs announced (three days before the European Court of Human Rights published *M.S.S.*!) that it would not execute transfers to Greece for a year’ (Battjes and Brouwer 2015: 198; cf. Bender 2011).

¹⁵¹ “Transfers” to Greece (from Germany) resumed in March 2017 (IAM 2018: 26).

¹⁵² On the ECtHR’s post-*M.S.S.* Dublin case law, see Baumgärtel (2019: 71).

of the CJEU's and the German courts' Dublin jurisprudence lies beyond the scope of this section, the former has 'emphasised even more the predominance of mutual trust' (Battjes and Brouwer 2015: 190),¹⁵³ and the latter have adopted 'a quite narrow reading of the implications of the *M.S.S.* judgement' (*ibid.*: 198).¹⁵⁴

Whether the Dublin system, after two decades of national and supranational litigation, is able to fulfil migrants/refugees' 'need for physical security' – let alone their 'interest in integration' (Gibney 2015: 458) – remains highly doubtful. While I will return to this in the following Chapter, a couple of points about the Member States to which Ahmed and Ibrahim were supposed to be "transferred" may serve to preliminarily illustrate the point. With respect to Finland, the ECtHR (2019) has recently ruled that its authorities had failed to adequately assess the risk that an Iraqi asylum seeker (like Ahmed) would be subjected to treatment contrary to Articles 2 (right to life) and Article 3 of the Convention upon removal to Baghdad (see Nieminen and Pekkarinen 2019). While the ruling was subsequently annulled when it transpired that the person in question had not in fact been killed or suffered any cruel, inhuman or degrading treatment (ECtHR 2021), it is hard to see how this could have any bearing on the serious deficiencies in the quality of the risk assessment carried out by the

¹⁵³ Thus, '[t]he 'systemic breaches' requirement, developed by the CJEU [2011] in the *NS v. SSHD* judgement and incorporated into the Dublin III Regulation, has been criticised by several authors not only as being too high a threshold for rebutting trust, but also because of the lack of precise standards on the basis of which national courts must consider trust as rebutted' (Battjes and Brouwer 2015: 191; cf. Baumgärtel 2019: 60). While the CJEU (2017a) later clarified that 'the absolute character of the prohibition of inhuman or degrading treatment' also applies beyond 'contexts where there [are] systematic flaws in the receiving Member State', several 'national courts used the notion of 'systematic flaws' to place an additional evidentiary burden on asylum seekers' in the meantime (*ibid.*: 60). And even after laying the "systemic breaches/flaws" requirement to rest, the CJEU (2018a) has continued to emphasise (in a judgment concerning a Dublin "transfer" from Germany to Italy) the 'particularly high level of severity' required to halt a Dublin transfer, stating that this presupposes 'a situation of extreme material poverty that does not allow [an asylum seeker] to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'.

¹⁵⁴ Thus, in a 'leading case' from 2014, the *Bundesverwaltungsgericht* (2014) (Federal Administrative Court) 'emphasised the importance attached to the principle of mutual trust by the Court of Justice and characterised the threshold for rebutting the presumption as 'high'' (Battjes and Brouwer 2015: 198). According to a recent report, the '[m]aterial requirements for a successful appeal remain difficult to fulfil and the way these requirements have to be defined in detail remains a highly controversial issue', as 'administrative courts in the Federal States continue to render diverging decisions with regard to the question of whether problems in the different Member States' asylum systems amount to "systemic deficiencies" or not' (IAM 2020: 40).

Finnish authorities identified by the ECtHR in its initial ruling. As for Spain, several people who were “transferred” to it in the course of 2018 were unlawfully denied access to reception conditions and thereby rendered destitute (Accem 2020: 70) – that is, the very same situation that led the ECtHR to find a violation of Article 3 ECHR in its “watershed” *M.S.S.* ruling.

IV. The right to free legal representation

Reflecting on some of the rather technical procedural guarantees introduced by the ECtHR in its jurisprudence on Dublin “transfers”, a human rights lawyer interviewed by Baumgärtel (2019: 79) worried that it ‘could end up benefiting mostly those persons who are aware of their rights and have a good lawyer, while others run a risk of falling between the cracks of the rights protection system’. While Ibrahim often made fun of my constant encouragements to seek professional advice on his legal situation (see Figure 4.2), most of my interlocutors did acknowledge that I had a point. Stunned by how cordial and smooth his identification procedure in Eisenhüttenstadt had been, for instance, Yacine remarked that ‘[h]aving a good lawyer like Karl’ – who was involved in the migrant/refugee solidarity network and had agreed to represent him for free – ‘really makes a huge difference’. Ahmed was so concerned about securing adequate legal representation (and so unsure as to how to assess its quality) that he once asked me to accompany him to his first appointment with a new lawyer so that I could ‘check if she is good’. The very first time we met, Muuse indignantly told me that he had recently been sentenced to 20 hours of social work for shouting ‘racist’ at a neighbour who persistently addressed him as ‘nigger’, adding that when he had confronted the Public Prosecutor about this ‘nonsense’, the latter had replied: ‘Why didn’t you get a lawyer? No lawyer, no justice (*Kein Anwalt, kein Recht*)’.

Figure 4.2: A drawing Ibrahim left on my flat’s visitor book

[...]

Note: The figure should be read from right to left

That ‘*free* legal assistance at *all stages* of the asylum procedure is an important component of a system of fair and efficient asylum procedures’ and ‘critical to the delivery of the right to asylum’ is something which scholars and migrant/refugee rights organisations have been stressing for years (Guild 2015: 277, emphasis added). In a nutshell, since ‘[a]sylum seekers often have no knowledge of the relevant law in the country where their asylum application is examined, do not speak the language of the county and are in many cases, due to traumatic experiences in their country of origin, distrustful of authorities’, the presence of a lawyer is essential to ‘ensur[e] that all elements of the application are taken into account’ and that ‘real or perceived inconsistencies or contradictions are clarified in a timely manner’ (European Council on Refugees and Exiles [ECRE] 2010: 34-39). Yet, despite this, few asylum seekers can afford one. In its evaluation of a pilot project conducted in the arrival centres of Bonn, Gießen and Lebach between March and May 2017, BAMF (2017: 7) itself unambiguously concluded that ‘independent and gratuitous advice on the asylum procedure’ in advance of its start and throughout its unfolding ‘contributes to enable asylum seekers to become acquainted with the individual steps of the administrative procedure and their significance, and to better understand their right and meet their obligations’, as well as ‘to ensure effective access to procedural guarantees and legal protection’.

Among my key interlocutors, however, only Yacine had enjoyed access to legal representation ‘when it is most needed’, i.e. ‘at the time [...] of making a request for international protection’ (ECRE 2014: 58). While Ibrahim and Muuse never had a lawyer, Ahmed only started looking for one *after* he had already had his asylum interview, one week after which he was notified that he was subject to Dublin “transfer”. The lawyer to whom a social worker at the camp directed him, who had to ask her secretary to translate for her (from German to English, rather than Arabic), initially agreed to represent Ahmed for €900. At their second appointment, however, it turned out that she had somehow misunderstood

his situation and could not represent him because ‘she didn’t do Dublin law’. With only one day left to file the appeal, the (legally untrained) social worker volunteered to write it based on a template found on the internet. Having managed to lodge the appeal at the last minute, Ahmed then spent the following three weeks looking for another lawyer, but was told time and again: ‘Sorry, I am too busy, try this colleague’. By the time he finally found someone, who “only” asked him for €600 because ‘she was new to asylum law’, his appeal had also been rejected. When, at the appointment I accompanied him to, Ahmed told the new lawyer who had written the appeal, she raised her eyebrows as if to say: ‘It shows...’

Under the German legal framework, access to legal representation is significantly constrained. More specifically, ‘[d]uring the first instance procedure at the BAMF, asylum seekers may be represented by a lawyer but they are not entitled to free legal aid, so they have to pay their lawyers’ fees themselves’ (IAM 2019: 29) – something which many of them are simply not in a position to do. In contrast to this, ‘[d]uring court proceedings’ (i.e. when they appeal against a negative first instance decision), ‘asylum seekers can apply for legal aid to pay for a lawyer’ (*ibid.*: 29). Even then, however, ‘[t]he granting of legal aid is dependent on how the court rates the chances of success’ – a “merits test” [that] is carried out by the same judge who has to decide on the case itself’, leading some lawyers to advise against applying for legal aid out of a concern that ‘a negative decision in the legal aid procedure may have a negative impact on the main proceedings’ (*ibid.*: 29). In addition to this, ‘decision-making in the legal aid procedure may take considerable time so lawyers regularly have to accept a case before they know whether legal aid is granted or not’ (*ibid.*: 29). Combined with the fact that ‘fees based on the legal aid system do not always cover their expenses’, such lengthy procedures make ‘specialising only on asylum cases [...] difficult for law firms’ (*ibid.*: 29), and ultimately result in a chronic shortage of specialised asylum lawyers (Hooock 2016; Mai 2017).

With respect to the ECtHR, although it has ruled on several occasions that the absence of free legal aid may in some circumstances lead to a violation of the right to a fair trial under Article 6 ECHR, it has also made clear that Article 6 ‘does not apply to asylum and expulsion proceedings [...] because a person’s immigration status is not a “civil right”’ (Lambert 2005: 45; see ECtHR 2000b). Underlining that such proceedings ‘have decisive consequences on the status – and thus rights – of migrant persons’, Dembour (2015: 506) has characterised this decision as ‘unacceptable’. While the right to an effective remedy under Article 13 ECHR *does* apply to negative asylum decisions, the Court’s jurisprudence in this area has also been described by Dembour as ‘weak’ and marked by a reluctance to challenge Western European states’ self-perception as ‘bastions of the rule of law’ despite ‘the multiple problems reported by legal representatives working in the field of asylum’, notably including ‘limited access to legal representation’ (*ibid.*: 426-427). To be sure, in *M.S.S.*, lack of legal aid and the shortage of asylum lawyers were among the many factors (lack of interpreters, lack of trained interviewers etc.) that led the ECtHR (2011: 315) to conclude that Greek asylum procedures violated Article 13 (in conjunction with Article 3). Yet, whether such factors would by themselves have sufficed for this conclusion to be reached remains highly doubtful, not least because ‘the Court shie[d] away from making pronouncements of principle’ on the matter (*ibid.*: 433).

Finally, with respect to EU law, Article 47 CFREU provides that ‘everyone shall have the possibility of being advised, defended and represented’ and that ‘[l]egal aid shall be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice’. Although ‘[t]his provision covers any judicial proceedings, including those conducted before administrative courts’, it still does not apply to the administrative part of the asylum procedure, including the crucial asylum interview

(Mikołajczyk 2014: 455). While the latter is regulated by the Procedures Directive,¹⁵⁵ the provisions on free legal aid and assistance contained in this instrument ‘leave States a lot of discretion in introducing their own modalities, exemptions and limits’ (*ibid.*: 467). Thus, largely thanks to Germany’s diplomatic efforts (Weinzierl 2017: 11), applicants are entitled ‘to consult, at their own cost, [...] a legal adviser [...] at all stages of the procedure’¹⁵⁶ but only have a right to ‘free legal assistance and representation [...] on request in the appeals procedures’.¹⁵⁷ Even then, Germany (and every other Member State) is allowed to ‘provide that free legal assistance and representation not be granted where the applicant’s appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success’,¹⁵⁸ paving the way for the aforementioned ‘merit test’. All in all, these provisions can be fairly described as ‘disappointing’ (Mikołajczyk 2014: 470; cf. Guild 2015).

V. The right to a home

While the focus has so far been on various obstacles to securing a right to stay, this and the following two sections look at various forms of rightlessness linked to asylum reception conditions. This section’s starting point is Ahmed’s aforementioned complaint that ‘[l]ife in the camp is so hard it’s not even life’. The “camp” in question was one of the thousands of “container villages” that were erected all over Germany in response to the 2015/2016 “crisis”.¹⁵⁹ Located at the outskirts of Berlin, it consisted of a large cement clearing encircled on all sides by a 3 metres-high fence on which stood about a dozen rows of containers (see Figure 4.2, below). Officially known as a “tempo-home”, Ahmed’s dwelling consisted of a

¹⁵⁵ The Dublin Regulation and the Reception Conditions Directive also contain additional provisions on legal aid and assistance, on which see Mikołajczyk (2014: 468-469).

¹⁵⁶ Article 22(1) Procedures Directive.

¹⁵⁷ Article 20(1) Procedures Directive.

¹⁵⁸ Article 20(3) Procedures Directive.

¹⁵⁹ At the height of the “crisis”, asylum seekers were hosted for months on end in even more – indeed, altogether – inadequate “emergency shelters”. For ethnographic accounts of the dismal living conditions in the ICC conference centre and the hangars of the former Tempelhofer Airport, two of Berlin’s most infamous “emergency shelter”, see respectively Young (2020) and Parsloe (2020).

shared ~15m² container furnished with two beds; a large metal cabinet; a small table and two chairs, plus another ~15m² container comprising a small kitchen and a tiny bathroom, which he shared with his roommate and the two other people living in the third container that completed the whole (see Figure 4.3). After visiting the camp (something which I had to give my personal details to a security guard in order to do), I described the overall atmosphere in my fieldnotes as ‘shabby and claustrophobic’, adding: ‘I really wanted to ask Ahmed to pull up the blind obscuring the only window in the room and turn off the surgery-room strip light that illuminated it, but didn’t because he told me he didn’t like being seen by his neighbours’.

Figure 4.3: A tempo-home camp similar to the one where Ahmed lived

[...]

Source: Graupner (2018)

Figure 4.4: Floorplan of a tempo-home

[...]

Source: *Berlin Senatsverwaltung für Gesundheit und Soziales* (2016: 6)

The need – if not the right – articulated by Ahmed couldn’t be clearer: what he yearned for was a ‘home’ of his own, where he could feel ‘comfortable’ and enjoy privacy and a measure of control over his immediate physical environment and daily rhythms, so as to be able to ‘do everything well’ and lead ‘a good, quiet life’. By the same token, Muuse once told me that being allowed to move from the “camp” to which he had been allocated when he first applied for asylum to a private accommodation had been ‘the first step to a normal life’. Ibrahim once similarly mentioned that living in a shared flat in Berlin, where he was able to stay free of charge for several months after he had (irregularly) left the reception centre in the small Saxonian town to which he had been assigned, was ‘so much better because you have your

own room and some nice people to talk to’, some of whom were themselves active within the migrant/refugee solidarity network. And Yacine was so deterred by his first impression of the arrival centre in Eisenhuttenstadt that, even though his lawyer warned him that a failure to remain there might lead his application to be deemed ‘withdrawn’,¹⁶⁰ he categorically refused to spend even just one night there, effectively choosing to go back to living “under the radar” (before his application was rejected as inadmissible due to the Dublin Regulation).

Migrant/refugee rights organisations often frame their critiques of the living conditions in reception centres – or, as they often call them, *Lager*¹⁶¹ – in terms of (dis)respect for human dignity (e.g. ProAsyl 2018). In a judgment pertaining to the Asylum Seekers Benefits Act, the *Bundesverfassungsgericht* (2012: 95) did emphasise that ‘[h]uman dignity [...] may not be modified (*ist nicht zu relativieren*) in light of migration-policy considerations’, ruling that the amount of cash benefits to which asylum seekers were entitled under the Act was ‘evidently insufficient’ to ensure the ‘fundamental right to [...] a dignified minimum existence’ (*menschewürdiges Existenzminimum*). As noted by Ganchev (2019: 261), however, while the judgment made clear that ‘this basic right has a very broad personal scope of application which extends to every natural person’, ‘the material scope of protection’ that it guarantees is ‘very narrow’. To put it with the *Bundesverfassungsgericht* (2012: 64), it ‘only covers those means that are absolutely necessary to maintain a dignified life’, including ‘the physical

¹⁶⁰ Under Section 33(1) *Asylgesetz*, ‘[a]n asylum application shall be deemed to have been withdrawn if the foreigner fails to pursue it’. The fact that an applicant ‘has violated the geographic restriction of his permission to remain pending the asylum decision’ – about which more in the following section – is listed under paragraph 2 of the same section as one of the factors based on which ‘[i]t shall be presumed that the foreigner has failed to pursue the procedure’. While Pelzer and Pichl (2016b: 100) have suggested that this provision is ‘disproportional’ and ‘inconsistent with EU law’, Article 28(1)(b) Procedures Directive provides that ‘Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for international protection in particular when it is ascertained that [...] he or she has absconded or left without authorisation the place where he or she lived or was held, without contacting the competent authority within a reasonable time’.

¹⁶¹ While the term “*Lager*” literally means “storehouse” or “camp”, migrant/refugee advocates and migrants/refugees themselves obviously deploy it with the intent of evoking the Nazi *Konzentrationslager*.

existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health’, and ‘the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life’. While the fact that the *Bundesverfassungsgericht* ‘leaves relatively broad leeway to the legislature’ to determine what needs to be provided has been praised as a virtue (Winkler and Mahler 2013: 401; cf. Leijtien 2012: 39), migrant/refugee rights advocates have criticised the legislative amendment that it spurred as ‘minimal’ and ‘not in line’ with the *Grundgesetz* (*ibid.*: 400).

Moving on to the ECHR, Article 8 (right to respect for private and family life, *home* and correspondence) ‘does not provide the right to a home itself’ but ‘merely protect[s] the home once the individual has established residence’ (Ippolito and Pérez González: 146). While it has been suggested that ‘Article 3 [...] could serve to recognise a right to housing in the migration context’ (*ibid.*: 146), the ECtHR (2011: 249) explicitly stated in *M.S.S.* that this article ‘cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home’, ‘[n]or does [it] entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living’. While the Court did reach the conclusion that the living conditions faced by the applicant in Greece constituted a violation of Article 3, as already shown in section III, ‘the bar for finding that the threshold of ill-treatment proscribed by Article 3 is met’ established by *M.S.S.* with respect to living conditions remains very ‘high’ (Dembour 2015: 424) – to recall: ‘a state of the most extreme poverty’ where it is impossible ‘to cater for [one’s] most basic needs: food, hygiene and a place to live’. As long as the Member States provide asylum seekers with ‘a place to live’ that is not entirely inadequate, as opposed to “a real home”, arguing that they fall short of their obligations under Article 3 is therefore very difficult.

As for EU law, Article 17(2) Reception Directive establishes that the ‘Member States shall ensure that material reception conditions provide an adequate standard of living for

applicants, which guarantees their subsistence and protects their physical and mental health'. While Article 20(1) allows the Member States to 'reduce or, in exceptional and duly justified cases, withdraw material reception conditions', Article 20(5) also underlines that they 'shall under all circumstances [...] ensure a dignified standard of living for all applicants'. The Directive, however, does not 'further defin[e] such standard[s]' (Silga 2018: 104).¹⁶² The CJEU has made clear that asylum seekers must be provided with housing even if they are subject to Dublin "transfer" (CJEU 2012: 39-43) or if 'the accommodation facilities specifically for asylum seekers are overloaded' (CJEU 2014a: 47), as well as that 'the withdrawal, even if only a temporary one, [...] of material reception conditions relating to housing, food or clothing would be irreconcilable' with Article 20(5) because 'it would preclude the applicant from being allowed to meet his or her most basic needs' (CJEU 2019: 47). Further '[d]etails as to the "dignified standards of living"' to which asylum seekers are entitled, however, 'are still left to the discretion of the state' (Smieszek 2021: 233). While the court's jurisprudence can be criticised for failing to provide 'the necessary specifics' as to where 'the dignity threshold' lies (*ibid.*: 233), its emphasis on "most basic needs" suggests that it is roughly as undemanding as the ones established by the *Bundesverfassungsgericht* and the ECtHR.

VI. The right to choose one's place of residence within Germany

While Ahmed complained about the living conditions in his "camp", he still considered himself 'very lucky' in one crucial respect: 'at least it [was] in Berlin'. The reception centre to which an asylum seeker is allocated is indeed determined – from their perspective, utterly

¹⁶² Tsourdi (2015: 24) has characterised this as 'a missed opportunity' to set 'a higher 'EU threshold' and lamented the failure 'to establish a reasonable and objective benchmark, which would have been the level of social assistance provided for nationals when they require such assistance'. The reason for these shortcomings, she suggests, is that 'the level of material support that must be available to asylum applicants [...] is an area where wide divergences are noted in national practice and it constituted, unsurprisingly, one of the most contentious points of the negotiations' (*ibid.*: 18).

randomly – by a distribution system known as “EASY”,¹⁶³ which operates ‘according to a quota system [...] based on the capacities of the centres, which are in turn dependent on the size and the economic strength of the Federal States in which the centres are located’ (IAM 2019: 19). While this system of forced allocation, which was first established in 1974 (Ette 2017: 99), is extremely complex and fragmentary, its main components today can be summarised as follows. To begin with, asylum seekers have an obligation to live in the assigned reception centre for up to 18 months.¹⁶⁴ If their application is rejected as ‘manifestly unfounded’¹⁶⁵ or (as in the case of people subject to Dublin transfer) ‘inadmissible’,¹⁶⁶ this limit extends to up to 24 months¹⁶⁷ or – if the applicant also comes from a ‘safe country of origin’¹⁶⁸ – until they eventually leave the country.¹⁶⁹ As long as the above-mentioned obligation applies, asylum seekers are also subject to a ‘geographic restriction’ that generally precludes them from leaving the district in which the centre is located.¹⁷⁰ And even once it elapses, they bear an ‘obligation to live in collective accommodation’ in the same *Land* until their claims are accepted.¹⁷¹ Recognised protection beneficiaries are themselves subject to a further obligation to reside in that *Land*.¹⁷²

¹⁶³ This is an acronym for *Erstverteilung der Asylbegehrenden* (initial distribution of asylum seekers).

¹⁶⁴ Section 47(1) *Asylgesetz*. The maximum length of this obligation was extended from three to six months in October 2015, and then again to 18 months in August 2018.

¹⁶⁵ Section 30(2) *Asylgesetz* provides that ‘an asylum application shall be manifestly unfounded if it is obvious from the circumstances of the individual case that the foreigner is remaining in the federal territory only for economic reasons or in order to evade a general emergency situation’. Paragraphs 3 and 4 of the same section list a long series of circumstances in which this is assumed to be the case, including factors such as ‘unsubstantiated or contradictory’ statements, ‘forged or falsified evidence’, the filing of an application ‘in order to avert an imminent termination of residence’ etc.

¹⁶⁶ Section 29(1) *Asylgesetz* provides that ‘[a]n application for asylum shall be inadmissible if [...] another country is responsible for conducting the asylum procedure’ under the Dublin Regulation or ‘based on other European Union law or another international treaty’; ‘another EU member state has already granted the foreigner international protection’; ‘a country that is willing to readmit the foreigner is regarded as a safe third country’ etc.

¹⁶⁷ Section 47(1b) *Asylgesetz*.

¹⁶⁸ See footnote 126.

¹⁶⁹ Section 47(1a) *Asylgesetz*.

¹⁷⁰ Section 56 *Asylgesetz*.

¹⁷¹ Section 53(1) *Asylgesetz*.

¹⁷² Section 12a *Aufenthaltsgesetz*.

This ‘most notorious system for restricting the residence of refugees in the developed world’ (Hathaway 2005: 701), which reproduces the perverse ‘no free-choice’ (Maiani 2017: 636) logic underpinning the Dublin system, was something against which all of my key interlocutors clashed and railed (cf. Scott 2018, Fontanari 2015, Bhimji 2016, Täubig 2019a). One of the main reasons why Hugo thought that ‘asylum is like prison’, for instance, was precisely that it entailed forced relocation to ‘some small village in the bush’. As already mentioned, Yacine’s categorical refusal to spend even just one night in Eisenhüttenstadt led to his asylum application being deemed “withdrawn” and Ibrahim also left the small Saxonian town in which the reception centre to which he had been assigned was located a couple of months after lodging his application, and only moved back to it one year later after his benefits had been reduced on account of his “absconding”. As for Muuse, who lived in Neuruppin (Brandenburg) for about three years (both prior to and after he obtained refugee status), he once referred to the ‘residence rule’ that forcibly kept him there at the time as his ‘nightmare’. When (several months later) his application for relocation to take up employment in Berlin was approved,¹⁷³ pending payment of a €50 administrative fee, he ecstatically told me: ‘€50?! I would give €200 to be free from that place! Seriously! [...] It’s like taking an arrow out of my heart!’.

While limited employment prospects were also part of the issue, what made Muuse yearn to ‘be free from’ Neuruppin were, above all, the countless episodes of racism that he had experienced (cf. Scott 2018). To mention only the crassest manifestations of this broader phenomenon, in the less than three years he had spent in Neuruppin, Muuse had been beaten into a coma a few hundred meters away from his initial reception centre; chased on the street

¹⁷³ Muuse was, by that point, a recognised refugee. Under Article 12a *Aufenthaltsgesetz*, the ‘residence rule’ applicable to beneficiaries of international protection ‘shall not apply where a foreigner [...] takes up or has taken up employment of at least 15 hours per week with full social security coverage, on account of which that person has an income amounting to at least the average monthly needs for individual persons pursuant to Sections 20 and 22 of Book Two of the Social Code’.

by a man brandishing a smashed bottle and shouting: ‘Run for your life, little nigger!’; and (after moving into private accommodation) repeatedly addressed with the same racial epithet by his next-door neighbour.¹⁷⁴ Next to his determination to avoid “transfer” to Spain, Ibrahim’s decision to move to Berlin from the small Saxonian town to which he had been allocated was also linked to similar experiences, including: witnessing multiple Muslim women having their hijab pulled off their heads; being told by a bar-keeper to leave the premises after he and a friend started talking in Arabic; being invited to ‘Get the fuck out of Germany’ by a skinhead; and fearing being ‘shot by those bad boys with black motorbikes’. While attacks against asylum seekers and reception centres also occurred in Berlin, their number was disproportionately high in areas with previously low numbers of foreigners, high levels of unemployment, and high electoral support for the AfD (Entorf and Lange 2019; Rees *et al.* 2019) – areas where none of my interlocutors would have chosen to settle in the first place.

As noted by McDonough (2009: 516), the *Bundesverfassungsgericht* ‘has upheld the central provisions of the *Residenzpflicht*’ – the most long-standing and, until the recent introduction of the obligation to stay in the initial reception centre, the most central element of the German system of forced allocation – ‘against numerous legal challenges’. While a comprehensive overview of this case law lies beyond the scope of this section, the leading judgment on the matter was delivered in 1997. Since Article 11 *Grundgesetz* reserves ‘the right to move freely throughout the federal territory’ for ‘Germans’, the case in question concerned an alleged violation of ‘the right to free development of [the applicant’s] personality’ enshrined under Article 2(1) thereof. Rejecting the allegation, however, the *Bundesverfassungsgericht* (1997: 52) found that the restrictions under consideration were ‘appropriate and necessary to evenly distribute the tasks linked to the reception of asylum

¹⁷⁴ I personally saw a video of the second attack, filmed by Muuse with his phone camera as he run away from his assailant.

seekers and to ensure the continuous reachability of the applicant for the purposes of his procedure and its expeditious implementation'. Several legal scholars have argued that neither of these objectives can be regarded as a valid justification for restricting individual rights (Hathaway 2005: 715-716; Hruschka 2010: 62) and that each of these goals could also be achieved through less invasive measures such as, respectively, 'a system of fiscal burden-sharing among the *Länder*' (Hathaway 2005: 717) and the use of modern communication technologies (Brings and Oehl 2015; Hoffman 2016: 273; Pelzer and Pichl 2016b: 100).

When a challenge against the *Residenzpflicht* finally reached the ECtHR, the applicant's claim that 'the restrictions placed on his liberty of movement [...] violated Article 2 of Protocol No. 4 to the Convention' was again deemed inadmissible. Under that Article, '[e]veryone lawfully within the territory of a State shall [...] have the right to liberty of movement and freedom to choose his residence'. According to the ECtHR (2007: 7), however, 'foreigners provisionally admitted to a certain district of the territory of a State, pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can only be regarded as "lawfully" in the territory as long as they comply with the conditions to which their admission and stay are subjected' (*ibid*). Since the applicant had failed to do so, 'he had not been "lawfully" within the territory of Germany at those times and could not therefore rely on [...] Article 2 of Protocol No. 4' (*ibid*). For several scholars, the Court's decision to declare the case inadmissible was quite simply 'wrong' because mere non-compliance with restrictions on freedom of movement and residence does *not* suffice to render an asylum applicant's stay within the country unlawful (Edwards 2013: 455; cf. Marx 2011: 162-163; McDonough 2009: 517; Pelzer and Pichl 2016b: 100).¹⁷⁵ Even if the ECtHR were to change its opinion on this point, however, the anomalously lax way in

¹⁷⁵ On the contested legal status of asylum seekers, however, see footnote 124.

which it interprets the requirements of necessity and proportionality when it comes to immigration detention does not bode well.¹⁷⁶

While the CJEU (2016) has ruled that burden-sharing among the *Länder* does not justify restrictions on the freedom of residence of subsidiary protection beneficiaries (see Carlier and Leboeuf 2017), the legal entitlements of asylum seekers under the Reception Directive are far more limited. While the EU Commission's original proposal envisioned that they too should enjoy freedom of movement and residence, the German government was 'particularly active in [...] pushing for a restriction' (Ette 2017: 110). As a result of German opposition, Article 7 Reception Directive provides that '[a]pplicants may move freely within the territory of the host Member State *or within an area assigned to them by that Member State*' (emphasis added), empowering the latter to 'decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection'. Several scholars have argued that this provision and/or the way it is applied in Germany is incompatible with Article 26 of the Convention Relating to the Status of Refugee (Edwards 2013: 454-457; McDonough 2009: 529; Pelzer and Pichl 2016b: 97),¹⁷⁷ which remains the ultimate 'yardstick for EU [asylum] legislation and its interpretation and application' (Banks 2015: 221).¹⁷⁸ While the CJEU's jurisdiction over the latter 'implies a power of interpreting the yardstick itself' (*ibid.*: 221), however, all the Court has hitherto had to say on the subject is that 'Member States may,

¹⁷⁶ Cf. ECtHR (1997, 2008). Commenting on these leading judgments, several scholars have complained that 'the proportionality and necessity of the decision to resort to pre-admittance detention are as insignificant for the question of its lawfulness as they are with regard to the lawfulness of pre-deportation detention' (Cornelisse 2010: 292-293; cf. Costello 2012).

¹⁷⁷ Under Article 27 of the Convention, '[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'.

¹⁷⁸ Under Article 18 CFREU, '[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees'. Article 78(1) TFEU also establishes that '[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection [...] in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'. The CJEU has 'explicitly refer[red] to situations where a provision of the Convention is reflected in EU legislation [...] as possible areas of jurisdiction' (Bank 2015: 221).

under certain conditions, require that applicants for international protection reside in a specific place’.

VII. The right to work

As already anticipated in section II, one of the main reasons why most of my interlocutors strove to secure a right to stay in Germany were the ‘limited opportunities to find decent employment as an individual in an irregular situation’ (Kraler 2019: 105). Shortly before being “transferred” to Spain, for instance, Ibrahim bitterly told me that his ‘mind [was] full of business ideas’ that could not be realised because of his lack of legal status and that he was entertaining the idea of starting to sell drugs, defiantly adding that the prospect of ending up in jail did not scare him in the least as his current situation was already comparable to ‘living in an open prison: nothing to do all day; nobody to talk to; nowhere to go other than Karstadt (a shopping mall)’. After telling me that he had started ‘working for free’ (volunteering) every Saturday in the café of the cultural centre where he took German classes, Ahmed similarly remarked that, although it was ‘difficult to reduce yourself lower than what you can do’, it was still ‘better than sitting all day in the camp with nothing to do’. And, even though Muuse had a right to stay, he too once complained to me that, ‘[h]ere, they put a lot of filters in the system’, underlining that – while his asylum application was still under consideration – he had twice been denied permission to take up employment despite having received a job offer.¹⁷⁹

My interlocutors’ statements confirm several previous studies’ finding that asylum seekers (and tolerated irregular migrants) in Germany perceive work as a central aspect of ‘a ‘normal’ life’, experience their inability to work as a form of ‘civil death’, and explicitly blame this

¹⁷⁹ This was due to the so-called ‘priority review’, whereby – for a period of 15 months following the registration of the asylum application – asylum seekers were only issued an employment permit if there was no other jobseeker with more secure residential status who was suited for the job offer in question (IAM 2019: 83). This specific barrier to access to the labour market was ‘suspended for three years in most parts of Germany’ in August 2016 (*ibid.*: 83) and ‘abandoned’ altogether in March 2020 (IAM 2020: 95).

condition on the applicable legal framework (Täubig 2019b: 346-349; cf. Etzold 2017; Kraler 2019; Scott 2018). Under this framework, ‘[a]ccess to economic activity’ is indeed generally restricted to ‘[f]oreigners holding a residence title’ (*Aufenthaltstitel*).¹⁸⁰ Lacking such a title,¹⁸¹ asylum seekers ‘shall [generally] not be allowed to take up paid employment (*eine Erwerbstätigkeit ausüben*) as long as they are required to stay in a reception centre’. ‘In derogation to’ this, ‘the pursuit of employment is to be permitted if: 1. the asylum procedure is not incontestably concluded within nine months after the filing of the asylum application, 2. the Federal Employment Agency has granted its approval or a statutory instrument stipulates that taking up such employment is permissible without [its] approval [...], 3. the foreigner is not a national of a safe country of origin [...] and 4. the asylum application has not been turned down as manifestly unfounded or inadmissible, unless the administrative court rules that the action brought against the decision [...] is to have a suspensive effect’.¹⁸² Moreover, ‘[a]n asylum applicant who has stayed in the federal territory for three months on the basis of permission to remain pending the asylum decision may [...] be permitted to take up employment’ if condition (2) applies.¹⁸³

Several ‘additional limitations to the access to the labour market in practice’ (IAM 2020: 95) also need to be taken into account. To begin with, each time they want to take up employment, asylum seekers have to apply for an employment permit, in order to get which ‘an employer has to declare that the asylum seeker will be employed in case the employment permit is granted’ (*ibid*: 95) – a burdensome and lengthy procedure that many potential employers prefer to avoid (Pichl 2017: 13). Another major practical hurdle to access the labour market is the lack of – and the difficulties involved in acquiring – sufficient language

¹⁸⁰ Section 4a(1) *Aufenthaltsgesetz*. In derogation to this, however, ‘a foreigner who does not have a residence title may [...] be permitted to take up employment, if [...] its pursuit has been permitted to him by the responsible authority’ (Section 4a(4) *Aufenthaltsgesetz*).

¹⁸¹ See footnote 119.

¹⁸² Section 61(1) *Asylgesetz*.

¹⁸³ Section 61(2) *Asylgesetz*.

skills.¹⁸⁴ Importantly, so-called “integration courses”, comprising 600 hours of language tuition and 100 hours of civic orientation, are only accessible to asylum seekers coming from a limited number of countries with high recognition rates, i.e. Syria, Iran, Iraq, Eritrea and Somalia.¹⁸⁵ Needless to say, asylum seekers subject to Dublin “transfer” are excluded altogether. Third, lack of – and difficulties in acquiring – sufficient educational and professional qualifications also severely limit employment prospects. Access to education for asylum seekers above the age of 16, ‘many of whom have not finished school in their countries of origin’, is indeed ‘severely limited’ (IAM 2020: 96). And although ‘[a]sylum seekers generally have access to vocational training’, potential employers ‘are often hesitant to offer’ it because of the ‘considerable risk that the training cannot be completed if the asylum application is rejected’ (*ibid.*: 96; cf. Lehner 2020).

Since ‘occupational freedom’ under Article 12 *Grundgesetz*, is explicitly reserved for ‘Germans’, the fact that – starting from 1980 – asylum seekers were denied access to the labour market for varying lengths of time spanning up to 5 years was for a long time perceived as legally unproblematic (Ette 2017: 99). After then CDU Minister for Work and Social Order Norbert Blüm disposed that any asylum seeker who had entered the country after 15 June 1997 was to be indefinitely denied a work permit, however, several social tribunals (*Sozialgerichte*) ruled that the Minister’s instructions did not constitute an adequate legal basis for such a ‘substantial restriction of work permit law’ (*wesentliche Einschränkung des Arbeitserlaubnisrechts*) and that work permit refusals based on it were therefore unlawful (e.g. *Landessozialgericht Nordrhein-Westfalen* 2000). Before the *Bundesverfassungsgericht* delivered its 2012 ruling on social benefits, some migrant/refugee rights advocates expressed hopes that

¹⁸⁴ To wit, a recent survey of German employers found that ‘insufficient language skills were the most frequently stated reason for not hiring asylum seeker and refugee applicants for jobs (61%)’ (Organisation for Economic Co-operation and Development 2017: 39).

¹⁸⁵ As pointed out by Voigt (2016), asylum applicants coming from countries that have equally high or even higher recognition rates (because of a low number of applications) are denied this possibility.

it would use the opportunity to declare that any ban on employment is incompatible with the guarantee of human dignity and the principle of the social state (ProAsyl 2012). While the *Bundesverfassungsgericht* (2012: 63) did state that, '[i]f people do not have the material means necessary to guarantee a dignified existence because they are unable to acquire means from gainful employment, [...] the state is obliged, within its mandate to protect human dignity and to maintain the social welfare state, to ensure that material means are available to those in need', it did not see fit to question the legality of the policies that prevent asylum seekers from engaging in work.

Moving on to the ECHR, Costello and O'Connell (2021: 18) have recently argued that, although it does not explicitly recognise the right to work, this right 'enjoys a degree of indirect protection' under some of its provisions, 'open[ing] up legal avenues for contesting labour market restrictions on asylum seekers and refugees'. Such avenues, however, are rather narrow – if not located entirely in the realm of *de lege ferenda*. To be sure, the ECtHR did state that 'article 8 (the right to privacy) includes *'the right to establish and develop relationships with other human beings'*, including in working life' (*ibid.* 20).¹⁸⁶ But to interpret this dictum as entailing a universal right to work regardless of (il)legal status seems rather daring. While it is also empirically true that 'forced labour often emerges when migration status limits free choice of employment', the suggestion that the prohibition on slavery and servitude under Article 4 ECHR may entail a positive 'obligation [...] to reform migration status, including work bans, to reduce risks of such exploitation' (*ibid.* 22) is equally bold. And although 'the ECtHR recognized in *MSS v Belgium and Greece*' that '[r]estrictions on the work rights of asylum seekers may also contribute to inhuman and degrading living conditions' contrary to Article 3 (*ibid.* 21), the violation finding in *M.S.S.* was contingent on the fact that Greece had *also* (and perhaps more decisively) failed to provide the applicant with the reception conditions

¹⁸⁶ The phrase in italics is a direct quote from ECtHR (1992).

to which he was entitled under EU law, thereby rendering him unable to fulfil his ‘most basic needs’.

As for EU law, Article 15(1) CFREU states that ‘[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation’. Whereas some commentators have rightly underlined that this Article contains ‘no nationality or status-related limitation’ (Costello and O’Cinneide 2021: 28), others have argued – or, rather, asserted – that its personal scope is limited to third-country nationals who have a permission to work (Bernsdorff 2019: 482; Ruffert 2009: 586). Whereas ‘[t]he full implications of Article 15 of the Charter remain to be seen’ (Costello and O’Cinneide 2021: 29), Article 15(1) Reception Directive quite clearly states that the ‘Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged’. In spite of this, it has been argued that the fact that certain asylum seekers (including those who are subject to Dublin “transfer” and those who come from “safe countries of origin”) are required to stay in initial reception centres – and, thus, denied access to the labour market for longer than 9 months – is justified by their ‘lesser need for protection and the related interest in the facilitation of deportation’ (Kluth 2015: 339). The CJEU’s (2021) recent ruling that the guarantee of access to the labour market after 9 months also applies to asylum seekers subject to Dublin “transfer”, however, supports the contrary view that this aspect of German policy violates Article 15(1) Reception Directive (Hofmann 2018; Wittmann and Röder 2019: 416).

VIII. Conclusion

Starting from my interlocutors’ comparisons between seeking asylum in post-2015 Germany and the condition of slaves, prison inmates, and herded animals, this chapter shed light on the multiple forms rightlessness that those who are subject to or stuck at the threshold of the asylum regime have to endure. With respect to the right to stay, I have argued that

applying for asylum (*sensu lato*) is effectively the only way in which migrants who are irregularly staying in the country can obtain it. The Dublin system and the lack of a right to free legal advice, however, constitute major (though by no means the only) hurdles to successfully claiming the right to asylum, and thus a right to stay. The lack of a right to stay in turn paves the way for exclusion from many other crucial legal entitlements, including the right to choose one's place of residence in the country and the right to work. Socio-economic rights such as the right to work and, even more so, the right to a home are only weakly and indirectly (if at all) protected by the law, which for the most part only bars infringements with these rights to the extent that such infringements can reach the high threshold of cruel, inhuman or degrading treatment. As these findings show, under the applicable law, the proposition that the rule of law 'enables us in here to keep those out there at bay' and the view that it 'requires [...] that we keep their rights in mind' (Steinbeis 2018a) are not as contradictory as it might at first appear.

As anticipated in section I, the question that this conclusion raises is: what would it take for the rule of law/*Rechtsstaat* to 'allow the [...] inequities of migration to receive new scrutiny' (Dauvergne 2004: 615)? This, in essence, is what political philosopher Matthew Lister (2018: 2) evocatively calls the 'problem of the border' – that is, 'whether and how the rule of law can be applied, in any consistent way, to people who are not part of the political community in question'. And not just at the literal, physical borders of the nation, but also at all of those 'multiple internal borders' that, as shown in this chapter, pervasively 'infiltrat[e] formally unified political and social spaces, challenging established patterns and mechanisms of integration and blurring the boundary between "inclusion" and "exclusion"' (Mezzadra 2016: 5). After all, as we have seen in chapter 2, the concept of *Rechtsstaat* has always been a kind of 'sluice [...] open to a steady stream of shifting ideas in the realm of political and

constitutional theory¹⁸⁷ (Böckenförde 1991: 47) and ‘a signifier of desire for political change’ – albeit a notoriously ‘slippery, overused [and] contested’ one (Cheesman 2015: 270 [with respect to the “rule of law”]). So, again, might the gates of the sluice not – at some point in the future – be opened up and let through a higher level of recognition for the rights that migrants/refugees already ‘venture to claim’ even though they are ‘not entitled to [them] within the scope of existing domestic and international laws’ (Gündoğdu 2015: 188)?

Some scholarly proposals to this effect have already been made, with most of the “discussion”¹⁸⁸ focusing on how “the rule of law” may contribute to expand the right to stay.¹⁸⁹ Archiving back to the conceptual framework introduced in chapter 2, these proposals can be arrayed on a spectrum going from “moderate” to increasingly “radical” forms of cosmopolitanism. Starting from the more moderate proposals, Lister (2018) and Ellermann (2014) have both argued that the rule of law provides good reasons for regularising *long-term* ‘unauthorized’/‘undocumented’ migrants. For Lister (2018: 10), this is basically about ‘bringing a large mass of people who now live in fear of the law but without its protection into the light’, whereas Ellermann (2014: 300-301) contends that, ‘when the state does not pursue undocumented migrants in a reasonably predictable and timely manner’, deportation becomes ‘arbitrary’ and contrary to the principle of ‘legal certainty’. While such arguments challenge the dominant view that the rule of law militates against regularisation,¹⁹⁰ what makes them “only” moderately cosmopolitan is that they “only” address the predicaments of one specific sub-category of irregularly staying migrants: those who have already endured

¹⁸⁷ As Dauvergne (2004: 607) puts it, ‘the rule of law is not a passive standard but a shape-shifter of long pedigree’.

¹⁸⁸ Insofar as none of the authors discussed below references the others, the discussion has hitherto been rather virtual.

¹⁸⁹ Since ‘[o]btaining the right to remain in the host country, ideally with a permanent status, is probably the most effective way for vulnerable migrants to increase their welfare and access to various other rights’ (Baumgärtel 2019: 44), is hardly surprising.

¹⁹⁰ As both authors note, one of the most common and powerful arguments against regularisation is indeed that it ‘both rewards lawbreaking and encourages future lawbreaking’ and is therefore incompatible with the rule of law (Lister 2018: 9; cf. Ellermann 2014: 298).

‘years of sitting on packed suitcases’ (Ellermann 2014: 303). This condition may be especially troubling. But what about people who – like my interlocutors – have (or had) only irregularly stayed in a country for a relatively short period of time? ‘Why should *jus domicile* [...] only be acquired after a certain probationary period, during which residents remain unequal, lack rights and are exploitable?’ (Bauder 2012: 194)

Moving along the spectrum, Schotel (2012: 174) has argued that ‘the principle of proportionality’, which ‘is already a core element of the rule of law’, should ‘be applied to all cases where authorities directly affect the legitimate interests of individuals’ – including migrants’ ‘interest to admission’ (*ibid.*: 197). Without getting into the intricacies of the argument, the key point for our purposes is its upshot: state authorities would have to demonstrate – on a case-by-case basis and subject to judicial review – that ‘the actual conduct’ of each and every foreigner they seek to remove ‘pose[s] a specific and actual risk’ to ‘public policy or security’ and that there are ‘no less burdensome ways’ to avert this risk than removal (*ibid.*: 175-176). Schotel’s proposal can be placed midway between the moderate and the radical poles of the cosmopolitan spectrum. For, on the one hand, a blanket ‘duty to justify’ exclusion – regardless of whether or not a migrant can invoke a special preferred status, how long s/he has been irregularly staying in a country, and whether or not the state has pursued his/her removal in a timely and predictable manner – would undoubtedly result in ‘a significantly higher’ admission rate than we have under the current regime (*ibid.*: 4-5). On the other hand, however, as Schotel himself emphasises, this proposal ‘is not a ticket to a policy of open borders’ and it neither presupposes nor entails ‘a legal right to admission or a fundamental or human right to free movement’ (*ibid.*: 4).

Finally, going even further toward the radical end of the cosmopolitan spectrum, Bohman (2009: 540) has contended that, from a ‘republican’ perspective centred on the value of ‘non-domination’, ‘a legal order that necessarily leaves many people either without legal status or

in the condition of illegality [...] should be regarded as the paradigmatic violation of the rule of law'. To put it the other way around, '[t]he only way to realize non-domination [...] is to incorporate a shared and universal status for all legal subjects into the rule of law' (*ibid.*: 547). What makes this conception of the rule of law so extremely radical is that, rather than casting it as basis for further constraints on the sovereign right of exclusion, it effectively understands it to require nothing short of its complete abolition. Although the prospect that 'rule of law may become unhinged from the nation and its sovereignty' in the way that Bohman proposes would certainly 'allow the global inequities of migration to receive new scrutiny' and is, in this sense, 'so breathtaking [that] it is worth considering imaginatively and fostering through advocacy', however, 'its theoretical supports remain shaky' at best (Dauvergne 2004: 615). In fact, insofar as this conception of the rule of law would preclude *any* form of differential treatment between citizens and non-citizens, it is so distant from the currently dominant understanding of this ideal that it looks like a different animal altogether – one that closely resembles what I have referred to as radical cosmopolitanism.

As we shall see in chapter 6, many of those who embraced this radically cosmopolitan – or, as they preferred to call it, no border – politics in fact understood it to make quite different – and even antithetical – demands than those that are often associated to the rule of law/*Rechtsstaat*, including 'a duty to disobey immigration law' (Hidalgo 2016). Before turning to that, however, the next chapter looks at the subsequent – and, in many cases, the final – stage of the complex process of migrant exclusion: deportation.

5. WE HAVE TO FOLLOW THE LAW (OR: THE PROBLEM OF NON-COMPLIANCE)

I. Introduction

One day in late October 2018, I woke up to find two missed calls and a message from Ibrahim, whom I had last seen two days earlier, just before he returned to his reception centre in Saxony after a brief stay in Berlin.¹⁹¹ The message read: ‘They got me. I’m going to Spain. Don’t worry about me, I will find a way to solve this’. Ibrahim sent me a voice message explaining how ‘they got’ him later that day. Having arrived at ‘the *Lager*’ a few hours earlier, he was hanging out with a friend in his room when, around midnight, someone knocked on the door. Ibrahim unthinkingly opened it and found himself face to face with five ‘cops’, who ascertained his identity and informed him that they were there to deport him. ‘I am not going’, Ibrahim told them, to which the lead officer replied that, if he didn’t cooperate, they would ‘have to use force’. ‘Where do you want to deport me?’, Ibrahim asked. When the officer replied ‘Libya’, his heart ‘started pumping really fast’ and he reiterated, now shouting, that he was not going to go. Some of the officers ‘got nervous’ and seemed ‘ready to hit’ him. Then, after a quick look at his papers, the lead officer exclaimed: ‘Apologies: it’s Spain, not Libya!’ Somewhat less terrified, Ibrahim eventually agreed to be brought to a police station, where he was ‘locked up’ for a couple of hours while transportation to Berlin’s Tegel airport was being arranged.

After the three hours’ drive, Ibrahim was handed over to a *Bundespolizei* (Federal Police) officer, whom he described as ‘the friendliest cop [he] ever met’. Here is how Ibrahim recounted their encounter:

‘As we were waiting [for boarding], I told him: “I can’t go back to Spain”. So he turned to me and said: “Listen, this is the law and we have to follow it, we have

¹⁹¹ As mentioned in the previous chapter, after (irregularly) staying (for free) in a shared flat in Berlin for several months, Ibrahim had to move back to his camp in Saxony when his benefits were reduced.

to respect the law”. I said: “OK, we are following the law. But what if you send me back to Spain, and then Spain sends me back to Libya and I end up dying there? Then you would be a cause, a reason, of my death. So please think again about what you are doing”. At first, he didn’t say anything. But I could see that he was not happy doing this. Then, he looked at me and said: “At least, when you get back to Spain, you’ll be a free man again”. And it’s just... What does he mean by “free man”? I am not free! I am trying to see it from multiple points of view but... I really don’t know what he meant’.

In fact, right upon landing in Madrid, Ibrahim was told by the Spanish immigration authorities that, since he had previously ‘gone to Germany illegally’, he now had ‘no right to a place [in a reception centre] or any social benefits’, meaning that he effectively had to fend for himself on the streets.

The officer’s laconic assertion ‘[t]his is the law and we have to follow it’ neatly encapsulates a very common refrain within the incessant public debate on “deportation” in post-2015 Germany.¹⁹² In a January 2017 speech in which Chancellor Merkel announced a greater ‘national effort’ (*nationale Kraftanstrengung*) on deportation, for example, she similarly stressed that ‘[w]here the law is laid down, it must also be implemented’ (Frankfurter Allgemeine Zeitung 2017). And, more than two years later, as the so-called “Orderly Return Act”¹⁹³ entered into force, Interior Minister Seehofer stated in almost identical terms that ‘[o]nly the consequential implementation of the law can ensure trust in the *Rechtsstaat* and acceptance of the asylum system among the population’ (BMI 2019a). Such statements, and the policies which they ushered in, simultaneously catered for and fuelled a significant ‘mood shift’ on the subject of deportation (Bartsch *et al.* 2019). As one newspaper article put it, whereas this had been something of ‘a taboo subject in Germany’,

¹⁹² For the present purposes, “deportation” can be defined as the *forced removal* of a person from the territory of a state of which he or she is not a citizen. As we shall see, Dublin “transfer” to an EU Member State and (forced) “return” to a non-EU country (usually the returnee’s “country of origin”) are regulated by two partly different legal regimes. However, both of these practices fit the definition of deportation given above and will be considered as such in this chapter. In contrast, “voluntary return” is, as the name itself makes clear, *supposed* to take place with the “consent” of the persons affected and therefore falls outside the scope of this chapter. Having said this, the voluntariness of “voluntary” return has been heavily questioned (see Kalir 2017, Leekers *et al.* 2017, Webber 2011 and, with specific respect to Germany, Mahar 2020).

¹⁹³ The official, if a little less evocative, name of the law was actually *Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* (Second Act to Improve the Enforcement of the Obligation to Leave the Country) of 15 August 2019.

‘public sentiment shifted in 2015, when more people migrated to Germany than ever before. The mass sexual assaults that occurred in Cologne on New Year’s Eve that year swept aside any lingering moral ambivalence and had people longing once again for the rule of law. For many people, including many politicians, the [alleged perpetrators] could not be deported soon enough. And while they were at it, send all the rejected asylum-seekers back with them, people thought’ (*ibid.*)¹⁹⁴

Yet, can these seemingly widespread sentiments – and the significant increase in the number of deportations in post-“crisis” Germany (Figure 5.1) – really be understood in terms of ‘a longing for the rule of law’? The claim that the ‘effective (*konsequente*) removal of foreigners who have an obligation to leave the country’ constitutes ‘a duty of the *Rechtsstaat*’ (Ahlswede 2019) rests on the argument that deportation is ‘necessary to secure the credibility of the asylum system’ (Gibney 2008: 167), which – in an age where asylum and immigration are extremely politicised – is in turn closely tied up with the credibility of the legal system and of the state as a whole. ‘If people are not granted protection’, the argument goes, ‘they must leave, and if they do not leave, the very idea of having a system [...] to distinguish between legitimate and illegitimate claimants in the first place becomes pointless’, fuelling ‘distrust and opposition to the very idea of [...] asylum [...] among voter segments in the receiving country’ and ‘feeding a backlash from racist voters unwilling to offer protection to refugees’ (Lamberg-Pedersen 2018: 53). While this ‘credibility argument’ (*ibid.*: 53) was very salient after 2015, concerns with ‘the possibility of asylum abuse’ and with the threat to public order posed by violent anti-immigrant mobilisation can be traced all the way back to the early 1980s and were a key reason for the ‘unprecedented increase in the number of deportations in the 1990s’ (Ellermann 2009: 19-20; cf. Gibney and Hansen 2003: 5).

Figure 5.1: Annual number of deportations, 2012-2019

[...]

Sources: Bundestag (2013, 2014, 2015, 2016, 2017, 2018a, 2019a, 2020b)

¹⁹⁴ On the event of New Year’s Eve 2015 in Cologne, see chapter 3, footnote 106.

As argued by Lemberg-Pedersen (2018: 56), even if one accepts the premise that (as the applicable legal framework provides) states have a right to exclude “normal migrants” and ‘agree[s] in principle that for protection systems to function, applicants must accept final decisions’, the credibility argument suffers from one major weakness: ‘it assumes states’ asylum decisions to be fair’. While the problems with this assumption should be clear from the previous chapter, this one shifts the focus away from the issue of ‘just cause for deportation’ and onto that of ‘just action in deportation’ – that is, whether ‘the actions taken by those charged with carrying deportation out’ are normatively and legally justifiable (Lenard 2015: 471). As several political scholars have emphasised, from the ‘dominant [...] liberal-statist perspective’ (Gibney 2013: 123), ‘the legitimacy of deportation’ partly rests on the claim that it ‘can be carried out while respecting the basic human rights and dignity of the deported’ (Walters 2019: 163) and the underlying ‘commitment to non-arbitrariness’ (Lenard 2015: 474), all of which are of course intimately connected to the *Rechtsstaat* ideal. While the issue’s normative salience can hardly be overstated, Carrera and Allsop (2017: 81) recently lamented the existence of ‘a ‘knowledge gap’ regarding [...] the ways in which the rights of individuals are guaranteed throughout the various phases comprising expulsion processes and procedures’ in Europe’. The present chapter can be understood as a contribution to the critical task of filling this gap.

Importantly, in a federal state where deportation-related measures are mostly a prerogative of the *Länder* (federated states),¹⁹⁵ enforcement practices vary considerably from place to place (Eule 2014; Schneider, Segadlo and Leue 2020), as well as over time.¹⁹⁶ Without any

¹⁹⁵ As explained by Schneider, Segadlo and Leue (2020: 566), ‘[t]he *Ausländerbehörden* [Aliens’ Authorities], which are typically part of the Ministries of the Interior [of the *Länder*] and are in charge of administrative decisions such as the handling of residence permits, are also responsible for deportations. They collect the required documents for people with an enforceable obligation to leave Germany, contact the country of origin and evaluate the physical readiness of unsuccessful asylum seekers before assigning the execution of the deportation to the police force of the *Land*. As we shall see in section VI, responsibility for physically “escorting” deportees out of the country is vested in the *Bundespolizei*.’

¹⁹⁶ As noted by Eule *et al.* (2019: 41), ‘there were 25 changes to migration and asylum law between summer 2015 and summer 2018 alone’, many of which – as we shall – had a bearing on the practice of deportation.

claim to comprehensiveness, the following pages therefore single out and zoom in on some deportation practices that have emerged as particularly legally (and morally) problematic in the course of my fieldwork. More specifically, building on previous work that demonstrates the importance of attending to the ‘processual quality’ of deportation (Drothbohm and Hasselberg 2014: 553; cf. Coutin 2014; Ellermann 2009; Hasselberg 2016; Fekete 2005; Gibney 2008; Peutz 2007; Walters 2016, 2019), this chapter tracks the forced movement of deportees across the five main stages of the ‘deportation corridor’ (Drothbohm and Hasselberg 2015): the issuance of deportation orders (section II); the pick-up (section III); detention (section IV); boarding and flight (section V); and the aftermath (section VI). The chapter’s core argument is that the relentless insistence of influential right-wing politicians across the ever blurrier “conservative”/“populist” divide, that a more “effective” deportation policy was vital to ‘ensure trust in the *Rechtsstaat* and acceptance of the asylum system among the population’ (BMI 2019a) resulted into ground-level implementation practices that ‘sail[ed] as close as possible to the line that separates compliance from violation of liberal norms’ (Gibney 2008: 166) and, indeed, frequently crossed it.

II. The issuance of deportation orders

Part of what rendered Ibrahim’s deportation so hard for him (and his friends) to accept was that, had he managed to avoid apprehension for another mere five days (!), the time-limit on his “transfer”, which had been extended from six to eighteen months on account of “absconding”,¹⁹⁷ would have elapsed, giving him a right to stay in Germany (at least until the conclusion of his asylum procedure).¹⁹⁸ While we have seen in the previous chapter that most of the ‘litigation saga’ (Costello and Mouzourakis 2014: 408) triggered by the Dublin

¹⁹⁷ The murky notion of “absconding” is examined in more detail in section IV.

¹⁹⁸ The “adjusted protection rate” – i.e. the proportion of asylum applications decided on the merits that resulted in the issuance of an international or a national form of protection – for Libyans in 2018 was 43.6% (own calculations based on BAMF 2019: 3), meaning that Ibrahim would have had a fighting chance of obtaining a long-term right to stay in Germany.

Regulation has revolved around whether reception conditions in the receiving states are consistent with the prohibition on cruel, inhuman or degrading treatment, the CJEU (2017b: 67) has recently ruled that ‘an applicant for international protection may [also] rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in [...] that regulation’ (see Thym 2018b). And while the complex system of time limits laid down in the Dublin Regulation has no bearing on the “return” of third-country nationals to a non-EU Member State, the latter form of deportation is also subject to a complex web of procedural safeguards, notably including ‘the right to an effective remedy enabling automatic suspensory effect, before at least one judicial body’ (CJEU 2018b: 58). As the political pressure for higher deportation rates kept increasing, however, such procedural safeguards have come under growing pressure and were, in some cases, simply ignored.

When, in early September 2018, Ahmed informed me via WhatsApp that he had been “transferred” to Finland, the news struck me as a bolt out of the blue. For, when I had last met and accompanied him to see his lawyer a few weeks earlier, the latter had told us that she – and BAMF – had been notified by the responsible court that the 6-month time limit on his Dublin “transfer” had elapsed. ‘Now we need to wait and see how BAMF will proceed’, the lawyer said, cautioning us that ‘they might still try to extend the time limit, in which case we’ll have to appeal’. Alarmed by this prospect, Ahmed asked her about its likelihood, to which his lawyer replied that she ‘wouldn’t worry too much about it’. After all, Ahmed had duly stayed put in his “camp”, where the police had only come looking for him once – ironically, on a day he had had to leave early in the morning for an appointment at the *Ausländerbehörde*. So there was really no basis for extending the time limit on grounds of “absconding”. ‘Am I safe then?’, Ahmed probed. Since the lawyer reiterated that she couldn’t give him ‘any guarantees’ until BAMF replied, I ventured that it might be wise for Ahmed to keep a copy of the court notification in case he ran into the police. Unfortunately for Ahmed,

his lawyer's reply that '[t]he police wouldn't really give a damn about it' was soon going to be proven right.

In fact, when Ahmed told the four police officers who knocked on the door of his "tempo-home" one morning at 4 A.M. that the time limit on his "transfer" had elapsed more than a month earlier and that 'what they were doing was illegal', one of them chided him: 'You think you know the rules better than us?'. Six weeks after the "transfer" took place, the Berlin Administrative Court effectively answered the officer's arrogant question in the affirmative. Rather than seeking to extend the time limit on Ahmed's "transfer", it turned out, BAMF had indeed simply failed to notify the Berlin *Ausländerbehörde* that it had expired and the latter had accordingly proceeded to instruct the police to carry it out. Ruling that the "transfer" had been unlawful, the Court instructed the *Ausländerbehörde* to fly Ahmed back to Germany, which it did a couple of weeks later. During the two months he spent in Finland, however, the local immigration authorities subjected him to such relentless pressures to opt for "voluntary return" to Iraq (in the form of threats of forced "return") that he only refrained from doing so due to his mother's warnings about the 'chaos' that prevailed in Baghdad at the time and to my and his lawyer's encouragements not to give up.¹⁹⁹ Even after he was flown back to Berlin, the whole experience left Ahmed so 'broken inside', 'disappointed, tired, confused', and unable 'to see or speak with anyone' that he eventually decided to seek psychological counselling.

The unlawful disregard for procedural safeguards that laid at the root of Ahmed's ills was part and parcel of a broader trend. To wit, in early 2019, the German government was forced to acknowledge that nine unlawful "transfers" and five unlawful "returns" (to non-EU states) had occurred during the previous year (Bundestag 2019b: 82, 2019a: 80). (Since many

¹⁹⁹ Ahmed's experiences point to the problems with the notion of "voluntariness" in the context of return, on which see footnote 129.

migrants/refugees subject to removal proceedings do not have a lawyer, the underlying dark figure can only be guessed, but is likely to be significant.)

The most well-known of these cases was certainly that of Osama Bin-Laden's (alleged) former bodyguard Sami Aidoudi. While the German administrative authorities had been trying to deport Aidoudi since 2006, various courts had repeatedly barred his removal on account of the risk of torture that he would face in his native Tunisia (Spiegel 2018a). Testifying to the political salience of the case, Interior Minister Seehofer himself had nevertheless publicly expressed his personal commitment to get Aidoudi out of the country as late as on 9 May 2018, but the Gelsenkirchen administrative court once again ruled out this course of action on the evening of 12 July 2018 (*ibid*). By the time the ruling reached BAMF and the competent *Ausländerbehörde* in Bochum (North Rhine-Westphalia) shortly after 8AM on the following day, however, Aidoudi was already air-bound to Tunisia (*ibid*). Informed of this, the court peremptorily instructed the *Ausländerbehörde* that, if Aidoudi had not yet been delivered to the Tunisian authorities, he was to be immediately flown back, but the plane ultimately took off for Germany without him (*ibid*).

In a strongly worded public statement, the President of *Oberverwaltungsgericht* (High Administrative Court) *Nordrhein-Westphalen*, judge Ricarda Brandts, accused the authorities of having 'blatantly test[ed] the limits of the *Rechtsstaat* – especially the separation of powers and effective legal protection' (Spiegel 2018b). To begin with, the Bochum *Ausländerbehörde* had (via BAMF) fed the competent administrative court a series of 'half-truths', as judge Brandts measuredly put it (*ibid*). Most crucially, when on 11 July the court asked BAMF to clarify whether a deportation flight was scheduled for the following day, it was reassured that this was not the case and rather disingenuously kept in the dark about the fact that a flight *was*

scheduled for the day after that.²⁰⁰ Moreover, while both *Bundespolizei* and federal Interior Ministry officials claimed that they had only become aware of the court's instructions to abort the deportation once it was too late (Bundestag 2018b: 5-6), North-Rhine Westphalia's Minister for Refugees Joachim Stamp (FDP) explicitly admitted that he had been in a position to prevent the hand-over, but decided not to do so out of fear that 'such an intervention may [...] produce considerable damages as regards foreign relations' (Frigelj 2018).²⁰¹ Lastly, North Rhine-Westphalia's Interior Minister Herbert Reul (CDU) even attacked the court's decision that Aidoudi had to be flown back to Germany for failing to mirror 'the population's sense of justice (*Rechtsempfinden*)' – a comment that was in turn widely criticised for displaying a 'disturbed relationship to the *Rechtsstaat*' (Spiegel 2018b).

What the German Police Union (GdP) Deputy Chairman, Mr. Sven Huber, characterised in an interview that we recorded in May 2019 as the 'trickery and chicanery' involved in Aidoudi's case were as exceptional as its political profile. Yet, a willingness to dilute procedural safeguards in pursuit of higher deportation rates manifested itself in many other ways. Thus, following the adoption of the Law on Accelerated Asylum Procedures of September 2015, "returnees" are no longer informed of the date of their deportation.²⁰² Underlining that 'it may take a considerable amount of time before an expulsion order is executed' and that changes that 'give rise to a potentially successful request for judicial review' may occur in the meantime, the European Council's Committee for the Prevention of Torture (CPT) (2019: 11) strongly criticised this provision for undermining access to legal

²⁰⁰ Insisting that '[w]e would never bend the *Rechtsstaat* to implement a political will', North Rhine-Westphalia's Minister for Refugees Joachim Stamp (FDP) sophistically defended the Bochum *Ausländerbehörde* by saying that 'BAMF did not ask whether a deportation was imminent', but only whether one was planned for 12 July (Süddeutsche Zeitung 2018b).

²⁰¹ By the time this statement was made, however, the *Oberwaltungsgericht Nordrhein-Westfalen* (2019: 28) had made quite clear that such considerations were 'legally irrelevant' insofar as it pertained to the (un)lawfulness of Aidoudi's deportation).

²⁰² Section 59(1) *Aufenthaltsgesetz*. People who are subject to Dublin "transfer" never had to be notified of their deportation date.

counsel and, thus, effective remedies.²⁰³ Secondly, although night-time home searches are generally prohibited (see section III), the majority of deportees are picked up – like Ahmed and Ibrahim – long before daybreak, when access to lawyers is all the more challenging (Baeck 2018). Thirdly, deportees are often deprived of their phones upon apprehension. While the *Berlin Senatsverwaltung für Inneres und Sport* (Senate Department for Interior and Sport) (2018) has stated that this practice is necessary to ‘prevent attempts at liberation’, Mr. Huber himself noted that police officers ‘should actually justify the confiscation based on a concrete danger’. Lastly, the CPT (2019: 15) also found that ‘some returnees were not [made] aware that they could make a phone call using a phone provided by the social support service’.

Ahmed and all of the other people whose unlawful deportation was acknowledged by the German government except for Aidoudi were eventually flown back to Germany (Bundestag 2019a: 81; 2019: b).²⁰⁴ While this certainly speaks to the power of the *Rechtsstaat*, however, this is only one part of the story. In a parliamentary interrogation (*kleine Anfrage*) submitted in February 2019, various *Linke* MPs asked the Federal Government whether it saw any ‘relationship between the increase in unlawful deportations and the national effort with respect to deportation announced by the Chancellor in January 2017, as well as the constant scandalization of alleged deportation enforcement deficits’ (Bundestag 2019a: 80). ‘The Federal Government is unable to see any such relationship’, a civil servant laconically replied (*ibid*: 80). This answer neatly illustrates the challenges involved in ensuring ‘responsibility in a migration regime of many hands’ (Eule *et al.* 2019: 187). As I hope to have shown in this section, however, the problem is not merely that messy regulatory frameworks and

²⁰³ One of the 46 people who were “returned” in the operation monitored by the CPT ‘had been issued with an expulsion order some five years earlier’ (CPT 2019: 11).

²⁰⁴ In Aidoudi’s case, the *Verwaltungsgericht Gelsenkirchen* (2019) eventually came to the conclusion that he did not need to be brought back to Germany after the Tunisian government issued diplomatic assurances that he would not be tortured. For a sceptical view of the reliability of diplomatic assurances in the context of deportation, see Giuffré (2017).

bureaucratic structures ‘enable individual state officials to denounce responsibility and “pass the buck” for morally and emotionally challenging work’ (*ibid.*: 189). Rather, some political and bureaucratic state actors seem willing to deliberately exploit this messiness to circumvent procedural “obstacles” – read: safeguards – against deportation, leaving the courts increasingly isolated in their attempt to uphold the *Rechtsstaat*.

III. The pick-up

One of the countless newspaper articles on the subject of “deportation enforcement deficits” published since the start of the 2015 “crisis” contained the following passage:

‘When the police unit arrives at the second address on the list [of deportees] and rings the bell, nobody is there. An officer knocks, but nobody opens. Perhaps there’s really no one in the room. The [reception] centre manager doesn’t know, nor can he find out. All it takes [for the deportee to avoid apprehension] is not opening the door. The officials have no right to open [it] with force’ (Lau 2015).

Sandwiched between a reference to Germany as a ‘hippie state’ on account of its ‘open border policy’ and the remark that ‘the costs [of this and other unsuccessful deportation raids] are born by the Berlin state’, the passage invites a feeling of indignation at the supposedly extravagant red tapes that tie immigration officials’ hands. This pervasive narrative of excessive legal constraints and resultant bureaucratic impotence (cf. Bartsch *et al.* 2018), however, presents two major blind spots. The first concerns the principled legal reason why neither reception centre operators nor the police are entitled to enter a deportee’s abode as they please – namely that, under Article 13 *Grundgesetz*, ‘[t]he home is inviolable’ and ‘[s]earches may be authorised only by a judge’. The second – and even more troubling – omission is that, in the context of deportation enforcement, police officers in post-“crisis” Germany systematically violated this fundamental constitutional right.

With respect to the applicable legal framework, three key aspects deserve to be highlighted.²⁰⁵

Firstly, the courts have consistently held that those parts of a reception centre where the residents' private and family life unfolds – namely, their rooms – must be considered a “home” in the meaning of Article 13 *Grundgesetz*. Secondly, the courts have also consistently held that entering a home for the purpose of picking-up a deportee does constitute a “search” in the meaning of that Article, and therefore generally requires a search warrant from a judge.²⁰⁶ Thirdly, when in February 2018 the Berlin *Landespolizei* tried to obtain such a warrant, both the *Verwaltungsgericht Berlin* (2018) and the *Oberverwaltungsgericht Berlin-Brandenburg* (2018) turned down its request for the simple reason that there was no applicable legal basis for it within the existing (*Land*-level) legislation. That the ‘lack of legal bases within [some] *Land*-level legislation’ forced officials ‘to apprehend individuals outside of their homes’, rendering their task ‘unnecessarily difficult’, eventually came to be perceived by the Interior Ministry as a major ‘problem’ (BMI 2019b: 38), as a solution to which the *Aufenthaltsgesetz* was amended in June 2019 to provide that ‘the authority carrying out the deportation may, to the extent necessary to carry out the deportation, enter the home of the foreigner to be deported for the purpose of apprehending the foreigner if there are facts indicating that the foreigner is present’.²⁰⁷ My fieldwork in Berlin predated this development.

Prior to this legislative amendment, however, deportation-related home searches without warrant were such a common practice that the *Flüchtlingsrat* (Refugee Council) *Berlin*²⁰⁸ (2017)

²⁰⁵ For a discussion of the legal framework that was applicable at the time of my fieldwork, see Herrmann (2017).

²⁰⁶ The exception to this rule is represented by situations involving an ‘imminent danger’ (*Gefahr im Vollzug*), which is not normally the case when it comes to the implementation of a deportation order (Herrmann 2017: 205).

²⁰⁷ Section 58(5) *Aufenthaltsgesetz*. Further powers and conditions related to home searches are defined in paragraphs 6 to 10 of the same Section. On these recent legislative changes, see Justus (2020) and Lichtenberg and Sitz (2021).

²⁰⁸ Established ‘in the early 1980s’ at ‘a time of massive anti-deportation protests’, the (*Land*-level) *Flüchtlingsräte* ‘attempt(ed) to constitute a voice countering the anti-migrant discourse, and to influence parliamentary decisions’ and ‘directly support(ed) asylum seekers and migrants with precarious legal status, often via legal means’ (Kirchhoff and Lorenz 2018: 50).

felt compelled to underline their unlawfulness in an information booklet for social workers operating within reception centres. Having read the booklet, when (in February 2018) half-a-dozen police officers showed up at the centre where she worked demanding access to its premises in order to pick up a deportee, a social worker and fellow activist named Tine initially argued with them that they had no right to do so without a warrant. Despite her protests and much to her chagrin, however, a security guard working in the centre independently decided to let in the officers and lead them to the room of the person they were after. Having knocked on the room's door and received no answer, but hearing noises behind it, the officers proceeded to enter the room, where they found themselves face-to-face with a completely naked man who had just come out of the shower and who eventually turned out to be the roommate of the person they were looking for. When she discussed this episode with her boss, Tine was explicitly warned against heeding the *Flüchtlingsrat's* call for social workers to report such instances of unlawful searches, as this may jeopardise the firm's prospects of securing a renewal of its tender to run the facility. Despite this, fed up with feeling like 'a cog in this shitty machine', Tine decided a few days later to report the episode and quit her job.

Insofar as the officers entered the man's room without a search warrant and without the "consent" of its occupant(s), the episode witnessed by Tine involved a clear breach of Article 13 *Grundgesetz*. In many other instances, however, the situation was more complicated. For people subject to deportation often "voluntarily" granted access to their "homes" to the police. As the reader may recall, this is precisely what happened in both Ibrahim's and Ahmed's cases. *Flüchtlingsrat Berlin* (2019) also reported an episode in which an asylum seeker who suffered from trauma and received psychiatric treatment, 'which the *Ausländerbehörde* must have been aware of', was woken up in the middle of the night by some police officers' insistent knocking on his door, and – under the effect of the 'strong medications' that he

took in order to sleep – let them in without understanding who they were. This self-defeating tendency to “cooperate”, if one can even speak of “cooperation” under such circumstances, on the part of people subject to deportation is largely due to their unawareness of their own rights and obligations vis-à-vis reception centre staff and police officers, which some of the latter shrewdly exploited to overcome legal constraints and accomplish their mission. Tellingly, not opening the door was one of the ‘ways to stop deportation’ illustrated in a popular info-comic produced by a group of activists to inform individuals who are obliged to leave Germany but do not intend to do so about how they can avoid it (see Figure 5.1).

Figure 5.2. One way to avoid deportation

[...]

Source: Anonymous (2016)

Quite possibly thanks to the *Flüchtlingsrat*'s persistent lobbying efforts, in May 2019, Berlin Senator for Integration, Employment and Social Affairs Elke Breitenbach (*Linke*) disposed that every private firm operating an asylum reception centre within the *Land* should be instructed about its (and the police's) rights and obligations concerning deportation-related home searches within these facilities. In an article titled ‘Senator Breitenbach torpedoed the police with respect to deportation’, however, the right-wing tabloid *Bild* reported that Senator for the Interior Andreas Geisel (SPD) did not ‘share’ Breitenbach’s interpretation of the applicable legal framework and therefore, there would ‘not be a change of instructions to the police’, who would instead ‘continue to apply federal law’ (Schupelius 2019).²⁰⁹ Corroborating Tine’s perception that many private companies tasked with running asylum reception centres were more interested in maintaining a good relationship with the authorities than in

²⁰⁹ While the author of the article confidently stated that Section 36 of the (Berlin-level) *Allgemeine Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung* (General Act on the Protection of Public Security and Order) provided a legal basis for the police to conduct searches within asylum centres (Schupelius 2019), this argument had already been rejected in the aforementioned judgment by the *Verwaltungsgericht Berlin* (2018). The *Oberverwaltungsgericht Berlin-Brandenburg* (2018: 7) saw ‘no need to decide on the matter’ because the search order at issue in that case had not been requested on this basis.

protecting the rights of the people who live in them, the manager of ‘one of the largest asylum centres in Berlin’ reportedly likened Senator Breitenbach to Pippi Longstocking for ‘mak[ing] the world the way she likes it, without taking into account the legal framework’, whereas another one stated that, ‘despite Breitenbach’s recommendation to the contrary, hardly any facility-manager will refuse to let in the police’ because ‘in many cases – for instance, when conflicts between residents arise – we depend on the police’ (Fahrun 2019).

Just one day after the spat between Breitenbach and Geisel made the news, I conducted an interview with Mr. Benjamin Jendro, a Police Union (GdP) representative at the Berlin *Land*-level. Quite naturally, our conversation soon turned to Senator Breitenbach’s initiative, which – my interlocutor complained – would ‘certainly make things harder for [his] colleagues’. ‘Didn’t Senator Breitenbach merely point to the applicable law, though?’, I asked. For the next twenty minutes, Mr. Jendro rehashed some of the same old arguments for deportation-related home searches without warrant that various courts had long rejected, including that the consent of the private firms operating the centres obviates the need for warrants; that home search powers are implicit in deportation orders; and/or that such powers are provided under policing law. As I kept questioning the validity of these arguments by reference to previous court rulings, Mr. Jendro eventually conceded that there might be ‘a juridical loophole (*eine juristische Lücke*) that must be addressed in order to provide a clear basis for conduct to [his] colleagues’, who certainly didn’t ‘like to break the law’. Insisting that until such a “loophole” – read: fundamental constitutional right – existed, his colleagues’ conduct remained nonetheless unlawful, I asked Mr. Jendro whether he thought that police officers generally have a good grasp of the law. ‘Probably not’, my interlocutor admitted, adding later in the interview that what they have is rather the ‘expectation (*Anspruch*) that everything is in conformity with the law: if my chief tells me to do this or that, I must assume that it’s lawful (*gesetzkonform*)’.

For street-level officials tasked with implementing deportations, assuming that what they are told to do is lawful may well be as much a psychological necessity as a matter of obedience to hierarchy. For, '[m]oral emotions can be most disruptive to the task of exclusion' (Vega 2018: 2546; cf. Eule *et al.* 2019; Gill 2016). As Mr. Jendro took pains to impress upon me, police officers 'are human beings' who 'feel empathy' and 'don't necessarily enjoy deporting' – a point that was reiterated in many street-level officers' accounts of deportation published since 2015 (e.g. Bartsch *et al.* 2019; Hillenbrand and Berkenkötter 2016; Lau 2015). What these accounts invariably also featured, however, was some variation of Mr. Jendro's immediately subsequent statement: 'But we have laws, and the laws have the highest priority'. As the reader may recall, this is almost exactly what Ibrahim was told by the friendly *Bundespolizei* official who oversaw his embarkation. And another interviewee from the *Bundespolizei* similarly told me that, '[e]nforcing residence-ending measures can involve considerable psychic burdens, but if someone has gone through a rule-of-law-compliant (*rechtsstaatlichen*) procedure and its outcome is that he has no right to stay, one cannot just ignore it'. In short, appeals to "the (rule of) law" appear to enable street-level officials to silence potentially disruptive moral feelings by lending legitimacy to their exclusionary practices. The problem is that what "the (rule of) law" often comes to stand for here is, in fact, the orders that they have been given – orders whose legality is often wrongly assumed.

IV. Detention

Considering the difficulties involved in picking up deportees from their homes, and since the point of "deportation detention"²¹⁰ (*Abschiebungshaft*) is precisely 'to fix an individual's

²¹⁰ Legally speaking, *Abschiebungshaft* denotes one specific form of deportation-related detention among many, namely, 'custody awaiting deportation' under Section 62 *Aufenthaltsgesetz*, which in turn encompasses 'custody to prepare deportation' (*Vorbereitungshaft*, paragraph 2), 'custody to secure deportation' (*Sicherungshaft*, paragraph 3) and 'temporary custody' (*behördlicher Gewahrsam*, paragraph 5). Other forms of deportation-related detention include: 'custody to secure departure' (*Ausreisegewahrsam*) under Section 62b *Aufenthaltsgesetz*; 'detention for the purpose of transfer' (*Überstellungshaft*) under Article 28 Dublin Regulation; and 'detention pending exit from the federal territory' (*Zurückweisungshaft*) under Section 15(5) *Aufenthaltsgesetz*. While the purpose, legal bases and maximum duration of each of these forms of detention differ (see Kefler 2019),

location, thus preventing [him/her] from becoming lost' (Gibney 2008: 152), this practice was unsurprisingly a major point of political contention after 2015. Indeed, according to Günther (2020: 105), 'positions on deportation detention have increasingly become a yardstick clarifying a politician's leaning within the overarching debate on the future of German asylum policy'. Given what we already know about that overarching debate, Günther's finding that the *Rechtsstaat* was 'by far the most often'-mentioned 'value' within the political disputes and, thus, the media coverage on deportation detention (*ibid.*: 99) is also quite unsurprising. Just as with every other aspect of the migrant exclusion process that we have examined so far, right-wing 'politicians would bring up the 'Rule of law' mostly to argue that deportation detention was necessary to ensure the functioning of the constitutional state, [whereas] civil society organizations referred to the 'Rule of law' when criticizing unlawful deportation detention' (*ibid.*: 106-107). What remains to be shown, and what this section undertakes to demonstrate, is that the latter references to the *Rechtsstaat* had a lot more substance to them than the former. As a critic of deportation detention interviewed by Günther quite plainly put it, 'the rule of law [...] means that we must protect the weakest; and that doesn't happen. We established rules and now we don't play the game according to them' (*ibid.*: 104).

Except for the couple of hours that Ibrahim was – as he put it – 'locked up' at the police station (in Saxony) before being transferred to Berlin Tegel airport, I hardly ever came across instances of deportation detention during my fieldwork. The reason for this is that (the *Land* of) Berlin had not had a deportation detention facility of its own since November 2015, when the one located in the district of Grünau was hastily turned into a reception centre as part of the frenzied attempts to cope with the sudden spike in arrivals (Roth 2015). Little more than

however, the term *Abschiebungshaft* is also used within political and public discourse in a looser, non-legal sense as an umbrella concept for all of them. In the following, I use the expression "deportation detention" to capture this looser, all-encompassing usage of the term *Abschiebungshaft*, while referring to specific sub-types thereof as and when needed.

a year later, the new Berlin governing alliance between SPD, *Linke* and *Bündnis 90/Die Grünen* (2016: 114) stated in its coalition contract that deportation detention was ‘fundamentally inappropriate’ and pledged to ‘champion [its] abolition at the federal level’. While the Berlin *Ausländerbehörde* could in fact continue to rely on deportation detention centres located in other *Länder*, and although a special deportation detention centre for “*Gefährder*”²¹¹ was opened in September 2018, the number of people affected by these policies remained all in all negligible.²¹² In stark contrast to this, however, while the number of people subject to deportation detention in Germany as a whole had drastically fallen from 8,805 to 1,850 between 2008 and 2015 (Bundestag 2021: 1), in subsequent years they have steadily climbed up to a peak of 5,113 in 2019 (*ibid.*: 9-12),²¹³ with the average duration of detention also increasing (*ibid.*: 1).

In order to account for the comeback of deportation detention, it is useful to start by looking at what precipitated its decline. While such decline was already underway, the dramatic fall in deportation detention figures that occurred between 2013 (4,812) and 2014 (90!) (Litschko 2014) was a direct result of two judicial rulings. First, in June 2014, the *Bundesgerichtshof* (Federal Court of Justice) (2014: 35) ruled that the only ‘objective criteria’ to assume a ‘risk of absconding’ that had been laid down in the *Aufenthaltsgesetz* – and, thus, the only valid legal bases to order ‘detention for the purposes of [Dublin] transfer’²¹⁴ (*Überstellungshaft*) – were a

²¹¹ The notion of “*Gefährder*” is used within policy and public discourse to designate people who fall under the scope of application of Section 58a *Aufenthaltsgesetz*, according to which ‘[t]he supreme *Land* authority may issue a deportation order for a foreigner without a prior expulsion order based on the assessment of facts, in order to avert a special threat to the security of the Federal Republic of Germany or a terrorist threat’. The ECtHR (2018: 28) translates the expression as ‘potential offender who poses a threat to national security’.

²¹² Thus, the number of people held in the Lichtenrade facility was 5 in 2018, 18 in 2019 and 18 in 2020 (Bundestag 2021: 9).

²¹³ Note that 61% of all deportation detentions in 2019 took place in just two (out of sixteen) *Länder*, namely, Bavaria (1,510) and Nordrhein-Westphalia (1,614) (own calculations, based on the data provided in Bundestag 2021: 9-12). While deportation detention figures fell again in 2020 to 3,006 (*ibid.*: 9-12), this is to be attributed to the impact of the Covid-19 pandemic (*ibid.*: 3-7).

²¹⁴ Under Article 28 Dublin Regulation, ‘[w]hen there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures’, subject to further conditions. Under Article 2(n) Dublin Regulation, ‘risk of absconding’ is defined as ‘the existence of reasons in an individual case, which are based on objective criteria defined by [the Member State’s national] law, to believe that an applicant [...] may abscond’. Note that, during the negotiations over the Dublin III Regulation, the German delegation had

‘change of place of residence without providing an address at which the foreigner is reachable’ or a ‘failure, for which the foreigner is accountable, to appear [...] at the announced transfer appointment’.²¹⁵ Since *Überstellungshaft* had hitherto been ordered on a wider set of grounds,²¹⁶ this ruling significantly tightened its use. Second, in July 2014, the CJEU (2014b) held that Germany’s use of regular prisons for deportation detention purposes violated Article 16(1) Return Directive, which requires that ‘detention shall take place as a rule in specialised detention facilities’. While Germany was not ‘obliged to set up specialised detention facilities in each federated state’, it did have to ensure ‘that the competent authorities of a federated state that does not have such facilities can provide accommodation for third-country nationals pending removal in specialised detention facilities located in other federated states’ (*ibid.*: 31).

Whereas migrant/refugee rights advocates and some left-wing politicians celebrated victory and called for the complete abolition of this practice, however, then Interior Minister de Mazière (SPD) immediately started ‘work[ing] on a reform [...] that again facilitates detention’ (Litschko 2014). Thus, in July 2015, the *Aufenthaltsgesetz* was amended to provide that ‘[f]oreigners are to be taken into [...] custody to secure deportation (*Sicherungshaft*) if [...] there is a risk of absconding’.²¹⁷ The list of factors that ‘may constitute concrete evidence’ that such a risk exists included: ‘the foreigner lies about his [sic] identity, especially by withholding or destroying identity documents or giving a false identity’; has failed to comply

fiercely opposed the introduction of this new requirement, ‘arguing that restricting grounds for detention solely for the risk of absconding is too strict’ (Armstrong 2016: 225).

²¹⁵ This is how the *Bundesgerichtshof* rendered the grounds for detention laid down in former Section 62(3), sentence 1, nr. 2 and 3 *Aufenthaltsgesetz*.

²¹⁶ In the case at hand, for example, *Überstellungshaft* had been ordered on the basis of a ‘justified suspicion that [the foreigner] wants to evade deportation’ (former Section 62(3), sentence 1 nr. 5 *Aufenthaltsgesetz*). The *Bundesgerichtshof* (2014: 23-24) ruled that this ‘sort of blanket clause detention ground [...] does not meet the requirements of [the Dublin III Regulation] because the provision does not specify the criteria that justify the suspicion that the foreigner wants to evade deportation’ and because ‘defining the risk of absconding by reference to an intention to evade deportation would constitute a mere pleonasm’.

²¹⁷ Former Section 62(3)(1) *Aufenthaltsgesetz*, as amended by the *Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung* (Act on the redefinition of the right to stay and the termination of residence, henceforth Termination of Residence Act) of 27 Juli 2015.

with his legal obligations to cooperate in establishing his identity in such a manner that ‘it can be concluded that he actively wants to avoid deportation’; has spent ‘considerable sums of money’ to be smuggled to Germany’; or has made ‘other preparatory acts of comparable importance’ to avoid deportation.²¹⁸ In addition to all of these factors, the fact that a foreigner has left another Member State before his asylum or his Dublin procedure was completed and that ‘the circumstances surrounding his detection’ in Germany ‘concretely suggest that he does not want to go back [...] in the foreseeable future’ was now *also* to be considered ‘objective criteria to assume that a risk of absconding’ in the meaning of the Dublin Regulation exists, thus providing yet another basis for *Überstellungshaft*.²¹⁹ Finally, a brand-new form of ‘custody to secure departure’ (*Ausreisegewahrsam*) was introduced.²²⁰

As already anticipated, the 2015 reform was harshly criticised by many migrant/refugee rights advocates as ‘partly unconstitutional and partly inconsistent with EU law’ (ProAsyl 2015: 5). With respect to the provisions related to “identity deception” and lack of efforts to obtain identity documents, it was argued that detaining someone on this ground is tantamount to an unconstitutional form of “imprisonment for contempt” (*Beugehaft*) (*ibid*: 5). With regard to the “considerable sums” criterion, it was argued that inferring a risk of absconding from it alone was ‘not acceptable’ (*ibid*: 6). As for the “other preparatory acts of comparable importance” criterion, it was criticised for falling short of the general *rechtsstaatlich* requirement of legal certainty (*Bestimmtheit*) underlined by the *Bundesgerichtshof* in its 2014 judgment (*ibid*: 6). Insofar as everyone who is subject to the Dublin Regulation has by definition left “the responsible country”, using this as a criterion for *Überstellungshaft* was also said to be blatantly inconsistent with the requirement that ‘Member States shall not hold a person in detention for the sole reason that he or she is subject to [...] this Regulation’²²¹

²¹⁸ Former Section 2(14) nr. 2 to 6 *Aufenthaltsgesetz*, as amended by the Termination of Residence Act.

²¹⁹ Former Section 2(15) *Aufenthaltsgesetz*, as amended by the Termination of Residence Act

²²⁰ Section 62(b) *Aufenthaltsgesetz*, as amended by the Termination of Residence Act.

²²¹ Article 28(1) Dublin Regulation.

(*ibid*: 8). Lastly, the fact that ‘custody to secure departure’ (*Ausreisegewahrsam*) could be ordered wholly independently of ‘the existence of a risk of absconding’ appeared to permit a surreptitious ‘expansion of custody to secure deportation (*Sicherungshaft*) that is not reconcilable with the principle of proportionality’ (*ibid*: 21).

Rather than addressing these serious criticisms, the subsequent legislative amendments introduced by the so-called “Orderly Return Act” of June 2019 – the one Interior Minister Seehofer portrayed as necessary to ‘ensure trust in the *Rechtsstaat* and acceptance of the asylum system among the population’ (BMI 2019a) and its critics re-dubbed “Get Lost (*Hau ab*) Act” (ProAsyl 2019a) – only moved things out of the frying pan into the fire. With respect to the subject of grounds for deportation detention, the law not only reformulated the already extensive list of factors that ‘may constitute concrete evidence’ of a risk of absconding in an even broader way, but – in certain cases – also shifted the burden of proof onto people seeking to challenge a detention order (Pro Asyl 2019b: 13-17).²²² In addition to this, dubiously equating the ‘disproportion between the number of people who are enforceably required to leave the federal territory and deportation detention capacities’ to an ‘unforeseen heavy burden on the capacity of the detention facilities’ (BMI 2019b: 54), the Orderly Return Act also made it possible for the *Länder* to derogate from the Return Directive and once again use normal prisons for deportation detention purposes until 1 July 2022.²²³ Both

²²² Thus, Article 62(3a) *Aufenthaltsgesetz* now provides that a ‘[r]isk of absconding [...] is assumed unless proven otherwise if [1.] the foreigner has deceived the authorities responsible for enforcing this law regarding his or her identity or in a way relevant for an obstacle precluding deportation and around the same time as the deportation, in particular by suppressing or destroying identity or travel documents or claiming a false identity, and has not corrected the information him- or herself, [2.] without being excused, the foreigner fails to appear for an interview or a medical examination [...] at the place specified by the foreigners authority, if the foreigner was informed when notified of the appointment that he or she could be taken into custody for failure to appear, [3.] the period allowed for departure has expired and the foreigner has changed his or her place of residence without notifying the foreigners authority of an address where he or she can be reached, [4.] the foreigner is in the federal territory in violation of section 11 (1) sentence 2 and has no permission to enter pursuant to section 11 (8), [5.] the foreigner has evaded deportation in the past, or [6.] the foreigner has expressly declared that he or she intends to evade deportation’. As underlined by Pro Asyl (2019b: 16), neither the Return Directive nor the Dublin Regulation contemplate such a “rebuttable assumption” (*widerlegliche Vermutung*).

²²³ Under Article 18(1) Return Directive, ‘[i]n situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a

aspects of the law attracted severe criticism from migrant/refugee rights advocacy groups (ProAsyl 2019b), scholars (Dollinger 2019; Schwarz 2019), the United Nations Committee Against Torture (2019), the Council of Europe Commissioner for Human Rights (2019), and even CDU and SPD *Land*-level Justice Ministers (Koch 2019).²²⁴

In conclusion to this section, it must also be noted that, as if the multiple problems at the level of “policies on paper” highlighted above were not enough, ‘many deportation detention orders have turned out upon judicial scrutiny to be (at least partly) unlawful’ (Bundestag 2021: 2). To wit, while only a ‘few *Länder* are able to provide statistics in this respect, and even then only limited ones’, one of the few specialists on deportation detention in the country has recently reported that just short of 50% of the 2,704 clients whom he represented between 2001 and February 2021 all across Germany were found by the courts to have been unlawfully detained for an average duration of 26.6 days (*ibid.*: 2-3). In January 2019, a spokesperson for the *Bundesgerichtshof* itself stated, with respect to the 99 deportation detention cases that the court had decided on since 2015, that ‘the detention order was as a rule (*in der Regel*) declared unlawful’ (Kastner 2019). And, in a recently published article, *Bundesgerichtshof* judge Johanna Schmidt-Räntsch (2020: 298) has also pointed out that, since people subject to deportation detention do not have a right to free legal counsel, ‘they ultimately cannot effectively claim their rights’ – a situation that she deemed ‘unworthy of a *Rechtsstaat*’. Finally, it should also be mentioned that, while both the Return Directive and the Dublin Regulation make clear that detention should only be used as ultima ratio,²²⁵ ‘this basic

Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to [...] take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1)’, which enshrines the separation rule. As underlined by ProAsyl (2019b: 21), far from being ‘exceptionally large’, the number of people that were enforceably required to leave the federal territory in 2019 was roughly comparable to what it had been throughout the previous two decades.

²²⁴ For a far less critical appraisal of the Orderly Return Law, see Thym (2019).

²²⁵ More specifically, under Article 28(2) Dublin Regulation, detention can be ordered ‘only insofar as [it] is proportional and other less coercive alternative measures cannot be applied effectively’. Article 15(1) Return Directive similarly provides that the detention may be used ‘[u]nless other sufficient but less coercive measures can be applied effectively’.

principle often plays no role within the praxis of the *Ausländerbehörden* and of many tribunals' (Bundestag 2021: 2; emphasis added).

V. Boarding and flight

The comeback of detention may well contribute to a reduction in the large number of deportations attempts that founder because the affected person cannot be located. Even then, however, boarding and flight remain extremely delicate stages of the deportation corridor.²²⁶ For, as an article published in the *Bundespolizei* journal put it, although the federal police officers tasked with implementing this part of the removal procedure, known in anodyne policy-speak as “aviation escorts” (*Personenbegleitern Luft*, henceforth PBLs), ‘mostly encounter peaceful people who have come to terms with their situation’, they sometimes ‘also run into deportees who are unruly and violence-prone (*gewaltbereit*) from start to finish, so that – next to communication – physical force must also sometimes be used’ (Gruben and Wilhus 2016: 18). In fact, of the 21,059 people who were deported from Germany by plane in 2018, slightly more than 50% were “escorted” out of the country by various force-wielding agents, including *Bundes-* and *Landespolizei* officials (7,987 cases), airline companies’ security staff (2,035 cases) and destination states’ agents (696 cases) (Bundestag 2019a: 51). Focusing on the role of the PBLs,²²⁷ this section examines the particular ways in which the use of physical force during boarding and flight has been ‘bounded and rationalized’ (Walters 2019: 171), as well as how the spiralling political appetite for higher deportation rates in the wake of the 2015-2016 “crisis” has led to these boundaries being increasingly tested and sometimes transgressed.

²²⁶ While deportations can also be implemented via land or sea, this section focuses on air deportation, which is by far the most common modality (Bundestag 2019a: 2-10).

²²⁷ On the involvement of private and foreign security actors in the field of deportation, and the challenges for accountability that it poses, see Ellermann (2009: 302-303) and Walters (2019: 165).

With respect to the applicable legal framework, it must be noted that, even though the use of force and means of restraint during the boarding stage falls under the exclusive jurisdiction of the *Bundespolizei*, responsibility for applying preventive and coercive measures to ensure flight security is vested in the aircraft's captain (CPT 2019: 20).²²⁸ More detailed provisions on the modalities of force and means of restraint available to the *Bundespolizei* are contained in an internal (i.e. secret) set of "Provisions about the aerial removal of foreign nationals", also known as *Best Rück Luft*. According to the CPT (2019: 20), the latter provides *inter alia* that: 'coercive measures are only applied based both on an individual risk assessment and on the returnee's conduct'; 'the principle of proportionality must be observed'; and 'the following means of restraint may be applied: steel, plastic or Velcro hand- and foot-cuffs as well as body-cuffs and head- (i.e. a helmet) and bite-protective devices' (*ibid*: 20). Moreover, 'the internal instruction explicitly mentions by way of clear guidelines the risks related to the use of force and/or means of restraint capable of causing positional asphyxia, including a detailed list of possible related symptoms, and prohibits the use of means likely to obstruct the airways as well as "techniques directed against the person's neck or mouth"' (*ibid*: 20). Finally, 'the forced administration of medication (i.e. sedatives or tranquilisers) as a means of chemical restraint to facilitate removal is strictly forbidden' (*ibid*: 20).

The *Best Rück Luft*, the *Bundespolizei*'s slogan 'Deportation: not at any price' (*Keine Abschiebung um jeden Preis*) and the requirement that PBLs must attend a qualifying 15-days training were all introduced as part of an attempt to 'ethicaliz[e] deportation' (Walters 2019: 178-179) in response to the scandalous death of Aamir Ageeb in the course of a Lufthansa flight to Sudan

²²⁸ The number of deportations aborted by pilots has steadily increased from 93 in 2015 to 506 in 2018, leading some refugee advocates to applaud their 'civil courage' and the *Bundespolizei* President to question their ultimate decision-making authority on board the aircraft (Litschko 2019). In contrast to these (antithetical) "political" interpretations of the statistics, a fellow activist who happened to work as a pilot told me that his colleagues mostly viewed deportation as a 'purely logistical issue'. In his opinion, the increase in the number of deportations aborted by pilots rather reflected an increasingly cavalier approach to risk-assessment on the part of the *Bundespolizei*, which had also increased pressure on airline companies to justify the decisions taken by their pilots.

on 28 May 1999 – the second casualty on a deportation flight from Germany after that of Kola Bankole in 1994 (Mesovic 2019). As it emerged from the criminal proceedings against the three police officers responsible for Ageeb’s death, the former had constrained the latter with eleven wire ties, a five-meter-long rope, four two-meter-long velcro tapes, and a motorcycle helmet. After dragging him to his seat, and as he continued to scream and wrestle, the officers had then pressed Ageeb’s upper body onto his knees, leading to what the coroner described as ‘death by positional asphyxia due to massive exposure to violence’ (*ibid*). The three officers were eventually found guilty of ‘bodily harm with fatal consequences’. However, considering that the minimum sentence for this offence – a one-year prison term – would automatically trigger their dismissal from civil service and deeming this ‘disproportionate’, the court ultimately delivered a milder sentence of 9 months of custody on parole and a payment of €2,000 per officer to the family of the deceased (*ibid*).

Police Union (GdP) Deputy Chairman Sven Huber recalled in our interview:

‘One of the colleagues [involved in the death of Ageeb] landed in psychiatry. She’s long been out of service: “unfit for duty”. Those who gave the orders, however, have all made career. It was the Police Union that paid lawyer and court costs – and then said: never again’.

While the horror of Ageeb’s death was still fresh in Mr. Huber’s mind, however, the political pressures to achieve higher deportation rates in post-2015 Germany had demonstrable practical consequences. Thus, the frequency with which ‘means of physical violence’ including ‘handcuffs, foot-cuffs, retaining straps and velcro-tape’ were used exponentially increased from 135 times in 2015, to 255 in 2016, 1,096 in 2017 and 1,231 in 2018 (Bundestag 2019a: 81). Furthermore, confronted with chronic personnel shortages, Interior Minister Seehofer issued in September 2018 a decree allowing untrained officers to participate in deportation flights – a decision that GdP Chief Oliver Malchow publicly condemned as ‘irresponsible’ (Bartsch *et al.* 2019). Before long, alarming reports of legally – let alone ethically – dubious practices in the course of boarding and flight started to surface, including:

allegations of forced administration of sedatives (*Flüchtlingsrat Berlin* 2018a); disregard for deportees' health conditions that rendered them unfit to fly, even when duly certified by a doctor, and dubious attestation of fitness to fly on the part of doctors employed by the authorities (Aulehla 2020, Funk 2017, Schumacher 2018); and disproportionate uses of force (*Flüchtlingsrat Berlin* 2018a, 2018b), including resort to 'techniques which impede a person's capacity to breathe and/or inflict severe pain to gain compliance' (CPT 2019: 3).²²⁹

When I asked Mr. Huber why some *Bundespolizei* officers chose to become PBLs although this is often described as a psychologically burdensome, poorly remunerated and professionally undervalued role (Bartsch *et al.* 2019, Gruben and Wilhus 2016), he replied that '[t]he old-timers' did it out of what he described within the space of three sentences as an 'inner conviction' in 'law and order' (*Recht und Ordnung*), 'an internalisation of the rule of law principle' (*Rechtsstaatsnorm*), and 'a certain sense of order' (*Ordnungsbewusstsein*). Next to that, he went on,

'there are also – let's say – competitive officers (*Wettbewerber*). I've heard of cases where [PBLs] will say: 'Here is someone we already failed to deport three times because of violence and rampage (*Bambule*). Let's get him out!''.

According to Mr. Huber, this attitude was 'not specifically linked to immigration law', but part of a broader 'question of professional honour' (*Berufsehrefrage*), which he summed up as: 'Here, it's not the tail that wags the dog, but the dog that wags the tail'. Finally, and without any prompting on my part, Mr. Huber concluded:

'What I don't believe – or, at any rate, I have never noticed when speaking with [PBLs] – is that there would be a political dimension behind it. At the leadership level it's different. There, you do see a we-have-to-save-the-country mindset, which I deem entirely absurd. But that's not the case with the officers who actually do deportations'.

²²⁹ Considering that (1) PBLs do not wear 'visible identification tags', (2) official complaint forms appear to be 'provided only upon request and [...] only [...] in the English language' (CPT 2019: 22) and (3) the few non-state actors allowed to monitor deportation flights have a duty of non-disclosure to the public, the real extent of unlawful practices during boarding and flight remains once again hard to gauge. On the weakness of existing deportation-monitoring mechanisms across Europe, see Pirjola (2015).

While there's a lot to unpack here, let me focus on two key points.

The first is the higher police echelons' conviction that deportations are necessary 'to save the country', which closely echoes the alarmistic discourse on the subject promoted by many right-wing politicians across the ever blurrier "radical"/"conservative" divide. While Mr. Huber dismissed this position as 'absurd' and denied that it was shared by PBLs, as already discussed in section II, the latter are ultimately expected to follow the orders that come from above. To be sure, street-level officials do have a considerable margin of discretion. In particular, as commanding officers on site, PBL team leaders always retain the authority to call-off a deportation – a prerogative which they exercised on more than 2,000 occasions in 2018 alone due to a variety of different reasons, including: active or passive resistance on the part of deportees; last-minute legal appeals against deportation; medical reasons etc. (Bundestag 2019a: 2-3). As I was told by Mr. Huber, however, PBL team leaders who decide to abort a deportation had recently 'come under pressure'. As he went on to elaborate,

'Sometimes there are even complaints to the [Federal Interior] Minister from his *Land*-level counterparts: 'We finally brought him to the airport and 4 hours later he's back at the reception centre!' So the colleagues are increasingly asked to justify themselves for having off-loaded [the deportee] from the airplane, as we say. That causes a lot of dissatisfaction among escort leaders. They say: 'Hey, I am a police officer! I have a right to decide, I don't need to justify myself!'

Second, Mr. Huber's attempt to ascribe "hard-line" (if not radical) views on immigration and deportation to the higher police echelons alone must be queried. In this respect, his slippage between the semantically germane but substantively rather different – if not antithetical (Cheesman 2015, 2017) – notions of "law and order" (*Recht und Ordnung*) and "rule of law" (*Rechtsstaat*) is quite revealing. For, whereas Mr. Huber told me at the beginning of our interview that he understood the notion of *Rechtsstaat* to entail that, 'in our country, what is law is also moral', the conception of 'professional honour' and the 'competitive', muscle-flexing tendencies that he saw among some of the officers tasked with implementing deportation point to a far less normatively encumbered 'sense of order' (*Ordnungsbewusstsein*)

and to the ‘tension in the practice of policing between the deployment of force in the name of a higher principle of order on the one hand, and respect for the rule of law [...] on the other’ (Fassin 2015: 101). The fact that even someone like Mr. Huber, who was highly critical of the way in which – as he put it – ‘deportation has become a fetish’ within political discourse and of the very concrete excesses to which this led, viewed such “law and order” tendencies among rank-and-file officers as politically neutral is quite indicative of how commonplace they are within the German police. Concerns about the prevalence of xenophobia, racism and right-wing extremism within this institution have indeed recently acquired unprecedented political salience (Connolly 2020; Deutsche Welle 2020; Knight 2020; Pfeifer 2020).

VI. Conclusion

This chapter started from the observation that achieving a higher number of deportations was insistently framed by the politicians who posited it as a policy priority and by the street-level migration control agents who were tasked with implementing it as a matter of respect for the (rule of) law. Part of what ‘the practice of deportation draws its legitimacy from’ is precisely that it is *supposed* to be ‘shaped and constrained by liberal procedural norms which involve the prohibition of the arbitrary use of state power’ (Gibney 2013: 123). However, what I hope to have shown in this chapter is that actual deportation practices in post-2015 Germany did not merely ‘sail as close as possible to the line that separates compliance from violation of liberal norms’ (Gibney 2008: 166), but in fact often crossed it. From the issuance of deportation orders to boarding and flight, passing through the pickup and detention, unlawful administrative practices were not so much an occasional exception to the rule (of law), but a widespread and rather predictable effect of the “fetishization” of deportation, which Mr. Huber also poignantly described as a ‘surrogate discussion (*Ersatzdiskussion*) that shifts the focus of societal discourse away from the core problem onto a marginal problem’.

The core problem being in his view ‘how we, as a country of immigration that not only is a destination for migration but urgently needs immigration, can ensure the cultural, linguistic and economic assimilation of the people who come to us’.

Having said this, however, the (at least nominally) ‘dominant [...] liberal statist perspective’, whereby adherence to the (rule of) law suffices to render the practice of deportation morally ‘legitimate’ (Gibney 2013: 123-125), must *itself* be subjected to critical scrutiny. The point is not so much that the ‘deportations of Jews, Blacks, and Roma to concentration and extermination camps under Nazi Germany were all done legally’ (Kalir 2019b: 8), for, leaving aside the question of whether this statement is even accurate,²³⁰ the current legal framework is of course vastly different from the one that was in force in Nazi Germany. Yet, even after the ‘fundamental shift towards a substantive ideal of the *Rechtsstaat*’ (Grote 2014: 196) occurred in the post-war era, the point that ‘[t]he equation of legality with legitimacy should [...] always be seen as an achievement of a hegemonic ideology’ (Kalir 2019b: 8) remains valid. Indeed, although the ‘liberal statist perspective’ is still (at least nominally) ‘dominant, partly because it reflects international human rights law, [...] it is hardly the only conceivable normative framework to which one might adhere’ (Gibney 2013: 124). To mention one alternative normative framework that we have already encountered and that we shall further explore in the next one, if one embraces a radically cosmopolitan view, ‘any and all deportation is illegitimate [...] because it violates the fundamental [albeit currently unrecognized] human right of each and every individual to reside where they wish on the globe’ (*ibid.*: 124).

Friendly as he was, the *Bundespölyzei* officer who oversaw Ibrahim’s boarding at Tegel airport is quite unlikely to have adhered to such a radically cosmopolitan perspective. And yet, his

²³⁰ On the long-lasting and still lively debate about the place of legality within Nazi rule in general and the Holocaust in particular, see respectively Meierhenrich (2018) and Rundle (2009).

apparent discomfort at Ibrahim’s remark that, even though he was following the law, he remained (morally) accountable for whatever might happen after deportation and his puzzling reply that, once Ibrahim arrived in Spain, he would ‘at least [...] be a free man again’ suggest that one doesn’t necessarily need to be a radical cosmopolitan in order to *feel* on some level that deportation raises ‘moral issue[s] that cannot be resolved by a mere reference to its legality’ (Kalir 2019b: 25). Indeed, by invoking the tantalising promise of “freedom” as a back-up justification for his actions, this officer effectively acknowledged the limits of the mantra that – as his colleague Mr. Jendro put it – ‘the laws have the highest priority’. What *actually* happened to Ibrahim after deportation only reinforces the point that equating legitimacy with legality (or respect for the rule of law) is reductive.²³¹ If legitimacy were purely a matter of adherence to the (rule of) law, one could hardly think of a less problematic instance of deportation: the time limit on Ibrahim’s “transfer” had not yet elapsed; he unthinkingly opened the door of his room to the police; he was only locked up for the brief time it took to arrange transport to Tegel; no force was used.

And yet, as mentioned at the beginning of this chapter, Ibrahim was told right upon landing in Madrid that, since he had previously ‘left Spain illegally’, he now had no right to material reception conditions, which essentially left him no other option than to fend for himself in the streets. As already mentioned in the previous chapter (section III), while asylum seekers who have been “transferred” under the Dublin Regulation *do* in fact have a right to the minimum reception conditions stipulated in the EU Reception Directive, in the course of 2018, the Spanish authorities frequently violated their legal obligations under it. Since Ibrahim was also legally excluded from accessing the regular labour market, he saw no other

²³¹ As recently lamented by Khosravi (2018: 1), ‘academic research on what happens after deportation is scarce’ - especially when it comes to deportations within and from Europe. With respect to post-Dublin “transfer” trajectories, see Brekke and Brochman (2015) Kasperek (2016a), Picozza (2017), Schuster (2011) and Wyss (2019). With respect to post-“return” trajectories, see Collyer (2012, 2018), Khosravi (2016), Schuster and Majidi (2013, 2015), Turnbull (2018).

viable option than to start selling marijuana with a couple of other “Dublined” asylum seekers – something which he reviled, but still found preferable to getting a black job under exploitative conditions or relying entirely on the support of his family and friends in Berlin. When, one month later, two of these friends and I went to visit him, Ibrahim was already neck-deep in the local drug-dealing milieu. His demeanour itself had changed, turning more streetwise and sharp-edged. ‘The worst thing in the world is being forced to do something you don’t want to do’, he poignantly told us on the first evening as we discussed his situation. The following morning, having breakfast in a sun-flooded café, he mused: ‘People I love, clean clothes, good food: I feel human again’.

That sentence came back to haunt me the following evening, as Ibrahim and I spent our last two hours together waiting in the long queue for the shuttles that every night at 10pm carried him and dozens of other people – many of them foreigners – back to the homeless shelter where he slept, about which I kept hearing new disquieting details every time that we phoned until he found an affordable room in a private flat-share one-year-and-a-half later. The smell of dozens of unwashed human beings concentrated in a single, windowless space; kids sniffing glue; mentally deranged people talking loudly to themselves all night long; suicide attempts; sudden eruptions of violence, put down by brutal police interventions; inflexible house rules, requiring people to leave during the day even if seriously ill; and so on and so forth. In short, the living conditions faced by Ibrahim in Madrid were almost indistinguishable from the ones that led the ECtHR to rule in its “watershed” *M.S.S.* judgment that Greece had violated the prohibition against degrading treatment under Article 3 ECHR.²³² Since Spain’s non-compliance with the Reception Directive only came to light three months after Ibrahim’s “transfer”, however, the German authorities *could* – in contrast to the Belgian ones in *M.S.S.* – plausibly claim not to have *knowingly* exposed him to such

²³² To recall: ‘months living in a state of the most extreme poverty, unable to cater for his most basic needs’.

proscribed treatment. While their conduct was therefore lawful, to claim that it was morally legitimate would in my view be nothing but an added insult to the injuries suffered by Ibrahim.

6. REALITY IS CURABLE (OR: THE PROBLEM OF UNCIVIL DISOBEDIENCE)

I. Introduction

After I read the message with which Ibrahim informed me that he had been deported to Spain, I immediately tried to reach him, but his phone was off. Aching to share my pain, I decided to call Jonas, a member of the grassroots migrant/refugee-solidarity initiative through which I had first met Ibrahim a year and half earlier and a close friend of his. In reply to his ‘Good morning! What’s up?’, I blurted out that Ibrahim had been deported and burst out crying. Jonas exclaimed something like ‘Bastards!’ and asked me how it had happened. Trying to repress the sobbing, I told him that all I knew was the little that Ibrahim had written to me and that I just felt like I had to talk to someone, adding that I would now call the other members of the organisation who were close to Ibrahim to inform them as well. Just before hanging up, I reflexively wished Jonas a nice day, to which he somberly replied: ‘As if (*Na ja*)’. I took a minute to calm down and then called up Sandra. Her cheery tone alerted me that she didn’t know what had happened either. ‘*Neeein! Nein, nein, nein!*’, she cried out when I told her, after which she swiftly switched back to her proverbial pragmatism and said something about contacting a lawyer. ‘The time limit [on Ibrahim’s “transfer”] was only going to expire in five days’, I reminded her, ‘so I am afraid that there’s not much we can do legally’.

After I hung up with Sandra, I gave a call to Julia. ‘Hey’, I said when she picked up. ‘Hey’, she replied with a funereal voice, sniffing. ‘So he told you as well’, I inferred. ‘He had five days to go!’, Julia shouted, her voice breaking. ‘It’s so fucked up!’, she continued between sobs. ‘I tried to call him, but his phone is off’. ‘He probably hasn’t even landed yet, let’s try again later’, I suggested. ‘OK, I have to go to work now, let me know if you manage to reach him’, Julia replied. ‘I will, of course’, I reassured her. Half an hour later she sent me the

following text message: ‘We have to do something against this disgusting (*ekelhaft*) Dublin system. It is bad, way too complex, impossible to understand and ultra-unfair. And then we need a right to be heard (*Mitspracherecht*) for those who are affected! Ahhh. I hope he gets in touch soon, our *Habibi* (Arabic for “beloved”).’ Later that night, Sandra sent me pictures of several advertisement billboards which she and Jonas had effaced in what she described as ‘a little symbolic action – a kind of childish “fuck you!”, really’ – in response to Ibrahim’s deportation. One of them simply read: ‘LOVE IBRAHIM – HATE RACISM’. A second one said: ‘VIVE L’ ANARCHIE’, and a third one: ‘FREEDOM OF MOVEMENT’. The fourth and last billboard retained the slogan of the TV show which it advertised – ‘Reality is curable’ – and added right below it: ‘STOP DEPORTATION!’

This chapter explores how some of those who – like Jonas, Sandra, Julia and I – were active within the migrant/refugee-solidarity movement took position vis-à-vis the *Rechtsstaat* and the vision of justice in immigration embedded in it. As I have already explained in chapter 1, this movement consisted of a loose network of individual and collective actors striving to assist migrants in accessing accommodation, income, healthcare, educational opportunities, legal advice and, ultimately, the right to stay – irrespective of their current legal status and their reasons for migrating (Baban and Rygiel 2017; Bhimji 2020; Fontanari and Ambrosini 2018). At the height of the 2015/2016 “refugee crisis”, a “welcoming culture” (*Willkommenskultur*) towards migrants/refugees had been actively promoted by the German government and practically enacted by millions of German citizens.²³³ By the time I started my fieldwork in June 2018, however, the mood had perceptibly shifted. As we have seen in the previous chapters, anxious to stem the electoral rise of the AfD, the governing (CSU-CDU-SPD) coalition had meanwhile adopted several aspects of its anti-immigration agenda,

²³³ As noted by Herrmann (2020: 203), ‘recent studies have consistently shown that volunteering for refugees has increased more than tenfold, drawing around 11 percent of the German population between 2015 and 2017’. On the “*Willkommenskultur*”, see also Hamann and Karakayali (2016) and Karakayali (2019).

including tougher refugee reception standards, tighter asylum procedures and a heightened emphasis on deportation. Against this backdrop, any form of “solidarity” toward “irregularly staying” migrants/refugees that contributed to render their removal from the country more difficult, including the mere provision of legal assistance, came to be framed by immigration hardliners such as the head of the CSU parliamentary group, Alexander Dobrindt, as an unacceptable attempt to ‘sabotage the enforcement of the *Rechtsstaat*’ (Welt 2018b).

Dobrindt’s statement must be understood as part and parcel of a Europe-wide process of ‘criminalisation of solidarity’ (Dadusc and Mudu 2020; Fekete 2018; Fekete *et al.* 2019). The notion of “criminalisation” is understood here broadly to encompass not only ‘actual criminal justice measures, such as [...] prosecutions’, but also more diffuse forms of ‘suspicion’, ‘intimidation’, ‘harassment’ and ‘disciplining’ on the part of state authorities (Carrera *et al.* 2018: 9). As for “solidarity”, while the boundaries between it and “humanitarianism” are in practice often ‘blurred’ (Mezzadra 2020: 426), the latter is typically associated with an apolitical and often paternalistic concern with “saving lives” (Fassin 2011; Ticktin 2011), whereas the former is usually understood to involve a form of ‘care without control’ that goes hand in hand with the ‘political contestation of borders and migration policies’ (Dadusc and Mudu 2020: 21; cf. Picozza 2021: 43).²³⁴ While much of the existing literature on the criminalisation of solidarity/humanitarianism has focused on activities occurring at or near a border, this chapter examines two criminalizable forms of solidarity toward migrants/refugees who are “irregularly staying” in the country. The first consists in offering them protection from deportation – or “civic asylum” (*Bürger*innen Asyl*)²³⁵ – by

²³⁴ Deploying this distinction, several studies of the *Willkommenskultur* have argued that, [w]hereas earlier cohorts of refugee supporters emphasized solidarity and common anti-statist political interests as important themes, [...] the volunteers’ humanitarian outlooks in 2015 and 2016 were politically useful to reinforce statist policies, marking the influx of refugees as a national state of exception’ (Herrmann 2020: 209).

²³⁵ While the promoters of “*Bürger*innen Asyl*” – including myself – translated this expression as “citizen asylum”, we always did so with much discomfort, knowing that this risked reaffirming the significance of citizenship as a basis for belonging. Shortly before the group of which I was part disbanded, we even abandoned the expression “citizen asylum” in favour of “solidarity asylum”. In order to convey all of the

hosting them in a private home, whereas the second consists in marrying irregular migrants/refugees for the “sole purpose” of enabling them to obtain a right to stay – a practice known in German as “*Schutzehē*” (“marriage of protection”) but which, following Rushchenko (2016, 2017), I will refer to as “solidarity marriage”.²³⁶

Despite growing academic interest in the subject of “crimes of solidarity”, the ethical and political considerations that lead people to commit them have so far received little attention. While conscious of ‘the risks of centring white subjects, and possibly “white saviours”, in the discussion around the criminalisation of migration’ (Dadusc and Mudu 2020: 16; cf. Picozza 2021: 128), this seems to me an important lacuna for at least two reasons. Firstly, while the control of “illegal(ised)” mobility is often conceptualised as a struggle between states and migrants, ‘people [...] who favour the entrance of immigrants, their entry into the labour market, accommodation, response to their social needs, and possibly regularisation’ play a crucial “mediating” role in this struggle (Ambrosini 2017: 1814). Secondly, insofar as many of these actors claim to be ‘ethically motivated’ (*ibid.*: 1827), shedding light on what pushes them to operate ‘at the very edges of the law’ promises to yield important insights into ‘the inadequacy of human rights’ (Tazzioli 2018a: 9) and of the vision of justice in immigration embedded in the liberal-constitutional *Rechtsstaat* more generally. In a nutshell, the argument advanced in this chapter is indeed that, while “crimes of solidarity” – and “civic asylum” and “solidarity marriage” in particular – do not fit the standard, liberal conception of civil disobedience as a ‘litmus test’ for and a ‘guardian’ of the legitimacy of the *Rechtsstaat* (Habermas 1985: 101-103), they nonetheless constitute morally justifiable forms of ‘uncivil disobedience’ (Delmas 2018).

above, I have decided to use the somewhat less nation-state-centric expression “civic asylum” unless I am directly quoting from texts in which the expression “citizen asylum” was used.

²³⁶ Makens (2017) has also referred to this as ‘humanitarian marriage’. The reason why I prefer the expression “solidarity marriage” to both “marriage of protection” and “humanitarian marriage” is that, as one my interlocutors put it, the latter ‘sound very top-down’ whereas ‘solidarity is a word used in left wing contexts’.

The remainder of the chapter consists of seven sections. Sections II and III offer a description of the two aforementioned “crimes of solidarity”. Thus, drawing on my personal involvement in *Bürger*innen Asyl Berlin*, section II looks at the practice of hosting people threatened by deportation in a private home (civic asylum), whereas section III examines the practice of solidarity marriage based on qualitative interviews with six “sponsoring spouses”.²³⁷ The subsequent two sections explore the uncertain risk of criminalisation involved in each of these practices. Thus, section IV shows that people offering shelter to illegalised migrants/refugees have increasingly been investigated and prosecuted – if rarely convicted – even though their actions seem hard to subsume under the legal definition of “facilitation of illegal residence”. Section V suggests that some solidarity marriages may well constitute genuine “marital communities” and that, even when they don’t, telling them apart from “real marriages” seems to necessitate investigative practices that are very hard to reconcile with the right to privacy and non-discrimination norms. Section VI examines the ideological roots of these risky practices, arguing that they lie in a radically cosmopolitan/no border politics that entails a moral right – if not a duty – to disobey immigration law (Hidalgo 2016, 2019a, 2019b). Section VII argues that civic asylum and solidarity marriages can be regarded as forms of *uncivil* disobedience that question the legitimacy of the *Rechtsstaat* but are nonetheless morally justifiable. Section VIII concludes by considering what these arguments imply when it comes to evaluating the legitimacy of migrants/refugees’ own unruly practices of freedom.

II. Civic asylum

As we have seen in chapters 4, for people who are liable to deportation – including asylum seekers whose application is deemed “inadmissible” because another EU Member State is

²³⁷ As noted by Block (2016: 38), the term “sponsoring spouses”, which describes citizens or resident foreigners who are joined by an incoming spouse, might be unusual for some readers but reflect[s] the legal terminology in this field’.

responsible for examining their claims for protection, as well as rejected asylum seekers who do not at least obtain a *Duldung* – staying in the reception centres to which they have been forcibly allocated and in which they are required to remain means living under constant fear of being picked up by the police and put on an airplane bound to a country which they have no intention of going back to. Many of these people therefore choose – just like Ibrahim did – to autonomously (that is, irregularly) relocate to larger urban centres such as Berlin, where it is easier to avoid (often discriminatory) identity checks and stay “below the radar”. Since securing decent employment and accommodation without “papers” is extremely difficult, however, many irregular migrants/refugees are forced to at least temporarily rely on other people’s assistance in order to fulfil their needs, including housing. Potential sources of support include a wide array of actors, such as relatives and friends; members of the same ethnic or national community; church-based structures; neighbourhood-based “welcome initiatives”; leftist activist networks; and lone “good Samaritans”. For the purposes of this section, however, I specifically focus on *Bürger*innen Asyl Berlin* (henceforth BAB) – a grassroots anti-deportation initiative within which I was active from its inception in early 2018 to its demise in early 2020.

As far as I was able to determine, the idea that private persons with secure legal status should ‘place themselves and their homes at the disposal of civic asylum’ as a matter of ‘damn obligation’ (*verdammte Pflicht*) and ‘civil disobedience in the name of humanity (*Menschlichkeit*)’ was first publicly articulated in February 2017 by a group of Stuttgart-based activists in response to the recent resumption of deportations to Afghanistan (Aktion Bleiberecht 2017).²³⁸ For these activists, civic asylum represented a necessary extension of church asylum (*Kirchenasyl*) (*ibid*) – an unofficial but tolerated practice whereby, since the early 1980s, both

²³⁸ The practice of hosting people threatened by deportation in private homes is no doubt older than that. As I mention below, for instance, a grassroots solidarity initiative that strove to find private accommodations for homeless and often illegalised migrants/refugees in Berlin had existed since 2014. What was new about the Stuttgart activists’ call was its effort to frame this as a matter of civil disobedience.

Catholic and Protestant churches have offered ‘temporary protection for refugees without legal residence status who [in their view] would face unacceptable social hardship, torture or even death’ upon removal with a view to ‘gain time for further negotiations’ with BAMF and allow ‘a careful [re]examination of the need for protection’ (Just 2013: 138-139).²³⁹ As the political salience of deportation rates kept increasing, however, the ‘synergistic relationship’ between the church and the state on which this practice is premised quickly ‘fray[ed]’ (Mitchell 2017: 280) and the proportion of successful cases of church asylum plummeted from about 80% in 2015 to 2% in 2019 (Bundestag 2019c: 2).²⁴⁰ Partly in response to this, between 2017 and 2019, sixteen civic asylum initiatives modelled on the one in Stuttgart – though without its specific focus on protecting Afghan migrants/refugees – sprung up in various parts of Germany, including Berlin (Aktion BürgerInnenAsyl: n.d.).

BAB was set up by a dozen people who had previously been involved in, and sometimes knew each other from, different migrant/refugee-solidarity and no-border groups in Berlin and other parts of Germany and Europe. Some of us were or had previously been active in a grassroots initiative that, ever since the eviction of the Oranienplatz migrant/refugee protest camp in 2014 (Bhimji 2016, Fontanari and Ambrosini 2018), strove to find private accommodations for homeless and often illegalised migrants/refugees in Berlin. Others had previously been active with an even older organisation that lobbies for and facilitates access to health care for all migrants regardless of legal status. One worked as an immigration and

²³⁹ As explained by Mitchell (2017: 278-279), although church asylum or, as it is also called, sanctuary ‘is not legal in any state in Europe’, ‘governments [generally] try to avoid physically removing someone who has sought sanctuary in a church’ out of fear of the ‘negative publicity’ that may result from violating ‘the cultural and religious sense of church space as sacred’. Whether church asylum is compatible with the *Rechtsstaat* principle has been a subject of heated debate (see e.g. Geis 1997 and Maaßen 1997). For a comparative study of ‘sanctuary practices’ in Europe and North America, see the edited collection by Lippert and Rehaag (2013), which also includes an ‘ethnography of relationships among church sanctuary actors in Germany’ (Oda 2013).

²⁴⁰ Equally importantly, the number of church asylums also drastically fell from about 2,300 in 2018 to 150 in the first half of 2020 (Steffens 2020). The reason for this was that BAMF started to consider people in church asylum to be “absconding” and to accordingly extend the time limit on their Dublin “transfer” from 6 to 18 months, making it much more onerous for churches to offer it (*ibid*). The legality of this new policy has been heavily questioned by church representatives and a court decision on the issue is currently pending (*ibid*).

asylum law counsellor. Another had militated with one of the no-border groups that were active in the Balkans during the Long Summer of Migration (see Milan and Pirro 2018, El-Sharawi and Razsa 2019). And yet another had been involved in the infrastructures of grassroots migrant/refugee support that have emerged at the increasingly militarised borders between Italy and France (see Giliberti and Queirolo Palmas 2020, Tazzioli and Walters 2019, Vergnano 2020). All of the core group members except for one were “white” and all had a secure right to stay, work, study and access social benefits in Germany as either German or EU citizens. All of us had a bachelor degree, had lived a minimum of one year in at least one other European country, were in our mid-20s to mid-30s and did not have children.

The work of BAB was structured around two main axes of intervention, which we referred to as “public outreach” and “practical solidarity”. With respect to public outreach, our main aim was to mobilise people with secure residence status in Germany to open their homes for migrants/refugees threatened by deportation as an act of civil disobedience – a framing to which I shall return below. In order to do so, we promoted the idea of civic asylum in a variety of different ways, including word of mouth; flyers and speeches at demonstrations and other “solidarity” events; social media; and interviews with “mainstream” media, such as *Tageszeitung* (Memarnia 2018; Schindler 2020), *Neues Deutschland* (Treblin 2018) and *Rundfunk Berlin-Brandenburg* 24 (Von Galen 2019). As for the practical solidarity dimension of the initiative, we essentially acted as “brokers” between people threatened by deportation and people willing to host them in their homes free of charge. In addition to this, we raised funds to cover for various expenses, including guests’ living costs, public transport tickets, lawyers’ fees etc. When a specific instance of civic asylum was set up, we also strove – without always succeeding – to create small “support groups” to assist and cooperate with “hosts” and “guests” in whichever way was required and possible (e.g. mediating conflicts, providing emotional support, assisting with administrative procedures). Between February 2018 and

February 2020, when BAB was disbanded and some of its members went on to establish a new “No Border Assembly”, the group facilitated more than twenty instances of civic asylum.

Due to security concerns, the details of those who opened their homes to people threatened by deportation were only known to the members of the BAB core group who were directly involved in brokering the offer of support to someone looking for it. While providing a comprehensive picture of who the “hosts” were is therefore not possible, there was general agreement within the BAB core group that our ambitions to – as we often said – ‘reach outside our radical leftist bubble’ and mobilise a more “bourgeois” (*bürgerlich*), mainstream and resource-rich section of society in support of our cause achieved very limited results. A host who agreed to be interviewed for *Neues Deutschland*, for instance, explained that, although he no longer had much time for activism since he started working, he had previously been ‘active in the milieu of Oranienplatz’, providing ‘support to the people who camped there’ (Treblin 2018). According to my own fieldnotes, another host with whom I personally spoke had ‘never hosted a person without secure legal status before but [had] been active within various refugee-solidarity initiatives’. A third one had approached a member of the group to offer us his flat’s guestroom after hearing a speech about BAB that she gave at a demonstration for safe and legal migration channels to Europe. Yet another “host” did the same at the end of a small info-event that we had organised at a neighbourhood centre for political meetings and discussions. A few of the “hosts” were also personal friends or acquaintances of BAB core group members.

As for how the room offers we received were allocated, this was a thorny issue that struck at the very core of our group’s self-understanding. Defining success in terms of the number of people we helped to secure a right to stay in Germany, we initially decided that the offers would be passed on to people who – as the minutes of one of our weekly meetings put it –

were ‘threatened by deportation’ but had ‘a concrete prospect of obtaining a right to stay within a specified time-frame’, such as people subject to a Dublin transfer whose time limit was about to elapse and people who had already found someone willing to marry them but needed some time to carry out their plan. Shortly after she joined the group in November 2018, however, a new member harshly criticised this ‘legalistic’ approach for ‘reproduc[ing] the state’s logic of a good prospect of staying (*Bleibeperspektive*)’.²⁴¹ The months-long internal debate that this critique sparked eventually culminated into a new consensus that room offers would from then on be passed on to anyone threatened by deportation, regardless of their current prospects of securing a right to stay. While this decision brought the practical solidarity dimension of BAB in line with its public outreach campaign, which had always taken a principled stance against *all* deportations, it also meant that we no longer saw ourselves as responsible for accompanying the people we supported all the way until regularisation, but only so far as our limited capacities allowed.

III. Solidarity marriages

As we have seen in chapter 4 (section II), for many irregularly staying migrants/refugees whose asylum claims have been rejected, marrying a German or EU citizen living in Germany is the only viable path to regularisation. That the right to family life²⁴² can sometimes engender a ‘human right to regularise illegal stay’ (Thym 2008) was something that everyone involved in the day-to-day politics of immigration and asylum knew. As Felix – one of the six “sponsoring spouses” I interviewed²⁴³ – told me when I asked him if he remembered how he discovered this, ‘[w]hen you come into close contact with people who don’t have a residence title, you quickly learn that this is one of the few ways of getting it’. Mentioning

²⁴¹ On the contested notion of a “good prospect of staying”, see chapter 4, footnote 126.

²⁴² The right to family life is enshrined in Article 5 *Grundgesetz*, Article 8 ECHR and Article 7 CFREU.

²⁴³ Four of my interlocutors identified as female, one as male and one as non-binary. Four were German citizens, one was an EU citizen and one was a national of a non-EU Member State with a permanent residence permit. All the sponsoring spouses were in their mid-20s to mid-30s. Half of them were university students, while the other half was in full-time employment.

that she had received as many as five proposals of ‘marriage for papers’ during the previous two years, Başak pointed out that not only lawyers and legal counsellors but even state officials themselves often told people that getting married was their only chance of getting a right to stay. According to Alex, the BAMF official who had carried out their²⁴⁴ soon-to-be-husband François’ asylum interview indeed frankly informed him at the end of it that his chances of success were virtually null and advised him to ‘look for a wife’. When I accompanied Ahmed to see his lawyer, she similarly encouraged him to ‘look for an opportunity to get married’, to which Ahmed replied with a hint of exasperation: ‘But how am I supposed to find a wife in my situation?!’

One answer to Ahmed’s pertinent question is, of course, that – at the risk of sounding trite – lightning could always strike. As the German search and rescue NGO Mission Lifeline tweeted in January 2019 (prompting several right-wing politicians to accuse it of promoting marriages of convenience), ‘You are not yet married? Maybe you’ll fall in love with a person who doesn’t yet have a right to stay here. It could happen, right? Stay open!’ (Bild 2019). For those who don’t place hope in the arrow of Cupid, another – more costly – solution is offered by what the press characterises as “smuggling gangs” (*Schleuserbanden*) that specialise in arranging “bogus marriages”²⁴⁵ (*Scheinehen*) in return for a fee (e.g. Debionne 2020; Zeit Online 2019). In June 2019, for example, a Berlin-based lawyer and three other individuals were reportedly charged with ‘violations of the *Aufenthaltsgesetz* and document forgery’ in connection with dozens of marriages, some of which involved conniving EU citizens and had in fact been regularly registered in Denmark, whereas others had been completely made up (Hendrik 2019). Charging fees that ranged between €6,000 and €16,000, the lawyer and his main partner in crime – a Serbian national who had previously been his client – were

²⁴⁴ At the time of our interview, Alex asked to be referred to with the pronouns they/them.

²⁴⁵ As noted by Block (2016: 65), while the expression “bogus marriage”/*Scheinehe* ‘implies a legally invalid marriage’, ‘civil marriages are usually legally valid as long as the two spouses contractually agree to marry, which is by definition also the case with marriages of convenience’.

accused of having pocketed a total of, respectively, €473,850 and €486,000€ (*ibid*). Also in 2019, the German government announced that the *Bundespolizei* had joined a pre-existing trans-European operational action named “Bride” aimed at ‘identifying and suppressing criminal groups in the problem area of marriage of convenience (*Scheinehe*)’ (Bundestag 2019d: 4).

According to a study of EU Member States’ experiences with detecting and preventing “marriages of convenience”, however, while ‘the motivations identified [...] for a sponsor to participate in [such marriages] were principally economic and financial, with some indication that organised crime groups pay the sponsor’, such conduct was in a significant number of cases rather underpinned by the desire to ‘help out a friend or acquaintance; compassionate or humanitarian grounds, or idealism, where the sponsor disagrees with the authorities or the immigration rules’ (European Migration Network 2012: 7). Of course, helping an irregularly staying migrant/refugee to obtain a residence permit by marrying him or her out of compassionate, humanitarian or idealistic motives and gaining an economic advantage from doing so are by no means mutually exclusive. In her study of narratives and counternarratives of marriages of convenience, for instance, Tamburlini (2016: 217) describes the case of a Portuguese woman whose decision to marry an irregular Algerian migrant was motivated by *both* financial advantage (a payment of €3,500) *and* ‘a sense of solidarity’ and ‘her belief in his right to mobility’ (cf. Andrikopoulos 2021). For the purposes of this chapter, however, I focus on marriages that are contracted *solely* because of ‘idealistic motivations, such as the quest for equality regardless of citizenship status and the desire to help undocumented migrants’ (Rushchenko 2016: 125). As already mentioned, while this practice is known in Germany as *Schutzehhe* (protection marriage), I will refer to it as ‘solidarity marriage’ (*ibid*: 125).

While none of the six sponsoring spouses whom I have interviewed received any money or other material advantage in exchange for their help, their perceptions of what Felix called ‘marrying for money’ differed quite markedly. Thus, Felix himself viewed this as ‘problematic’ because it involves ‘tak[ing] advantage of someone in need’, whereas Başak told me on the contrary that, ‘as long as both parties involved freely agree’, she didn’t really see any problem with it. Despite these differences, all of my interviewees emphasised that, as Başak herself put it, nobody could ‘buy [their] commitment (*Verbindlichkeit*) with money’. In addition to the absence of a monetary transaction, another thing that differentiated the six solidarity marriages into which I was granted insight from the stereotypical “marriage of convenience” was that the former invariably involved a pre-existing relationship of genuine friendship and mutual trust between the two spouses. Before I elaborate on this point, however, let me also underline that all of my interlocutors told me that they had made very clear to their future spouses right from the outset that they were *not* romantically available and that they deemed it crucial for their relationship to remain on the level of pure friendship in order to avoid potential misunderstandings and complications. Indeed, at the time they decided to get married, many of the sponsoring spouses had a romantic relationship with someone (other than their future spouse) who was aware of and supported their plans to enter a solidarity marriage.

All of my six interviewees were either themselves involved or connected to people who were active in the migrant/refugee solidarity network and had indeed met their future spouses through this network. Thus, Bettie had met Jeremy when he moved into the “soli-room”²⁴⁶ of the leftist commune (*Hausprojekt*) she was part of and ‘looked after (*betreut*) and accompanied (*begleitet*)’ him on his ‘legal and political struggle for a right to stay’ for roughly one year before it became clear that marriage was the only way in which he could obtain this

²⁴⁶ The expression “soli-room” was commonly used within leftist circles to designate a room in a flat share made available free of charge to a migrant/refugee lacking secure residence status and unable to pay rent.

right and she decided to propose to him. Alex and François had volunteered side by side for a grassroots migrant/refugee support initiative for more than a year before the latter asked the former to marry him. Felix, who used to be involved in the same initiative, and Lamin had met through a mutual friend who had already obtained his own residence permit through marriage. Kasia and Hope got to know each other through their common militancy in a leftist political group. While Sophie was not directly involved within the migrant/refugee solidarity network, one of her flatmates had entered a solidarity marriage and she met her husband Theo through a mutual friend who was part of this network. And although Başak and Nestor had quite simply been flatmates for a year when his study visa expired and he asked her to marry him, she too had been an active participant in the migrant/refugee solidarity movement ever since the days of the refugee protest camp in Oranienplatz.

One last common trait between the solidarity marriages under consideration that deserves to be highlighted is that each of them was backed by a small “support group” consisting of two or three friends of either spouse or both. When I asked Alex which considerations had contributed to overcome their initial hesitance to accept François’ marriage proposal, for instance, they mentioned that ‘one thing that certainly strengthened my resolve was to hear from a couple of people – two mutual friends – that we could count on them in case we needed any support with things like raising money, helping us with the research, and mediating between the two of us in case of conflict’. Sophie similarly told me that ‘what was really important for [her] was that this wasn’t just between [her] and Theo, but something supported by a group of friends with a shared political vision’. The latter not only ‘helped a lot with bureaucratic things’ such as ‘arranging appointments, figuring out how different parts of the procedure worked and so on’, but also provided invaluable ‘emotional support’ throughout this ‘ultra-stressful’ process. Echoing this, Kasia told me that having a reliable support group – consisting of two other people who were part of the same political

organisation through which she and Hope had met – had been crucial not only in practical terms, but also as a way of collectively sharing responsibility and blame for any potential mistakes, which made her feel much more relaxed about the whole thing.

IV. The fight against the “facilitation of illegal residence”

In early 2019, several politicians from across the political spectrum publicly spoke out against BAB and similar initiatives – a sure sign that our public outreach efforts had not gone unnoticed. Thus, in February 2019, an AfD member of the Berlin state parliament named Hanno Bachmann filed a written question to the Berlin Senate titled ‘facilitation of illegal residence’, in which he asked whether an investigation into BAB’s activities had been launched and, if not, why not (Abgeordnetenhaus Berlin 2019: 1). One month later, a federal Interior Ministry spokesperson stated in an interview that ‘[i]t is not acceptable to unilaterally (*eigenmächtig*) attempt to prevent Dublin transfers and returns’, adding that civic asylum could not be compared to church asylum because the latter was subject to ‘an agreed-upon procedure’ and thus ‘consistent with rule-of-law (*rechtsstaatlichen*) principles’, whereas the former was ‘not foreseen by the law’ (Handelsblatt 2019). Emphasising that ‘[a] person who has an enforceable obligation to leave the country but does not leave voluntarily and evades [...] deportation is liable to prosecution for illegal residence’, Brandenburg Interior Minister Karl-Heinz Schröter (SPD) warned that ‘those who provide help in this respect can be prosecuted under criminal law for facilitation of illegal residence’ (*ibid*). Mecklenburg-Vorpommern Interior Minister Lorenz Caffier (CDU) added that it did ‘not behove any civic initiative to judge the legality of the administration’s conduct’ (*ibid*). And an SPD member of the Barnim (Brandenburg) district administration cautioned that, ‘[i]f we start to adduce morality to flout the applicable law, we will soon end up in a very difficult situation’ (*ibid*).

This section and the next examine the uncertain legal risks involved in the two practices of “solidarity” discussed in the previous two. Starting with civic asylum, its own proponents’

understanding of the potential legal ramifications was at best patchy. To wit, tasked with drafting a response to the battery of aforementioned allegations and criticisms for our social media channels, the best I could come up with was a long series of questions and doubts. Did hosting people threatened by deportation always constitute a punishable act of facilitation of illegal residence? Didn't this actually hinge on a whole series of circumstantial factors including, perhaps, the specific legal situation of the "guest" and/or whether a payment was involved? How likely was it that the authorities would actually start criminal proceedings against us and/or those who actually hosted people threatened by deportation in their homes?²⁴⁷ And what was the punishment for these offences? Acknowledging that I didn't know enough to answer any of these questions, I then sketched out a second line of reply to our critics centred on the moral – as opposed to legal – case for civic asylum. 'In contrast to the Barnim district administrator', I wrote, 'we are convinced that it is actually when we, as a society and as individuals, start to adduce "the applicable law" to avoid urgent ethical discussions that we end up in a very difficult situation'. 'Our conviction', I added, 'is that all deportations are morally unjustifiable'.

That – roughly one year after BAB came into being – my and my fellow activists' understanding of the (un)lawfulness of what we were doing was still so blurry has to do with several factors. First and foremost, given the complexity of the legal framework, achieving clarity on this point would have required us to seek legal advice. Up until that point, however, this had generally been perceived within the group as a relatively low priority compared to the more urgent tasks of defining the specific goals of the initiative; publicising it through events and the media; establishing internal working structures; creating links with other

²⁴⁷ In its answer to the written question filed by AfD MP Hanno Bachmann, the Berlin Senate had elusively stated that while 'the Berlin District Attorney has not instituted legal proceedings' against BAB, 'the facts reported in the Rundfunk Berlin-Brandenburg (RBB) article [on BAB to which Bachmann had referred in his question] has been taken by the District Attorney as an opportunity to start an investigation procedure (*einen Prüfungsvorgang anzulegen*), in the course of which an initial legal assessment will be carried out' (Abgeordnetenhaus Berlin 2019: 1).

grassroots solidarity groups in Berlin and beyond; securing room offers; supporting the first few instances of civic asylum that we had helped to broker etc. This order of priorities, however, also reflected a widespread perception within the BAB core group that, as a fellow member wrote in her feedback to my draft statement, ‘there’s no point in trying to find legal arguments speaking for the legality of civic asylum’ because ‘what makes it so strong politically is that it’s civil disobedience’. In line with this, the brief message that we ended up posting on the group’s social media channels (instead of my draft) simply read: ‘citizen asylum ‘is not foreseen by the law’? Oops, then it must be a form of civil disobedience! Nice that we cleared that up [...] If solidarity ‘is not foreseen’ by German law, then that’s a problem of German law, not ours’.

While the question of whether the activities of BAB could really be subsumed under the (contested) notion of “civil disobedience” is addressed in section VII, during the following months we did make heightened efforts to gain a better understanding of the legal risks involved in what we were doing. Thus, according to my fieldnotes, in the beginning of May 2019, we were told by an asylum lawyer who had spoken at one of our outreach events that, ‘although the legal framework is really complex and it all depends on the specifics of the case, basically, offering citizen asylum can be [construed as] a crime punishable with up to 1 year imprisonment’ – though ‘it wasn’t clear [to the lawyer] whether the above only applies to hosts or also to us’ members of the BAB core group. A few weeks later, a legal advisor from *Rote Hilfe* – an organisation that provides legal and other forms of support to ‘politically persecuted individuals from the leftist spectrum’ – gave us some useful tips regarding secure communications and what to do in case the police would show up at our homes with a search warrant but told us he had little specific knowledge about the nexus between criminal and immigration law. Finally, in September 2019, one of us consulted a lawyer specialising in this field, who told us that both we (BAB core members) and the “hosts” were potentially liable

to charges of ‘facilitation of illegal residence’ and, thus, risked ‘a fine of up to €800 or one year on probation’.

As I only learnt much later, however, under Section 96(1) no. 2 *Aufenthaltsgesetz*, someone who ‘assists [another] person in committing an act referred to in Section 95(1) [...] no. 2’ – that is, ‘resid[ing] in the federal territory without a necessary residence title’ – is *only* ‘punishable with up to one year’s imprisonment or a fine’ if he or she ‘receives a pecuniary advantage or the promise of a pecuniary advantage in return’.²⁴⁸ This pecuniary advantage requirement was introduced due to ‘pressures on the part of [...] humanitarian organisations and churches to make use of the escape clause (*Öffnungsklausel*) [...] with respect to instances of humanitarian assistance’ contained in the EU Facilitation Directive (Winkelmann 2013).²⁴⁹ The BAB core members and the “hosts”, of course, never received any pecuniary advantage and, in fact, often sustained expenses for lawyer, living and transportation costs. What I also found out, however, is that ‘hundreds’ of clergy persons have recently been investigated for offering church asylum on charges of facilitation of illegal residence (Strack 2021; cf. Krone 2021; Steffens 2019, 2020; Wölfel 2021). While most of the investigations have been discontinued, several of them have led to prosecution and at least two have resulted in first instance convictions and fines of up to €3,000, leading church representatives to speak of an ‘escalation’ (*ibid*). A civic asylum activist in Hanau was also charged with ‘public incitement

²⁴⁸ Note that this is only the case if the person receiving assistance or incitement ‘is enforceably required to leave the federal territory, [...] has not been granted a period for departure or this has expired and [...] his or her deportation has not been suspended’ (Section 95(1) no. 2 *Aufenthaltsgesetz*). Section 96(1) no. 2 also covers a broader constellation of cases.

²⁴⁹ Under Article 1(1b) Facilitation Directive, ‘[e]ach Member State *shall* adopt appropriate sanctions on [...] any person who, *for financial gain, intentionally* assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens’. As underlined by the EU’s Fundamental Rights Agency (2014: 8), this provision entails that the ‘Member States *may* refrain from punishing facilitation of irregular stay, *if this is not done intentionally and/ or for financial gain*’ (emphasis added), as foreseen in the *Aufenthaltsgesetz*.

to commit offences²⁵⁰ but has been acquitted at first instance (Aktion BürgerInnenAsyl 2021).

While I was unfortunately unable to track down the court rulings on the church asylum cases,²⁵¹ the media coverage on the subject leaves some crucial questions unanswered. First, if – as I have argued – for something to count as unlawful facilitation of illegal residence there must be a pecuniary advantage involved, why were the two members of the clergy – who presumably received no such advantage – found guilty? Second, media reports point to inconsistent first instance rulings on the implications of ‘[f]reedom of faith and of conscience and freedom to profess a religious or philosophical creed’ under Article 4 *Grundgesetz*, which at least two members of the clergy have invoked to defend their actions in court. Thus, whereas one judge (reportedly) ‘stated that, although [the defendant] had committed an offence, he was not guilty’ because ‘he had acted based on freedom of faith and conscience’ (Bayerische Rundfunk 2021), another one (reportedly) ‘counterposed to it the *Rechtsstaat* principle’ and ruled that, although it was ‘preposterous (*ein Unding*) that [...] a criminal judge ha[s] to decide over such cases’, the clergywoman had to pay a fine of €500 (Domradio 2021). How the higher courts will resolve this contradiction (both judgements have been appealed) remains to be seen. So too does the answer to the question of whether Article 4 *Grundgesetz* could act as a shield against criminalisation for laypersons acting out of what can arguably be described as a secular ‘philosophical creed’ in the fundamental injustice of all deportations (see section VII).

²⁵⁰ Under Section 111 *Strafgesetzbuch* (Criminal Code), ‘[w]hoever publicly, in a meeting or by disseminating material [...] incites the commission of an unlawful act incurs the same penalty as an abettor’. Under Section 26, ‘[w]hoever intentionally induces another to intentionally commit an unlawful act (abettor) incurs the same penalty as an offender’.

²⁵¹ The Hanau civic asylum activist was acquitted because the court deemed the initiative’s call to offer safe haven to ‘people threatened by deportation’ (*von Abschiebung bedrohte Menschen*) to be too vaguely formulated to rule out the possibility that it referred to ‘people liable to deportation who reside in the Federal Republic of Germany with a *Duldung* and whose residence is therefore not illegal in the meaning of Section 95(1) *Aufenthaltsgesetz*’ (cited in Aktion BürgerInnenAsyl 2021).

V. The fight against “marriages of convenience”

Just like most BAB members, most of the “sponsoring” spouses whom I interviewed assumed that their conduct was unlawful. When I asked Başak whether she would describe her marriage as a “*Scheinehe*” (“bogus marriage”/“marriage of convenience”), for example, she paused for a moment and then somewhat hesitantly replied in the affirmative, explaining that it was ‘not a real marriage (*echte Ehe*) – not a romantic union (*romantische Vereinigung*) between two people who want to have children and build a life together or whatever’ – but rather ‘a union between friends (*eine Vereinigung von Freunden*)’, which ‘is not supported by the legislator (*vom Gesetzgeber unterstützt wird*), I think’. Sophie at one point referred to her marriage as a *Scheinehe* (without any prompting) and mentioned later on that she couldn’t understand ‘why two people are only allowed to establish a legal relationship if they love each other, whatever that is supposed to mean’. Kasia told me that, ‘politically speaking’, she preferred to think of her marriage as ‘a protection marriage (*Schutzehē*)’, but *Scheinehe* was ‘ultimately quite fitting’ because she and her wife had ‘never been in a romantic relationship’ and had ‘only gotten married for residence purposes’. Alex similarly mentioned that the marriage they were about to enter was ‘not foreseen by the law’, but when I asked them why they said so, they readily acknowledged that they were ‘actually not sure about what a “real” marriage is supposed to look like’ or ‘whether there’s even a precise legal definition for it’.

Under Section 27(1a) no. 1 *Aufenthaltsgesetz*, residence for family reasons ‘is not permitted [...] if it is established that the marriage has been entered into [...] solely for the purpose of enabling the [migrant spouse] to enter and stay in the federal territory’. While this provision was only introduced in 2007, the underlying principle that what is required for the migrant spouse of a German national or a foreign legal resident to acquire a right to reside in the country is ‘the existence of a “marital community” (*eheliche Lebensgemeinschaft*)’ – as opposed to [t]he mere existence of a lawful marriage’ – had been consistently affirmed by the courts

‘since the 1980s’ (Bloch 2016: 136).²⁵² Synthesising this settled jurisprudence, Interior Ministry guidelines state that:

[a] marital community is to be assumed when the spouses recognisably live together or want to live together in a durable (*dauerhafte*) relationship shaped by close attachment (*enge Verbundenheit*) and reciprocal support (*gegenseitigen Beistand*). What is required is therefore a connection (*Verbindung*) between the spouses whose intensity exceeds that of a relationship between friends’ (BMI 2009: section 27.1 a.1.1.0).

In addition, the guidelines provide two non-exhaustive lists of ‘circumstances that may speak for the intended establishment of a marital community’²⁵³ or, on the contrary, ‘make it conjecturable that, despite a formally contracted marriage, no establishment of a marital community in Germany is envisaged’,²⁵⁴ while also emphasising that ‘[t]he assessment is [ultimately] based on the circumstances of each specific case’ (*ibid.*: sections 27.1a.1.1.6 to 27.1a.1.1.8).

²⁵² As explained by Block (2016: 136), the introduction of the Section 27 (1a) *Aufenthaltsgesetz* was justified in terms of a need ‘to explicitly standardise the rejection of family migration rights in cases of marriages [...] of convenience’ by reference to the (2003) EU Family Reunification Directive, whose Article 16(2b) provides that the ‘Member States may [...] reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that [...] the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State’. According to Block, however, ‘the main function of the newly introduced provision [was] a symbolic one’, namely, ‘to increase both the sense of wrongdoing of the parties involved in such marriages as well as the awareness of those applying the law’ (*ibid.*: 136). In practice, given that intention cannot be measured directly (*ibid.*: 70), immigration authorities and courts have continued to focus on the presence or absence of the hallmarks of a “marital community” (see below).

²⁵³ Such circumstances are understood to include: ‘a shared accommodation is available and is supposed to be inhabited’; ‘the spouses know each other for some time (*bereits länger*) and provide roughly (*im Wesentlichen*) consistent information regarding their personal details and other circumstances that are decisive for the establishment of the marital community as well as circumstances pertaining to both partners’; ‘the spouses have already lived together prior to the marriage’ or have made each other ‘visits and other demonstrable contacts while one spouse [was] in the country and the other abroad’; ‘adequate contributions [...] to the obligations stemming from the marriage (e.g. caring for children and the household; securing the financial bases of the marriage through work [...]) are planned for’ etc. (BMI 2009: section 27.1a.1.1.6).

²⁵⁴ Such circumstances include the absence of the above-mentioned factors as well as the fact that the spouses do not have a common language and ‘there are no detectable efforts to establish a common basis of communication’; ‘the payment of a sum of money for entering the marriage (except for sums that are transferred as dowry in the case of nationals of countries in which [this] is the praxis)’; ‘there are concrete reasons to believe that one or both spouses have previously entered marriages of convenience (*Scheinehen*) or has/have stayed without authorisation or in the context of an asylum application (*unbefugt bzw. im Rahmen eines Asylantrags*) in another EU Member State’ in a way that evidences ‘a recognisable intention to obtain residence independently of the spouse’ (BMI 2009: section 27.1a.1.1.7).

While the “romantic” conception of “love” that Başak, Sophie and Kasia assumed to be integral to the official definition of “marriage” is *not* in fact part of it at all,²⁵⁵ their and Alex’s perception that their own marriages were – to use Başak’s words – ‘not supported by the legislator’ was nonetheless quite accurate. For Başak, Sophie, Kasia and Alex did *not* ‘want to live together [with their spouses] in a *durable* relationship shaped by *close* attachment and *reciprocal* support’, nor did they envisage ‘a connection whose level of intensity exceeds that of a relationship between friends’. On the contrary, all of them emphasised that they and their spouses were precisely “just friends” and told me that they had planned from the very outset to get divorced once their spouses would obtain an ‘independent right of residence’.²⁵⁶ Insofar as ‘the expected familial relationship [was] not present in these cases’, Başak’s, Sophie’s, Kasia’s and Alex’s marriages can be quite accurately described – as they themselves implied – as ‘an abuse of family migration policies’ (Block 2016: 63). Whether they can also be described as an abuse of “marriage” as such is an altogether different question, with respect to which I will merely note that, insofar as it purports to provide ‘a universal definition of marriage’, the notion of “marital community” embedded in the *Aufenthaltsgesetz* ‘unavoidably exclude[s] many social relationships’ that are ‘described as marriage’ in other contexts or could be so described (Moret, Andrikopoulos and Dahinden 2021: 333).²⁵⁷

²⁵⁵ As several authors have shown, immigration authorities in many European countries *do*, as a matter of administrative practice, routinely try to ‘establish the authenticity of a marriage by assessing the existence of emotions, in particular, ‘love’ (Andrikopoulos 2021: 344). This widespread administrative practice, however, simply has no legal basis.

²⁵⁶ Under Section 31(1) *Aufenthaltsgesetz*, ‘[i]f marital cohabitation (*eheliche Lebensgemeinschaft*) ends, the spouse’s temporary residence permit is extended by one year as an independent right of residence [...] if [...] marital cohabitation has lawfully existed in the federal territory for at least three years’ and further conditions are met. And under Section 9a(2) *Aufenthaltsgesetz*, ‘[a] foreigner is to be issued an EU long-term residence permit pursuant to Article 2 (b) of [the EU long-term Residence Directive] if the person in question ‘has been resident in the federal territory with a residence title for five years’, her ‘subsistence [...] is ensured by a fixed and regular income’ and she ‘has a sufficient command of the German language’.

²⁵⁷ As Moret *et al.* (2021: 333) rightly underline, ‘[t]he number of spouses, the gender of spouses, the scope of marriage, the degree of spouses’ consent, the parties united through marriage (individuals, social groups), the spouses’ place of residence before and after marriage, the rights and obligations stemming from marriage and the norms and morality that regulate the marital union differ’ (*ibid.*: 333) quite dramatically across the globe. Given this sheer multiplicity of “marriage” conceptions, the fact that ‘the problematisation of the term has never been a central issue in the study of cross-border marriages’ (*ibid.*: 333) smacks of eurocentrism.

Although states are generally assumed – from an implicitly statist perspective – to have a right and a duty to curb such abuses of spousal migration laws,²⁵⁸ and EU states have placed increasing emphasis on this over the last ten years or so (De Hart 2017), two complicating factors need to be taken into account. The first is that some marriages of solidarity do arguably fit the parameters of a genuine “marital community”. What needs to be kept in mind here is that, even if two spouses were to openly admit that their marriage was motivated by the desire to enable one of them to secure a right to stay, ‘this would neither be an abuse nor a misappropriation of marriage, *as long as the two actually live in a marital community*’ (Göbel-Zimmermann. and Eichhorn 2016: 192; emphasis added). Somewhat ironically, the one solidarity marriage into which I was granted insight that arguably met this requirement was the one between Felix and Lamin, two heterosexual men who not only lived together but also (according to the former) saw each other as ‘more than friends’ and were bound by ‘a really emotional, lasting and special connection’, which was ‘different to any other’ and which effectively amounted to a ‘life contract’. As Felix quite movingly put it, ‘you have to be comfortable with this person to the extent that, in case you die, this person is going to be in charge of your funeral. And I am comfortable with that’.

As for the second complicating factor, it consists in the difficulty of differentiating “genuine” marriages from solidarity marriages that, albeit devoid of an intention to ‘live together in a durable relationship shaped by close attachment and reciprocal support’, nonetheless superficially display all of the hallmarks of a “real” marital community singled out in the

²⁵⁸ Indeed, next to the rather ludicrous claim that ‘[m]arriages of convenience constitute [...] a skipping of admission queues vis-à-vis other migrants or refugees’, which assumes the existence of a queue that does not in fact exist, the main reason why this phenomenon is viewed as a problem is precisely that it results in the ‘undermining of state sovereignty in migration control’ (Block 2016: 63). The fact that what is perceived to be at stake in spousal migration is nothing less than state sovereignty also explain why ‘the validity of national citizens’ marriage reasons [...] is subject to nothing like such intense scrutiny: the questionable morality of such widespread reasons for marriage as reducing a couple’s tax burden, or financial security, seem to go ignored’ (Bartolini 2021: 50).

Interior Ministry guidelines. As Bettie, who did *not* see her marriage with Jeremy as a life contract but *did* nonetheless shoulder the full weight of its repercussions,²⁵⁹ defiantly put it:

‘I dare them to try and prove that our marriage is not real! Let them take a look at the consequences that it has had for my finances, my job, my health and try to argue that it was just *für Schein* (bogus/for convenience)!’

To be sure, had they looked more closely into Bettie’s – and Başak’s, and Kasia’s and Sophie’s and Alex’s – marriage, the authorities *would* have detected several “suspicious” circumstances, including the fact that none of them lived with their spouses and some of them had another partner. But this merely points to the key difficulty involved in detecting “marriages of convenience”, namely, doing so while ‘respecting fundamental rights’ (European Migration Network 2012: 6). For the ‘intimacy enquiries’ that immigration authorities currently carry out, including ‘interview[ing] the spouses’ and ‘pos[ing] questions on the couples’ history, future plans and everyday life’, are already widely criticised for involving a potential ‘violation of the privacy of the spouses’ (Block 2016: 67-70; cf. Gössner 2013).²⁶⁰

While all my interviewees had prepared for potential scrutiny on the part of the authorities by devising and memorising answers to the questions that are typically asked during interviews and collecting fake proofs of their romantic bond (pictures holding hands; chats full of tenderness etc.), most of them did not actually have to undergo an intimacy enquiry. Sophie and her husband Theo, however, were separately interviewed by her (EU) country’s embassy officials upon applying for a permission to marry – an experience which involved what she described as ‘shockingly racist treatment’. To wit, the officials had warned

²⁵⁹ Jeremy had previously married and divorced another EU national. Suspecting that that marriage had been a sham, the *Ausländerbehörde* refused to recognise the validity of Jeremy and Bettie’s marriage until the investigation into the previous one had been concluded. As a result of the ensuing uncertainty, Jeremy had fallen into a serious depression, punctuated by suicidal thoughts. Bettie, who was Jeremy’s main source of emotional and financial support, had herself started suffering from anxiety attacks, which eventually forced her to quit her job.

²⁶⁰ As noted by Block (2016: 68), when suspicions on the “genuineness” of the marriage arise, the authorities can resort to even more invasive measures such as ‘(surprise) house visits, the questioning of neighbours and the request of documents bearing proof of a longstanding and emotional relationship (e.g. bills addressed to both spouses, private correspondence, photographs)’. While much of the existing literature on this subject narrowly focuses on how intimacy enquiries affect “real” couples and “loving partners” (Andrikopoulos 2021: 345), people who abuse spousal migration policies of course *also* have a right to privacy.

her that ‘people from [Theo’s country of origin] are not to be trusted’ and asked him ‘whether he knew what it’s like to marry a European woman’, alerting him to the fact that ‘[s]he’s not just going to stay put in the kitchen’ and provocatively asking him: ‘Where is your man pride?’²⁶¹ Felix, on the other hand, mentioned that he was told by his lawyer that ‘the authorities tend to control homosexual marriages much less because they don’t know what a gay marriage looks like, and so they don’t feel comfortable questioning whether it’s real’. Both Sophie’s and Felix’s remarks point to another oft-cited problem with intimacy enquiries, namely, the inherent ‘danger of discrimination [...] along nationality, religious, race or gender lines’ that are not only ‘arbitrary and morally indefensible’ (Block 2016: 69), but also ‘legally questionable’ (De Hart 2017: 286) – even when, as in Felix and Lamin’s case, discrimination can ultimately play to the advantage of those seeking to avoid detection.

VI. Radical cosmopolitanism and the right/duty to disobey interaction restrictions

Having examined the uncertain legal risks involved in helping “illegalised” migrants/refugees to secure a right to stay by harbouring them in one’s home and marrying them, this section tackles the crucial interrogative raised by Vergnano (2020) in her recent article on border-crossing facilitation practices, namely, ‘why take such risks?’ While I fully agree with Vergnano that addressing this question requires us to move ‘beyond profit’ motives, her own answer to it foregrounds ‘aspects related to [the] well-being, pleasure, delight and psychological benefit’ of those involved in these criminalisable activities, while only acknowledging in passing that their ‘practices, forms of sociality and visions of the future’ were ‘linked together’ by ‘the idea of solidarity’ (*ibid.*: 751-752). Building on this key point, this section zooms in on the notion of “solidarity” that underpinned my and my interlocutors’ willingness to take the risks that we took, arguing that it was at bottom a

²⁶¹ Sophie told me that, while she had considered filing an official complaint to the Embassy, she ultimately decided against it after discussing it with her support group and coming to the conclusion that it was ‘not a good idea to make problems’.

shorthand for the kind of radically cosmopolitan – or, to use another emic term, ‘no border’ (Anderson *et al.* 2012) – politics that we have already encountered at various points in the previous chapters. Since this politics creates an ethical demand to ‘act as if there were no borders’ (Nicolacopoulos and Vassilacopoulos 2004: 65) in a world in which (geopolitical and other kinds) of “borders” are firmly embedded in the law, fulfilling this ethical demand is understood by those who feel it to presuppose and engender a moral right if not a ‘duty to disobey immigration law’ (Hidalgo 2016).

My interlocutors and I embraced what I have been calling ‘radical cosmopolitanism’ but we usually referred to as ‘no border’ – a political vision whose ‘signal demand [...] is for every person to have the freedom to move *and* [...] the concomitant freedom [...] to stay’ (Anderson *et al.* 2012: 82). As the *How-to Guide for People Offering Rooms* that BAB compiled and published just before it dissolved and some of its members went on to establish a new “No Border Assembly” put it, what we were after was ultimately ‘a fairer world, in which all people can freely decide where they want to live’. Başak similarly explained her decision to marry Nestor as ‘a statement against the state, its borders and the rights of citizens (*Bürgerrechte*)’,²⁶² adding that she didn’t ‘agree with the idea that some people cannot travel and stay where they want – that they cannot have a self-determined life’. Alex similarly said that their decision to marry François was grounded in ‘[t]he ideal of freedom of movement’. For Sophie, ‘the fact that one can’t just go wherever one wants [was] simply absurd’. Felix underlined that ““we” – “the North”, the “Europeans”, the “Westerners” – we are here because we exploited the resources and the people of the Global South while prohibiting these people to come here, which from [his] perspective – from a global perspective – [was] simply unfair’. And Kasia also stated that the ‘main reason’ why she got married was that ‘if

²⁶² Cf. Anderson *et al.*’s (2012: 82) remark that ‘far from reaffirming the significance of citizenship, [a No Border politics] calls into question the legitimacy of the global system of national states itself’.

someone wants to also live here, he or she should be able to do so, plus the whole historical North-South injustices'.²⁶³

To be sure, 'match[ing] the radically egalitarian goals of the [no border] movement' in actual 'everyday practices' is 'no small feat' (Gauditz 2017: 49). As the BAB core members and the sponsoring spouses whom I have interviewed were keenly aware of, insofar as we were almost exclusively "white" subjects with secure legal status and – in many cases – a university degree and a relatively comfortable socio-economic situation, we remained extremely privileged compared to the people with whom we stood in solidarity.²⁶⁴ And, as the internal discussions within BAB concerning who should have access to the room offers we received to which I have alluded in section II underlines, white activists like myself are by no means immune from unwittingly reproducing racist, (post)colonial and statist ways of thinking (Picozza 2021). In this sense, the more-than-"humanitarian" ideal of 'autonomous solidarity' that we embraced – one that is neatly captured by the slogan 'care without control' (Dadusc and Mudu 2020) – ultimately remained precisely that: an ideal toward which we imperfectly strove. While no border is often dismissed as hopelessly "utopian", its proponents nonetheless emphasise its 'eminently practical' nature (Anderson *et al.* 2012: 84; cf. King 2016: 57). As Bettie succinctly put it: '[d]uring the course of my life, I probably won't see the day when all borders are done away with, I am afraid, but as long as one is alive, one better

²⁶³ These statements echo both of the two main types of arguments 'against borders' identified by Sager (2020: 5), namely, 'arguments [...] based on freedom and the need to justify coercion' and 'arguments based on the demands of distributive justice'. I return to these arguments in the following section.

²⁶⁴ To take one example, the BAB's *How-to Guide for People Offering Rooms* underlined that '[w]e live in a society in which different forms of discrimination play out on a daily basis, often unnoticed by people that are not affected by them. While growing up in an environment, in which these discriminations are present, all of us have unconsciously learned some form of these discriminations. Even when having the best intentions, white people sometimes act in a racist way without wanting to do so. The same happens concerning other power structures. That's why we think that all of us can benefit from a continuous learning process to unlearn discriminatory behaviours, terminologies and internalized attitudes. Let's work on ourselves and our surroundings to make every Solidarity Asylum a place where we challenge forms of racism, sexism, homophobia, transphobia, ableism or any other discrimination'.

do what one can'. In a world where (geopolitical and other) "borders" are deeply entrenched, however, what *can* – or, indeed, *should* – one do against them?

For some of the BAB members (including myself) and the sponsoring spouses, immigration law represented an important 'terrain of struggle over where and how to steer society' (Abraham 2014: 289). Kasia, for instance, volunteered three mornings a week as an administrative assistant in a legal advice centre for migrants/refugees and one of the BAB members worked as a legal counsellor for another organisation. Felix had dropped out of his politics degree to start a new one in law with a view to becoming an immigration lawyer. BAB as a group also occasionally criticised deportation by highlighting the multiple unlawful state practices that we have encountered in chapter 5, as when we posted on our social media channels a video on unlawful deportation detention and encouraged our 500+ followers to learn 'why so many people land there without a proper legal ground (if such a thing can even exist)'; or when we shared an immigration lawyer's post on unlawful searches without warrants, prefacing it with the caption: 'Each and every deportation of the last years was ILLEGAL'; or when we re-posted a *Flüchtlingsrat's* report of disproportionate uses of force during a deportation flight, coupled with the statement: 'Deportations have to end! They violate basic human rights'. At one point in our interview, Alex also pointed to the high proportion of successful appeals against negative asylum decisions and unlawful home searches as evidence of the fact that 'those [state officials] who say that the laws must be followed are often quite willing to break them'.

Having said this, however, I and my interlocutors were also firmly convinced that migrant exclusion raises 'moral issue[s] that cannot be resolved by a mere reference to its legality' (Kalir 2019: 25). Right after drawing attention to the aforementioned unlawful state practices, for example, Alex hastened to add: 'And then there is the larger question of whether the law is even legitimate – whether it is *at all* legitimate for someone to say: "You don't have a right

to stay here”’. As already mentioned, this was *the* key message of BAB’s entire public outreach campaign. When a journalist put to one of us that civic asylum was ‘of course illegal’, for instance, she promptly replied that ‘[i]t may not be legal, but it is surely legitimate’ (Memarnia 2018). When I asked Kasia what she would respond if someone told her that her marriage was morally wrong because it was unlawful, she smiled and stated with a shrug that ‘what’s written in the law books is not necessarily my political compass’. And when I asked Başak the same question, she similarly answered:

‘I’d tell them the same thing that I told my mum when she brought up this point: make your own laws! You can do that! You can rule yourself (*dich selbst regieren*)! You have to be smart about it to avoid negative consequences, but do it! Trust yourself! Act! Look for your own truths, your own laws, your own reason (*deine eigene Wahrheiten, deine eigene Gesetze, deine eigene Vernunft*)!’

As recently noted by Hidalgo (2016: 165), while the ‘revisionary view’ that ‘immigration restrictions are generally unjust’ has been endorsed by a ‘growing number of political philosophers’, the latter ‘have focused almost entirely on public policy’ and ‘neglected to consider whether their view matters for individual ethics’. For Hidalgo and a couple of other scholars, however, private individuals ‘have duties to disobey immigration law in order to avoid complicity in injustice’ (*ibid.*: 166; cf. Bertram 2018; Delmas 2014, 2018; Hidalgo 2019a, 2019b; Sager 2020). While the merits of this highly controversial view are considered in the following section, what I want to highlight here is that, for many of those who – like me and my fellow BAB activists, the sponsoring spouses whom I interviewed, and migrants/refugees like Yacine and Ibrahim – were active within the migrant/refugee solidarity movement, the existence of a moral duty – or, at least, a right²⁶⁵ – to disobey immigration laws that ‘impose

²⁶⁵ Speaking of a duty in this context may well be supererogatory – the term used by philosophers to describe actions that are morally good but not (strictly) required. Having said that, as already mentioned in section II, the Stuttgart-based activists who first publicly called upon private individuals with secure legal status to ‘place themselves and their homes at the disposal of civic asylum’ did explicitly frame this as a matter of moral ‘obligation’ (*Pflicht*) (Aktion Bleiberecht 2017). In a brief account of Ibrahim’s deportation that was posted on the BAB social media channels, I myself concluded by citing the well-worn adage (often attributed to Bertold Brecht) ‘when injustice becomes law, resistance becomes *duty*’. The BAB’s *How-to Handbook for People Offering Rooms* more mildly stated that, ‘[a]s long as the injustice of deportation exists, we *should* all continue the long-standing practice to provide safe shelters’.

legal obligations [...] to [...] refrain from interacting with unauthorized migrants’ – or as Hidalgo (2016: 170) calls them, ‘interaction restrictions’ – represented a rather logical corollary of our eminently practical no border politics. In a world where the law itself is deeply implicated in the maintenance of the current nation-statist order and its exclusions, ‘act[ing] as if there were no borders’ (Nicolacopoulos and Vassilacopoulos 2004: 65) practically entails taking the risk of acting against the law. The next section turns to consider whether this less than submissive attitude towards the law poses a problem for the *Rechtsstaat* and, if so, whether it can nonetheless be justified.

VII. (Un)civil disobedience in the liberal-constitutional *Rechtsstaat*

As I have already underlined in section II and section IV, those who – like myself – promoted civic asylum often framed it as a form of “civil disobedience”. When I told Felix that I had read a newspaper article in which someone (writing under a false name) similarly portrayed her decision to ‘marry a refugee so that he can stay here even though it is prohibited’ as ‘an act of civil disobedience’ (Schmitz 2013) and asked him whether this made sense to him, he also replied without hesitation:

‘Yes, definitely. We live in a country where marriage has a long tradition and a lot of weight [...] It has this power through the law. It has a status in the law. So, if you get married against the “normal” or expected way, it is against the law and it is a kind of disobedience against the state’.

Although I regrettably did not pose this question to the other sponsoring spouses whom I interviewed, I suspect that at least some of them would have endorsed Felix’s answer.²⁶⁶ Yet, can civic asylum and solidarity marriages really be understood as forms of *civil* disobedience? The reason why I deem it productive to start from this interrogative is that several scholars view “civil disobedience” as a ‘litmus test for the democratic constitutional state’

²⁶⁶ The suggestion that ‘marriage entered into solely for legal status purposes’ can be regarded not only as ‘a legitimate and rational choice’ and ‘a more or less intentional form of bending the law’, but ‘in some cases even as a form of civil disobedience’ has also been made by Tamburlini (2016: 227).

(*demokratischen Rechtsstaat*) and a ‘guardian of [its] legitimacy’ (Habermas 1985: 103; cf. Scheuerman 2016, 2018).

In fact, while the view that ‘*any* disobedience – be it criminal or principled; civil or uncivil’ – [...] erodes the rule of law’ used to be dominant, ‘the potential of civil disobedience to protect rather than undermine the rule of law is now widely accepted in the literature and (to a lesser extent) in public discourse’ (Delmas 2020: 24). As Habermas (1985: 101) puts it in his critique of ‘the “law is law” mentality’ whereby ‘those who break laws under appeal to their conscience [...] threaten [...] the tranquillity of the legal order’, the fact of the matter is that ‘[t]he modern constitutional state [...] only expect[s] of its citizens obedience to the laws *if and in so far as* it rests on principles worthy of recognition’, and ‘establishing or maintaining, renewing or broadening a legitimate legal order under constantly changing circumstances’ constitutes a ‘precarious undertaking’ and a ‘project’ that is always ‘incomplete’ (*ibid.*: 102-104). In light of this, liberal theorists like Habermas argue that civil disobedience ought to be regarded as a legitimate and necessary instrument ‘to correct errors in the process [...] or to set innovations in motion’ (*ibid.*: 104). If one agrees with this (now widely accepted) view, the significance of framing civic asylum and marriages of solidarity in terms of civil disobedience becomes plain to see: doing so sets such practices apart from ‘common crime[s]’ (*ibid.*: 106) and elevates them to illegal but nonetheless indispensable engines of progressive legal reform on the long path toward justice.²⁶⁷

The problem with this framing, however, is that both civic asylum and solidarity marriages lack many of the essential traits of ‘the standard conception of civil disobedience’ (Delmas

²⁶⁷ As Celikates (2021: 142) puts it, ‘Habermas and others who write in the liberal tradition tend to understand civil disobedience as a kind of warning signal to existing institutions that needs to be activated under extraordinary circumstances, pointing to potential trouble and allowing political leaders to react in ways that increase the overall stability of the existing order’.

2018: 8), of which Habermas represents a prominent champion.²⁶⁸ Most importantly for our purposes, according to this standard liberal view, part of what renders civil disobedience not only legitimate but a guardian and litmus test of the *Rechtsstaat*'s own legitimacy is indeed that it is supposed to be 'carried out with appeal to the legitimating foundations of our democratic constitutional order' and 'without calling into question obedience to the rule of law as a whole' (Habermas 1985: 99-100). Other key features of the standard understanding of civil disobedience – including that it should consist of 'a public act' of an 'exclusively symbolic character' and that its authors should 'accept the legal consequences of the transgression' (*ibid.*: 100) – are intimately connected to this demand of 'fidelity to the rule of law' (Celikates 2016: 983). As we have seen in the previous section, however, rather than appealing to "the legitimating foundations of our democratic constitutional order", civic asylum and marriages of convenience are underpinned by a radical no border politics that explicitly 'calls into question the legitimacy of the global system of national states' (Anderson *et al.* 2012: 82) and demands 'the demolition of the state' (Bauder 2015: 401). And rather than being purely symbolic public acts for which responsibility is taken and punishment accepted, these practices effectively amount to forms of covert direct action.

Does this mean that civic asylum and solidarity marriages cannot be regarded as forms of "civil disobedience" but constitute instead mere common crimes? Wanting to resist this conclusion, one could easily draw on the work of several authors who argue that standard, liberal accounts of civil disobedience such as Habermas' offer an 'overly constrained, domesticated and sanitized understanding of this complex political practice', and accordingly put forward much 'less normatively demanding and therefore less restrictive' definitions of civil disobedience that leave 'open whether [it] always has to be public, [purely symbolic],

²⁶⁸ Habermas' (1985) own account of civil disobedience is explicitly and strongly indebted to that of liberal political theorist John Rawls (1971), whom Delmas (2018: 7) characterises as 'chief among' the philosophers who have contributed to the development of the standard account.

directed only at state institutions, limited in its goals, and restricted to transforming the system within its existing limits, as well as whether accepting punishment is a necessary criterion' (Celikates 2016: 983-986; cf. Delmas and Brownlee 2021).²⁶⁹ While sharing the urge to rehabilitate (some) forms of 'principled disobedience' that do not fit the standard account of civil disobedience, however, Delmas (2020: 10-11) has aptly pointed out that attempting to do so by broadening the latter concept involves a risk of 'get[ting] stuck at the level of definition and classification' and has therefore proposed to 'concede – even embrace – the uncivil nature of such forms of disobedience and concentrate instead on the task of articulating 'their potential [for] justification', 'even in supposedly legitimate, liberal democratic states' like Germany.²⁷⁰ Quite fittingly, Delmas herself singles out the activities of 'Sanctuary workers' who 'provide unauthorized migrants [...] shelter' as one such form of *justified* albeit 'uncivil disobedience' (*ibid.*: 9-10).²⁷¹

According to Delmas (2018: 138), what makes sheltering – and, presumably, marrying – unauthorised migrants justifiable *even though* this is done (partly or entirely) covertly, without willingly accepting punishment for it and without fidelity to the rule of law is that it is the most effective way of fulfilling '[t]he Samaritan duty [...] to aid persons in peril or dire need when we can do so at no unreasonable cost to ourselves'.²⁷² More specifically, arguing that

²⁶⁹ In line with this, Celikates (2016: 985) proposes to redefine civil disobedience as 'an intentionally unlawful and principled collective act of protest [...], with which citizens – in the broad sense that goes beyond those recognized as citizens by a particular state – pursue the political aim of changing specific laws, policies, or institutions [...] in ways that can be seen as civil (as opposed to military)'. If the abolition of any discrimination between citizens and non-citizens (which arguably requires the abolition of the state itself) counts as "changing specific laws, policies or institutions", civic asylum and marriages of solidarity would appear to fit this definition.

²⁷⁰ Of course, this "pluralist" approach to disobedience presents its own dangers. For 'whether dissent is successfully framed as "*civil* disobedience" [matters], not just in terms of how the public perceives it, but also in terms of who might be mobilized to join it, which types of political dynamics it can trigger, and how the police, prosecutors, and courts approach it' (Celikates 2019: 132; emphasis added).

²⁷¹ Delmas (2020: 19) characterises "uncivil disobedience" as 'a cluster concept' that 'designates a principled breach of law in response to perceived wrongs (injustice or wrongdoing) and that fails to satisfy the basic norms of civility by being either: covert/anonymous, evasive, violent, or offensive/ disrespectful'.

²⁷² As noted by Delmas (2018: 138), although '[t]he Samaritan duty is generally deemed among the most stringent requirements of ordinary and critical morality', scholars disagree on [its] nature' and its scope. Moraro (2020: 75), for example, argues that 'Delmas appears to understate the costs of law-breaking'. If this is correct, as I think it is, sheltering or marrying unauthorised migrants should be understood as morally good but not (strictly) required.

‘unauthorized aliens [...] are human beings in dire need – isolated and destitute men, women, and children’ – and that existing immigration law ‘violates the[ir] dignity [...] by erasing them’, Delmas concludes that ‘sanctuary groups [...] are forced to act covertly in order to protect those they seek to aid’ (*ibid.*: 142-143).²⁷³ While Delmas’ emphasis on ‘peril or dire need’ risks reproducing the problematic centrality of exceptional forms of “vulnerability” within humanitarian discourse (Fassin 2011, Ticktin 2011), Hidalgo (2016: 167) eschews this danger by framing the duty to disobey interaction restrictions as a response to the injustice of ‘[r]estrictions on [migrants/refugees] freedom of movement’, ‘freedom of association, freedom of occupational choice, and other valuable liberties’. As we saw in the previous section, next to ‘arguments [...] based on freedom’, some of the sponsoring spouses also sought to justify their actions on the bases of ‘the demands of distributive justice’ (Sager 2020: 5) vis-à-vis the historical and ongoing exploitation of the “Global South” by the “Global North”.²⁷⁴

As already anticipated, the view that private individuals living in a liberal-constitutional *Rechtsstaat* such as Germany have a duty (or at least a right) to disobey interaction restrictions remains highly controversial – or, as a (sympathetic!) reviewer of Hidalgo’s work put it, ‘bordering on scandalous’ (Higgins 2019: 513). According to another critic of Hidalgo’s work, ‘[t]he regimes of primary and secondary immigration law’ – that is, the restrictions on immigration and the ancillary interaction restrictions – ‘enacted by a constitutional democracy normally have legitimate authority, such that the subjects of these legal regimes have a presumptive moral duty to comply’, which only lapses if constitutional democratic states unlawfully ‘exclude refugees and others who have a human rights-based claim to be

²⁷³ According to Delmas (2018: 143), ‘the Samaritan duty *also* supports resisting injustice through protest and [other forms of] civil disobedience’ directed at ‘eliminating or righting the injustice at the root of the peril - that is, reforming unjust laws, policies, or institution’ (emphasis added).

²⁷⁴ For some classic freedom-based arguments against borders, see for example Abizadeh (2008) and Carens (1987, 2013). For a more recent statement of the distributive justice-based argument against border controls, see Achiume (2019).

admitted’ (Yong 2018: 481). Since this argument rests on the premise that ‘there is no [general] human right to immigrate according to one’s choice’ (*ibid.*: 472), however, what it ultimately demonstrates is only that ‘whether [...] resistance to immigration law is justified depends in part on our background assumptions about the justice or injustice of immigration restrictions’ (Hidalgo 2019: 8). While it seems fair to say that the diatribe concerning which “background assumptions” are correct remains far from being settled, my interlocutors knew which side they were on. As Felix put it,

‘When you hear the stories that migrants tell you and the stories that politicians tell you – these are two pictures that collide. And in my head I always go for the migrants’ side. This is my political ideology’.

VIII. Conclusion

Building on recent scholarship on the criminalisation of solidarity, this chapter has explored two practices of assistance toward illegalised migrants/refugees with which I grew familiar in the course of my fieldwork, namely, civic asylum and solidarity marriages. After offering a description of these practices, I have attended to the uncertain legal risks that they involve. With respect to civic asylum, I have argued that, although the people who offered it did not receive any pecuniary advantage in return for it and their activities cannot therefore be construed as facilitation of illegal residence, they – and the clergywomen and men who provide church asylum – have nonetheless faced increasing repression (though only rarely conviction). With respect to solidarity marriages, I have argued that at least some of them may actually constitute genuine “marital communities” and that telling one apart from the other at any rate appears to necessitate highly invasive and arbitrary intimacy enquiries that appear to be hard to reconcile with the right to privacy and the prohibition against discrimination. Having done that, I have then examined the ideological roots of these legally risky practices, arguing that they were underpinned by a radical cosmopolitan/no border politics that entails a moral right – if not an obligation – to disobey interaction restrictions.

Lastly, I have explored the possibility that, while civic asylum and solidarity marriages do not fit the standard template of civil disobedience, they may nevertheless be considered justifiable forms of uncivil disobedience.

Having highlighted at the beginning of this chapter ‘the risks of centring white subjects, and possibly “white saviours”, in the discussion around the criminalisation of migration’ (Dadusc and Mudu 2020: 16), let me conclude it with a brief reflection on how the arguments that I have presented here bear on the justifiability of migrants/refugees’ own ‘practices of spatial disobedience’ and ‘unruly mobilities’ (Tazzioli 2018b: 2765-2766). Tackling this important subject, several scholars have recently argued that at least some of these practices can themselves be regarded as forms of civil disobedience (Allen 2017, Benli 2018, Cabrera 2021, Celikates 2021, Mégret 2019, Owen 2020). And, no doubt, ‘some cases of unlawful border-crossing’ and other forms of migrant/refugee disobedience ‘are consciously conducted as civil disobedience’ and neatly fit the standard understanding of it (Aitchison 2021: 45). To take an example that we are familiar with from chapter 3 and which several of the aforementioned authors refer to, the migrants/refugees who, in September 2015, decided to leave Budapest and reach Austria on foot not only did so in a very public – indeed quite spectacular – manner, but also (arguably) sought to justify their act by reference to moral reasons that are quite compatible with the kind of ‘weak[ly] cosmopolitan’ vision of justice in immigration that is embedded in the liberal constitutional *Rechtsstaat*, i.e. the fact that the Hungarian authorities did not fulfil their legal obligations to provide adequate reception conditions and a fair assessment of their asylum claims (Benli 2018: 325).

Having said that, however, I think that it is nonetheless fair to maintain that many – indeed, most – migrant/refugee practices of disobedience do *not* fit the standard, liberal conception of civil disobedience. For one thing, some of the above-mentioned authors seek to apply this label to forms of illegal residence and other forms of ‘everyday disobedience’ (e.g. ‘driving

without licenses, working without papers’) that clearly fail to meet the requirements of publicity and willingness to accept punishment (Allen 2017: 46). Second, and perhaps more importantly, the suggestion that what migrant/refugee non-compliance with immigration laws challenges is these laws’ ‘misalign[ment] with the commitments to human moral equality and individual rights in the UN Charter and numerous global rights treaties’ (Cabrera 2019: 331) greatly overstates the – in reality, quite limited – degree to which such cosmopolitan principles are institutionalised in these and other legal documents (cf. chapters 2 and 4). As argued by Mégret (2019: 32), while some forms of migrant/refugee disobedience do appeal to ‘a cosmopolitanism of law and human rights, which merely argues that all migrants should be treated with dignity’, many others are instead rooted in ‘a more radical cosmopolitanism, based on [...] freedom of movement for all and [...] the need to thoroughly rethink citizenship’. Celikates (2021: 75) has similarly underlined that many forms of migrant disobedience point to ‘the fundamentally problematic character of the system that regulates migration and the need to protest it in ways that go beyond established legal channels of political action’.

Confronted with this lack of fit, one response (which we are already familiar with from the previous section) would be to insist that the standard, liberal conception of civil disobedience should be radically revised (Celikates 2021) or, more modestly, that migrant/refugee forms of disobedience that fail to match this template should be regarded as a ‘special class’ (Allen 2017: 37). As I have already explained in the previous section, however, rather than ‘get[ting] stuck at the level of definition and classification’ (Delmas 2020: 10), it seems to me more productive to focus on whether certain forms of principled disobedience that *cannot* be regarded as “civil” (in the classic sense of the word) *can* nonetheless be regarded as fully justified. Quite obviously, the same ‘arguments based on freedom’ and ‘arguments based on distributive justice’ (Sager 2020: 5) that can be marshalled in support of uncivil forms of

disobedience vis-à-vis secondary immigration laws on the part of migrant/refugee supporters can also – indeed, all the more – be employed to justify uncivil forms of disobedience vis-à-vis primary immigration laws on the part of migrants/refugees themselves. That, insofar as ‘immigration laws unjustly make people worse off than they would otherwise be by interfering with their ability to access opportunities’, ‘migrants have a right to resist’ them (Sager 2020: 92; cf. Bertram 2018: chapter 3; Blunt 2018) is an argument that several scholars have indeed quite forcefully defended *without* any need to engage in endless definitional and classificatory disputes about the “true” meaning of “civil disobedience”.

7. CONCLUSION

This thesis started with a seemingly minor incident in Ellwangen and a seemingly rhetorical question: is the *Rechtsstaat* ‘what enables us in here to keep those out there at bay’, as many security officials, conservative MPs and right-wing journalists clamoured in reaction to that incident, or is it rather ‘what requires that we [...] keep their rights in mind’, as migrant/refugee advocates equally loudly insisted (Steinbeis 2018a)? As the previous chapters have shown, however, the answer to this question is anything but straightforward. Just like the closely related and partly overlapping notions of “rule of law”, “constitutionalism” and “constitutional state”, “the *Rechtsstaat*” is an extremely – if not essentially – contested concept (MacCormick 1984: 66) and immigration law is an area where the clash between ‘competing visions’ (Motomura 2008: 147) of these ideals becomes particularly evident. Indeed, if there is one thing that this thesis has clearly demonstrated, it is that ‘there is very little agreement about what the rule of law in immigration law means’ (*ibid.*: 147). Since ‘the way we think about the rule of law in immigration law is very much tied up with how we think about justice in immigration’ (*ibid.*: 144), this is hardly surprising. For the requirements of justice (in immigration) are, of course, even more heavily contested than those of the *Rechtsstaat*/rule of law. Nevertheless, some ‘red lines’ (Baer 2018: 360) with respect to the limits that the *Rechtsstaat* places – or, indeed, fails to place – on existing practices of migrant exclusion *can* be drawn.

Starting from the premise that, ‘[d]espite the surrounding uncertainty, it is not the case that any proposed meaning [of the *Rechtsstaat*] is as good as another’ and that ‘[t]here is a relatively short list of plausible conceptions, each derived from a recognized historical-political context’ (Tamanaha 2004: 4), chapter 2 offered a historical overview of the development of the *Rechtsstaat* doctrine within German legal thought and its belated, contested and still only fledgling extension to the realm of immigration law. The main argument it advanced is indeed

that, while the previously absolute right of the state to exclude migrants has become subject to a complex web of domestic and supranational norms that endow migrants with several fundamental/human rights, this complex web of norms still condones many forms of discrimination on the basis of legal status. From a political theory perspective, the specific vision of justice in immigration embedded in the post-war *Rechtsstaat* is, thus, best understood as a form of moderate (liberal) cosmopolitanism *and/or* moderate (liberal) nationalism (Lenard and Moore 2012) – a normative framework that simultaneously asserts the existence of ‘a minimum content of cosmopolitan citizenship’, defined and delimited by legally enshrined human/fundamental rights, *and* clings on to the idea that ‘nationality matters in the recognition of rights’ (Romeo 2014: 911). While this constitutional vision of justice in immigration reflects ‘the conventional moral view’ (Carens 2013: 10) within liberal democratic states, however, more radical conceptions of cosmopolitanism and nationalism are also on offer.

Building on the latter point, chapter 3 chronicled how the narrative that the German government’s decision to grant admission to hundreds of thousands of migrants/refugees during the “crisis” of 2015-2016 constituted a “breach of the law” (*Rechtsbruch*) was used by the AfD to (mis)represent itself as a party of the *Rechtsstaat* and, thus, a legitimate political alternative at the same time as it embraced a vision of justice in immigration that is fundamentally irreconcilable with the one embedded in the post-war conception of this ideal. After laying out the specific articulation of the *Rechtsbruch* thesis contained in the constitutional lawsuit lodged by the AfD in April 2018, I argued that the German government was in fact not only allowed but obliged under EU law to refrain from turning asylum seekers away at the country’s border. Building on the socio-legal insight that meritless legal claims can still have a powerful mobilising effect, I then explored the political vision that lay behind the *Rechtsbruch* myth, arguing that the party promoted a form of radical

(ethno)nationalism that has no regard for the minimum content of cosmopolitan citizenship enshrined in the *Rechtsstaat*. The broader ‘civic nationalist normalisation strategy’ (Halikopoulou and Vlandas 2019) of which the *Rechtsbruch* myth was part, however, was only as effective as it was because “conservative” right-wing actors eagerly contributed to the redrawing the shifty and contested ‘boundary that demarcates the frivolous from the plausible’ in law (Balkin 2011: 88).

Confronted with the problems of unfriendly takeover, the liberal reflex is to enjoin citizens to ‘rise for the rule of law, stand up for human rights, and call for constitutionalism’ (Baer 2018: 367). The liberal tendency to portray the exclusionary *Rechtsstaat* discourse peddled by the radical nationalists as something that ‘has *nothing* to do with the rule of law in its constitutional sense’ (*ibid.*: 352; emphasis added), however, requires correction. For, stopping way short of requiring ‘the *complete cancellation* of the constitutional distinctions between citizens and resident aliens’ (Rubio-Marín 2000: 195; emphasis added), the rule of law, human rights and constitutionalism merely provide that ‘some rights are directly achieved through access into the territory’, while many ‘others are not’, and thus effectively condone many forms of ‘de jure rightlessness’ (Mann 2018). More specifically, as we have seen in Chapter 4, far from recognising a universal and unconditional right to move and to stay across borders, the applicable legal framework only provides limited regularisation pathways. The asylum pathway is itself ridden with multiple layers of legal deflection, including the Dublin system and the lack of a comprehensive right to legal advice, representation and aid. And, lacking a right to stay, asylum seekers are in turn subject to many other forms of exclusion, including with respect to the right to a home, the right to choose their place of residence in Germany, and the right to work.

In addition to this, even when the law does lay down constraints on the sovereign right of exclusion, such constraints are often disregarded in practice. Indeed, as we have seen in

chapter 5, when it came to the ever more politicised issue of deportation, governing right-wing politicians and street-level migration control agents often mobilised the *Rechtsstaat* to justify enforcement practices that did not merely ‘sail as close as possible to the line that separates compliance from violation of [legal] liberal norms’ (Gibney 2008: 166) but actually crossed it. While ‘the capacity of the juridical process to name state illegality, dispute dominant narratives of border protection and produce counternarratives’ must be acknowledged (Pickering and Weber 2012: 184), relying solely on ‘internal resistance to illegal state action’ (*ibid.*: 185) on the part of the judiciary is dangerous for at least two reasons. First, as *Bundesverfassungsgericht* judge Suzanne Baer (2018: 365-366) herself points out, ‘many serious violations of fundamental rights [...] never reach the courts’ – a problem that is exacerbated by the difficulties involved in securing legal representation. Second, as Baer also underlines, courts ‘tend to register political pressure quickly, as they are institutions walking the fine line between law and politics’, and ‘a court that protects minorities [...] does not cater to majoritarian sentiment’ (*ibid.*: 360-362).

In an age in which ‘the protection of individual rights’ is widely supposed to have become a key precondition for ‘legitimate statehood’ (Gündoğdu 2018: 367), the fact that – even if unfriendly takeovers and non-compliance are factored out – the *Rechtsstaat* upholds and legitimises many forms of migrant rightlessness inevitably weakens – if not altogether undermines – its claim to legitimacy among those who embrace a radically cosmopolitan vision of justice in immigration. As we have seen in chapter 6, from a radically cosmopolitan perspective, the ‘differing treatment of citizens and non-citizens is always objectionable’ (Romeo 2014: 911) because ‘border- control practices of national states not only *reflect* people’s unequal rights (e.g. whose movements are deemed to be legitimate and whose are not) but also *produce* this inequality’ (Anderson *et al.* 202: 82). Insofar as this vision of justice is understood to entail a moral obligation to ‘act as if there are no borders’ (Nicolacopoulos

and Vassilacopoulos 2004: 65) in a world where borders continue to be deeply entrenched in the law, it effectively results in a ‘duty to disobey immigration law’ (Hidalgo 2016). Heeding this duty, many people in post-2015 Germany engaged in criminalizable forms of solidarity, including civic asylum and marriages of solidarity. While these practices do not fit the standard liberal template of civil disobedience as a litmus test for and a guardian of the legitimacy of the *Rechtsstaat* (Habermas 1985), they can nonetheless be understood as justifiable forms of uncivil disobedience (Delmas 2018).

To sum it all up in one sentence, depending on which specific practice of migrant exclusion is at issue, the *Rechtsstaat* can be either ‘what enables us in here to keep those out there at bay’ or ‘what requires that we [...] keep their rights in mind’ (Steinbeis 2018a) – or, indeed, *both things at the same time*. To quote again Newendorp (2011: 102), for migrants without secure legal status, the rule of law can serve *both* as ‘a vehicle of belonging’ *and* as ‘a vehicle of oppression’. While ‘[a] free floating, global rule of law in the realm of migration’ may ‘allow the global inequities of migration to receive new scrutiny’, the possibility that the ‘rule of law may become unhinged from the nation and its sovereignty’ remains at present quite a distant prospect. At present, the rule of law ideal is instead thoroughly imbricated in – *and significantly helps to legitimise* – an international order that is premised on the ‘division of people by citizenship into separate sovereign States’ and accordingly views most migrants as ‘people out of place’ (Gibney 2013: 122-123). While the rule of law does place both substantive and procedural limits on what states can do to return individuals to ‘their rightful places of residence’ (*ibid.*: 123), it does *not* fundamentally challenge their sovereign right to exclude migrants. The question this conclusion raises is whether the *Rechtsstaat*/rule of law ‘adds more in justice than it costs in the legitimation it lends to the unjust [border] regime’ (West 2011: 41).

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