



DR. JUR. KLAUS KAMMERER

Column 7

Dear citizens of Georgia,

Before we turn to another column on the subject of the legal nature of Union law, the central question for European law of its direct applicability and validity and its priority over the national law of the member states, I would like to use this column to describe some of the events that have occurred in Germany in the recent past, which have unfortunately resulted in many deaths and injuries, some of them serious, as terrorist attacks carried out in public. They were committed by individual perpetrators who are enjoying asylum here as refugees from Palestine (Gaza), Saudi Arabia, Syria and Afghanistan or whose stay is only tolerated.

These terrible events, their consequences for the victims and their families, and the dispute over the political conclusions to be drawn from them may - with the necessary sensitivity to the fact that law must serve people - lead to a better theoretical understanding of the Union law **principle of priority of application** and the problems that exist in practice.

The domestic political dispute in Germany triggered by these terrible acts over who bears political responsibility for this, which failures of the authorities were partly responsible, combined with the accusation of alleged enforcement deficiencies in relation to the existing legal situation, and how such acts can be prevented in the future, has led to a breaking point in the political discourse between the parties and in particular to a conflict over the question of whether European law, which is decisive for the asylum procedures and the right of residence of refugees and migrants and has priority of application, can still do justice to the situation that has arisen, or whether - by virtue of the opening clause of Article 72 TFEU - **national law** with appropriately adapted national laws and regulations can better and more successfully counter the dangers posed by potential perpetrators in the future.

The **tension** between the ideal formulated in asylum, refugee and migration policy of an over-

riding interest in European integration, corresponding to an equal distribution of burdens in the

distribution of refugees and migrants among the individual member states and the equalization of living conditions on the one hand and the legitimate national interests of the member states on the other, which are resisting an excessive demand on their society and state resources and are under pressure from left-wing extremist and right-wing populist currents, may serve as a **projection surface** for the theoretical penetration of European legal matter in the next column (No. 8).

The key events and **crimes** that now dominate the domestic political discourse took place between January 25, 2023 and January 22, 2025 (*in Brokstedt / Schleswig-Holstein, Mannheim / Baden-Württemberg, Solingen / North Rhine-Westphalia, Magdeburg / Saxony-Anhalt, Aschaffenburg / Bavaria*) and each resulted in several, sometimes many, deaths, serious and severe injuries - women and men of all ages, including a police officer. The crimes, which took place only a short time ago and particularly shocked politicians and the public, occurred on December 20, 2024 and January 22, 2025:

- *On **Friday, December 20, 2024**, 50-year-old Taleb A., a citizen from Saudi Arabia who worked as a specialist in psychiatry and psychotherapy in a neighboring city, drove a car at high speed into a Christmas market in the city center of **Magdeburg** at around 7 p.m. without braking. He killed six people over a distance of at least 400 meters and injured a total of 300 other people, including 86 seriously injured people.*

Taleb A. has lived in Germany since 2006 and has a permanent residence permit. He had turned away from Islam and was granted asylum as a politically persecuted person in 2016.

- *On **Wednesday, January 22, 2025**, at around 11:45 a.m., 28-year-old Afghan Enamullah O. suddenly and deliberately attacked several people in a kindergarten group with a kitchen knife in a public park in **Aschaffenburg**, killing a two-year-old boy of Moroccan origin with several stab wounds. A 41-year-old father of a family, who happened to be there as a passerby, selflessly rushed to help and was also stabbed to death by the perpetrator. He seriously injured three other people with stab wounds.*

As it only became clear after the crime, the perpetrator is apparently mentally ill. In November, he had announced in writing that he was voluntarily leaving for his home country of Afghanistan, but failed to do so and could not be found. The asylum procedure, which had not yet been completed, was canceled because of his announcement.

Legislative initiative of the opposition party CDU/CSU in the German Bundestag

The opposition party CDU/CSU, represented in the German Bundestag, has taken these murders, which occurred in a short period of time, and the resulting ongoing threat to public safety

and order as an opportunity to launch a **legislative initiative** before the upcoming **federal election** on February 23, 2025, in order to limit the unregulated influx of illegal migration of third-country nationals. It is citing **Article 72 TFEU**.

The main content of the bill, which was introduced in the Bundestag on January 31, 2025 in second reading, but failed in the vote due to a lack of a majority, and the justification for it, is as follows:

- Permanent border controls at all German borders
- Consistent rejection of all attempts to enter the country illegally
- Effective entry ban for persons without valid documents
- Immediate detention of persons required to leave the country
- Tightening of residence rights for criminals and dangerous persons.

It is intended that people who want to apply for asylum in Germany can also be turned back at the border if they are clearly already safe from persecution in neighboring European countries. In addition, family reunification in favor of those people who already enjoy subsidiary protection is to be terminated until further notice, since - according to the justification - the integration capacities in Germany have been exhausted in view of the reception of more than 1.8 million asylum seekers and Ukrainian refugees since the beginning of 2022.

Finally, according to the further justification, it is of central importance that the federal police, as part of their duties and in agreement with the responsible immigration authorities, are given their own authority to implement measures to terminate residence in order to enforce the obligation to leave the country for people they encounter in their local area of responsibility (train stations). This affects third-country nationals without a toleration permit and those with a toleration permit due to a lack of travel documents. This expanded authority for measures to terminate residence should also include the application for detention and custody to ensure deportation.

Criticism and resistance from the two governing parties and the public

The **SPD** and **Alliance 90/The Greens**, the remaining parties of the former coalition government, see this approach and the measures proposed in the draft law as a **breach of European law** and the German **constitution**, the Basic Law. They refer to the procedure regulated in the **Dublin III Regulation** and to the need for joint and uniform action in the Union, which takes precedence over individual national actions. The draft law therefore violates European law.

The adoption of this law failed, as mentioned. It did not find a majority, although the right-wing populist opposition party **AfD** (*Alternative for Germany*) had also approved the draft law. This fact was the trigger for numerous large demonstrations and sustained protests the following weekend in almost all major cities in Germany, all of which were directed against the CDU/CSU and AfD parties.

Article 72 TFEU and Regulation (EU) No. 604/2013 (Dublin III) of July 19, 2013

Article 72 TFEU contains an opening clause that establishes the responsibility of the national member state to maintain public order and protect internal security. It reads as follows:

TFEU - TITLE V

Article 67

(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. **It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.** For the purpose of this Title, stateless persons shall be treated as third-country nationals.

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Article 72

(ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Regulation (EU) No. 604/2013 (Dublin III)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604>

regulates the criteria and determines the Member State responsible for conducting an asylum procedure, i.e. for examining an application for international protection submitted by a third-

country national or stateless person in a Member State. It replaced the Dublin II Regulation (343/2003).

It sets out an **order of examination** for determining the responsible state. Particular consideration is given to the protection of the child's welfare and the principle of family unity (family reunification). In the case of unaccompanied minors, if family members are already in a Dublin state, this state is responsible as long as this is in the child's best interests. In the case of adult asylum seekers, at the request of the person concerned, the state responsible is the state in which close relatives are located who are in the asylum procedure or who have already been granted protection.

The criterion of first entry takes precedence when determining the responsible Member State. Accordingly, the state in which the asylum seeker irregularly crosses the EU borders for the first time is obliged to carry out the asylum procedure.

If the examination shows that another Dublin state is responsible for the application, this state is usually asked to (re)take the asylum seeker. However, according to Article 3 Paragraph 2 Sentence 2 of the Regulation, the Member State that is not responsible in itself is obliged to continue the examination procedure in order to consider another Member State as responsible or to carry out the recognition procedure itself, namely "if it proves impossible to transfer an applicant to the Member State initially determined to be responsible because there are substantial reasons to believe that the asylum procedure and the reception conditions for applicants in that Member State have systemic weaknesses that entail a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights" (**ECJ**).

Criticism from legal scholars - accusation of breach of European law and the constitution, with unforeseeable consequences

The massive criticism that the plans and political discourse in migration policy and to limit the flow of refugees have provoked in legal scholars, and which accuses the CDU/CSU party, as the originator of the plan, of breaching the constitution and European law, culminates in the accusation that the **priority of application of Union law** is being politically called into question by calling into question the autonomy and validity of European law and by perceiving international law as an unwelcome restriction of national scope for action coming "from outside". Creeping resistance is forming well into the middle of the political spectrum against the commitment to an open statehood engraved in the Basic Law that relies on European and international integration. This applies to the Federal Republic's denunciation of the European Convention on Human Rights (ECHR), which has already been propagated in public discourse,

and the intention to turn back refugees at German borders without regard to the requirements of European law.

By invoking the opening clause of Article 72 TFEU, the opposition party CDU/CSU wants to make use of the "right to the primacy of national law", which raises the question of whether this only means the use of emergency clauses in European law or whether the **primacy of Union law** is fundamentally **called into question**.

The talk of the right to the primacy of national law turns the relationship between Union law and national law on its head; the formulation comes from the script of right-wing populist parties, as used in Poland and Hungary, and wants to put their own political goals above the law.

The **primacy of Union law** is a cornerstone of the establishment of an internal market that has brought prosperity, freedom and security to Germany. The Federal Constitutional Court also accepts this priority. Through the state objective of European integration in Article 23 Paragraph 1 of the Basic Law (GG), the priority of application of Union law enjoys German constitutional status. The exceptions developed by the Federal Constitutional Court, in particular to protect German constitutional identity, cannot justify the desired transformation of the relationship between European law and national law.

What is alarming for international and European law is that the rhetoric that determines the political discourse conceals whether the essentially correct statement that law can and must be changeable reveals the will to enter into lawmaking processes or whether the breach of the law is simply accepted in order to achieve a political goal. In the latter case, law and the application of the law would be nothing more than instruments that could be ignored at will in order to achieve political goals. But such **arbitrariness of the law** must ultimately endanger the security of every person. For those who ignore international legal obligations will no longer be subject to constitutional law.

Counterarguments from politicians

The political discourse, on the other hand, brands the asylum procedures and migration policy currently practiced at the European level as "**dysfunctional**" and sees the **Dublin III procedure** as a failure. A uniform European line, let alone a reform based on a consensus among the member states and joint action with equal distribution of burdens, are illusory. Many member states - from Scandinavia to Eastern and Central Europe to Hungary and Austria - have long pursued national solo efforts in the refugee and asylum sector.

In addition, the state and society are reaching the limits of their resilience (former Federal President Joachim Gauck: "Our hearts are big, but our possibilities are finite"). The enforcement deficits at the state level and in the municipalities - which the Federal Government has cited - require an immense expenditure of financial, material and human resources to eliminate them, which cannot be managed in view of the dangerous situation, the dangers posed by potential perpetrators and the need for psychiatric and psychotherapeutic treatment of mentally ill and traumatized refugees, which is difficult to assess because it is not obvious. The placement in psychiatric hospitals - even preventative - as a measure depriving people of their freedom is also subject to high legal hurdles. In addition, there is a lack of the necessary data exchange between the authorities in order to be able to assess any clinical picture of possible perpetrators and the dangers they pose in a timely and accurate manner.

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*The subject of the next column – after this introduction – will be **the legal nature and priority of Union law** and in particular the different views of the ECJ and the Federal Constitutional Court regarding the limits of priority of application and the associated review powers.*

(signed) Dr. Kammerer