

## Migration Law for Non-Migrants

Franz Merli\*

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### I. What's in a name?

In March 2019, Herbert Kickl, the interior minister of the right-wing populist Freedom Party of Austria (FPÖ), issued a decree renaming the refugee reception centres. In these centres, the decision will be taken as to whether a Dublin procedure, a “fast-track-procedure”, or a full procedure will be used to deal with an application for asylum. The decree renamed the reception centres into “departure centres” (Ausreisezentren).<sup>1</sup>

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\* Professor at the Department of Constitutional and Administrative Law, University of Vienna. This is a slightly redacted and annotated version of a paper presented at the Slovenian-Austrian Conference “Managing Migration and the Rule of Law” on 29 September 2019. I would like to thank Iris Potocnik and Jakob Pflügl for valuable research assistance.

<sup>1</sup> Herbert Vytiska, ‘Austria: Interior minister wants tighter right of asylum’, Rob Kirby (transl.), Euractiv, 26 February 2019, available at <https://www.euractiv.com/section/justice-home-affairs/news/austria-interior-minister-wants-tighter-right-of-asylum/> (last accessed 12 February 2020). According to the Ministry of the Interior, there was “no need for legal changes”, as “the new terms [did] not conflict with the provisions of the law and the terms used therein”, see Irene Brickner, ‘Warum Kickl aus Aufnahmestellen "Ausreisezentren" macht’, DerStandard, 27 February 2019, available (in German) at <https://www.derstandard.at/story/2000098647513/warum-kickl-aus-aufnahmestellen-ausreisezentren-macht> (last accessed 12 February 2020). For details on the planned

As lawyers, we are used to focusing on the operative consequences of legal acts. We understand law as an instrument to influence the behaviour of its addressees. We compare the rights and duties of the persons concerned before and after the enactment of a given regulation, and we analyse the incentives and the sanctions the law creates in the hope people will behave as intended. Sometimes we criticize the law for not being effective enough, and sometimes we advise persons on what they should do to satisfy the legal requirements or how they could circumvent them.

What to make of the renaming decree? The act does not create or change the rights or duties of anyone. It does not affect their status, nor does it influence anyone's behaviour. Kickl commented on it in the following manner: "The message has to be that those not granted protection don't have a chance in Austria. They don't get an entrance card but a one-way ticket back home."<sup>2</sup> However, I doubt that refugees in Syria or Libya took notice of the renaming and therefore decided not to apply for protection in Austria, or that they, once in Austria, saw and understood the new doorplate, lost their hope, withdrew their application and accepted a one-way ticket back home without resistance.

Although the renaming did not have any obvious consequences for anyone it was a highly debated issue. Legally, one could discuss if the administrative decree complied with the parliamentary statute calling the same institutions reception centres<sup>3</sup>. (It did

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changes in asylum law, see the press release of the Austrian Federal Ministry of the Interior, 'Kickl präsentiert Neuerungen im Asylbereich: Zukünftig Ausreisezentren statt Erstaufnahmezentren – Start in Traiskirchen und Thalham', OTS0165 5 CI 0697 NIN0003, 25 February 2019, available (in German) at [https://www.ots.at/presseaussendung/OTS\\_20190225\\_OTSO165/kickl-praesentiert-neuerungen-im-asylbereich](https://www.ots.at/presseaussendung/OTS_20190225_OTSO165/kickl-praesentiert-neuerungen-im-asylbereich) (last accessed 17 October 2019).

<sup>2</sup> Vytiska, 'Austria: Interior minister wants tighter right of asylum'.

<sup>3</sup> See, in particular, § 4 Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl (BFA-Einrichtungsgesetz - BFA-G) (Federal Office for Immigration and Asylum Establishment Act), Austrian Federal OJ I 2012/87 as last amended by Austrian Federal OJ I 2018/56, and section 1(1) - (3) Verordnung der Bundesministerin für Inneres zur Durchführung des BFA-G (BFA-G - Durchführungsverordnung - BFA-G - DV) (Order of the Minister of the Interior implementing the Federal Office for Immigration and Asylum Establishment Act), Austrian Federal OJ II 2013/453, where the affected facilities are explicitly designated as "reception centres". The term "reception centres" is also used in §§ 10(3) and (6), 11(1), 34(7), 43(1)(1), (2 a) and 49(4) Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz - BFA-VG) (Federal Office for Immigration and Asylum Procedures Act), Austrian Federal OJ I 2012/87 as last amended by Austrian Federal OJ I 2019/53, and in §§ 28(4), 29(4), 31(1) and (3), 32(1) and 33(1) and (4) Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005 - AsylG 2005) (Federal Act Concerning the Granting of Asylum), Austrian Federal OJ I 2005/100 as last amended by Austrian Federal OJ I 2019/53. (All Austrian statutes and ordinances can be accessed via the Federal Laws Information System,

not and the subsequent Minister of the Interior repealed it, by the way.<sup>4</sup>) Its legality was not the core of the matter, though. The core of the matter was its message. In this respect, Kickl was right; however, it was not a message to asylum seekers but a message to the voters of the Freedom Party living in Austria. As such, the decree was migration law for non-migrants.

## II. Operative and expressive functions of the law

Let us take a step back for a minute and look at this episode from a more general perspective. It reminds us that law has not only operative (or instrumental) functions, like creating rights and duties in order to protect individuals and to pursue certain policies. Linguistics teaches us that language also has performative aspects and a much more pragmatic dimension, utterances can be considered as speech acts, and legal theory and everyday experience tell us that law can have symbolic or expressive functions.<sup>5</sup>

In many instances, law is not so much concerned with directly influencing people's behaviour as with making statements: expressing values which the legislator deems

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[www.ris.bka.gv.at](http://www.ris.bka.gv.at) with their title or OJ number.) On the alleged legality of the measure, see the answer of the Federal Minister of the Interior to the written questions of a MP concerning the renaming of the first reception centres as departure centres, (3022/J) 2998/AB 26. GP. (Written questions and the corresponding answers can be found at <https://www.parlament.gv.at/PAKT/JMAB/> by their respective legislative period and their type, plus their name and/or number.)

<sup>4</sup> 'Innenministerium montiert "Ausreisezentrum"-Schilder ab', Die Presse, 29 May 2019, available at <https://www.diepresse.com/5636489/innenministerium-montiert-ausreisezentrum-schilder-ab?from=rss> (last accessed 12 February 2020).

<sup>5</sup> See e.g., Lawrence Lessig, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago Law Review* 943-1045; Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021-2053; Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503-1575. In the German-speaking countries, the discussion, often following Joseph R. Gusfield, 'Moral Passage: The Symbolic Process in Public Designations of Deviance', (1967) 15 *Social Problems* 175-88 (at pp. 176-8), focuses on the distinction between the instrumental and symbolic functions of law: e.g. Peter Noll, 'Symbolische Gesetzgebung', (1981) 122 *Zeitschrift für Schweizerisches Recht* 347-67; Wolfgang Schild, 'Funktionale und nicht-funktionale Bedeutung des Gesetzes', in Ilmar Tammelo and Erhard Mock (eds.), *Rechtstheorie und Gesetzgebung. Festschrift für Robert Weimar* (Frankfurt am Main, Bern, New York: Peter Lang Verlag, 1986) 195-215; Harald Kindermann, 'Alibigesetzgebung als symbolische Gesetzgebung', in Rüdiger Voigt (ed.), *Symbole der Politik. Politik der Symbole* (Opladen: Leske Verlag + Budrich, 1989) 257-73; Benjamin Davy, *Folgenloses Umweltrecht* (Wien: Service Fachverlag an der Wirtschaftsuniversität Wien, 1989), pp. 18-9; Angelika Siehr, 'Symbolic Legislation and the Need for Legislative Jurisprudence: The Example of the Federal Republic of Germany' (2008) 2 *Legisprudence* 271-306, and is most concerned with laws which were not enacted for their legal effectiveness but as a message to the voters that the government is responsive to new problems or in control of a dangerous situation or similar contentions.

important (eg, “Austria is a federal state”, as our constitution stipulates<sup>6</sup>), creating an identity for society (eg, Europe is a “death-penalty-free zone”, the Council of Europe proclaimed<sup>7</sup>), officially recognizing groups of people (e.g. minorities<sup>8</sup>), condemning certain kinds of behaviour (in particular via criminal law<sup>9</sup>), reaffirming, corroborating, sometimes changing social norms (like the acceptance of intersexual persons<sup>10</sup>). Sometimes such a statement may guide further legislation; sometimes it is meant to indirectly influence the behaviour of people; often it should convince voters that something is being done about a problem; and sometimes it may just stand for itself.

Our renaming decree is an extreme example in the sense that it is purely expressive. The other end of the scale is marked by mostly operative measures, e.g. technical rules or certain traffic regulations.<sup>11</sup> In many cases, however, operative and expressive functions of the law go hand in hand. Let us take statutes on sexual harassment as an example to this effect. On the one hand, they directly ban certain forms of behaviour and provide for controlling mechanisms and sanctions; on the other hand, they are also important to create a general awareness of the problem, to change attitudes, to

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<sup>6</sup> Art. 2 Bundes-Verfassungsgesetz 1920 (B-VG), Austrian Federal OJ 1930/1 as last amended by Austrian Federal OJ I 2019/57.

<sup>7</sup> See <https://www.coe.int/en/web/portal/10-october-against-death-penalty>.

<sup>8</sup> E.g. Art. 8 § 2 B-VG: “The Republic (Federation, provinces and municipalities) subscribe to its linguistic and cultural multiplicity having grown, expressed in the autochthonous ethnic groups. Language and culture, existence and preservation of these ethnic groups are to be respected, safeguarded and to be supported.” For constitutional recognition of minorities, see also Jürgen Pirker, ‘Recht und Symbolik. Die neue Verfassung des Landes Kärnten in Volksgruppenfragen’ (2017) 74 *europa ethnica* 2-8.

<sup>9</sup> See, e.g. the Austrian Constitutional Court (VfGH), 13 December 2017, G 408/2016 et al., holding that the stigmatizing effect is relevant for the distinction between criminal and administrative offenses. (All decisions by the Austrian constitutional court can be accessed via <https://www.ris.bka.gv.at/Vfgh/> by their case numbers.) For an example of symbolic condemnation of noncriminal Nazi-style nonsense in public forums, see Franz Merli, ‘„Unfug“ im Einführungsgesetz zu den Verwaltungsverfahrensgesetzen’, in Mathias Lichtenwagner and Ilse Reiter-Zatloukal (eds.), *„... um alle nazistische Tätigkeit und Propaganda in Österreich zu verhindern“. NS-Wiederbetätigung im Spiegel von Verbotsgesetz und Verwaltungsstrafrecht* (Clio, Graz, 2018) 35-45.

<sup>10</sup> Cf. VfGH 15 June 2018, G 77/2018.

<sup>11</sup> Of course, even traffic rules can (and do) express something: e.g. order, safety, reliability, care for the weak or the environment, openness for high-tech-solutions, freedom for urban street life, ... or the respective opposite.

make clear what is not tolerable and to reinforce the respective norms in a social sphere poorly accessible to the law.<sup>12</sup>

Once we focus on the expressive function, we see it almost everywhere. This is particularly true for migration law.

### III. Expressive migration law: Some examples

After the so-called “refugee crisis” of 2015 had ended, the government, then led by chancellor Faymann of the Social Democratic Party of Austria, announced a decree setting a ceiling on asylum applications.<sup>13</sup> A limit for applications is a very operative measure. The proposed decree was, of course, also highly controversial: the government claimed that it was in conformity with international and European law, but most experts did not agree. However, the gist of the idea was that the ceiling of applications was deliberately chosen so that it would not be reached. The ceiling of 37,500 asylum-seekers was not attained, the proposed decree did not come into force, and a statutory emergency mechanism enacted later<sup>14</sup> was never applied. In the end, it was only the expressive function that mattered: We, the government, are in control of the situation and will not tolerate an unlimited influx of refugees anymore.

Deploying the Austrian armed forces to the eastern border in 2015 had sent a less clear message between control and helplessness.<sup>15</sup> At any rate, the role of the army

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<sup>12</sup> Sunstein, ‘On the Expressive Function of Law’, p. 2043; see also Danielle K. Citron, ‘Law’s Expressive Value in Combating Cyber Gender Harassment’ (2009) 108 *Michigan Law Review* 373-415 (pp. 404-415).

<sup>13</sup> Justin Huggler, ‘Austria closes its borders to almost all asylum-seekers’, *The Telegraph*, 31 March 2016; Kirsti Knolle, ‘Austria plans to further restrict number of asylum seekers’, Gareth Jones (ed.), *Reuters*, 30 March 2016, available at <https://www.reuters.com/article/us-europe-migrants-austria/austria-plans-to-further-restrict-number-of-asylum-seekers-idUSKCN0WW1XO> (last accessed 12 February 2020).

<sup>14</sup> §§ 36-41 AsylG 2005.

<sup>15</sup> Francois Murphy, ‘Austria says army will help impose tougher border checks’, *Reuters*, 14 September 2015, available at <https://www.reuters.com/article/uk-europe-migrants-austria/austria-says-army-will-help-impose-tougher-border-checks-idUKKCN0RE0SZ20150914> (last accessed 12 February 2020); Federal Ministry of Defence, ‘Armed Forces Deploy to Help With Refugee Crisis’, 18 September 2015, available at <http://www.bundesheer.at/english/dynmod/artikel.php?id=4506> (last accessed 17 October 2019); Wolfgang Gröbming, ‘15 Years of Border Surveillance’ (2006) 1 *TRUPPENDIENST International* 1, available at [http://www.bundesheer.at/english/td\\_international/artikel.php?id=32](http://www.bundesheer.at/english/td_international/artikel.php?id=32) (last accessed 17 October 2019); Decision of the Council of Ministers 73/27, 14 September 2015, based on Art. 79(2) B-VG 1920 and § 2(1)(b), (5) and (6) Wehrgesetz 2001 (WG 2001) (Defense Act 2001), Austrian Federal OJ I 2001/146 as last amended by Austrian Federal OJ I 2019/102. Chancellor Faymann called the measures “a clear signal (to the international community) that Austria and Germany cannot solve the

(which is still there today) has been largely symbolic, as the troops deployed consist of young conscripts with hardly any training and without special powers in a mere supporting role for the regular border police.

A real highlight was a large-scale border patrol exercise held in 2018 on the Austrian border with Slovenia at Spielfeld/Šentilj. 200 soldiers and 500 policemen practiced stopping refugees, in a one hour and a half long exercise that saw police trainees pretending to cross the border and being turned back. A platform was set up for the photographers. Two Black Hawk helicopters circled overhead. Two hundred students from the police academy were enlisted as “refugees”. A video was produced. Heinz-Christian Strache, then Austria’s Vice-Chancellor, described the training exercise as a “major police and army” event and said it would send a “clear signal” that Austria wanted to protect its borders.<sup>16</sup>

A second set of examples of expressive migration law concerns financial subsidies for asylum seekers and those who were granted asylum or subsidiary protection. Asylum seekers are not allowed to work in the first three months after their application but they can be employed by government and municipal entities for domestic and garden work or transport services.<sup>17</sup> These entities paid varying wages up to 5 Euro per hour.

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world's asylum question alone", see 'Austria to deploy army to help with migrant influx', The Tribune, 14 September 2015, available at <https://tribune.com.pk/story/956595/austria-to-deploy-army-to-help-with-migrant-influx/> (last accessed 7 February 2020).

<sup>16</sup> See the press release of the Federal Ministry of the Interior, 'Einladung zum Medientermin im Rahmen der Grenzschutz-Übung "ProBorders"', OTS0015 5 CI 0120 NIN0001, 22 June 2018, available (in German) at [https://www.ots.at/presseaussendung/OTS\\_20180622\\_OTS0015/einladung-zum-medientermin-im-rahmen-der-grenzschutz-uebung-proborders](https://www.ots.at/presseaussendung/OTS_20180622_OTS0015/einladung-zum-medientermin-im-rahmen-der-grenzschutz-uebung-proborders) (last accessed 17 October 2019); further information on the event can be found on the website of the Federal Ministry of Defence: Federal Ministry of Defence, 'Grenzschutzübung "Pro Borders": Bundesheer übt mit Polizei', 26 June 2018, available (in German) at <http://www.bundesheer.at/cms/artikel.php?ID=9540> (last accessed 17 October 2019) and Reinhard Leprich, 'Frage: Was passiert bei einem Migrationsstrom wie 2015 an Österreichs Grenzen?', 26 June 2018, available (in German) at [https://www.bmi.gv.at/news.aspx?id=73624A61743351515366413D&fbclid=IwAR3OLb8-6Lmkn1a2mJKBGLKudSmpny\\_a5tUNjOwbTWANAg7QZ9npGST5Dok](https://www.bmi.gv.at/news.aspx?id=73624A61743351515366413D&fbclid=IwAR3OLb8-6Lmkn1a2mJKBGLKudSmpny_a5tUNjOwbTWANAg7QZ9npGST5Dok) (last accessed 17.10.2019). The description of the event follows Abby Young-Powell and Nick Squires, 'Austria conducts anti-migrant border exercise in show of defiance against Angela Merkel', The Telegraph, 26 June 2018, available at <https://www.telegraph.co.uk/news/2018/06/26/austria-conducts-anti-migrant-border-exercise-show-defiance/> (last accessed 12 February 2020); Katrin Bennhold, 'This European Border Is Still Open. But for How Long?', The New York Times, 24 July 2018, available at <https://www.nytimes.com/2018/07/24/world/europe/austria-slovenia-border-migrants-spielfeld-schengen.html> (last accessed 5 September 2020).

<sup>17</sup> § 4(1)(1) Bundesgesetz vom 20. März 1975, mit dem die Beschäftigung von Ausländern geregelt wird (Ausländerbeschäftigungsgesetz – AuslBG) (Employment of Foreign Nationals Act), Austrian Federal OJ 1975/2018 as last amended by Austrian Federal OJ I 2019/25; §§ 1 and 7(3), (3)(a) and (5) Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird (Grundversorgungsgesetz – Bund 2005 – GVG-B 2005)

Kickl, the former Minister of the Interior, considered these amounts excessive and drafted a decree limiting the hourly wage to 1.50 Euro.<sup>18</sup>

For recognized refugees and third country nationals in general, social allowances were severely cut in a legislative reform which was passed in May 2019 with the votes of the two right-wing parties then in power:<sup>19</sup> Foreigners without German or English language skills should receive about 300 Euro less than the regular amount of about 900 Euro per month. The full amount was to be paid not before the persons concerned had taken an exam proving that they had achieved level B1 in German or C1 in English, a rather demanding standard,<sup>20</sup> in particular for refugees with low levels of formal education. Child allowances would decrease with the number of children: € 221 for the first child, € 133 for the second child, and only € 43 for the third and any additional child. Single parents have no legal entitlement to higher payments. Some 70,000 children would have been directly affected by these changes. Families

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(Federal Act on Basic Welfare Support for Asylum Seekers, Austrian Federal OJ 1991/405 as last amended by Austrian Federal OJ I 2019/53.

<sup>18</sup> Herbert Vytiska, 'Austria plans €1.50 hourly wages for asylum seekers', Daniel Eck (transl.), Euractiv, 28 March 2019, available at <https://www.euractiv.com/section/economy-jobs/news/austrian-government-plans-e1-50-hourly-wages-for-asylum-seekers/> (last accessed 12 February 2020); § 3 Verordnung des Bundesministers für Inneres über die Heranziehung von Asylwerbern und bestimmten sonstigen Fremden für gemeinnützige Hilfstätigkeiten und die Höhe des hierfür zu leistenden Anerkennungsbeitrags 2019, Austrian Federal OJ II 2019/123. This order was later repealed by a decree of the next Minister of the Interior, too; see Austrian Federal OJ II 2019/131; and 'Neuer Innenminister macht letzte Amtshandlungen Kickls rückgängig', Die Presse, 23 May 2019, available at <https://www.diepresse.com/5633394/neuer-innenminister-macht-letzte-amtshandlungen-kickls-rueckgaengig> (last accessed 12 February 2020).

<sup>19</sup> See, in particular, §§ 4, 5, 7 and 9 Bundesgesetz betreffend Grundsätze für die Sozialhilfe 2019 (Sozialhilfe-Grundsatzgesetz) (Federal Act Concerning the Principles of Social Allowances), Austrian Federal OJ I 2019/41; § 16c(1) Bundesgesetz zur Integration rechtmäßig in Österreich aufhältiger Personen ohne österreichische Staatsbürgerschaft 2017 (Integrationsgesetz - IntG) (Federal Act for the Integration of Persons without Austrian Nationality Legally Resident in Austria), Austrian Federal OJ I 2017/68 as amended by Austrian Federal OJ I 2019/41.

<sup>20</sup> The Common European Framework of Reference for Languages (CEFR) (available at <https://rm.coe.int/1680459f97>, last accessed 5 September 2020) 24, defines B1 as "Can understand the main points of clear standard input on familiar matters regularly encountered in work, school, leisure, etc. Can deal with most situations likely to arise whilst travelling in an area where the language is spoken. Can produce simple connected text on topics which are familiar or of personal interest. Can describe experiences and events, dreams, hopes and ambitions and briefly give reasons and explanations for opinions and plans" and C1 as "Can understand a wide range of demanding, longer texts, and recognise implicit meaning. Can express him/herself fluently and spontaneously without much obvious searching for expressions. Can use language flexibly and effectively for social, academic and professional purposes. Can produce clear, well-structured, detailed text on complex subjects, showing controlled use of organisational patterns, connectors and cohesive devices".

living in Vienna, for example, had previously received € 233 for each child.<sup>21</sup> By cutting benefits of people with lower language skills and larger families, the law mainly targeted foreigners. As several experts noted,<sup>22</sup> the new regulation did not provide any savings for the federal and state budgets but specifically disadvantaged certain groups, especially immigrants.

Of course, these are rigorous operative measures. They also have an expressive function, though: the official reasoning for the different treatment of the needy is that people without adequate language skills are not prepared for the labour market so they should be motivated to improve their German,<sup>23</sup> but this is just a pretext. What really matters is another effect: these measures shall ensure that foreigners receive less than Austrians in a comparable situation whatever the reason. By putting foreigners in their place, they endorse a certain form of justice, which is as popular as it is in tension with European law: “Austrians first”.<sup>24</sup>

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<sup>21</sup> Markus Salzmann, ‘Austrian government ties welfare payments to German language skills’, WSW, 3 May 2019, available at <https://www.wsws.org/en/articles/2019/05/03/aust-m03.html> (last accessed 12 February 2020).

<sup>22</sup> Georg Renner, ‘Mindestsicherungs-Reform: Neue Sozialhilfe kostet noch mehr als bisher’, Kleine Zeitung, 14 March 2019; for the experts’ statements at the public hearing in the Labour and Social Affairs Committee of the Austrian National Council, see the parliamentary correspondence PK Nr. 406, 15 April 2019; for the estimated costs of the reform, see the parliamentary correspondence PK Nr. 268, 15 March 2019 and the impact assessment of the government bill RV 514 BlgNR 26. GP - Vorblatt und WFA Art. I + II and RV 514 BlgNR XXVI. GP - Vorblatt und WFA Art. III. (parliamentary documents and bills can be found at <https://www.parlament.gv.at/>).

<sup>23</sup> See the explanatory remarks on the government bill RV 514 BlgNR 26. GP, p. 1 and the Report of the Labour and Social Affairs Committee on the government bill RV 514 AB 588 BlgNR 26. GP, pp. 1-2; see also the press statement by the Secretary General of the Austrian People’s Party: Die Neue Volkspartei, ‘Nehammer in HOHES HAUS: „Wollen Motivation schaffen, so rasch wie möglich wieder zu arbeiten“’, OTS0031 5 II 0294 NVP0001 CI, 28 April 2019, available (in German) at [https://www.ots.at/presseaussendung/OTS\\_20190428\\_OTS0031/nehammer-in-hohes-haus-wollen-motivation-schaffen-so-rasch-wie-moeglich-wieder-zu-arbeiten](https://www.ots.at/presseaussendung/OTS_20190428_OTS0031/nehammer-in-hohes-haus-wollen-motivation-schaffen-so-rasch-wie-moeglich-wieder-zu-arbeiten) (last accessed 22 October 2019); Benjamin Bathke, ‘Austria passes welfare reform that spells cuts for foreigners’, Infomigrants, 29 April 2019, available at <https://www.infomigrants.net/en/post/16559/austria-passes-welfare-reform-that-spells-cuts-for-foreigners> (last accessed 12 February 2020).

<sup>24</sup> Meanwhile, in a decision of 12 December 2019 (G 164/2019, G 171/2019), the Constitutional Court repealed central provisions of the law: The declining scale of child benefits discriminated against large families and did not guarantee the subsistence of the concerned children; and language skills on such a high level were obviously not necessary for the employability of foreigners. See Franz Merli, ‘Zweck verfehlt’ (2020) at <https://verfassungsblog.de/zweck-verfehlt/> (last accessed 7 February 2020).



The third set of examples includes consecutive bans of face covering in public<sup>25</sup> and head scarfs first in kindergarten,<sup>26</sup> then in elementary school<sup>27</sup> and finally in secondary school.<sup>28</sup> From a legal point of view, these are hard cases because they claim to protect gender equality and the freedom of religion while restricting the rights of Muslims and women; it is not easy to entangle goals and effects or good reasons and pretexts and to assess proportionality questions in a confusing variety of social settings. The expressive function of the respective regulations is quite clear, though: They require assimilation and a symbolic submission to the majority culture.

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<sup>25</sup> Bundesgesetz über das Verbot der Verhüllung des Gesichts in der Öffentlichkeit 2017 (Anti-Gesichtsverhüllungsgesetz - AGesVG) (Federal Act on the Prohibition of Face Covering in Public), Austrian Federal OJ I 2017/68. See Elisabeth Holzleithner, 'Zum Verbot der Gesichtsverhüllung in Österreich - eine rechtliche Farce' (2018) 27 *Femina politica* 127-133; Elisabeth Holzleithner and Ines Rössl, 'Ein Trojanisches Pferd. Zur Instrumentalisierung von Frauenpolitik in der Integrationsdebatte', in Blaustrumpf ahoi! (ed.), „*Sie meinen es politisch!*“ 100 Jahre Frauenwahlrecht in Österreich: Geschlechterdemokratie als gesellschaftspolitische Herausforderung (Löcker: Wien, 2019) 361-79, pp. 371-6.

<sup>26</sup> Francois Murphy and Alexandra Schwarz-Goerlich, 'Austria's government aims to ban headscarves in kindergarten', Richard Balmforth (ed.), Reuters, 4 April 2018 available at <https://www.reuters.com/article/us-austria-politics-headscarves/austrias-government-aims-to-ban-headscarves-in-kindergarten-idUSKCN1HBI0Y> (last accessed 12 February 2020); Art. 3(1) Vereinbarung gemäß Art. 15a B-VG zwischen dem Bund und den Ländern über die Elementarpädagogik für die Kindergartenjahre 2018/19 bis 2021/22 (Agreement between the Federal Government and the Provincial Governments, Pursuant to Art. 15a [Federal Constitutional Law](#), on Elementary Pedagogy for the kindergarten years 2018/19 through 2021/22) Austrian Federal OJ I 2018/103. As legislation on kindergartens is a matter of the "Länder" under the constitution, the Federation had to resort to an agreement with the *Länder* which linked federal financial aid with a headscarf ban of the *Länder*.

<sup>27</sup> § 43a(1) Bundesgesetz über die Ordnung von Unterricht und Erziehung in den im Schulorganisationsgesetz geregelten Schulen 1986 (Schulunterrichtsgesetz - SchUG) (School Education Act), Austrian Federal OJ 1986/472 as last amended by Austrian Federal OJ I 2019/54; see also Philip Oltermann and agencies, 'Austria approves headscarf ban in primary schools', The Guardian, 16 May 2019, available at <https://www.theguardian.com/world/2019/may/16/austria-approves-headscarf-ban-in-primary-schools> (last accessed 12 February 2020); Norbert Mappes-Niediek, 'My Europe: A culture war in Austrian classrooms', DW, 18 May 2019, available at <https://www.dw.com/en/my-europe-a-culture-war-in-austrian-classrooms/a-48786170> (last accessed 12 February 2020).

<sup>28</sup> Parliamentary Motion to amend SchUG 1986, IA 1023/A 26. GP; see also the press release of the Freedom Party of Austria: Freiheitlicher Parlamentsklub, 'FPÖ bringt Antrag für erweitertes Kopftuch-Verbot in Schulen ein', OTS0099 5 II 0414 FPK0002, 19 September 2019, available (in German) at [https://www.ots.at/presseaussendung/OTS\\_20190919\\_OTS0099/fpoe-bringt-antrag-fuer-erweitertes-kopftuch-verbot-in-schulen-ein](https://www.ots.at/presseaussendung/OTS_20190919_OTS0099/fpoe-bringt-antrag-fuer-erweitertes-kopftuch-verbot-in-schulen-ein) (last accessed 22 October 2019); Askin Kiyagan, 'Austria mulls to expand headscarf ban in schools', Anadolu Agency, 10 September 2018, available at <https://www.aa.com.tr/en/europe/austria-mulls-to-expand-headscarf-ban-in-schools/1251424> (last accessed 12 February 2020).

Instead of giving more Austrian examples<sup>29</sup> let us continue with some general observations which might apply to other countries, too.

#### IV. Expressive use of migration law: Some characteristics

As mentioned, an expressive use is not unique to migration law. In migration law, we can find special characteristics of the expressive function, though.

- Migration law deals with difficult, highly controversial, and emotional questions, which make people long for moral simplification rather than for legal sophistication. Therefore, an expressive use meets a higher demand in migration law than in other, more technical areas of law-making.

- Migration law's operative content is decided to a large degree on the European level.<sup>30</sup> National law-making is, therefore, often reduced to implementation - or, politically more promising, it can be used to serve expressive needs culminating in overt non-compliance. In this way, the expressive use of the law compensates for its operative weakness.

- Usually, the law addresses the same people both in its operative and expressive functions. Constitutional equality proclamations or sexual harassment rules, e.g., are designed to regulate the behaviour and to influence the values and attitudes of the same public. In other instances, the two functions part: a provision of criminal law may concern just a small group of perpetrators while demonstrating toughness on crime to all voters. In migration law, too, the addressees of the two functions are often not identical.<sup>31</sup> While its operative function is directed at migrants, its expressive function addresses the longstanding residents of the country; or at least those who came earlier: migration law for non-migrants, as shown above.

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<sup>29</sup> For regulations conveying the message that foreigners are potential free-riders, possible tricksters, unreliable, suspicious and dangerous, see e.g., the papers of Julia Reisinger, Reinhard Klaushofer and Lamiss Khakzadeh-Leiler, in Franz Merli and Magdalena Pöschl (eds.), *Das Asylrecht als Experimentierfeld* (Vienna: Manz, 2018) pp. 129-46, 147-73, 175-187.

<sup>30</sup> See Arts. 77-80 of the Treaty on the Functioning of the European Union; for details, see Kay Hailbronner and Daniel Thym (eds.), *EU Immigration and Asylum Law. A Commentary*, 2nd edn. (München: C.H. Beck/Hart/Nomos, 2016).

<sup>31</sup> Cf. Mike Slaven and Christina Boswell 'Why symbolise control? Irregular migration to the UK and symbolic policy-making in the 1960s' (2019) 45 *Journal of Ethnic and Migration Studies* 1477-1495, p. 1479.

- Legal theory often describes the expressive function of the law as a primarily progressive and educational endeavour.<sup>32</sup> Antidiscrimination law is a standard example because of its aim to change social norms, to help people overcome their prejudices and to explicitly recognize minority ways of life. We should not forget, however, that it was precisely discriminatory law that raised our awareness for the expressive dimension of legal instruments.<sup>33</sup> Migration law reminds us that expressive functions can be used with bad intentions as well: e.g., as we have seen, to reject, devaluate and submit foreigners and to symbolically reaffirm the dominance of the resident population – a somewhat sobering finding.

- Finally, migrants have no right to vote.<sup>34</sup> Therefore, expressive law at their expense is more likely to go democratically unpunished.

For all these reasons, migration law is a fertile ground for an expressive use, in Austria and elsewhere,<sup>35</sup> and we should not be surprised by an expressive focus of migration law.

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<sup>32</sup> E.g. Sunstein, 'On the Expressive Function of Law'; Wibren Van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31-59; Citron, 'Law's Expressive Value in Combating Cyber Gender Harassment'.

<sup>33</sup> The discussion evolved around the stigmatizing effect of the law; for an overview, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996), pp. 57-76; Matthew D. Adler, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 *University of Pennsylvania Law Review* 1363-1501, pp. 1370-2, 1386, 1428-38. See also the example of early smoking regulation as a tool to support male dominance: Lessig, 'The Regulation of Social Meaning', pp. 1025-7. For a theoretical account of positive and negative symbolic legislation see Bart van Klink, 'Symbolic Legislation: An Essentially Political Concept', in Bart van Klink, Britta van Beers and Lonke Poort (eds.), *Symbolic Legislation Theory and Developments in Biolaw* (Springer: Cham, 2016) pp. 19-35.

<sup>34</sup> In Austria, only Austrians citizens have the right to vote in regional and national elections. Naturalisation usually requires, i.a., 10 years legal and continuous residence in Austria.

<sup>35</sup> Cf. for Austria: Reinhold Jawhari, '„Gastarbeiterproblem“, „Ausländer-raus-Gesetz“ und „Überfremdungsbescheid“' (2001) 41 *Der Donauraum* 118-127; Magdalena Pöschl, 'Integrationsvereinbarung alt und neu' (2006) 4 *migraLex* 42-54; Julia Mourão Permoser, 'Civic Integration as Symbolic Politics: Insights from Austria' (2012) 14 *European Journal of Migration and Law* 173-198; for the Netherlands: C.A. Groenendijk, 'Vom Ausländer zum Mitbürger: Die symbolische und faktische Bedeutung des Wahlrechts für ausländische Immigranten' (1987) 7 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 21-25; for the UK: Slaven and Boswell, 'Why symbolise control? Irregular migration to the UK and symbolic policy-making in the 1960s'; for the U.S.A.: Marie Gilot, *Believe the Hype: The Symbolic Tendencies of Immigration Legislation in the United States 1980-2005* (Thesis, The University of Texas at El Paso, 2007); Pratheepan Gulasekaram, 'Why a Wall?' (2012) 2 *University of California Irvine Law Review* 147-192; Emily Ryo, 'On Operative Effects of Immigration Law' (2017), 13 *Stanford Journal of Civil Rights and Civil Liberties* 95-133.

## V. Instead of a conclusion: Some questions about expressive harm and insincere legislation

Let me conclude with some lawyerly questions.

The first question would be whether the expressive function is relevant for legal analysis.

Two reasons speak in favour of an affirmative answer. First, although a certain expressive effect seems to be an unavoidable by-product of any regulation, a given law may express more than is automatically conveyed with its operative content. This is most easily seen if we imagine a “People from Shitholes Act”<sup>36</sup> or an “Islamic Terrorism Act”<sup>37</sup>. Such laws convey a message that does not depend on their operative content.<sup>38</sup> If the expressive effect can thus be a separate and distinct feature of a given law it cannot always be controlled by dealing with its operative content alone.

Second, it seems plausible that expressive harms can constitute legal injuries. This depends on the scope and content of rights which may be infringed by the expression. Art. 8 ECHR on the protection of private life may provide such a right,<sup>39</sup> and the

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<sup>36</sup> Cf. Josh Dawsey, ‘Trump derides protections for immigrants from “shithole” countries’, *The Washington Post*, 12 January 2018, available at [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) (last accessed 5 September 2020).

<sup>37</sup> Propaganda titles of statutes are very common: See, e.g., the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act” of 2001 (<https://www.govinfo.gov/content/pkg/STATUTE-115/pdf/STATUTE-115-Pg272.pdf#page=1>), the “Defense of Marriage Act” (<https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg2419.pdf#page=1>), the (German) “Gesetz zur zielgenauen Stärkung von Familien und ihren Kindern durch die Neugestaltung des Kinderzuschlags und die Verbesserung der Leistungen für Bildung und Teilhabe (Starke-Familien-Gesetz-StaFamG)”, or the (Austrian) “Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG)” (<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555>) and, in some sense, also the “Integrationsgesetz” (<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009891>); not to compare, of course, to the infamous Nazi-“Gesetz zur Wiederherstellung des Berufsbeamtentums” (Law for the Restoration of the Professional Civil Service) <http://alex.onb.ac.at/cgi-content/alex?aid=dra&datum=1933&page=300&size=45>.

<sup>38</sup> Cf. Anderson and Pildes, ‘Expressive Theories of the Law’, pp. 1527-47; Van der Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’, p. 45.

<sup>39</sup> See European Court of Human Rights (ECHR) (Grand Chamber), *Aksu v. Turkey* (Application nos. [4149/04](#) and [41029/04](#)), Judgment of 15 March 2012, § 58: “In particular, any negative

Austrian provisions of the constitution on equality before the law not only prohibit discrimination but also include, at least in an academic reconstruction of the jurisprudence of the Constitutional Court, a (non-comparative) right of all persons to basic respect by the government.<sup>40</sup> A good example was the “separate-but-equal” distinction of marriage for opposite-sex couples and registered partnerships for same-sex couples under Austrian law: The Constitutional Court found this to be an untenable discrimination of same-sex couples even if the rights and duties in both institutions were almost the same.<sup>41</sup> Similarly, the Court repealed the duty to register the sex as either male or female in official documents as a violation of the right to privacy under Art. 8 of the European Convention of Human Rights, because it ignored the self-determination of persons with an alternative sexual identity.<sup>42</sup> So purely expressive harm can be illegal, too.

The second question would be as to how can we take account of the expressive dimension, e.g. in judicial review, if it really matters.

Here, we probably can distinguish between two situations. In some cases, we can attribute the expressive harm to a separate part of the law which can be revoked by a court: e.g. its title; the humiliating conditions on which it offers a benefit to a certain group; a discriminating distinction as such.<sup>43</sup> In many cases, however, the expressive harm will be entrenched in the core operative content of the law. Here, the operative part may be unconstitutional irrespective of expressive effects. But in some instances, the expressive harm might make an arguably useful legal distinction between groups of people to a prohibited discrimination; or a well-reasoned restriction of a freedom to an excessive interference.

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stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.” See also ECHR 15 October 2019, *Lewit v. Austria*, application no. [4782/18](#), § 46.

<sup>40</sup> Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Wien – New York: Springer, 2008), pp. 162 f, 170, 190, 269 ff, 461 f, 499 ff, 881 ff, 886; Michael Holoubek, ‘Art 7/1 S 1, 2 B-VG’, in Karl Korinek and Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, loose-leaf edition 14th installment (Wien: Verlag Österreich, 2018), paras. 59 et seq.

<sup>41</sup> (Austrian) VfGH 4 December 2017, G 258/2017 ua.

<sup>42</sup> (Austrian) VfGH 15 June 2018, G 77/2018. See Elisabeth Holzleithner, ‘Geschlecht als Anerkennungsverhältnis’, in Susanne Baer et al. (eds.), *Jahrbuch des Öffentliches Rechts der Gegenwart*, vol. 67 (Tübingen: Mohr Siebeck, 2019) 457-85.

<sup>43</sup> Striking down a mere title of a law is not self-evident, though, at least in cases, in which the constitutionality review is limited to those provisions of a law that were *applied* in the respective case before another court.

A final question would be as to how we should deal with legislative pretexts.

History abounds in laws that proclaim to serve an honourable purpose while actually pursuing less respectable goals. In particular, laws expressing the inferiority of certain people are often veiled by an elaborate reasoning – a kind of deception<sup>44</sup> often inflicted with the tacit consent of the deceived.

At first glance courts have developed four techniques to handle such situations: a court can take the official reasoning seriously and revoke the norms because they do not serve the official purpose or are not necessary to achieve it.<sup>45</sup> A court may take the pretext as a starting point and annul the norms because they lack coherence against the backdrop of the pretended purpose. In this context, the suitability test is much stricter; if the law fails it, this might hint at another hidden motive.<sup>46</sup> A court can reveal the “real” purpose and repeal the law for its prohibited motivation. Although finding true reasons is an inconvenient exercise for judges, there are more than just a few cases of this kind decided by various courts.<sup>47</sup> Finally, in Germany, a

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<sup>44</sup> See Lessig, ‘The Regulation of Social Meaning’, p. 1042.

<sup>45</sup> See, e.g., the decision on the Austrian Constitutional Court cited in note 22; or its ruling VfGH 10 October 2005, G87/05 ua, V65/05, holding that the exclusion of same-sex partners from public health co-insurance could not be justified by the proclaimed aim of supporting families with children as the co-insurance of opposite-sex partners did not depend on children, either; or the decision of the German Constitutional Court (BVerfG), 6 July 2004, 1 BvL 4/97 et al. (accessible at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/07/1s20040706\\_1b\\_vl000497.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/07/1s20040706_1b_vl000497.html)), voiding a cut of benefits for children of foreign nationals because there were no grounds to assume that it would decrease incentives for immigration (the official reasoning), while it discriminated against foreigners lawfully residing in Germany.

<sup>46</sup> See, e.g., the European Court of Justice (ECJ) Judgment 6 November 2003, *Gambelli and Others*, C-243/01, ECLI:EU:C:2003:597, holding that while restrictions of gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, they must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner; and leaving it to the national court to determine whether such legislation actually serves the aims which might justify it.

<sup>47</sup> See, e.g., VfGH 23 June 1986, G 14/86, striking down a law which limited the number of taxi licenses allegedly in order to enhance traffic safety and consumer protection because the real purpose of the law was to protect the existing license holders from competition; or the ECHR (Grand Chamber), *A. and Others v. the United Kingdom*, Application no. 3455/05, Judgment of 19 February 2009, § 186, qualifying anti-terrorism legislation supposedly justified as immigration measures a violation of the Convention: “The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. [...] The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.” The ECJ Judgment 24 June 2019, *Commission v. Poland*, C-619/18,

court may consider a discrepancy between the reason for the law and its content as a violation of legislative “truthfulness”, a requirement derived from the rule of law-principle.<sup>48</sup>

At last in Austria, there are no recipes in our textbooks and methodological manuals to deal with an insincere legislator, institutionalized hypocrisy, legal populism and unfulfillable legal promises.<sup>49</sup> Maybe migration law can be a starting point for reflections to this effect. I am afraid it is time for it.

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ECLI:EU:C:2019:531, §§ 82-6, did not believe that the goal of the contested justice reform in Poland was standardizing the general retirement age, but supposed that in fact its aim might be to exclude a pre-determined group of judges of the Supreme Court. The majority of the Supreme Court of the U.S.A., 27 June 2019, *Department of Commerce et al. v. New York et al.*, 588 U.S., concluded that that the official rationale for adding a citizenship question to the census (to aid enforcement of the Voting Rights Act) was a pretext and therefore did not meet the reasoned explanation requirement of administrative law.

<sup>48</sup> E.g. BVerfG 19 March 2003, 2 BvL 9/98 and others, E 108, 1. See Stephan Meyer, ‘Die Verfassungswidrigkeit symbolischer und ungeeigneter Gesetze. Die Normenwahrheit - ein neuer Verfassungsrechtsbegriff und dessen Folgen für ein altes Problem’ (2009) 48 *Der Staat* 278-303, pp. 294-302; Angelika Siehr, ‘Symbolic Legislation under Judicial Control’, in Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds.), *Rational Lawmaking under Review. Legisprudence According to the German Constitutional Court* (Switzerland: Springer, 2016) 315-46.

<sup>49</sup> Cf. the observations of Clemens Jabloner, ‘Die “Zusinnung” an den Gesetzgeber: Interpretation oder Rechtsanwendung?’ (2018) 73 *Zeitschrift für Öffentliches Recht* 459-478, pp. 466-7.

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