Status, Accountability and Community after 9/11

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The terror attacks of 11 September 2001 and their aftermath hit Western societies at a time of sustained and – notwithstanding discrepancies between subjective perception and global distribution (IOM, OECD) – visible migration that took place (and is taking place) in an increasingly battered common asylum system. In the years since, different terror groups first announced in grainy camera footage, then professionally edited social media posts, that they would directly target civil societies and ushered so-called „lone wolves“ to action (on IS, for example, p. 22 f.). These groups were aided in achieving their goals by some of the tabloid media landscape, with the voyeuristic and sensational reporting of terror attacks fueling social division and thereby making recruitment easier. Even if the law processes social developments with some delay, and can thus filter out some things, the tone of the debate on migration has gained its own significance due to its intricate connection to social cohesion. From the perspective of public safety, however, to which politics is constitutionally committed, such announcements can only be fulfilled by people who are either already in the country or are entering it. In other words, beyond cyberterrorism, there is no possibility of carrying out a terrorist act without holding a legal status (toleration, protection status, residence status, citizenship, EU citizenship).

A „securitization“ of the debate is thus a systematically close possibility. It also is an internally rational act of the political system, which – admittedly in very different nuances – hardly any party can avoid. Migration and citizenship law are politically configurable matters, like all others. All terrorist threats affect the state’s duty to protect life, possibly state infrastructure and the sense of security in the public sphere. Picking up a connection to migration, in contrast to already existing domestic right-wing and left-wing extremism, can promise a quick reduction of external dangers in the political competition. Certainly, most people reject an equation of migration and terrorism as politically (and legally, para. 2 ff.) backwards. However, the image of migration being infiltrated by terrorism is effective. It is then no longer a question of whether there is a security debate about migration and status rights, but in which direction it is going.

The European asylum system may fail due to irreconcilable approaches of the member states, but it nevertheless drivers’ further divisions because it can be utilized as an ‘external’ problem ‘internally,’ for example in election campaigns. This is the only way to explain Michel Barnier’s proposal in the current French presidential election campaign to erect a ‚constitutional shield, against migration policy decisions by the ECJ and ECHR – even if not all migrants are „major terrorists or delinquents“ (stress: major; Brexit sarcasm: ‚Stop immigration, curb the European court but don’t call me a Frexiteer,). His response to the (calculated) outrage underlines the problem: „To avoid any unnecessary controversy and as I have

always said very precisely, my proposal for a ‚constitutional shield' **will only apply to migration policy**." (my emphasis; French original). What is interesting is not whether such ideas carry into the Élysée Palace (we shall see), but that the limitation of the statement to migration law appears to be uncontroversial. Why do presidential candidates have to defend themselves against migration **policy** decisions with constitutional shields if elected? As elected representatives, do they not play a decisive role in shaping it? Barnier does not represent an outlier in France, but only shows how the overarching climate can change in the worst case.

In the following, I would like to look at the development of status rights in Germany after 9/11. This can only be done via selected ‚highlights' that will project light and cast shadow. The focus will be on citizenship law. In contrast to large parts of the right of residence and refugee law, it is a status that is largely determined by German law and thus focuses the view more precisely on developments in a society. My conclusion will focus above all on the need for a distinction that we, as legal scholars, legal politicians and moral thinkers at the same time, should maintain when criticizing and justifying: A security policy ‚framing' of migration rights remains an assertion made by social actors who expect something from it for policy reasons. Providing multi-layered developments with a generalizing narrative releases a lot of critical potential through intensification but remains unavoidably selective. The effects of 9/11 are undoubtedly discernible, but there can be no talk of a „securitization" or instrumentalization of status rights law. In the Federal Republic of Germany, their design is not at the disposal of democratic majorities in order to show off defensiveness on the backs of individuals. It is integrated into a functioning basic and human rights framework, in which fundamental openings as well as restrictive regulation have taken place over the last twenty-odd years. This framework is just as much a part of the legitimate spectrum of a democratic state under the rule of law, which links the acquisition and loss of status to the individual's own responsible actions.

Ambivalences: Suspicious practice, legal openness and the role of law in the formation of personal autonomy

The immediate reactions to 9/11 quickly become visible in January 2002 in the form of the Counter-Terrorism Act. However, these early reactions mainly concern the extension of intelligence powers and changes in procedural and data protection law, also regarding the law on foreigners. An early, in my opinion, low point for the status rights can be found below the legal level, at the interface between political control and administrative practice. Between 2005 and 2008, for example, it was the administrative practice of the Land Baden-Württemberg to raise „general" doubts about the commitment of Muslim applicants for naturalization to the free democratic basic order, based on one survey (p. 121 ff.). In the period mentioned, the Länder themselves were also responsible for creating questions for the naturalization tests. Here, the wording was admittedly neutral. Nevertheless, test questions from Baden-Württemberg and Hesse have achieved global notoriety, for example in the Oxford Handbook of Comparative Constitutional Law (Shachar, p. 1014).

Those addressed were abundantly recognizable, such as samples from the 2005 Baden-Württemberg test („Imagine that your adult son comes to you and declares that he is a homosexual and would like to live with another man. How would you react?“) and the Hessian one of 2006 („A women should not be allowed to move freely in public or travel unless escorted by a close male relative. What is your standpoint on this?“). The framework of cognitive knowledge of the legal and social order was led into the moral realm, with standards being applied to applicants for naturalization that, would they be applied to the general population, surely would lead some natural born citizens to lose their citizenship (further examples: p. 2136 ff.). The Muslim immigration that took place until 2001 had apparently not triggered such considerations. The test questions soon became a matter for the federal government, are now exclusively cognitive-normative in orientation and generally have a pass rate of upwards of 97% (overview of the first year based on the test designed by the federal government: pp. 53 f.).

Developments after 9/11 can also be ascribed to circumstances that predate the attacks. The introduction of the ius soli in Section 4 (3) of the Basic Law (StAG) was, before and after the extensive relaxation of the option obligation (Section 29 (1a) of the Basic Law), even more regarded as a far-reaching and generous regulation, also in a legal comparison.[1)]Gerdes/Faist/Rieple, ‚We are All „Republican“ Now: The Politics of Dual Citizenship in Germany, in: Faist (ed.), Dual Citizenship in Europe, 2007, p. 45 (46): „one of the most far-reaching jus soli supplements in citi-zenship law on the European continent“; Langenfeld, Staatsbürgerschaft und Bürgerrecht – Doppelte Staatsangehörigkeit, in: Bröhmer (ed.), Europa und Welt, Kolloquium zu aktuellen europa-ölkerund menschenrechtlichen Themen.), Europe and the World, Colloquium on Current Issues in European, International and Human Law on the Occasion of the 80th Birthday of Prof. Dr. Dr. h.c. mult. Georg Ress, 2016, p. 153 (158): „also in comparison to numerous other states with an immigration tradition […] generous regulation of the acquisition of birth“. [translation] By requiring language skills and, later, knowledge of law and society in naturalization law, the legislature reacted to the realization that under the usual naturalization norms contained in the Aliens Act since 1990/93, sufficient integration through mere residence was not achieved (e.g. p. 18 f. here on section 86 Aliens Act). If the justification for the law is concerned with improving integration processes, included in the famous phrase „demand and promote“, this is to be taken seriously. Against this, blanket devaluations of democratic negotiation and legislative processes seem as unconvincing as positions which, through high naturalization hurdles, yearn for the functionalization of naturalization law as a danger prevention-instrument. Basically, the rejection of the ’no immigration country‘ paradigm triggered the realization that diverse immigration into an open society needs institutional and legal accompaniment. The legal structure needs to proceed in the abstract and address people from all over the world with their diverse backgrounds, from Eritrea to Singapore to the UK (especially after Brexit). With the Fourth Act Amending the Nationality Act, the legislature has only recently opted for further facilitations of naturalization (Art. 1 No. 5a and 6 lit. c and e Amending Act). Macro narratives such as de- and renationalization phases of citizenship (p. 859 ff.), under which the opening and closing phases of status rights of different states are summarized in the sense of uniform developmental movements, have always seemed to me to be

too blurred and, with the underpinning of events such as 9/11, must neglect different circumstances and complex backgrounds in the various societies affected differently by migration.

Limits to access and loss of status in the face of terror and extremism

When the legislator introduces regulations on the loss of status rights and/or exclusion, he enters a particularly sensitive field. Article 16 (1) of the Basic Law protects nationals (according to the prevailing view, absolutely) against deprivation and at the same time restricts possibilities of loss. Nothing happened here directly after 9/11. Instead, the possibilities for expulsion were expanded (today § 54 No. 2-5 AufenthG) and the Immigration Act entered dogmatically new territory with the deportation order inserted in § 58a AufenthG for the rapid termination of the residence of „top threats“ without expulsion and prior threat of deportation. Not only is the connection to 9/11 immediately recognizable, but it is also noteworthy that the norm remained practically meaningless[2)]Berlit, ZAR 2018, 89 (89 f.); Kluth, in ders./Heusch (Hrsg.), BeckOK AuslR, 30. Edition 1.7.2021, § 58a until 2017 due to various constitutional doubts, until cases of application triggered decisions in Leipzig and Karlsruhe that declared the norm to be materially constitutional (on the BVerfG, marginal no. 35 ff.). In this respect, residence statuses have unquestionably experienced increasing discussion within a securitization debate. And when, for example, the evaluation of mobile phones in the asylum procedure to establish identity and nationality, systematically an exceptional provision (section 15a (1) Asylum Act), becomes practically a standard measure, the impression of a security check instead of a procedure to examine individual need for protection intensifies. On the other hand, the interest expressed in the norm to know for whom the procedure is being conducted (whether people are travelling without papers deliberately or through no fault of their own) cannot be considered illegitimate – if only to dispel myths of loss of control and infiltration. The central problem here, as so often in migration and nationality law, is whether the *application* of the norm is unconstitutional or not.[3)]On the dilemma Bergmann, in ders./Dienelt (eds.), Ausländerrecht, 13th ed. 2020, § 15a AsylG Rn. 5.

In citizenship law, loss and exclusion cases related to terrorism and extremism have only been encountered at a late stage. These are not only reactions to the aftermath of 9/11, but also reactions to developments within society. These include, for example, the exclusion from naturalization in the event of a conviction for an unlawful anti-Semitic, racist, xenophobic or other act of contempt for humanity in § 12a para. 1 sentence 2 StAG, which came into force at the end of August 2021. In the background, there have been increasing numbers of cases and visible anti-Semitic demonstrations and attacks for years (p. 17 aE f.; p. 19). Particularly with regard to anti-Semitism, there are problems in recording its exact social distribution (differentiated here and in detail here), in order to be able to target long-term solutions more precisely through socio-political and educational policy measures. However small the number of cases may be, it is not inconceivable to draw a line of

access to clearly convicted anti-Semites, racists and similar perpetrators. Besides that, legislation also communicates symbolically.

This last aspect also predominates the insertion of the loss of status due to concrete participation in combat activities of terrorist organizations according to section 28 (1) no. 2 StAG in August 2019. The discrepancy between the practical relevance to date (zero cases of application) and the emotional legal-political debate about the permissibility of the norm, also on this blog (not conclusive: Gärditz/Wallrabenstein, Thym), shows something positive in my opinion: The dispute about the boundaries of the political community has a common legal place, beyond more relevant group affiliations and individual self-understandings. I have explained several times that I consider the norm to be a regulation that conforms to the constitution, because it is linked in a non-discriminatory way to behavior that is indisputably serious and reasonably avoidable according to the known, but also deliberately open standards of the Federal Constitutional Court. In the end, objections based on fundamental rights, Union and/or international law do not prevail over the narrow requirements,[4)]From a dogmatic and legal-political point of view, Weber, ZAR 2019, 209 et seq.; currently ders, in Kluth/Heusch (eds.), BeckOK AuslR, 30th edition 1.7.2021, § 28 StAG Rn. 24 et seq. even in a legal comparison.[5)]More detailed Weber/Hailbronner, in: Hailbronner/Kau/Gnatzy/Weber, Staatsangehörigkeitsrecht, 7th edition 2021, Grundlagen G. Rn. 449 et seq. Of course, this is also seen differently (e.g. Walter/Nedelcu; again Wallrabenstein, whose department in the Second Senate of the Federal Constitutional Court is responsible for citizenship law) and makes the analysis of a norm that has so far been insignificant for practice nonetheless intriguing.

Instead of instrumentalization: linking to (informed) decisions of individuals for and against status

The dispute over regulations in this area, the volume of social disputes and xenophobic tones from very different corners provide a decaying image of a harmonious idea of integration. However, beyond the xenophobic outbursts, a more convincing thesis is that the volume of social debate increases, not decreases, as a result of successful integration, and that different perspectives clash over what unites and what should unite. Recently, the number of naturalizations has fallen overall (also due to the decline of the Brexit application wave and the pandemic), but has risen, for example, among Syrian applicants. The Expert Commission on Integration Ability found that the reason why many people do not apply for naturalization is not always because the barriers are too high, but because of insufficient information. It therefore proposes a better communicated culture of naturalization.[6)]Fachkommission Integrationsfähigkeit, Gemeinsam die Einwanderungsgesellschaft gestalten, 2020, p. 148; previously Weber, Staatsangehörigkeit und Status, 2018, p. 481; Baum/Kuhle, Plädoyer für eine neue Einbürge-rungskultur, Welt v. 11.8.2018, online. This brings us back to talking about status rights. The (next) federal government can support this encouraging trend if it points out the advantages of naturalization more visibly. The rule of law and

constitutional jurisdiction function (here) and are accompanied by a strong debate on legal policy. An instrumentalization and one-sided „securitization“ of status rights in Germany after 9/11 is, in my impression, not discernible, unless one wants to consider every link to individual behavior as instrumentalization. That is possible, of course. However, having to take responsibility for the consequences of one’s own actions cannot be sold as instrumentalization in a constitutional order that places the individual in its center. It would be an instrumental turn on accountability. But the Basic Law is built on this just as much as on fundamental and human rights.

Bei diesem Text handelt es sich um eine Übersetzung des Beitrags, Status, Verantwortung und Gemeinschaft nach 9/11, durch Michael Borgers.

References

- Gerdes/Faist/Rieple, ‚We are All „Republican“ Now: The Politics of Dual Citizenship in Germany, in: Faist (ed.), Dual Citizenship in Europe, 2007, p. 45 (46): „one of the most far-reaching jus soli supplements in citi-zenship law on the European continent“; Langenfeld, Staatsbürgerschaft und Bürgerrecht – Doppelte Staatsangehörigkeit, in: Bröhmer (ed.), Europa und Welt, Kolloquium zu aktuellen europa-ölkerund menschenrechtlichen Themen.), Europe and the World, Colloquium on Current Issues in European, International and Human Law on the Occasion of the 80th Birthday of Prof. Dr. Dr. h.c. mult. Georg Ress, 2016, p. 153 (158): „also in comparison to numerous other states with an immigration tradition […] generous regulation of the acquisition of birth“. [translation]
- Berlit, ZAR 2018, 89 (89 f.); Kluth, in ders./Heusch (Hrsg.), BeckOK AuslR, 30. Edition 1.7.2021, § 58a
- On the dilemma Bergmann, in ders./Dienelt (eds.), Ausländerrecht, 13th ed. 2020, § 15a AsylG Rn. 5.
- From a dogmatic and legal-political point of view, Weber, ZAR 2019, 209 et seq.; currently ders, in Kluth/Heusch (eds.), BeckOK AuslR, 30th edition 1.7.2021, § 28 StAG Rn. 24 et seq.
- More detailed Weber/Hailbronner, in: Hailbronner/Kau/Gnatzy/Weber, Staatsangehörigkeitsrecht, 7th edition 2021, Grundlagen G. Rn. 449 et seq.
- Fachkommission Integrationsfähigkeit, Gemeinsam die Einwanderungsgesellschaft gestalten, 2020, p. 148; previously Weber, Staatsangehörigkeit und Status, 2018, p. 481; Baum/Kuhle, Plädoyer für eine neue Einbürge-rungskultur, Welt v. 11.8.2018, online.
