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Migration, Asyl & Staatsbürgerschaft

9// *20 Jahre später*

Verfassungsbooks
ON MATTERS CONSTITUTIONAL

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Migration, Asyl und Staatsbürgerschaft

9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche

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Vorwort

Der 11. September 2001 markiert für viele Menschen den Beginn eines Generalverdachtes: Seit den Anschlägen vor 20 Jahren werden die Themen Migration, Asyl und Staatsbürgerschaft vor allem unter dem Aspekt der inneren und äußeren Sicherheit diskutiert. Die Folgen dieser Diskursverschiebung umspannen den ganzen Globus und durchziehen die gesamte Zeitspanne seit 9/11. Die 13 Beiträge dieses Bandes kartographieren diese Folgen in ihren inter- und transnationalen Bezügen und Dimensionen: Sie fokussieren auf Grenzen und ihre Überschreitung, auf Zugehörigkeit und ihre Instrumentalisierung, auf Schutzbedürftigkeit und ihr Wahrgenommenwerden als Gefahr.

Viele der Beiträge wurden während der Flüchtlingskrise nach dem Fall Kabuls im Sommer 2021 verfasst, die wie kaum ein zweites Ereignis deutlich gemacht hat, welch fatale Auswirkungen die Verknüpfung von Migration und Terrorismus für das Schicksal gerade derjenigen Menschen hat, die die Anti-Terror-Politik des Westens am unmittelbarsten und härtesten trifft. Dieses Vorwort dagegen entsteht einige Wochen nach Putins Einfall in der Ukraine, der im Kontext Migation, Asyl und Staatsbürgerschaft in kürzester Zeit Unmögliches möglich gemacht hat. Ob er das Ende der Epoche

markiert, die mit 9/11 begonnen hat, ist noch zu früh zu sagen. Eine Zäsur ist er so oder so.

Dieser Band mit 13 Beiträgen ist nach dem Band „9/11 und das Völkerrecht“ der zweite in einer Reihe von sieben Bänden. Diese Buchreihe ist aus zwei Projekten des Verfassungsblogs hervorgegangen: Gefördert von der Bundeszentrale für Politische Bildung konnten wir im Rahmen des Projekts *9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche* sieben Blog-Symposien realisieren. Unser vom Bundesministerium für Bildung und Forschung gefördertes Projekts *Offener Zugang zu Öffentlichem Recht* hat uns ermöglicht, aus diesen Symposium Bücher zu machen. Dabei wollen wir den digitalen Ursprung dieses Buches nicht leugnen: mit dem QR-Code auf der rechten Seite gelangen Leser:innen direkt zum Blog-Symposium, und über die einzelnen QR-Codes, die den Beiträgen vorangestellt sind, zu den einzelnen Texten – eine Idee, die wir uns bei den Kolleg:innen vom Theorieblog abgeguckt haben. Über diesen kleinen Umweg lassen sich die Quellen nachvollziehen, die in der Printversion an den ursprünglich verlinkten Stellen grau gehalten sind.

Marlene Straub

Inhalt

Ferdinand Weber

Status, Verantwortung und Gemeinschaft nach 9/11

Die Terrorakte vom 11. September 2001 und ihre Folgeerscheinungen trafen westliche Gesellschaften in einer Zeit anhaltender und – ungeachtet Diskrepanzen zwischen subjektiver Wahrnehmung und globaler Verteilung (IOM, OECD) – sichtbarer Migration, die in einem immer angeschlagenerem gemeinsamen Asylsystem stattfand (und -findet). In den seither vergangenen Jahren kündigten wechselnde Gruppen erst in körnigen Kameraaufnahmen, dann professionell bearbeiteten Social Media-Beiträgen an, terroristische Kämpfe in offene Gesellschaften zu tragen und riefen „einsame Wölfe" unmittelbar zum Handeln auf (zum IS etwa S. 22 f.). Das Ziel der subkutanen Präsenz, das tägliche Leben in freien Gesellschaften unsicher zu machen und das Freiheitsgefühl einzuschränken, fand in boulevardesken Überzeichnungen auf manche Tat begriffliche Vollzugshilfe für dieses gesellschaftliche Spaltungsprogramm. Auch wenn Recht gesellschaftliche Prozesse verzögert verarbeitet und dadurch manches herausfiltern kann, hat der Debattenton über Migration und Statusrechte eine eigene Bedeutung, weil in ihm auch gesellschaftlicher Zusammenhalt verhandelt wird. Aus der Perspektive öffentlicher Sicherheit aber, der Politik verfassungsrechtlich verpflichtet ist, können solche Ankündigungen nur von Personen erfüllt werden, die sich entweder schon im Land aufhalten oder hierzu einreisen. Es gibt mit anderen Worten jenseits von Cyberterrorismus keine Möglichkeit, einen terroristischen

Akt auszuführen, ohne einen rechtlichen Status (Duldung, Schutzstatus, Aufenthaltsstatus, Staatsangehörigkeit, Unionsbürgerschaft) innezuhaben.
Eine „Versicherheitlichung" der Debatte kündigt sich damit fast systemisch an. Sie ist in demokratischen Staaten auch eine binnenrationale Handlung des politischen Systems, der sich – freilich in sehr unterschiedlichen Nuancen – kaum eine Partei entziehen kann. Migrations- und Staatsangehörigkeitsrecht sind politisch gestaltbare Materien, wie alle anderen. Alle terroristischen Bedrohungen berühren die staatliche Schutzpflicht für das Leben, möglicherweise staatliche Infrastruktur und das Sicherheitsgefühl im öffentlichen Raum. Gerade eine Verbindung zu Migration aufzugreifen kann im Gegensatz zum schon heimischen rechten und linken Binnenextremismus die schnelle Reduktion externer Gefahren im politischen Wettbewerb versprechen. Sicher verwerfen die Meisten eine Gleichsetzung von Migration und Terrorismus als politisch (und rechtlich, Rn. 2 ff.) zurückgeblieben. Das Bild einer Unterwanderung von Migration *durch* Terrorismus aber wirkt. Es geht dann nicht mehr darum, ob eine Sicherheitsdebatte über Migration und Statusrechte läuft, sondern in welche Richtung sie läuft.

Das europäische Asylsystem scheitert zwar an unversöhnlichen Grundvorstellungen der Mitgliedstaaten, schafft aber trotzdem eine weitere Flanke, weil es innerstaatlich, etwa im Wahlkampf, als externes Problem

markiert werden kann. Nur so lässt sich Michel Barniers Vorschlag im laufenden französischen Präsidentschaftswahlkampf erklären, ein „constitutional shield" gegen migrationspolitische Entscheidungen von EuGH und EGMR zu errichten – auch wenn nicht alle Migranten „major terrorists or delinquents" seien (betone: major; Brexit-Sarkasmus: „Stop immigration, curb the European court but don't call me a Frexiteer"). Seine Erwiderung auf die (kalkulierte) Empörung unterstreicht das 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*" (Hervorhebung von mir; frz. Orig.). Interessant ist nicht, ob solche Ideen in den Élysée-Palast tragen (das werden wir sehen), sondern dass die Begrenzung der Aussage auf das Migrationsrecht als unkontrovers erscheint. Warum müssen sich Präsidentschaftskandidaten für den Fall ihrer Wahl mit verfassungsrechtlichen Schutzschildern gegen Entschei-dungen der migration policy wehren? Gestalten sie die als gewählte Repräsentanten nicht maßgeblich mit? Barnier steht in Frankreich nicht für einen Ausreißer, sondern zeigt nur, wie sich das übergreifende Klima im schlechtesten Fall verändern kann.

Ich möchte im Folgenden einen Blick auf die Entwicklung der Statusrechte in Deutschland nach 9/11 richten. Das kann nur über ausgesuchte „Schlaglichter" gesche-

hen, die Licht und Schatten zeigen werden. Der Schwerpunkt wird auf dem Staatsangehörigkeitsrecht liegen. Im Gegensatz zu weiten Teilen des Aufenthalts- und Flüchtlingsrechts ist es ein maßgeblich vom deutschen Recht bestimmter Status und konzentriert den Blick so genauer auf die Entwicklungen in einer Gesellschaft. Mein Ergebnis wird vor allem auf die Notwendigkeit einer Unterscheidung hinauslaufen, die wir uns als rechtswissenschaftlich, rechtspolitisch und moralisch gleichzeitig denkende Wesen beim Kritisieren und Begründen erhalten sollten: Ein sicherheitspolitisches „Framing" von Statusrechten bleibt eine Zuschreibung durch soziale Akteure, die sich hiervon aus unterschiedlichen Gründen etwas versprechen. Vielschichtige Entwicklungen mit einem generalisierenden Narrativ zu versehen, setzt durch Zuspitzung viel kritisches Potenzial frei, bleibt aber unvermeidbar selektiv. Auswirkungen von 9/11 sind fraglos auszumachen, von einer „Versicherheitlichung" oder Instrumentalisierung der Statusrechte kann aber keine Rede sein. Ihre Gestaltung steht in der Bundesrepublik nicht zur Disposition demokratischer Mehrheiten, um auf dem Rücken Einzelner Wehrhaftigkeit zur Schau zu stellen. Sie ist in einen funktionierenden Grund- und Menschenrechtsrahmen eingebunden, in dem die letzten zwanzig Jahre gleichermaßen grundlegende Öffnungen wie restriktive Regelungen erfolgten. Letztere gehören nur ebenso zum legitimen Gestaltungsspektrum eines demokratischen

Rechtsstaats, der Statuserwerb und -verlust an eigenverantwortliche Handlungen der Einzelnen anknüpft.

Ambivalenzen: Verdächtige Praxis, gesetzliche Öffnung und die Rolle des Rechts für die Ausbildung personaler Autonomie

Die unmittelbaren Reaktionen auf 9/11 werden im Januar 2002 schnell im Terrorismusbekämpfungsgesetz sichtbar. Sie betreffen aber vor allem die Ausdehnung geheimdienstlicher Befugnisse und verfahrens- sowie datenschutzrechtlicher Änderungen, auch im Ausländerrecht. Ein früher, meines Erachtens status-rechtlicher Tiefpunkt findet sich unterhalb der gesetzlichen Ebene, an der Schnittstelle zwischen politischer Steuerung und Verwaltungspraxis. Zwischen 2005 und 2008 wurden etwa in der baden-württembergischen Verwaltungspraxis bei muslimischen Einbürgerungsbewerbern „generell" Zweifel am Bekenntnis zur freiheitlich demokratischen Grundordnung – auf der Grundlage einer Umfrage – angemeldet (S. 121 ff.). Im genannten Zeitraum waren die Länder zudem selbst für die Erstellung von Fragen für die Einbürgerungstests zuständig. Hier wurde zwar neutral formuliert. Dennoch haben es Testfragen aus Baden-Württemberg und Hessen zu globaler Bekanntheit gebracht, etwa im *Oxford Handbook of Comparative Constitutional Law* (Shachar, S. 1014). Die Angesprochenen waren überdeutlich erkennbar, wie

Proben aus dem baden-württembergischen Test von 2005 („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?“) und dem hessischen des Jahres 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?“) zeigen. Der Rahmen kognitiver Kenntnisse der Rechts- und Gesellschaftsordnung wurde ins Moralische verlassen, mit Maßstäben, die auch zum Verlust einiger „Autochtoner“ führen würde (weitere Beispiele: S. 2136 ff.). Die bis 2001 stattfindende muslimische Zuwanderung hatte solche Überlegungen offenbar nicht ausgelöst. Die Testfragen wurden bald Sache des Bundes, sind nun ausschließlich kognitiv-normativ ausgerichtet und weisen in der Regel eine Bestehensquote von 97% aufwärts auf (Übersicht zum ersten Jahr auf Grundlage des vom Bund gestalteten Tests: S. 53 f.).

In die Jahre nach 9/11 fallen auch Entwicklungen, die auf ältere Umstände zurückzuführen sind. Die Einführung des *ius soli* in § 4 Abs. 3 StAG galt vor und gilt nach der weitgehenden Lockerung der Optionspflicht (§ 29 Abs. 1a StAG) umso mehr als eine auch im Rechtsvergleich weitreichende und großzügige Regelung.[1] Mit den Erfordernissen von Sprachkenntnissen und später Anforderungen an Rechts- und Gesellschaftskenntnisse im Einbürgerungsrecht reagierte der Gesetzgeber auf die Erkenntnis, dass sich unter den seit 1990/93 im Aus-

lG enthaltenen (Regel)Einbürgerungsnormen eine ausreichende Integration durch bloßen Aufenthalt gegen die Erwartungen nicht einstellte (etwa S. 18 f. hier zu § 86 AuslG). Wenn es der Gesetzesbegründung um die Verbesserung von Integrationsvorgängen, auch durch das berühmte „Fordern und Fördern" geht, ist das als Anliegen ernstzunehmen. Pauschalabwertungen demokratischer Aushandlungs- und Gesetzgebungsprozesse entfalten deshalb wie Positionen, die sich über sehr hohe Zugangshürden funktionale Gefahrenabwehrinstrumente herbeisehnen, keine ernsthafte Wirkung. Im Grunde löste die Abkehr vom „kein Einwanderungsland"-Paradigma die Erkenntnis aus, dass eine diverse Zuwanderung in eine offene Gesellschaft institutionelle und rechtliche Begleitung braucht. Die Gesetzesstruktur muss abstrakt verfahren und von Eritrea über Singapur bis zum Vereinigten Königreich (besonders nach dem Brexit) Personen aus aller Welt mit ihren unterschiedlichen Hintergründen adressieren. Mit dem Vierten Gesetz zur Änderung des Staatsangehörigkeitsgesetzes hat der Gesetzgeber sich erst vor Kurzem, neben der im Verfahren zentralen NS-Wiedergutmachung auf Gesetzesebene, für weitere Einbürgerungserleichterungen genereller Natur entschieden (Art. 1 Nr. 5a und 6 lit. c und e Änderungsgesetz). Makroerzählungen wie De- und Renationalisierungsphasen *of citizenship* (S. 859 aE f.), unter denen Öffnungs- und Schließungsphasen von Statusrechten verschiedener Staaten im Sinne gleich-

förmiger Entwicklungsbewegungen zusammenfassend beschrieben werden, erschienen mir stets als zu unscharf und müssen mit der Unterlegung von Ereignissen wie 9/11 differierende Umstände und komplexe Hintergründe in den verschiedenen und verschieden von Migration betroffenen Gesellschaften vernachlässigen.

Zugangsgrenzen und Statusverlust angesichts von Terror und Extremismus

Wenn der Gesetzgeber Verlust- und Ausschlussregelungen einführt, betritt er ein besonders sensibles Feld. Art. 16 Abs. 1 des Grundgesetzes schützt Staatsangehörige (nach überwiegender Auffassung absolut) gegen Entziehungen und schränkt zugleich Verlustmöglichkeiten ein. Hier ist nach 9/11 zunächst nichts geschehen. Dafür wurden die Ausweisungsmöglichkeiten erweitert (heute § 54 Nr. 2-5 AufenthG) und mit dem Zuwanderungsgesetz über die in § 58a AufenthG eingefügte Abschiebungsanordnung zur schnellen Beendigung des Aufenthalts von „Top-Gefährdern", ohne Ausweisung und vorherige Abschiebungsandrohung, dogmatisch neue Gefilde betreten. Nicht nur die Linie zu 9/11 ist unmittelbar erkennbar, sondern auch bemerkenswert, dass die Norm wegen verschiedener verfassungsrechtlicher Zweifel bis ins Jahr 2017 praktisch bedeutungslos blieb,[2] bis Anwendungsfälle Entscheidungen in Leipzig und Karlsruhe auslösten, die die

Norm materiell für verfassungskonform erklärten (zum BVerfG Rn. 35 ff.). Aufenthaltsstatus haben insofern fraglos eine Zunahme von Sicherheitsaspekten erfahren. Und wenn etwa die Auswertung von Mobiltelefonen im Asylverfahren zur Feststellung von Identität und Staatsangehörigkeit, systematisch eine Ausnahmevorschrift (§ 15a Abs. 1 AsylG), praktisch zur Standardmaßnahme wird, verdichtet sich der Eindruck eines Security-Checks statt eines Verfahrens zur Prüfung individueller Schutzbedürftigkeit. Auf der anderen Seite kann aber das in der Norm zum Ausdruck kommende Interesse, zu erfahren für wen das Verfahren geführt wird (ob nun bewusst oder unverschuldet ohne Papiere gereist wird) nicht als illegitim gelten – schon um Kontrollverlust- und Unterwanderungsmythen von sich zu weisen. Das zentrale Problem ist auch hier, wie so oft im Migrations- und Staatsangehörigkeitsrecht, ob die Norm*anwendung* verfassungswidrig ausfällt oder nicht.[3]

Im Staatsangehörigkeitsrecht sind Verlust- und Ausschlusstatbestände, die mit Terrorismus und Extremismus in Zusammenhang stehen, erst spät anzutreffen. Es handelt sich nicht nur um Reaktionen auf Folgeereignisse von 9/11, sondern auch innergesellschaftliche Anlässe. Hierzu zählt etwa der Ende August 2021 in Kraft getretene Einbürgerungsausschluss bei Verurteilung zu einer rechtswidrigen antisemitischen, rassistischen, fremdenfeindlichen oder sonstigen menschenverachtenden Tat in § 12a Abs. 1 S. 2 StAG. Im Hintergrund

stehen seit Jahren ansteigende Fallzahlen und sichtbare antisemitische Demonstrationen und Übergriffe (S. 17 aE f.; S. 19). Insbesondere zum Antisemitismus bestehen Erfassungsprobleme seiner genauen gesellschaftlichen Verteilung (differenziert dazu etwa hier und ausführlich hier), um langfristige Lösungen über gesellschaftspolitische und bildungspolitische Maßnahmen genauer ansteuern zu können. So gering die Fallzahl auch sein mag, ist es daneben aber nicht ausgeschlossen, gegenüber eindeutig verurteilten Antisemiten, Rassisten und ähnlichen Tätern eine Zugangsgrenze zu ziehen. Gesetzgebung kommuniziert daneben auch symbolisch.

Dieser Gesichtspunkt überwiegt bislang auch die Einfügung der Verlustregel wegen einer konkreten Beteiligung an Kampfhandlungen terroristischer Vereinigungen nach § 28 Abs. 1 Nr. 2 StAG im August 2019. Das Auseinanderfallen von bisheriger praktischer Relevanz (null Anwendungsfälle) und der emotional geführten rechtspolitischen Auseinandersetzung um die Zulässigkeit der Norm, auch auf diesem Blog (nicht abschließend: Gärditz/Wallrabenstein, Thym), zeigt meines Erachtens etwas Positives: Der Streit um Grenzen der politischen Gemeinschaft hat einen gemeinsamen rechtlichen Ort, jenseits lebensweltlich relevanterer Gruppenzugehörigkeiten und Selbstverständnisse. Das ist im Vergleich nicht mehr selbstverständlich. Ich habe mehrfach dargelegt, dass ich die Norm für eine verfas-

sungskonforme Regelung halte, weil sie diskriminierungsfrei an ein unstreitig schwerwiegendes und nach den bekannten, aber auch bewusst offen gehaltenen Maßstäben des Bundesverfassungsgerichts zumutbar vermeidbares Verhalten anknüpft. Gegenüber den auch im Rechtsvergleich engen Voraussetzungen[4] dringen grundrechtliche und unions- wie völkerrechtliche Einwendungen im Ergebnis nicht durch.[5] Das wird selbstverständlich auch anders gesehen (etwa Walter/Nedelcu; nochmals Wallrabenstein, deren Dezernat im Zweiten Senat des Bundesverfassungsgerichts für das Staatsangehörigkeitsrecht zuständig ist) und macht die Analyse einer bislang für die Praxis unbedeutenden Norm spannend.

Statt Instrumentalisierung: Anknüpfung an (informierte) Entscheidungen Einzelner für und gegen Status

Der Streit um Regelungen in diesem Bereich, die Lautstärke gesellschaftlicher Auseinandersetzungen und fremdenfeindliche Töne aus ganz unterschiedlichen Ecken liefern einer harmonischen Vorstellung von Integration ein Verfallsbild. Dagegen spricht jenseits fremden-feindlicher Ausfälle allerdings die überzeugende These, dass gesellschaftliche Lautstärke durch gelungene Integration gerade zu-, nicht abnimmt und unterschiedliche Perspektiven aufeinandertreffen, was verbindet und was verbinden soll. Zuletzt sind die Einbür-

gerungszahlen insgesamt (auch durch das Zurückgehen der Brexit-Antragswelle und die Pandemie) gesunken, aber zum Beispiel bei syrischen Antragstellern gestiegen. Die Fachkommission Integrationsfähigkeit stellte fest, dass es nicht immer an zu hohen Zugangshürden liegt, wenn viele Personen sich nicht einbürgern lassen, sondern unzureichender Information. Sie schlägt deshalb eine besser kommunizierte *Kultur der Einbürgerung* vor.[6] Damit wären wir wieder beim Sprechen über Statusrechte. Die ermutigende Tendenz kann die (nächste) Bundesregierung steigern, wenn sie sichtbarer auf Vorteile einer Einbürgerung hinweist. Der Rechtsstaat und die Verfassungsgerichtsbarkeit funktionieren (hier) und werden von einer starken rechtspolitischen Debatte begleitet. Eine Instrumentalisierung und einseitige „Versicherheitlichung" der Statusrechte in Deutschland nach 9/11 ist nach meinem Eindruck nicht erkennbar, möchte man nicht jede Anknüpfung an individuelle Verhaltensweisen als Instrumentalisierung werten. Das geht natürlich. Das Einstehenmüssen für die Konsequenzen des eigenen Handelns lässt sich in einer vom Einzelnen gedachten Verfassungsordnung aber nicht gut als Instrumentalisierung verkaufen. Es wäre ein *instrumental turn on accountability*. Auf ihr baut das Grundgesetz aber ebenso auf wie auf Grund- und Menschenrechten.

Hinweise

1 Gerdes/Faist/Rieple, 'We are All "Republican" Now': The Politics of Dual Citizenship in Germany, in: Faist (Ed.), Dual Citizenship in Europe, 2007, S. 45 (46): "one of the most far-reaching jus soli supplements in citizenship law on the European continent"; Langenfeld, Staatsbürgerschaft und Bürgerrecht – Doppelte Staatsangehörigkeit, in: Bröhmer (Hrsg.), Europa und die Welt, Kolloquium zu aktuellen europa-, völker- und menschenrechtlichen Themen aus Anlass des 80. Geburtstages von Prof. Dr. Dr. h.c. mult. Georg Ress, 2016, S. 153 (158): „auch im Vergleich zu zahlreichen anderen Staaten mit Einwanderungstradition […] großzügige Regelung des Geburtserwerbs".

2 Berlit, ZAR 2018, 89 (89 f.); Kluth, in ders./Heusch (Hrsg.), BeckOK AuslR, 30. Edition 1.7.2021, § 58a Rn. 1.

3 Zum Dilemma Bergmann, in ders./Dienelt (Hrsg.), Ausländerrecht, 13. Aufl. 2020, § 15a AsylG Rn. 5.

4 Ausführlicher Weber/Hailbronner, in: Hailbronner/Kau/Gnatzy/Weber, Staatsangehörigkeitsrecht, 7. Auflage 2021, Grundlagen G. Rn. 449 ff., im Erscheinen.

5 In dogmatischer und rechtspolitische Hinsicht Weber, ZAR 2019, 209 ff.; aktuell ders., in Kluth/Heusch (Hrsg.), BeckOK AuslR, 30. Edition 1.7.2021, § 28 StAG Rn. 24 ff.

6 Fachkommission Integrationsfähigkeit, Gemeinsam die Einwanderungsgesellschaft gestalten, 2020, S. 148; zuvor Weber, Staatsangehörigkeit und Status, 2018, S. 481; Baum/Kuhle, Plädoyer für eine neue Einbürgerungskultur, Welt v. 11.8.2018, Online.

Luicy Pedroza

From Opposing the Wall to Becoming it

Dilemmas of Migration Policy in Mexico

As much as the comparative study of migration policies has developed recently, it still suffers from a blazing assumption: that states have equal sovereign power to determine their migration policy according to their own interests. The notion of "externalization", so widely discussed nowadays, reminds us of asymmetries of power. Some famous cases of externalization suggest a degree of negotiation: Turkey or Libya have been compensated for adapting their "own" migration policies to the preferences of richer states and regional blocs. In cases of extreme asymmetry though, as in the relation between Mexico and the United States, the spaces for sovereign decision making on migration policy are extremely thin to nonexistent.

Post-9/11, the rhetoric in the US on migration changed, and rapidly securitized, culminating in Trump's "Muslim Ban". The US has consistently equated migration with a threat to national security – particularly salient at the porous border to Mexico. There, economic dependence and asymmetries of power meet. While Mexico was not directly affected by 9/11 and subsequent terrorism, its migration policies are inseparable from the US' securitization in response to the attacks. I will show this in this text that from having passionately opposed the wall, Mexico became the wall.

The stakes: migrants and numbers

Mexican migration policy is hard to understand for others because it is so glaringly incoherent. As part of the main migration corridor in the world and origin of an enormous diaspora, Mexico is a country deeply involved with migration. Its migration regulations have evolved slowly but arrived at the forefront of progressive approaches. Though some incoherences remain in the laws, the biggest incoherence of all is between laws and their implementation. It results from a lack of investment in capabilities to manage migration and from the power – at times, outright coercion- of a neighbour that chokes any attempt to move away from the securitization of migration.

The US is not only the strongest world economy and military hegemon, for Mexico it is the destination of over 83% of its total exports as of 2019, home to 12 million Mexican citizens and 38.4 million of Mexican origin, as of 2018. While not all these people keep ties with Mexico, many remit money, mostly to rural households to finance basic living expenses such as food and clothing. This demonstrates an unwavering support based on familial and community ties, often explained by the painful reality of family separation due to involuntary return and deportation, which started increasing since 2008. MPI and Colmex researchers have estimated that over 1.5 million persons were forcibly returned to Mex-

ico between 2015 and 2018 alone, many of whom had left as children and thus barely knew the country. The other side of the coin merits mention: US nationals constitute the majority of immigrants in Mexico; Masferrer and Roberts find that half a million of them are children (US citizens due to *ius soli*), mostly living under constellations of family separation: they live with one parent or a grandparent in Mexico, while the other parent or both parents remain in the US.

Clearly, Mexico needs to cooperate with the USA because the stakes for its economy are too high, but also because a history of migration links its people across the two countries. The Mexican State gets this. Regardless of the party in power, successive governments over the last twenty years invested in capacities to support Mexican emigrants in the USA, as research by Alexandra Delano has shown. With every electoral reform since the early 2000s, Mexico has expanded emigrants' electoral rights.

But Mexico has also started to grapple with the fact that it has become a country of return, transit, and where people seeking humanitarian protection may want to remain – a number estimated to be around 230,000 in 2021. This is not insignificant, but it is by no means overwhelming. Considering that Mexico has 126 million inhabitants, it should be possible to integrate this population if the capacities of the institutions that administer migration and refugee processes were

strengthened, and if the coordination of agencies that manage migration at different levels of government included the voices of important stakeholders. Capacities in this regard are still utterly insufficient but there is recognition that more is needed.

Mexico is now at a juncture where many slowly and painfully developed improvements could be lost. It is a historical moment because it ceases to be "just" a country of emigration and is developing a complex migration profile. The stakes for deciding how its institutions will cope with this are high. And then came Donald Trump.

A-U turn in migration policy

At its inauguration in December 2018, the current Mexican government promised a humanitarian and solidaristic approach to migration, especially towards our "brethren" from Central America. A regional development program (under the auspices of the ECLAC) should bind southern Mexico and El Salvador, Guatemala and Honduras together, providing for opportunities so that people are "not forced to emigrate". President López Obrador's first international act was to sign it, and the first international trip of the foreign minister Marcelo Ebrard was to Marrakesh, to sign the *Global Compact for a Safe, Orderly and Regular migration*, where he promised that Mexico would "show how" it is

applied, recalling that one of the two ambassadors who led the drafting process is a Mexican diplomat.

Big, brave plans, shortly after the caravans hailing from Central America started crossing Mexico, and as Trump was milking every chance to portray them as a security threat.

The new government in Mexico resisted this construal for a while. Having designated an expert academic as the head of the infamously corrupt *National Migration Institute* (INM by its acronym in Spanish), the highest authority in migration policy and, specifically, migration control, the incoming government seemed intent on doing differently: in its first trimester, it issued close to 20,000 humanitarian visas to people from the caravans, which allowed them to stay in Mexico legally for a year and to seek employment. Integration programs and job fairs were set up in key places.

I will not recall here how Trump turned xenophobia into a pillar of his style of politics, but the ways in which he challenged Mexico's sovereignty to decide its own migration policies were unparalleled. Trump began to pressure Mexico to accept a safe third-country agreement early into his government. Legal scholars, academics, human rights groups, and civil society organizations opposed the idea. The mere vision is grotesque for a country in which the state has lost control of public security in vast areas and where internal displacement due to violence is rising. Mexican authori-

ties openly resisted. And yet, in June 2019 Mexico accepted "for humanitarian reasons" its participation in the *Migrant Protection Protocols* (MPP), which until then had been allegedly a unilateral US measure by which people seeking humanitarian protection in the US were returned to Mexico to wait there for their turn to start a process in the US. As if these MPPs did not subject Mexican border cities to enough stress, additional measures on the US side curtailed the access to asylum throughout the pandemic. Even though the UNHCR and INGOs such as *Doctors without Borders* provided relief to the people stuck in Mexico, the costs have been borne by Mexicans and by the migrants and refugees themselves.

Historically, the asymmetric relation leaves Mexico little space for an independent position on anything that US authorities tag as a security issue. The trend in the US-Mexico relation to securitize the border is very long, and it expanded to issues of migration since 9/11. As the work by Beatriz Zepeda shows, successive Mexican governments have agreed ever since, through various cooperation agreements, to both contain migration and develop infrastructure of its north and south borders according to the security needs of the US. The "crises" of 2014 when unaccompanied children from Central America crossed Mexico to reach the US brought a new era of construal of undocumented migration as a security threat, and a further impulse of Mexican governments to secure the southern border with

the *Frontera Sur program*. Yet the crude display of power when Trump threatened to impose tariffs on Mexican imports that would increase for each month that Mexico "did not its job" to contain migration represents an extreme case of duress, only understandable because it came from the same man who imposed the so-called "Muslim ban", caged the children of families who attempted to enter the US without a visa, ejected the US from multilateral institutions and attacked central democratic pillars of that country.

So, Mexico bowed. Diplomatic authorities agreed to send 6,000 troops to the border and that, if that failed to reduce immigration within 90 days, would consider a safe third-country agreement.

The U-turn was not all Trump's doing. In trying to "show off" Mexican authorities had made mistakes. Even though the human rights-based approach only went as far as an attempt to finally apply the Migration Law of 2011, the investment in capacities for implementation was missing. The head of the INM was a person committed to go forward, but his agency required a deep restructuring for its bureaucracy to follow him. Mexico's neighbours, both North and South, disapproved the issuing of humanitarian visas in Mexico, complaining about spillover effects on them.

The solution was to desist from the approach, in practice, if not in rhetoric. First, to reduce tension with the US, the foreign minister was put in charge of migration

management – a move that simultaneously deprived the institutions formally mandated to direct migration policy of their power, and that "migratized" Mexican foreign policy. Second, and with vastly more serious long-term repercussions, the Decree that created the National Guard (a new security body mostly composed of former army men) gave it powers to support the INM in migration control. Third, in the urge to show that Mexico is "doing its job" deportations soared, often without due process. Until today, the open arms rhetoric of the President coexists with a militarized border that includes parade-like displays of the National Guard. The constitutional right of free movement of persons in Mexican territory has been curtailed, as the INM herds and chases migrants applying racial profiling practices learned from the US.

From vehemently opposing the wall, Mexico became the wall. Containment dominates and overwhelms its migration policy. Any hope to build a common front with Central American countries on a different approach has been prevented by US governments through bilateral negotiations, the constellation where the gigantic asymmetry works most in their favor.

Where we stand today

We have arrived at a bottleneck – by definition, an uncomfortable place. After Biden's inauguration, there

was hope for greater alignment between Mexico and the US. He presented an ambitious plan that included rebuilding the asylum system, regularization with a path to citizenship and opening some new routes of labor migration that would benefit the entire region. However, with a tie in Congress, the hopes were moderate and are waning quickly. Vice-President Harris visited Mexico and Guatemala to deliver the utmost message of hopelessness: "Do not come". The recent visit of Secretary Blinken to Mexico referred to migration, again, only by way of security. Mexico's President is bidding for the US to support his modest socioeconomic development programs in Central America, but Biden's take is quite different – and none of the two is ready to admit that even if they managed to cooperate on a common approach for the region, it is unrealistic that it will stop emigration from it. Migration will prevail; it is a multicausal phenomenon with political, cultural, and climate-change roots beyond insecurity or poverty.

Meanwhile, the incoherence in Mexico's migration policies makes Mexico weaker internally to meet the challenges of migration.

Maximizing the limited spaces for action

In a *Colmex* research project, we studied the intersection of foreign policy and migration policy in today's Mexico. We find a small window of opportunity now for

Mexico to recenter its migration policy towards its own interests and laws. The necessary conditions for it to enjoy outward legitimacy are for it to be a long-term, comprehensive strategy, built through ample consultation. This could give Mexico a stronger hold in the future, especially in the scenario that *Trumpism* strengthens in 2022 and 2024, but also in other plausible scenarios that require hemispheric cooperation.

Migration challenges require being addressed with realism. Mexico needs its security forces to provide public security to Mexico's inhabitants rather than stand on the border as a human wall to deter migrants. Moreover, Mexico cannot afford to reduce its migration policy to border controls, detentions, and deportations. It urgently needs to address the increasing demand for humanitarian protection, internal displacement and the integration of immigrants and returnees.

The responsibility and costs for a solution to the challenges of migration in the region cannot be dumped on Central America or in Mexico. If it is true that the US is ready to find a "decent solution", then it must take responsibility for developing a wider approach to migration and educating its society on how much it relies on and owes to it. Talking about externalization is fine, but at times it falls short of the extortion seen in some asymmetric constellations.

Eleonora Celoria

Counterterrorism Measures as a Migration Control Device

Insights from Italy

Since the 9/11 attacks, public discourse on migration and asylum has been deeply affected by the linking of migration to terrorism, and vice versa. This tendency has become even more evident in Italy and in Europe starting from 2015, when Europe was faced with twin crises: the (so-called) refugee crisis, and the growing threat produced by ISIS. The two discourses have become so intertwined that, more and more often, asylum seekers have been labelled as "terrorists", or at least potential terrorists. This has also happened in Italy, despite the absence of terrorist attacks in the country as well as of any evidence of radicalization among asylum seekers. While the link between the two categories has proved to be inconsistent empirically, it is still worth reflecting on the nexus between terrorism and Italian law and policies on migration, in particular considering that it is underexplored in the debate among migration legal scholars in Italy.

While concerns over terrorism have not shaped Italian migration policy in a comprehensive way, the increased use of the administrative measure of expulsion of foreigners for counter-terrorism purposes must be questioned. It poses serious challenges to fundamental rights and rule of law principles and might foster a shift from a punitive to a preventive approach in the field of migration control.

Securitization of migration in Italy

While present in public discourse, the association of foreigners and migrants with terrorism cannot be identified as the *main* driving force of the process of securitization of migration in Italy, at least from a legal perspective. Already before the adoption of the first comprehensive migration act, migration had mostly been dealt with by the police, as a matter of public safety. Thus, the development of what has been defined by some Italian scholars as "special" police law or "law of the enemy" can be traced back to the '90s (see Caputo, 2007). The perception of the foreigner as a threat and, eventually, as an "enemy" was reinforced in the first decade of the 21st century: undocumented migrants were depicted as criminals and their irregular presence in the country was criminalized through the *Bossi-Fini Law* (L. 189/2002) and the *Security Packages* (D.L. 92/2008 and L. 94/2009).

More recently, the securitarian approach that has affected the legislation on migration and asylum in the aftermath of the 2015 refugee crisis has been mainly based on the evergreen idea of an "invasion" and on the perception of "uncontrolled" migration flows that could endanger the social order. In other words, terrorism is only one piece of a broader picture, which has always been characterized by security concerns. In this sense, explaining the securitarian shift of migration policy by

referring to the strengthening of the link between migration and terrorism alone would be misleading and, to some extent, could oversimplify the more complex picture in which different rationales come into play.

However, links between migration control and counter-terrorism measures *do* exist in the Italian migration management system. They raise questions on the use/abuse of further discretionary police powers in a field which was already historically characterized by ample administrative discretion. The main legal manifestation of the intertwinement between migration and terrorism is the use of the administrative measure of expulsion in the fight against terrorism. It can be traced back to the period that followed 9/11, and it was further implemented in the aftermath of 2015 Paris attacks.

The extensive use of expulsion as a counter-terrorism tool

Italian immigration law provides for different types of security-motivated expulsion procedures. Some are issued by judicial authorities; others are of an administrative nature. The *Consolidated Immigration Act* introduces two types of administrative expulsions on the basis of "security" concerns: a) expulsion for "State security or public order" reasons, ordered through a decision of the Ministry of the Interior (art. 13, para 1, D. TUI); b) expulsion motivated by the threat posed to the

public order by specific categories of individuals, framed as "dangerous", issued by the territorial executive authority, the Prefecture (art. 13, para 2, lett.c) TUI).

The anti-terrorism law of 2005 (L. 155/2005) then introduced a specific provision that allows the Ministry of Interior to order the deportation of the foreigner in case of "well-founded reasons to believe that the permanence of the alien in the territory of the State may in any way facilitate terrorist organizations or activities, including international ones" (art. 3, D.L. 144/2005).

Whereas the latter is the only one measure that has been specifically designed as a counter-terrorist tool, all three types of administrative expulsion are implemented by the Italian authorities as "flexible" and "efficient" terrorist risk prevention instruments. All of them allow for the prompt and fast removal of foreigners suspected to have links with terrorist networks even before any evidence of their actual involvement with such networks is assessed within criminal proceedings. The absence of a direct link with ongoing criminal investigations for terrorism-related crimes opens up spaces for a misuse of the expulsion device, which, because it is often based upon mere suspicions instead of concrete evidence, can be extended to a potentially large scale of foreigners.

These measures have been indeed used extensively after 2015: while between 2002 and 2014 the expulsions

motivated by reasons of State security or public safety never exceed 30 cases, from 2015 onwards that number more than tripled. 66 deportations were carried out both in 2015 and 2016, 105 in 2017 and the number grew up to 112 in 2018. In its 2019 report to the Parliament on the state of security in the country, the Ministry of the Interior specified that 98 expulsions were carried out in relation to jihadist threats: out of them, 17 were executed through orders of the Ministry of the Interior, 54 were based on expulsion decisions adopted by the Prefecture, 23 on the basis of judicial decisions, 2 in compliance with Dublin procedures and 2 were related to Schengen procedures.

Because of the high numbers of both ministerial and prefecture expulsions, I briefly focus on the main features of these legal regimes and the challenges posed by these measures *vis a vis* the fundamental rights of foreigners.

Ministerial expulsions

Ministerial expulsions – being adopted on the grounds of "State security", or in conformity with the 2005 anti-terrorism law – are fundamentally used in a preventive manner, similarly as the measures regulated by Legislative Decree 159/2011, a piece of legislation that aims at fighting organized crime and terrorism. Preventive measures normally imply restriction to the freedom of

movement and financial restrictions (seizure and confiscation). The grounds for applying the two legal instruments are similar and, ultimately, justified by the imperative of State security: expulsions are issued when there are "well-founded reasons to believe" that foreigners facilitate terrorist organization, the general preventive measures target those who are engaged in preparatory acts for the commission of terrorism-related crimes. However, while the latter are to be requested by a prosecutor and issued by a judicial authority, administrative expulsions of foreigners are adopted by the executive power, whose discretion in that respect is basically unquestionable.

The expulsion orders are immediately enforceable and, even though they can be appealed in front of the Administrative Court of Rome, their execution cannot be suspended. In other words, individuals might already have been expelled from the country, before any access to judicial redress is possible. Moreover, according to the case law of the Council of State (the Highest Italian *Administrative* Court), the judicial authority can only review the formal legitimacy of the act, and not its merit. It cannot review, for instance, the evidence related to the dangerousness of the person. In practice, such expulsions are often applied when there are not enough elements for prosecuting the person under criminal law, or in cases where, during a criminal investigation, a request for the enforcement of custodial measures is de-

nied based on the lack of sufficient circumstantial elements.

Prefectorial expulsions

Removals based on the decision of territorial representative of the executive (Prefecture) are also used for prevention of terrorism, even more so following the anti-terrorism law of 2015, which included among the categories of "dangerousness" those who carry out "preparatory acts" that aim to support an organization with terrorist purposes. Essentially, these cases are not only not related to any previous criminal prosecution, but they are not even linked to an act of political responsibility attributable to the Ministry of Interior. Thus, every Prefecture has a wide margin of appreciation of the conducts that might ground the "dangerousness" of the individual.

Whilst both the procedural and the substantial legitimacy of these expulsion decisions can be challenged, and they can be suspended pending the appeal decision, the structural shortcomings that affect the access and quality of judicial remedies for migrants jeopardize the formal safeguards prescribed by the law. In fact, the competence for the review of deportation orders belongs to honorary judges, who can barely be considered independent and rarely question the assumptions made by police authorities (see Antigone and International

Commission of Jurists remarks). This is especially true in situations that concern alleged risks for public safety, in which the honorary judges consider themselves to be bound to the "informed opinion" adopted by the Prevention Unit of the Ministry of the Interior, which are normally communicated to police authorities. This, even though the Court of Cassation (Italian Highest *Civil* Court) has recently pointed out that such "opinions" only have circumstantial value within a judicial proceeding, and they can be challenged in substance (Court of Cassation, n. 25596/2021).

Implications for fundamental rights

The deportation measures are often presented as an effective and useful tool from a counter-terrorism perspective. This is not the place to provide counterarguments on this level, even though experts have depicted possible counterproductive consequences of the Italian approach. My objective is to show the challenges posed by their extensive use from a different perspective. First, deportations have serious implications for the fundamental rights of migrants. The primary concern is for the respect of the principle of *non-refoulement*. As the European Court of Human Rights has well-established in case law, the absolute nature of Article 3 ECHR cannot be limited or derogated even in cases related to suspected involvement in terrorist ac-

tivities. The Italian law indeed provides for a prohibition on expulsion where there is a risk that the person faces persecution or torture, which applies to ministerial expulsions. Nonetheless, deportations are generally carried out without a proper assessment of this risk. In case of ministerial expulsions, their speedy execution and the absence of procedural guarantees accorded by the law basically imply that an appeal can be presented only after deportation, thus exacerbating the risk of violation of *non-refoulement*. As for prefectorial expulsions, a similar outcome originates from the existing gaps between the law (which provides for a review of the decisions) and the practice (characterized by the poor quality of judicial review).

Against this background, it is not surprising that Italy has been repeatedly condemned for breaching Article 3 of the ECHR because of the deportation of Tunisian nationals who risked being tortured after their return (see, among others, Saadi and Ben Khemais). This sometimes even happened in situations where the ECtHR had previously intervened with *interim measures* to protect the persons concerned (see Trabelsi and Toumi). Moreover, even when deportations do not amount to a violation of *non-refoulement*, other challenges persist, such as that the authorities' wide margin of discretion are not balanced with sufficient procedural safeguards, including the right to defense and to an effective remedy. The fairly extreme limitation of the individual rights of for-

eigners, combined with the impossibility to challenge the executive decision seem problematic from a rule of law perspective too. Especially, when considering that preventive measures are not used in very few, exceptional cases, but are increasingly becoming a common practice. To put it simply, the derogation to guarantees normally offered by the democratic legal order exceeds what could be considered a narrow "state of exception" situation.

Normalizing the preventive approach to migration control

For the "preventive" deportations of foreigners to comply with the principles of rule of law and with fundamental rights, they must be accompanied by additional procedural safeguards, including the mandatory judicial review in front of an ordinary civil court, and shall only be implemented in very exceptional circumstances, where no other instrument can be considered as effective, and provided that they do not breach the absolute prohibition of *non-refoulement*.

Outside these strict boundaries, the use of expulsions would turn into an abuse of such measures. Moreover, in light of the drastic increase of their numbers, they cannot be conceived merely as a tool to fight terrorism. In particular, the resort to Prefectorial expulsions implies an expansion of the cases in which deportations are based on evasive elements, that resembles more to a

mere suspicion than a concrete danger. As a consequence, expulsions are executed even when there are no actual and real risks for the collective interest, and are applied to a larger range of people than intended for, thus turning into a device of migration management.

From this perspective, the abuse of deportations based on alleged terrorist risks mark a shift from the "penal" to the "preventive" approach to migration control – a trend that has been analyzed also with regard to immigration detention. Foreigners would not be any longer considered as enemies to be sanctioned within the criminal apparatus, but as "risk bearers" to be neutralized by anticipating the intervention of State actors, whose discretionary powers underpin the basic principles and rights developed in the field of criminal law and of human rights law.

Sangeetha Pillai

Post-9/11 Australia has Pushed a Tradition of Exclusion to Constitutional Extremes

"A shared identity", "a common bond" and "a privilege offering enormous rewards" are terms that the Australian government uses to describe Australian citizenship. Commentators have used other terms: "thin", "contradictory", "the forgotten poorer cousin of Australian constitutional law". In the 120 years since Australian Federation, citizenship's primary legal significance has been protection against the wholesale exclusion that is possible under sweeping constitutional aliens and immigration powers.

Post 9/11, Australian law has become increasingly exclusionary: it is harder to become a member of the Australian community, and easier to be expelled from it. Citizenship no longer guarantees protection against exclusion. This has brought two long-unanswered questions into focus. What are the limits of Parliament's capacity to exclude people from Australia? And what does it mean to be Australian?

Citizenship and exclusion under the Australian Constitution

In contrast to many written constitutions, the Australian Constitution is silent on Australian citizenship. Leading up to Federation, the Constitution's framers considered constitutionalising citizenship, and discussed complex questions about who to make a citizen, what rights to give them, and what role Parliament would play. Ultimately, unable to reach agreement on

these things, they simply left citizenship out. The Constitution says nothing direct about what it means to be Australian, when a person is entitled to Australia's protection, or who can claim to "belong" to Australia.

While the framers could not agree on who belonged in the Australian constitutional community, they did express a clear and united desire to be able to comprehensively exclude people who were not of "British race". To achieve this, they gave Parliament plenary legislative powers over "naturalisation and aliens" and "immigration and emigration". Due to these powers, any person who qualifies as an "alien" or someone undergoing a process of "immigration" can only enter the Australian community to the extent that Parliament allows. They may be granted full membership, or, conversely, excluded entirely for virtually any reason. One of the first actions of Australia's first federal Parliament was to rely on these powers to pass a law that formed the basis for the White Australia Policy, which remained in place for over 50 years.

It is unsurprising, then, that the Constitution has been described as more concerned with exclusion than with inclusion. The White Australia Policy is no more, but the aliens and immigration powers provide an ongoing foundation for various exclusionary choices made by Australian parliaments. These include mandatory immigration detention for non-citizens who arrive without a visa, and laws enabling the deportation of

both long-term permanent residents and people born in Australia who Parliament has excluded from citizenship.

Since 1949, Australia has defined citizenship through legislation. The Preamble to the current statute says that citizenship represents "full and formal membership of the Australian community". By contrast, Australia's key migration statute defines its object as "regulat[ing], in the national interest, the coming into, and presence in, Australia of non-citizens". Together, these statements suggest that non-citizens, however long they have been in Australia, are not full members of the community until they obtain citizenship. Once they do, they pass beyond the reach of the aliens and immigration powers, gaining protection against exclusionary devices that rely on those powers for constitutional support. Historically, while most rights in Australia can be enjoyed without citizenship, a secure place in the Australian community has been one of its major benefits.

But the uncertainties that led the framers to leave citizenship out of the Constitution endure. The constitutional silence makes it unclear where comprehensive power to pass citizenship laws comes from. The High Court has confirmed that Parliament does have this power, but its foundations and scope have never been fully explained. Several questions persist. If Australian citizenship is merely a statutory creature, could it be re-

pealed entirely? Can Parliament deny citizenship to anyone it chooses, or do some constitutional limits apply? Is there a class of "constitutional citizens" from whom certain rights cannot be taken away?

Until recently, these significant questions have remained dormant. Litigation has led to repeated judicial affirmation that lawmakers have remained within the extremely wide boundaries of their power in this area. Case law confirms that Parliament may authorise the immigration detention and removal of "aliens" "for whatever reason [it] thinks fit". It also makes clear that, by defining Australian statutory citizenship, Parliament shapes the *constitutional* meaning of "alien". This is delicate, because the constitutional meaning of alien simultaneously constrains Parliament's legislative power. Judges have long acknowledged that an outer limit on Parliament's power exists, but without a fact scenario demanding this limit be defined they have declined to define it. While Parliament (and the Executive, when exercising statutory authority) stays within its lane, courts will not measure that lane for us. For decades it seemed plausible that a case compelling courts to draw a line around Parliament's exclusionary powers might never arise.

Legislation and policy since 9/11

Since the 9/11 terrorist attacks, Australian law and policy has lurched towards constitutional boundaries, in the name of national security. Before 9/11, Australia did not have a single national counter-terrorism law on its books. Now it is home to one of the world's most expansive anti-terror regimes, with over 92 federal anti-terror laws, spanning over 5000 pages. These laws are broad-ranging, in some cases going further than emergency laws enacted during World Wars I and II.

When it comes to citizenship and migration, post-9/11 laws increase barriers to becoming part of the Australian community and reduce barriers to being ejected from it. There are three trends worth noting.

Trend 1: Securitisation and exclusion of "boat people"

In late August 2001, a Norwegian container ship, MV Tampa, rescued 433 asylum seekers from a sinking boat, and took them towards Christmas Island, the nearest port. The Australian government denied entry, ordered the military to board the boat, excised Christmas Island from Australia's migration zone so that the passengers could not validly apply for asylum, and, in the midst of litigation, arranged for them to be sent to Nauru.

On September 11, the Tampa litigation was ongoing, and the government faced an upcoming election. In this climate, Defence Minister Peter Reith emphasised that "security and border protection go hand in hand", and stressed the need to control the unauthorised arrival of boats carrying asylum seekers, which he said could be a "pipeline for terrorists".

The government did not substantiate the link it drew between seeking asylum and terrorism. Recent research shows that no such link exists. But the association has endured, and has led to a plethora of laws and policies, often implemented under military leadership, which have blocked asylum seekers who arrive by sea from making protection claims in Australia. Many are prevented from reaching Australia by laws that provide for their transfer to "offshore processing", or removal to other countries, and a military-led policy to turn back intercepted boats. Those who do arrive face mandatory immigration detention, and are statutorily barred from making visa applications. As a best-case scenario, this bar may be lifted, allowing them to apply for a temporary protection visa, which comes with limited rights, and must be reapplied for every 3-5 years.

These laws and policies reflect a political choice to comprehensively exclude a subset of vulnerable non-citizens, based on an unsubstantiated national security rationale, and in a way that contravenes Australia's obligations under international human rights and refugee

law. However, due to the very wide scope of the exclusion-oriented immigration and aliens powers, they rest on sold constitutional ground. This is underscored by unsuccessful constitutional challenges to the offshore processing regimes in both Papua New Guinea and Nauru.

Trend 2: Expanded visa cancellation powers

Since 9/11 it has also become easier for non-citizens, including long-term permanent residents, to be stripped of their visas on character or security grounds, and subsequently detained or removed from Australia. For decades prior to 9/11, non-citizens have been vulnerable to visa cancellation and expulsion if found not to be of good character. After 9/11, however, these visa cancellation powers were increasingly invoked, especially against long-term residents. In 2014, the statutory regime for visa cancellation on character grounds was significantly expanded to grant the Minister broad, imprecise powers that would enable visa cancellation on the basis of community protection, where any risk to the community is in fact very low. For instance, the Minister may cancel a person's visa if satisfied that their presence "*may be* a risk to the health, safety or good order of the Australian community or a segment of the Australian community", or if they reasonably suspect that, on the basis of their conduct, the person is not of good character. Cancellation is mandatory on the

basis of certain criminal activity, including relatively petty offending. For example, people have had visas mandatorily cancelled on the basis of dangerous driving after misunderstanding road rules, and misrepresenting used cars for sale. The Minister also has a personal power to override a delegate's or tribunal's decision that a visa should *not* be cancelled.

Following these changes, an average of 1000 people per year have had visas cancelled on character grounds – around a tenfold increase on prior numbers. The government has attempted to further lower the threshold for character-based visa cancellation, without success so far.

This regime raises several human rights and international law concerns. But once again, the aliens power, which was held to support laws authorising character-based visa cancellation in 1982, provides a constitutional foundation for the current laws.

However, one significant exception has been recognised. Following the 2014 changes, a number of Aboriginal and Torres Strait Islander people who do not hold Australian citizenship have had visas cancelled on character grounds.

In a 2020 case, *Love v Commonwealth,* two Indigenous men whose visas were cancelled argued that, although the cancellation regime was supported by the aliens power, it did not extend to Indigenous non-citizens, as they are non-aliens. By the narrowest of majorities, the

High Court agreed, recognising the first limit to date on Parliament's capacity to control the constitutional meaning of "alien" through the statutory parameters of citizenship.

Less than two years after this landmark decision, the Commonwealth is appealing to a differently composed High Court to have it overturned, making further clarification of the limits on Commonwealth power in this area likely in the near future.

Trend 3: The weakening of citizenship

Until recently, Australian citizenship was a highly secure status, revocable only in extremely limited circumstances. But in 2015, after a "lone wolf" gunman falsely purporting to represent Islamic State held a number of people hostage in a Sydney cafe with fatal consequences, and following an increase in Australians travelling overseas to partake in foreign conflicts, Parliament introduced new citizenship stripping laws. Australian citizens aged 14 and over may be stripped of their Australian citizenship if they are convicted of certain terrorism-related offences or if the Minister for Home Affairs is satisfied that they engaged in specific terrorism-related conduct while in a foreign country. The Minister cannot strip someone of citizenship if they consider this would make the person stateless.

The *Australian Citizenship Act* describes these citizenship-stripping laws as Parliament's recognition that cit-

izens may, "through certain conduct incompatible with the shared values of the Australian community", demonstrate that they have "repudiated their allegiance to Australia". This is a clear attempt to invoke the constitutional support of the aliens power: several High Court judges have described constitutional alienage as characterised by allegiance to a foreign power or an absence of allegiance to Australia.

Whether Australia's citizenship stripping laws would in fact pass constitutional muster is unclear. The laws assume that where Parliament determines that an Australian citizen has repudiated their allegiance to Australia, they become an alien. But there are real questions about whether Parliament is able to use statute to control the constitutional meaning of alienage to this extent. These questions ring particularly loud with respect to some of the more benign grounds that can trigger citizenship loss. For example, a person may lose citizenship for entering or remaining in a declared no-go zone, even if they do not mean or cause harm. It is not clear that Parliament has the power to declare that this conduct represents a repudiation of allegiance, making the person an alien who can be expunged from the constitutional community. Nor is it clear that other constitutional powers, such as the defence power, would provide support for such a law.

It is likely that we will see these questions clarified in the near future. *Dalil Alexander*, a dual Australian and

Turkish citizen who was stripped of his Australian citizenship has initiated proceedings in the High Court, arguing that a natural-born Australian citizen who has not renounced citizenship does not fall within the scope of the aliens power, and cannot be stripped of citizenship. Alexander lost his citizenship following a terrorism conviction in a Syrian court, after making admissions which he says were obtained under torture.

Conclusion

Since its earliest days, Australia's sweeping constitutional powers over aliens and immigration have been drawn on to support broad exclusionary laws. In the two decades since 9/11, the tendency towards exclusion has increased significantly. While many of the laws and policies introduced during this time stand on firm constitutional ground, there are also indications that Parliament has reached or overstepped the limit of its capacity to determine which people will be treated as constitutional aliens. With one category of protected members of the Australian constitutional community recognised so far, there is a likelihood of further litigation to clarify long-unanswered questions about what it means to be Australian.

Michael Sebastian Schneiß

Wir befinden uns im Krieg

Aktuelle Trends der Asyl- und Migrationspolitik der Europäischen Union 20 Jahre nach 9/11

Wir befinden uns im Krieg – auf diese Formel lässt sich der Zustand der Asyl- und Migrationspolitik der Europäischen Union bringen. 20 Jahre nach den Anschlägen auf die *Twin Towers* hat sich der Krieg gegen den Terror in einen Krieg gegen Menschen auf der Flucht verwandelt. Legitimiert von der politischen Führung der Europäischen Union ist es heute Realität, dass rechtsstaatliche Prinzipien an den EU-Außengrenzen systematisch und ohne Konsequenzen unter Verweis auf den Schutz der europäischen Grenzen außer Kraft gesetzt werden können. Die Europäische Union hat den Krieg erklärt gegen schreiende Babys und Kinder in Seenot, deren Eltern verzweifelt versuchen in Selbstausbeutung und unter Aufopferung des eigenen Wohlbefindens vor Verfolgung zu flüchten und gleichzeitig die Europäische Union mit ihren Plastikbooten zu erobern. Uniformiert in unzureichenden Rettungswesten und bis unter die Zähne bewaffnet mit Pappschildern auf denen „Asylum“ steht, versetzen sie Staats- und Regierungschefinnen in eine solche Panik, dass sie den Ausnahmezustand zur Regel erklären.

Gemeinsam haben die Situation an den europäischen Außengrenzen und die Anschläge von 9/11, dass wir den Personen eine falsche, aber dennoch überschneidende Zuschreibung auf Basis von Äußerlichkeiten und dem angeblichen Treiber der Anschläge, dem Islam, machen. Wenn sie eine andere Hautfarbe hätten und

anders gekleidet wären, dann würden sie gerettet werden, davon bin ich überzeugt. 9/11 hat in unserem kollektiven Gedächtnis genau diese Zuschreibung mit Angst verknüpft. Sie hat sich verselbständigt und führt uns in eine Situation, in der sie Treiber politischen Handelns wird. Was folgt ist meiner Meinung nach fatal: Die Europäische Union und ihre Mitgliedsstaaten verstoßen systematisch gegen ihre eigenen rechtlichen Grundlagen, unter anderem die Europäische Menschenrechtskonvention und einige Verordnungen, die die rechtliche Grundlage für die Situation an den EU-Außengrenzen bindend regeln. Der „War on Terror“ ist Fluchtursache und schafft gleichzeitig die Legitimation, mit deren Stütze eine technologisch unvergleichbare Aufrüstung an den Außengrenzen der Europäischen Union vorangetrieben wird.

Pushbacks als Standardpraxis

Grundsätzlich ist einer der häufigsten Rechtsbrüche an den EU-Außengrenzen der *Pushback*. Bei einem Pushback werden Menschen nach Grenzübertritt zurückgeführt, ohne dass man ihnen das Recht zugesteht, ein Schutzgesuch stellen zu können. Direkte Rückführungen dieser Art verstoßen gegen das Prinzip des *Non-Refoulment* der Genfer Flüchtlingskonvention von 1951, das durch die Aufnahme und Ausformulierungen in der Europäischen Menschenrechtskonvention Teil des

rechtlich bindenden Rahmens der Europäischen Union ist[1].

Die Außengrenze in der Ägäis

An der Seegrenze zwischen der Türkei und Griechenland versuchen Menschen in Schlauchbooten von der Türkei aus, die ägäischen Inseln zu erreichen und werden auf dem Wasser an der Weiterfahrt gehindert. Die griechische Küstenwache fängt die Schlauchboote ab, beschädigt sie und lässt die manövrierunfähigen Boote in Richtung Türkei zurücktreiben. Vermehrt kommt es auch dazu, dass die Schutzsuchenden auf Rettungsinseln gesetzt werden, die dann orientierungs- und hilflos in der Nacht auf dem Wasser zurückgelassen werden.

Im Oktober 2021 hat ein Team aus Investigativjournalistinnen noch einmal klarer belegen können, dass hier eine Spezialeinheit der griechischen Küstenwache die Menschen unter Androhung von Gewalt daran hindert, einen Asylantrag in der Europäischen Union stellen zu können. Mittlerweile ist dieses Vorgehen zu einer solchen Routine geworden, dass die türkische Küstenwache alle durch die Pushbacks erzeugten Seenotrettungsfälle dieser Art auf einer eigens angelegten Website mit dem einschlägigen Titel „Pushback Incidents“ sammelt. Hunderte mit Videos, Bildern und Augenzeuginnenberichten belegte Fälle lassen darauf schließen, dass es sich nicht um Einzelfälle, sondern ein systematisches und geplantes Vorgehen handelt. Allein

im September 2021 wurde von der Menschenrechtsorganisation *Mare Liberum* 91 Fälle von Pushbacks mit circa 2.289 betroffenen Personen gezählt. Auch die NGO *Aegan Boat Report* veröffentlicht regelmäßig Statistiken zu den Vorfällen an der Seegrenze zur Türkei. Seit Beginn ihrer Datenreihe im Januar 2017 kommt sie auf insgesamt 5.996 Boote, die gestoppt wurden und 209.535 Menschen, denen in Folge dessen ihr Recht auf ein Zugang zu einem Asylverfahren verwehrt wurde.

Aber es sind nicht nur unbekannte Menschenrechts-NGOs, die die Pushbacks in der Ägäis als Realität und Teil eines systematischen Vorgehens ansehen. In zwei Berichten von Juli 2020 und Januar 2021, in denen nicht nur die rechtliche sondern auch anhand genauer GPS-Datenauswertung die Geographie präzise beschrieben wird, hat das *Legal Centre Lesvos* klar belegt, wie das System funktioniert. Auch *Amnesty International*, *Human Rights Watch*, das *Centre for European Policy Studies* und der *Special Rapporteur der Vereinten Nationen für Flüchtlingsfragen* kommen zu dem Schluss, dass es sich um systematisches Vorgehen handelt.

Die Außengrenze auf dem Balkan

Auch auf dem Balkan, in den Grenzregionen rund um Bosnien, Kroatien und Ungarn kommt es immer wieder und immer häufiger zu Pushbacks. Menschen auf der Flucht versuchen dort über die sogenannte „grüne Grenze“ zu kommen und werden nach einigen Kilome-

tern innerhalb der Europäischen Union aufgegriffen, brutal zusammengeschlagen und unter Androhung von Gewalt wieder zurück nach Bosnien gebracht. Die Zahlen und die Entwicklungen der letzten Jahre sind beeindruckend und schockierend. Das *Border Violence Monitoring Network* hat in seinem „Black Book of Pushbacks" hunderte Fälle, mit geschätzt 12.000 betroffenen Personen dokumentiert und musste aufgrund der schieren Anzahl sogar zwei Bände herausgeben. Bis einschließlich September hat die NGO *Danish Refugee Council* allein im Jahr 2021 7.203 von Pushbacks betroffene Personen in Bosnien und Herzegowina registriert. Die Datenreihen der NGO zeigen akribisch, wie lange und wie alltäglich diese Menschenrechtsverletzungen sind. Und auch hier reicht die Evidenz mittlerweile so weit, dass renommierte Organisationen wie *Amnesty International* und *Human Rights Watch* Stellung beziehen. Sie attestieren aufgrund der Häufigkeit und der Glaubwürdigkeit, dass dies gängige Praxis ist und von staatlichen Stellen zumindest geduldet vor sich geht. Im Oktober 2021 veröffentlichte ein Recherche-Team investigativer Journalistinnen dann stichhaltige Beweise, dass es Spezialeinheiten der kroatischen Polizei selbst sind, die Pushbacks durchführen. Auch hier ist klar, Pushbacks sind nicht Zufall oder Ausnahme, sie sind Teil eines Systems.

Die Außengrenze im zentralen Mittelmeer

Um zu verhindern, dass Menschen erfolgreich die lebensgefährliche Fluchtroute über das zentrale Mittelmeer nach Italien, Malta und Spanien hinter sich bringen können, finanziert die Europäische Union die libysche Küstenwache – die Fluchtroute beginnt meist in Libyen – die wiederum sogenannte *Pullbacks* durchführt. Im zentralen Mittelmeer agieren also keine Grenzschutzbeamtinnen der Europäischen Union, allerdings liefert die EU Agentur *Frontex* die notwendige Aufklärungs- und Koordinierungsarbeit, um es anderen zu ermöglichen. *Frontex* überfliegt mit Drohnen und Flugzeugen das zentrale Mittelmeer, aber Boote in Seenot, die geortet werden, werden nicht gerettet. Im Gegenteil: sie kommen unter Lebensgefahr zurück nach Libyen. Wie das funktioniert, beobachtet die Seenotrettungsorganisation *Sea-Watch* seit Jahren mit ihren eigenen Aufklärungsflugzeugen. Auch der *Commissioner for Human Rights of the Council of Europe* legt dar, dass etliche Mitgliedsstaaten der Europäischen Union ihren rechtlichen Verpflichtungen hier nicht nachkommen. Grundsätzlich gilt, dass Menschen, die aus Seenot gerettet werden, an einen sicheren Ort gebracht werden müssen (Siehe hierzu auch die IMO Richtlinien für die Behandlung von auf See geretteten Personen). Libyen ist definitiv kein sicherer Ort, zu dem Schluss kommt auch der *UN Special Rapporteur on the Human Rights of*

Migrants, Felipe González in seinem Bericht zur Situation vor Ort. Durch die Finanzierung der libyschen Küstenwache können sich die Mitgliedsstaaten so positionieren, dass sie nicht die Schuld an einer möglichen Gefahrenaussetzung tragen. Allerdings geben die Aufklärungsflugzeuge und Drohnen von Frontex, die Koordinaten von in Seenot geratenen Booten nicht an umliegende Schiffe, sondern lediglich an die libysche Küstenwache weiter, wie Recherchen von Journalistinnen bewiesen haben. Auf diese Weise wird das *Hirsi-Urteil* aus dem Jahr 2012 umgangen[2], Europäische Schiffe dürften die Menschen eben nicht nach Libyen zurückbringen. Die Schuld an der Gefahrenaussetzung trägt aber klar die Europäische Union, denn Frontex hat die faktische Kontrolle (d.h. ist die entscheidende Instanz über den Ausgang der Situation), wenn die Agentur bewusst nicht alle, sondern nur bestimmte Schiffe über den Seenotrettungsfall informiert. Durch die bewusst erzeugte Verantwortungsdiffusion durch eine angeblich nicht von der Europäischen Union kontrollierbare Akteurin (die libysche Küstenwache), ist es nicht möglich den Mitgliedsstaaten und Frontex die Schuld daran zuzuweisen. Trotz der mittlerweile erdrückenden Beweislage und sogar Berichten von Schüssen auf Boote in Seenot, geht die Ausstattung der libyschen Küstenwache durch die Europäische Union weiter und wird in den nächsten Jahren auch mit bilateralen Abkommen fortgesetzt werden.

Gefängnisse, Sicherheitstechnologie, Mauern und scharfe Munition an den Außengrenzen

Eine zweite zentrale Entwicklung ist die Errichtung geschlossener Lager auf den ägäischen Inseln Lesbos, Samos und Chios. Dort werden mit Mitteln der EU sogenannte *Multi-Purpose Reception and Identification Centres* errichtet, die als Pilotprojekte vorgesehen sind. Sie sollen nach und nach die bisherigen Erstaufnahmeeinrichtungen ersetzen und den neuen Standard für den Umgang mit Ankünften an den Außengrenzen setzen. Die Realität ist eine Ansammlung von Plastikcontainern, die von meterhohen Mauern und Stacheldraht umgeben sind, deren Zugang nur mit Chipkarten und Fingerabdrücken möglich ist und deren Innenleben konstant von Kameras überwacht werden. Kurzum: ein modernes Internierungslager zum Willkommensempfang für traumatisierte Menschen auf der Flucht. Die Kritik ist an den neuen Einrichtungen ist groß. *Ärzte ohne Grenzen*, aber auch eine Studie der *Heinrich-Böll Stiftung* und dem *European Council of Refugees and Exiles* legen die Situation detailliert dar und listen in ihrer Studie zahlreiche Rechtsverletzungen auf, sollten die neuen Lager tatsächlich wie geplant betrieben werden. Im September 2021 wurde das Erste auf der Insel Samos eröffnet.

An der Landgrenze zur Türkei am Evros errichtet Griechenland parallel einen hochmodernen Grenzzaun,

um auch hier dafür zu sorgen, dass es Menschen physisch unmöglich gemacht wird, die Europäische Union zu erreichen. Auch die etwas absurde Vorstellung, einen Grenzzaun auf dem Wasser zu errichten, hat die griechische Regierung in die Realität umgesetzt, wenn auch hier die Ineffektivität letztlich dafür sorgte den Versuch zu beenden. Doch das passive Aufhalten von Menschen durch einen Grenzzaun scheint auch hier nicht genug zu sein. In einem Beitrag für die *Deutsche Welle* wird deutlich, dass die griechische Polizei in Zukunft Tag und Nacht kleinste Bewegungen in der Grenzregion überwachen können wird. Mitte 2021 wurde außerdem bekannt, dass die griechische Regierung den Einsatz sogenannter *Long Range Acoustic Devices* (LRADs) testet. In einem wie ein Werbe-Video anmutenden Beitrag erklärt ein griechischer Polizist unverfroren, wozu die Waffe dient: Menschen mithilfe von Gewalt daran zu hindern, Europa zu erreichen. Eigentlich fehlt nur noch, dass an Europas Grenzen mit scharfer Munition auf wehrlose Schutzsuchende geschossen wird, doch auch dies ist schon geschehen. Anfang März 2020 erschossen griechische Grenzschutzbeamte nachweislich mindestens einen Menschen, der versuchte einen Grenzübergang am Evros zu passieren. *Amnesty International* hat die Situation im Anschluss analysiert, die unglaublich detaillierte Beweisführung von *Forensic Architecture* belegt ohne Zweifel, was sich genau dort zugetragen hat.

Hybride Gefahr - wie der Rechtsbruch legitimiert wird

Man möchte annehmen, dass sich spätestens mit dem Moment, an dem an den EU-Außengrenzen Menschen sterben und scharf geschossen wird, in der Politik ein Widerstand gegen solche Zustände regen dürfte. Tatsächlich ist genau das Gegenteil der Fall. Die Politik legitimiert sprachlich die Verbrechen der eigenen Grenzschutzbeamtinnen und schafft damit einen Möglichkeitsspielraum, Menschen zu entrechten. Sprachlich findet die Legitimierung auf höchster politischer Ebene statt. Im März 2020 besuchte die EU-Kommissionspräsidentin Ursula von der Leyen die Grenzregion am Evros und dankte der griechischen Polizei, die in den Tagen zuvor mit Wasserwerfern und Tränengas Schutzsuchende daran gehindert hatte, Asyl in der EU beantragen zu können. Als „Europäischer Schild" bezeichnete sie Griechenlands Verhalten. Einen Tag später wurde dort ein Schutzsuchender erschossen. Und auch im September 2021, als in der Grenzregion zwischen Belarus und Polen Menschen mit Gewalt daran gehindert werden, Schutz in der Europäischen Union finden zu können, spricht sie in ihrer *State of the Union Address* von einer hybriden Gefahr. Von einer hybriden Gefahr, die dadurch entsteht, dass ein Diktator Schutzsuchende instrumentalisiert, um die Europäischen Union zu destabilisieren.

Die Formulierung „hybride Gefahr“ ist in diesem Zusammenhang nicht neu. Sie wird von der griechischen Regierung und dem Exekutiv Direktor von Frontex, Fabrice Leggeri genutzt, um die illegalen Pushbacks an der Außengrenze als rechtlich möglich erscheinen zu lassen (Auch Dana Schmalz verweist auf diese rhetorische Entrechtlichung von Asylsuchenden). Es wird geleugnet, dass sich Boote in Seenot befänden und wie mit ihnen umgegangen wird, aber auch hervorgehoben, dass es sich um Menschen handelt, die, von anderen Staaten eingesetzt, zu hybriden Gefahren werden, die gezielt unsere Europäische Union destabilisieren sollen. Mit der Einstufung von Menschen als hybride Gefahr wird auf ein Recht auf Selbstverteidigung gepocht, um die rechtsstaatlichen Vorschriften der Seeaußengrenzenverordnung der Europäischen Union, der Frontex-Verordnung und der Europäischen Menschenrechtskonventionen außer Kraft setzen zu können.

Auch ob die überfüllten Schlauchboote in der Ägäis sich in Seenot befinden, ist für die griechische Regierung und Frontex damit plötzlich diskutierbar. Der Schriftverkehr zwischen Frontex und den beteiligten Küstenwachen verweist mehrfach auf die „hybride Gefahr“. Damit konfrontiert, reagieren die politisch Verantwortlichen meist ähnlich: Sie verweisen auf eine angebliche Lücke in den rechtlichen Rahmenbedingungen. Sie müssten zuerst definieren, ob ein Gefährt sich in Seenot befindet. Solange aber niemand diese Katego-

risierung vornimmt, dürfen sie Grenzschutzmaß-nahmen durchführen.

Anders formuliert, solange die griechische Küstenwache niemals ein Boot in Seenot als ein solches bezeichnet, ist es möglich Pushbacks durchzuführen. Unter welchen rechtlichen Rahmenbedingungen dann manövrierunfähige Boote und Rettungsinseln eingesetzt werden dürfen, bleibt schleierhaft. Die Einstufung von Seenot ist sehr klar geregelt und durch das *Frontex Konsultative Forum on Fundamental Rights* festgelegt. In Seenot befinden sich alle diese Boote.

Fazit

20 Jahre nach 9/11 befinden wir uns also in einer Situation in der sich die europäische Asyl- und Migrationspolitik nicht nur kontinuierlich rhetorisch einer sicherheitspolitischem Rhetorik bedient, sondern die Instrumente, Praktiken und Infrastruktur an den Außengrenzen mehr und mehr an einen Kriegszustand erinnert. Klare rechtsstaatliche Prinzipien und Verordnungen werden nicht nur zufällig sondern bewusst außer Kraft gesetzt, mit dem Verweis auf den Schutz des Landes, der Souveränität und inneren Sicherheit der Europäischen Union.[3] Wie können Asylsuchende eine hybride Gefahr für die Europäische Union sein? In dem diese Instrumentalisierung mitgegangen wird, werden Menschen zu einem Sicherheitsaspekt re-

duziert. Wir könnten sie auch als Schutzsuchende betrachten und behandeln, aber das ist nicht gewollt. Im ersten Moment scheint es willkürlich zu sein, wen wir damit bezeichnen. Im zweiten Blick wird deutlich, wie dies letzten Endes funktioniert: Über das rassistische Bild der Gefahrenabwehr gegen angeblich einwandernde Terroristinnen und Menschen, die „unserer Kultur fremd sind". Die politische Antwort auf die in unserem kollektiven Gedächtnis verankerte Angst vor Terrorismus, ist eine irrationale Politik, die sich zum Ziel setzt, jegliche Migrationsbewegung nach Europa zu verhindern. Damit gewinnen am Ende diejenigen, die mit ihrem Terror Angst und Verunsicherung in unsere Gesellschaften tragen wollen.

Im Jahr 2021 ist die Antwort der Europäischen Union an diejenigen, die an ihren Grenzen um Schutz bitten, eine Verstärkung von Grenzschutzmaßnahmen. Für diejenigen, die es schaffen der Gewalt durch Grenzbeamte zu entkommen, nicht zu ertrinken und nicht sofort illegal zurückgeführt zu werden, bauen wir hochmoderne Vorzeigegefängnisse, in denen keinerlei unabhängige Kontrolle der Asylverfahren, Pressefreiheit oder Lebensbedingungen möglich ist. Willkommen in Europa heißt übersetzt in die derzeitige Politik: Schade, dass wir dich nicht am Grenzübertritt hindern konnten, hier kommst du erstmal in den Knast.

Hinweise

1 Eine sehr gute Zusammenfassung der rechtlichen Situation findet sich beim *European Center for Constitutional and Human Rights*.

2 Hier wurde geurteilt, dass militärische Schiffe, die meist in den zivilen Vereinbarungen ausgenommen sind, Menschen unrechtmäßig nach Libyen zurückgebracht hatten.

3 Vielleicht ein trauriger Höhepunkt der Absurdität des Zusammendenkens von Sicherheit, Flucht und Migration ist das Verhalten des Bundesministeriums des Inneren mit Hinblick auf die Evakuierung afghanischer Ortskräfte nach Deutschland. Menschen, die seit Jahren für Deutschland gearbeitet haben, lassen wir in Afghanistan zurück, wo ihnen der Tod droht, weil wir es nicht geschafft haben ihre, Sicherheitsüberprüfung abzuschließen.

Ayşe Dicle Ergin

Delayed Parallels

The Securitization of Deportations in Turkey

At the global stage, following the events of 9/11, there was a trend towards securitizing migration policies. Turkey experienced the same trend, albeit for different reasons. The country has historically faced large mixed flows of refugees and migrants, many of whom wish to reach Europe. Turkey's national migration policies have been most affected by regional developments and/or those in the countries of origin of the refugees and migrants. These countries are often neighbours to Turkey (i.e. Iran, Syria) or have cultural ties with it (i.e. Afghanistan). When political instabilities and violence become more prevalent there, and affect local dynamics, Turkey has considered these developments to endanger its national safety and public order. Accordingly, Turkey has securitized its migration and asylum policy.

Even though 9/11 has had a significant impact on the global linking of migration and security, different triggers may be required for each country for the concrete effects of this approach to emerge. For Turkey, the developments are parallel but delayed. Turkish immigration policy, which was trending towards becoming more liberal and rights-based after 9/11, has suffered a serious break after a series of terrorist attacks in the country.

Preparation of a national asylum law: shifting of the paradigm from "national security" to "human rights"

Beginning in the late 1990s, a major factor influencing the policy environment in Turkey was its potential accession to the EU. The *2001 EU Accession Partnership Document* (laying out a roadmap for Turkey's full membership to the EU) and *2003 National Programme for the Adoption of the Acquis* (establishing the government's planned undertakings) showed Turkey's willingness to carry out comprehensive legal reforms in line with the *EU acquis* by 2006. The reform process culminated in the *2005 Asylum and Migration Action Plan* and outlined the tasks Turkey planned to follow to develop a fully-fledged asylum system.

Meanwhile, the Turkish protection regime faced significant pressure from the ECtHR through several negative decisions against Turkey, including *Jabari v. Turkey*, *D. and others v. Turkey*, *Mamatkulov and Askarov v. Turkey,* followed by the landmark *Abdulkhani and others v. Turkey* judgement. *Abdulkhani and others v. Turkey* constitutes a milestone, where the ECtHR decided on the violation of Articles 3 (torture), 5 (detention) and 13 (effective remedy) ECHR, while also highlighting the problems in the implementation of deportation procedures and lack of legal basis thereof.

During this period, the fields of migration and asylum (including the entry, stay and deportation of foreigners) were governed by laws, dating back to the 1950s, and a number of administrative acts, mainly the *1994 Regulation*. Under Article 19 of the repealed *Law on Residence and Travel of Foreignes* in Turkey it was possible for a "mischievous" foreigner to be deported based on "general safety, political and administrative requirements". During this period, the institutional perspective focused on the prioritisation of state's sovereignty by granting broad discretionary powers to the administration. Despite a number of decisions rendered by the Turkish administrative courts favouring legal certainty and procedural guarantees, the migration and asylum regime remained largely arbitrary and concepts were broadly interpreted by the administration.[1]

Adoption of the law on foreigners and international protection (LFIP) in 2013

In 2008, the Asylum and Migration Bureau under the Ministry of Interior was tasked to prepare a draft law on migration and asylum. Following an intensive preparatory process between 2008 and 2012, Turkey recognized a solid rights-based asylum framework through the *Law on Foreigners and International Protection* – Law No. 6458 (LFIP) – which entered into force in April 2014. Academics, experts and UNHCR agreed that the inclus-

ive way the LFIP was drafted showed a significant transformation in Turkey's asylum policy.

The LFIP became the basis for international protection procedures and rights, entitlements and obligations of and for all persons in need of international protection. This right-based legal framework tried to counterbalance national security considerations by introducing specific provisions on administrative detention and deportation of foreigners. These included the prevention of deportation for individuals whose life would be in danger or where they risk of being tortured, and also procedural safeguards against arbitrary deprivation of liberty, improvement on duration and conditions of detention and ensured judicial review. The LFIP symbolised "a shift in mentality away from a purely security-driven approach to a human rights-focused one", which is also evident in the transfer of authority in migration matters from the law enforcement to a civilian body.

A retrospective analysis of the adoption of the LFIP easily reveals the impact of commitments towards the EU, the fruits of UNHCR's ongoing dialogue, and the direct pressure caused by the ECtHR's negative decisions against Turkey.

Terrorist attacks in Turkey leading to major amendments to the LFIP in 2016 and the role of the Turkish Constitutional Court as the guardian of human rights

Under the LFIP, deportation decisions could be issued against foreigners only if there were serious reasons to believe that they posed a threat to Turkish national security or if they were convicted for an offence constituting a threat to the public order. The LFIP also allowed room for a judicial appeal against a deportation decision within 15 days and prevented the removal of the appellant until the finalization of their appeal proceedings. This framework could be described as having an "automatic suspensive effect" of the appeal application against deportation, which is a constitutive element of the right to an effective remedy and in line with the *Abdulkhani and others v. Turkey* judgement.

Between June 2015 and December 2016, a couple of years after the promulgation of the LFIP, Turkey became the target of several terrorist attacks. 497 people lost their lives in these attacks and the number of injured exceeded 2000. The attacks were mainly carried out by ISIS and directly targeted civilians. In 2016, a significant increase in PKK and TAK attacks were observed. High-level officials emphasized Turkey's willingness to combat terrorism and pointed to the increased number of foreign terrorist fighter suspects, against whom entry bans had been issued and administrative detention and

deportation decisions had been taken. At this turning point, the scales tipped towards securitization.

Following the aforementioned terrorist attacks, the legal framework was found to have not been sufficient to cope with security threats, some of which emanated from foreigners within Turkey's protection system. Thus, major amendments were introduced in the deportation provisions and appeal mechanisms of the LFIP with the adoption of Emergency Decree No. 676. As per these changes, "being considered to have been associated with terrorist organizations designated by international institutions and organizations" was added as a new ground for deportation under Art 54/1/k, LFIP. Individuals who are considered "to be leaders, members or supporters of a terrorist organization or a criminal organization", "to pose a public order or public security or public health threat" or "to have been associated with terrorist organizations designated by international institutions and organizations" could be deported at any stage of their international protection proceedings under Art 54/2, LFIP. These grounds remain largely vague and can be interpreted widely. More importantly, with the introduction of these changes, the automatic suspensive effect of appeals applications has been lifted. It became possible to deport even though appeals were pending. With these changes the administration exceeded the legal framework initially foreseen, which

could easily be defined as "securitisation" of Turkey's migration policy.

These legislative changes were heavily criticized by several actors including lawyers, NGOs and human rights activists. On the other hand, the Turkish Constitutional Court (TCC) has assumed a stronger protective function to safeguard the rights of deportees. Since the entry into force of the *Emergency Decree 676*, the most effective way to prevent removal has been to lodge an individual application before the TCC with a request for an interim measure. These are modelled after the individual complaint procedure of the ECtHR. Individuals can claim a violation of "any of the fundamental rights and liberties set forth in the Turkish Constitution and safeguarded by the ECHR and its Protocols". While individual complaints to the TCC do not carry suspensive effect, an urgent interim measure can be requested by the applicants as per Article 73 of the Rules of Court on account of "serious risk on the applicant's life, physical and moral integrity".

The developments around the *Emergency Decree 676* led to a significant shift in the TCC's utilization of its interim measure decisions. The TCC announced that it would start initiating the pilot decision procedure due to the existence of a structural problem in the legal framework pointing out in its *Y.T. judgment* that it had granted interim measure decisions in 90.5% of a total of 866 applications. Accordingly, the TCC started "tempor-

arily suspending the deportation action" on the same day or within a couple of days' time following the applicant's request, even without undertaking a real assessment concerning the existence of a risk against the applicant's physical and mental integrity. In May 2019, by the time the total number of applications to the TCC reached around 1500, the TCC rendered a pilot decision, where it highlighted that the lack of suspensive effect to prevent the risk of deportation pending appeal constituted a breach of Article 40 (right to an effective remedy) in conjunction with Article 17 (right to physical integrity) of the Constitution of the Republic of Turkey, and called for the re-amendment of the LFIP.

Additional amendments to the LFIP in 2019: back to track but not fully on trail

In December 2019, based on the pressure from the TCC, further amendments were introduced in the LFIP. They removed previous exceptions to the automatic suspensive effect of appeals against deportation decisions.

Despite this positive development, two major drawbacks snuck into the amendments. First, the appeal period against deportation decisions has been shortened from 15 to 7 days (Article 53/3). This shortening is expected to negatively affect those kept in administrative detention in the view of practical challenges for their access to legal assistance and legal

aid from within the removal centres. Second, new reasons were added for the issuance of deportation decisions beyond the breach of the terms and conditions for legal entry, to include those who "attempt to breach" them (Article 54/1). This extension risks an increase in the issuance of deportation decisions. So as to avoid deportations of individuals in need of international protection, these provisions should be implemented in line with Article 8 LFIP[2], allowing access to the international protection procedure for those in need of such protection.

All in all, the 2019 amendment did not completely reinstate the LFIP's former protection concerning the deportation of foreigners, and occasional criticism on illegal deportations still take place. Although the changes also brought some provisions, such as introducing alternatives to detention in Article 57/A, the change in the deportation provision was rather a minimum level amendment as directly forced by the TCC.

Conclusion

There is a general acceptance that following 9/11, migration policies were securitised globally. In the case of Turkey, we initially see the opposite; a strong right-based commitment in the early 2000s to regulate its migration and asylum framework; and the realisation of this commitment with the adoption of the LFIP in 2013.

This period even overlaps with the emergence of the internal disturbances within Syria resulting in mass migratory movements towards Turkey. Increased securitisation within Turkey's migration policy only occurred when the security threat materialised in its territory in the form of terrorist attacks, linked to some category of foreigners (foreign terrorist fighters) who originate from and/or are connected to Turkey's neighbours. During this process, the TCC assumed a proactive function to prevent potential human rights violations in the application of the LFIP.

One could conclude that the events of 9/11 did not seem to have directly affected the securitisation of Turkish asylum and migration. However, the regional instabilities, particularly in its neighbouring states, spilled over and led to a return to the securitisation of asylum and migration policy in Turkey.

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1 See for instance Council of State 10th Chamber Decision, 2003/863 E., 2006/5701 K, 16 October 2006.

2 Article 8 LFIP, "The conditions stipulated in Articles 5, 6 and 7 shall not be construed and implemented to prevent the international protection claim."

Emilie McDonnell

The UK's Securitisation and Criminalisation of Migration and Asylum

On 6 July 2021, the UK Home Secretary, Priti Patel, introduced the highly controversial *Nationality and Borders Bill* into the House of Commons. Leading UK barristers have concluded that the Bill "represents the biggest legal assault on international refugee law ever seen in the UK".

In this article, I argue that this Bill is the culmination of the UK government's increasingly securitised, criminalised and hostile approach to asylum and migration post-9/11. While 9/11 served to *solidify* the highly dubious nexus between migration and terrorism, the UK (alongside other destination states) has for decades been implementing restrictive migration policies and practices designed to deter and prevent asylum seekers and other migrants from reaching its territories and accessing safety.

The impact of 9/11 on UK asylum

The 9/11 terror attacks are often viewed as the defining event for global security and the securitisation of migration, having been "immediately politicised as an exceptional and global threat to the United States and the Western World more generally". In the UK context, various scholars identified how post-9/11, politicians began to label asylum seekers as potential or suspected terrorists that may seek to exploit the asylum system in order to gain entry to the UK (see for an overview and on the

European Union), even though not a single one of the 9/11 hijackers entered the US as a refugee or filed an asylum claim in the US.

This led to adoption of the draconian *Anti-terrorism, Crime and Security Act 2001*, which permitted the indefinite detention of suspected terrorists without trial, even where the person cannot be deported due to practical considerations, or where this would amount to *refoulement*, and excluding substantive consideration of their asylum claim and thus from protection under the 1951 Refugee Convention, even where the refugee only has "links" to a terrorist group. After the 2005 London bombings, the *Prevention of Terrorism Act 2005* and *Immigration, Asylum and Nationality Act 2006* were passed, the latter including expanded grounds for deportation and exclusion from refugee status, deprivation of British citizenship if "conducive to the public good", and the collection of advance passenger information from airlines and ships.

Today, counterterrorism remains a top priority for the UK government, with the continuing introduction of sweeping and harsh anti-terror laws that often excessively restrict human rights and reinforce a permanent state of emergency.

Although the aftermath of 9/11 saw immigration, asylum and border control through a lens of security, counterterrorism and risk, the UK and various other destination states in the Global North have been re-

stricting access to their territory for asylum seekers for decades, engaging in diverse forms of externalised migration control, including Australia, the EU and US. As Fitzgerald traces, visas and passports have long been used to obstruct movement, whereby "Liberal European states and governments throughout the Americas [in the 1930s and 1940s] adopted increasingly restrictive visa policies on Jewish refugees and pressured their neighbours to do the same [...] Since the 1980s, many countries, such as Canada, Germany, and the UK, have continued to impose visa requirements on nationalities with the open goal of deterring asylum-seeking".

Nevertheless, 9/11 and subsequent terrorist attacks on British soil set into motion an approach to migration and asylum that has served to increasingly restrict, deter and penalise asylum seekers and other migrants, rather than protect such vulnerable persons. The *Nationality and Borders Bill* is the natural, though very extreme, continuation of such trends.

The Nationality and Borders Bill

The Bill is proclaimed to be the most significant overhaul of the asylum system in decades. The proposed system is supposedly "fair but firm" and one that "takes back control of our borders". During the second reading speech, Home Secretary Patel said "*enough*" of "dinghies arriving illegally on our shores, directed by

organised crime gangs", "economic migrants pretending to be genuine refugees", "people trying to gain entry illegally, ahead of those who play by the rules" and "foreign criminals – including murderers and rapists – who abuse our laws and then game the system so we can't remove them".

With the Bill sitting at 87 pages long, it is impossible to outline the myriad ways its clauses are inconsistent with international law and domestic UK law (see for detailed analysis the *UNHCR's* legal observations on the Bill and *Freedom from Torture* joint opinion). Overarchingly, the Bill strikes at the core principles of the Refugee Convention and international refugee regime. A number of clauses, if implemented, would severely undermine the right of individuals to seek and enjoy asylum, including by restricting access to territory, failing to effectively protect against direct and indirect *refoulement,* discriminating against certain categories of refugees, and criminalising individuals simply for seeking asylum.

Such a securitised and punitive approach to migration and asylum is ostensibly justified because those who cross the English Channel and seek asylum through irregular means are "illegal migrants", "dangerous foreign criminals" and potential "radical terrorists" that pose a national security risk.

Clause 10 of the Bill would allow refugees to be treated differently depending on their mode of arrival,

creating two groups of refugees depending on how they arrived in the UK. Those who travelled through a "safe" third country and failed to claim asylum there, or those who fail to show good cause for why they entered the UK irregularly, would be granted lesser rights in relation to the length of time they would be allowed to stay in the UK, access to mainstream welfare benefits and housing assistance, and family reunification rights. This raises clear compatibility issues with the prohibition on non-discrimination and obligations under the right to family life enshrined in international and domestic law.

The Bill also seeks to criminalise irregular entry, penalising asylum seekers who arrive in the UK without entry clearance through the imposition of fines and/or imprisonment for up to 12 months or four years on indictment (clause 37). Individuals can also be sentenced to *life imprisonment* for assisting an asylum seeker enter the UK irregularly (clause 38). It removes the requirement for this to be done for gain or profit, going beyond the narrow definition of smuggling contained in the Palermo Smuggling Protocol to criminalising forms of "humanitarian smuggling" and conflicting with the duty imposed by the law of the sea on all states and shipmasters to rescue persons in distress. Such provisions clearly target asylum seekers crossing the English Channel, with over 17,000 people having crossed by boat so far in 2021.

The criminalisation and differential treatment of asylum seekers and refugees shows "contempt" for the non-penalisation principle enshrined in Article 31 of the Refugee Convention and section 31 of the *Immigration and Asylum Act 1999*, which prohibits the penalisation of asylum seekers for unlawful entry or stay, in recognition that many refugees have to resort to unlawful means in order to seek asylum. Clause 34(1) of the Bill amends the generally accepted interpretation of Article 31, specifying that "a refugee is *not to be taken* to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, *they stopped in another country* outside the United Kingdom, unless they can show that they could not reasonably be expected have sought protection under the Refugee Convention in that country" (emphasis added).

Under clause 14, those who have a connection to a safe third state can have their asylum claims declared inadmissible, accompanied by no right of appeal, seemingly targeting everyone who arrives by boat or lorry from France. Alarmingly, the Bill allows asylum seekers to be removed to *any other* "safe" country for offshore processing, while their asylum claim is pending (clause 26). As the *UNHCR* detailed in its observations, "the primary responsibility for identifying refugees and affording international protection rests with the State in which an asylum-seeker arrives and seeks that protec-

tion". "[R]equiring refugees to claim asylum in the first safe country they reach would undermine the global, humanitarian, and cooperative principles on which the refugee system is founded".

The UK would also be empowered to undertake maritime enforcement against ships suspected of committing an immigration offence (clause 41 and schedule 5). In doing so, the Bill sanctions the pushback of migrant vessels while failing to detail how, if at all, asylum seekers can raise their specific protection needs and effectively challenge being pushed back from the UK. Perhaps most worryingly, border force officials that engage in pushbacks in the English Channel which leads to drownings or endangerment will be given immunity "in any criminal or civil proceedings for *anything done* in the purported performance of functions" if the court is satisfied that the act was done in good faith and there were reasonable grounds for doing it (schedule 5, Part A1, J1, emphasis added). As barrister Colin Yeo has argued, "How can there ever be reasonable grounds for pushing back a small boat loaded with refugees in one of the world's busiest shipping lanes?".

Given the recent withdrawal of US and NATO troops from Afghanistan – with the 2011 US-led invasion of Afghanistan *part of the declared "War on Terror"* – many asylum seekers that the UK plan to criminalise or push back may well be Afghans fleeing Taliban persecution. While the UK's *Afghan Citizens Resettlement Scheme* and

Afghan Relocations and Assistance Policy are much welcomed, it is inevitable that Afghans who cannot access such schemes will need to resort to irregular means to seek safety in neighbouring countries and further afield, including the UK.

Several provisions also directly advance the securitised approach to migration and border control. An Electronic Travel Authorisation scheme is being introduced (as exists in Australia, Canada and the US) "to block the entry of those who present a threat to the UK", which is not without its human rights implications. The Bill would also make it easier to remove refugees who have been convicted of a particularly serious crime and deemed to constitute a danger to the community, even when they would face persecution on return. Clause 35 lowers the threshold (as set out in Article 33(2) of the Refugee Convention on exclusion from *non-refoulement* protection) of "particularly serious crime" from crimes receiving at least a two-year sentence to those only attracting a one-year sentence. Clause 51 operates to disqualify victims of modern slavery or human trafficking from protection if they are considered a threat to public order, including those who engaged in a terrorism-related activity *because they were trafficked by a terrorist organisation*. This clause is said to have been introduced to prevent the return of British women and children that were trafficked to Syria by ISIS.

Rediscovering international law

With the Nationality and Borders Bill likely to become law, the UK is now at an extreme point of departure from its obligations under international law.

9/11 has accelerated restrictive approaches to migration and asylum, fuelling xenophobia, Islamophobia and "othering". However, such approaches only serve to increase the risks to migrants and render them more vulnerable. As the Australian "model" has shown, offshore processing and pushbacks are costly, unlawful and lead to immense suffering. Such externalisation measures are also often ineffective and counterproductive, serving to push migrants into the hands of people smugglers and traffickers and increasing the risk of loss of life as they are left with no other option than to take more hidden, more dangerous routes. The UK's decision to close "legal" and "orderly" pathways by imposing restrictive visa measures on states that do not cooperate in the return of their nationals (see clause 59 of the Bill) and limiting family reunification pathways, as discussed above, will only perpetuate this.

The UK and other governments must take seriously their obligations under international law and reaffirm their commitment to upholding the rights of all asylum seekers, refugees and other migrants, regardless of how they sought asylum or arrived in the UK and without fear-mongering and labelling migrants as a threat. At

the most basic level, they must respect the right of asylum seekers to flee by any means, not criminalise asylum seeking, and uphold their *non-refoulement,* collective expulsion and right to life obligations. Securitisation, criminalisation and externalisation are not the answer.

Julia Gelhaar

Mit Sicherheit gegen Migration

Nach den Anschlägen des 11. Septembers 2001 hat in der Europäischen Union die Europäisierung mit der Idee der Schaffung eines „Gemeinsamen Europäischen Asylsystems“ (GEAS) besonderen Aufschwung erfahren. Bereits eine Aussage des damals amtierenden spanischen Außenministers Pique kurz nach den Anschlägen zeigt, wie Immigration und Terrorismus nun unmittelbar verknüpft wurden: „*The reinforcement of the fight against illegal immigration is also the reinforcement of the fight against terrorism.*“ Die Bedenken über die negativen Auswirkungen von Migration auf beispielsweise den wirtschaftlichen Wohlstand, die nationale Identität, die soziale Ordnung und die staatliche Souveränität gingen 9/11 zwar voraus, doch sie haben die Bedenken in migrationsbezogene Sicherheitsängste verwandelt. Auch in Deutschland lösten die Ereignisse eine Debatte um die innere Sicherheit aus, unter der rot-grün geführten Bundesregierung wurden Forderungen über eine „Verschärfung des Ausländerrechts“ laut. Dieses war zwar schon immer ein Gefahrenabwehrrecht, erst seit 9/11 aber werden Verbindungen zur Terrorismusgefahr gezogen: weg von der konkreten Gefahr zu einer abstrakten Gefährdung.

Durchschlagenden Erfolg hatten Versicherheitlichungsversuche dann im Zuge der sogenannten Flüchtlingskrise, der die Bedrohung schon semantisch inhärent ist: Auf die strukturelle Niederlage des europäischen Grenzregimes im Sommer 2015 folgten tem-

poräre Schließungen der Binnengrenzen und ein weiter anhaltendes Wettrüsten unter den Mitgliedstaaten um die migrationsgesetzliche Abschottung. Mit Wieder-Abschaffung der internen Grenzkontrollen wird nun der Schutz der gemeinsamen Außengrenzen harmonisiert und verstärkt, um steuern zu können, wer das Territorium der EU betritt. Das von instrumenteller Vernunft gesteuerte Kredo: Ein gemeinsames europäisches Problem wird dann zu einem nationalstaatlichen Problem, wenn die europäische Lösung nicht fruchtet und andersherum.

Vom Asylpaket bis zum „Hau-ab-Gesetz"

In der Bundesrepublik ist mit dem Asylpaket I im Oktober 2015 eine weitreichende Asylrechtsverschärfung eingeführt worden. Es beinhaltete unter anderem Leistungskürzungen für Asylsuchende und Geduldete in § 1a Asylbewerberleistungsgesetz (AsylblG) und die Einstufung von Kosovo, Albanien und Montenegro als sogenannte „sichere Herkunftsstaaten", um Asylanträge von Menschen aus dermaßen deklarierten Staaten einfacher ablehnen zu können. 2016 folgten auf Asylpaket I Nummer II und das Integrationsgesetz. Zu den „sicheren Herkunftsländern" gesellten sich Marokko, Tunesien und Algerien, der Familiennachzug wurde (schließlich bis 2018) ausgesetzt und beispielsweise eine Wohnsitzauflage für bereits anerkannte Flüchtlin-

ge eingeführt. Das Gesetz zur besseren Durchsetzung der Ausreisepflicht schließt sich 2017 an, ihm folgt ein Migrationspaket, das sieben Gesetze, unter anderem das „Geordnete-Rückkehr-Gesetz" inklusive einer Duldung „light" in § 60b Aufenthaltsgesetz (AufenthG) für Personen „mit ungeklärter Identität", enthält und dessen umfangreichen Änderungen im Asyl-, Aufenthalts- und Sozialrecht zu verschiedenen Zeitpunkten in den Jahren 2019 und 2020 in Kraft getreten sind. In Summe handelt es sich um sicherheits- und außenpolitische Maßnahmen, die Migrationsbewegungen möglichst in ihrer Entstehung verhindern und den Zugang zu Schutz erschweren, gar verunmöglichen sollen. Wie wurde diese immer restriktiver werdende Migrationspolitik legitimiert?

Versicherheitlichung von Migration

Hohe Ankunftszahlen von Migrant*innen an den europäischen Außengrenzen strapazieren das Asylsystem und die Kapazitäten der Aufnahmestaaten. Die Situation im Sommer 2015 habe dann das Vertrauen der Bürger*innen in ein funktionierendes Asylsystem erodieren lassen. Dieses Narrativ schreit nach Lösungen. Und es kollidiert mit menschenrechtlichen Schutzgarantien, wie zum Beispiel dem *Refoulement*-Verbot, verankert in Art. 33 der Genfer Flüchtlingskonvention. Es verbietet, Personen in ein Staatsgebiet abzuweisen, auszuweisen

oder auszuliefern, in dem ihre elementarsten Menschenrechte in Gefahr sind und statuiert so zwar kein Recht auf Asyl, aber zumindest ein Recht auf ein faires und individuelles Asylverfahren – doch der vermeintliche Schutz des deutschen Staates und seiner Bürger*innen trägt zu ihrer Aushöhlung bei.

Diese implizite oder explizite Konstruktion einer existentiellen Bedrohung erfasst die Politikwissenschaft mit dem Begriff der „Versicherheitlichung". Mit Blick auf Migration wurde sie innerhalb der EU erstmalig von Didier Bigo und Jef Huysmans untersucht. Ihr zentrales Ergebnis: Migration und Asyl werden mit Themen der inneren Sicherheit wie Terrorismus verknüpft und bilden ein Kontinuum „Sicherheit".[1] „Sicherheit" stellt dabei der Kopenhagener Schule folgend keine objektive Gegebenheit dar, sondern wird sozial konstruiert – sie ist ein deklarativer Sprechakt, Ergebnis eines Diskurses, innerhalb dessen soziale Phänomene zu existentiellen Gefahren beziehungsweise Bedrohungen erklärt und damit konstruiert werden.[2] Das Framing von Migration als Bedrohung ist somit keinesfalls eine natürliche Reaktion auf gegebene Umstände, sondern das Ergebnis politischer Diskurse und Entscheidungen. Ist das Publikum von der Bedrohung überzeugt, können außergewöhnliche Maßnahmen wie weitreichende Asylrechtsverschärfungen getroffen werden, durch die die vermeintliche Sicherheitsbedrohung mithilfe des Staates,

dessen Rolle dadurch unverzichtbar wird, abgewendet werden soll.[3]

Ein genauerer Blick auf die Verflechtungen von Versicherheitlichung und Migration zeigt: Migrant*innen werden als Bedrohung für das Überleben des Staates und die Gesellschaft, den Wohlfahrtsstaat, kulturelle Besonderheiten und/oder die Identität der Aufnahmeländer konstruiert – mit ihnen, so ein gängiges Narrativ, kommen Terrorismus und Kriminalität.[4] Oder anders: Wenn Bombenanschläge im Namen einer extremistischen, antiwestlichen Ideologie verübt werden, ist Terrorismus auch eine „Bedrohung der nationalen Identität".[5] Neben sogenannten Push-Faktoren wie Verfolgung, Bürgerkriege und dem Klimawandel, wird der Fokus auf Pull-Faktoren von Migration gelenkt und es werden Verantwortungs- und Schuldzuschreibungen vorgenommen: Das Grenzmanagement sei mangelhaft, Rückkehrraten zu niedrig, das Dublin-System funktioniere nicht und unterschiedliche Anerkennungsraten und Verfahrenslängen würden schließlich zu „Asylmissbrauch" führen. Als Antwort darauf bekommen Sicherheitsakteur*innen wie das Militär und die Rüstungsindustrie eine gewichtige Rolle zugeschrieben.[6] Sie statten etwa die Grenzschutzagentur Frontex personell und materiell aus oder übernehmen den Grenzschutz direkt selbst (wie beispielsweise die libysche Küstenwache als Teil der landeseigenen Marine). Zu den Asylrechtsverschärfungen gesellen sich weitere Gesetze, wie das Da-

tenaustauschverbesserungsgesetz, das den rechtlichen Rahmen für die Einführung eines neuen Kerndatensystems auf Basis des Ausländerzentralregisters, das den Behörden Zugriff auf die Stammdaten einreisender Geflüchteter ermöglicht, geschaffen hat und dem Kontinuum Sicherheit-Migration zuzurechnen ist.

Besonders auffällig ist, dass zumeist nur die sogenannte „irreguläre" Migration versicherheitlicht wird. Innerhalb der Unterscheidung in „irreguläre" Migrant*innen und solchen, die „wirklich" schutzbedürftig seien, werden Erstere sogar als Bedrohung für Zweitere geframed, denn sie würden die vorhandenen Aufnahmekapazitäten illegitimerweise blockieren. Das verschleiert aber das Problem, dass eine solche Unterscheidung von Migrant*innen nur in einem individuellen und fairen Asylverfahren getroffen werden kann. Praktisch betreffen die innen- und außenpolitischen Sicherheitsmaßnahmen somit alle fliehenden Menschen, vor allem solange es kaum legale Zugangswege nach Europa gibt.

Der vermehrte Fokus auf die Ursachenbekämpfung in den Herkunftsländern blendet darüber hinaus vollkommen aus, dass Faktoren wie die Kolonialgeschichte, Waffenexporte oder asymmetrische Handelsbeziehungen ebenso ursächlich für Fluchtbewegungen sind.[7]

Sicherheitsfragmente einer Bundestagssitzung

Der Blick auf Ausschnitte einer Bundestagssitzung exemplifiziert die Versicherheitlichungsrhetorik in migrationsrechtlichen Debatten. 1. Oktober 2015, die Parlamentarier*innen reagieren auf den Anstieg der Geflüchtetenzahlen. Unter Tagesordnungspunkt 3 a und b beraten sie erstmals den Entwurf des Asylverfahrens-beschleunigungsgesetzes und des Entlastungsbeschleunigungsgesetztes zur Entlastung der Länder und Kommunen bei der Aufnahme und Unterbringung von Asylbewerber*innen aus dem oben genannten Asylpaket I. Stephan Mayer aus der CDU/CSU-Fraktion bringt an:

> *„[…] allein im September sind mehrere zehntausend Flüchtlinge und Asylbewerber nach Deutschland gekommen. Sie wurden nicht registriert. Sie wurden nicht kontrolliert. Ich möchte in aller Deutlichkeit feststellen: Damit besteht* auch ein großes Sicherheitsrisiko. *Es ist deshalb das Gebot der Stunde, dass wir zur Rechtsstaatlichkeit zurückkehren. Jeder Flüchtling und jeder Asylbewerber muss schnellstmöglich, wenn er deutschen Boden betritt, registriert und überprüft werden. Das ist im deutschen Interesse.“* [Herv. d. Verf.]

Unter Beifall der eigenen Fraktion und einzelner Abgeordneter der SPD fährt er fort:

> *„Für mich ist eines entscheidend: Deutschland und Europa haben nicht nur Verpflichtungen gegenüber schutzbedürftigen Menschen – dies haben wir sehr wohl auch –, wir haben insbesondere auch eine Verpflichtung gegenüber unserer heimischen Bevölkerung, ein funktionierendes Gemeinwesen und sichere und soziale Lebensbedingungen zu gewährleisten. Es sind vor allem die Menschen in unserem Land, denen wir verpflichtet sind. […] Wir geben mit diesem Gesetz zur Beschleunigung des Asylverfahrens ein wichtiges Signal an all die Menschen, die nicht schutzbedürftig sind, sich nicht nach Deutschland aufzumachen. […] Wer mit Ignoranz darauf reagiert, dass sich Ängste in der Bevölkerung manifestieren, und wer die Probleme in der Bevölkerung negiert,* gefährdet *letzten Endes den* inneren Frieden und auch unseren gesellschaftlichen Zusammenhalt.*“* [Herv. d. Verf.]

Ein Redebeitrag unter Tagesordnungspunkt 6 steht dann aus konstruktivistischer Perspektive beispielhaft für die Verknüpfung von Migration und Terrorismus. Das Parlament berät den Antrag der Bundesregierung an der Beteiligung bewaffneter deutscher Streitkräfte an der EU-Operation EUNAVFOR MED zur Unterbin-

dung des Geschäftsmodells der Menschenschmuggel- und Menschenhandelsnetzwerke im südlichen und zentralen Mittelmeer. Laut Roderich Kiesewetter, ebenfalls aus der CDU/CSU-Fraktion, geht es in dieser Debatte „darum, wie wir als Europäische Union mit der Flüchtlingslage an den europäischen Grenzen umgehen." Die Zahlen eingesetzter Kriegsschiffe und Luftfahrzeuge werden referiert, sie seien „ein Zeichen europäischer Solidarität, aber […] auch […] ein Teil der notwendigen Strategie". Diese Strategie, so erfährt man im Laufe des Beitrags Kiesewetters, ziele auch auf:

> *„die Unterbindung von Terrornetzwerken, denen in Libyen Tür und Tor geöffnet wurde. Es geht auch darum, dass wir die* Ausbreitung von Waffen und von Proliferation*, aber auch von ausgebildeten* Terroristen eindämmen. *Das bedeutet eben, dass wir neben entwicklungspolitischer Zusammenarbeit und außenpolitischen Strategien auch eine gewisse* polizeiliche und militärische Begleitung brauchen." [Herv. d. Verf.]

Diese Sichtweisen gehen logischerweise davon aus, dass der Zusammenhang zwischen Einwanderung und Terrorismus offensichtlich ist: Migrant*innen sind Ausländer*innen und stellen eine Bedrohung dar; Terrorist*innen sind Ausländer*innen und stellen ebenfalls eine Bedrohung dar; folglich kann jede*r Mi-

grant*in ein*e Terrorist*in sein, und folglich besteht der beste Weg, Terrorismus zu verhindern, darin, im Umgang mit Migration hart zu sein – ein „Worst-Case-Szenario"-Ansatz, der die Grundlage der europäischen und damit auch deutschen Migrationspolitik bildet.[8]

Versicherheitlichung in rechter Verschwörungserzählung

Jenseits der staatspolitisch getriebenen Versicherheitlichungsrhetorik existiert im rechten politischen Spektrum der Mythos einer kulturell einheitlichen Nation beziehungsweise einer nationalen Identität, die vor Migration geschützt und dem Verschwinden bewahrt werden muss.[9] Diskursiv wird die Entscheidung für oder gegen Einwanderung mit der Entscheidung für oder gegen die Gemeinschaft gleichgesetzt. Mit der Zuwanderung (vor allem aus dem Nahen Osten) drohe eine Islamisierung. Es wird eine inkompatible, bedrohliche „Kultur" heraufbeschworen und im Anschluss eine – wahlweise „deutsche" oder „europäische" – kollektive Identitätskrise imaginiert.[10] Diese mündet häufig in der Zeichnung von Verbindungslinien zwischen den Migrationsbewegungen und vermeintlichen oder tatsächlichen islamistischen Anschlägen oder entsprechenden Plänen.

Die extremste Variante der Versicherheitlichung von Migration lässt sich in der neurechten Verschwörungserzählung vom „großen Austausch" der Bevölke-

rung ausmachen. Es existiere ein Geheimplan, nach dem die weiße Mehrheitsbevölkerung gegen muslimische oder nicht-weiße Migrant*innen ausgetauscht werden soll. Im deutschen Sprachraum wurde diese Ideologie zuvorderst von Protagonisten der Identitären Bewegung wie dem Österreicher Martin Sellner bemüht. Über neurechte Publikationen, Blogs und Foren ist der Mythos vom „Austausch" popularisiert worden; Vertreter*innen dieser Ideologie sitzen in deutschen Parlamenten. Was ihresgleichen im Namen der Sicherheit zu tun gedenken, wird mit dem Begriff der „wohltemperierten Grausamkeit" euphemisiert.

In der Gesamtschau kann festgehalten werden, dass Migration das Ergebnis vielfältiger Push- und Pull-Faktoren ist und ohne die seit 9/11 geradezu ritualisierte Verknüpfung mit Sicherheitsbedenken diskutiert werden sollte – denn alle Migrant*innen sind von der Versicherheitlichung von Migration betroffen, während die überwältigende Mehrheit der Migrant*innen keine Terrorist*innen sind.

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Peter Billings

Counterterrorism Rhetoric, the Deterrence Paradigm, and the End of Asylum: An Antipodean Viewpoint

In Australia, the quickening securitisation of unauthorised maritime migration and the *de facto* criminalisation of asylum seekers coincided with the events of 9/11. Australian asylum policy was securitised via interdiction at sea and the containment and slow processing of asylum claims offshore in third countries. These law and policy developments were, partly, justified on national security grounds (*qua* terrorism fears). However, Australia's approach towards refugee protection seekers, from August 2001 to date, has largely been underpinned by a political drive to combat crime (*qua* people smuggling) and, relatedly, to exclude certain asylum seekers from refugee protection in Australia because of their "irregular" (or, clandestine) mode of arrival.

In addition to employing immigration laws with significant border security-based exclusions, it is worth noting that the Australian government has enacted more counterterrorism statutes than any other Western democracy. This "hyper-legislative" approach has been assisted by the lack of a national bill (or charter) of human rights, either in the federal *Constitution* or enshrined in legislation (Billings and Ananian-Welsh: 2020).

The Australian government's agenda of progressive border securitization was, initially, sustained by counterterrorism rhetoric in 2001, however, that rhetoric has waned subsequently. The focus of concern, I argue, has

shifted away from the potential terrorist threat posed by asylum seekers towards deterring unauthorised maritime migration. Though the nexus between terrorism and asylum lacks an empirical basis in Australia, certain laws, policies and practices premised on counterterrorism in 2001 endure to this day – offshore processing of asylum seekers arriving by sea, notably. I argue that Australia's deterrence model has had a negative "signalling effect" on some European states' contemporary asylum policies and practice.

Escalating exclusionary laws and practices

How then has migration regulation (and asylum seeker policy, in particular) developed over the past 20 years in Australia and the wider Asia-Pacific region?

From October 2001 onward, military interdictions of asylum seekers at sea (firstly conducted until November 2003) coupled with offshore regional processing (on Nauru and Manus Island, Papua New Guinea (PNG)) were critical aspects of the Howard Government's approach to "irregular" maritime migration. This policy and practice was part of the so-called "Pacific Solution" and the suite of deterrence policies served to greatly diminish boat arrivals to negligible levels by 2005 to 2006 (Philips: 2017). The Howard Government partly justified tightened border securitisation and the *de facto* criminalisation of asylum seekers by constructing them

as potential terrorists. Within two days of the 9/11 attacks Australia's Defence Minister, Peter Reith, had linked the unauthorised arrival of asylum seekers by sea with national security, warning that boats "can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities." This theme continued during the course of the 2001 federal election campaign, and it had substantial political traction and capital coming in the wake of the infamous *MV Tampa* affair (August 2001) (on which see, Sangeetha Pillai's blog on the 9/11 debate).

After a five-year hiatus (from 2007 to 2012) under a centre-left government initially intent on restoring integrity in migration management and displaying compassion towards refugees, regional processing of asylum seekers in designated third countries (Nauru and PNG, once more) was resuscitated in August 2012. The revival of interdiction at sea practices under a newly elected right-wing party ensued, in late 2013, with "push-backs" to transit countries (Indonesia) and "take-backs" (to Sri Lanka and Vietnam). This backward-looking shift in policy (dubbed Operation Sovereign Borders) occurred due to rising numbers of unauthorised "boat arrivals", peaking at 300 boats carrying 20,587 people in 2013 (Philips: 2017).

Operation Sovereign Borders was largely, though not exclusively, justified on the basis of addressing the lucrative activity of people smuggling (by "breaking the

people smugglers' business model") and rested upon humanitarian grounds too (the mantra of "saving lives at sea"). Removing the "product" people smugglers sell to asylum seekers, is achieved by a combination of interdiction at sea and turn-backs, backed up by offshore (third country) processing and a ban on resettlement in Australia (discussed below). The spectre of boats transporting a "pipeline of terrorists" barely featured (as it had in 2001) in the political discourse sustaining the resuscitation of the "Pacific Solution" in 2012, nor did it attend the launch of Operation Sovereign Borders, in late 2013. Even though one of its architects (Jim Molan – a retired major general) would, several years later, encourage Europe to follow Australia's lead on border control because it would, he suggested, lower the risk of a terrorist attack (Sheftalovich: 2017).

Connecting terrorism with asylum

While political and media discourse since 2009 has, increasingly, associated asylum seekers arriving by boat with organised transnational crime, the alleged terrorist threat posed by refugees and asylum seekers (especially Muslims) has continued to be peddled by some politicians. For example, in 2016 a leaked draft Cabinet document pointed to perceived links between terrorist attacks in Australia and the official annual overseas humanitarian/refugee resettlement intake, as a justifica-

tion for stricter controls over residency and citizenship, in order to mitigate supposed threats posed by refugees admitted through the regular resettlement program (Lipson: 2016). Additionally, (then) Minister for Immigration, Peter Dutton, intimated that asylum seekers who arrived in Australia by boat, without a valid visa or identity documentation, should be viewed with suspicion – as a national security risk. Specifically, he said:

> *„Secure borders, as Europe has learned at great cost, are an important part of national security. It is a concerning fact that a large number of IMAs [irregular maritime arrivals] who could afford to pay the people smugglers to bring them illegally to Australia arrived here without any identification. They needed identity documentation to fly into Indonesia, but disposed of it on the sea journey to Australia. Why?*" (cited in Billings and Ananian-Welsh: 2020).

Statements of this sort, insinuating that asylum seekers are potential terrorists, have nourished popular antipathy towards those seeking refugee status and legitimised the harsh border protection laws sketched out above. Now, almost two decades after 9/11, we are in a better position to assess the connection between asylum seekers, refugees and terrorism in Australia. It cannot be claimed with certitude that no refugees who have arrived in Australia "irregularly" by boat have

links to terrorism. However, counterterrorism scholars have observed that there is no "obvious, compelling evidence" that any terrorist acts have been planned or commissioned by refugees who arrived by boat (Jones and McGarrity: 2015).

Indeed, Duncan Lewis, head of Australia's national intelligence agency from 2014 to 2019 and now professor at the Australian National University, maintained that he had "absolutely no evidence to suggest that there is a connection between refugees and terrorism" when questioned by a parliamentary committee in 2017. He further ventured: "We have had tens of thousands of refugees come to Australia over the last decade or so and very few of them have become subjects of interest for ASIO [the Australian Security Intelligence Association] and have been involved in terrorist planning" (Kolziol: 2017).

Lewis' conclusions about the lack of a connection between asylum seekers/refugees and terrorism in Australia carry substantial weight. Conversely, some may argue that the evidence connecting refugees to terrorism does not exist because Australia's migration laws and policies have been successful in excluding potential terrorists, including those seeking to arrive "irregularly". Nevertheless, the lack of demonstrable connection between a person's asylum seeker/refugee status and their risk to Australian security challenges the resilient counterterrorism justification for border securitiz-

ation. Essentially, counterterrorism emerges as an unconvincing justification for stringent extra-territorial border controls, or residency and citizenship tests (Billings and Ananian-Welsh: 2020).

Border/national security laws and systemic rights violations

From 19 July 2013, asylum seekers transferred to third countries, pursuant to the resuscitated policy of offshore processing, were prohibited from seeking refugee status and (in a new policy twist) forever barred from resettlement in Australia. Essentially, Australia repudiated legal responsibility for any asylum seekers arriving by boat, instead forcibly transferring them to PNG and Nauru for refugee processing and resettlement elsewhere.

Australia's attempt to divest itself of legal responsibility for asylum seekers and refugees sent offshore has attracted censure from several quarters. For example, the UN Special Rapporteur on Torture affirmed, in 2017, that the outsourcing of refugee protection obligations to third countries, in conjunction with the privatization of service delivery, did not permit Australia to relinquish her international law duties and evade legal responsibility for the harms caused to asylum seekers. Furthermore, in 2017 the UN Special Rapporteur for Migrants Rights emphasized that Australia was legally responsible for those under its effective control and

ultimately accountable for any human rights violations that occur in the regional processing centres. In summary, Australia's legal responsibility for the physical and psychological damage suffered by the asylum seekers and refugees was clear and undeniable.

Importantly, in the case of *Namah v Pato*, PNG's Supreme Court decided that the treatment of asylum seekers at the Manus Island regional processing centre was unconstitutional and beyond legislative power. Mandatory detention was not for the permissible purpose of preventing unlawful entry of a person or effecting the expulsion, extradition or lawful removal of a person. Rather, it was used to facilitate the processing of asylum claims; therefore, the asylum seekers' freedom of movement was curtailed unlawfully. The Supreme Court held that the asylum seekers' treatment also breached international law. The closure of the processing centre slowly followed on 31 October 2017, intensifying the need for Australia to find third-country resettlement options for the former detainees it had forcibly transferred to PNG.

Relatedly, in late 2016 the "American solution" was publicized as a way to end the prolonged period of uncertainty for refugees subjected to regional processing on Nauru and Manus Island (PNG). The Obama administration agreed to consider the resettlement of 1,250 refugees contained on Nauru and in PNG, including provision of settlement service support. In turn, *quid*

pro quo, Australia pledged to resettle Central American refugees held in Costa Rica. Although incoming President Trump detested the deal brokered with Australia, because the US was, in his view, accepting "bad" refugees who Australia had "imprisoned" (ABC News: 2018), the arrangements were honoured and the first group of refugees were accepted for resettlement in the U.S. fiscal year ending 30 September 2017. Interview processes were slow, and the finalization of cases was delayed due to the COVID-19 pandemic. Matters were still ongoing in late 2020 at the time of the U.S. presidential election. By July 2021, 977 refugees had been resettled in the USA.

Now, nine years after the re-establishment of offshore processing, a cohort of 231 people remain in limbo (either in Nauru or Port Moresby, PNG) as the U.S. resettlement programme slowly draws to a close. Additionally, over 1,000 people (mostly "recognized" refugees) are living in Australia temporarily, as "transitory persons", having been evacuated from Nauru or PNG on emergency medical grounds. They have all experienced extreme hardship under conditions of restraint and containment for years. To be clear, Australia's regional processing policy has resulted in "systemic human rights violations" (UN Special Rapporteur for Migrants: 2017).

Policy transplants: the demise of asylum in Europe?

European political leaders habitual interest in processing asylum seekers, rescued at sea, outside of Europe, must be viewed in the light of the foregoing analysis and Australia's troubled experiences of offshore processing. There is an extraordinary human and financial cost associated with this policy and practice. Moreover, whether an adapted version of the Australian "model" would be consistent, in principle and practice, with EU law and the European Court of Human Rights' jurisprudence on *refoulement*, is doubtful. In addition to those legal constraints (that have no direct application in Australia), there are political hurdles too. In order to employ offshore processing, EU states would need the agreement of those states expected to serve as hosts, and establish and fund administrative institutions with fair and effective procedures, for refugee status determination and oversight (Brandt and Higgins: 2018).

In June 2021, Denmark introduced a contentious new law enabling authorities to forcibly transfer asylum seekers outside of Europe to an (as yet) undetermined destination country (possibly Rwanda) for asylum processing, accommodation and, potentially, protection. The policy and legal framework resembles Australia's regulatory approach to offshore processing. The political objective is to secure borders by deterring irregular migration, to achieve a goal of "zero asylum seekers"

according to the Prime Minister. Moreover, in Denmark (as in Australia, in 2001 and 2013) there is, apparently, an electoral motive: deterring asylum seekers is a vote winner. The hard-line asylum policy seemingly contributed to electoral success for the centre-left Social Democratic Party in June 2019.

Whether Denmark's new laws (and potential practices with/in a third country) will comply with EU law and human rights law, with respect to access to a fair and effective asylum procedure and protection, is difficult to assess at this time, given the lack of administrative detail. If Denmark's *Alien's Act* mandates compliance with Denmark's international refugee and human rights law obligations (in principle and in practice) as a condition precedent of prospective third country designations and administrative arrangements, the courts will, un-questionably, be invited to carefully scrutinise the lawfulness of forcibly transferring asylum seekers to non-EU countries.

It appears that political disquiet about the (comparatively modest) scale of irregular migration to Denmark, since 2015, entwined with broader concerns around the integration of migrants from Muslim countries the Middle East and Africa, rather than fears about potential terrorists, has animated contemporary deterrence policies and migration law reforms. Indeed, Denmark (like Australia) exhibits a preference for accepting a

limited quota of refugees, through the UN, in an *orderly* fashion from overseas.

Conclusion

Ad hoc national asylum and border security initiatives, such as those pursued by Australia and Denmark (also note analogous British proposals to deter irregular Channel crossings from France), serve to undermine international refugee law and global solidarity around refugee protection. Furthermore, this gives encouragement to other states to perform likewise and opt out of efforts to find joint and sustainable solutions. A proliferation of deterrence policies aimed at excluding all asylum seekers moving "irregularly" and externalising migration controls, could well spell the demise of asylum in the Global North. This has already occurred for "boat arrivals" seeking protection in Australia. Moreover, deterrence and externalisation of border controls sends the wrong signal to developing states in the Global South, many of whom host a far greater number of the world's refugees than states in the Global North.

Mohsin Alam Bhat

Irregularizing Citizenship in India

On 31 August 2019, a citizenship enumeration process in India's eastern state of Assam excluded 1.9 million residents from the National Register of Citizens (NRC). The excluded – among them many who have lived in Assam for generations – were now officially liable to prove their citizenship in the country's Foreigners Tribunals. They joined an approximate 500,000 others, who have been classified as suspected foreigners through other processes. Besides their tremendous scale, what is striking about these processes is the mode through which they have weakened citizenship.

India has not revoked citizenship of any excluded person by formal denationalization that may render them stateless. Rather, India has created complex legal mechanisms that have introduced severe insecurity of citizenship status. These mechanisms permit arbitrary targeting of persons as suspected foreigners, place unreasonable evidentiary standards for proving citizenship, and facilitate creeping loss of sub-stantive rights – all without a formal revocation of citizenship status. These processes, I suggest, are best understood as what Peter Nyers calls "irregularizing citizenship". States that irregularize citizenship destabilize it by stealth, because they violate the expectation that the state will not question citizenship status arbitrarily, and also respect the rights associated with formal citizenship.

The central feature of these processes is the appeal to national security. Irregularization in India resulted from historical anxieties around mass immigration from Bangladesh. These anxieties heightened during the 1980s and 1990s, and eventually coalesced into the growing national and international discourse around terrorism in the early 2000s. While India's immigration law was initially the site of debate and conflict, these dynamics also resulted in securitizing Indian citizenship. This not only undermined the country's inclusive citizenship regime, but also justified the creation of insidious legal procedures that have introduced severe citizenship insecurity among millions of Indians.

Antecedents in immigration law

The imperative of national security is the hallmark of India's immigration regime. The Foreigners Act 1946, which is the principal legislation in the field, was a colonial law meant to give the government *carte blanche* to deal with enemy aliens in its territory. The law gives complete authority to the government to prohibit, regulate or restrict any foreigner in the country. The government can constitute Foreigners Tribunals to give their opinions about the status of persons. But the law does not bind these tribunals, or for that matter the government, with any legal standards. The Executive also has a free reign in detaining foreigners, and hence

criminalizing immigration without adequate due process protection. This has constituted a permissive, punitive, and an *ad hoc* immigration system, which is based on executive fiat.

The Foreigners Act also clubs all non-citizens in the same bundle of foreigners, and does not recognize or differentiate between vulnerable groups like refugees, asylum seekers, and the stateless. This has undercut the possibility of a uniform rights-based legislative approach towards immigrants. Instead, the government has instrumentalized immigration policy by adopting divergent attitudes to different groups through executive orders and *ad hoc* measures. For instance, a government order in 2015 exempted non-Muslim immigrants from Pakistan and Bangladesh from the Foreigners Act, despite this being in tension with the Indian Constitution's secular ideals.

The immigration regime became securitized in the wake of the country's Partition on religious lines in 1947. In 1950, the Indian Parliament enacted the Immigrants (Expulsion from Assam) Act that gave the government complete authority to "remove" any foreigner that it deemed to be "detrimental to the interests of the general public." The advocates in favour of the legislation argued that this exceptional remedy was needed to address the national security concerns raised by the "treasonous activity" of Muslim immigration from East Pakistan.

These anxieties around Muslim immigration have since remained perennial. The most dramatic example has been Assam, where local Assamese-speaking communities started politically mobilizing in the 1980s, against the perceived threat of demographic change due to Bengali immigration. The Indian state came to an understanding with the groups in 1985, according to which long-term immigrants would be naturalized, and the others identified and deported. But this did not settle the matter. While the existence and rate of Bengali immigration remained controversial in the absence of rigorous data, there was a widespread perception of unregulated immigration continuing among many sections of the state. What further complicated the matter was the historical presence of millions of Bengali Muslims and Hindus, who had been part of the state's social fabric for decades if not centuries. Many political elements saw their presence as the reflection of the unresolved question of foreigners in the state.

The main target of the disgruntled groups was the Illegal Migrants (Determination by Tribunals) Act 1983, which provided a range of protections to Assam's residents from unfair targeting and harassment on the suspicion of being foreigners. The critics saw in these due process protections an attempt to safeguard illegal immigrants. In 2005, the Indian Supreme Court in the *Sonowal* case accepted this criticism and struck down the 1983 Act. It extended the Foreigners Tribunal pro-

cess under the Foreigners Act – which was permissive and bereft of any due process safeguards – to decide the status of suspected foreigners in the state. The Court shifted the burden of proof on the citizen rather than the state. It justified this on the ground – unprecedented in judicial discourse – that illegal immigration posed a serious threat to the country's national security. Illegal immigration, according to the Court, was foreign "infiltration" based on "international Islamic fundamentalism", which sought to carve out Assam from India. It was a form of international aggression, which demanding more exceptional measures, even if they came at the cost of due process.

Securitized citizenship

By the 1990s, the conversation about illegal immigration had reached a state of moral panic beyond Assam. The Indian state started to rely on national security to legislate substantive and procedural changes in the country's citizenship regime. In 1986 and 2003, India eroded its inclusive *jus soli* citizenship, by disqualifying persons born in India if they had even one parent deemed to be an "illegal migrant". Since the determination of foreigner status was to be conducted under the immigration regime, the law incorporated the exceptionalist logic in the very heart of citizenship. This posed a serious threat to the security of status, most of

all for children born in India who could now face threat of statelessness.

National security also emerged as the justification for introducing documentary regimes of citizenship, most notably the NRC. India introduced the mandate of compulsory citizenship enumeration through government orders, simultaneously with the legislative changes dismantling *jus soli* in 2003. The rationale for the NRC is best reflected in the parliamentary debates in 2005 on the Supreme Court's *Sonowal* judgment. During one debate, the opposition leader from the *Bhartiya Janata Party* (BJP) – the party that eventually came to power in 2014 and piloted the NRC – framed illegal immigration and global terrorism together as the "creeping threat" to India's internal security. This framing was not contested in Parliament. Introducing documentary procedures in the citizenship regime was the strategy to address this problem. As one member argued, India had "wasted" time "in trying to detect the foreigners." His suggestion was to "look the other way around," by identifying "genuine Indians first." "Give them a National Citizenship Identity Card," insisted the member. "Leaving aside" those with identity cards and work permits, the member continued, "the rest of the population should automatically be deported." The documentary regime of the NRC was thus meant to sift the citizen from the foreigners in service of national security.

The NRC remained unimplemented for a decade, until the Indian Supreme Court in 2014 initiated it in Assam. The Court again relied on the security threat posed by immigration, to subject millions of the state's residents to unreasonably demanding evidentiary standards. By the time the process concluded in 2019, India had spent close to $165 million on the policy, desperation had driven scores to commit suicide, and 1.9 million people were staring at an uncertain future. The Indian government has subsequently proposed to extend the policy to the whole country. This proposal was greeted by protests led mostly by Muslims, who saw in it a grave threat to their citizenship status.

Travails of documentary citizenship

Documentary regimes like the NRC and the Foreigners Tribunals have produced three kinds of citizenship insecurities. The first is faced by those who are directly subjected to them. Scores of people in India – women, transgenders, migrants, the internally displaced, the illiterate, and the economically disadvantaged – have barely any meaningful access to documents. Many have had to sell their meagre properties to pay legal fees. The unreasonable evidentiary standards have further made these processes burdensome. The Foreigners Tribunals, which have declared more than 100,000 persons as foreigners, are known to rely on minor discrepancies in

documents and to disregard oral evidence. Unsuccessful proceedings expose the litigants to detention. It is meaningless to talk about deportation, because the excluded persons are not Bangladeshi nationals, and India has not even raised this matter diplomatically with Bangladesh. This has meant that detention, or the threat of detention, can be indefinite.

The second insecurity relates to the slow infraction of substantive citizenship rights. Recently, for instance, the Assamese government has decided that only those who have their names included in the NRC can benefit from the state's rehabilitation support after being evicted from public lands. India has also barred the national identity cards of millions of persons excluded from the NRC, who now cannot access welfare benefits or even employment in many cases.

It is the third insecurity that is the most pernicious. Grave uncertainty of status has enveloped the lives of people who are yet to be actively subjected to legal processes. The border police in Assam, which are authorized to identify suspected foreigners, have often notified persons without reasonable grounds in the absence of adequate safeguards and accountability. This has exposed vulnerable communities to harassment and targeting. In the case of the NRC, the government is yet to announce procedures for filing appeals in the tribunals. Disconcertingly for the excluded, there is already talk of repeating the NRC because, according to

the Assamese government, the process *did not exclude large enough numbers*! The Indian state has pushed these precarious citizens into what I have called twilight citizenship, where their citizenship status is in a state of indecision and suspension.

In effect, the stigma of being a Bengali migrant has transformed into the ever-present dread of being classified as a foreigner. These communities have become what Mae Ngai has termed as "alien citizens", who, despite being citizens, do not form part of the nation. Alien citizens are racialized, often in conjunction with legal processes. While they may legally have citizenship status, their citizenship rights are subject to nullification – through policies of internment and repatriation – without formal revocation of citizenship itself. The insidious legal processes in India, constituted on the justification of national security, have made members of these communities perennially susceptible to being suspected foreigners and doubtful citizens.

While the absence of formal revocation may mean that the precarious and alien citizens are not stateless, their right to nationality is still being insidiously eroded. Indian courts, rather than being sensitive to the costs of these processes, have consistently endorsed them on the grounds of national security. Being attentive to this problem would require placing negative and positive duties on the state, including the prohibition of burdensome procedures that engender citizenship in-

security, and the creation of accessible and non-discriminatory citizenship identity. But to what extent the law can play this ameliorating role remains unclear, considering also the Supreme Court's role in furthering these processes to begin with.

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Security-Vested Institutional Racism

The Case of Migration to Belgium

Institutional Racism (IR) was first coined as a notion in the mid-twentieth century to describe the discrimination suffered by Afro-Americans living in the US. Distinct from individual racism, the concept referred to a system of exclusion targeting the black community in the everyday functioning of established institutions in society. Since then, IR has gained popularity mainly within North-American and British academia, but also across wider society as a tool for political struggles – such as the Civil Rights movements in the US and anti-racist mobilizations more broadly.

Yet, until the brutal killing of African-American George Floyd by a white policeman brought structural racist discrimination back into the global spotlight, IR had become a dormant concept. Because of key theoretical ambiguities and global transformations, such as decolonization or the expansion of liberal democracies, IR came to be only rarely mentioned in analyses of race-based inequality. Within liberal democratic systems, the state apparatus can no longer be seen as engaging explicitly in any form of racist discrimination. As a consequence, debates on structural racism were somehow ejected from public discourses and policies.

Nonetheless, racist discrimination remains very much structural in most of the prosperous world. Increasingly since the 9/11 terrorist attacks in New York and the consequent further securitization of migration, Muslims and other racialized groups – predominantly

migrants – have been experiencing systematic discrimination in the so-called "Western world". As a consequence, it remains pivotal to investigate the operation of IR for deconstructing how racist exclusion functions, is maintained and accentuated.

Responding to such concerns, we offer a view on contemporary IR that intercepts current changes in the structural (re)production of racist discrimination (for more developments, see our published article). In particular, we focus on non-EU migrants in Belgium, as they constitute an extremely relevant case to illustrate how institutions of a liberal, democratic European state have transformed and adapted the ways they operate discrimination along racist lines.

Over the past decades, immigration in Europe came to be portrayed and treated by politics and the media as a major security issue, so that a variety of security-centred measures were designed and implemented to regulate and control migrants' lives. Our key argument is that, nowadays, the systemic discrimination of racialized groups of migrants operates within the increasing securitization of migration.

With liminal legal spaces expanding on several domains of non-EU migrants' lives in Europe, specific populations of third country nationals came to face greater discriminatory treatment. However, rules and procedures are adopted in the name of security and the protection of public and/or social order against so-

called "irregular migration". Racial discrimination is thus indirect as it operates within (and behind) security-centred political discourses and policies concerned with migration.

How does security-vested IR operate concretely?

To discuss how IR operates within securitized migration policies, we draw on data gathered for the interdisciplinary project Personal Aspirations and Processes of Adaptation: How the Legal framework Impacts on Migrants' Agency (LIMA) which combines insights from demography, law, and sociology, to study how Belgian and European legal frameworks influence third-country nationals' migration, family and professional trajectories, aspirations and plans.

After decades of policies to attract migration to Belgium through the so-called guest-worker programmes and a general *laissez faire* attitude with respect to migrants' illegal entries, stays and employment in the country, since 9/11 immigration has been increasingly regulated as a security issue. Accordingly, successive Belgian governments have introduced new pieces of legislation to control and limit foreigners' access and presence on the national territory.

In particular, immigration is viewed as a multi-dimensional threat: a threat to public order and national security (see the largely unchallenged expulsion of

third-country nationals convicted of criminal offence), to the prevailing socio-economic order (family reunification is increasingly subject to income-related conditions), to the culture of the majority (integration requirements have been made mandatory in an increasing number of European States) and more recently immigrants have been portrayed as a threat to the sanitary order (as a result of Covid-19, international travels have been severely restricted with consequences on family reunification).

Each time, norms are adopted to restrict the rights of immigrants and to increase the (discretionary) powers that can be exercised on them. As a consequence of successive reforms, legal frameworks concerned with migration have become more restrictive and selective, but also increasingly complex. Public servants have to implement rules and procedures that are often unclear or imprecise and at times even contradictory.

As a result of these (deliberately) vague rules, their discretionary powers have increased to the detriment of legal security and the protection of the migrants' fundamental rights. Examples of newly restrictive and security-centred policies can be found with respect to a variety of aspects of migrants' lives.

For instance, since the federal legislation of 24 February 2017, whose aim is to "reinforce the protection of public order and national security", situations where the administration can withdraw the residence permit

of third country nationals on the grounds of public order and national security have been extended. Since then, whoever is considered a threat to security and public order may be subject to a removal order. A "threat" (not otherwise defined) is sufficient, since a criminal sentence is no longer needed. This measure also applies to non-nationals who have been in Belgium since their childhood, as well as to foreigners born in Belgium. In so doing, Belgium is challenging the application of key criminal law principles such as the prohibition of double punishment (since removal comes in addition to usual criminal sanctions) and legal certainty. Therefore, protections against removal on the "grounds of public order" continue to decrease.

Another example which embodies the tension between (securitized) policy objectives and the protection of migrants' fundamental rights is the detention of minors with their families while awaiting deportation. Such a measure, which was revoked in 2008 after Belgium was condemned by the European Court for Human Rights (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*), was reintroduced in 2018 through a Royal decree. It was *again* deemed illegal in 2019 by the Council of State – Belgium's supreme administrative court. This legal-political battle illustrates that in the name of effective return procedures, procedural safeguards are increasingly challenged (see also the recent proposal from the

European Commission on a recast of the Return Directive).

These are just two examples of how recently introduced policies conflict with other normative obligations. In the context of immigration, otherwise applicable legal principles such as the rule of law, legal certainty, equality before the law and judicial independence are increasingly contested. The underlying "migration crisis" context, which is seen as a threat to the current social order and which is sustained by anti-migrant politicians, is used to justify and legitimate these measures. Moreover, exceptions to human rights provisions, including public order or public health, are interpreted broadly. As a consequence, fundamental rights and procedural safeguards are under stress.

Looking at family reunification, laws introduced in recent years *de facto* favour educated, white and wealthy families. Non-EU nationals living in the country and wanting to reunify with their relatives abroad must demonstrate sufficient and stable means of subsistence for the whole family. In addition to these socio-economic criteria, adequate housing (not however defined) is required to accommodate the whole family.

Such restrictions, which are in place in other countries as well, make access to family reunion increasingly difficult for migrants in lower-paid jobs. The exercise of the right to family reunification – although defined as a fundamental right – is thus dependent on the social

class one belongs to. Yet, for many migrants, social class also depends on their nationality. Socio-economic criteria are now used as a selection and exclusion mechanism, which have a larger impact on migrants from Turkey and Morocco, for instance.

More generally, foreigners' right to the protection of their family life is somehow subordinated to a general atmosphere of suspicion, as illustrated by the fight against marriages of convenience, which have gained greater political scrutiny in recent years. In this case, again, the overwhelming (racist) suspicion of state authorities collide with the right to fulfil personal family or conjugal aspirations.

Besides the proliferation of exceptional normative frameworks hindering migrants' equal protection before the law, foreigners may also experience racism throughout the administrative process of settling in. In practice, access to rights relies on the decision of street-level bureaucrats whose interventions have profound impact on foreigners' public and private lives. At the level of public administrations, contemporary IR operates when bureaucrats' day to day decisions (re)produce dis-/advantage based on racist discriminatory categorizations and hierarchizations.

Importantly, discrimination also occurs in the day-to-day work of public administration officials. This is confirmed by interviews we conducted with migrants of different nationalities and skin colours in our study, to

offer a bottom-up view on the operation of current (and security-vested) IR. Interviewees have had very diverse experiences of the same administrative procedures.

One example which often came up, concerns the registration of a legal cohabitation between a non-EU and an EU citizen. This is an apparently non-discriminatory administrative procedure. Yet, as attested to by our interviewees, skin colour determined the severity of the controls, as minimum requirements were requested for whites – e.g., the proof of previous shared residence – and extended requirements for non-whites applicants – e.g., travel tickets, holiday bookings, pictures or private email conversations, etc.

Further, discrimination can occur with respect to the residency check performed by local police, when foreigners register in a Belgian municipality. The experience of many participants in our study clearly showed a disparity of treatment for foreigners of same legal status but different skin colour and/or nationality.

Conclusions

Within liberal democratic orders, checks and balances are introduced to avoid discrimination. Concurrently, due to the prominence of anti-racist discourses and policies, race-based discrimination had to go invisible. Today, public officers' racist considerations and bias can only be unspoken, so that specific migrant populations

are racialised by activating non-race related categories. As we have shown, security-centred concerns related to migration – which have grown exponentially since 9/11 to target especially, but not exclusively, Muslim populations – somehow allow to hide the everyday operation of structural racist discrimination.

Through a focus on the everyday manifestations of IR in Belgium, we discussed a number of cases when exceptional rules concerning migration produce liminal (il)legal spaces, where racist decision-making can take place within the justice system. Similarly, in concentrating on a series of bureaucratic procedures, we provided insights on how public administrators can discriminate non-white foreigners (trying to) settle down in the country.

As it operates somehow invisibly within the securitization of migration, current IR is to be detected also, if not mainly, in the experiences of those who are systematically discriminated against by institutions – that is, racialized migrants. After all, and as admitted very recently by the Belgian king when apologizing for the country's colonial past – amid major anti-racism protests in the country – "discrimination [...] still [remains all] too present" in Belgian society.

Audrey Macklin

The Long Shadow of 9/11

Canada and Migration Law, Two Decades Later

In the immediate aftermath of 9/11, I wrote about the securitization of migration for an edited volume about the impact of the attack on Canada. I did it again in 2011. This time, I mark the twenty-year anniversary of 9/11 with a blog.

At the broadest level, my thesis is that 9/11 exacerbated the chronic precarity of non-citizens' status as legal subjects governed under the rule of law. In principle, the rule of law is indifferent to citizenship: after all, the legal subject is constituted through subjection to law, not to the state as such. The constraints imposed by the rule of law on the exercise of state power are critical to non-citizens, since they hold no currency in the democratic marketplace and have no voice in the creation of the laws that govern them.

And yet, the rule of law has always been insipid in the sphere of migration, and securitization diluted it even further. This is true across all jurisdictions, including those bound by human rights entrenched in constitutional texts. Arbitrariness and unaccountability are endemic, and practices that courts would not tolerate in other fields of law are routine. It's this routine exceptionalism of migration law that 9/11 accelerated, amplified and leveraged, but did not initiate.

I chronicle this through a selection of post-9/11 examples in the spheres of legislation, institutions, and jurisprudence, in which the themes of broad and vague grants of executive power, arbitrary exercise of power

and lack of accountability play out with an extravagance that post-9/11 securitization has enabled.

1. Legislative reform

In the weeks following the attack, the justice department feverishly produced a raft of amendments to the *Criminal Code* to create new terrorism-related offences, expand existing police powers to arrest without warrant, detain without charge, and refuse disclosure of evidence.

Coincidentally, the immigration department had introduced a new comprehensive immigration and refugee statute shortly before 9/11. No amendments were proposed to the draft *Immigration and Refugee Protection Act* (IRPA) in its wake. The government did not revise IRPA to confer greater powers to deal with terrorism or national security. It didn't need to. As I said at the time, immigration law had long permitted the state to do to non-citizens all that it proposed to do to citizens under the *Criminal Code* – and more. The minister already had authority to unilaterally designate a non-citizen as a threat to national security and issue a "security certificate" against them that permitted automatic, indefinite, virtually unreviewable detention and, ultimately, deportation. A non-citizen could be deemed a terrorist threat if there were reasonable grounds to believe that they were in the past, present or may in the

future become members of an organization that there were reasonable grounds to believe had committed, was committing or may in the future commit an act of violence. Judicial review of the Minister's designation of the security certificate detainee was limited in scope, much of the evidence was secret, and the hearing itself could exclude the detainee and their counsel.

While 9/11 did not literally or immediately alter the text of Canadian immigration law, the government certainly drew on a durable reservoir of negative discourses about non-citizens, and leveraged the equation of terrorism with foreignness to advance other immigration and refugee policies that had little actual connection to national security or terrorism.

Refugee law furnishes a prominent example. Owing to the accident of geography, restrictive visa policies, and border externalization, relatively small numbers of asylum seekers can reach Canada to seek refugee protection. Exclusion happens elsewhere, by remote control, without spectacle or visible violence. So, while European states allowed Alan Kurdi and many in his family to drown in the Mediterranean in 2015, the Canadian government simply refused his relatives the visas that would have saved their lives and allowed them to reunite with family members in Canada.

Reducing the numbers of asylum seekers has been a long-standing policy objective of the Canadian government. Canada's only land border is with the United

States, and it is easier for an asylum seeker to reach the United States by land, air or water than to reach Canada directly. By the 1990s, a significant proportion of asylum seekers entered Canada from a port of entry at the US border. Inspired by the Dublin Regulation, Canada unsuccessfully attempted to persuade the United States in the late 1990s to enter into a safe third county agreement whereby asylum seekers would be required to claim refugee protection in the first country of arrival as between Canada and the United States. Since the flow of asylum seekers was disproportionately from south to north, the United States had no incentive to participate in a mechanism that would translate into increased numbers of asylum seekers in the United States.

September 11 changed that. The attackers were foreigners, although none entered the US as asylum seekers and, contrary to early rumours, none transited through Canada. As part of its response, the United States undertook to harden its northern border through a raft of border control measures that required Canadian cooperation. Canada seized this opportunity to extract a *quid pro quo* from US negotiators, namely accession to a Canada-US Safe Third Country Agreement (STCA). The agreement could not be promoted publicly by explicitly presenting refugees as a terrorist threat. After all, if the STCA purported to make Canada more secure by reducing the presence of asylum seekers

in Canada, then it would follow that the US was made less secure by the concomitant increase in number of asylum seekers remaining on US soil. Having said that, the Canadian government was able to exploit the general unease and suspicion of non-citizens and the fact that refugee claimants are not screened in advance – and thus not fully legible to the state – to encourage a depiction of refugees as inherently risky.

The STCA went into effect on 29 December 2004. It has been subject to two constitutional challenges since then, each failing before the Federal Court of Appeal. The Supreme Court of Canada refused to hear an appeal from the first decision of the Federal Court of Appeal in 2009. A post-Trump challenge was launched again in 2018, and the applicants have sought leave to appeal to the Supreme Court of Canada from the second judgment of the Federal Court of Appeal in 2021.

Shortly after 9/11, I fretted that in the zeal to protect Canada from the menacing alien from without, we would veer into producing the alien within. I did not mean that literally, but I should have. From 2015 -2019, the Conservative government pursued a campaign of making citizenship harder to get and easier to lose, culminating in the adoption of a UK-inspired citizenship revocation law directed at Canadian citizens who were alleged foreign fighters, or who were convicted of criminal offences related to national security. This, in effect, went beyond *de facto* repudiation of Canadian citizens

abroad, and formally converted citizens into aliens. The law was repealed in 2017 by the subsequent Liberal government.

While the election of a Liberal government in 2015 dialled back xenophobic rhetoric, strategies to deter asylum seekers continue to trade on the burgeoning transnational security infrastructure. Beginning in WWII, Canada joined the "Five Eyes" intelligence alliance with the US, UK, Canada, Australia and New Zealand, anchored by a treaty for joint cooperation in signals intelligence. The "war on terror" enhanced inter-state cooperation among states in surveillance, intelligence gathering and information sharing. In the now-familiar tradition of "mission creep", Canada (among other partners) has leveraged the Five Eyes alliance in the service of border control. In 2019, Canada incorporated the Five Eyes alliance explicitly into its asylum-deterrence policy. Amendments to the *Immigration and Refugee Protection Act* now deny access to refugee determination to anyone who previously made a refugee claim in another Five Eyes state, based on data shared under the agreement. It does not matter whether the claim was heard, decided or refused by the other state (existing law already precluded a person who has refugee protection elsewhere from refugee determination in Canada).

2. Institutions

One of the least discussed but most profound and deleterious changes, wrought by 9/11, was a structural reorganization of the government department responsible for migration and border control. Prior to 2003, the Department of Citizenship and Immigration managed all aspects: temporary and permanent migration, international students, economic and family class immigrants, permanent residence, resettlement of refugees, humanitarian classes, as well as inadmissibility and enforcement at and inside the border.

As part of its securitization agenda post-9/11, the United States reconfigured its immigration bureaucracy, and Canada followed suit in 2003. Functions associated with immigration enforcement, namely border control, detention, surveillance, investigation and removal, were separated from overseas admissions, visa issuance, and other facilitative tasks, which remained with (what is now called) Immigration, Refugees and Citizenship Canada. Enforcement became the job of a new Canadian Border Services Agency ("CBSA"), which was assigned to the portfolio of the recently created Minister of Public Safety and Emergency Preparedness, which also encompassed the federal policing body (Royal Canadian Mounted Police, "RCMP") and the national security agency (Canadian Security Intelligence Services, "CSIS"). In short, the government created a new federal

law enforcement agency dedicated to migration and border control.

The segregation of immigration facilitation from border enforcement, and the alignment of border enforcement with policing and national security, gave institutional form to the securitization of migration. This had two related impacts on institutional culture. First, public servants in migration no longer circulated between divisions of a single bureaucracy focused on the admission of non-citizens (as beneficial and salutary), as well as divisions preoccupied with exclusion and expulsion in the name of public safety and security. Since 2003, uniformed CBSA officers encounter non-citizens more or less exclusively as vectors of risk, danger and potential harm, and never as refugees in need of protection, workers contributing to Canada's economy, or family members reuniting with kin in Canada.

Secondly, co-locating CBSA with the RCMP and CSIS entrenched a law-enforcement mentality that continues to shape who applies to CBSA, who is hired, who is promoted, and the institutional norms that CBSA embraces internally and promotes externally. For example, the union representing CBSA officers lobbied successfully in 2007 to carry firearms. In the first decade after they were armed, CBSA officers discharged their guns 18 times – 11 times accidentally, and the remainder in

order to kill animals. In other words, the need for a weapon – as opposed to the desire to carry a weapon – remains questionable. Over its almost twenty-year history, CBSA has increasingly been the subject of complaints of aggressive, abusive, intrusive and violent conduct. At least fifteen people have died while in CBSA custody since its formation. Despite this record, CBSA remains the only armed law enforcement agency in Canada with no independent, civilian-led oversight body.

3. Foreign relations

Like many other states, Canada cooperated with the United States in its *War on Terror*. One strand of this alliance involved the subordination of state-citizen relationship between Canada and citizens (especially Muslim, Arab men) in favour of the political relationship between Canada and the United States. In practice, this meant abandoning Canadian citizens in Guantanamo Bay, in Syrian prisons, or in black sites, denying them consular protection or passports, and otherwise delaying or obstructing repatriation to Canada. Among others, this included Omar Khadr, a Canadian citizen apprehended and tortured by US forces at age fifteen in Afghanistan, and detained for nine years in Guantánamo Bay before he was repatriated to Canada.

The legacy of this functional repudiation of Canadian citizens abroad persists in the current unwillingness of the Canadian government to repatriate almost 50 Canadians held in northeast Syrian detention camps as alleged ISIS foreign fighters. Well before 9/11, Canada's formal position was that consular protection was not a right of citizens, but extended as a matter of absolute and unfettered discretion. Canada's conduct after September 11 has not departed from that position, but rather has demonstrated it *in extremis*, in circumstances where the Canadian government knew or had reason to know that Canadians were being detained and tortured or subject to cruel, inhuman or degrading treatment.

4. Jurisprudence

By coincidence, the Supreme Court of Canada heard an appeal in May 2001 by a Tamil non-citizen designated under a security certificate for fundraising activities allegedly linked to the Liberation Tigers of Tamil Eelam (LTTE). The issues in the *Suresh* case addressed the constitutionality of some aspects of the Security Certificate regime with the *Canadian Charter of Rights and Freedoms*. It issued its judgment in January 2002, barely four months after 9/11. The Court imposed additional procedural requirements on the system, but upheld the constitutionality of Ministerial discretion to return a person to face a substantial risk of torture "in excep-

tional circumstances". Unsurprisingly, the government advanced the position, that every person held on a Security Certificate post-9/11, raised an exceptional circumstance warranting deportation to torture (although none have actually been deported to date). The Supreme Court of Canada remains the only apex court in the world that, in principle, authorizes deportation to torture. A subsequent constitutional challenge to the security certificate regime effectively endorsed the special advocate model devised by the UK Supreme Court in a challenge to that state's regime. However, the Supreme Court of Canada declined to place meaningful limits on the length of detention for non-citizens inside or outside the national security context, an issue that remains salient today.

While other US allies successfully sought the release of their nationals (and, in some cases, permanent residents) from Guantanamo Bay, Canada made no efforts to do so. The Supreme Court of Canada ultimately ruled that Canada had violated Mr Khadr's constitutional rights through its cooperation with US authorities while he was in detention, but declined to order Canada to request his repatriation. Consular protection, even in circumstances of human rights abuse, remains a matter of sovereign discretion more or less free from judicial encroachment.

Lower courts in Canada have, on occasion, resisted the erosion of legal protections of citizens abroad, and

non-citizens within Canada. But the Supreme Court of Canada has generally adopted a timid, proceduralist approach to constitutional interpretation of immigration and security-related cases post-9/11. This trend reveals a convergence of the deferential posture of the court toward the executive in relation to matters of national security, compounded by the deferential posture of the court toward the state in relation to non-citizens.

5. Conclusion

The Canadian trajectory over the last two decades suggests a multiplier effect of national security and citizenship status on the diminution of rule-of-law protections for non-citizens *qua* legal subjects. This applies both within and outside the spheres of national security, Canadian territory, and the *Canadian Charter of Rights and Freedoms*. Migration law is replete with vague and expansive grants of discretion. Institutional accountability mechanisms are weak or non-existent. Courts are reluctant to substantively restrain governmental action carried out under the rubric of national security and/or migration and tilt toward proceduralism if inaction is untenable. The general securitization of migration shades all matters touching non-citizens more deeply than before, even those seemingly far removed from any direct connection to national security. There are exceptions, of course, and some Canadian

governments and some courts have been more attentive to the rule of law than others. And Canada's reputation often benefits from comparison to the more spectacularly egregious conduct of other states. I look forward to telling a better story ten years from now.

Jaana Palander and Saara Pellander

Securitizing Asylum Seeking in Speech and Practice in Finland

Europe is witnessing numerous incidents of pushing back asylum seekers at its borders and suspending the right to seek asylum altogether (e.g., in Poland). This is connected to the discussion on the well-established international law principle of *non-refoulement*; whether or not it can be considered a peremptory (*jus cogens*) norm allowing no derogation or balancing. Push backs at the border and derogations based on a terrorist threat are seen as a state practice undermining the *jus cogens* status of the *non-refoulement* principle. Evidently, the right to seek asylum is under threat and this, we believe, is connected to the securitization of asylum seeking.

The idea of securitization implies speech acts that label something as a security issue without proper justification. There is already a wealth of literature on the securitization and criminalization of migration law, policy and practice, to which we have contributed by describing the developments in Finland. We found evidence of a strong security paradigm in migration law, policy and court practice, which, as our historical approach showed, was not a new phenomenon. However, what has become more prevalent in Finland recently is the securitization of asylum seeking. We argue that in the aftermath of the 9/11 terrorist attacks in the United States (USA), not only were increasing connections made between border security and terrorism in Finnish

policy making, but also between border security and asylum seeking.

For a long time, this speech has not turned into practice. The parliamentary debates and policy talks have not affected the law and court practice in an alarming way. Based on our sample, Finnish courts seem to respect the *non-refoulement* principle and apply balancing between the security interests of the state and human security of the individual. It is challenging to assess the fairness of such balancing since information on possible security threats is usually not disclosed. Notably, outside the law and courts, the discourse is shifting. Likewise, as recent parliamentary debates on limiting the right to seek asylum have shown, the securitizing debates from the past 20 years may be put into law and practice, in response to the migration influx after 2015 and in the Belarusian context, and thus have severe legal consequences for asylum seekers and their possibility to seek protection.

Security in migration debates before 9/11

Already when drafting the first Aliens Act of 1983, several members of the Finnish parliament (MP) suggested that the Aliens Act should be well balanced between protecting the rights of individual migrants and protecting the national security interests of Finland, a statement that is repeated five times at different points

in the debate. Security was seen as having two opposite dimensions: that of the individual migrant and that of the state. Mastering this conflict and ensuring the humane treatment of immigrants was a central challenge. Even MP Vennamo from the Finnish Rural Party (the predecessor to the Finns Party), who took an anti-immigration stance in the debates overall, stated the following: "The law should protect the country, but when implementing the law, there should be common sense and humanity and understanding of the current situation. Foreigners are not a threat to Finland. They are, on the contrary, in need of protection" (MP Vennamo, HE 196/1981, 2 k, January 27, 1981).

We found references to terrorism and to protecting the country from threatening immigrants already in those early debates then, but only as single mentions, not as a dominating discourse. "In addition to the refugee question, immigration legislation is facing new challenges, such as preventing international terrorism and ever more mobile criminality" (MP Muroma, HE 186/1981, October 29, 1981). Overall, four MPs linked immigration to terrorism and security when drafting Finland's first Aliens Act. The bill stated that authorities should be able to respond effectively to threats posed by increased mobility, and that the national interest is a central frame to addressing complicated issues. The draft also includes a mandate for the government to alter rules in

the times of crisis, such as war, terrorism, or other threat to national security.

In the 1990s, political debates evolved around what constituted a safe country, and asylum seeking as such was not presented as a threat to national security. Also during the 1990s, the understanding that Finland's legal responsibilities were restricted to its own citizens started to be challenged. Finland had in 1989 become a member of the European Council and signed the Human Rights Convention, which required legislators to reconsider the treatment of foreigners in relation to immigration control. The rapid internationalization of Finland, both in terms of the mobility of people, as well as in terms of international human rights engagement, was a major motivation behind replacing the previous Aliens Act. The objectives of the renewal of the act were two-fold: to enhance the processual rights of immigrants, while at the same time preserving the capability of authorities to prevent terrorism and crime.

Intensified securitization after 9/11

The number of references to security has increased in the Finnish legislation over time, and the change after 9/11 terrorist attacks in the USA is significant. When drafting the new Aliens Act of 2004, mentions of asylum seeking as a potential threat to national security grew in parliamentary debates. In particular, the then Minis-

ter of Internal Affairs Rajamäki (Social Democratic Party) fostered a discourse which very much questioned the motives of those who seek refuge. He used expressions such as "asylum tourism" or "asylum shopping" as well as "anchor children", and very much dominated the parliamentary debate (e.g., HE 28/2003, lk, June 16, 2003). Security became thus emphasized in the then new Finnish Aliens Act as a general criterion for obtaining residence permits. Despite a clear security turn in legislation, we also found some improvements to the security of asylum seekers. In the 1990s, threats to national security were included as reasons to not grant protection to asylum seekers, but in the Aliens Act of 2004, national security as a reason to refuse international protection was omitted from the law.

A strong proof of securitization has been the appearance of the concept of the irregular (illegal) entry of asylum seekers in Finnish security policy documents. While there are some mentions in reports from the 1990s, the increase in later reports is significant. In the security and defense report published in 2004, immigration is mentioned a few times, and a separate chapter is dedicated to immigration management. Later, in 2016, in a report on internal security, the Finnish government mentions immigration forty times and asylum seekers fifty-two times. Also, several references to terrorism and illegal entry were made, connecting the large inflow of asylum seekers to public order and security. We

can thus see the problematization of immigration and asylum seeking starting after 9/11 and intensifying after the larger inflow of asylum seekers to Europe and Finland in 2015.

The current legislation from 2004 allows the consideration of general and national security aspects both through general provisions and specific provisions concerning entry, residence, detention and deportation. Importantly, there are also requirements for the overall assessment and balancing of different aspects in cases of rejection and deportation, although not explicitly applying in situations of national security. EU-citizens face more lenient requirements in terms of security concerns, emphasizing personal connections instead of generalized threats, which would ideally be the proper threshold for all foreigners. This development emphasizing security aspects and allowing discretion in the application of security conditions increases the potential of securitization if the legislation is not applied reasonably. Juxtaposing and balancing different security interests is challenging, but there needs to be a principled proportionality assessment for fair and transparent deliberation.

Courts as the guardians of proportionality

The Supreme Administrative Court of Finland is the highest court of appeals for issues concerning migra-

tion administration. We have analyzed all relevant cases that are electronically available in the Finlex Data Bank. The database includes significant cases published in the Court Yearbook since 2001, as well as short summaries of important court decisions from the 1980s and 1990s. Our data is collected up to the year 2017. The total number of analyzed cases is sixty-five, giving a comprehensive picture of the development of court practice in the interpretation of migration law. The term security appears in three different contexts characterized by the type of decision: international protection (twenty-two cases), deportation (twenty-four cases), and family reunification (nineteen cases).

As mentioned above, the legislation allows for balancing in difficult cases, which courts have applied. Balancing is a proportionality test where the importance of different factors is assessed and weighted against each other to find out if the measure used is proportionate to the aim sought. An analysis of the court cases does not seem to reveal any issues raising concerns of unreasonable use of security arguments. Although it is possible to argue that in some specific cases the court should have placed more weight to the interests of the migrant, or it should have justified the decision better, all in all, both national security and the personal security of the applicant are considered in cases related to immigration. We noticed that after 9/11 especially, in cases connected to deportation, the security concerns of the state

often prevailed. In one case, the court noticed the Greek asylum system facing serious problems, but the personal security of the asylum seeker was not seen to be threatened to the extent of triggering the *non-refoulement* principle. However, in another case the court recognized systemic faults in Hungary, preventing the return of an asylum seeker.

Knowing that the detailed information is crucial for assessing the fair balance between different interests, secrecy, especially in cases related to national security make the analysis challenging. An important case from 2007 in the Supreme Administrative Court concerning family reunification sets procedural guarantees on access to information on national security for the judges. However, as a newer case from 2020 related to asylum seeking restates, the information cannot be disclosed to the applicant. Although the empirical study is difficult, researchers can theoretically approximate how the balancing should be done in cases concerning security issues. As Aharon Barak has explained, decision-makers should evaluate the probability and extent of the added security that a restrictive measure is claimed to achieve. The probability of a security threat should thus determine the weight given to that factor. It implies that the security threat needs to be real and probable in order to outweigh the right or interest of an individual.

Trend of securitization continues

Research published after our article shows how, in response to the rise in numbers of asylum seekers to Europe in 2015, many restrictions were added to Finnish migration law. Another article argues that even the application of the law on international protection was applied more restrictive than before. The possibilities for receiving international protection were narrowed by removing a national category of humanitarian protection. However, the minimum obligations of international law were respected and mentioned in the preliminary works. During that time, the human security of migrants was also improved, and legal protection added to victims of domestic violence by allowing them to apply for extension of residence permit despite a rupture in family ties. On the other side, restrictions to family reunification of people receiving international protection weakened human security. A high-income requirement was placed on all categories of international protection, with an exception for refugees whose family members applied within three months. Although this restriction did not have a direct connection to securitization, it did underline the erosion of the favourable treatment of people receiving international protection, as well as the economic approach to migration management. It is also a prime example of the race to the bottom in migration policy.

The situation at the Polish-Belarusian border in 2021 is significantly different from the situation at many borders of European countries in 2014–2016. The hybrid character of the situation brings forth new security issues. It is strongly questioned in public discourse, whether the responses should follow international law obligations and take the asylum seekers' human security into account. In the Finnish parliamentary debates, alarming suggestions on suspending asylum seeking have been put forward. Not only by the traditional anti-immigration party, the Finns, but also by the most popular (according to recent polls) party, the liberal-conservative National Coalition. Using the state of emergency and revisiting the legislation on exceptional situations has been suggested by politicians and security professionals. Fair balancing and probability assessments are thus crucially needed in the legislative phase, if new legislation is the way forward. The law should also leave room for balancing in the application phase, especially if there is doubt on the compliance with international norms.

What is at stake?

We noticed that securitization happens in connection to border security when discussing mass migration and illegal entry of asylum seekers, especially in security reports. The securitization of migration is a rhetorical

move, used to justify tight and sometimes even extreme political measures, which rarely deal with questions of the fleeing individuals' security. Recently, this type of securitizing speech acts have dominated in the parliamentary discussions on the Polish-Belarusian conflict, which may lead to law and court practice threatening the right to seek asylum and the protection from *non-refoulement*.

When discussing asylum seeking only in connection to the potential threat that this poses to national security, several things tend to be forgotten.

First, those who seek refuge usually flee conditions that are dangerous to both themselves and their families. Thus, when debating forced migration and implementing laws and policies related to the topic, our first and foremost concern should be the security risk that people face – both in the country from which they left and in transit countries on their way to Europe and Finland. It is asylum seekers' lives that are at risk when they are forced to leave their homes and resort to irregular pathways, or when they drown in the Mediterranean Sea due to a lack of safe routes to asylum. In addition to natural forces, the people on the move face threats of abuse and trafficking, even by state actors as seen in the case of Belarus today.

Second, discussions dominated by security push aside other issues that are much more relevant to the arrival and settlement of newcomers. Migration could be de-

bated from the perspective of social justice and inclusion, from the perspective of education, in relation to racism and racialized structures in societies, or from the perspective of demographic challenges of ageing societies. At the same time, as concerns over attracting more people to Finland are growing, politicians are seemingly trying to make Finland as unattractive as possible for potential asylum seekers.

The history of a strong security paradigm in migration law and the securitization of asylum seeking, which has intensified after 9/11, has paved the way for the current debate questioning human rights principles and obligations protecting asylum seekers. Finnish politicians are at the crossroad of choosing between a humane or securitized approach to asylum seeking. If the right to seek asylum is compromised, the courts will face challenging cases requiring balancing between national and human security, where hopefully the rule of (international) law prevails and only proportionate security concerns are acknowledged.

Die Verknüpfung von Migration und Terrorismus ist heute ein ebenso präsenter wie fragwürdiger Topos öffentlicher Debatten. Nach dem 11. September 2001 nahm diese Verknüpfung erheblich zu, die Themen Migration, Asyl und Staatsbürgerschaft wurden zunehmend auf die innere und äußere Sicherheit bezogen. Die Folgen dieser Diskursverschiebung sind ernst: Steigende Ressentiments und sinkende rechtliche Gewährleistungen gegenüber Schutzsuchenden sind auch außerhalb des Globalen Nordens wachsende Phänomene. Lässt sich die Geschichte der globalen Migrationssteuerung tatsächlich nur als Abwärtsspirale erzählen?