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Crimmigration and Pre-Crime in German Law

Connecting the International Debate to the German National (Legal) Context

Crimmigration und *Pre-Crime* im deutschen Recht. Zum Anschluss der internationalen Debatte an den nationalen (rechtlichen) Kontext in Deutschland

The point of departure for current inter- and transdisciplinary debates on "crimmigration" is a critical legal perspective that transcends disciplinary boundaries within the law and dares to look at criminal law and migration law as a unified whole. The article will focus on how these areas of law interact with each other to result in infringements of the procedural rights of the foreign nationals concerned. While the article acknowledges the importance of international approaches to border criminologies derived from the crimmigration debate, it calls for the relevance of legal practice and legitimizing normative programs in crimmigration law not to be overlooked. This applies especially in the national context of Germany, where this perspective is still largely absent. Examples of such an analysis that takes the law seriously as a powerful (discursive) practice are provided.

Keywords: Crimmigration law; legal practice; expulsion; deportation; pre-crime; terrorism; immigration detention; enemy penology

Den ursprünglichen Ausgangspunkt aktueller inter- und transdisziplinärer Debatten über *crimmigration* stellte eine kritische juristische Perspektive dar. Sie transzendierte die innerrechtlichen disziplinären Grenzen und wagte einen Blick auf das Gesamtbild strafrechtlicher und migrationsrechtlicher Eingriffsbefugnisse. Daraus resultiert eine Analyse, wie sich die Verflechtung mehrerer Rechtsgebiete nachteilig für die prozessualen Rechte der betroffenen Nicht-Staatsangehörigen auswirkt. Der Beitrag anerkennt die Wichtigkeit internationaler Ansätze in den aus der *crimmigration*-Debatte entstandenen, interdisziplinären *border criminologies*. Er plädiert allerdings dafür, auch rechtlich verfasste Praxen und sie legitimierende normative Programme im Krimmigrationsrecht nicht aus dem Blick zu verlieren. Er fordert dies besonders in Bezug auf den nationalen Kontext des deutschen Rechts, in dem eine solche Perspektive bisher weitgehend fehlt. Es werden Beispiele für eine solche Analyse gegeben, die das Recht als eine machtvolle (diskursive) Praxis ernst nimmt.

Schlüsselwörter: Krimmigrationsrecht; Rechtspraxen; Ausweisung; Abschiebung; Vorfeldverlagerung; Terrorismus; Abschiebungshaft; Feindstrafrecht

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Crimmigration (law): the international debate and its (low) resonance in Germany

The article will first deal with the low resonance of the international crimmigration debate in Germany and discuss the shortcomings of its initial reception. It will then show why and how the crimmigration thesis should be adopted to analyze laws and practices in the country.

When in 2006, *Stumpf* coined the term "crimmigration", describing the merger of criminal law and migration law in the United States at the time, a lively international discussion was ignited that extended not only to Australia (e.g. Billings 2019), Asia (Lee/Johnson/McCahill 2018) and South Africa (Vigneswaran 2013), but also to Europe (e.g. Kyler et al. 2017). The European debate went far beyond legal perspectives on multi- and interdisciplinary border criminologies to include a criminology of mobility (e.g. Bosworth/Franko/Pickering 2018; Pickering/Bosworth/Franko Aas 2015; Franko Aas/Bosworth 2013).[2] The European academic discourse involves authors from the UK (e.g. Bosworth 2014; Zedner 2019; Singh Bhui 2016), the Scandinavian countries (e.g. Franko 2020; Barker 2018; Jahnsen/Skilbrei 2018; Ugelvik/Damsa 2018), the Netherlands (e.g. van der Woude/van der Leun 2017; di Molfetta/Brouwer 2020), Italy (Fabini 2017), and Spain (e.g. Brandariz 2021; López-Sala/Barbero 2021), and eventually reached the *European Court of Human Rights* (Pinto de Albuquerque 2016; 2021). However, as pointed out above, the resonance of this debate in Germany has been relatively low.

Nevertheless, there are some notable exceptions. For example, *Walburg* (2016) has used the term "crimmigration" to describe the tightening of expulsion regulations and penal law that was initiated in response to "the events in Cologne on New Year's Eve" 2015/2016[3] (cf. Althoff 2020). The broader understanding of these "events" has also fueled crimmigration discourses internationally (Barker 2018: 6).

More recently, the author of this article (Graebsch 2019a; 2020a; 2020b) has discussed several legal developments and practices within the crimmigration framework. She described some of these previously as a form of de facto multi-punishment with lower procedural safeguards than criminal law, and as a different and additional de facto criminal-law system for non-citizens (1998; 2009; 2011; 2012).

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2 Cf. the University of Oxford's Centre for Criminology interdisciplinary webpage <https://www.law.ox.ac.uk/centres-institutes/centre-criminology>https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies [01.09.2021].

3 Far more than 1,000 complaints about sexual assaults which the police had attributed to "NAFRIS" (a derogatory term used by police for citizens of the Maghreb which implies that these persons are multiple offenders) resulted in only very few convictions (<https://www.dw.com/en/new-years-eve-in-cologne-5-years-after-the-mass-assaults/a-56073007> [11.07.2021]).

In 2007, *Krasmann* discussed terrorist laws used to enforce border control as a form of "enemy penology". Her views critically engage with those of *Jakobs*, a German criminal-law scholar who proposed an express distinction between a criminal law for the enemy (*Feindstrafrecht*) and a criminal law for the general citizen. In *Jakobs'* view, the latter is to be protected against the former by means of, for example, preventive detention (Jakobs 2004). *Krasmann's* analysis gave rise to scholarly discussion in Australia about crime-, pre-crime-, and sub-crime-related deportations (Weber/Powell 2020). However, such an analysis has not yet been advanced in respect of Germany.[4]

Notwithstanding this scholarly lacuna, topics falling within the purview of crimmigration are manifestly relevant also for Germany. A few practical illustrations will suffice to make this clear. For example, crimmigration issues arise when controls at the intra-Schengen borders, including the German-Dutch one, are analyzed (Franko Aas 2011; Bowling/Westenra 2018; van der Woude in this volume). In addition, *Barker* (2018) uses the Swedish border closure in 2015 as a starting point for her analysis of penal nationalism and the walling-off the welfare state against non-citizens. At the same time, (selective) border checks were reintroduced between Germany and Austria. The similarities between Germany and Sweden are uncanny when she mentions that not only were the events that took place on New Year's Eve in Cologne used in Sweden to justify walling-off the welfare state against unwanted foreign nationals, who were framed as intruding sexual offenders, but also that a similar (discursive) event took place in Sweden (Barker 2018: 6).

The need to analyze national (legal) contexts in an all-international field

One may wonder whether a specific national perspective is required. However, this approach is necessary and especially important in this context. The law, including migration law, is, despite its Europeanisation, at its core still a primarily national endeavor. In addition, even if crimmigration laws across European countries are in many ways similar, the legal outcomes for those persons in respect of whom they are applied depend on the national context in which they are implemented (Fabini 2017). Such laws also reflect a specific understanding of a particular sovereign state about how to address the complexities of and challenges posed by immigration, and which exclusionary mechanisms to adopt, as *Barker* (2018) has so convincingly shown using the example of penal nationalism in Sweden.

While it is true that in the past criminology confined itself to a perspective connected to criminal law and the nation state, it should now, instead of contemplating a "merger" of criminal law with other control measures and bor-

4 The dissertation by *Villagómez Moncayo* (2018) deals only with the Spanish example.

der-management technologies, finally transcend criminal law and methodological nationalism (Moffette/Pratt 2020). However, it is necessary to understand the crucial significance of the individual nation state's construct of citizenship as an exclusionary concept, as well as the manner in which the concept functions in society. This is especially the case when one considers the current tendency on the part of state authorities to amalgamate criminal law with migration law.

Nevertheless, in adopting this approach a criminological perspective on the (national) legal context should not be confused with a formalistic legal perspective. Understanding national specificities is still necessary because, unlike in other jurisdictions, detailed legal analytical work has not yet been carried out in respect of German law. Thus, such an approach is still relevant and can merely be supplemented, but not substituted, by extending one's analysis beyond the law and the nation state.

Since an overwhelming number of (the few) criminologists in Germany are lawyers, and criminology departments are usually connected to law faculties, the widespread ignorance within legal academe of "crimmigration law" as an analytical perspective may come as a surprise. However, the strong attachment of German criminology to law may well be the reason for the low resonance this concept has thus far achieved. The strong interconnections between these two nominally separate areas of law are a blind spot for legal scholars. The assumed separateness of criminal law and migration law is so thoroughly taken for granted that lawyers usually do not see the significant overlaps between them, let alone look at both sets of rules as interconnected in a way that deprives the concerned individuals of any of the procedural safeguards usually associated with the criminal law. Even the few lawyers who attempt to take a closer look at the issue do not see the whole picture due to their professional blinkers. As a recent example, *Werkmeister* (2018) explicitly uses "crimmigration" as a starting point for his examination of German laws criminalizing migration. He mentions (193) the possibility of the authorities terminating criminal-law proceedings in respect of a foreign national owing to the trifling nature of the offence or after deportation. However, like other authors, he underestimates the significance of these regulations, and especially how they work in concert with the termination of criminal-law proceedings while migration-law interventions are in place. He concludes by saying that analyzing the law on expulsion in terms of a crimmigration framework is necessary, although he does not formulate a critical perspective in this regard. While *Bode* (2020: 485ff.) has recently considered this issue, she puts forward merely a discussion about whether it would be preferable to officially integrate expulsion into criminal law as a penalty that could be imposed in addition to imprisonment or a fine. She does not deal with the question of how the law as it is (and how it would be if her suggestion were to be followed) operates in practice by means of the interaction of criminal- and migration-law measures experienced by those who are subjected to them.

Legal practice as a starting point for analyzing crimmigration laws

Most studies in international border criminologies take an empirical approach towards understanding discourses and practices. They often deal with what can be understood as the real-life consequences of crimmigration laws, and not with the law itself. However, it is also important to take the law seriously as a powerful fabricator and legitimator of certain social practices, as well as the creator of common understandings in hegemonic discourse. Nevertheless, in contrast with the straightforward lawyer's perspective, it is necessary to analyze legal practice not as merely the application of the law considered in terms of intended consequences and detrimental side effects in accordance with the usual binary conception of "law in the books" versus "law in action".

The latter approach all too easily promotes a view of the law as an instrument of direct intentional governance that can either succeed or fail but is not the cause of any factual shortcomings and common understandings. For example, legal scholars widely acknowledge that expulsion and deportation arising out of a penal conviction are experienced by the person affected by the order as a punishment (e.g. Bode 2020: 487). This state of affairs is perceived as an unfortunate but inadvertent one, an unintended factual consequence of the law in the books. From a strict theoretical perspective, expulsion and deportation have nothing to do with punishment; rather, they are seen as preventive measures for averting a danger in German law (cf. some critical aspects Kießling 2016). Obviously, this aversion pertains at best to the German state, to which a return is also not impossible, even though it is forbidden by an entry ban (Sect. 11 Residence Act). However, due to the historical origins of migration law in police law, prevention is considered to be its purpose.

Expulsion and deportation occur in an area of law that is separate and different from criminal law – with a contrasting normative program, distinct courts, and alternative executing agencies. The fact that those who are affected by the orders do not understand these sophisticated legal distinctions means that their common perception is understood as being one of ignorance. As a result, activists and non-lawyer criminologists are excluded from the community of legal experts who *understand* these differences. The very few attempts that have been made to challenge the widely held perception that expulsion and deportation are not intrinsically punitive in nature (Beichel 2001; Graebsch 1998) have not succeeded in eliciting from lawyers a satisfactory jurisprudential explanation. This is the case even though the intensity of the measures used to terminate a person's sojourn in a country, the regular causes for their invocation (criminal offences), and their official purposes (special and general prevention of harm to the public) are congruent. The difference between punishment and expulsion is usually explained with reference to the concept of appropriate retribution for offenders and the fact that this is not applicable in migration law. However, this argument is not persuasive, because the principle of retribution in response to fault/guilt (*Schuldprin-*

zip) in the main only serves the function of establishing an upper sentencing limit after the court takes into account the preventive purposes of criminal sanctions in German law (e.g. Kinzig 2019: marginal no. 18). Preventive purposes may not be pursued beyond the amount of guilt inherent in the offence. Jurisprudence does not adequately explain how the mere absence of retribution as a limiting principle should be able to render a measure different from what is regarded as the most intrusive measure in the legal system – the criminal sanction. Criminology should not confine itself to accepting such legal presuppositions when analyzing the law (cf. Zedner 2016; Graebsch 1998).

Instead, striking law-based practices can and should be traced back to the system(s) of regulation (e.g. criminal law *and* migration law) from which they derive, so that a holistic understanding of how the law conceptualizes a certain area of lived reality can be achieved. Only a perspective that is liberated from legal self-assurances and does not insulate itself from theoretical analysis will facilitate a dive into the deep structure of crimmigration law.

An analysis based on this perspective does not give priority to the question whether the merger of crime control and migration control is a new development, despite the fact that it can quite obviously be observed throughout history (de Koster/Reinke 2017; see also Melossi 2015). The suggested form of analysis deals rather with how this connection between penal power is fabricated within the law, and how the power to punish and the power to banish (cf. Franko 2020: 52ff.) interconnect at a certain point in time in a particular national legal system. A further question is which images are produced, not only by the media and public discourse, but also in a very powerful way by the implemented legal practices themselves.

A perspective that aims to challenge various fundamental jurisprudential convictions obviously needs an analytical starting point beyond the "law in the books". Such insights about the law in action may be derived not only from official statistics and empirical research, but also from practical experience. While the latter, as opposed to social-science research, may not suffice as a methodology to prove the existence of a broad legal practice, it is certainly adequate as a starting point for analyzing the normative "crimmigration" program. Thus, a single illustrative case would be a sufficient basis for drawing useful conclusions. The analysis at hand uses case examples as a basis for analyzing how legal practice is based in normative concepts.

However, it is worthwhile first to consider official statistics that show how the criminalization of migration occurs in the German context.

The criminalization of migration in Germany

The merging of two formerly separate areas of law "until they are only nominally separate" clearly implies a two-directional process in which the objec-

tives of pure migration law are increasingly pursued by means of criminal law, but also the objectives that were formerly pure criminal law are increasingly secured by means of migration law.[5] As *Brandariz* (2020) has pointed out, the prevailing focus within international discourse has been on governing migration through crime/criminal law. While the criminalization of migration (criminalization-crimmigration) occurs in Germany, it is not of overwhelming significance, as will be explained below. This might be one reason for the low prominence of analyses focusing on "crimmigration" in German discourse.

First of all, the legislative technique of criminalizing certain more severe violations of a law is by no means unique to migration law. Moreover, many violations are registered by the police but only very rarely culminate in a formal court process or result in a conviction.

In 2019, some 9,313 foreign nationals were convicted of violations of migration law, this figure constituting 3.6 % of all convictions of foreign nationals.[6] The overwhelming majority of these convictions were offences that probably related to the foreign nationals' own (illegal) stay in Germany, and only 433 of them involved smuggling.[7] Thus, the criminalization of migration mostly involves cases that can also be governed by migration-law measures.

Only 535 adult persons and six juveniles (5.8 % of convictions) received a prison sentence (with or without probation) for migration-related offences. However, for all types of offences some 14.3 % of convictions resulted in a custodial sentence.[8] Thus, while the criminalization of migration-law violations is not irrelevant, it seems to be an exaggeration to regard imprisonment and even criminal law as the prevailing means by which the authorities deal with foreign nationals who violate migration regulations in the sense of criminalization-crimmigration. In 2019,[9] less than 1 % of all commenced criminal proceedings related to migration offences reached the level of indictment.[10] It is important to understand what happened to the vast majority of cases. Some 3.5 %[11] of terminated criminal proceedings brought against foreign nationals with respect to migration offences are explicitly terminated due to the execution of deportation orders (Sect. 154b Code of Criminal Procedure), 7.2 %[12] owing to the absence of the suspect/accused (which may also be caused by migration-law measures), and about 43 %[13] because of the trifling nature of the offence (which does not exclude migration law measures).

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5 Both sides of the crimmigration process have been described more thoroughly than it is possible in this article in *Graebsch* (2019) in German.

6 255,885, with 35.1 % of all convictions referring to foreign nationals (Statistisches Bundesamt, Fachserie 10, Reihe 3, 2019, 454).

7 Statistisches Bundesamt, Fachserie 10, Reihe 3, 2019, 454.

8 36,649 of 255.885, Statistisches Bundesamt, Fachserie 10, Reihe 3, 2019, 470.

9 Statistisches Bundesamt, Fachserie 10, Reihe 2.6, 2019, 112.

10 1,898 of 193,728, Statistisches Bundesamt, Fachserie 10, Reihe 2.6, 2019, 26.

11 6,730 of 193,728, Statistisches Bundesamt, Fachserie 10, Reihe 2.6, 2019, 112.

12 13,945 of 193,728, Statistisches Bundesamt, Fachserie 10, Reihe 2.6, 2019, 112.

13 83,921 of 193.728, Statistisches Bundesamt, Fachserie 10, Reihe 2.6, 2019, 112.

It is not possible to directly deduce from these or other figures the percentage of criminal proceedings that have been terminated because migration-law measures were prioritized. It is known only that in the same year, 22,097 foreign nationals were deported from Germany.[14] Even though there are no official statistics on the reasons for the deportations, it is possible that migration-law measures were taken rather than criminal-law ones. Migration-related crimes – like other kinds of offences – serve as a legal basis for expulsion (Sect. 54 Residence Act) and enhance the likelihood of deportation in various other ways.

The primacy of migration law over criminal-law measures is also based in (European) law – namely, the Return Directive (2008/115/EC) and the case law of the Court of Justice of the European Union (ECJ, 28. 4. 2011 − C 61/11 PPU, Hassen El Dridi).[15] Return measures take precedence over criminal-law ones with respect to migration-related offences, and a deportation may not be delayed in order for a relevant punishment to be executed. This occurrence is usually considered to be a human rights victory for the migrant because criminal-law interventions have been dispensed with.

In Germany, considerable reluctance to accept and implement such restrictions to criminalization and prosecution is visible with respect to courts as well as legislation (Kretschmer 2021a). Thus, the threat of criminal prosecution still exists. Concerns about the proportionality of punishment for mere violations of administrative (migration) law are dismissed by the authorities, who point to the fact that punishments for migration-law offences are in practice lenient and only rarely imposed (Gericke 2018: marginal no. 15).

The penalization of migration law in Germany and the different de facto criminal law for foreign nationals

However, when one considers the impact of criminal-law proceedings on a person's migration status and his or her living conditions, one's perspective changes. Those negative consequences may ensue in respect of both migration-related and other offences, and a criminal-law conviction is not a prerequisite for them to arise. Migration authorities may use the facts and materials collected by the police and the prosecution as a basis for their independent migration-law decision, which is framed not as one relating to criminal responsibility, but rather the supposed future threat posed by the foreign national.[16] However, the threat is inferred from the suspicion that the person committed a crime in the past. Especially with respect to drug-related

14 <https://www.bpb.de/gesellschaft/migration/flucht/zahlen-zu-asyl/265765/abschiebungen> [01.10.2021].

15 For how this is reflected in German law, see *Kretschmer* (2021b: 86f.).

16 This is different from other states like Norway (Gundhus 2020: 251), where expulsion is a penal sanction, or Switzerland, where a penal-law version (*Landesverweisung*) exists in parallel with the migration-law version (*Wegweisung*).

offences (Sect. 54 para 2 no. 3 Residence Act), but also in connection with any other suspected criminal or even sub-criminal wrongdoing (Sect. 54 para 2 no. 9 Residence Act), the authorities may legally expel the person without a conviction. Even though an established practice does not follow from it automatically, this provision opens up a space within which the authorities may intervene and curtail a foreign national's rights. The result is a penalization of migration law in the sense that the relevant authorities make use of migration-law measures for the purposes of the criminal law, but with lower procedural safeguards. This aspect of crimmigration law is often overlooked internationally, as the focus is on the criminalization of migration (Brandariz 2021 with further sources). However, in countries like Germany *immigrantionization* of penal policies plays a more important role, whereby deportation is given priority over punishment.

According to the case law of the Federal Administrative Court, the perceived future danger posed by a foreign national does not necessarily have to flow from the expected dangerous behavior of that person in the future (special prevention), but may also result from similar actions expected of other foreign nationals (general prevention).[17] From a criminological perspective, this legal construct is obviously premised on the notion that foreign nationals need to be deterred from wrongdoing more than German nationals do. Thus, it reproduces public stereotypes that identify crime with migration (for an earlier example, see Graebsch 1998).

The potential for state intervention is further extended by a law that does not merely allow for expulsion if these conditions are met, but also defines the absence of an "interest in expulsion" (Sect. 5 para 1 no. 2 Residence Act) as a precondition for a residence permit. This construction allows for such a permit to be denied even in cases where the necessary requirements for expulsion are not met. This is regularly relevant when in a particular case the state's interest in expulsion is outweighed by the individual's legitimate interest in staying (Sect. 55 Residence Act). It means that, even if no expulsion order is made, the existence of a criminal case will become relevant when the foreign national applies for renewal of his or her residence permit.

The denial of a residence permit and even an expulsion order do not necessarily result in a foreign national's deportation. Owing to the state of origin's refusal to take him or her back, or for humanitarian reasons, many foreign nationals remain in the realm of being merely "tolerated". The legal status of *Duldung* (toleration) is not really a legal status at all, but only a temporary suspension of deportation (Sect. 60a para 2 Residence Act). It often flows from criminal-law cases (conviction or merely prosecution) and results in the person in question being excluded from many essential social goods, such as welfare benefits, access to work, and the possibility of changing his or her place of residence in the country (Sect. 61 para 1d Residence Act). In the

17 BVerwG, Urteil vom 12.07.2018 – 1 C 16/17 –, marginal no. 16, juris.

case of a criminal-law conviction for offences not related to migration law and, in the case of drugs offences, a mere suspicion of having committed one of these, the migration office may also prohibit a person from leaving the district in which the office is located without the authorities' prior permission (Sect. 61 para 1c Residence Act).

This comprehensive downgrading of a person's status because of a criminal conviction or accusation amounts to a severe quasi-punishment for foreign nationals who cannot be deported. Additionally, they are forced to live in a permanent state of uncertainty about whether and when they will be deported that can last for years, decades, and even generations. Recently, the authorities have introduced a further sub-status below that of toleration, referred to colloquially as "toleration-light". It requires tolerated persons to co-operate with the authorities in their deportation, especially by clarifying their identity and acquiring a passport (Sect. 60b Residence Act).

When one considers what happens to a foreign national when he or she has been accused of a crime, the situation is obviously very different from the treatment received by a German citizen in the same or similar circumstances. While the ideal of equality before the law in principle applies to the criminal law irrespective of citizenship, it is in reality bypassed by means of migration law. As will be shown, this distinction also has an impact on the law of criminal procedure, in the form of an infringement of the foreign national's right to defend himself or herself.

Pre-crime and the jigsaw puzzle of migration law and criminal law in Germany

Especially in the last few years, the connections between criminal law and migration law have been tightened with respect to terrorism prevention and pre-crime interventions. In criminal law, a reference to international terrorism has led to the criminalization of both the original criminal act and the preparation for it. Thus, the law now extends to mere intentions and subjective dispositions to (possibly) commit a terrorist attack. This tendency has been described internationally as a movement towards pre-crime laws (Zedner 2007). Since migration law in Germany is historically connected to police law and the aim of averting supposed dangers (in the form of the foreign national in person), it is predisposed to serve these tendencies well. Today, deportation is legally constructed as a means to avert the danger of terrorist attacks. As irrational as it may seem to prevent acts of international terrorism by removing suspicious individuals from the territory of one national state, this logic is widely shared in the political as well as the legal arena. The persons subjected to deportation include those born and raised in Germany who lack any social, economic and language connections with their state of citizenship. The construction of the danger they pose allows the authorities to facilitate otherwise impossible deportations by dispensing with legal guaran-

tees contained in migration law and criminal law while conveniently making use of legal instruments and mechanisms from both.

In 2017, after an Islamist attack on a Berlin Christmas market, a draconian regulation was applied (Sect. 58a Residence Act). It had been in force since 2005 but was widely considered to be unconstitutional (Kießling 2017). The regulation allows for the deportation of a foreign national in possession of a valid residence permit in the absence of a prior expulsion or asylum procedure. The deportation order can be made after a one-stage (summary) proceeding at the Federal Administrative Court during which the person will be detained (Sect. 62 para 3 Nr. 3 Residence Act). The foreign national must apply for the summary proceedings within seven days, and he or she must be represented by a lawyer at the hearing.

A great deal can be learnt from a landmark case about crimmigration law that was triggered by pre-crime interventions. This 2017 case (the first where the person concerned made a serious legal stand against the actions the authorities planned to take) dealt with a Russian citizen who received a deportation and detention order on his 18th birthday, despite the fact that he had never been convicted of or prosecuted for any crime.[18] The order was based on his radical Islamist beliefs, a large number of radical and violent videos in his possession, and some talk on his part about wanting to commit a terrorist attack. The Federal Administrative Court ruled that he could be deported, as it seemed to be as likely that he would commit an attack as he would not. Thus, they assumed a 50 % probability that his words would not be an idle boast but that he would put them into effect. They presumed such a "probability" without having evidence such as plans, weapons, and so on. In criminal law, a 50 % probability that an offence was committed by a suspect serves as a legitimate basis for an indictment (Kölbel 2016: marginal no. 14). However, the burden of proof is considerably higher for a conviction. Moreover, to secure a deportation there is no need for the court or tribunal to base its prognosis on the evidence of expert witnesses or a police risk assessment. Also, the foreign national's lawyer has no right of access to a police risk assessment that has been conducted using the RADAR-iTE instrument, even if its original result showed that the foreign national posed only a moderate risk to the society.[19]

The facts serving as the basis for the deportation of a foreign national have in many cases been gathered from a criminal investigation and prosecution. Even though the primary intention of the authorities is always to deport the

18 Represented by the author as his lawyer, he challenged the deportation order not only at the Federal Administrative Court (1 VR 3.17; 1 A 4.17), but also the Federal Constitutional Court (2 BvR 1606/17) and the European Court of Human Rights (Appl. No. 54646/17, X v. Germany). While the ECtHR stayed his deportation for about a month, he was ultimately unsuccessful and was deported in the end.

19 As decided by the Federal Administrative Court in this case (1 VR 3.17; 1 A 4.17). For more details *Graebsch* (2019b).

foreign national, diverse criminal law powers are used, including pre-trial detention, which may serve no legal purpose other than that of securing a forthcoming criminal trial. When the deportation is executed, the criminal procedure is then terminated due to deportation (Sect. 154b Code of Criminal Procedure). The prosecution can even determine when deportation will take place, because prosecutors must give their approval of the termination given that the state has impliedly waived its right to impose punishment in such cases (Sect. 72 para 4 Residence Act). The accused has no opportunity to challenge the termination of the criminal procedure because the termination is considered to be nothing but a benefit to him or her.

As a result, the evidence will be "frozen in time" in the manner it has been constructed by the police and prosecutors, without the accused ever having been granted the opportunity to mount a defense or the benefit of a judicial decision by a criminal court on the issues. In criminal law, the outcome of a trial is highly unpredictable and very often the conviction and/or punishment less severe than what is stated in the indictment. Nevertheless, the police and prosecutors' preliminary statement of the facts can be used to justify deportation, since the presumption of innocence is not applicable within the framework of migration law. This amounts to a situation in which a suspect is convicted merely on the basis of police evidence and without the benefit of a trial. Only when the foreign national returns to Germany can the case be reopened. However, legal return to the country is prevented by an entry ban (Sect. 11 Residence Act).

The case of the young Russian and a similar one involving an Algerian (for details, see Graebsch/Burkhardt 2017; forthcoming), the facts of both of which occurred in the federal state of Bremen, served as a model for several legislative amendments that will in future further obstruct attempts to preserve at least some legal safeguards for the individuals concerned. Bremen's minister of the interior complained that both individuals together had brought 25 lawsuits to various courts (Hellwig 2017). However, they had nevertheless not been successful in preventing their deportations. The reason why they had brought such a large number of lawsuits and been so unsuccessful with them is as follows: the law is highly fragmented and allows the authorities to pick and choose between different powers deriving from criminal, migration and police laws permitting them to intervene in the matter. These opportunities for intervention are not simply parallel, but rather complementary to each other. Together they form a jigsaw puzzle of options that allows the authorities to choose whatever rule or regulation fits their objectives.

Thus, German crimmigration law is characterized by instrumentalism (as defined by Brandariz 2021). Government agencies use different sets of legal regulations as interchangeable toolboxes from which to mount interventions, irrespective of their formal legal designation. This happens against the backdrop of Germany often being praised for its outstanding level of constitutionality. However, guarantees are not worth the paper they are written on if

government agencies are able to easily circumvent key constitutional principles by simply jumping from one set of rules to another while renaming and reframing measures.[20]

The case discussed above also illustrates the fact that migration control ultimately trumps crime control. The latter serves merely as a pretext for more intrusive and efficient investigations, as well as a back-up solution if migration control cannot be enforced. A punitive legal sanction may ultimately not ensue from the criminal process. However, for this group, as *Stumpf* (2013) puts it, "the process is the punishment", in the sense that a trial and defense is out of reach for the foreign national. This state of affairs results in a disruption of the criminal law's procedural standards in respect of foreign nationals, for whom crime is governed mainly by migration law.

The preventive logic described above is closely linked to the creation of a figure called the *Gefährder*[21] (a person endangering public safety), which is not an official legal term, but rather one constructed by police (Wegner/Hunold 2017; Kretschmann 2017). However, due to its opaque meaning, but strong association with the (foreign national) would-be Islamist terrorist, it has exerted a powerful influence on legal practice. This figure is the "enemy at the border" (Krasmann 2007), to whom a different set of legal norms is applied via the amalgamation of criminal law with migration law that amounts to a de facto criminal law for the enemy (*Feindstrafrecht; enemy penology*).

Deportation orders according to Sect. 58a Residence Act are still relatively complicated for the authorities to execute because they must explain them in a demanding and sophisticated procedure before the Federal Administrative Court. However, the "crimmigrant" logic connected to the figure of the *Gefährder* has meanwhile spilled over into other areas of migration law, such as the law pertaining to the deportation of those with already precarious migration statuses. This development is especially evident when one considers the position of foreign nationals in a state of toleration (*Duldung*) and asylum seekers (for more details, see Graebsch/Burkhardt forthcoming).

While in these cases a crude logic of deportation as prevention (of crime and terrorism) prevails, this does not, however, mean that migration control in general trumps penal control in the case of foreign nationals. Rather, a

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20 With respect to the related area of preventive detention after a prison term has been served, see McSherry (2020), who praises Germany for its high level of constitutionality, but does not seem to appreciate how the authorities are able to evade constitutional protections by labeling interventions as something other than a punishment. On how such an analysis would be a profound misunderstanding of the very subtle and legally complicated manner in which human rights guarantees can be circumvented, see the dissenting opinion of Judge Pinto de Albuquerque (2016), in which he was joined by Judge Dedov, in Ilnseher v. Germany (Appl. nos. 10211/12 and 27505/14).

21 Some 90 persons labeled as *"Gefährders"* have been deported between the attack on a Berlin Christmas market at the end of 2016 and the end of 2019. <https://www.dw.com/en/germany-deported-more-than-90-potential-terrorists/a-51566040> [30.09.2021].

completely unpredictable approach of instrumentalism prevails with regard to the deportation of foreign nationals while they are serving a prison term. The foreign national concerned can neither foresee nor control whether and when he or she will be deported, or whether he or she will have to serve the full prison term, not to mention which alternative would be the lesser evil in a particular case (Graebsch 2021: margin 56f.).

Immigration detention and steps taken towards pre-crime imprisonment

Another example of crimmigration law in Germany is the law on the detention of immigrants. Recent changes in the law have made it possible for the authorities to detain foreign nationals who cannot (yet) be deported for reasons of pre-crime prevention in regular prisons.

One of the regulations that has been changed following the Bremen cases discussed above refers to the possibility of the authorities being able to detain an immigrant despite the fact that there is no realistic possibility of his or her deportation during the next three months (Sect 62 para 3 sentence 4 Residence Act). Such a provision is contrary to the strong purpose limitation implied in German constitutional law. In this new law, detention of an immigrant may take place merely based on the classification of the person as dangerous.

Following another Bremen ("clan chief") case pertaining to allegations about general crime, not terrorism, in 2020 a further new law was passed.[22] It allows the authorities to detain first-time asylum seekers returning to Germany who have violated an entry ban after having been previously either expelled or deported following a conviction for certain crimes. Such persons can also be detained owing to a consideration of the terrorism-related threat they pose, or because they are after their return considered to be a danger to any legally protected good such as internal security, or on the basis that they are an imminent danger to life or limb of any third party. *En passant*, this law extends the understanding of *Gefährder* to cover dangers that are not related to terrorism.

This law is also part of a jigsaw puzzle connected to regulations that allow the authorities to carry out immigration detention in general prisons. Germany has long tried to circumvent the requirements of Art. 16 para. 1 Returns Directive (2008/115/EC). The first attempt to argue for the use of general prisons to detain foreign nationals, based on the stipulated exception for "Member States" who cannot provide accommodation in a specialized detention facility, was an intentional misinterpretation that equated "Member State" with "federal state" in Germany and was finally rejected by the Court of Justice of the European Union.[23]

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22 Sect. 62c Residence Act, cf. <https://www.asyl.net/view/neue-ergaenzende-vorbereitungshaft-fuer-personen-die-nach-ausweisung-erneut-einreisen/> [11.07.2021].

23 WM Case C-18/19, judgment 02.07.2020 – C-18/19

However, later the German state succeeded in making an argument for accommodating immigration detainees in regular prisons. This law[24] considers security needs as a reason for prison accommodation in the case of immigration detainees who are categorized as dangerous. The argument is made despite the fact that the government has constructed special prison-like immigration detention facilities that allow detainees to be isolated and severely restrained, extending all the way to complete immobilization.[25]

Soon after the CJEU's judgment, the abovementioned law extending the notion of who can be considered a dangerous immigration detainee was enacted.[26] This happened rather stealthily by means of an Act that dealt mainly with the postponement of a census due to the pandemic. Non-transparent legislative techniques are a common feature when it comes to crimmigration law in Germany. This was (proudly) conceded by *Horst Seehofer*, the federal minister of the interior, with respect to another important but opaque crimmigration law, the Second Act on the Improvement of Data Exchange,[27] which enables several agencies, including the police, to gain access to the Central Register of Foreign Nationals. *Seehofer* said he intentionally made this law complicated and enacted it very quietly so that it did not cause too much irritation. He further pointed out that, in his experience, laws have to be complicated. He laughed and added: "It then does not attract so much attention." (Das Gupta/Fried 2019).

A key component of crimmigration law is how it compartmentalizes the various legal remedies that can be pursued by the state, with a resultant lack of clarity about how the interaction of several areas of law will play out in legal practice. The abovementioned recent changes in the field of immigration detention law enable the authorities in future possibly to engage in the pre-crime detention of foreign nationals in a general prison. German citizens need a criminal conviction or at least an order of pretrial detention with respect to a crime in the past to be lawfully detained in a prison. According to the current system of crimmigration laws, however, foreign nationals can also be held in a prison on the basis of the suspicion that they will commit a crime in the future.

Resume

As has been shown in this article, the subject of crimmigration is by no means irrelevant to the German national (legal) context. In Germany, a dominating aspect of crimmigration law is the issue of governing (pre-)crime through migration control – namely, deportation and detention. While not irrelevant,

24 Sect. 62a para 1 Residence Act that will come into force on 01.07.2022.
25 E.g. in the law of North Rhine-Westphalia (*Abschiebungshaftvollzugsgesetz*).
26 Draft law of 25.09.2020, BT-Drucksache 19/22848; law in force since 10.12.2020.
27 BGBl. I, 1131; 04.08.2019.

the direct criminalization of migration is not as important as it is in many other jurisdictions. Governing crime, pre-crime, and sub-crime by means of migration-law measures is much more important within the German context. It results in the deportation of foreign nationals who have been deprived of the procedural standards guaranteed by the law of criminal procedure. If deporting a foreign national is not possible, crimmigration law can nevertheless also have a serious impact on the living conditions of that person. The authorities are able to downgrade a person's migration status and expose them to diverse restrictions and exclusions. Meanwhile, the foreign national faces the constant possibility of deportation when he or she lives permanently in a state of merely being "tolerated". The deterioration in such a person's living conditions comes as a quasi-punishment for that person attracting the attention of the criminal justice system.

While the interplay of criminal law and migration law has been intensified recently, and especially with respect to pre-crime, it has nevertheless long been an important policy. However, the manner in which the two areas of law interact and inform one another is widely unrecognized by lawyers as well as criminologists. The procedural instrumentalism displayed by the state authorities can refer to the interplay of various legal regimes. They interlock like a jigsaw puzzle, allowing state agencies always to choose the intervention most suitable for their purposes and determine when deportation will take place.

Crimmigration laws take distinct forms in different national legal contexts. For instance, similar approaches with respect to terrorist suspects of foreign nationality seem to have been taken in Belgium. However, the manner in which these laws were implemented was different, such as withdrawing nationality after naturalization or lowering the threshold for expelling long-term residents (de Pelecijn/de Ridder 2020). Different regulations in particular jurisdictions may lead to similar results in legal practice, and similar regulations to different practices, as is often the case when one compares the application of laws in various social contexts (Nelken 2010). However, this is the reason why crimmigration laws and practices need to be analyzed within a specific jurisdiction and then compared with the situation obtaining in others, with the aim of detecting and understanding common recurring patterns within the various jurisdictions, as well as the differences between legal cultures.

An analysis of legal practices and norms like the ones discussed above is able to show the various possibilities opened up in the law for the implementation of crimmigration measures, with diverse options for authorities that are able to choose from and combine different areas of law. These measures are designed as (pre-)crime prevention. They mostly result in the creation of deportability, uncertainty, and the marginalization of crimmigrant subjects, independently of whether they are deported or stay in an endless state of abeyance in Germany. The official aspiration of preventing crime may well

be contradicted by these consequences. In any case, especially when one considers the recent changes in the law and legal practice, all foreign nationals in Germany share this suspended status to a certain degree, from which not even a valid residence permit protects them. All foreign nationals are "crimmigrant subjects" when one considers these powerful legal constructions. They influence not only legal practice, but also public discourse about who is considered to be potentially dangerous.

These results, which emerge from a close analysis of how these legal concepts have been deployed in some key cases, should, however, be complemented by empirical research. Examples of important questions that should be studied empirically are how crimmigration laws are put into practice, how decisions are justified by street-level bureaucrats, and how the institutional cultures of criminal justice agencies have been retained or overcome in the name of deportation (Brandariz 2021: 6). In this respect, criminology in Germany needs to catch up with studies from other countries.

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