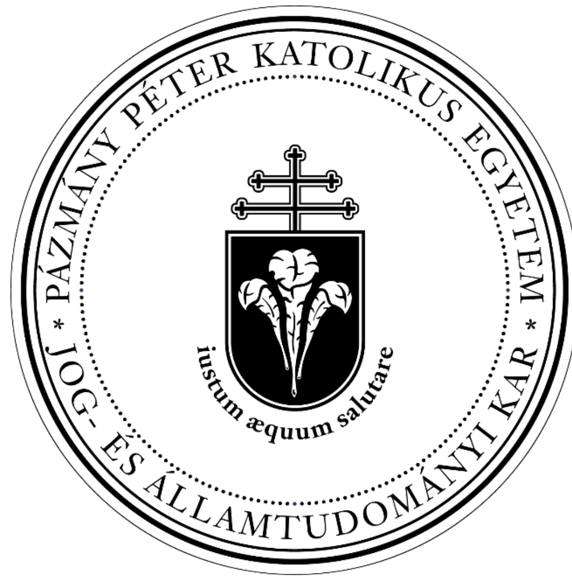

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Misconceived Modernity. European and international law aspects of the German Act on the Modernization of Nationality Law

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Misconceived Modernity. European and international law aspects of the German Act on the Modernization of Nationality Law

The parliamentary procedure in Germany which led to the recently published *Gesetz zur Modernisierung des Staatsangehörigkeitsrechts* (Act on the modernization of nationality law, in the following 'Modernization Act')[1] was held during a time of unrest. Demonstrations surrounding Israel and Hamas, statements from the Turkish president and anti-Semitic incidents, including their acclamation, fuelled a question central to any immigration country (like Germany)[2]: What can law contribute to an overall sense of belonging in a political community? Rules on acquisition and loss of nationality law are one among others but nevertheless an important factor in this context. Besides its symbolic function, nationality grants the right to vote in national elections, thus full political membership. The state of Saxony-Anhalt, for example, reacted to the unrests surrounding Israel and Ghaza in larger German cities – while the parliamentary procedure at the federal level wasn't even finished – by strengthening the grounds for exclusion from naturalization of anti-Semites via administrative decree already in November 2023[3] which underlines the connection between societal eruptions and questions of political membership.

The Modernization Act entered into force at the end of June 2024 and is primarily concerned with modifying acquisition criteria. The expert hearing in the German Parliament's Committee on Internal Affairs raised numerous questions and doubts here, *inter alia* with a view to the principle of legal certainty and practicability regarding rules which aim to tighten the grounds for exclusion from naturalization by anti-Semitic, racist or other inhumane behavior. Similar debates emerged on the tightening of the requirement to secure one's own subsistence, the reduction of residence periods for naturalization and *ius soli*-acquisition and finally the competent authorities' work overload which is likely to disappoint expectations of faster administrative procedures after the Modernization Act entered into force (for different perspectives see the expert opinions, accessible via the *Bundestag's Committee*)[4].

Besides those points, other problems have largely been under the radar, especially in the Federal Government's draft bill motifs.[5] This applies to some complex aspects of international and European Union law in particular. This article aims to briefly examine them, primarily the international law implications of an unconditional and unlimited admission of multiple nationality.

I. The basic arguments of the government's draft regarding multiple nationality

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[1] BGBl. 2024 I No. 104, 26 March 2024, https://bit.ly/3KsJc1t.

[2] Compare the contributions in the recently released book (edited by Daniel Thym) 'Germany as a Country of Immigration', 2024, in German, accessible via https://bit.ly/4cCMvz0 (OpenAccess).

[3] See Hinweise zu den §§ 11 und 12a Staatsangehörigkeitsgesetz (StAG) zum Erlass des Ministeriums für Inneres und Sport des Landes Sachsen-Anhalt, 29. November 2023, accessible via https://bit.ly/4cJczIZ.

[4] Deutscher Bundestag, Committee of Internal Affairs and Community, https://bit.ly/45GMjMZ.

[5] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Modernisierung des Staatsangehörigkeitsrechts (StARModG), BT-Drs. 20/9044 of 1. November 2023, https://bit.ly/3XDtrMT.

The draft bill dates from November 2023 and claims stagnating naturalization numbers, supposedly ranging below a colported European average. According to the government, this leads to a problematic gap between people with German nationality who form the people of the *Grundgesetz* (article 20 (2))[6] and the resident population without German nationality. In the government's reasoning, the principle of avoiding multiple nationality hinders closing this gap effectively, even if – as is rightly stated elsewhere in it – multiple nationality is statistically already largely accepted by way of derogation clauses.

The problem with this reasoning, which has been popular in parts of the literature for decades, is that it is outdated itself. The German Association of Counties, among others, disagreed from a practical perspective in its statement.[7] Even the Federal Government's 2021 own migration report, unlike the draft bill's claim, reports a naturalization rate above the colported European average.[8] The Federal Statistical Office also reported continuously rising naturalization numbers for some time, especially for Syrians who arrived since 2015/16.[9] For the year 2023 – under the old nationality regime – it even reported the highest number of naturalizations since the turn of the millennium[10]. This casts doubt on the factual basis of the government's reasoning and raises the question why the situation is being portrayed as 'less modern' than it actually is.

The fact that multiple nationality is statistically accepted in most cases since some years finally leads the draft's motifs to assume that the legal principle should be abandoned in its entirety. This draws legally flawed conclusions from superficial numbers. The high acceptance rate of multiple nationality is based on derogation clauses, especially in favor of other EU citizens and for people whose home countries make it legally or factually impossible for them to give up their old nationality (e.g. Syria, see former Section 12 German Nationality Act [StAG])[11]. In contrast, the acceptance rate for EU candidate countries (including North Macedonia, Serbia, Turkey) is only 11,9%, only 11.5% for other European states (including Russia, Moldova, Ukraine if one doesn't count the United Kingdom) and only 6% for third countries such as Cameroon.[12] Drawing upon exceptions legitimized by the Parliament itself to cast doubt on the avoidance principle as such distracts from the fact that the exceptions confirm the latter's functioning at a second glance. The government uses an extremely incoherent reasoning here which distorts the factual and legal framework.

The argument of a *growing* incongruence between a state's people and its population remains as popular and theoretical as it is misplaced if there is no growing gap. Besides that, the basic

[6] An English translation provided by the Federal Ministry of Justice is accessible via https://bit.ly/3zpTAEY.

[7] Deutscher Landkreistag, Stellungnahme vom 7. December 2023, Bundestag Ausschuss-Drs. 20(4)349 F, https://bit.ly/3VKjIBL.

[8] Migrationsbericht der Bundesregierung 2021 (December 2022), p. 171 et seq, https://bit.ly/460DttL.

[9] Federal Statistical Office, 28% mehr Einbürgerungen im Jahr 2022, Press release No. 205 of 30 May 2023, https://bit.ly/3zjNMN4.

[10] Federal Statistical Office, 200 100 Einbürgerungen im Jahr 2023, Press release No. 209 of 28 May 2024, https://bit.ly/3RLqfei.

[11] The (now) old version is accessible under https://bit.ly/3W2B2DB.

[12] For example from 2021 Federal Statistical Office, Bevölkerung und Erwerbstätigkeit, Einbürgerungen (10th June 2021), table 12, accessible as an excel document under https://bit.ly/3XETRxB.

assumption is structurally flawed for being decontextualized: If a state like Germany leaves individuals free choice between naturalization or different permanent residence statuses – whose only *practical* difference is the right to vote – it is an open choice. Evocating a structural problem by pointing to abstract concepts and superficial numbers is simply undercomplex. This can be ignored, one is only left with a simplistic congruence thinking which tries to push aside the existing legal environment it can't escape in the end. Whether the gap really shrinks through more simplifications in nationality law or after informing eligible individuals about advantages of acquiring German nationality is an open question for itself. The Expert Commission on Integration Capability – set up by the previous federal government – accentuated the latter point just in 2020.[13] The statistically low propensity to naturalize among nationals of other EU Member States but also among people from Maghreb States already shows today that multiple nationality mustn't be the key factor. All these points put the governmental draft's basic assumptions in doubt.

II. Consequences of unconditional and unlimited Multiple Nationality

If the motives and actual premises of the draft's basic assumptions are already dubious, the consequences of an *unconditional* and *unlimited* acceptance of multiple nationality further increase doubts. In the future, not only a growing number of persons from third countries will remain eligible to vote for elections in their former home countries, but also their descendants who were born, raised and live in Germany. Experiences with Turkey have shown the potential for intervention in domestic processes in Germany through a large diaspora for years now.

Moreover, multiple nationality within the European Union can result in privileged influences on the Council of the European Union and the European Council via national voting rights abroad. They are not coordinated at European Union level, as a younger research report of the European Parliament shows.[14] A similar situation within a State would be clearly untenable for reasons of constitutional law and from a democratic perspective (the principle *one man, one vote*). The problem of multiple influences on supranational organs – just remember the elections to the European Parliament[15] – is a serious one because Union law claims unconditional primacy of application.[16] These problems of unconditional and unlimited multiple nationality are largely ignored by its advocates. The price is high though and the advocation not free from contradictions: equating multiple identities with passports while ignoring problems of multiplied, uncoordinated voting rights in a shared supranational governance structure is neither modern nor liberal.

Plus, on the international plane, the entitlement to exercise diplomatic protection vis-à-vis other home states is still tied to nationality. German foreign policy will thus lose its entitlement to protect individuals significantly in the future because each state may rely *only* on its own

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[13] Fachkommission Integrationsfähigkeit, Gemeinsam die Einwanderungsgesellschaft gestalten, November 2020, p. 148, https://bit.ly/3zkJ5m5.

[14] European Parliament, Disenfranchisement of EU citizens resident abroad, Situation in national and European elections in EU Member States, by Eva-Maria Poptcheva, June 2015, Doc. PE 564.379, p. 4., accessible via https://bit.ly/3CwTda4.

[15] *Toby Vogel/Cynthia Kroet*, Vote twice and go to jail, Politico, June 5 2014, https://bit.ly/3VYxRwq.

[16] In more detail *Ferdinand Weber*, Vermeidung von Mehrstaatigkeit, in: Berlit/Hoppe/Kluth (Eds.), Jahrbuch des Migrationsrechts für die Bundesrepublik Deutschland 3 (2022), 2023, 395 (413-414).

nationality under international law (*nationality rule*).[17] Russia's interventions in Georgia, Crimea and other occupied parts of Ukraine reflect only the most recent and extreme case of strategic invocations of nationality, even if the Russian Federation's passport distribution may be judged as being contrary to international law in many cases. The Modernization Act makes passportisation[18] obsolete because the retention or re-acquisition of Russian nationality won't have consequences. The arbitrary imprisonment of the (then) sixteen-year-old German-Russian dual national Kevin Lick, followed by his sentence to four years in prison for treason while Russia denies Germany consular assistance, is just the most recent example.[19] The German Federal Foreign Office officially warns against arbitrary detentions and advises dual nationals not to travel to Russia[20] while the government's Modernization Act will multiply such potentialities and enrich potential conflicts in international relations to the detriment of individuals. Just recently, the Turkish government prohibited the admission of new schoolchildren via a verbal note if they (also) possess a Turkish nationality which is likely to increase with the Modernization Act. Media reports cite voices from parents who now think about abolishing Turkish nationality or return to Germany.[21]

Finally, the governmental parties' coalition agreement, to examine how an unlimited transfer of multiple nationalities can be avoided in the long run, becomes obsolete. [22] By admitting *unconditional* and *unlimited* multiple nationality, the Federal Republic loses every negotiation position. These aspects lead towards a first conclusion: avoiding multiple nationality allows a clear demarcation of peoples, (democratic) responsibility and (diplomatic) protection. It serves long-term conflict prevention. Liberal democracies are a global minority in contemporary international community.[23] Clarity reduces targeted, autocratic interventions in democratic processes and preserves protection rights in conflicts with them at the same time. If one looks at the current status of international relations, the draft's statement that problems resulting from multiple nationality are unknown is simply incomprehensible and, with a view to the government's Federal Foreign Office doing the opposite (see above) shows itself as a strategic fiction.

The unlimited and unconditional multiplication of nationality thus is ultimately hardly a modernization but rather a vulnerabilization of individuals on the international plane and a challenge to political communities' stability. Retaining one's old nationality may be a plausible argument for the first generation of immigrants who want to naturalize and keep close ties to

[17] *Stefan Talmon*, Nachteile der doppelten Staatsangehörigkeit, Bonner Rechtsjournal 2017, 24 et seq., accessible via https://bit.ly/3L3fSyQ.

[18] On such practices with further references *Ferdinand Weber*, Passportisation: From a Neglectable Phenomenon under International law to an Elusive Imperialist Strategy?, German Yearbook of International Law 66 (2023), in press.

[19] *Maria Mitrov*, "Als dann das Urteil gesprochen wurde, da bin ich fast gestorben", Zeit-Online, March 2024, https://bit.ly/3VZNbch; *Victoria Lick*, Kevin Lick: story of teenager's treason sentence, 25 April 2024, https://bit.ly/3zmHAUC.

[20] Federal Foreign Office, Russiche Föderation: Reise- und Sicherheitswarnung (Teilreisewarnung), 28 June 2024, https://bit.ly/4cbn1ZL.

[21] *Friederike Böge*, Türkei setzt deutsche Auslandsschulen unter Druck, FAZ Nr. 171 v. 25.7.2024, 4, also Online.

[22] Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP, Mehr Fortschritt wagen, p. 118, https://bit.ly/3VHcqyQ.

[23] Our World in Data, Liberal democracy index, 2024, https://bit.ly/3VZhnEr.

their former home country. But this aspect loses plausibility for later generations who have been born in the new State and grew up in it. Socio-cultural identities don't need to be protected by passports *ad infinitum*. They are and have been protected by fundamental rights ever since.

III. The abolition of the dismissal procedure violates the European Convention on Nationality

The draft overlooks another problem, linked to one of the Council of Europe's Conventions. The abolition of the dismissal procedure (Sections 18-19 and 22-24 StAG) violates Article 8 (1) of the European Convention on Nationality of 6 November 1997 (ECN)[24], which the Federal Republic of Germany ratified. The norm emphasizes the importance of the individual's will to renounce its nationality and, for this purpose, obliges the contracting parties to secure the possibility to voluntarily renounce one's nationality while avoiding statelessness. The explanatory report to the ECN, which has been approved by the Committee of Ministers of the Council of Europe, confirms this and shows that Article 8(1) of the ECN also covers the case of release/dismissal besides renunciation (see marginal no. 79)[25]. Its abolition makes it impossible for persons to naturalize in a third country which obliges them to renounce their (only) German nationality *before* that.

The draft's argument – renunciation suffices – is wrong. Renunciation of nationality is only legal under German law if a second nationality is *already* in possession (Section 26 (1) StAG).[26] Besides that, the draft's reasoning points towards a duty to comply with a judgement of the European Court of Justice from 2022, which concerned only Estonia and Austria.[27] The judgment doesn't even oblige any Member State to delete its dismissal procedure.[28] Estonian law simply lacked a provision like Section 24 StAG[29] to prevent statelessness in accordance with international law. Reflections on article 8 (1) ECN, on the other hand, are missing completely in the draft bill.

IV. Union Law. Judicial Harmonization and Parliament's servility as a constitutional Issue

Finally, the insertion of a special proportionality test with a view to possible losses of Union Citizenship in Section 30(1) StAG is problematic in terms of constitutional and Union law alike. In accordance with the principle of conferral (Art. 4(1), 5(2) TEU)[30], Member States have deliberately *not* conferred any competence on the Union regarding nationality law. Therefore and logically, no act of harmonization from the Union legislator in this field exists. Additionally, in Declaration 2 of the Final Act to the Maastricht Treaty, the Member States expressly pointed

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[24] European Treaty Series, No. 166, https://bit.ly/3Cug32k.

[25] Explanatory Report to the European Convention on Nationality, 6 November 1997, https://bit.ly/3GPiJKi.

[26] See above, note 6.

[27] ECJ (Grand Chamber), Judgment of 18 January 2022, C-118/20, ECLI:EU:C:2022:34 – *JY/Wiener Landesregierung*, https://bit.ly/3zuRpQc.

[28] For a critical analysis, see *Ferdinand Weber*, Competence Fusion Through Citizenship. The Federal Logic in the CJEU's Jurisprudence on Union Citizenship, European Public Law 28 (2022), 397-422, https://bit.ly/3VLhYrN.

[29] See above, note 6.

[30] Treaty on the European Union, consolidated version (2012), https://bit.ly/3L4jgtd.

out that only the law of the Member States shall determine who their nationals are.[31] Finally, the German Federal Constitutional Court (FCC) expressly stated that the "derived status of the citizenship of the Union and the safeguarding of national citizenship are the boundary of [...] the case law of the Court of Justice of the European Union"[32].

The newer case law of the ECJ negates and oversteps these limits. Through Union Citizenship, it developed detailed judicial regulations, including the start of deadlines and information obligations regarding the nationality law of the Member States and its administrative procedures.[33] The line of jurisprudence amounts to a functional harmonization, bypassing the vertical competence architecture and reversing the relationship between Union citizenship and nationality in this respect. This also contradicts the legal framework architecture of article 20 (1) TFEU[34]. The bill does not reflect this and behaves as if mandatory directives from the Union legislator were to be implemented, which, due to the lack of any democratic act, can't even exist. The dilemma following from this get visible in the fact that the draft's assumptions are based on the ECJ's Tjebbes judgement from March 2019,[35] but its content are likely to be outdated by a newer decision of the ECJ's Grand Chamber from September 2023.[36] This way, the German Parliament turns itself into an implementer of non-legislative acts of case law whose constant overhaul by new judgements is at the horizon instead of clearly traceable and identifiable legislative standards in a field which particularly concerns democratic self-determination.

In this case, this also amounts to a problem of German constitutional law. The FCC recently stated that "the rule-of-law principle (Art. 2 TEU, Art. 20 para. 3 GG) gives rise to a requirement that the exercise of public authority must have a valid legal basis. As measures of EU institutions, bodies, offices and agencies that result from an exceeding of competences are not based on a valid allocation of powers in the Treaties and the corresponding act of approval (Art. 5(1) first sentence TEU), they can also not justify interferences with citizen's rights and legal interests"[37]. The ECJ is an institution of the Union, established and limited by the Treaties.[38] The German Parliament, besides this, has a responsibility with regard to European integration (*Integrationsverantwortung*). From this, according to the FCC, follows not only a prohibition to participate in acts of Union institutions exceeding their competences, but even a duty to counter such acts.[39] Accordingly, it must be examined whether implementation, in

[31] Declaration on nationality of a Member State, OJ No C 191, 29 July 1992, 98, https://bit.ly/3VLxTq8.

[32] BVerfGE 123, 267 (405) – *Treaty of Lisbon* (2009), accessible in English under https://bit.ly/4cGz6Gg.

[33] See above, note 28.

[34] See above, 30.

[35] ECJ (Grand Chamber), Judgment of 12 March 2019, C-221/17, ECLI:EU:C:2019:189 – *Tjebbes et al.*, https://bit.ly/4cCLvLi.

[36] ECJ (Grand Chamber), Judgment of 5 September 2023, C-689/21, ECLI:EU:C:2023:626 – Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise), https://bit.ly/3zxE9u4.

[37] BVerfGE 164, 193 (283 para 127) – ERatG – NGEU, English version accessible under https://bit.ly/3xEDE0W.

[38] In detail *Ferdinand Weber*, Innere Souveränität. Die Union und ihre Mitgliedstaaten, in: Till Patrik Holterhus/id. (eds.), Handbuch Europäische Souveränität, 2024, 47-87.

[39] BVerfGE 164, 193 (288 para 141) – ERatG – NGEU, English version accessible under https://bit.ly/3xEDE0W https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/12/rs20221206_2bvr054721en.html.

this case, is not possible in the first place due to the *Bundestag's Integrationsverantwortung*. There is no reflection on this in the draft bill's reasoning either.

V. Verdict

The 'Modernization Act' raises a number of doubts regarding its premises, on many different legal aspects and problems under international, constitutional and Union law. The unconditional and unlimited admission of multiple nationality ignores all potential conflicts as well as democratic and diplomatic consequences and celebrates a questionable liberalization in a remarkably introverted perspective. Its method, an unbridled equation of socio-cultural identities with passports can hardly count as an expression of modernity, neither legally nor in terms of integration policy, and comes with an important blind spot: a thorough look at the international political and legal environment it is embedded in.

Dr. Ferdinand Weber, MLE.[40]

[40] The author was invited on behalf of the CDU/CSU parliamentary group in the Deutsche Bundestag to the expert hearing in the Committee on Internal Affairs on 11 December. The article is partly based on the statement submitted there, compare Stellungnahme, 8 December 2023, BT Ausschuss-Drs. 20(4)349 J neu, https://bit.ly/474XKNA.