

# Borders of Citizenship? Biopolitics and differential inclusion in local fields of labor and asylum

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## 1. Introduction

In 2018, 22.3 million third-country nationals resided within the European Union and 17.6 million persons lived in one of the EU member states on 1 January 2018 with the citizenship of another EU Member State (Eurostat 2019). At the same time, 10.9 million foreigners (third-country nationals and Union citizens) were staying in the Federal Republic of Germany (FRG) (Statistisches Bundesamt 2019: 19). Contrary to natural born citizens, migrants can have a variety of legal statuses depending on how they are classified by immigration law. This classification constitutes a system of civic stratification (Morris 2010) that determines the access to social benefits and social services, such as education and qualification measures and health care, and regulates foreigner's legal access to labor markets. Social policy research brought this system in contact with different welfare state regimes and showed a growing differentiation in immigrants' social rights based on entry categories (Sainsbury 2012). Thereby, limited access to social benefits and services are considered to be a nation state's internal instrument of migration control (Bommes/Thränhardt 2010; Atac/Rosenberg 2019). Regardless of the welfare type, nowadays a growing pluralization and differentiation of legal status positioning can be observed in different European Union Member States. This concerns EU citizens' cross-border social rights, the social rights of third country nationals coming to Europe for professional or educational reasons as well as refugees.

Increasing border crossing mobility raises questions of inclusion and exclusion of non-citizens into the social systems, such as the legal system, the political, economic or educational system. Still, it is mainly the national state moderating the access to labor market and social services.

How can we depict the various forms of differential inclusion (Mezzadra/Neilson 2013) in social and legal systems within the FRG? How can we grasp the simultaneousness of restrictive border practices and the selective liberalization of immigration law and the coincident growing embracement of the migrant population throughout integration policies? Classical concepts of citizenship refer to the state, on a national or nowadays on a European level. While they overestimate the political capacity to integrate society; at the same time they underestimate the power of political rationalities shaping the current migration and membership policies.

In contrast, this contribution argues that recent developments in immigration policies and immigration law can and should not be approached from the point of view of state institutions such as citizenship. It outlines the extensive proliferation of status differentiation of migrants into the social systems as an outcome of biopolitical rationality. Moreover we can observe an emerging system of differential inclusion consisting out of overlapping lines of inclusion and exclusion and memberships in flux beyond the institution of citizenship.

(Section 2) Therefore, we first have to consider the »nation form« and the complex interplay of democracy, nationality and welfare state. Citizenship as well as non-citizenship thereby have to be shown as political categories which are producing the problematization of immigration in world society.

(Section 3) Labor market access for asylum seekers and granted refugees is a paradigmatic field to depict the inconsistent and heteronomous outcome of biopolitical selectivity. Biopolitics can be observed within the European agendas as controlling migration (3.1) as well as, in recent legislation for asylum seekers, regulating their access to labor and labor-related social services (3.2). At the same time, this rationality produces conflicting legal spheres and institutions in multi-scaled policy areas.

(Section 4) Based on local case studies, the contribution gives an insight into the contradictory effects of immigration policies on the local level.

## 2. The national social state

Talking about the borders of citizenship implies to talk about migration and the concept of the nation state. This starting point follows a trend in migration research that Nieswand calls the decentralization of migration. That means not only to deal scientifically with the challenges of migration and »integra-

tion« of migrants into a new society, but also with the structural and world social dynamics which produce the specific forms of problematization and handling immigration (Nieswand 2016: 285).<sup>1</sup>

The international political system is segmented in nation states. The concept of a nation state is the historical-political form of organizing society. Like every form of unity, the nation is an imagined unity that needs to be materialized. It materializes in symbols as well as in technical artefacts. In the course of the 18<sup>th</sup> century and mainly the 19<sup>th</sup> century, nations began writing and producing its histories and curating their specific heritage. Emblematically, the United States' history – its unity and difference – is set in scene in the National Mall in Washington D.C (Manow 2018). Thereby the nation can constitute its unity in different ways. In the German case, the nation established itself as a mainly ethnically defined union against particular political entities. In the French case, the nation did not answer to particularism but to the misuse of power, which was not exercised by the people, but by some privileged (Bommes 1999: 109-115). The national history of statehood makes it always possible to emphasize the somehow politically or culturally unified people. The end of the cold war also revitalized the accentuation of nationalist patterns of identifying and unifying. In a liberal sense, former member states of the Warsaw Pact abolished communist dictatorship but developed more and more an intensive and externally-endangered and ethnically-defined unity. Both pathways, the liberal democratic and the ethnical, are possible patterns to fill the empty signifier nation, so that, for example the 1989 German national-liberal slogan »We are the people« (»Wir sind das Volk«) soon turned out to be a xenophobic phrase (Glück 2018).

As Earth is almost completely covered by territorially defined nation states, the individual states as well as an international state system successfully monopolize the legitimate means of movement. Therefore, the state assigns his citizens with documents: »the notion of national communities must be codified in documents rather than merely imagined« (Torpey 2010: 6) and it interpellates (Althusser 2016: 85) citizens as voters, pupils, taxpayers or soldiers.

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1 Problematisation is a Foucauldian term (Foucault 1996: 78; Foucault 2004b: 114f) that describes an angle, which is less interested in the problem definitions based on existing institutions and more focused on the observation of forms of knowledge and practices producing the problems of migration.

Democracy describes power relations. The concept of a nation describes a form of unity in the context of other unities. Both evolve in parallel to the welfare state. The construct of a welfare state is the active agent, trying to implement the modern promises of permanent economic growth, consumption and wealth. A national social state (Balibar 2010: 25) represents the two sides of state activity: the welfare state regulating social conflicts and reproducing the relations and means of production and the nation form (Balibar 2011), which is the symbolic form of a both sacrificed and secularized unity.

This welfare state is far from being an universalistic form. Moreover, its concrete spatial and historical shape depends on the societies' mode of production (e.g. fordistic and post-fordistic), the political system, the nation's political parties and, last but not least, the economic growth (for an overview: Myles and Quadagno 2002). The post-war Keynesian welfare state emerged as an answer to the rise of socialist movements among industrial workers and in the cold war against the socialist block. For some time in the post-war period, it seemed to be the political solution for societal contradiction by successfully regulating the conflict between labour and capital. At the same time, it guaranteed the stability of a nation and linked social and political rights within the institution of citizenship, thereby producing insiders and outsiders. Rights, equality and social protection on the one hand and the expectation of loyalty and obligation on the other hand mutually tie together state and citizens (Bommes 1999: 125).

The welfare state's objective is less the legal term of the people than the sociological and empirical term of the population (Foucault 2004b: 114). The invention of the population is based on forms of statistical knowledge, producing this empirical artefact in visualized numbers, curves and statistics. Differently to the people or the nation, the governed population is subject to multiple divisions, based on nationality, on gender, on age, or class composition as well as on different territorial developments in segregated spaces (Jessop 2016: 35). The statistical observation of the population enables to handle and govern objectives like birth rates, family structures, migration, education, vocational training and so on. By governing the population, the welfare state moderates chances of inclusion into and exclusion from the social systems and legitimates itself with the objective to guarantee public wealth and social equality between state citizens. While the welfare state legitimates itself with the promise of growing wealth and equality, it is less interested in inequality between the states. Moreover, the relative equality within the state makes the inequality between the states invisible (Stichweh 1998: 51), as elected politici-

ans are primary obliged to the well-being of their voters and not to the well-being of the rest of the world. Enduring cross-border migration contradicts the assignment of people to territorial states. Enduring cross-border mobility brings the tension between insiders and outsiders into the nation state's territory and points at the central tension between particularistic-social rights, which are exclusively bounded by national membership, and the drivers producing enduring cross-border mobility, such as post-colonial conflicts and international system of labour division.

The question of inclusion and exclusion in legal, political and social rights is politically contested and historically alterable. Referring to the form of democracy, it arises questions of voting, representation and political inclusion (Bausch 2015). Referring to the nation, it evokes questions of loyalty and unity. Referring to the welfare state which governs the statistically produced population based on economic knowledge (Foucault 2004a: 164-165), it induces a debate about costs and benefits of migration, about push and pull factors and about inequality between state citizens, immigrants and their descendants. With this shortly outlined co-evolution of the nation form in mind, the welfare state and the self-description as democracy, the following section depicts an evolving system of differential inclusion not only between citizens and non-citizens, but also between different groups of migrants within the state. Thereby it focuses on legislation concerning refugees' labor market access and argues that welfare state refugee policies are following biopolitical calculations. It also shows the outcome of these policies on a local level.

The research was conducted in three selected German municipalities which differ in their organizational framework to govern labor markets and in their size. Finally, they are located in three different federated states (*Bundesländer*), with differing legal responsibilities, policy objectives for refugee integration and, last but not least, with varying resources of public services. The eight expert interviews in each municipality (n=24) aim to grasp the partly contradictory organizational rationalities and reactions on forced migration. The research focusses on methods of coordinating federal actors, like the local employment agency or the regional department of the Federal Bureau of Migration and Refugees, with municipalities administration, such as the municipal immigration office (*Kommunale Ausländerbehörde*) or integration offices, and with the welfare market actors implementing the integration courses or measures of activation. The selected data for this contribution highlight questions of identifying and the contradictions

and interplay between the local labor administration and the municipal immigration offices.

### 3. Border extensions: the case of labor market access of refugees in Germany

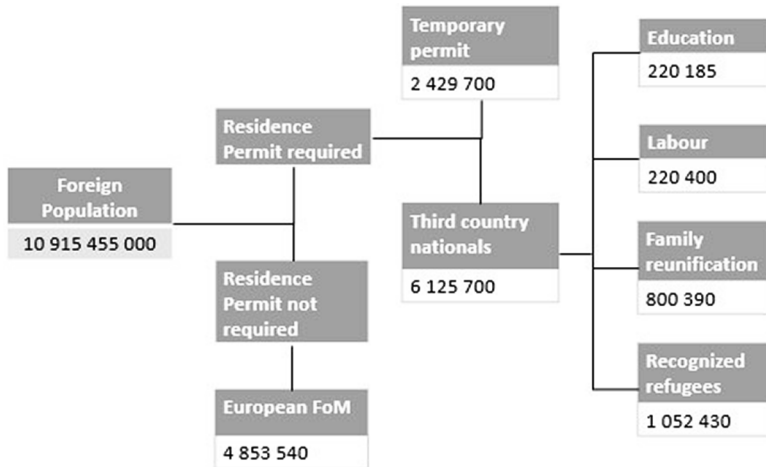
The paradoxical nation form produces the problematization of immigration that the national social state tries to solve and control at the same time. The term »differential inclusion« describes the increase of »differentiation and selectivity of human mobility« (Könönen 2018: 55; see also Morris 2010: 9-12). This tendency can be observed in the evolution and growing complexity of immigration law. Immigration law assigns legal status, identities and motives of mobility based on the differentiation of citizens and aliens, and is thereby the productive instrument to »categorize and individualize« (Balibar 2009) non-citizens. At the same time, it extends external state borders into the inner side of the nation state or the respective political union. This suffix is necessary because the nation state's migration policy – and by this, the immigration law itself – became more and more part of inter-state formations reacting to the mobility of world's societies. In the German case, immigration law does not consist in a single code, but in a complex intersection of legal spheres, mainly the Residence Act (AufenthG), the Asylum Law (AsylG), the Second, the Third or the Eighth Book of the Social Code (SGB II, III and VIII) and the Asylum Seekers Benefit Act (AsylbLG). Figure 1 shows the differentiation of legal residence status for foreigners, based on the attribution of motives to enter the country.

#### 3.1. From deterrence to managing migration

In this context, asylum is one attributed reason to achieve a residence permit. Nowadays relevance of refugee law as a form of protection only makes sense with the development of border and passports controls, visas restrictions and an uprising technical infrastructure directed to control the population's movements (Behrman 2018; Behrman 2019: 284).

In the post-war era, asylum was based on the Art. 16, para. 2 cl 2 of the German Constitution (*Grundgesetz* – GG), which provided protection against political persecution, as well as on the Geneva Convention, which grants protection to people who have a »well-founded fear of being persecuted for rea-

Figure 1: Attribution of motives to stay



Source: Author's compilation based on Statistisches Bundesamt 2019 and BT-Drs 19/8258

sons of race, religion, nationality, membership of a particular social group or political opinion.« National as well as international law needs to be implemented. The set of laws, regulations, institutions and procedures that implement asylum law in the Federal Republic of Germany can be called a system of asylum enforcement. Under the circumstances of the old Art. 16 of the German Constitution, the asylum enforcement system was the nation state's singular and probably failed instrument to control asylum migration. It relied on deterrence throughout mobility restrictions, work ban and a differentiation of access into the social security systems. These restrictive instruments should avoid giving incentives to 'abuse' asylum. These policies led to the paradox situation that »the country with the world's most liberal asylum law was also the one with most illiberal asylum practice« (Joppke 1997: 294).

The growing numbers of asylum seekers in the course of the armed conflicts in former Yugoslavia led not only to new debates about asylum, but also to pogrom-like violent crimes and the so-called asylum compromise. With the new version of Art. 16a of the GG, asylum grant no longer depends on the flight motive, but on the escape route. Art. 16a (2) of the GG cannot be invoked by those who enter federal territory of a Member State of the EC (EU) or

another third country in which the application of the Geneva Convention and the European Convention on Human Rights is ensured. This new regulation is already applied in the context of the developing European migration policies (Münch 2013: 76).

Within an emerging European migration law, the Maastricht Treaty did not only transform former foreigners into union citizens with legal rights, a certain degree of political rights and quite limited social rights; it also declared asylum and migration policies to a matter of common interest. Within the Amsterdam treaty, the member states committed themselves to develop a Common European Asylum System. What we can observe evolving on a European level since then, is an institutional architecture of making border, which at the same time follows a certain rationality described as migration management. This semantics indicates a significant shift in migration policies, which from now on follows the two-folded aims to simultaneously combat illegal migration and foster the wanted forms of migration (Buckel 2012: 90). The managerial semantics promises leadership, rationality, control, effectiveness and the problem-solving capacity. This new frame is due to the realization that migration ›flows‹ cannot be prevented by single nation states; moreover, the mobility of world societies cannot and shall not be prevented at all. The semantics of ›flows‹ and ›waves‹ and other frequently water-related metaphors show a rationality which is geared towards the naturalized population (Meyer/Purtschert 2017: 156).

The opposite of controlled and managed migration is uncontrolled migration. Uncontrolled migration is illegal migration, from people trying to reach Europe in order to seek asylum or achieve another residence permit. The European Visa policies, which have been designed with the Schengen Agreement, are producing the ›flows‹ of illegalized migration and made it impossible to reach Europe via legal pathways. Uncontrolled migration is linked to security issues (›heightened terrorist activities‹; European Commission 2018: 6), to a lack of integration into the society (the problem of unity) and to the ›humanitarian efforts‹ to protect migrants from smugglers and other forms of exploitation on their route.

The Migration Management rationality is astonishingly clear. Foucault calls this kind of rationality and technique *biopolitical*. Biopolitics target on the enhancement of the natural processes of the population. The natural processes of the population are determined by the reality of human beings who act economically and who are coordinated by market mechanisms and exchange. For the modern era, the market is the true reality of society (Vogl 2002: 371)



and also the biopolitical knowledge is based economically. According to this reality, biopolitical rationalities take care of every individual being (Foucault 1981) and thereby raise the productivity and strength of the body politics within a hostile global environment. Biopolitics includes investment in the human capital of societies. As education, activation labor market measures or preventive health promotion, immigration policies are a sort of investment in societies' collective human capital. Bröckling (2017: 333) recently quoted, if life was subordinated to economic calculations, and became a function of investment, disinvestment would be death. On the other hand, body politic is permanently endangered by people who lack the capacity to integrate, who cannot adapt to the shared life styles and mainly who are not expected to meet the requirements of the market. This attribution intersects with racial differentiations. They can be observed on a global scale but also within the European Union, where harsh divisions between wanted and unwanted (so called poverty-driven) migration are constructed (Ulbricht 2017: 271). As outcomes of colonial history, economic rationality and racist attributions are mutually linked. In the case of Germany as in other western European countries (Lafleur 2018), European freedom of movement is more and more problematized as uncontrolled migration. This problematization leads to a legislation limiting the access to social service in order to control movements with social legislation and with restrictive local organizational practices (Riedner 2017: 101).

The technical and institutional outcome of this biopolitical rationality is a multi-scaled apparatus dealing with immigration issues. In a functional way, this apparatus is scientifically described as a multi-level governance system ?; in a more distanced sense it is grasped as a heteronomous migration regime (Pott/Rasch/Wolf 2018). The theoretical framework of Governmentality Studies degrades the state and also the evolving European state apparatus to a set of technical instruments based on a political rationality. In consequence, it is not »the old nation state« which tries to control the processes of bordering, but an institutional ensemble of a supranational migration apparatus consisting of diverse European authorities and jurisdictions, including not only the European Union institutions or the administrations of the member states, but also private actors (like formal or informal transport companies and enterprises) and humanitarian agencies (de Genova 2017: 17). Most researchers stress the nation state's loss of capacity to control migration within this architecture, while it is rarely pointed out that this is more a transformation of exercising power than an attempt to abolish the claim to sovereign

control. On the contrary, an »orderly management of migration flows« has to be ensured. Sovereign control in this context means the attempt to extend the governance of human mobility by the capability to institute, personalize and interpellates human beings, and that depends on calculations concerning the expectable exploitability of human capital.

The narrative of asylum misuse led to a set of administrative measures that, still today, will not give disincentives for asylum migration (SVR 2019a: 71). Taking in account not only asylum and residence law, but also the different fields of social (mainly the books of the social code) and employment regulation (BeschV), the processes of bordering do not only concern the nation state's or nowadays Europe's external border, but also different administrations and levels within the nation states. The following section shows the intrastate attempts to govern and to exploit human mobility and analyzes the relevant legislative changes for asylum seekers concerning the labor-related issues.

### 3.2. Incentives and compulsions

Labor market access for refugees in Germany is caught between migration policies and an activating labor market policy. Migration policies intend to govern migration based on a push-pull model. In contrast to this, activation policies rely on investment in human capital with the intention to produce a self-responsible workforce that is not dependent on social benefits and try to increase the labor market supply side.

Access to labor-related social services and to the labor market depends on different factors. The first of them is the outcome of the asylum procedure. It is the Federal Office for Migration and Refugees (BAMF) that decides in its regional branches on the legal status of third country nationals in the FRG. It is affiliated with the Ministry of the Interior and also organizes and implements the federal language courses, so-called integration courses.<sup>2</sup> The Janus-faced Migration and Refugee Office plays roles as gate keeper and as main actor to provide the first step to an ideally modelled integration process (OECD 2017: 24).

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2 This course is directed to all foreigners living in Germany. It includes language learning (normally 600h, or 900h or 400h) and an orientation part, which aims to provide daily life skills and knowledge about the legal system (100h) (cf. Integration Course Regulation – *Integrationskursverordnung*). The access is restricted to refugees with officially recognized status as refugees or refugees who are expected to be recognized (§ 44 AufenthG).

There are mainly five possible outcomes of the asylum procedure: being recognized as entitled to protection under

1. the Geneva Convention (§ 3 AsylG),
2. the asylum article (§16a GG) or
3. the subsidiary protection regime (§ 4 AsylG),
4. In addition, rejected asylum seekers can fall within the national ban on deportation, or
5. their asylum application can be rejected and they are subject to deportation (see figure 3).

Most refugees are recognized under the Geneva Convention. The old Art. 16 of the German Basic Law quantitatively no longer plays a role. Recognized asylum seekers have full access to the labor market and to labor market measures. The distinction between different types of protection has only indirect consequences, for example, being recognized under subsidiary protection hinders family reunification (§ 140 (3) AufenthG) and the duration of the recognition is first limited for one year.

The second crucial factor for the labor market access for refugees is the duration of the stay. In this context, the European Reception Directive is the most extensive European intervention into the national social state. Member states obligate themselves to grant access to medical care and a human standard of living. Labor market access must be granted not later than nine months after the time of the application (Art. 15 Abs. 1, European Reception Directive). German legislation even reduced this time to three months (§ 61 Abs. 2 AsylG), but not without making exceptions. § 61 Abs. 1 AsylG bans people living in an initial reception center as well as people from secure states of origin from access to labor. People who are not officially tolerated and who shall be deported (60 000 persons) (SVR 2019b) are also under work ban. These prohibitions can contradict the Art. 15 of the Reception Directive.

The legislation responding to the forced migration in the years 2014 to 2016 tried to facilitate and accelerate labor market access for refugees. The legal packages passed in 2015 and the following years are not easily to be categorized as either being dominantly liberal or restrictive. Moreover, they include restrictive measures for some refugees and liberal measures for others. They

- extended the list of secure states of origin (§ 61 (1) AsylG), from which refugees have no chances to be granted asylum in Germany,
- opened legal pathways for people from Serbia, Montenegro, Albania, Bosnian and Herzegovina to migrate with an existing contract for labor purposes to Germany (26 Abs. 2 BeschV),
- invented the notion of the »good perspective to stay« that enables people to participate at the integration course during the ongoing asylum procedure and to accelerate processes of language learning and, thereby, of labor market integration.

The law liberalizes access to social services for asylum seekers who are expected to stay and who will be recognized as refugees; it is restrictive for asylum seekers from countries with a recognition rate of less than 50 %.

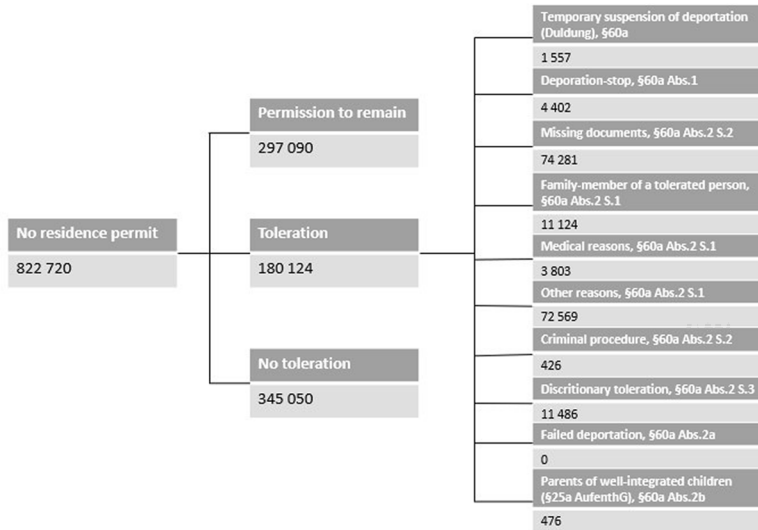
The Integration Law of 2016, which is also a legal package concerning the Second and the Third Book of the Social Code and the Residence Act as well as the Asylum seekers benefit Act (AsylbLG), is once more a combination of pressure and incentive to act economically. It introduced

- an obligation to remain at the assigned place of residence for three years (§ 12a AufenthG) and makes at the same time an exception for people who work, study or start a vocational training. The residence obligation is introduced because of spatial differentiation in Germany and the misgiving that due to local housing markets, spatial segregation would be intensified (Bt-Drs. 18/8829, p: 3), although the positive effects of mobility restrictions are scientifically doubted (IAB 2019).
- possibilities to reduce social benefits for asylum seekers and tolerated persons if they do not cooperate (§ 1 (4 and 5) AsylbLG).
- measures of activating labor market policies for rejected refugees.
- a permission to stay for the duration of an apprenticeship of three years and for two more years of work.

The law of 2016 was revised in 2019. It extends the possibilities to acquire a permanent residence permit in Germany through work. It points at the increasing quantity of people who got their application for asylum rejected but still stayed in Germany for different reasons (IAB 2019). This affects both refugees who start a vocational training and tolerated refugees who are in employment relationships and provide their own livelihood. This legislation opens new pathways to acquire a permanent residence in Germany.

The rejected asylum seekers, who are subject to deportation and who nonetheless permanently live in Germany, are the most troublesome group of third country nationals.

Figure 2: No residence permit



Source: Author's compilation based on Statistisches Bundesamt 2019 and BT-Drs 19/8258.

There are about 180 000 asylum seekers who are rejected and have a temporary permission to stay. In addition to the 300 000 people who have an authorization to stay in the country for the duration of the asylum procedure, there are also 345 000 third-country nationals who have no permission to stay (see Figure 3). These people have no access to the integration courses. They remain within the asylum seekers benefit act and have no access to the activating labor market measures of the local job centers.

The renewed law is dedicated to people who are well-integrated. In this context, integration mainly stands for individual success in education and work (Schammann 2017b: 751). While residence laws until now attributed the motives to stay in Germany, it now establishes a new selectivity within these causes. This selectivity is based on educational and economic capacity. Hannes

Schamman (2017b) called this a meritocratic turnaround, now also present in asylum policies.

The always two-sided legislation does not miss to implement repressive measures at the same time. Currently, a new legal package is negotiated which aims to facilitate and accelerate deportations, e.g. in cases of substance misuse or other crimes. The law mainly affects people who do not cooperate with the administration in identifying them: »German authorities need to know who resides in *our* [emphasis added] country. The obligation to present a travel document has to be enforced, especially for tolerated refugees« (BMI 2019: 2).

The managing migration agenda interrelated with the discourses of demographic change and the interest to increase the supply of workforce to the labor market now also affect the residence law for asylum seekers. The multiplication of entitlements to stay in Germany can be seen as borders within the nation state, increasing the selectivity of asylum-related human mobility. Recent legislation packages open the access to social services and labor for people who have been assessed as worth investing in. In contrast to the growing complexity of the different immigration-related legal spheres, the core of this legislation is not very sophisticated at all. It follows a classical model of conditioning, i.e. it promises incentives to act in an expected manner on the one hand and works with threats, compulsion and deportation on the other hand. The Janus-faced migration apparatus fosters education and training and enables people to live their lives in peace, democracy and wealth. At the same time this apparatus works at the borders of legality, always trying to expand these borders in order to push back illegal and useless lives. The following section outlines the contradictions of these policies in focusing on the legislation and on central local actors implementing this legislation for people whose asylum application has been rejected.

#### 4. Questions of identifying: Tolerated refugees between the rationalities

After being recognized as a refugee, the asylum seekers fall under the jurisdiction/legislation of the Second Book of Social Code, mostly until they find work. There have been 990 000 people in February 2019, from whom 598 000 are capable to work (BA 2019: 14). All activating labor market measures are now opened to them. It is important to recognize that tolerated refugees do

not fall under the legislation of the Second Book of the Social Code (SGB II), which provides basic income and tries to enable people to find work by individual training. In contrast, tolerated refugees receive their basic income from the municipalities and do not leave the jurisdiction of the Asylum Seekers Benefits Act, so municipalities continue to be financially responsible for this category of refugees. Thus, municipalities have to deal with the consequences of restrictive national politics and implement integration policies besides the policies of nation states (Scholten 2019). The following section shows how local institutions deal with these persons.

The focus on local fields of labor and asylum (Etzold 2017) follows a growing interest in local varieties (Schammann 2017a) in order to grasp the complex interplay of actors from different policy fields in multi-scaled arrangements. In a functional sense, research stresses the local capacities to solve problems; in a more political sense, researchers emphasize the local autonomy in shaping integration policies. »Solidarity Cities« give room to new political ideas apart from nation states violence (Neumann 2019).

The following section depicts the core of control that is the power to decide on and interpellate one's identity. The chapter focuses on the labor-related role of the municipal immigration offices<sup>3</sup> and thereby shows the tension between migration policies and activating social policies.

Whilst the Federal Office for Migration and Refugees (BAMF) decides on the legal status of asylum seekers and organizes the integration courses as well as other language learning measures, it is subject to the 16 federal states (Länder) to implement the residence law. They supervise the municipal immigration offices and determine the responsibilities to implement the federal law. The federal state of Bavaria, for example, organizes deportations and is responsible for all rejected asylum seekers. In contrast, in the state of North Rhine-Westphalia the municipal immigration offices deal with these issues (for example ZustVAuslR-BY; Zust AVO NRW).

There are more than 500 municipal immigration offices within the FRG, which have, corresponding to the inhabitants and the local immigration situation, quite different personnel resources (Bogumil/Hafner/Kastilian 2017: 29). These organizations suffer from a structural personnel shortage. That is due to the growing immigration-related tasks and the depicted differentiation of motives to remain in Germany. As one local expert illustrates, it is hard

3 The municipal immigration office (Kommunale Ausländerbehörde) is quoted as MIO.

to attract staff to implement the residence law, which is for many administrators less attractive than working in an integration-related field (Frankfurter Rundschau 2019). At the same time, the residence law intersecting with labor law is a complex and very unstable legal sphere. The legislative furor in the field produces legal uncertainty. An expert quotes:

»A colleague compiled a list of all legislative changes within the last five years. You have to say: that is unbelievable. At the beginning, one tried to facilitate deportation; afterwards one tried to facilitate the possibilities to stay. The Articles 25a and b were added to approve integration efforts. Well, that is also some years ago now. That is all not stable over time. You cannot say that the government tried to complicate the lives of foreigners. That would not be true, moreover sometimes in this direction sometimes in another direction. Overall: I cannot identify a direction within this legislation« (MIO, June 2018).

Political legal activism, under pressure to prove the political ability to act, at the same time produces uncertainty in law implementation. In this sense, Eule (2017: 177) quotes that the municipal immigration offices are not only a crucial actor in the field but also – due to legislative uncertainty and their decision-making scope – an unpredictable player.

Until 2005, it was only the labor administration who examined if there were preferential applicants for a job vacancy which was to be filled by a foreigner. This examination privileged nationals and European citizens and aimed to prevent the labor market from wage reductions caused by immigration. Since the 2005 immigration law, the municipal immigration offices have to permit work for foreigners. That is a shift in responsibilities from welfare state actors to migration control actors (Goebel 2019: 109). Municipal immigration offices only consult the labor administration in select cases to verify the labor market situation, but it is the immigration office which grants the permit to work.

In the case of rejected refugees who are tolerated (§ 60 para. 2 AufenthG), the employment legislation quotes that these persons *can* receive a work permit after three months of residence within the FRG (§32BschV). Mostly local authorities grant this permit, because it reduces the costs for social benefits that municipalities need to cover. On the other hand, by allowing rejected refugees to work in Germany it becomes increasingly difficult to deport them. Deportation is the core of the BAMF decision. The longer people live and work



in Germany, the harder it is to deport them. People acquire social rights, they get children who are in school, they marry nationals or other foreigners with possibly differing legal status. In short: they integrate themselves into society. In legal terms, this is taken into account as individual efforts to integrate in society (§ 25a and § 25b AufenthG) and influences the decision to deport rejected refugees or to extend their toleration:

»Sure, if someone has been working in Germany for some seven or eight years, it will be hard to deport this person. Normally we think, we can deport for two, maximum three years; if we don't succeed within three years, it will be hard to deport (MIO, June 2018)«

Identification is the crucial issue in this context and current legislation mainly addresses this question. Within the 180 000 people who are tolerated, there are about 74 000 people who have no identity papers and 72 000 people who are tolerated out of unspecific »other reasons« (Bt-Drs. 19/8258: 38). Looking at the 2018 refugee migration to Germany, we can observe that out of the 83 000 people who applied for asylum for the first time, there were 48 000 (or 54 %) without identity papers, coming e.g. from Nigeria, Iran or Afghanistan (Bt-Drs. 19/8701). More than 90 % of refugees from these states of origin arrive in Germany without identity papers. This is due to different reasons, for example, the lack of registration and passport systems, the loss of their papers en route to Europe – and it could also be a strategy to stay in Germany, as the systems gives incentives to cover the identity:

»Well, that's like it is: If people do not relinquish their identities, we cannot deport but afterward these people will also not acquire a permanent permission to stay. These people remain tolerated. When we find out who they are, we'll deport them, yes, I would say it is like this. Sure, this is contradictory. It means in effect they can receive a permission to stay, when we know who they are. But the problem is: if we know who they are, we will deport them« (MIO, January 2018).

The legal consequences are harsh. People are under employment ban, if the reasons that prevent from deportation can be accounted to them (§ 60a para. 6 cl. 1 Nr. 2). In addition, these people have the obligation to stay at their attributed places. They have no chances to receive the mentioned toleration for causes of vocational training or employment (see above). Until today, in some cases the vocational training gave reason to receive a toleration status. The

new legislation waives this opportunity (SVR 2019b) and quotes that, after finishing the vocational training, these people will still be obliged to clear their identities. The newest legislation emphasizes that it is not worth disguising identities and therefore gives incentives not to lie and implements restrictive measures based on a suspicion. This kind of messages sent in form of deterrence did not prevent people to seek asylum in Germany until today. In contrast: it institutionalizes exclusion and generates precarious immigrants.

However, the new legislation tries to specify what »collaboration« to clear one's identity means. It is a difficult issue because people who fled from their country of origin normally cannot easily return and even the contact with an embassy is not always reasonable. With this in mind, the scope of the decision of the municipal immigration office shifts to the question whether a person without identity papers fulfills the obligations of cooperation to clear the identity. The local varieties of implementing these questions lead to further efforts in some federal states to centralize migration policies (Niedersachsen 2019).

Other local players also observe this scope of decision. The local branch of the Federal Employment Agency (BA) is the local labor office. It is responsible for the labor market integration of tolerated people as well as for people who are expecting their asylum decision. The respective Third Book of the Social Code defines its purposes as »the promotion of employment that should counteract the emergence of unemployment, shorten the duration of unemployment and support the balance of supply and demand in the education and labor market« (§ 1 SGB III). Tolerated people need a permission to work from the foreigners' office:

»Sure, for tolerated refugees and these, who are still in the asylum procedure, they have this clause in their papers, saying that the local immigration office needs to give permission to start working. Everybody is uncertain in this issue. The applicants, the entrepreneurs, the voluntary-helpers, and also, we are unsure. We never can precisely predict, if the immigration office will give the permission. [...] They began to rely on these identity questions and they began to stress, that they do not open a perspective to stay, for people they do not know who they are. There were some refugees, they started their training yet and then, suddenly, the permission was not extended any longer. Also, the work-permission: there were some people who have been working for a year and then their permission to stay was not prolonged. That

means we have people receiving social benefits and they want to work. I really do not understand it» (Public Employment Service, January 2018).

The velocity of legal changes in this field does not only produce an opacity of decisions and actions and a certain degree of contingency in these decisions, but also leads to structural mutual misunderstandings.

## 5. Conclusion

Differential inclusion is a concept to empirically grasp the proliferation of legal status beside the normality of citizenship. This is necessary because the various forms of inclusion and exclusion are becoming normality beside full citizenship rights. Differential inclusion is not a new phenomenon, concerning the continuity of differing legal positions within a nation state as well as the non-formal mechanisms of exclusion like ethnicity and gender. What is new is the pluralization of legal status positioning caused by a growing selectivity of human mobility. Economic calculations are the center part of these biopolitical calculations. The local labor administration and the municipal immigration office are only two stakeholders with differing legal bases and organizational rationalities shaping the local fields of asylum and labor. They coproduce social policies (Bakoben et al. 2019) together with the local branches of the Federal Migration and Refugee Office, with social worker, volunteers, teachers, security agencies, lawyers, economic actors who are very interested in the labor force of refugees (especially the Chamber of Crafts). The local fields of labor and asylum are highly fragmented between differing rationalities and interests. The depicted rationality of identifying in order to control migration and the activation paradigm is accompanied by the municipalities' interest in integrating refugees to avoid social spending. It remains a scientific task to empirically outline these overlapping and partly conflicting interests and rationalities within the local fields of labor and asylum.

The blindfold of these institutions – that means in this case the legal and organization-centered concept of differential inclusions – is obvious. It emphasizes the productivity of immigration law but covers the multiple subject positions and thereby the »subjective viewpoints of border crossing and struggles« (Mezzadra/Neilson 2013: 166) completing the institutional side of differential inclusion. Beside the historical dimension of the struggle for rights (see Tischmeyer in this volume) and the state's formal citizenship legislati-

on (see Behrens in this volume) as well as the legislation beyond citizenship which is shown in this contribution, it is the »enactments of citizenship« and the political actions that appropriate legal and institutional frameworks for one's own purposes (see Rządtki in this volume), completing a political understanding of citizenship.

However, the depicted biopolitical rationality and selectivity is far from being an »immigrant issue« only. The borders of citizenship and the legal pathways in society are, in a figurative sense, the venue where the notion of belonging is negotiated and where we can observe the human selectivity of societies based on powerful self-descriptions of societies in economic terms. Biopolitics affect democratic institutions and thereby the institution of citizenship in their core. Economic and biopolitical calculations do not answer Kelsens (1963: 49) question »who actually belongs to the people« – which is an eternal question of democracy – in legal terms. They rely on unlimited commodification and assess humans based on accounted exploitability. The consequences of this contemporary transition from legally-oriented to economy-based rationalities is hardly predictable, but like every hegemonic project it is contested.

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