A prospect of staying? Differentiated access to integration for asylum seekers in Germany

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ABSTRACT

This paper investigates the normative permissibility of differential inclusion policies, taking Germany as a case study. In the face of mounting asylum applications, Germany introduced new administrative rules differentiating access to integration for asylum seekers. The paper normatively examines whether this practice is consistent with two conventional liberal concepts: special obligations grounding the moral commitments of the liberal state towards its own citizens and the principle of legal certainty grounding its moral commitments towards everyone under its jurisdiction, including asylum seekers. Combining these two usually separately employed perspectives, it argues that while differential inclusion is in principle consistent with these liberal principles, the crude criterion of the country of origin does not comply with both perspectives. The paper contributes to the debate on the ethics of immigration by scrutinizing this real-world instrument of differential inclusion from a political philosophy perspective.

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Differential inclusion is the predominant mode of today's immigration policy regimes (de Haas, Natter, and Vezzoli 2018; Helbling et al. 2017). States use immigration policies to select who is allowed to enter under which conditions and who is denied

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access to the state's territory (Shachar and Hirschl 2014). Differential inclusion – a term coined in this context by Mezzadra and Neilson (2012) – describes how selection does not only occur at the external state border: borders follow the immigrant inside, in the form of differentiated rights and obligations within the destination country (Bosniak 2007; Song 2016). Dissolving the binary between inclusion and exclusion, a myriad of different sociolegal statuses is thus produced (Mezzadra and Neilson 2012). This paper investigates the normative permissibility of differential inclusion policies for migrants in a precarious status, taking Germany's asylum policies as an example. "Precarious residents" (Gibney 2009, 10), i.e. migrants residing in a country who hold few rights and enjoy limited opportunities to advance to a more secure residence status can be found all over the world, with asylum seekers constituting an important sub-category. The related dilemma that policy-makers in practically all receiving countries face is this: which rights to grant people in the limbo situation of awaiting the decision on their asylum claim, which due to both complex legal structures and mismanagement of asylum systems can take several months and even years. Both psychological (e.g. Pernice and Brook 1996; Sinnerbrink et al. 1997) and social science research (e.g. Hainmueller, Hangartner, and Lawrence 2016; Jackson and Bauder 2014) have shown the detrimental effects of waiting time on asylum seekers' psychosocial health and (socio-)economic integration. The negative societal effects are often exacerbated by policies restricting access to the health system (Bozorgmehr and Razum 2015) or the labour market (Marbach, Hainmueller, and Hangartner 2018). However, as granting access to education and employment can establish rights to remain in the receiving country independent of the asylum decision, policy-makers are reluctant to broaden these opportunities for persons whose asylum claim has not yet been approved.

The resulting policy-makers' dilemma has become especially visible in Germany (cf. Lehner 2016; Thym 2016), owing to the unprecedented numbers of asylum applications the country received in 2015 and 2016. As the asylum system struggled to cope, a new administrative category was introduced to speed up processing and to enable 'early integration'.[1] This category is the *Bleibeperspektive*, literally translated the 'prospect of staying', i.e. the prospect of long-term residence. It determines i.a. an asylum seeker's rights to economic integration, by making only those with an allegedly '*good* prospect of staying' eligible for integration programmes such as language courses prior to their asylum decision. This differentiation and thereby expansion of bureaucratic categories for asylum seekers is part of a longer-term trend in states seeking to manage 'refugee crises' (Sigona 2018).

This article asks whether this specific type of differentiated access to integration using a country-of-origin differentiation is normatively permissible based on two conventional arguments of the normative debate on migration. The German example can be taken as a typical case of the more profound question regarding the tension inherent in the Western nation-state, which continuously struggles between its two founding blocks: universalistic liberalism postulating equal rights and liberties and particularistic nationalism presupposing the exclusion of non-members (Cole 2000; Hampshire 2013). Even though the number of asylum applications has considerably decreased since the height of the 'refugee crisis', the issue of prolonged waiting periods in refugee status determination processes remains salient (ECRE 2016). At the end of March 2018, there were 892.355 pending asylum cases in the EU, 420.305 of which in Germany (Eurostat 2018). The presence of migrants in this and similar limbo situations is an EU-wide phenomenon (Rosenberger and Küffner 2016) and similar to situations all over the world (Gibney 2009), and so the question of normative permissibility of

differential treatment of these 'unwanted' migrants will remain significant. As Shachar (2014, 122) argues regarding "the current state of affairs in immigrant democracies", it is precisely "the proliferating 'in-between' categories [i.e. categories *in-between* members and non-members which] must be closely monitored" (cf. also Mezzadra and Neilson 2012, 62).

While a larger part of the literature on the ethics of immigration is concerned with the question of whether the liberal state[2] has a sovereign right to restrict entry of non-citizens at its external borders (Abizadeh 2008; Blake 2006; Carens 1987; Miller 2009; Walzer 1983), this article focuses on what the liberal state owes or does not owe in terms of socio-economic integration to those who have already passed the first gate of entry.[3] The fact that asylum seekers usually pass the external border without the state's legal consent – due to the paradox that the international asylum system presupposes irregular entry (Nußberger 2016) – does not matter here: Their presence in the state's territory is regularized by the asylum application they lodge.[4]

There are three main positions on the question of whether the liberal state can rightfully exclude non-members (Wilcox 2009): The conventional view postulates that the state has a broad right to exclude at the border. One of the traditional arguments for the conventional view is the special obligations argument. Famously spelled out by communitarian Michael Walzer (1983), it maintains that a national community should legitimately prioritize its compatriots over non-members. Both liberal egalitarian and cosmopolitan positions have challenged this view. Idealist liberal egalitarians have argued for a human right to migrate (most prominently Carens 1987). Cosmopolitan proponents of more porous state borders have argued that global justice requires states to admit immigrants, as in the face of global inequalities barriers to immigration set by affluent states arbitrarily deny some the opportunity to improve their life prospects (e.g.

Pogge 2005). Strikingly, the phenomenon of forced migration has largely been absent in the normative debate on the state's right to exclude non-citizens (Gibney 2016). Recently, however, the literature on the ethics of asylum has been growing. This increasing interest might be rooted in the growing critical awareness of state attempts to circumvent humanitarian obligations through externalization and deterrence policies (e.g. Gammeltoft-Hansen 2014) and the introduction of meritocratic elements in asylum policies (Schammann 2017). It also accompanies a gradual shift within the normative debate on migration itself, which has become less absolutely divided in proponents and opponents of open borders: today, most scholars agree that the state may control its borders, differing merely about the exact extent of and justification for it (Bader 2012).

This paper seeks to contribute to the literature on the ethics of immigration in two ways. First, it combines two perspectives that are usually separated, approaching the legitimacy of states' actions regarding migrants both from the perspective of what the state owes its own citizens and the rights of non-citizens. Second, its case selection of a recently introduced administrative policy targeting asylum seekers allows grounding the often somewhat detached normative debate on migration, while also covering an understudied group in this literature. The approach thus allows testing some of the arguments commonly brought forward on a real-world dilemma faced by a liberal state. Departing from two minimal, conventional views on states' commitments, the paper argues that while differential inclusion is in principle a legitimate policy, the liberal state seems obliged to extend these privileges to all those to whom it fails to act in a timely manner.

The 'prospect of staying' construction is not a 'hard' legal category, but a 'soft' administrative one defined and re-defined by state agencies, which implies that it cannot be appealed against (Lehner 2016). This paper does therefore not explicitly analyse

whether the construction is compatible with constitutional or human rights commitments. While such a legal analysis would certainly have its own merits, this article's main contribution lies in scrutinizing this instrument of differential inclusion from a political philosophy perspective on the meta level, going beyond the question of what is compatible with the law to address what is compatible with broader normative commitments of the liberal state (that ultimately underlie legal provisions). What we can gain from such an analysis is thinking beyond the law on paper, challenging the institutions often taken as given.

Introduction of the 'prospect of staying' category

The term 'prospect of staying' was first introduced in German law and policy on asylum in the heat of the 'refugee crisis' in October 2015 with the *Asylverfahrensbeschleunigungsgesetz* (law to speed up the asylum procedure). According to its explanatory memorandum, "people who have a good prospect of staying should be integrated into society and the labour market as quickly as possible" (publication no. 18/6185 of the German Parliament, author's translation). The law stipulates to grant access to integration courses[5] to the thus designated group, and the relevant passage in the Residence Act now reads as follows: "This regulation applies accordingly […] to foreigners who […] are in possession of a temporary residence permit of asylum applicants during the asylum process and *for whom a regular and long-lasting stay is to be expected*" (§ 44 Abs. 4 S. 2 AufenthG, author's translation and emphasis). The passage continues clarifying that "[f]or an asylum seeker originating from a safe country of origin in accordance with § 29a of the asylum law it is assumed that a regular and long-lasting stay is not to be expected" (ibid., author's translation). The 'prospect of staying' is thus only partially and negatively defined in the legal text itself. The explanatory memorandum of the *Asylverfahrensbeschleunigungsgesetz*,

however, gives some further information: included are "asylum seekers […] from a country with a high recognition rate or for whom a resilient outlook for the asylum application to be successful exists" (publication no. 18/6185 of the German Parliament, author's translation). The category has found entry into German law on two more occasions since then, most recently in the Integration Act which entered into force in August 2016, establishing preferential treatment mainly in the form of access to socio-economic integration measures for a subgroup of asylum seekers.[6]

It is crucial to note that the 'prospect of staying' is an administrative rather than a legal category: who counts as having a 'good prospect of staying' is determined by subordinate state agencies, i.e. the Federal Agency for Migration and Refugees (BAMF) and the Federal Agency for Employment (BA).[7] The recognition rate[8] of the respective country of origin group serves to determine the likelihood of a long-lasting stay: if it was above 50 per cent, the 'prospect of staying' is assumed to be 'good' or 'high' – it is determined biannually which countries this applies to. Currently, this is understood to apply to Syria, Iran, Iraq, Eritrea and Somalia.[9]

Why was the category introduced? Arguably, this was driven by an economic logic that has become an important determinant of migration and integration policies (cf. e.g. Mezzadra and Neilson 2012; Ong 2006; Shachar and Hirschl 2014). The immediate aim of providing newcomers early access to education and the labour market (and even making integration obligatory, as the Integration Act partly stipulates) is to minimize the dependence of residents on the welfare state, following a broader trend of integration policies of Western European countries (Joppke 2007). The category's introduction occurred against the backdrop of increasing numbers of arrivals and the correspondingly mounting backlog of asylum applications. As the Federal Ministry of the Interior (BMI) put it, the idea was "to speed up the [asylum] processes so that it

becomes clear early on that those who stay are being integrated and those who are not allowed to stay leave our country" (BMI 2015, author's translation) – it was thus an attempt to address the above-mentioned policy-makers' dilemma; enabling those likely to stay to become 'productive' members of the society as soon as possible, while preventing the integration of those who will likely not receive a permit to stay, as this would make it more difficult to later enforce their return.[10] In other words, the 'prospect of staying' was thought to help operationalize the likelihood of a positive return on investments in language competence and employability.

Two moral benchmarks for state action

Borders constitute social institutions that are crucial factors for stratifying the social and economic world at local, regional, national and international level (Balibar 2004; Bosniak 2007; Mezzadra and Neilson 2012). In the words of Balibar (2004, 111), borders have moved to the inside of states, "from the 'edge' to the 'center' of public space." The 'prospect of staying' category is a form of positive selection of some into "programmes of social inclusion […which can] also function as devices of hierarchization and control" (Mezzadra and Neilson 2012, 67). It can hence be understood as one of the many boundaries within the state. Just as immigration control at the external border works as a filter into the country, regulations and administrative practices such as the 'prospect of staying'-differentiation serve as filters into society, assigning different degrees of utility and potential belonging to individuals. To approach the question of the normative legitimacy of this particular filtering mechanism, two moral benchmarks for state action – one towards its citizens and one towards all individuals present on its territory – can be identified. These two are chosen as both imply a minimal and conventional understanding of what the liberal state owes non-citizens. Hereby, the threshold for a policy's normative permissibility is set

deliberately low.

The special obligations argument as a justification for excluding non-members

In the normative debate on migration, the conventional view postulates that the state has a broad right to exclude at the border. One of the traditional arguments for this view is the special obligations argument. Famously spelled out by Michael Walzer (1983), the special obligations argument maintains that a national community should prioritize its compatriots over non-members. In the words of Miller (2009, 297), it generally takes the following form: "principles of distributive justice apply to people who have a certain relationship to one another. It is by virtue of being so related that they can advance particular claims of justice against one another, invoking distributive principles".

As Walzer (1983, 31) explains, "[t]he idea of distributive justice presupposes a bounded world within which distributions take place". While it is clear that distributive justice works within a group of people that have a certain relationship to one another, it remains controversial who forms that group and which principles determine membership. Affiliations between family members seem to be an obvious case: parents have special concern for the well-being of their own children that they do not have for the well-being of someone else's children. This is not deemed unjust, but "potentially constitutive of every person's well-being" (Abizadeh 2016, 108). It is less morally intuitive, however, to claim that there is a special relationship between compatriots that results in them owing each other special obligations. This question – should priority be given to compatriots or not – has been thoroughly debated by political philosophers and theorists (see the discussion in Bader 2005). The important issue here is that the special obligations concept underlies the currently practiced approach of liberal states, where social justice is understood to be "justice within the boundaries of independent states whose members have a common national identity" (Miller 2009, 304).[11]

The aim here is not to analyse the special obligations argument in its entirety, but to show the possibility to derive the permissibility of differential access to integration from this well-accepted, conventional argument. For the sake of the argument, let us assume that the state is in fact morally obligated to prioritize the interests of its own citizens.

The principle of legal certainty

While a conventional approach to the question of whether state exclusion of non-members is normatively justified is easily palpable, due to the scarcity of respective literature it is harder to identify a similarly classical approach of moral commitments of the liberal state towards asylum seekers on its territory. A minimal – and therefore, one could argue, consensual – approach would be to assume that the liberal state needs to guarantee legal certainty for every person under its jurisdiction, regardless of legal status.

Constitutionalism makes it generally difficult for the liberal state to exclude internally. This is pointed out by Joppke (2005, 51), who maintains that the modern liberal state's possibilities for internally excluding non-members "are even more limited than excluding them externally", for "[n]ow a democratic logic enters, according to which immigrants […] are owed equal consideration by the state under whose roof they have come to reside, and on whose protection they now depend". The fact that someone is due to their physical presence on a state's territory subject to that state's power and coercion generates certain rights and responsibilities for that person. "Ethical territorialists", as Bosniak (2007, 395) calls them, even argue that the fact that all 'territorial insiders' – i.e. people physically located on the state's territory regardless of their way of entry – are subject to state power should generate equal rights for them (Bosniak 2007; Song 2016; Walzer 1983). One does not have to go to such lengths to

acknowledge that everyone present in a state should be subject to the rule of law. The rule of law is a crucial characteristic of constitutionalism, and the principle of legal certainty is one of its central preconditions. This principle "recognizes the right of individuals to make long-term plans for their lives by requiring that state action be reasonably predictable and nonarbitrary" (Ellermann 2014, 293).[12] The principle of legal certainty also requires the state to act in a reasonably timely manner.

Analysis: is the 'prospect of staying' legitimate?

Against the benchmarks of special obligations and legal certainty, is the 'prospect of staying' category a legitimate policy instrument? Is it consistent with the moral commitments of the state towards both its own and territorially present non-citizens as conventionally understood?

Is differentiation permissible at all?

The 'prospect of staying' implies differentiated access to economic integration. Nationals from a country with an assigned 'good prospect of staying' have advance access to integration courses and labour market education and training programmes. The latter include for instance job application training, skill assessment, employment education programmes for up to eight weeks (including occupation language training) and funding opportunities for job applications, travel costs, and costs for the recognition of foreign certificates (BMAS 2017).

Differentiated access to economic integration can be framed as a question of distributive justice. The conventional approach to the distribution of rights within a territorially bounded state is the status-based approach, where rights are derived from the respective legal status of a person, with only citizens enjoying the full rights spectrum.[13] Differentiation in the liberal state e.g. along the lines of immigration status

is not the exception, but the rule (Bosniak 2007). The principle of equality, a cornerstone of the liberal state, does not require treating everyone the same, but treating everyone with equal concern and respect (cf. Dworkin 1973). However, is differentiation normatively permissible in respect to economic integration?

According to the special obligations argument, the state may exclude non-citizens at the external border. The question remains whether this also applies to migrants who have already entered the country. Applied to internal boundaries, the principle of prioritizing citizens would justify some barriers to accessing institutions such as the labour market for non-citizens, as they prevent what could be regarded as unfair competition to local workers. It is the protective function of the border here that justifies differential exclusion (cf. Newman 2003). The other side of the coin, differential *in*clusion can also be justified from this perspective, as it is arguably least costly for the society as a whole if economic integration is offered (only) to those who will likely stay, minimizing the chances of welfare dependence. If migrants were exluded for a long period, this would lead to welfare loss. Thus, differentiation is in principle consistent with the special obligations argument.

According to the principle of legal certainty, state action has to be timely and predictable. Both differentiation according to legal status and graduation – i.e. that the set of rights increases "in extent and significance the closer to the status of citizenship the individual progresses" (Bosniak 2007, 391) – seems permissible from that perspective, as long as the respective regulations are comprehensible and accessible for those concerned. Hence, differentiation is in principle consistent with the moral commitments of states towards asylum seekers, too.

Let us consider the alternative scenario 'access for all' (i.e. non-differential inclusion). This in fact breaches both principles, which strengthens the argument made.

In practice, an individual asylum seeker's *real* prospect of staying is not only determined by whether or not a protection status is granted, but in case of a negative decision also by whether the person actually leaves the country. Opening early integration measures for all, including those who will very likely have to leave due to a rejection of their asylum application might a) be an investment in vain if the person leaves[14] (and hence not in line with special obligations), and b) in the case of persons not leaving voluntarily after a negative asylum decision ironically make it more difficult for the liberal state to enforce their departure (cf. Gibney 2008). The better integration outcomes are already during the asylum process, the more unfortunate it seems if later, after the rejection of the asylum application, a deportation decision is taken (cf. Lehner 2016) – one could argue that the principle of legal certainty becomes destabilized.[15]

Hence, differentiation can be consistent with both the special obligations argument and the principle of legal certainty.

Is it legitimate to apply group-based differentiation?

Instead of being clearly defined in the law, the category 'prospect of staying' is determined "schematically, with the aid of the coarsest scale the asylum and residence law has in store, namely the country of origin" (Lehner 2016, author's translation). A three-tier system has emerged since the introduction of the category, distinguishing 1) those assumed to have a 'good prospect of staying' from 2) those from a 'safe country of origin' (designated by law)[16], and 3) all other asylum seekers (hybrid group). In addition to determining access to economic integration, the category also used to determine the length of the asylum process, as cases in group 1 and 2 were processed by the BAMF as a priority in 2016 and 2017 (BAMF 2017, 2018; BMI 2015; Will 2018).

[Table 1 near here]

The cut-off value of 50 per cent, above which a 'good prospect of staying' is to be expected, seems arbitrary (Table 1). Technically, the criterion also applies to several other countries of origin: these are primarily countries with low case numbers (such as Ruanda, Myanmar, Nepal), but among them we find also one of the most important countries of origin: Afghanistan, which is in the 'hybrid' category (Voigt 2016). Afghanistan's recognition rate in 2016 was above the threshold (55.8 per cent), but Afghan asylum seekers were still not allowed to participate in integration courses.[17] In 2017, the recognition rate of Afghans went slightly below the 50 per cent threshold (44.3 per cent).

Moreover, the duration of proceedings needs to be considered. The average time from when the asylum application is submitted until a final decision is taken varies a lot between countries of origin (Table 1, last column). Statistics indicate that asylum seekers in the hybrid group such as Afghans and Nigerians are "doubly disadvantaged" (Brücker 2016, 380, author's translation): First, their asylum processes are usually lengthy, which has a negative impact on economic integration (Hainmueller, Hangartner, and Lawrence 2016). Second, during this long waiting period, they are excluded from key state integration programmes.

Against this backdrop, it seems that the 'prospect of staying' category does not comply with the two normative benchmarks proposed above. The connecting element of both principles employed here is time. From the special obligations perspective, the question arises whether asylum seekers during the oftentimes considerable waiting period between submitting an application for asylum and receiving a final decision from the authorities develop de facto relationships with the national community that then establish special obligations. Although asylum seekers often live in centralized housing, one could argue that "[w]hatever their legal status, individuals who live in a society

over an extended period of time become members of that society, as their lives intertwine with the lives of others there. These human bonds provide the basic contours of the rights that a state must guarantee" (Carens 2005, 16; cf. also Gibney 2009). Among these rights would arguably be the one to not being excluded from certain integration services.[18]

Yet, even if one deems it far-fetched to consider asylum seekers as gradually becoming members and thereby establishing rights and would rather keep the group of state members narrowly defined, the 'prospect of staying' tool cannot do justice to protect the rights of the narrowly-defined group of state members, i.e. nationals. To protect the native population from economic harm, supporting the integration of those who stay and hence their path to economic independence is an investment in the future that promises reduced social costs and higher benefits (e.g. taxes). Departing now from the premise that the state has special obligations toward its citizens and therefore needs to ensure that asylum seekers will not pose an economic burden on the society in the future, it is crucial to point out that the assumptions of the 'prospect of staying' category do not comply with reality:

First, the empirical premise of the differentiation – that Syrians, Iranians, Eritreans, Somalis and Iraqis will likely stay for a considerable amount of time and others such as Afghans will likely not – is very shaky, as the recognition rates indicate (Table 1). Second, for a variety of reasons is has proven difficult to return rejected asylum seekers to countries of origin (Ellermann 2009; Eule 2014; Gibney 2008). So even if it contradicts political interests of migration control, the reality is that regardless of the asylum decision, many applicants will likely stay for a considerable amount of time. By not granting them early access, it seems no exaggeration to caution that the

"integration problem of tomorrow is being created" (Brücker 2016, 380, author's translation).

One could object that the practical matter of how asylum and return policies are implemented is not relevant for the legitimacy of differential integration policies, as this argument would disappear once these issues are resolved. However, a non-idealistic argument needs to take into account real-world circumstances and it is arguably unlikely that these issues will be solved in the foreseeable future (for the difference between realistic and idealistic approaches to the ethics of migration, cf. Carens 1996; for the persistence of the "deportation gap", see Rosenberger and Küffner 2016).[19]

In addition to this, from the legal certainty perspective, it can be argued that the state is obliged to guarantee a decision about asylum applications in due time. In a first step, territorial presence establishes the right to obtain a permission to remain as an asylum seeker (in Germany, the *Aufenthaltsgestattung* § 55 Abs. 1 AsylG). This status then in a second step establishes further (graduated) rights towards the receiving state, i.a. the right to legal certainty. It can be argued that the failure to decide about an asylum application in a timely manner as well as the non-facilitation of return of rejected asylum seekers amount to a type of state failure. In the absence of state action in a timely manner, the principle of legal certainty requires that individuals concerned can move on with their lives and plan for their future. Denying access to economic integration programmes is therefore not consistent with the principle of legal certainty. In other words: during an unreasonably long time in limbo, asylum seekers in the hybrid group grow into a legal position in which it becomes considerably harder for the liberal state to deny them rights to integration. However, one would have to differentiate between long waiting times through no fault of one's own and self-inflicted ones due to non-cooperation with the authorities.[20]

That long wait times should lead to certain rights is in fact widely accepted (Carens 2010; Ellermann 2014), but usually as an *a posteriori* decision: The longer a person waits in limbo, the more rights they should be granted.[21] However, it is argued here that the principle of legal certainty warrants that access to integration programmes should be *a priori* granted to all asylum seekers who at least have an earnest chance of remaining (be it due to a positive asylum decision or the non-feasibility of return). This would be a just measure because of the central inconsistency of the 'prospect of staying' category with the principle of legal certainty, which consists in the fact that the category is an administrative and not a legal one, and can hence not be appealed against.

To clarify this point, it is instructive to briefly look at the historical development of immigration admission policies: liberal states have turned from a group-based mode of exclusion to the current individual-based one. Early immigration policies in countries such as the USA, Australia and the United Kingdom were explicitly racially discriminatory – an often mentioned example is the 'White Australia Policy' which remained in force until the early 1970s (Cole 2000). Today, immigration policies seek to select individuals primarily on the basis of market values, i.e. skills, talents and financial resources (Shachar and Hirschl 2014), or in other words based on the expectation of their ability to integrate into the host society: Pre-arrival civic integration policies that "discourage the immigration of unwanted groups without explicitly naming ethnic categories" (FitzGerald et al. 2018, 30) are one example of how "systematic group biases" remain, or have maybe even become more prevalent, in immigration policies of liberal countries (Ellermann and Goenaga 2019, 87). However, *explicit* ethnic or national criteria for group-based categorical exclusion have vanished from liberal democratic migration policies.

The ‘prospect of staying’ poses a problem to this general liberal agreement of non-selectivity based on citizenship and ethnicity precisely because it is non-refutable: “the apodictic practice of state agencies regarding integration measures normatively does not seem to be sufficiently verified and differentiated” (Lehner 2016, author’s translation). The ‘prospect of staying’ cannot be changed ex post, but has an impact on one’s socio-economic integration opportunities – which ironically in turn influence one’s real prospect of staying, as good integration outcomes can improve a migrant’s chances of obtaining permanent residence and later citizenship status. Insofar as the category assigns a group characteristic to an individual qua their nationality, one could even argue that it contains a racializing element. In short, the country of origin based criterion seems incoherent with the requirements of the principle of legal certainty, too.

Conclusion

Drawing on insights from the normative debate on external migration control, and taking Germany’s asylum policies as a case study, this paper has argued that differentiated access to early integration is in principle a legitimate measure taken by the liberal state. Using the country of origin as the criterion to determine a person’s eligibility, however, seems normatively questionable as it does not comply with conventional views about the state’s moral commitments towards both citizens and non-citizens. Additionally, the analysis also suggests that the tool is practically unwise, as it seems hardly able to meet its stated objectives. Policy-makers face significant constraints in dealing with the phenomenon of precarious residence (Gibney 2009; Rosenberger and Küffner 2016; Thym 2016). A liberal state, however, needs to be able to reconcile the apparent trade-off between migration control and integration management more competently than with a country-of-origin based instrument, as seen in the case study analysed here. An alternative to this fixed ‘prospect of staying’

category could be individual-based access rules that take into account the (likely) duration of asylum proceedings. If these exceed a certain timeframe, access to integration measures should be granted regardless of the person's nationality.[22] This alternative procedure would be consistent with both the special obligations argument and the principle of legal certainty.

Several lessons can be drawn from this case of differential inclusion of asylum seekers in Germany for the broader debate on liberalism and migration. Looking at the seldom analysed case of asylum and providing a reality check of the often employed special obligations argument for closed (external) borders, this paper sheds light on unresolved issues in the normative debate on migration and integration. The analysis has pointed out that the special obligations argument does not always result in the seemingly obvious conclusion: to protect its own citizens, it might in certain circumstances be the state's obligation to facilitate inclusion rather than exclusion of territorial insiders, as this will pay off in the long term. While the legitimacy of states' actions on migration and integration has usually been approached either from the perspective of what the state owes its own citizens or which rights non-citizens have, this paper combined the two. Departing from two rather minimal, conventional views on states' commitments, the analysis has come to the conclusion that while privileged access to integration opportunities is in principle a viable policy, the liberal state seems obliged to extend these privileges to all those to whom it fails to act in a timely manner. The main limitation of this paper consists in its focus on economic rationales regarding the special obligations argument, i.e. leaving aside questions of national and cultural identity also frequently used to legitimate external migration control for the sake of prioritizing citizens' needs. Although this focus can be justified by the fact that an

economic logic was underlying the introduction of the category in the first place, future research focusing on the cultural dimension would be welcome.

Notes

[1] Already from November 2014 onwards, the German government had liberalized the regulations of labour market access for asylum seekers (cf. e.g. Thränhardt 2015).

[2] For the purpose of this paper, a 'liberal state' is understood to be a constitutional state built on the core principles of liberty and equality (cf. Hampshire 2013).

[3] In the tradition of the debate on distributive justice, I am not concerned with the state's obligation to provide for basic material needs and basic human rights (concept of minimalist justice), but with the rules the state sets that regulate access to socio-economic integration and upward social mobility (concept of maximalist justice) (Miller 2009).

[4] As signatory to the Geneva Convention the state also commits to the principle of *non-refoulement*, which could be taken as consent to enter into a relationship with the individual asylum seeker.

[5] Integration courses were introduced with the immigration law in 2005 and are primarily language courses, but also include an 'orientation course' on German history, culture and the legal system.

[6] The phrase "regular and long-lasting stay to be expected" is also used in § 421 of the Third Book of the Social Security Code about the support of language courses (§ 421 Abs. 1 S. 1 SGB III) (Lehner 2016) and it also figures in § 132 of the Third Book of the Social Security Code on the promotion of vocational training of foreigners.

[7] It is assumed, however, that the specific categorization has been coordinated within the federal government; see e.g. an e-mail by the Federal Ministry of Labour and Social Affairs (BMAS): http://biaj.de/images/stories/2015-12-07_bmas-schreiben-421-sgb3-anlage.pdf, last accessed 14.06.2018.

[8] The recognition rate is calculated as the sum of asylum recognitions (Basic Law Art. 16a), refugee recognitions (Geneva Convention), subsidiary protection statuses and determinations of a deportation ban, relative to the total number of decisions in a given time period (publication no. 18/12623 of the German Parliament).

[9] https://www.bamf.de/SharedDocs/FAQ/DE/IntegrationskurseAsylbewerber/001-bleibeperspektive.html, last accessed 30.07.2018.

[10] The aim of speeding up asylum processes has been reached to some extent at least regarding new applications, but it is debated whether this came at the cost of decreasing quality of

decisions. The case backlog has not disappeared with faster processing, but shifted to the courts (publication of the German Parliament no. 19/3148).

[11] This principle even holds in the EU, which has still not advanced to become a social union.

[12] Ellermann (2014) employs the principle of legal certainty to ground the right to stay of undocumented immigrants.

[13] In calling the status-based approach the 'conventional' one, it shall not be concealed that elements of territorial-based rights (in addition to status-based ones) do play a role in many liberal democratic countries (cf. Bosniak 2007, 393).

[14] Although there might be other legitimate reasons for providing these services even in those circumstances (in line with the special obligations argument): returnees might use newly obtained skills in their country of origin, thereby fostering development and (i.a. economic) transnational links.

[15] Arguably, this 'unfortunate' situation stems from the somewhat artificial separation between asylum and non-asylum migration law.

[16] For insights into the historical evolution and critical analyses of current practices of the 'safe country of origin' concept, cf. e.g. Engelmann (2014).

[17] Afghans were never included into the 'good prospect of staying' category, although they were likely to stay in Germany even in case of a negative asylum decision, as they were subject to a deportation stop unless classified as a criminal or potential threat. This was effective from December 2016, but was heavily debated again in June 2018 (see https://www.zeit.de/politik/deutschland/2018-06/asyllagebericht-abschiebestopp-afghanistan-aufhebung-angela-merkel, last accessed 22.06.2018). The BMAS decided to open labour market integration programmes for Afghan asylum seekers for the second half of 2017 (see http://ggua.de/fileadmin/downloads/ausbildungsfoerderung/RD-Weisung_Afghanistan.pdf, last accessed 21.06.2018).

[18] For a discussion of the right to stay, see Carens (2010) and Ellermann (2014).

[19] From the said normative perspective, a prospect of staying instrument that includes not only protection, but also deportation rates would be easier to justify – however, politically certainly unfeasible.

[20] This is increasingly recognized in German law, see e.g. §60a Abs. 6 AufenthG, §1a Abs. 3 AsylbLG.

[21] One could read e.g. the EU Reception Conditions Directive in such a way. For instance, Article 15 stipulated that access to the labour market has to be granted to an asylum seeker no later than nine months after the application ((https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN, last accessed 15.02.2019)

[22] In case of non-cooperation on the part of the asylum seeker, these rights could be revoked.

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Table 1. Recognition rates of top 10 countries of origin in Germany, 2016 and 2017

Country	**Administrative Category (as of June 2018)**	**Number of (first) Applicants**		**Recognition Rate (%)**		**Recognition Rate (Adjusted) (%)**		**Avg. time until admin. decision (months)**		**Avg. time until final decision (months)**
		2017	**2016**	**2017**	**2016**	**2017**	**2016**	**2017****	**2016**	**Jan.-June 2017**
Total		198.317	722.370	43,4	62,4	53,0	71,4	10,0	7,1	12,6
thereof:										
Syria	Good prosp. of staying	48.974	266.250	91,5	98,0	99,9	99,9	6,1	3,8	9,1
Iraq	Good prosp. of staying	21.930	96.116	56,1	70,2	64,5	77,2	8,0	5,9	10,8
Afghanistan	Hybrid	16.423	127.012	44,3	55,8	47,4	60,5	13,1	8,7	12,9
Eritrea	Good prosp. of staying	10.226	18.854	82,9	92,2	97,6	99,3	7,1	10,7	10,8
Iran	Good prosp. of staying	8.608	26.426	49,4	50,7	57,1	60,6	10,6	12,3	12,0
Turkey	Hybrid	8.027	5.383	28,1	8,2	33,6	17,5	9,2	16,3	17,1
Nigeria	Hybrid	7.811	12.709	17,3	9,9	24,2	17,3	13,5	14,2	18,5
Somalia	Good prosp. of staying	6.836	9.851	60,8	71,1	82,9	89,2	11,7	17,3	17,7
Russian Fed.	Hybrid	4.884	10.985	9,1	5,2	13,9	10,4	14,3	15,6	13,1
unsettled*	Hybrid	4.067	14.659	50,6	84,4	63,2	91,6	11,1	7,3	13,1

Source: publication no. 18/11262, 19/185 and 19/1371 of the German Parliament; BAMF (2017, 2018); own compilation.

Note: Recognition rates and average time only apply to those applications that have been decided upon in 2016 (2017), the number of which is smaller than the number of applicants.

*Most of these appear to be Kurds and Palestinians from Syria, who do not have Syrian identification papers, but can nonetheless prove their protection need. **3rd quarter of 2017 (no other data available)