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Federal Diversity of Asylum Policies in Germany
What Can We Learn From "Immigration Federalism"?

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Abstract In 2015 and 2016, Germany received 1.2 million refugees. Accordingly, the schemes for registering, housing, providing health care to refugees, administrating their asylum procedures etc., reached their limits. This so-called "refugee crisis" (see Bogumil et al. 2018) attracted scholarly attention to a number of particularrities of German asylum policy, especially the division of labour in German federalism (Laubenthal 2015). In Germany, migration policy such as asylum policies and the policy of residence is mostly regulated at federal level. Yet, given that in German federalism – as opposed to e.g. US-American federalism – the states have the duty to implement most federal laws, they exert considerable discretion by doing so. This again results in high levels of diversity in policy implementation among the 16 German states (*Länder*). Publications to date have only illustrated very specific aspects of asylum policies of or within the states (e.g. Schammann 2015; Riedel and Schneider 2017; Hörisch 2018), or have given an overview (Münch 2016; 2017) but did not provide systematic empirical data for a variety of aspects pertaining all states (but see Reiter and Töller 2019). In particular, we need an evaluation of this diversity.

This paper *first* discloses the remarkable diversity of asylum policies in the German *Länder* by providing fresh and reliable empirical data with regard to three core areas: the provision of housing and healthcare to refugees (implementation of the Asylum Seekers Benefits Act [*Asylbewerberleistungsgesetz*]); the procedures for obtaining protection status (implementation of the Asylum Act [*Asylgesetz*]); and the implementation of the Residence Act regarding the voluntary return or deportation of persons for whom neither protection nor a toleration can be provided (Residence Act [*Aufenthaltsgesetz*]). The data show a remarkable diversity in all areas. *Second,* the paper asks whether diversity is a good thing in this context. Since other relevant debates, such as migration studies or the debate on German federalism (e.g. Sack and Töller 2018), fail to offer criteria for evaluating this normative question, we draw on the debate on "immigration federalism". This debate has developed in order to understand and evaluate developments in the US American, Canadian and Australian migration policy since the 2000s (Spiro 2001; Huntington 2007; Gulasekaram and Ramakrishna 2015). We argue that although there are relevant differences between these federal systems and Germany, the debate has a lot of potential to help us evaluate federal diversity as we encounter it in German asylum policy. Drawing on Spiro (2001), we distinguish three issue areas that are well aligned with the three areas already addressed: immigration rights (access to social rights), immigration benefits (acquisition of a status e.g. political asylum or citizenship); and immigration enforcement (e.g. border control and deportation of persons with no right to remain). We apply two criteria to these issue areas. Firstly, the criterion of equal treatment and second, the criterion of adequate accomplishment of tasks and develop a rather critical evaluation of federal diversity in German asylum policy, however with differences between the issue areas. Finally, we discuss the political implications that our evaluation may have.

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1. Introduction

Foreigners who "come to the Federal Republic of Germany in order to take up residence move to a federal state"[1] (Münch 2016, 365). However, while e.g. EU foreigners can freely select their place of residence, refugees who come to Germany are distributed among the 16 German states according to a specified allocation mechanism (e.g. Hummel and Thöne 2016, 18). Refugees face widely differing policies depending on the state. These range from housing and rules on healthcare to the likelihood of their asylum application being accepted, right through to repatriation policies (Reiter and Töller 2019). This is despite the fact that states do not have any legislative powers in this policy area. On the one hand, this federal diversity of policies represents a scientific challenge, insofar as you would not expect the implementation of federal law alone to result in such divergent policies. On the other hand, it presents a political problem since the finding is inconsistent with normative concepts such as the principle of equal treatment, which is also set out in article 3 sentence 1 of the German constitution or Basic Law (*Grundgesetz*, GG). The objective of this paper is to first highlight the "federal diversity" of asylum policies among the German states, and then to evaluate it.

The subject of policy diversity at the German state level has recently been addressed in connection with various scientific discussions (e.g. Sack and Töller 2018). The debate surrounding *Migration and Integration Research* seems to be particularly interesting for this paper. Even at the beginning of the 2000s, in light of differences between migration and integration policies among the German states, Thränhardt called for "introducing a federalist perspective" into migration research (2001, 21). At this point in time, however, empirical evidence of diversity in migration policies among states and municipalities was rather anecdotal in nature, with the first systematic comparisons having only been presented in the coming years (e.g. Ellermann 2009; Eule 2014; Schammann 2015). This federalist perspective indicates that such differences in migration and integration policies among constituent states may also occur in other federal states (Thränhardt 2001, 15; Reich and Barth 2012). Besides this similarity, the federal states exhibit essential differences as regards how competences are distributed at both the federal and constituent state levels (Thränhardt 2001, 19; Reich and Barth 2012, 424; Soennecken 2014, 162; Belser 2015). German migration research in recent years is characterised by a paradoxical awareness of convergent developments within the EU framework on the one hand, and of (persistent or even increasing) regional and local diversity in migration policy on the other (Schammann 2015, 162; 2017). Having said this, the discussion is only tentatively linked to policy studies or federalism theoretical debates. Hence, focusing on the development of migration policy in Germany against the background of developments in other federal states such as Canada, the USA or Switzerland, seems to be an insightful way of analysis (Soennecken 2014; Reich and Barth 2012; Belser 2015). Hence, in recent years discussions have been held in the USA in particular on the topic of "immigration federalism", which we believe to be instructive for our topic and wish to explore in our paper (Spiro 2001; Huntington 2007; Reich and Barth 2012; Gulasekaram and Ramakrishnan 2015).

The starting point of our paper is the observation that, in addition to a number of overview contributions on asylum policy in German federalism (Laubenthal 2015; Thränhardt and Weiß 2017), there is in particular a variety of descriptive analyses on specific aspects of asylum policies among the German states (e.g. Müller 2013; Wendel 2014; Wächter-Raquet 2016; Der paritätische Gesamtverband 2018). There continues to be a few comparative studies that single out individual parameters and analyse them causally (e.g. Wolf 2013; Hörisch 2018; Hörisch and Heiken 2018). What is more, a first comparative analysis of a wider range of factors was recently presented (Reiter and Töller 2019).

[1] Translated from German by the authors.

However, what is missing is a scientific evaluation of the identifiable major disparities between the asylum policies among the states.

We will adopt a two-pronged approach to filling this gap in the research. The first step will present the federal diversity of asylum policy in the German states in three areas, which we characterise by classifying the measures on a continuum between the “permissive” and “restrictive” poles. The second step – based on the discussion about “immigration federalism” – will make an assessment of the federal diversity previously described.

When classifying the asylum policies of the German states in the first step, we initially examine how the Asylum Seekers Benefits Act is implemented. The latter regulates the social rights of persons in flight, particularly during the first 15 months following their arrival in Germany. Secondly, we consider the execution of asylum procedures, which although not a state competence, but rather that of the federal authority BAMF (Federal Agency of Migration and Refugees), their implementation reveals high levels of diversity nevertheless. Thirdly, the paper deals with the German states’ repatriation policies (in other words voluntary return and deportations).

Methodically speaking, it is a comparative analysis of the German states’ asylum policies. In the first step, we made a justified selection of the categories for comparison and classification of asylum policies (cf. chapter 3.1). We focus on aspects of asylum policy that directly affect persons in flight (hence, we do not take into account the procedural differences in the states’ internal administrative practice, for instance). Furthermore, we only recorded aspects about which there is data for all German states. Here the main sources used were the above-mentioned studies and scientific expertise. Secondly, data for all categories identified as relevant were updated in line with 2017. This involved drawing on data from the Federal Statistical Office, the *BAMF*, and, where necessary, from newspaper articles. Thirdly, we used this data to identify and classify the asylum policies of individual German states as rather “restrictive” or “permissive”.

The paper is divided as follows: In Section 2, we provide a brief overview of the federal allocation of authority in the area of asylum policy. In Section 3, we at first justify our case selection as well as our categories in order to classify asylum policies (3.1). Following this, we shed light on the federal differences in various areas (3.2): the states’ implementation of the Asylum Seekers Benefits Act, the BAMF’s enforcement of the asylum procedure in the states as well as application of the Residence Act with regard to carrying out repatriation by the states. In Chapter 4, we make a normative assessment of this federal variety. We start by introducing the discussion on “immigration federalism”, which has become increasingly prevalent since 2000, especially in the USA but also in Canada. From this, we distil evaluation criteria for our “federal diversity” (4.1). In a second step, we apply these criteria to the variety described above (4.2). In Section 5, we provide a conclusion.

2. Federal Allocation of Authority in Asylum Policy

Asylum policy – as with migration policy in general – is a multi-level governance (Kreienbrink 2015, 54; Schammann 2015). For the Member States of the European Union, the EU primarily constitutes a superordinate level, from which a series of binding standards for member states’ asylum policies now emanate within the framework of the Common Asylum Policy (Art. 77-79 TFEU).[2] In Germany, in

[2] In particular, these constitute various Regulations (Dublin I – III), the so-called Mass Influx Directive (2001/55/EC), which regulates temporary protection in the event of a mass influx, the Return Directive

contrast with the dual federalism e.g. in the USA, we have an inter-state federal system. In most fields of regulation – including asylum policy – the federal government has the legislative competence, whereas a distinction needs to be made between exclusive and competing legislative competence (see below). The states have their own legislative powers in a number of regulatory areas, such as in cultural and educational policy, and since the federalism reform of 2006, in a series of other areas with a more regional context, too (Reus and Vogel 2018). The states implement their own state law as well as (in most cases) federal law. They generally do so "subject to their own discretion" (Art. 83 GG), in other words they have large scope when it comes to establishing authorities and organising administrative procedures. This factor results in a highly interconnected administrative system for migration policy in general and asylum policy in particular (Bogumil, Hafner and Kuhlmann 2016, 289), whereby states have significant room for manoeuvre even in areas where they do not possess any legislative powers (Ellermann 2009, 127; Laubenthal 2015; Münch 2016, 369).

In the Federal Republic of Germany, issues pertaining to immigration and emigration as well as nationality lie within the exclusive legislative competence of the federal government pursuant to Art. 73 (1) sentence 2 and 3 of the German constitution or Basic Law (*Grundgesetz*, GG). In contrast, "affairs of refugees and displaced persons" according to Art. 74 (1) sentence 6 GG as well as the "right of residence and settlement of foreigners" pursuant to Art. 74 (1) sentence 4 GG, were allocated to concurrent legislation. In other words, the states may issue their own laws in this area unless the federal government has made use of its legislative competence (Art. 72 (1) GG). Nonetheless, the federal government adopted comprehensive regulations with the Asylum Act and the Asylum Seekers Benefits Act (both: 1993) and the Residence Act (2005), which were in many ways amended and predominantly tightened in the wake of the so-called "Refugee Crisis"[3] of 2015/16 through "asylum packages I to III" as well as the law for better enforcement of the obligation to leave the country dated March 2017 (Bogumil, Hafner and Kuhlmann 2016, 298; Janda 2017a, 243 et seqq.; Münch 2017, 264). The *Asylum Act (AsylG)* regulates the implementation of the asylum procedure, the *Asylum Seekers Benefits Act (AsylblG)* determines which services need to be provided in order to ensure the subsistence level for asylum seekers during the first 15 months of their stay in Germany. The *Residence Act (AufenthG)* represents the legal basis for the entry and exit to/from Germany as well as the residence of foreigners in Germany.

Since 1992, the Federal Office for Migration and Refugees (*BAMF*) with its 42 branch offices has been exclusively responsible for conducting the asylum procedure in accordance with the *Asylum Act*, which is a rare case for a federal administration in Germany. On the other hand, the federal government transferred enforcement of the *Asylum Seekers Benefits Act* to the states through § 10 AsylbLG. Their remit of responsibility includes housing asylum seekers and granting monetary and non-cash benefits as well as providing healthcare. The majority of states have delegated these tasks entirely or partially to the municipalities (Schammann 2015, 172; Müller, 2013). The enforcement of the *Residence Act,* with its regulations on deportations as adopted in 2005 by the red-green coalition and

(2008/115/EC), which includes providing guidelines for deportations, the Qualification Directive (2011/95/EU), which lays down minimum standards for decisions about the need for protection, as well as the Asylum Procedures Directive (2013/32/EU) and the EU-Reception Conditions Directive (2013/33/EU) that establishes minimum standards for receiving persons in flight.

[3] The "refugee crisis" refers to the situation in Germany between the 2015 and 2016 when a total of 1.2 million people came to Germany and asked for refugee protection there. This volume of people brought the systems of registration, housing, supplies, healthcare, asylum procedures as well as repatriations into severe crisis. This was partly because it was not designed for so many people, but also because necessary steps, such as the digitalisation of procedures in the Federal Office for Migration and Refugees (*BAMF*), had not been taken.

which has been modified several times since then, technically lies with the states. However, the federal police force assists with the actual deportation on the one hand and the federal government is responsible for the deportation of persons likely to threaten public safety pursuant to § 58a (2) sentence 3 of the Residence Act (Wittmann 2018, 14) on the other.

3. Differences in Asylum Policies of the States or within the States

3.1 Conceptual Considerations

In the following, we at first justify the case selection and then present our concept for the classification of asylum policies.

3.1.1 Case Selection

In which areas of asylum policy have differences between the states been identified to date and which areas did we select here and why? There is an astonishingly large scope of topics on asylum policy (as well as migration and integration policy), where we can identify differences between the states. This concerns the application of the Asylum Seekers Benefits Act, particularly with regard to housing (Müller 2013; Wendel 2014; Hörisch and Heiken 2018), the amount of expenditure for persons in flight (Hörisch 2018) and healthcare (Wächter-Raquet 2016; Günther, Kurrek and Töller 2019). Furthermore, there are – despite the competence of the *BAMF* for integration and language courses (Bogumil, Burgi, Kuhlmann, Hafner, Heuberger and Krönke 2018, 41) – also differences in whether and to what extent the states draw up their own integration measures (especially language courses), and how access to these measures is regulated (Laubenthal 2015, 13; Thränhardt and Weiß 2017, 9). Major differences arise in the way in which the branch offices of the *BAMF* implement asylum procedures (Riedel and Schneider 2017). What is more, the Residence Act is not applied consistently, for example with regard to the handling of tolerations (Hörisch 2018; Der paritätische Gesamtverband 2018) and the hardship case procedure (Wolf 2013), between the states. There are also differences as regards the repatriation quota, the share of voluntary repatriations and the deportations (Deutscher Bundestag 2018a). Recently, there have also been variations in the establishment of so-called anchor centres (cte/dpa, 2019). Finally, asylum policy between German states differs in light of accounting costs between the state and municipality, the cost coverage by the state and the distribution of federal funds for refugees compared with the distribution of persons in flight (Hummel and Thöne 2016, 24, 46).

We have selected those aspects of asylum policy that impact on the situation of the refugees within the meaning of an expansion ("permissive") or restriction ("restrictive"), of the opportunities for social participation. Therefore, we have excluded internal administrative differences as well as issues pertaining to internal accounting (e.g. Hummel and Thöne 2016). Secondly, we only recorded those parameters that can in fact be understood as the expression of a permissive or repressive policy. This for example is not the case with the – very different – state expenses per person in flight, which (in contrast to the statements by Hörisch 2018), cannot be interpreted as an expression of a more or less generous policy (in detail Reiter and Töller 2019). Moreover, we also – thirdly – only selected those areas that are documented for all the states in a reliable and up-to-date way, which is why we have not included the hardship case procedures (2013) that were subject to informative analysis by Wolf. In particular, we subsequently focus on the implementation of the Asylum Seekers Benefits Act (*AsylbLG*) in the German states in relation to regulations for housing, healthcare and securing subsis-

tence for asylum seekers (3.2.1), the implementation of the asylum procedure by the *BAMF* branch offices in the states (3.2.2), and the implementation of the Residence Act as regards the regulations on tolerations and repatriations (3.2.3).

3.1.2 Categories for the Classification of Asylum Policies

In welfare state research, (re) distributive policies are distinguished according to how generous they are (e.g. Wenzelburger, Arndt, and Jensen 2018). In environmental policy research, (regulative) measures are characterised as permissive (weakly regulative) and repressive (strongly regulative) (e.g. Töller 2019). In his analysis, Hörisch also classified political measures of the asylum policy on a continuum between permissive and restrictive (2018, 787). The specific feature of migration policy is that it includes both regulative and distributive measures. Gulasekaram and Ramakrishnan analyse migration policies of the US American federal states and distinguish between an "integrationist" and "restrictionist" policy (2015, 7). The study by Juárez et al. uses a country comparative meta-analysis to examine the policy effects of national migration policies on healthcare for persons in flight and makes a distinction between "generous" and "restrictive" policies (2019, 22). Both go in a similar direction, however, the contrasting pairs are not really coherent. We therefore decide in favour of the categories used by Hörisch, since the underlying latin word origins *permittere* (allow), *restringere* (bind, tie, hinder), create a link with migrants' participation in social and public life. "Permissive" is understood in line with implementing federal law by a German state when it results in facilitating migrants' participation in social and public life in Germany. One reason could be that it grants faster and easier access to individual rights and benefits compared with the other German states. Conversely, "restrictive" can be described as those state practices that lead to impeding migrants' participation in social and public life. For example, because they require a delayed or (bureaucratically) highly complex process for accessing rights and benefits when compared with other German states.

We use "permissive" and "restrictive" as relational concepts, whose content can be identified only in relation to a "mean value" (that is to be empirically determined) of a certain policy. Therefore, the categories in this paper will not be used in the meaning of a theoretically conceivable degree of permissiveness or restrictiveness. Rather, we use them descriptively with regard to the scope of actual policies identified in the German states. Moreover, they will not be used as evaluating concepts but merely for the analytical classification instead.

3.2 Empirical Findings

3.2.1 Asylum Seekers Benefits Act

As already highlighted at the start, the federal government has transferred the enforcement of the *Asylum Seekers Benefits Act* to the states through § 10 AsylbLG. They are responsible for the initial distribution, initial registration, the implementation of an initial medical examination, the housing and introduction of the asylum seekers at the responsible *BAMF* branch office, as well as for the granting of monetary and non-cash benefits for securing their subsistence and healthcare (Bogumil, Burgi, Kuhlmann, Hafner, Heuberger and Krönke 2018, 31). All states – except Bavaria – have delegated these tasks to municipalities, either partially or entirely (Schammann 2015, 172; Müller 2013; Laubenthal 2015, 11). However, the Asylum Seekers Benefits Act constitutes a highly ambivalent legal basis, since it intends to regulate the provision of care (reduced in comparison with the local population), while deterring potential asylum seekers at the same time (Schamman 2015, 169f). It also includes an "unusually large number of vague legal terms and discretionary powers" (Scham-

mann 2015, 168), and in this respect grants the states tremendous scope in its implementation, as is clear from the areas of housing and health services as represented below.

Housing

Pursuant to § 44 (1) of the Asylum Act, states are committed to "creating and maintaining the necessary reception centres for accommodating asylum seekers and – based on their admission quota – providing the necessary number of housing places in light of the monthly entry of asylum seekers in the reception centres." Asylum seekers, on the other hand, are obliged in accordance with § 47 (1) of the Asylum Act to live up to six months in the reception centre responsible for them. There are major differences between how the states comply with this obligation, and namely with regard to managing housing, regulations on the basis of which states reimburse municipalities for costs incurred, the minimum standards for structural integrity and staff keys for shared housing and its supervision and finally as regards the type of housing (Wendel 2014). Following housing in reception centres, you can generally distinguish between centralised housing in shared accommodation and decentralised housing. While centralised housing in shared accommodation may be deemed an "emergency solution" in the best case and an element of the "repressive arsenal of refugee policy" and a "deterrent method" in the worst (Wendel 2014, 7), decentralised housing in normal homes has the potential to prevent ghettoisation, foster participation in local community life and to locally integrate persons in flight (Hörisch and Heiken 2018, 212). A high proportion of decentralised housing may therefore be considered an expression of a permissive policy and a high proportion of centralised housing as one that is repressive.

The ratios of centralised and decentralised housing for asylum seekers differ starkly from one state to the next (Wendel 2014; Hörisch and Heiken 2018; Statistisches Bundesamt 2018). The percentage of decentralised housing is listed in *Table 1,* Column 1. As of 31 December 2017, the following states have high proportions of decentralised housing: Schleswig-Holstein (90.6 percent), Hamburg (88.2 percent), Rhineland-Palatinate (84.7 percent) and Lower Saxony (77.6 percent). In each case, the ratio of decentralised housing lies at least one standard deviation (20.28) above the mean value of the ratio of decentralised housing in all German states (54.9 percent). By contrast, low levels of decentralised housing (in other words ratios with at least one standard deviation below the mean value), can be found in Saxony (33.3 percent), Baden-Wuerttemberg (33.9 percent) and Brandenburg (34.3 percent). At 34.7 percent, Hessen is only slightly above this level of 34.62 percent and has a clear lead over the other states, which is why it is also rated as low.

Healthcare

Under the Asylum Seekers Benefits Act pursuant to § 4 (1), healthcare for asylum seekers is limited to the "*necessary* medical and dental treatment of *acute* illnesses and pain".[4] According to § 6 (1) of the AsylbLG, additional services may be granted "if on a case-by-case basis they are essential […] for safeguarding […] health". Persons in flight receive access to regular health services (§ 2 AsybLG, Social Code [SBG] XII) only after their refugee status has been accepted or after 15 months. To ensure that the necessary services can be provided according to § 4 (1) AsylbLG in the case of acute illness, a large number of individual approvals are necessary at first, making it difficult for asylum seekers to access medical care (Schammann 2015, 175). With the asylum package 1, as of October 2015 it was made easier for state governments by amending § 264 of the German Social Code [SGB] V to entrust

[4] Italics by the authors.

the statutory health insurance with the healthcare of asylum seekers. This constellation, which has already been applied in Bremen since 2005 and in Hamburg since 2012, involves two central changes: Firstly, the providers of the services can invoice these to the health insurance company, which receives an administrative lump sum for this and invoices the costs to the municipality. Secondly, the procedural modalities of asylum seekers' use of services is subject to change. They now receive an electronic healthcare card and can make use of medical services without acquiring an authorisation at the social welfare office in each individual case. Even though the substantial scope of services for asylum seekers remains limited by § 4 (1) and § 6 (1) AsylbLG, the commissioning of health insurance companies may constitute a permissive measure from a procedural point of view, since this constellation excludes the need for non-specialist social welfare office employees to scrutinise the necessity of the service, as well as removing the stigmatising "special treatment" of asylum seekers at the doctors (cf. Günther, Kurrek and Töller 2019).

Table 1: Differences in the application of the Asylum Seekers Benefits Act (2017)

State	**Column 1 Ratio of decentralised housing[5] in percent 2017**	**Column 2 Commissioning health insurances/ healthcare cards[6]**
Baden-Wuerttemberg	33.9	Not
Bavaria	53.3	Not
Berlin	60.6	Extensive
Brandenburg	34.4	Extensive
Bremen	62.1	Extensive
Hamburg	88.2	Extensive
Hessen	34.7	Not
Mecklenburg-WP.	29.5	Not
Lower Saxony	77.6	Option model
North Rhine-Westphalia	39.4	Option model
Rhineland-Palatinate	84.7	Option model
Saarland	45.6	Not
Saxony	33.7	Not
Saxony-Anhalt	57.4	Not
Schleswig-Holstein	90.6	Extensive
Thuringia	52.3	Extensive

Own research.

States' use of the option to commission health insurance companies reveals a very mixed picture (*Table 1*, column 2). Bavaria and Saxony refused to commission health insurance companies from the outset, and although other states (Baden-Württemberg, Hessen, Mecklenburg-Western Pomerania, Saxony-Anhalt, and the Saarland) adopted initial steps at first, they did not finally implement the

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[5] Statistisches Bundesamt 2018.

[6] Wächter-Raquet 2016; Günther, Kurrek and Töller 2019.

plan, which means the repressive policy of the *AsylbLG* continues to exist on a procedural basis. Ultimately, commissioning health insurance companies and comprehensively introducing the electronic healthcare card for asylum seekers in all municipalities (and hence a permissive policy from a procedural perspective), was only carried out in four states (in addition to Bremen and Hamburg): Berlin, Brandenburg, Schleswig-Holstein and Thuringia. A so-called option model, in which the municipalities are free to decide whether they participate, was implemented by Lower Saxony, North Rhine-Westphalia and Rhineland-Palatinate; this led to the municipal authorities' rather low participatory rates in its implementation (Günther, Kurrek and Töller 2019).

3.2.2 Asylum Procedures

As explained above, the Federal Office for Migration and Refugees (*BAMF*), a higher federal authority within the portfolio of the Federal Ministry of the Interior (*BMI*), is responsible for implementing the asylum procedures. The *BAMF* currently has 42 branch and regional offices in the states carrying out the asylum procedures, in other words deciding upon the need for protection and protection status of a person (Kreienbrink 2015; Bogumil, Burgi, Kuhlmann, Hafner, Heuberger and Krönke 2018, 11-13). In spite of the nationwide Asylum Act and its execution by a federal authority's branch offices, the recognition rates vary dramatically depending on the states. As Riedel and Schneider first pointed out based on data from the years 2010 to 2015 (2017, 28). These differences in the study by Riedel and Schneider continue to persist even when excluding the fact that the composition of asylum seeker populations among states varies according to their countries of origin. This means that there are also considerable differences between the total recognition rates of the individual German states for individual countries of origin. More recent figures for 2017 enabled us to confirm this observation.

As regards the total recognition rates for all countries of origin, Bremen and the Saarland present strong recognition rates with 59.7 percent and 72.8 percent respectively. They display a distance of at least one standard deviation (11.39) from the mean value of the recognition rate in all German states (44.94). In contrast, low recognition rates (in other words rates that lie at least one standard deviation below the mean value), can be found in Brandenburg (24.5) and Saxony (33.0). Bavaria is only slightly above this with 31.8.[7] These variations are all the more astounding since they are not the result of decisions taken by 16 different regional authorities, but rather "...Decisions of one federal authority […], which defines standards on an identical legal basis and according to national internal specifications (country of origin assessment and guidelines, instructions for the application of the law and for the case-by-case assessment etc.") (Deutscher Bundestag 2017, 1).

[7] The values for the countries of origin Afghanistan and Iraq, merely serve – analogous the approach by Riedel and Schneider – to check the plausibility of values in column 1 and hence are not covered further here.

Table 2: Total recognition rate[8] according to German state and country of origin in 2017

State	**Column 1 Total recognition rate all refugees[9]**	**Column 2 Total recognition rate refugees from Afghanistan[10]**	**Column 3 total recognition rate refugees from Iraq[11]**
Baden-Wuerttemberg	37.7	39.9	50.0
Bavaria	31.8	34.6	46.4
Berlin	44.3	50.3	42.1
Brandenburg	24.5	29.6	20.5
Bremen	59.7	62.6	88.7
Hamburg	47.9	45.9	48.7
Hessen	53.2	43.8	58.2
Mecklenburg-WP	37.2	47.0	31.0
Lower Saxony	52.4	49.1	69.0
North Rhine-Westphalia	45.3	48.4	61.4
Rhineland-Palatinate	44.6	48.0	40.0
Saarland	72.8	37.2	45.0
Saxony	33.0	42.1	47.7
Saxony-Anhalt	38.2	43.8	37.2
Schleswig-Holstein	52.4	50.7	54.5
Thuringia	44.1	51.2	42.6

Own research.

permissive

restrictive

neither clearly permissive nor restrictive

3.2.3 *Repatriations Pursuant to the Residence Act*

In 2017, the *BAMF's* asylum procedure amounted to "an adjusted total recognition rate" [12] of 53 percent (Deutscher Bundestag 2018b, 5); thus the need for protection of asylum seekers was therefore rejected in 47 percent of cases. If an asylum application is rejected and no obstacle to deportation according to the Residence Act is determined, the *BAMF* orders these persons to leave Germany (SVR 2017, 10). The obligation to leave the country is a legal duty, which is binding and must be immediately complied with (Kempen 2016, 219). Deportation should only be carried out when the person who is obliged to leave the country can no longer be trusted to leave on a voluntary basis, or it is necessary to monitor their exit for reasons of public safety or order (§ 58 (1) sentence 2 of the Residence Act), (Kempen 2016, 220). Its execution is the responsibility of the states, who have no room for manoeuvre with this (Unterarbeitsgruppe Vollzugsdefizite 2015; Kempen 2016, 220). Of the 228,859 foreigners who were obliged to leave the country on 31 December 2017, 72.6 percent were

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[8] The total recognition rate includes all four potential types of protection (eligibility for asylum according to Art. 16a GG; refugee protection pursuant to the Geneva Refugee Convention; subsidiary protection to prevent "serious damage" in the country of origin; and existence of obstacles to deportation (e.g. violation of the European Convention on Human Rights by the state of origin).

[9] BAMF 2018.

[10] Deutscher Bundestag 2018b, 13.

[11] Deutscher Bundestag 2018b, 14.

[12] The adjusted total recognition rate is obtained by removing from the total recognition rate the cases that have been formally decided but not examined in terms of content.

registered with a toleration (the deportation was therefore temporarily suspended), 62,691 (27.4 percent) were obligated to leave under an enforceable decision (Deutscher Bundestag 2018a, 34). Nevertheless, a federal government working had already determined that “it is impossible to carry out each enforceable obligation to leave the country” (Unterarbeitsgruppe Vollzugsdefizite 2015, 6). Against this background, the “timely and consistent enforcement of statutory obligations to the leave the country” (Unterarbeitsgruppe Vollzugsdefizite 2015, 3), became an important political project for the federal government as of 2014 at the latest. In the meantime, various political measures have been adopted to implement it. In particular the Act on Redefining the Right to Remain and the Termination of Residence dated August 2015, the Act on the Acceleration of Asylum Procedures dated October 2015, and the Act on Introducing a Fast Track Asylum Procedure dated 17 March 2016 (Deutscher Bundestag 2016a; 2016b). In February 2017, the federal government and states agreed upon a 15-point plan, which was essentially implemented by the act for better implementing the obligation to leave the country dated June 2017. During the spring of 2019, the federal government planned to adopt the “orderly return act”, whose methods include using detention to deport those who are obliged to leave the country more easily (Iser 2019).

Below we will highlight major differences between the states both in light of the toleration of those obliged to leave the country and of repatriating those immediately obliged to leave.

Tolerations

Tolerated persons are obligated to leave the country, but this will not be enforced immediately (Kempen 2016, 222). Persons obliged to leave must be tolerated, “provided that deportation is impossible for factual or legal reasons” (§ 60a (2) sentence 1 of the Residence Act). This includes the absence of a passport or an interrupted travel itinerary to the country of origin (Janda 2017b, 27) as well as illnesses impeding deportation, for which there has been a stricter obligation to provide proof since autumn 2015, however (Kempen 2016, 225). In 2016, the Integration Act introduced the so-called apprenticeship toleration (§ 60a (2) sentence 4 et seqq. of the Residence Act). Accordingly, legal entitlement to a toleration exists “if the foreigner starts or has started qualified vocational training in a state recognised or similarly regulated skilled occupation in Germany”, and has not been convicted of having intentionally committed an offence within the territory of the Federal Republic of Germany.

A toleration may also take place (based on a discretionary decision) through a decision issued by the states’ interior ministries. Pursuant to § 60a of the Residence Act, these ministries may order the suspension of deporting foreigners from certain states or otherwise of certain categories of foreigners in general or in certain states for a maximum of three months “for grounds (including) those under international law or humanitarian reasons”. A paradigmatic case in this context is the deportation to Afghanistan (SVR 2017, 12; Hörisch 2018). Even though the security situation has dramatically deteriorated there since early 2017 according to a UNHCR report, the federal government considers it to be a safe country of origin (Biermann 2017). In October 2016, the Federal Ministry of the Interior concluded a readmission agreement with Afghanistan and called on the German states to carry out deportations to Afghanistan in a standardised way (Spiegel online 2017). However, according to the analysis of Hörisch on the basis of press reports (status December 2016), Berlin, Bremen, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein did not carry out deportations to Afghanistan (2018 tab. 5). Hence they demonstrate a more permissive policy. Having said this, only Schleswig-Holstein (in February 2017), ordered a halt to deportation according to § 60a of the Residence Act (from which offenders are exempt, Ministry of the Interior Schleswig-Holstein 2017). In the other four

states, e.g. in Rhineland-Palatinate a halt to deportation is the de facto result of “four years applied practice of merely deporting offenders and violent criminals to Afghanistan” (Dolderer 2017). The other states that do not deport to Afghanistan, such as Bremen and Lower Saxony, carry out individual assessments in which the security situation prevents deportation in each case (Dolderer 2017; Spiegel online 2017). Owing to such an individual assessment or “applied practice”, according to media reports deportations to Afghanistan are only carried out in NRW for “criminals, persons likely to threaten public safety and young men without an obvious intention to integration” (Dolderer 2017) and in the case of Thuringia, “hardly ever” (Lohse and Pergande 2017) (see *Table 2*, column 1).

Repatriation of those Immediately Obliged to Leave the Country

Those obliged to leave the country that are not tolerated and have not acquired a residence permit via the hardship procedure (Wolf 2013, 14), are immediately and executably obliged to leave. Nonetheless, not all persons immediately obliged to leave the country exit voluntarily or via deportation. Here, too, there are major differences in the repatriation practices among the states – as illustrated by empirical investigations, documentation and press reports (Unterarbeitsgruppe Vollzugsdefizite 2015, 6; Kempen 2016). These differences can be represented on the basis of repatriation quotas, which indicate the relationship between those who are executably obliged to leave and those who actually do so (deportations and voluntary departures). Here we see major differences, as illustrated in Table 2, column 2, between the states for the year 2017: Low repatriation rates (in other words, rates deviating downwards from the mean value [46.9 percent] by at least one standard deviation [9.56]), which indicate a permissive policy, can be seen in the city states of Berlin (29.3 percent), Bremen (34.7 percent) and Hamburg (32.6 percent). High repatriation rates (in other words, rates deviating upwards from the mean value by at least one standard deviation), which suggest a restrictive reparation policy, can be seen in Mecklenburg-Western Pomerania (56.9 percent), the Saarland (57.4 percent) and Thuringia (66.9 percent) (Deutscher Bundestag 2018a, see *Table 2*, column 2).

Furthermore, the states also manifest clear differences in relation to “voluntary” departures (which are supported by repatriation advice and repatriation programmes) and deportations (Unterarbeitsgruppe Vollzugsdefizite 2015, 5). A high proportion of deportations as opposed to voluntary departures (in other words, rates deviating upwards from the mean value [50.3 percent] by at least one standard deviation [13.78]), which may be interpreted as a restrictive repatriation policy, were clear to see in 2017 in Hamburg (71.8 percent), and the Saarland (84.3 percent) (Deutscher Bundestag 2018a, see *Table 2*, column 3). Low deportation rates, which can be seen as an indication of a permissive repatriation policy, (that is, rates deviating downwards from the mean value by at least one standard deviation), are to be found in Bremen (29.2 percent), Lower Saxony (34.7 percent) and North Rhine-Westphalia (35.7 percent).

Table 3: Repatriations

State	Column 1 Deportation to Afghanistan[13]	Column 2 Repatriation rate[14] 2017 in percentage	Column 3 Share of deportations in repatriations 2017
Baden-Württemberg	Yes	50.9	54.9
Bavaria	Yes	43.6	49.1
Berlin	No	29.3	59.8
Brandenburg	Yes	50.9	37.4
Bremen	No	34.7	29.2
Hamburg	Yes	32.6	71.8
Hessen	Yes	40.7	43.0
Mecklenburg-WP	Yes	56.9	60.4
Lower Saxony	No	48.3	34.7
North Rhine-Westphalia	No*	48.2	35.7
Rhineland-Palatinate	No*	55.5	46.0
Saarland	Yes	57.4	84.3
Saxony	Yes	43.8	45.3
Saxony-Anhalt	Yes	48.0	52.2
Schleswig-Holstein	No	42.4	45.7
Thuringia	No*	66.9	54.6

Own research.

permissive

restrictive

neither clearly permissive nor restrictive

3.3 Patterns and causes of diversity

In summary, it can be said that there are major differences in the treatment of asylum seekers between the states in all three areas – and hence irrespective of whether enforcement lies with the states (3.2.1), predominantly with the states (3.2.3) or with the federal government (3.2.2.). Hence, there are states that manifest permissive values in all or many areas and no restrictive values: in particular, these are Bremen but also Berlin, Schleswig-Holstein, Rhineland-Palatinate, North Rhine-Westphalia and Lower Saxony. In total, Bavaria, Saxony and the Saarland as well as Mecklenburg-Western Pomerania, present restrictive values in many areas, which is why the unusually high recognition rates in the Saarland create a contrast, however.

[13] The data come from Hörisch 2018, but countries marked with * are listed as deportees by Hörisch at the end of 2016, but according to various consistent information from 2017 (e.g. Dolderer 2017) do not deport to Afghanistan. In all countries that do not explicitly deport to Afghanistan, offenders are excluded.

[14] The repatriation rate is calculated as the rate of repatriated persons obliged to leave the country (deported, Deutscher Bundestag 2018a, 33, and those who depart voluntarily, Deutscher Bundestag 2018a, 59) by the sum of repatriated persons and remaining persons obliged to leave the country (without toleration) as of 31 December 2017 (Deutscher Bundestag 2018a, 34).

The causes of the differences shown have not been conclusively and reliably examined. In the area of the Asylum Seekers Benefits Act, however, there are clear indications of partisan effects for both housing and healthcare (Hörisch and Heiken 2018; Günther, Kurrek and Töller 2019; Reiter and Töller 2019).[15] However, Riedel and Schneider have clearly shown that when implementing the asylum procedure, it is not partisan effects but rather other regional circumstances such as the frequency of xenophobic attacks or the unemployment rate, that could have a clear (in both of these cases negative) effect on the chances of asylum being granted in a German state (Riedel and Schneider 2017, 40). The most unclear seem to be the reasons for differences between repatriation policies. Indeed, there are also indications of partisan effects in this respect – all centre-right governments are willing to deport people to Afghanistan, for example (Hörisch 2018). Nonetheless, to date only specific parameters have been causally examined, whereby administrative factors were largely overlooked (Reiter and Töller 2019).

4. Evaluation of the Federal Diversity

In light of the federal diversity in the asylum policy, our second question now focuses on how we are to assess this diversity and hence the associated allocation of authority in asylum policy. Is diversity, as the German discussion on federalism sometimes suggests (cf. Sack and Töller 2018), per se welcome (or objectionable)? Or should the assessment be carried out differently depending on the field (implementation of the Asylum Seekers Benefits Act, application of the Asylum Act, implementation of the Residence Act with regard to rejected asylum seekers)?

4.1 Conceptual Framework: Immigration Federalism

To date, the discussion on German federalism has had no discernible focus on the field of migration or asylum policy. What is more, migration research has at best focused very generally and rather descriptively on the fact that German migration policy is conducted within a federal structure (e.g. Thränhardt 2001; Soennecken 2014). In addition, insofar as it moved beyond this (Münch 2016; 2017), it did not engage in normative evaluations. Another informative (yet unhelpful) view is that developed by the administrative sciences perspective, which empirically identifies a plethora of interface problems between the federal government and the states and hence intends to change the federal order especially with regard to reducing interfaces (Bogumil, Burgi, Kuhlmann, Hafner, Heuberger and Krönke 2018, 100; 244 et seqq.).

In this context, we consider the discussion on "immigration federalism" to be more fruitful. Since approx. 2001, it has attempted to understand, explain and evaluate the development of migration policy in the federal system in the USA but also in Canada and Australia (e.g. Spiro 2001; Huntington 2007; Reich and Barth 2012; Gulasekaram and Ramakrishnan 2015). It goes without saying that there are major differences between the USA and Germany as regards specific constellations of federalism as well as the migration policy situations in federalism. The USA has a system of dual federalism and in Germany, there is an inter-state or even executive federalism. In the USA, the important and controversial theme is illegal migration, whereas it is asylum policy in Germany. In the USA, for some 140 years the federal government was responsible for migration issues (Gulasekaram and Ramakrishnan 2015, 12-56), until 2001 when the states increasingly adopted initiatives to regulate social rights (of mainly illegal) migrants (Gulasekaram and Ramakrishnan 2015, 58). As "decentralisation", this

[15] That is consistent with the findings of Gulasekaram and Ramakrishnan for the US American states (see below).

development lies at the heart of the discussion on immigration federalism and poses fundamental questions about the American constitutional system that go beyond migration policy issues (Huntington 2007, 7; Gulasekaram and Ramakrishnan 2015). In Germany, by contrast, the states have "always" played a role in asylum policy by locally receiving persons in flight (and deporting them where necessary), but also (such as with the "asylum compromise" of 1993), by contributing towards federal law via the Bundesrat (Laubenthal 2015). The federal government has invariably had legislative power in asylum policy. However, it was not until the dogma of Germany not being an immigration country began to be increasingly undermined, that it slowly discovered its role in other migration policy areas. Having said this, whether we can infer a "centralisation" of migration policy from this, as is partially confirmed in the literature (Thränhardt 2009; Soennecken 2014), seems rather questionable.

Although the USA and Germany present different framework conditions in their federal systems as well as rather contradictory developments, discussions are being held in the USA, which we ourselves are trying to find the answers to; namely, "what does a meaningful allocation of migration policy tasks between the central state and constituent states look like?" In this sense, federalism presents us with an evaluative and normative tool in order to answer this question (Huntington 2007, 48). To answer this question, the discussion provides two (clearly different) criteria (Huntington 2008, 5); firstly the criterion of equal treatment of individuals and secondly the criterion of a factually optimal allocation of authority within the federal state.

The criterion of equal treatment, which is often applied by migration researchers with normative intent, points out that decentralised authorities in migration policy may lead to differences within a state and hence to the unequal treatment of migrated individuals. Depending on the initial situation, this may culminate in discrimination against individuals (Huntington 2007, 1). The criterion of optimally allocating authority in the federal state ("the appropriate allocation of authority […] between the national and the sub-national governments", Huntington 2007, 5, 4), is subject to varying argumentative developments by the different authors. Our initial starting point are the reflections by Spiro (2001), which differentiate and classify three areas of regulation as well as the contribution by Huntington (2007).

The *immigration rights* constitute the social rights of migrants, in other words social security, particularly the access to services in the health, work, housing and educational sectors (Reich and Barth 2012, 424). From around 2001, a number of states in the USA became strongly involved in immigration rights, which until 2012 entailed largely restricting them while some have been expanded in the meantime (Reich and Barth 2012, 424; Huntington 2007; Gulasekaram and Ramakrishnan 2015, 59-85). In the discussion about the (legal and political) appropriateness of this development, Spiro contends that these issues may represent tasks belonging to the constituent states or even the local community. The reason for this is that the latter are ultimately responsible for providing local migrants with access to the employment or housing market, to health and education (Spiro 2001, 72; Huntington 2007, 12). In this context, however, Gulasekaram and Ramakrishnan indicate that this tendency to grant rights at the local level by no means illustrates "organic responses to regional needs that are self-evident and driven by objective conditions", and is therefore non-political in this respect. Instead, they can most certainly be politicised in the local context and at the level of states (Gulasekaram and Ramakrishnan 2015, 59-85).

The area of *immigration benefits* describes the acquisition of status, and hence the right to enter, to reside as well as the conditions surrounding acquiring citizenship, which are valid throughout the whole territory and are therefore referred to as central government tasks (Spiro 2001). This also involves deciding which migrants should gain legal access to an (entire) territory, in other words an immigration policy. On the one hand, this fact speaks in favour of a central authority, whereas the need for migration (positive or negative) is increasingly defined in states and regions – depending on whether the labour market requires migrants and on the type of migrants (cheap, potentially illegal or qualified, Spiro 2001, 70; Huntington 2007, 34). It must be possible to take this into account in the context of constituent states (Spiro 2001, 71; Huntington 2007, 33).

Immigration enforcement ultimately means border control as well as enforcing the deportation of people who reside illegally (Spiro 2001, 69). In the literature, the general belief is that control over entry and exit is not only de facto an issue for the federal government in the vast majority of federal states, but that it makes sense for it to be so (Huntington 2007, 12). The argument propounds that it is essentially an aspect of foreign policy, in other words policies towards other states or their nationals, which must be consistent and effective (Spiro 2001, 71; Huntington 2007, 32). The German states' authorities with respect to deportation are considered an exceptional case that is difficult to justify (Spiro 2001, 69; also Soennecken 2014, 172). For the USA, Spiro argues that decentralised authorities result in differences and, when it comes to the entire territory, the costs for these differences are to be borne by others ("Montana might not care about uncontrolled migration").

How can we now apply the (rather implicitly included) equality criterion and the allocation criterion to our findings?

4.2 Evaluation

The equality criterion tends to invariably speak against decentralised solutions because they inevitably lead to inequalities (Huntington 2007, 32; Laubenthal 2015, 20). Hence, the criticism levelled e.g. against Switzerland's refugee policy is "that the cantonal diversity stymies national control and leads to unequal treatment that is very hard to justify"[16] (Besler 2015, 118). As regards social tasks (immigration rights) that have to be provided on a local level (such as housing, healthcare etc.), the counterargument is that this is actually more effective, however (Öney 2015, 76).

Furthermore, we need to differentiate between the natures of decisions with regard to the criterion of equal treatment. While questions such as whether an asylum seeker should temporarily be centrally or de-centrally housed or whether they have access to an electronic health card may be important in cases of doubt, albeit not a matter of life and death, this is potentially different when it comes to implementing the asylum procedure (protection status or not) and the repatriation (deportation or not). Hence, the principle of equal treatment does not speak against states adopting different measures as part of the Asylum Seekers Benefits Act in the areas of housing and healthcare organisation, for instance. Even though it is politically regrettable that the Asylum Seekers Benefits Act – owing to its ambivalent legal basis – facilitates such diversity when supporting refugees (Schammann 2015, 169 et seq.). The principle of equal treatment, however, argues against major differences in the recognition of protection status or the enforcement of the obligation to leave the country, which is why decentralised competencies appear to be inappropriate here. Whereas, therefore, federal responsibility is appropriate in the case of asylum policy, the fact that it fails to

[16] Translated from German by the authors.

commit decision-makers in the branch offices to common decision criteria, is highly problematic. By contrast, as regards repatriation and especially deportation, the allocation of authority among the states already poses a problem since it results in differences in one fundamental question (deportation or not), which cannot be justified in terms of content (also Unterarbeitsgruppe Vollzugsdefizite 2015, 6). In view of such decisions, the equality criterion is also particularly sensitive because individuals themselves, owing to the allocation based on a predetermined formula, have absolutely no influence on the state in which they file their asylum application or become obliged to leave the country (Schammann 2015) – as opposed to the reference case of illegal migrants in the USA, who at least in theory can go to the state where conditions are favourable (Huntington 2007, 26). This fact, which Wolf pointedly described as the "lottery of chances" (Wolf 2014, 130), is a criticism that is levelled by Belser against Switzerland, too: "That a […] person, depending on which canton they were allocated, will one day have more or less chances of family reunification, access to employment or remaining for humanitarians reasons, cannot be justified"[17] (Belser 2015, 132).

The criterion of appropriate authority allocation refers to the nature of the task and the effectiveness of its fulfilment. The implementation of the Asylum Seekers Benefits Act would therefore fall into the category of social immigration rights, whose effective guarantee can be attributed to the sub-national levels. Given that these services can be provided locally, we can even assume that the states do this better than the federal government could (see above). Applying the Asylum Act means recognising a status for the entire federal territory (it represents an immigration benefit in this respect). According to the effectiveness criterion, this task (and that also applies to acquiring citizenship), must be carried out by a federal administration in line with homogeneous results. In connection with such tasks (who has access and is allowed to stay?), the discussion on immigration federalism indicates, however, that the need for migration is also increasingly dependent on the requirements of the local and regional economy (Spiro 2001; Huntington 2007, 33). That is also reflected in German asylum policy, whereby there are initiatives from the regional economy advocating the right to remain for those refugees without protection status but who are in employment. The problem here is ultimately that an asylum application so far represents essentially the only form of orderly migration to Germany for many non-Europeans, a situation that is not consistent with the needs of the (regional) economy.

As regards the above-described perspective on performing tasks at the federal level, the most problematic aspect seems to be the states' decentralised competence with respect to repatriating people who have neither protection status nor a toleration. It is not clear why the enforcement of a legal duty, which is important for the federal territory, might depend on the political will and the administrative capacity of individual German states. If the federal government essentially depends on the states to perform this task, because it does not have its own enforcement administration for this purpose, then decisions about (such as for humanitarian reasons) exceptions must be a federal matter and procedures and resources for executing the deportation must be standardised.

[17] Translated from German by the authors.

5. Conclusion

In the wake of the so-called “refugee crisis” between 2015 and 2016, the specifics of German asylum policy became part of the public consciousness as well as that of the academic world. The intuitively astounding elements of this policy include the division of labour in German federalism (2015). Whereas most areas of migration policy such as asylum policies and residence policies are regulated at the federal level, the states have the duty to implement most federal laws. In doing so, they exert considerable discretion which again results in a remarkable diversity in policies among the 16 German states. Yet, publications to date have highlighted only very specific aspects of *state* asylum policies and have not provided systematic empirical data for a variety of aspects for all *states*. Moreover, they do not provide an evaluation of the diversity identified.

In order to mitigate this research gap, our first step identifies three different areas to demonstrate the considerable federal diversity when dealing with asylum seekers. This diversity – between permissive and restrictive asylum policy – is irrespective of whether the enforcement, as with the Asylum Seekers Benefits Act, is a state competence (3.2.1), as with repatriations according to the Residence Act, is predominantly a state competence (3.2.3), or as with the Asylum Act, is a federal government competence (3.2.2).

Table 4: Evaluation of the federal diversity in asylum policies

	Criterion of equal treatment	Criterion of optimal allocation
1. Immigration rights Implementation AsylbLG (Living, money, health)	Decentralised √	Decentralised √
2. Immigration benefits Application of Asylum Act (Asylum procedure)	Centralised √ (decentralised) x	Centralised √ (decentralised) x
3. Immigration enforcement Application Residence Act (deportation)	Decentralised x	Decentralised x

Own graphic.

In a second step, we have evaluated these differences in the three areas using categories of the discussion on “immigration federalism”, and summarised the results here in Table 4. From the perspective of the optimum allocation of authority, the states (or municipalities) seem to be the right actor for implementing the Asylum Seekers Benefits Act; from the perspective of equal treatment, they seem tolerable, at least. In principle, the federal government seems to be the right actor for applying the Asylum Act (“immigration benefits”), according to both the criterion of optimal allocation as well as the criterion of equal treatment. However, the fact that local conditions may result in such significant differences in the implementation, is unacceptable from both perspectives. In the area of repatriations (“immigration enforcement”), the states’ predominantly decentralised competence seems to be highly problematic from both perspectives.

It is of course well known that in the current political discussion and particularly about the enforcement of deportations, hard-liners advocate a federal competence (e.g. the incumbent respective interior ministers), who combine federal competence with a more consistent and restrictive enforcement (Münch 2017, 263). Yet, if we abstract from this current political discussion, the question as

to whether decentralising or centralising migration policy competences in general and asylum policy competences in particular *systematically* result in a more restrictive or permissive policy, is not an easy one to answer. In the literature concerning Germany, the prevailing perception (since the publication of works by Münch), has been that the states represent – at least via the Bundesrat – a rather restrictive stance (Münch 1993, 145; Münch 2017, 261). This is confirmed by the most recent initiative taken by all 16 Minister-Presidents as of December 2018, to curtail social benefits for those asylum seekers who are already registered in another country (so-called "Dublin cases") (dpa 2018). Exceptions to this rule can be expected in German states ruled by the green party (Münch 2017, 261). Other publications also state the contrary, however. For instance, a report by the Stiftung Mercator points out that the majority of German states assign integration policy to the social ministries and link these with social and labour market policy approaches, in contrast to the federal government, which arranges them according to domestic policy instead (Bogumil et al. 2018, 107). This could imply that the federal government pursues a rather restrictive migration policy, whereas some of the states adopt a rather permissive approach. Angenendt and Bendel also argue that states used their scope to make decisions in asylum policy "in the past often as an important corrective to a refugee policy that focuses on the fate of each individual refugee" (Angenendt and Bendel 2017, 19).

The findings from the USA are unclear, too: It is true that rhetoric focusing on the federal government's inability to prevent illegal immigration – presenting states with major problems – was the basis of measures, which were, however, primarily adopted by republican-governed states (and municipalities) (Gulasekaram and Ramakrishnan 2015, 67-72). Yet, even in the wake of predominantly (but not exclusively) restrictive measures adopted by the federal states (between 2004 and 2012) aimed at reducing the rights of illegal migrants, an increasing number of permissive measures have been taken since 2012 that improved illegal migrants' access to education or healthcare, for instance (Reich and Barth 2012, 424; Gulasekaram and Ramakrishnan 2015, 3 and 58).

Conceptually speaking, federal diversity invariably means the deviation of states from a reference value to a greater or lesser degree (Reus and Vogel 2018). This reference value might simply be the mean value of all countries or a federal policy (Sack and Töller 2018). Depending on the extent to which this reference value is restrictive or permissive, the scope for decision making in states (or its absence) may have very different effects in terms of content. Therefore, there is no reason to conclude that a regulatory level (federal government or state), has the tendency to be restrictive or permissive in asylum policy per se (Huntington 2007, 33). On the contrary, competencies at sub-state levels enable diversity, which may range from restrictive to permissive, as we outlined in Section 3. In turn, whether certain federal constellations have systematic effects on the substance of asylum policy is a question that requires closer investigation.

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