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Migration and the Transformation of German Administrative Law:
an interdisciplinary research agenda

Migration and the Transformation of German Administrative Law: an interdisciplinary research agenda[1]

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Abstract

This working paper, which arose from collaborative research carried out at the Law & Society Institute at the Law Faculty of Humboldt University in Berlin and at the Department 'Law & Anthropology' at the Max Planck Institute for Social Anthropology in Halle, contributes to the growing field of socio-legal research on the topic of migration in Germany. It outlines a genuinely interdisciplinary research agenda for studying (German) administrative law as a central arena in which both notions of statehood (governed by the rule of law) and notions of citizenship are practiced, negotiated, and potentially transformed. We present a suggestion for how to bring theoretical concepts, methodological approaches, and findings from sociocultural anthropology, socio-legal research, and public law scholarship into a novel and productive dialogue.

In initiating such a dialogue, we hope to engage hitherto largely disconnected academic audiences, each of which we address with a particular objective: We encourage sociocultural anthropologists, who have a long tradition of studying legal and political organization in non-state settings and more recently have also turned their attention to the study of bureaucratic institutions and the state, to study German administrative law and its enactment within bureaucratic and judicial institutions with the same ethnographic scrutiny they apply to other systems of meaning and social practices. We invite legal sociologists to build on their focus on state law in action and their concern with how official law is implemented and mobilized and apply it more strongly to the study of migrants' interaction with state law as one among a number of normative frames in which migrants are potentially embedded. Consideration of the ramifications of migrants' transborder mobility and their embeddedness in plural normative orders can contribute to socio-legal conceptualizations of current dynamics in public law. And finally, we present to scholars of German public law an alternative proposal for understanding doctrinal reasoning as a contextualized social practice. Our proposal, which not only deconstructs the position of doctrinal reasoning in legal scholarship, but also reconstructs it, is based on integrating empirical ethnographic research into legal theory-building in a novel way. By nature, this attempt can be nothing but a first step and will necessarily be both too general and too selective in many respects. Placing our deliberations in this working paper series thus adequately represents their in-progress nature and is intended to stimulate further (interdisciplinary) discussion.

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1   Introduction

Since the summer of 2015, migration as a global phenomenon has gained a considerable amount of public attention. Often couching it in the language of crisis, public and academic commentators alike have decried the humanitarian catastrophe taking place in the Mediterranean and pointed to the challenges that the European Union as a political actor, or respectively the German government, its executive institutions or society as a whole face due to the arrival of large numbers of refugees.[3] In this situation, political negotiations connected with such underlying values as solidarity, belonging and equitable distribution of burdens,[4] as well as the more practical regulation of migrants/refugees by means of law,[5] and the actual workings of those public institutions that are charged with the reception, accommodation, and status determination of refugees[6] are among the topics that are receiving renewed and certainly much-needed academic attention. At the same time, however, the current rhetoric of crisis leaves little space either for more carefully historicized approaches to the regulation of migration and processes of integration or for a more strongly contextualized and self-reflexive examination of the changing paradigms, questions, and foci of migration and integration research in Germany. In this introduction, we provide a brief overview of German migration and integration research and identify a lack of attention to the function and effects of law – in particular administrative law – at both a theoretical and an empirical level. We argue for the relevance of socio-legal research not only with regard to short-term regulation of mass migration but also with regard to long-term effects of legally regulating migration in a pluralist society that offers equal chances of legal protection and participation. We also argue that such research is necessary for a better understanding of socio-legal change.

In the main part of the paper, we present our own research agenda, focusing on transformative dynamics in notions of citizenship and in perceptions of the state under the rule of law (*Rechtsstaat*) that result from interactions in and around the field of administrative law. In order to

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[3] For a commentary on this widespread rhetoric of crisis from the perspective of critical migration research see: Tazzioli and de Genova (2015); for an anthropological view on the 'German refugee crisis' see Holmes and Castaneda (2016).

[4] Such political negotiations take place at various levels within a field of multi-level governance. At the level of the European Union, the Dublin system for redistributing refugees has come under increased scrutiny. See Trauner (2016) and Marx (2016); for debates about the Dublin system and alternative proposals for distributing refugees within the European Union. The recent EU-Turkey agreement aimed at stopping irregular migration via Turkey to Europe can also be placed within the frame of negotiating the perceived burdens of migration flows – this time between the EU and its neighbours. For a legal commentary, so far primarily in the legal blogosphere, see Thym (2016); Peers and Roman (2016); Hathaway (2016); Heilbronner (2016). Within Germany the debate is carried out in context of federalism and involves discussions about the distribution of costs and responsibilities among *Bund*, *Länder*, and municipalities. Frequently, a macroeconomic perspective is applied and several economic research institutes, foundations, and public bodies have issued policy recommendations (see for example Hummel and Thöne 2016; Geis and Orth 2016; Deutscher Städtetag 2016).

[5] In response to the rise of incoming refugees in 2014 the asylum legislation was amended in several waves. The so-called *Asylpaket I*, effective since 24.10.2014, and *Asylpaket II*, effective since 17.3.2016, aim to accelerate the asylum determination process. They contain – among other measures – the designation of several Balkan countries as 'safe countries of origin', the introduction of fast-track asylum determination procedures in special reception centres, restrictions on family reunification, and obligatory residence in so-called first reception centres; at the same time, they also offer refugees who are considered to have 'good prospects of remaining in Germany' (*gute Bleibeperspektive*) early access to language and integration courses. A third amendment (*Asylpaket III*) that would include the designation of some Maghreb states as safe countries of origin was being discussed at the time this paper was written. Furthermore, a law on data exchange (*Datenaustauschverbesserungsgesetz*), effective since 5.2.2016, aims to improve the registration of refugees and the exchange of data among administrative entities. The law on integration (*Integrationsgesetz*), effective since 6.8.2016, aims to facilitate the integration of recognized refugees. It includes measures to facilitate refugees' access to the labour market, but also extends the restriction on free choice of residence for recognized refugees to a period of 3 years. For discussions of these legislative changes see Eichenhofer (2016, 2016a); Kluth (2016); Pelzer and Pichl (2016); Thym (2015, 2016a, 2016b); von Harbou (2016).

[6] See Bogumil, Hafner and Kuhlmann (2016) for an analysis of the capacity of German administrative bodies to handle the perceived 'refugee crisis'. For sociological research on the bureaucratization of the Common European Asylum System as a European administrative field, see Lahusen (2016).

demonstrate what such an interdisciplinary approach might look like, we develop a number of composite middle-range concepts that form a conceptual framework on which we base our empirical research. In the last part of the paper, we discuss some of the methodological choices to be addressed in such interdisciplinary research at the intersection of empirical migration research and public law scholarship and outline how they translate into a research design.

Although Germany is home to a significant number of immigrants and can look back on decades of regulating immigration, the fact that the country had become a society of immigration was not officially recognized until the late 1990s. This recognition went along with a political change of agenda: the earlier assumption that immigrants were temporary guests was reluctantly replaced with the aim to regulate not only immigration but also the integration of immigrants (Sauer and Brinkmann 2016: 1; Eichenhofer 2013: 25–62). German migration studies have in many ways been shaped by this sociopolitical context; they have also in turn contributed to the political change of agenda by critically challenging accepted wisdom. Traditional push-and-pull models of migration and earlier concepts of assimilation were abandoned in favour of new – and increasingly diverse – paradigms in migration and integration research. These were variously grounded in the study of social inequality, the critical analysis of power structures, or pluralist, multiculturalist, or transnational conceptualizations (Nieswand 2016: 284). This pluralization of theoretical (and methodological) approaches was also due to a massive expansion of migration studies as a field of research. As a common denominator one can identify a shift from the study of migration as a marginal societal phenomenon with a more or less implicit emphasis on the newcomers' efforts to integrate into mainstream society to a focus on the transformation of core institutions and areas of this society.[7] Describing this development as an analytical process of decentring, i.e. of "focusing less exclusively on migrants and 'ethnic others' and more inclusively on mainstream social actors and institutions" (Nieswand 2016: 283), Boris Nieswand points to an underlying concern with the interdependency between migration and larger processes of (re)producing social order. This concern with processes of creating social order as such (now also transcending the limits of methodological nationalism) goes beyond the traditional focus of much migration and integration research (ibid.: 284). We concur with Nieswand that applying the meta-theoretical concept of 'decentring' to the field of migration and integration research is useful for achieving the kind of reflexive epistemological stance[8] that we also advocate for studying the nexus between public law, migration, and integration.

Among the strands of research that Nieswand subsumes under the concept of 'decentring', we note, however, an important absence. There are an increasing number of studies that focus on the regulation of migration by state institutions and on bureaucratic encounters between migrants and state officials[9] – thus turning the analytical gaze on state institutions. And debates on 'postmigrant' or 'superdiverse' societies have turned mainstream society into an object of investigation. However, public law – as a regulatory force that mediates between society and the state – does not play a prominent role in these studies. Empirical socio-legal studies on the regulation of migrants'

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[7] Indexed in different strands of migration and integration research by such keywords as 'postmigrant' (Foroutan 2016), 'postethnic' (Römhild 2014), or 'superdiversity' (Vertovec 2007).

[8] See also a recent edited volume by Nieswand and Drotbohm (2014) in which the authors argue for a reflexive turn in migration and integration research.

[9] According to Nieswand, many of these studies no longer ask how culturally or ethnically distinct migrants adapt to the host society, but employ Foucauldian approaches, perspectives from the sociology of knowledge, or critical analyses of power to investigate how state institutions and policies in turn define (and thereby produce) social phenomena such as 'migrants', 'diversity', and 'refugees' (Nieswand 2016: 287).

lives by administrative law, the legally structured nature of their interactions with administrative bodies, or perceptions of law and notions of belonging related to migrants' legal status or resulting from interactions with state bodies are still relatively rare. The intersection of administrative law and migration seems to have been neglected within the legal sciences and socio-legal research as well as in social science research on migration. This has contributed to a perception that legal change is a political response to public opinion in times of crisis while making invisible the everyday productive relational labour that migrants and state representatives perform on, with, and around administrative law. With the term 'relational labour' we highlight individual and collective investment in building social relations through which 'law' is negotiated, (re)produced, and potentially transformed in everyday encounters. This relational approach bridges the familiar distinction between 'law on the books' and 'law in action', or the common dichotomy of 'law *and* society', both of which imply a separation of spheres. In this, we partially follow Ewick and Silbey in their understanding of "legality as an emergent feature of social relations" (Ewick and Silbey 1998: 17), but our approach also has close similarities with a relational anthropology of the state (Thelen, Vetters and Benda-Beckmann 2014).[10] The approach we advocate for is based on a notion of transformation which empirically asks whether changes in legislation, scholarly doctrinal reasoning, jurisprudential decision-making, and legal practice occur in the course of or as the result of such relational labour, and if so, how.

2 Migration, Administrative Law, and Socio-Legal Transformation – the need for new interdisciplinary research in the German context

In the following paragraphs, we describe the understanding of socio-legal transformation that guides our research and provide an overview of the three disciplinary fields we aim to join together in an interdisciplinary research frame.

2.1 On Tracing Socio-Legal Transformation Empirically

In approaching the nexus between migration and socio-legal transformation first and foremost as an empirical question, we propose to take the legal relation between migrants and the German state as an entry point for investigating the transformative dynamics of the interactions between the involved actors. Our empirical orientation stems from a decidedly socio-legal understanding of normative change proposed as early as 1973 by Sally Falk Moore and more recently by Eckert and her collaborators (2012), who develop this in relation to the globalization of law and contexts of (transnational) legal pluralism. Moore treats law not as sharply divided from other spheres of society but as a "semi-autonomous social field". This analytical move renders socio-legal change visible and turns the investigation of socio-legal transformation across social fields into a central research problem (Moore 1973: 742). With Eckert et al. we build on the premise that "in the use of law, law transforms those who use it" while at the same time "law itself is transformed in iterative processes [of mobilization]" (Eckert et al. 2012: 1). This foregrounding of the sociality of law paves the way for empirically investigating the emergence of new legal meanings in social relations and interactions. That state actors, switching between their roles as state officials, co-villagers, neighbours, and relatives, hold an important place in the relational reproduction, negotiation, and transformation of legal meanings and are therefore an important category of persons to study, has

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[10] The term itself is loosely coined in analogy to Arlie R. Hochschild's 'emotional labour' (Hochschild 1983).

long been recognized by anthropologists, in particular with regard to postcolonial contexts of legal pluralism (Benda-Beckmann and Benda-Beckmann 1998). We transfer this insight to our field of study – the enactment of administrative law in Germany.

Hence, we are interested in the twofold effect of relational labour in specific interactional settings (social fields) shaped by German administrative law: on the one side, we ask whether and how administrative law itself is transformed; on the other side, we investigate whether and how notions of citizenship and complementary perceptions of the state under the rule of law (*Rechtsstaat*) might change among the involved actors. At the outset of this empirical endeavour, we deliberately adopt a broad understanding of the transformation of administrative law, encompassing changes in legislation and legal doctrine (*Dogmatik*), in prevailing case law, in internal administrative rules interpreting a legal act, in the actual implementation practices of public institutions, or in the perception and practices of legal mobilization of lawyers and lay persons.[11] Moreover, it encompasses changes in both procedural and substantive law. It leaves room for a variety of forces and agents that might initiate transformative dynamics and allows for the possibility of interdependencies and influences between these different legal dimensions and actors.

A similarly broad understanding applies to the conceptual pair 'citizen' *(Bürger)* and 'state under the rule of law' (*Rechtsstaat)* that is at the core of what administrative law aims to regulate, namely the legally defined relations between the individual and the state. We speak of notions or perceptions of 'citizenship' and 'state under the rule of law' to cover a range of meanings (i.e. 'citizen' and 'state' as explicitly expressed in the wording of the law or as doctrinal concepts held by legal scholars, judges, and lawyers, but also the understandings of street-level bureaucrats, migrants, and support organizations) and aim to grasp the complex interdependencies between these ideas and actual practices.

For our own empirical research on socio-legal transformation at the nexus of migration and administrative law, we formulate the following research questions based on our actor-oriented, constructivist, and relational perspective:

- How do migrants[12] who are affected by state regulation as individual and collective actors use and mobilize legal protections offered by administrative law?
- How do people who apply these laws in administrative bodies and courts consider, recognize, and integrate migrants as legal subjects?
- How do these simultaneous processes, acted out in personal encounters and webs of relations, mutually influence each other and co-constitute the concrete, context-specific

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[11] Here again, we set aside the dichotomy of 'law on the books' and 'law in action' and prefer to work with a notion of intersubjectively produced legal knowledge. This concept closely mirrors Ewick and Silbey's use of the concept of legal consciousness insofar as both professional and nonprofessional actors are recognized as legal agents participating in the production of law (Ewick and Silbey 1998: 20). We do not find it helpful to conceptually restrict legal consciousness solely to perceptions of law held by 'ordinary citizens' – as other authors do (e.g. Merry 1990) – but apply it also to bureaucrats (cf. Hertogh 2010) and legal professionals (for an inspirational study in administrative law scholarship see Hoffmann-Riem 2016).

[12] At this point, we use the collective and broad term 'migrant', fully aware of the immense range of life experiences, legal statuses (from the recently arrived asylum-seeker to a German citizen born in Germany to parents who immigrated), and socioeconomic positions that this umbrella term encompasses. Apart from flattening out differences in positionality, the term 'migrant' also glosses over a process of self-identification with the category 'migrant' that might take a lifetime or might not take place at all. Analytically taking into account this complexity and problematizing how the 'migrant' and her or his legal subjectivity is produced in processes of categorical ascription is part of our research agenda and developed in detail below.

meaning of individual legal regulations, particular administrative law doctrines, or (migration) law as such?

- What are the consequences of this social practice (i.e. interactions and negotiations about the meaning of law(s)) for German administrative law and for conceptions of 'citizenship' and of 'the rule of law' among the participating actors? Are German administrative law and its basic ordering principle of the rule of law transformed in the process, and if yes, how?

Within our more general proposal for new directions in migration research, socio-legal studies, and administrative law scholarship, these specific but nevertheless broad questions guide our attempt to empirically assess the actors and the scope and effects of transformative dynamics at the intersection of migration and administrative law. In our endeavour to answer these questions we draw on three disciplinary fields – administrative law studies, socio-legal studies, and politico-legal anthropology – that have hitherto remained fairly separate with regard to the study of migration. In the remainder of this section, we provide a brief introduction to the conceptual frameworks and debates in these disciplinary fields. We pay particular attention to the situated nature of disciplinary knowledge formations and point out concepts and debates that are particular to the German context.[13]

2.2 *The Reform Approach in Administrative Law* – (Neue) Verwaltungsrechtswissenschaft

The first disciplinary field within which we position our research is public law, specifically the study of administrative law (*Verwaltungsrechtswissenschaft*). We take recent developments in German legal scholarship, namely the so-called *Neue Verwaltungsrechtswissenschaft*, as one conceptual starting point. This approach evolved in the 1990s with the proclaimed objective of modernizing and reforming administrative law and practice. Its proponents in academia set out to develop new theoretical and methodological perspectives for the study of administrative law.[14] Relevant for our concern are three central aspects of the *Neue Verwaltungsrechtswissenschaft*: its focus on the transformation of doctrinal reasoning as captured in its core concept of reform;[15] its opening towards neighbouring disciplines; and its critical scrutiny of the state of the art of methodologies in doctrinal as well as empirical research in the field of administrative law studies.[16]

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[13] In this spirit, we include a large number of the original German legal and administrative terms. Wherever possible, we refer to publications in English, but also draw on a significant amount of research published in German. In this regard, our working paper also functions as a literature review, making debates in different disciplinary fields and language traditions available to a wider audience.

[14] For summary descriptions of this approach in English, see Voßkuhle 2007 and Eifert 2014. For a debate on the current state of the art and its achievements and blind spots see the contributions to volume 65 of the *Jahrbuch des öffentlichen Rechts der Gegenwart*, notably Eifert (2017), Schönberger (2017) and Rennert (2017).

[15] On the core notion of administrative law reform as a response to societal change see Hoffmann-Riem (1993), Hoffmann-Riem and Schmidt-Aßmann (1994) and, in a more critical vein, Möllers (2002: 23–30). Although reforming administrative law is a self-proclaimed objective of the *Neue Verwaltungsrechtswissenschaft*, relatively little thought has been given to theorizing the nature of legal transformation beyond reform that is intentionally planned and enacted by legal scholars or policymakers. Within public law scholarship a substantial and sophisticated debate exists about constitutional change (e.g. Bryde 1982; Voßkuhle 2004). By comparison, administrative law scholarship has engaged in less in-depth debate about the agents, causes, and forms of change – with the exception of a strand of literature concerned with innovation (e.g. Hoffmann-Riem and Schmidt-Aßmann 1994). A comprehensive treatment of the state of innovation research in German legal studies has recently been published by Wolfgang Hoffmann-Riem (2016a). While he develops a highly sophisticated framework for a reflexive and 'open' kind of legal scholarship that acknowledges the constructed nature of (scholarly and lay) knowledge and insists on the context-dependency of innovation, he also retains core assumptions about a controlled/controllable process of improvement also inherent in the notion of 'reform'.

[16] Some of the now-classic publications on methodology are Schmidt-Aßmann and Hoffmann-Riem (2004) and Möllers (2012, 2002, 1999). More recently, interdisciplinarity and methodology have been topics at the annual meeting of German public law professors (*Staatsrechtslehrertagung*); see Röhl (2014), von Arnauld (2014) and Kaiser (2014).

While these aspects offer themselves as potential entry points for our interdisciplinary endeavour, we are more critical of a fourth characteristic of the *Neue Verwaltungsrechtswissenschaft*, namely its orientation towards a paradigm of regulation or 'steering' (*Steuerung*) as a particular expression of more general governance theories.[17]

Eberhard Schmidt-Aßmann's *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2006 [2004] (General Administrative Law as a Systematic Ordering Idea) was a landmark publication in the reform debate, because it offered a theoretical framework for conceptualizing the forces of change and continuity in administrative law as playing out in the relationship between general administrative law (*Allgemeines Verwaltungsrecht*) and so-called 'fields of reference' (*Referenzgebiete*), i.e. fields of special administrative law (*Besonderes Verwaltungsrecht*). While general administrative law contains basic definitions of legal forms and procedural rules codified in the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*) and the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*), in sectoral laws these procedures and forms are adapted to the regulatory purpose of the particular field of reference (such as police work environmental protection, education, business regulation, social services – or immigration and naturalization). Schmidt-Aßmann describes the relationship between general and special administrative law as one of dynamic tension. One the one hand, such subfields of specialized administrative law have evolved in reaction to and in accordance with societal changes, which has the potential to lead to idiosyncratic legal developments. On the other hand, changes in special administrative law might also indicate legal innovations and thus signal a necessary adjustment in general administrative law. According to Schmidt-Aßmann, it is the task of legal scholars to tie these specialized developments and legal innovations back into the overarching system of general administrative law doctrine (*Dogmatik*). As an underlying structure, legal doctrine encompasses both the law as legal text and its interpretation by legal scholars and professionals (see also section 3.1, esp. fn 38 and 39 below). Administrative law doctrine is understood to embody the dual core principles of democracy and rule of law (*Rechtsstaatlichkeit*). These are considered fundamental to maintaining the function of administrative law: protecting individual liberties from arbitrary decisions while simultaneously enabling the state to (efficiently) fulfil tasks meant to ensure the common good (Schmidt-Aßmann 2006: vii).

Immigration law as specialized subfield of administrative law has only very recently been discovered as a fruitful topic for analysing the dynamic tension between general and specific administrative law. Moving beyond the classical *Ausländerrecht* (law on aliens), immigration law is today conceived more broadly as the sum of laws that regulate the consequences of globalization-induced mobility, and it has increasingly attracted attention as a field of reference in which the dynamics of social transformation can be observed. Recent attempts in scholarly doctrinal reasoning to systematically map and (re)order developments in the field of immigration law include Daniel Thym's monograph (2010), which adheres to a regulatory perspective in line with the *Neue Verwaltungsrechtswissenschaft* and depicts immigration law as primarily characterized by one form of state action, namely sovereign, hierarchical, and imperative state

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[17] For an early use of concept of 'steering' in administrative law scholarship see Schuppert (1993). By 1996 the concept was important enough to be a topic at the annual meeting of German public law professors (*Staatsrechtslehrertagung*); see Schmidt-Preuß (1997) and Di Fabio (1997). Renate Mayntz (2005) provided an influential contribution to the turn towards 'governance', and Gunnar Folke Schuppert further advanced the theoretical debate in a series of publications (e.g. Schuppert 2011). For a (critical) contextualization of this 'paradigm shift' in administrative law scholarship, see Treiber (2007, 2008).

action. Whereas Thym sees little scope (empirically or theoretically) for doctrinal innovation or new legally defined forms of state action in the field of immigration law and speaks instead of a consolidation of the regulative, interventionist model of administration in this subfield of administrative law, Jürgen Bast in his doctrinal study (2011) detects an innovative potential – in particular at the intersection of European and German migration and human rights law – that could have a ripple effect on longstanding doctrinal questions in general administrative law regarding the position of the individual vis-à-vis the state. To a certain degree, both authors incorporate insights from neighbouring social sciences. Another publication that draws on social science concepts is Johannes Eichenhofer's (2013) study of the legal meaning of the concept of integration in Germany's Residence Act. Less firmly anchored in the spirit of the *Neue Verwaltungsrechtswissenschaft*, but also integrating socio-legal scholarship and recent concepts from the sociology of migration is Anuscheh Farahat's (2014) doctrinal proposal for progressive inclusion as a new legal principle governing immigration law.

These recent monographs on immigration law, together with a growing body of shorter articles, indicate that within German public/administrative law scholarship there is a focus on the doctrinal (re)ordering and systematizing of immigration law (which to a lesser extent is also understood in a broader sense as integration law). While scholars note the relevance of empirical data and theoretical concepts from neighbouring disciplines, the primary aim remains that of legal systematization guided by a normative-doctrinal epistemic interest. In the field of immigration law, this normative-doctrinal interest is geared towards the question of, first, how to steer/regulate/manage migration and integration, and, second, how to achieve (gradual/progressive) inclusion.[18]

To conclude this brief survey, while the *Neue Verwaltungsrechtswissenschaft* has opened new avenues for research into the nexus between migration and administrative law, there is still ample scope to theorize and use empirical findings and research methods beyond the narrow confines of a predominantly doctrinal orientation. Moreover, it can be argued that the legal scientific concern with reform and the accompanying notion of steering/regulating, which undergird the *Neue Verwaltungsrechtswissenschaft* as well as current studies of immigration law, is both in need of a broader theoretical conceptualization about the nature and interdependence of social change and the transformation of administrative law as well as in need of empirical knowledge about the everyday workings of immigration law.

2.3 German Socio-Legal Research

Socio-legal research in Germany developed along a trajectory that has certain similarities to the US law and society movement (Wrase 2006; Machura 2012), although it differs from it in some important ways. Looking back at the recent history of socio-legal research in Germany from the particular standpoint of our research agenda, one can identify particular topics of interest and research questions that dominated the field at different times. In the formative period of legal sociology in the 1960s, a research focus on judges and legal authorities predominated (cf. Bryde 2000). Especially in the 1970s and early 1980s, a significant number of empirical studies were produced which first examined the social profile of judges and later on turned to the analysis of

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[18] New terms and legal subfields have emerged alongside the concern with inclusion; these include, for example, *Migrationsfolgenrecht*, the norms regulating the consequential effects of migration once legal status is determined, and *Integrationsfolgenrecht*, norms regulating the consequences of integration (Burgi 2016; Kluth 2016a; Thym 2016c).

judicial decision-making in different legal subfields, such as criminal, civil, or labour law (e.g. Kaupen, 1969, Opp and Peukert 1971; Lautmann [1972] 2011; Bender and Schumacher 1980; Rottleuthner 1984). Comparably few socio-legal studies were concerned with the field of administrative law (e.g. Görlitz 1975; Schütze 1978). Despite later calls for more empirical research (Voßkuhle 1994; Schuppert 2000), the actual work of administrative courts still continues to be under-researched.

In these early studies, socio-legal scholars were particularly concerned with class justice: they investigated the legal and judicial system from a realist or Marxist perspective and criticized unjust results of judicial decision-making as an expression of socioeconomic conditions (Rottleuthner 1969; Rasehorn 1969). More recent research has also focused on inequalities based on gender, race, or religion as factors that have an impact on the outcome of court decisions (i.e. Lucke 1996; Liebscher et al. 2014; Folianty and Lembke 2014). These later studies are now often influenced by a critical legal studies perspective that evolved out of the earlier legal realism in anglophone law and society research.[19]

The effects of legal regulation have been an important field of research at the intersection of legal sociology and political science. Several strands can be discerned within the umbrella term of *Rechtswirkungsforschung*: an interest in the social effectiveness of law, i.e. the level of compliance with specific laws or the general legal order (*Effektivitätsforschung*); analysis of the implementation of legislative acts (*Implementationsforschung*); and evaluation of the intended and unintended consequences of specific laws (*Gesetzesfolgenabschätzung*) (cf. Wrase 2002). This research has resonated with the call for more empirical research in the regulatory approach to administrative law favoured by the *Neue Verwaltungsrechtswissenschaften*.

In a parallel development but from a different angle, access to justice and, related to this, legal mobilization became prominent topics in German legal sociology research (Blankenburg 1995; Baer 2017: 219–235). While Marxist and realist approaches had looked mainly at structural, socioeconomic factors as barriers that could hinder people from seeking justice, a more idealist perspective emerged around the concept of 'legal consciousness' (*Rechtsbewußtsein*). Both Anglo-American socio-legal scholarship[20] and the German *Rechtssoziologie*[21] have worked with this concept to describe people's knowledge and perception of law based on their own experiences; this determines whether or not one feels that a claim is legitimate or a right exists and therefore is worth fighting for in court.

Regarding the choice of methods, an early focus on statistical analysis in studies of judges and the operation of courts soon expanded to include various forms of textual analysis (ranging from quantitative content analysis to more qualitative types of discourse analysis). Interviewing and

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[19] For an overview of critical legal studies and their reception in Germany see Frankenberg (2009); for a more narrow focus on the application of critical race theory in the German and European context, see Barskanmaz (2008) and Möschel (2014).

[20] For a classic study, see Merry (1990) and – with a broader notion of legal consciousness – Ewick and Silbey (1998); see also Silbey (2005) for a discussion of variations in the use of 'legal consciousness' as an analytical concept.

[21] In the German debate, legal consciousness (*Rechtsbewußtsein)* originally also denoted lay persons' understanding of law and was contrasted with the professional production of law, although this dichotomy was soon challenged (Bryde und Hoffmann-Riem 1988: 1, Benda-Beckmann and Benda-Beckmann 1988). Some authors, however, continued to link notions such as legal consciousness, legal knowledge, and legal ethos closely to the question of compliance or acceptance of official legal norms and focus on lay persons solely as the addressees of law (*Normadressat)* rather than producers of law (*Normproduzent)*; see for example Rehbinder (2014: 113–127).

observation also became standard techniques that were applied in the context of diverging theoretical and methodological approaches.[22]

In retrospect, it seems possible to recognize a development in the understanding of and the heuristic perspective on law in German socio-legal studies that went hand in hand with shifts in the choice of theoretical and methodological frameworks. In the heyday of legal sociology in the 1960s and 1970s, law was largely analysed in connection with the activities and mindsets of legal professionals such as judges and legal institutions such as courts. Law as state law made and applied by legal professionals was the focus of research that relied predominantly on quantitative analyses.[23] The analytical perspective then gradually shifted towards other social actors. The formation of legal consciousness among ordinary citizens and the question of how and by whom the law is mobilized became central concerns. An originally sociological framework was broadened to include cultural studies perspectives and an array of new qualitative and interpretative methods. Simultaneously, the social life of law in other institutional spaces such as the legislative and executive branches – i.e. the vast field of public administration – and supra- or transnational fields of regulation received more attention. Another shift occurred from an early interest in the socioeconomic characteristics and mindsets of individual actors or groups to a recognition of the theoretical relevance of investigating the interactions between these individuals or groups (in particular in courtroom settings, but also during the legislative process or in administrative encounters).

Despite these developments, a strong constructivist perspective that goes beyond the classic mobilization paradigm and asks how lay persons and legal professionals alike transform official law and contribute to the production of legality in the process of implementing, mobilizing, and negotiating law in interaction with other normative orders has yet to be firmly established in interdisciplinary socio-legal research in Germany.[24] Recent methodological and theoretical stimuli for a turn towards constructivist, interactionist, interpretative, and performative perspectives in contemporary socio-legal studies of courts seem to stem from at least three different research trends: firstly, a renewed interest in ethnomethodological approaches, in some cases combined with elements from science and technology studies – i.e. ethnographic microlevel studies of interactions in courtrooms and beyond;[25] secondly, a concern with law and politics in a national context – i.e. empirical studies of the politics of decision-making in courts and the consequences of court decisions for the wider legislative and political process;[26] and thirdly, the gradual recognition and acceptance of legal pluralism as a useful analytical concept which challenges a narrow state-centric

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[22] See Blankenburg (1975) for an overview of research techniques; a more recent German-language publication dedicated exclusively to socio-legal research methods remains a desideratum.

[23] Examples of this quantitative approach are Hilden (1971), Blankenburg and Fiedler (1981), Rottleuthner (1984). Lautmann's (1972) ethnographic study of judicial decision-making is an early exception.

[24] The conceptual framing of legal professionals as *Rechtsstab* (legal staff) in a Weberian tradition and the central importance that the notion of *Rechtsstab* acquired for structuring legal sociological knowledge might have contributed to this reluctance (Schulz-Schaeffer 2004: 146–149).

[25] The ethnomethodological study of law dates back to early studies in legal settings by Harold Garfinkel. His disciples have produced a steady stream of works (for overviews see Manzo 1997 and Dupret, Lynch and Berard 2015). In German legal sociology there have been some individual studies, but they do not form a coherent body of work (for an overview see Löschper 1999: 83–135). Recently, however, the ethnomethodological approach has been reinvigorated (see Scheffer 2006a, 2006b, 2010).

[26] Influenced by Alec Stone Sweet's thesis about a 'judicialization of politics' (2000), empirical studies by German scholars have focused on the German constitutional court (Krahnenpohl 2010; von Steinsdorff 2010; Wrase and Boulanger 2013).

notion of law.[27] This interest in how law is constructed and transformed beyond the formal legislative process by actors other than those formally designated as professional legal actors and who are in many ways decoupled from the nation state paves the way for reconsidering the underlying and implicitly state-centric notion of law that has shaped legal sociology for so long. It also contributes to the current rapprochement between legal sociology and legal anthropology.[28]

Although these recent conceptualizations increasingly ascribe importance to globalization as a causal factor in the transformation of socio-legal orders, analysis of how migration and migrants as social actors contribute to this transformation has not figured prominently. While there is currently a sharp rise in socio-legal studies of immigration management and immigration law, these studies predominantly adhere to an implicit methodological nationalism. They either ask how migrants themselves perceive and interact with the *German* legal order or how state officials apply immigration law in the *German* context.[29] We review this body of literature in more detail in section 3.2. At this point, it is sufficient to note that very few of these empirical studies situate themselves in the larger analytical frame of the dynamic tension between general administrative law and developments in the specific field of immigration law. And although these studies have produced valuable insights, they are not part of what has been described as the decentring move in migration research (see section 1), nor do they address the question of socio-legal transformation directly.

2.4 Legal Anthropology, Political Anthropology, and the Anthropology of the State

The third disciplinary strand of our proposed research agenda builds on a longstanding tradition of political and legal anthropology that has recently been complemented by a renewed interest in manifestations of statehood. The development of legal anthropology is almost inseparably tied to the development of the discipline of anthropology itself, whose early pioneers followed evolutionary approaches and were trained in law. Political anthropology burgeoned somewhat later, focusing on the colonial African context and working in the frame of structural functionalism in the 1940s.[30] Both subfields, however, were united by their interest in studying legal and political order, or law-like forms and forms of political organization in stateless societies.[31]

With their interest in the values, judgments, and meanings underpinning social behaviour and forms of social organization, from early on anthropologists paid attention to the 'rules' and 'norms' of all types that structure peoples' lives and social organizations in specific local contexts. With the development of the subfield of legal anthropology, approaches to 'law-like' and 'legally' structured social phenomena underwent profound transformations. Interests and debates shifted from 'law as rule' paradigms in the beginning of the 20th century towards more process-oriented approaches

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[27] This acceptance that legal pluralism is both an empirical reality and a useful analytical concept is indicated by Teubner's (2007) article "Global Bukowina", which builds its argument on the legal sociology of Eugen Ehrlich. Today, even a normative use of the concept of legal pluralism is under debate among legal scholars (Günther 2014).

[28] The Frankfurt-based research cluster "The Formation of Normative Orders" is an example of such a reorientation towards interdisciplinary socio-legal research and a renewed interest in broader notions of normativity (Forst and Günther 2010); see also Günther and Randeria (2001).

[29] With regard to migrants, Kohlhagen (2006), who applies the conceptual framework of legal pluralism, is an exception. With regard to state officials, Lahusen (2016) maps new terrain by focusing on administrative cooperation in the frame of the Common European Asylum System.

[30] For historical overviews of developments in legal anthropology, each with a slightly different emphasis on particular periods or debates, see Conley and O'Barr (1993), Donovan (2008), Moore (2001), and Pirie (2013). In the field of political anthropology, Vincent (1990) is a classical introduction; we find Thomassen (2008) particularly insightful.

[31] See Fortes and Evans-Pritchard (1940) and Kramer and Sigrist (1983) for this assumption in political anthropology. For legal anthropology see Malinowski's approach to social control and legality in *Crime and Custom in Savage Society* (1926).

focusing on 'dispute-resolution processes' as embedded in social settings and webs of relations by the 1970s.[32] Thus, two paradigms emerged, namely a normative analysis focusing on 'rules' and a processual analysis focusing on 'processes'. On the one hand, scholars were interested in networks and social relations between individuals involved in disputes as they characterized the processual nature of dispute resolution. On the other hand, they retained existing conceptualizations about 'rules and regulations' shaping social orders. During the period in which scholars focused more on the processual character of disputes, they also began paying increasing attention to institutional complexities and dispute management in 'Western' societies (Greenhouse 1986; Merry 1990; Nader 1980; see also Conley and O'Barr 1993: 56–64). With *Law and Social Change: the semiautonomous social field as an appropriate subject of study* (1973) Sally Falk Moore published an early and influential contribution to the ethnographic study of law in both so-called tribal and complex societies; this study also paved the way for conceptualizing legal pluralism.

   Starting in the 1970s the idea of 'legal pluralism' began to influence debates within the discipline of legal anthropology and by the 1990s it had become increasingly dominant (Griffiths 1986; Merry 1988; Benda-Beckmann 2002). The 'legal pluralism' approach questions the meaning of 'law' and the often-presumed exclusiveness of state-law in specific local settings, even while the scope and methodology of this approach have been subject to much debate. Following Sally Engle Merry, one can distinguish between a 'classical legal pluralism' concerned with the intersection of indigenous and European law in colonial and postcolonial societies and a 'new legal pluralism' geared towards the analysis of plural normative orders in industrialized countries of the West, where the existence of non-state normative orders was less easily discerned and recognized (Merry 1988: 872). Both strands of legal pluralism have investigated the linkages, interrelations, and interdependencies between normative orders, but whereas classical legal pluralism addressed the imposition of one (European) legal system on societies with other, often uncodified systems of law under conditions of unequal power relations, the new legal pluralism addressed and argued against an 'ideology of legal centralism' – i.e. the notion that state law is the only form of legal order.

   Legal anthropologists applied legal pluralism as an analytical concept and insisted on understanding law in its emic terms, following a less etatist perspective, whereas legal sociologists were and are more inclined to regard state law as the given legal order and focus their research on how this normative order is enacted (Benda-Beckmann 2002, 2007, 2008). With the confluence of classical and new legal pluralism anthropologists increasingly turned towards the analysis of "the dialectic, mutually constitutive relation between state law and other normative orders" (Merry 1988: 880) and developed a host of ancillary concepts to describe and conceptualize these interdependencies: Keebet von Benda-Beckmann's notion of 'forum shopping' (Benda-Beckmann 1981) provided a conceptual tool to understand how local dispute processes contribute to the transformation of normative orders in legally plural situations. Boaventura de Sousa Santos coined the term 'interlegality' as the phenomenological counterpart to legal pluralism to describe the interaction and intersection of legal spaces and scales (Santos 1987). With regard to globally generated ideas of human rights that are locally appropriated and adapted by various state and non-

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[32] Thus, for example, rule-based approaches to 'law' analysed these phenomena on a more abstract level, regarding 'law' as an instrument of power and control (e.g. Radcliffe-Brown 1965). However, the increasing interest in the processual character of 'law' shifted the focus towards social relations and processes of dispute settlements rather than norms and institutions (e.g. Bohannan 1989; Nader and Todd 1978). From the beginning, legal anthropologists have disagreed about the application of 'Western' legal categorizations in non-Western contexts, and in this context frequently revisited the famous Gluckman-Bohannan debate of the 1950s (Donovan 2008: 164–167).

state actors, Peggy Levitt and Sally Engle Merry (2009) speak of 'vernacularization'. Most recently and in the context of debates about legal pluralism, juridification, and globalization, Eckert et al. (2012) have asked how law travels to new contexts and how different cultures of legality are employed as 'law against the state' by marginalized people in various parts of the world.

Political anthropology as a distinct disciplinary subfield underwent similar paradigm shifts in the post-WWII era – broadly speaking from functionalist to structuralist to Marxist approaches. After this classical period another shift occurred to interpretative perspectives and various forms of poststructuralist reasoning starting in the 1980s. This went hand in hand with a transformation from a largely stateless anthropology to an anthropology in, and later of, modern nation states (Thomassen 2008: 267). Alongside this development, an increasing number of ethnographic studies of inter- and supranational organizations were produced (e.g. Bellier and Wilson 2000; Niezen and Sapignoli 2017).

As Anthony Marcus (2008: 64) argues, a flourishing interest in 'the state' as the explicit object of ethnographic study and anthropological theorizing emerged in the post-Cold War era. Partially inspired by and alongside Akhil Gupta's article on corruption and images of the state in the Indian postcolonial context (Gupta 1995), there was a proliferation of ethnographic studies that described 'the state' as diffuse, fractured, and socially produced and imagined (Herzfeld 1992; Taussig 1992; Nugent 1994; Hansen and Stepputat 2001; Aretxaga 2003; Das and Poole 2004). Under conditions of increasingly asymmetrical global relations and the circulation and translation of state images in an environment of globally and locally intertwined contexts, so-called 'state effects' also became a major topic of interest in anthropology (Trouillot 2001). In the first major introduction to the 'anthropology of the state', Sharma and Gupta consolidated this new, predominantly postcolonial ethnography of the state into an approach that aimed at investigating the everyday practices and representations of the state in order to understand its cultural constitution (Sharma and Gupta 2006: 11–20). Though the tendency to emphasize the culturally constructed nature of specific state images (and to a lesser extent practices) that this approach induced has recently been criticized on a number of grounds (Marcus 2008; Bierschenk and de Sardan 2014; Thelen, Vetters and Benda-Beckmann 2014), the interest in ethnographically studying the state has continued to flourish and has also been picked up by anthropologists working outside an immediate postcolonial context.

These anthropologists have argued for an 'anthropology of the contemporary' (Rabinow et al. 2008) or a 'symmetrical anthropology' (Latour 2007, 2009) which turns its gaze to core 'modern' institutions of the West. But while ethnographic studies of bureaucratic and institutional settings of nation states and the European Union exist in large numbers, how law works in and through these institutions is much less understood.[33] This gap is not surprising, given – as mentioned before – that legal anthropology was initially concerned with questioning the effectiveness and dominance of state law in different social and local settings. Especially in conversations with legal sociologists, legal anthropologists found themselves arguing against the dominant conceptual framework of state law and for the recognition of other normative orders. The study of how law constitutes and permeates modern state institutions was not a core interest on their agenda and it is only now – when legal pluralism has gained currency with legal scholars and the study of

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[33] Bruno Latour's study of the French Conseil d'Etat (2009) stands out in this regard. In addition, a recently published volume edited by Didier Fassin and collaborators (2015) collects analyses of the 'state' and 'bureaucracies' in situative encounters, with several contributors focusing on judicial institutions.

bureaucratic institutions has been established in anthropology – that the anthropology of the state and legal anthropology are beginning to draw closer to each other once again.

This lack of attention to public law is even more pronounced with regard to migration. While there is a large and diverse field of anthropological migration research focusing on Germany, hitherto only a few anthropological studies exist that are explicitly concerned with migrants and the German court system (e.g. Schiffauer 1995; Caglar 2002). Although research on interactions between migrants and different administrative bodies has been conducted (e.g. Scheffer 2001; Arbeitskreis Ethnologie und Migration 2011; Nieswand 2014; Eule 2014), there have been no all-encompassing ethnographic studies of administrative justice. The nexus between migration and public law that has been most thoroughly addressed by anthropologists is the concept of citizenship.[34] We discuss this practice-oriented, anthropological approach to citizenship in more detail below; here we limit ourselves to noting a certain parallelism between these citizenship studies and the new ethnography of the state that investigates the state from the margins (Das and Pole 2004) or looks at 'state effects' (Trouillot 2001) outside formal state structures. While these studies have significantly advanced our understanding of citizenship in times of globalization, we nevertheless argue for paying close attention to the nitty-gritty details of procedural and substantive legal regulation. Administrative law works as a regulatory force on and through individual and collective actors; it shapes social realities and is negotiated in social interactions in and around state institutions (such as immigration, registry, or welfare offices and administrative courts). This makes it, in our view, a central dimension for understanding citizenship and perceptions of statehood.

3 Composite Heuristic Concepts: central parameters for an integrated interdisciplinary research approach

This outline of the epistemic orientations and theoretical debates across time in these three disciplinary fields has served to identify gaps in research on public law and migration, but also highlights the bounded nature of knowledge formation in these disciplines. The question of migration-induced transformation of the socio-legal order cuts across established knowledge formations, and we have seen that existing disciplinary frameworks exhibit difficulties in theoretically and empirically addressing the interplay of migration, administrative law, and socio-legal transformation. In the following section, we propose recombining these disciplinary frameworks in such a way as to reset the focus squarely on the nexus between administrative law, migration, and social transformation. We begin this interdisciplinary endeavour by outlining our understanding of theory-building and its relation to empirical research on the one hand and doctrinal reasoning on the other. Based on this understanding, we then suggest working with composite heuristic concepts as a means of integrating different disciplinary perspectives, and finally we demonstrate this approach using the four composite heuristic concepts we developed for our research questions.

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[34] For an overview see Caglar (2015); for more details see section 3.2.

3.1 Theory-Building, Doctrinal Reasoning, and Empirical Socio-Legal Research

We follow Herbert Kalthoff (2008), who – writing on the dialectics of qualitative empirical research and sociological theory-building – has described two perspectives on the nature and function of theory in social science research. One understanding of theory starts at the highly aggregated level of social theories.[35] Such theories contain a body of assumptions on the social as a totality and these assumptions then guide the empirical research process, i.e. the formulation of research questions, as well as the selection of research subjects, units of analysis, and research methods. Based on the research findings, these assumptions are confirmed or challenged and accordingly modified and refined. Another understanding of theory, more frequently found in qualitative empirical research of an interpretative and social constructivist vein, perceives social theories as the result of concepts that emerge from empirical data. In these theories, which are frequently characterized as middle-range theories, much work is invested in the development and refinement of concepts that explain a particular aspect of social reality rather than 'the social' or the working of 'society as a whole'.[36]

While we acknowledge the usefulness of aggregated social theory, our ethnographic approach falls within the latter category of middle-range theory-building.[37] Theoretical concepts (such as governmentality, habitus, hegemony, or – to draw on concepts that have been imported into administrative law scholarship – cooperation, accountability, network, governance) therefore have a value as heuristic devices and we selectively draw on them in the formulation of our own composite heuristic concepts. Yet we accord primacy to the empirical investigation of the interpretations and meanings that actors in the field put forward in the course of their social practices. For this reason, when developing our own conceptual framework we also rely heavily on conceptualizations of individual and collective agency, the nature of the state, and individual subjectivity/citizenship that have emerged from earlier ethnographic and micro-sociological studies.

When we turn to German legal studies (*Rechtswissenschaften*), this picture needs to be complicated on yet another level: here the key relation structuring disciplinary knowledge formation is not the one between theory and empirical research, but rather between legal theory and legal practice (Scherzberg 2008). In public law scholarship (*Wissenschaft vom öffentlichen Recht*), doctrinal reasoning has traditionally held a central position as an activity that bridges theory-

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[35] Examples of such social theories include: system theory or critical (neo-)Marxist theory as structuralist theories; Bourdieu's practice theory and Giddens's structuration theory as process- and practice-oriented theories; and Foucault's notion of governmentality as a poststructuralist theory. Another example, particular to the German context and already partially incorporated into the science of administrative law, is the so-called actor-oriented institutionalism (*akteurszentrierter Institutionalismus*) developed by Renate Mayntz and Fritz W. Scharpf (1995).

[36] Arguably, researchers adhering to this understanding of theory do not enter empirical research free of all theoretical assumptions or (more or less explicitly articulated) sympathies for one or the other abstract social theory of the first kind. The two modes of theory-building are therefore not to be understood as mutually exclusive but rather as indicating a preference for epistemologically privileging either the observation of social practice or the construction of comprehensive explanatory models.

[37] See Merton (1957) for an early elaboration of middle-range theory-building.

building, legal research, and practice,[38] though the scientific nature of doctrinal scholarship has recently come under increased scrutiny. In this context, scholars debate what functions (description, systematization, explanation, reflection, or critique) legal scholarship should fulfil, the relation between doctrinal reasoning and legal theory, and whether and to what degree it is possible to import bodies of knowledge from other disciplines into doctrinal reasoning in a theoretically informed manner.[39] In particular, authors who identify with the *Neue Verwaltungsrechtswissenschaft* have followed the last line of enquiry and – in a reformist spirit – developed an increasingly sophisticated understanding of how to incorporate 'extrajuridical knowledge' into doctrinal reasoning.[40]

Diverging from a strong version of legal positivism which relegates empirically observable social realities to a sphere outside legal scholarship, scholars connected with the *Neue Verwaltungsrechtswissenschaft* have advocated working with so-called key or bridging concepts as a way to introduce 'extrajuridical knowledge' into legal scientific reasoning and theory-building (Schuppert 1999; Voßkuhle 2001; Baer 2004; Kaiser 2013). 'Extrajuridical knowledge' here often refers to expert knowledge from the realm of natural sciences or concepts from the social sciences. However, the primary aim when using such bridging concepts is still to test their suitability for doctrinal arguments and legal systematization. Many of the terms that have been discussed as bridging concepts – such as 'cooperation', 'accountability', 'network', 'steering' (*Steuerung*), or 'governance' – are not part of the classic repertoire of doctrinal scholarship but rather new terms taken over from neighbouring disciplines with the more or less explicit aim of establishing them as individual doctrinal concepts or strengthening a complex doctrinal systematization.[41] In a critical appraisal of the use of such bridging concepts by proponents of the *Neue Verwaltungsrechtswissenschaft,* Christoph Möllers pointed out that the concepts that have been imported most successfully are in fact not the result of empirical research, but were extracted from larger holistic social theory instead (Möllers 2002: 38–40). This has often gone hand in hand with a rather fuzzy understanding of empirical knowledge (*Empirie*) – ranging from primary data collected with empirical methods to the findings of empirical research or the simple designation of extra-legal 'facts' as *Empirie* (Möllers 2002: 40–42).[42]

With our commitment to interdisciplinary study of the transformative dynamics of migration on German administrative law that takes doctrinal reasoning and its practical effects seriously, we find the notion of bridging concepts helpful. However, rather than searching for meta-rules that guide

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[38] See von Bogdandy (2009) for the central place of doctrinal reasoning in German constitutional law scholarship and Schmidt-Aßmann (2013) for its role in administrative law scholarship. Doctrinal reasoning (*Dogmatik)* can be defined as the development of individual normative institutions and complex normative orders on the basis of positive law without being dependent on the existence of a particular legal definition or rule (Brohm 1971: 246); this is taken up in similar terms by later authors such as Möllers (2012: 156), Waldhoff (2012) and Eifert (2014: 214). Following this understanding, doctrinal reasoning has the task of ordering, systematizing, and refining a field of law such as administrative or public law in its entirety. Both legal scholars and judges participate in this task. Whereas the latter are bound by the necessity of deciding on concrete cases, legal scholars can take a more distanced position and dedicate themselves to issues not addressed in the courts, as well as considering the overall coherence of the legal system.

[39] See Jestaedt (2008) and the individual contributions to Kirchhof, Magen, and Schneider (2012).

[40] For an introduction to the debate, see the contributions in Augsberg (2013).

[41] But see Eifert (2014: 213–214), who speaks of such bridging concepts formulated by the regulatory approach of the *Neue Verwaltungsrechtswissenschaft* as heuristic instruments rather than building blocks for doctrinal systematization. Nonetheless, he acknowledges the tension this creates within a discipline that has built its identity on doctrinal work (ibid.: 214). Schönberger (2017) and Treiber (2017) are more critical and speak of bridging concepts as merely having a metaphorical function.

[42] See also Schönberger's (2017) analogous critique of the *Neue Verwaltungsrechtswissenschaft* as being ambiguous about its nature as a scientific or a reform-oriented enterprise and as lacking clarity on its underlying philosophy of science.

the incorporation of extrajuridical knowledge under new bridging concepts into doctrinal reasoning, we make use of such bridging concepts in a reverse manner: as a form of middle-range theory-building, we construct composite analytical key concepts by juxtaposing doctrinal ideas with middle-range concepts that have emerged from previous qualitative/ethnographic research. As heuristic devices, these composite concepts guide our own empirical research and consistently challenge us to rethink and probe the construction and uses of doctrinal concepts in legal practice and scholarship. As a result, doctrinal reasoning with its inbuilt linkage of legal practice and legal scholarship becomes itself an object of sociological/anthropological investigation in the sense proposed by Schulz-Schaeffer (2004). Schulz-Schaeffer convincingly argued that because doctrinal reasoning plays an integral part in constituting the social reality of law, this activity should not be disregarded by legal sociologists, but rather be made into an object of sociological study. By consistently looking at doctrinal concepts from administrative law scholarship and judicial practice and juxtaposing these with middle-range concepts that have emerged out of ethnographic research, we generate a theoretical dialogue which is productive precisely because it disrupts accepted knowledge and allows for, or even calls for, a change of perspective on both sides. In sum, we engage in a repeated exchange between theoretical, doctrinal, and empirical perspectives in order to overcome the established division of work between doctrinal legal scholarship and empirical legal sociology. We now demonstrate how we arrived at the four composite heuristic concepts that are central to our research questions.

3.2 Graduated Citizenship

Our first concept – 'graduated citizenship' – aims to analytically grasp and open up to empirical investigation the diversity of legal statuses vis-à-vis the German state that is obscured by both the umbrella term 'migrant' in immigration law and the generic use of the term 'citizen' in general administrative law.[43] The lived realities and experiences with the German state of a recently arrived asylum seeker, a third-country national married to a German, a European Union citizen studying or working in Germany, a person with dual citizenship, or a person born in Germany with a German passport but of non-German parents might differ vastly but are nevertheless grounded in graduated sets of rights accorded by immigration and naturalization laws.[44] Despite this internal diversity, a migrant's position vis-à-vis the German state is thus – at least initially – characterized by a divergence from the secure and temporally stable basic legal position of the 'citizen' that administrative law envisions as its addressee. Migrants are likely to encounter their host state from an initially insecure and temporally shifting legal position with specific – once again varying – options for gradually consolidating their legal position over time. It is this dimension we hope to capture with the notion of graduated citizenship. It analytically highlights the idea that a process of

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[43] 'Graduated citizenship' is used in the literature on citizenship (cf. Migdal 2006) alongside a range of other terms (such as 'stratified citizenship'/'civic stratification', cf. Kofmann 2002, Morris 2002) or 'flexible citizenship'/'graduated sovereignties' (cf. Ong 1999), which also denote a fragmentation of legal status or a growing mismatch between different dimensions of citizenship (membership, rights, obligations and participation) that map out differentially for varying categories of persons. We develop our conceptualization in dialogue with these concepts.

[44] While refugees currently hold a central place in public perception of and debates about migration, statistics offer a more nuanced picture: In 2015 9.1 million foreigners were registered in Germany, the majority of whom were citizens of EU member states (4,013,179 persons) and of EU candidate countries (1,987,701 persons). Of the total registered third-country foreigners, 2,482,022 persons held a permanent residence permit (*Niederlassungserlaubnis*). The degree to which migration has shaped German society becomes even more visible if one applies the German Federal Statistical Agency's definition of *Migrationshintergrund* ('migrant background', i.e. referring to people born without German citizenship or born to at least one parent without German citizenship): 21.0% per cent of German residents fell within this category in 2015 (see Statistisches Bundesamt 2016, 2017).

gradation in legal status takes place along multiple lines of administrative categories/markers of difference and increasingly fragments migrants' access to rights according to their different status groups.

In German legal theory, citizenship has traditionally been understood as linking full legal status to nationality, i.e. belonging to a nation state.[45] The German constitution adheres to such an understanding when it distinguishes between 'citizens' rights' (the so-called *Deutschenrechte)* and everybody's rights (*Jedermannsrechte*), and legal scholars such as Kay Hailbronner have consistently argued against proposals that call on fundamental human rights as a reason to extend the legal position/subjective rights of foreigners (e.g. Hailbronner 1983). With the introduction of European Union citizenship, the reform of German naturalization laws in the year 2000, and the diversification of legally recognized purposes of residence in immigration laws over the last several decades, this understanding of citizenship has come under increased scrutiny (Siehr 2001; Schönberger 2005). Legal scholars are now developing doctrinal arguments for progressive inclusion (Farahat 2014) and new forms of denizenship[46] (Bast 2013) and considering a decoupling of rights that are conjoined in full citizenship status (Walter 2013). Rather than focusing on the element of citizenship that foregrounds formal belonging to a national community (*Staatsangehörigkeit)*, such conceptualizations foreground citizenship as defining the material legal status of the individual vis-à-vis the state *(Bürgerstatus)*. Central to this line of reasoning is Georg Jellinek's doctrinal systematization of various status dimensions and the ensuing subjective rights vis-à-vis the state,[47] which holds a foundational place in constitutional doctrine (Walter 2013: 16). Almost as frequent are references to social science conceptualizations of citizenship that hark back to T.H. Marshall's (1950) classic distinction between civil, political, and social citizenship rights.[48]

Disaggregating the different sets of rights traditionally bundled together in full citizenship (understood as equivalent to nationality) allows us to examine the specific rights that immigration law grants to migrants as sets of rights that are graduated both along the dimensions of civic, political, and social rights as well as along the status dimensions systematized by Jellinek. Such rights include the freedom of movement and choice of place of residence within Germany, the right to family reunification, freedom of choosing an economic activity, access to social benefits or other state services (such as language and integration courses), and rights of political participation, but also procedural rights. Most recently, Markus Krajewski (2016) has provided an overview of basic status categories (citizen, EU citizen, third-country national) in immigration law and – by using the example of restrictions on the choice of residence – has shown that there are significant further differentiations and temporal gradations of rights and obligations within these categories.[49] In line with much of recent immigration law scholarship, he explores how far these graduated sets of

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[45] This link was particularly strong as long as German citizenship legislation was based on the principle of *ius sanguinis* (Kokott 2014: Art. 16 GG Rn 2).

[46] Denizenship refers to the resident non-citizen and the (increasing) bundle of rights he or she can activate on the basis of residence rather than on the basis of citizenship.

[47] Jellinek (2011 [1905]) distinguishes between a *status negativus* (freedom from state interference), a *status positivus* (the right to state services/provisions), and a *status activus* (participation in public affairs); see also Masing (2012) for later modifications of this typology.

[48] Marshall's systematization has also been amended and the historical sequence of the model has been challenged: see Turner (1993: 7–14).

[49] Other examples of such differentiations – currently the subject of much debate following recent legislative changes – within the status group of asylum seekers are: rights and obligations connected to the status of subsidiary protection or dependent upon the migrant's prospects of remaining in Germany (*Bleibeperspektive*). Access to the labour market is a prime example of differentiated rights across basic status groups which also exemplifies the temporally defined nature of specific sets of rights.

rights and obligations contribute to achieving immigration law's overarching goal of steering/regulating migration and integration as envisioned by the German state (ibid.).

With our concept of graduated citizenship we partially move away from this state-centric, regulatory perspective and incorporate social science debates on transnational citizenship as a social practice.[50] Breaking with the evolutionary perspective and methodological nationalism inherent in Marshall's study, Nina Glick-Schiller and her colleagues, for example, introduced the concept of 'transborder citizenship' based on an alternative understanding of migrant's life-worlds as *transnational social fields* (Glick-Schiller, Basch and Blanc-Szanton 1997; Glick-Schiller 2005). This concept is of interest for this study, since it recognizes the possibility of membership in more than one political community. Instead of focusing on push- and pull factors between country of origin and host country, this approach analytically foregrounds the transnational networks and fields that emerge through social practices and foster new identities and forms of transnational citizenship.[51] Moreover, the concept also captures the possibility of fragmentation of citizenship, with migrants often claiming (some of) their rights and maintaining membership in two or more countries. Access to citizenship in one state might vary depending on the status admitted by the legal system of the host state, but migrants might also claim rights independently of this citizenship status and instead refer to transnational legal and political norms (Yalçın-Heckmann 2011). Thus, despite being accorded a specific formal legal status by the host country, migrants might claim rights on different levels with reference to different types of rights, legal scales and jurisdictions, and non-state (religious, customary) normative orders. These claims might have the potential to challenge given categorizations anchored in German administrative law and the accompanying doctrinal systematizations.

Both doctrinal legal thought and early citizenship theorists such as Marshall understood citizenship to be a status (Jellinek 2011 [1905]; Marshall 1950: 28–29). However, citizenship studies in the social sciences and particularly in sociocultural anthropology have since moved away from this static understanding and emphasized the practice of citizenship. In conceptualizations of 'citizenship as enactment' and 'acts of citizenship' (Isin and Nielsen 2008; Caglar 2016) citizenship is understood as a practice of claiming citizenship rights regardless of formal legal status. These studies examine when and how modes of claim-making depend on one's specific sets of procedural and substantive rights and how different amounts of bargaining power lead to disenfranchisement and/or juridification. They focus on an analysis of citizenship within ruptures of a given system and the moments in which subjects constitute themselves as claimants of their rights and thus as *citizens* (independent of, despite, or outside of their formal legal status).[52]

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[50] On the side of administrative law scholarship, Daniel Thym (2016c) has recently identified a 'sedentary bias' as an underlying pattern of thought in German public law. However, having detected such a guiding idea, he nevertheless argues against reconceptualizing structural principles, ordering ideas, and doctrinal concepts. Instead he proposes incorporating insights from a transnational perspective into the existing legal infrastructure (ibid.: 172–173). However, this approach, which he applies to the field of social law, has the somewhat puzzling result of reinforcing an exclusive understanding of belonging to German society and reproducing a binary division between country of origin and host country. His use of insights from social science literature to support a normative argument thus differs from the methodological proposal we made in section 3.1.

[51] Other factors, such as class, that restrict or facilitate mobility and the capacity to form transnational social fields, are pushed into the background in this analytical framework, and this has rightly been criticized.

[52] This focus also captures constellations where people formally possess citizenship rights, yet still face diverse forms of discrimination that trigger acts of citizenship within or outside the formal legal framework. For an example in the framework of national citizenship, see Herzfeld (1992); for acts of citizenship in Germany by Romanian Roma holding European Union citizenship, see Caglar (2016).

In line with our approach of making empirically observable social practices the starting point for middle-range theory-building, we incorporate this understanding in our concept of 'graduated citizenship'. Thus, we apply a relational, interactionist perspective that focuses on legal, political, and social struggles and contestations and processes of negotiation brought about by actors who do not necessarily act in the frame of formal citizenship status granted to them by a given jurisdiction. In that sense, people who are 'excluded' or at the margins of a socio-legal order are of special analytical interest, assuming that alterity is a crucial factor for triggering struggles for citizenship, claim-making, and the production of subjectivity (Caglar 2016; Isin and Nielsen 2008; Isin and Saward 2013). For both recently arrived and long-settled migrants, graduated citizenship thus denotes a material status as well as a social practice of citizenship that is shaped by their specific legal position vis-à-vis the German state.

As helpful as the above-described relational and practice-oriented perspectives are in directing analytical attention to a wide, empirically observable array of citizenship claims and self-perceptions of legal status on the side of migrants, they have nevertheless sometimes neglected to seriously engage with the function and workings of administrative law in the relevant national contexts. They tend to implicitly focus on migrants' social practices and fail to conceptualize administrative practice as a specific type of social practice formalized/regulated by administrative law. To avoid this pitfall, another recursive loop back to administrative law scholarship – in our case in the German context – is necessary.

Both external and internal administrative activity, as well as the ensuing procedural and substantive legal consequences (*Rechtsfolgen*), are regulated in administrative law and thereby become amenable to juridical control. Typically, it is the administrative act (*Verwaltungsakt*)[53] that gives legal form to state actions. It is the central mode of action in a doctrine of modes of action (*Handlungsformenlehre*) that ties each mode of state action to specific legal consequences and forms of juridical control (Hoffmann-Riem 2012). According to the underlying logic, the function of the *Verwaltungsakt* and other legally regulated modes of state action is to rationalize state-citizen relations in such a way as to enable state action for the general public good (*Gemeinwohl*) while simultaneously providing legal protection to the individual citizen.[54]

Though this conceptualization of the 'administrative act' starts from a perspective diametrically opposed to that of anthropological citizenship studies, namely the normative aim to regulate state-citizen interactions, it nevertheless provides important and hitherto neglected points of entry for practice-oriented empirical research that takes the effects of administrative law seriously. The notion of administrative discretion is one such entry point; another is the interplay between different normative sources, such as constitutional principles, parliamentary laws, executive rules, or forms such as the externally oriented individual administrative act and internal administrative directives that seek to interpret and concretize the application of laws for the administrative personnel. It is essential to carefully consider the legally determined and doctrinally developed

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[53] Legally defined as "any order, decision, or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect" (§ 35 VwVfG in the official translation, see https://germanlawarchive.iuscomp.org/?p=289, see also Schröder 2012: 55).

[54] The classic understanding of the *Verwaltungsakt* presupposed a subordinate position of the individual vis-à-vis the state. In the wake of reform debates of the *Neue Verwaltungsrechtswissenschaft*, the *Verwaltungsakt* as core legal form has also come under scrutiny, and other legal modes of action, such as the administrative contract (*Verwaltungsvertrag*), have gained doctrinal weight. The *Verwaltungsakt* has nevertheless remained a central instrument of administrative law (Schoch 1994; Hoffmann-Riem 2012).

systematic nature of such elements that structure administrative practice.[55] A solid knowledge of the modes of action and legal consequences as well as the scope for flexibility within this legal system makes it possible to arrive at a more nuanced understanding of how the 'migrant-citizen' is produced in administrative interactions. We surmise that graduated citizenship is produced in this interplay between legal status as defined by immigration laws, the scope for autonomous concretization of norms by the executive, the specificities of legally regulated administrative modes of action, and non-regulated administrative practices. Such forms of graduated citizenship, in which legal positions are highly fragmented, temporally unstable, and to a substantial degree shaped/produced by discretion can no longer be described (either in theoretical or in doctrinal terms) with the classic image of the state-citizen relation presupposed by administrative law scholarship.[56]

Administrative law not only provides a structured system of modes of state action but has also, in conjunction with constitutional law, developed a sophisticated conceptualization of individual rights to be defended from state interference. This conceptualization hinges on the legal concept of 'subjective rights' (*subjektive Rechte*). The relation between individual subjective rights on the one hand and state action on the other hand is at the heart of administrative law and of great concern to doctrinal scholarship. Subjective rights grant citizens the freedom to pursue their individual interests; they are also the prerequisite for the state to address its citizens as individual legal entities and in turn function as the basis for activating juridical control of state action. In our second composite heuristic concept we therefore juxtapose this legal concept of subjective rights with sociological and anthropological conceptualizations of subject formation.

3.3 Legal Subjectivity

Legal subjectivity, as used here, denotes the formation and self-perception of a person as a legal subject and this person's capacity to mobilize administrative law in order to protect or further what is perceived as his or her legitimate interests. Our theoretical inspirations for this composite concept once again range from legal theory and doctrinal reasoning to social science approaches. As in the previous section, we compare these two disciplinary perspectives. We prefer the concept of legal subjectivity to the notion of legal consciousness because it accentuates not only how legal knowledge is formed, but also how legal personhood emerges in the process (Coutin 2003: 51–55). Though the legal subjectivities formed by migrants in the course of their interactions with various legal orders and actors are at the core of our interest, such subjectivities cannot be fully understood without also taking into account the legal subjectivities that other participants (such as state officials, lawyers, and judges) bring to these interactions. Accordingly, these are also included in the empirical investigation. As a heuristic concept for understanding migrants as legal actors, legal subjectivity builds on graduated citizenship insofar as we surmise that the fragmented nature of

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[55] German administrative law has its own fine-grained doctrinal systematization of discretion which differs from the broad notion of discretion in Anglo-American contexts (see section 3.4). Similarly, there is an elaborate doctrine of a hierarchy of normative sources that distinguishes between different types of norms according to the norm-making authority, the scope of application (general or individual case), and whether the norm is intended to have internal or external effects (Sauerland 2005; Saurer 2006). As in the case of discretion, this systematization is tied to varying degrees of judicial control. An understanding of the practical effects of this doctrinal systematization is once again imperative for studying interactions around administrative justice disputes.

[56] Maurer (2011: 175) and Schmidt-Aßmann (2006: 12–16) are – among many others – representative of this understanding of the state-citizen relation.

legal status has consequences for how migrants position themselves vis-à-vis the state and how they claim rights.

The autonomous individual as a bearer of rights and obligations forms a cornerstone of legal theory and is seen as a necessary precondition for participating in the legal system as a legal subject. It is therefore taken as given, because without it, persons do not exist as legal actors (Röhl and Röhl 2008: 356–405). The notion of the autonomous individual, which has its roots in private law, is also deeply ingrained in public and in particular in administrative law, where the doctrine of rights *ad personam*/subjective rights (*subjektive öffentliche Rechte)* constitutes the foundation of a system of legal protections.[57] According to the doctrine of subjective rights, proceedings against administrative acts can only be initiated if it can be demonstrated that a legitimate individual interest has been violated. Tying the success of administrative court actions to individual affectedness[58] decouples protection against state acts from citizenship status prima facie, as it extends legal protection to every person subjectively affected by those state actions. However, it is not always easy to determine whether a subjective right (beyond the objective binding force of law on any state action) can be established. What counts as individual interest is defined by the legislator (who explicitly creates a basis for subjective claims in each piece of sub-constitutional legislation) or defined by the courts (in the course of disputes and by way of interpretation according to the theory of protective norms (*Schutznormtheorie*)). A frequently quoted definition of subjective rights – the legal power granted to an individual by virtue of public law to demand a certain action (acting, tolerating, or refraining from action) from state authorities in order to realize personal goals (Maurer 2011: 173) – highlights that subjective rights only exist to the degree that they have been conceded by public law. In the case of migrants who have not yet obtained German citizenship, their subjective rights and possibilities to initiate legal proceedings against state action are thus circumscribed by the provisions of immigration law.[59] This link between subjective rights and the right to instigate legal proceedings, i.e. legal standing *(Klagebefugnis)* as well as determination of the merits of the claim (*Begründetheit*), which orients control by administrative courts towards individual rights, makes the administrative dispute process a particularly interesting site for a sociological/anthropological investigation of the legal subject.

In contrast to the position taken in legal doctrine, in the social sciences the legal subject is largely regarded as socially constructed and the term 'subjectivity' denotes this quality of the formation of

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[57]Constitutionally guaranteed by Art. 19(4) GG and procedural provisions in §§ 40 et seq. VwGO; see Voßkuhle and Kaiser (2009), Masing (2012).

[58] Procedurally, subjective rights have a twofold meaning: Firstly, according to § 42(2) VwGO, a suit against administrative acts is admissible only if the applicant claims to have experienced an infringement of a subjective right (this requirement applies to the types of suits listed in § 42(1) VwGO and – by analogy – to suits for performance (*Allgemeine Leistungsklage*). This so-called *locus standi* or right to instigate legal proceedings (*Klagebefugnis*) requires that the claimed infringement seems plausible. Secondly, subjective rights are crucial for determining the merits of the claim (*Begründetheit*), because according to § 113(1) VwGO the administrative action must in fact infringe the claimed right.

[59] Though constitutional fundamental rights are subjective rights in the most basic legal sense (Masing 2012: 426, 442), the scope and content of subjective rights is largely specified by sub-constitutional administrative laws, and recourse can only be made to fundamental rights if the legal position of an individual is not clear according to the specific law the administrative legal process is based on. Groß (2014: 432–436) argues that both the German Federal Court and the Federal Administrative Court have been reluctant to recognize fundamental rights positions of foreigners.

a sense of the self in interaction with the environment.[60] We draw on such sociological understandings of subjectivity to assess how and to what extent interactions in the course of administrative disputes shape migrants' understandings of their rights and their capacities to mobilize rights vis-à-vis the German state.[61]

As we showed in the previous section, the legal statuses that migrants are granted are diverse and connected to a host of fragmenting and stratifying restrictions. Migrants' capacity to take an active role in legal situations and settings is determined to a large degree by their legal status. We therefore consider their 'legal subjectivity' to be produced within and around specific legal conflict situations. The legal subject that eventually emerges out of the specific conflict situation defines the possibilities that a migrant has as a claimant at a certain point in his or her life. It defines migrants' possible actions and duties and therefore also their possibilities for enforcing their rights in a specific conflict situation as well as in the future.

A number of sociological and anthropological research articles have recently addressed the question of legal subjectivity with regard to asylum seekers' confrontation with the legal order of the receiving countries. Sophie Arndt (2015) takes the formal legal conception of the autonomous individual as a starting point and complements it with a blend of critical, Foucauldian, and interactional constructivist approaches. Based on observations of court hearings, she finds that asylum seekers are defined as autonomous claimants according to the procedural logic of administrative law. In practice, however, representing themselves or being represented as victims and disempowered subjects often increases the chances that their need for protection will be rated credible and therefore also the probability that they will be granted asylum or refugee status. Arndt concludes that, paradoxically, self-disempowerment becomes a viable strategy for asylum seekers to enforce their subjective rights in the legal conflict situation in court.

From a Marxist perspective, Simon Behrmann (2014) also points to the reduction of autonomy and power to act that accompanies the construction of refugees and asylum seekers as legal subjects. Refugees and asylum seekers have to act as legal subjects and to develop a legal subjectivity; at the same time, they are not allowed to act as political subjects. Because refugees must claim their legal status as refugees, they are given the responsibilities of the law without the benefits that accrue to those who are also able to engage in (re)negotiating the terms of their subjectivity through politics, economic activity, etc. Therefore, they do not exist in a space of political subjectivity that would allow them to be active political subjects who are able to influence political processes. Instead they have been transformed through legal subjectification from someone deserving of protection because of their personal situation and the problems they suffered in their countries of origin into subjects who must now fulfil a set of legal criteria that often bear no relation to their suffering.

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[60] There is a large and diverse body of theories of subjectivation, spanning from Marxist/(neo)-materialist (e.g. Althusser 1977; Buckel 2007: 113ff) to poststructuralist Foucauldian approaches (Foucault 1982, see also Biebricher 2009 and Cremonesi et al. 2016). Feminist scholarship and gender studies have made significant contributions to the critique of the autonomous (legal) subject (Butler 1995, 1997, see also Meißner 2010). Lastly, Bourdieu's notion of 'habitus' encompasses many of the elements that we include in the concept of legal subjectivity (Bourdieu 1987, see also Nour 2009). We draw on these theories and concepts in the manner explained above (section 3.1), but rely more heavily on ethnographically based applications of these concepts.

[61] Our approach thus takes a different starting point than Susanne Baer's seminal study of the construction of subjects in German administrative law. Baer asks how shifts in the dominant concepts of the state are reflected in notions of citizenship and become enshrined in administrative law (Baer 2006). Rather than looking at and deconstructing guiding objectives in legal texts, we begin our investigation with the social practices of migrants, administrative personnel, lawyers, judges, and other involved actors.

Ethnographers such as Dominik Kohlhagen (2006) have shown that knowledge about different legal systems forms an important aspect of legal subjectivity, particularly in relation to undocumented and illegalized migrants. It is also likely that experiences with persecution or with state authorities who fail to protect individual interests in the country of origin inform a person's legal and political subjectivity. In the case of asylum seekers, crossing borders can even be read as an attempt to regain basic civil and political rights and be re-constituted as a full legal subject. Less research has been conducted regarding how legal subjectivity is formed over time in the host country along a trajectory that eventually encompasses long-term residence, a secure legal status, and possibly also naturalization. Do migrants who have German or a secure dual citizenship encounter a different set of possible consequences when taking legal actions within German administrative law? Do these migrants still perceive their position vis-à-vis the state and their legal subjectivity as insecure (even if going to court or avoiding a court case might become more of a matter of choice than of necessity, since the issue at stake no longer concerns their right to residency) because of their experiences of previous interactions with state officials? If so, how are notions of citizenship and legal subjectivity (re)produced in the intergenerational order of migrant communities or within families? These constellations will be included in our empirical research, since we surmise that after the original process of obtaining legal residence in Germany – and thus the acquisition of a more or less secure legal position – is complete, transnational ties, circular forms of mobility, and the availability of different legal forums play a more prominent role in shaping the formation of legal subjectivity in administrative disputes within Germany.[62] In this context, social networks in their role as forums for (legal) knowledge production and exchange are of crucial relevance, since it is through these networks that experiences get produced and reproduced and that subject formation takes place (Kohlhagen 2006; Zillinger 2014; see also Eckert 2012).

Equally important and more within the reach of actual observation in the course of fieldwork are the interactions with central participating actors in diverse legal interactional settings during the course of administrative dispute processes. This leads to a broadening of the empirical gaze to the legal subjectivities brought into the dispute by other participants and the mutual co-constitution of subjectivities. In addition to the legal subjectivity that migrants develop, we therefore suggest also looking at the specific legal subjectivity assumed by legal professionals such as lawyers, judges, and state officials. Here, legal subjectivity may be more strongly influenced by training, education, and professional socialization and can be conceptualized in analogy to Bourdieu's concept of habitus (Bourdieu 1987). Adherence to doctrinal law among judges can be understood as an expression of the legal subjectivity of legal professionals influenced by the conditions of their work (Schulz-Schaeffer 2004; Stegmaier 2009). In a study of employees in German immigration offices, Tobias Eule (2014) has shown the impact of intra-office socialization into a collective body of practical knowledge. Sally Richards has analysed legal consciousness among government officials in the Refugee Review Tribunal of Australia (2015), and Marc Hertogh (2010) has pointed to the importance of empirical research that looks at front-line officials' understanding of administrative justice. There is less empirical research on the contemporary self-perception and formation of legal subjectivity among lawyers in Germany, but the few existing older studies also indicate the formative impact of professional standards and training (e.g. Rüschemeyer 1976). We therefore

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[62] These forms of transnational legal consciousness have been explored in the realm of family law by Hart, Rossum, and Sportel (2013) and with regard to migrants returning to their home country by Kubal (2012).

presume that the legal subjectivity of this group of professional actors is less fluid and subject to change than that of migrants and non-legal-professionals, but nevertheless open to extra-professional influences (see next section).

Because of the formalized rules of German administrative court procedure, legal professionals hold a dominant position and influence the legal subjectivity of other non-professional actors, particularly at court hearings.[63] Thus, a fine-grained analysis of the formation of legal subjectivities among participating actors and the procedural rules structuring their differing possibilities of participating in legal disputes can contribute to a much better understanding of how and when migrants can raise what types of claims and mobilize administrative law. We aim to analyse how migrants as individual and collective actors with specific (albeit 'graduated') rights use and mobilize the legal protections that are offered by German administrative law when they are affected by its regulations; we will also examine how their legal subjectivity is transformed during this process. Rather than taking the individual legal subject as the foundational starting point of a doctrinal system of administrative justice, we explore the processes by which law produces migrant subjects with or without the capacity to claim rights. Assuming that law not only transforms those who use it, but is also transformed in the very process of its application, in the next section we turn to the varying margins of interpretation, scope of discretion, forms of agency, and room to manoeuvre that the actors involved might or might not be able to realize in different interactional constellations and settings structured by administrative law.

3.4   Room to Manoeuvre/Margins of Interpretation

The composite concept 'room to manoeuvre/margins of interpretation' is closely tied to the concept of legal subjectivity, yet encompasses a broader range of contextual and constituting factors that shape the relation between the migrant and the state. In its broadest sense the concept includes, first, those margins of interpretation and possibilities for agency that are contained in administrative law (procedural rights as well as the gradations of status in immigration law) and second, the room to manoeuvre that actors claim in negotiations about citizenship and access to rights when they participate in legal conflict situations.

Following this broad understanding, margins of interpretation and scope for agency can be mobilized both within and outside the formal legal frame of administrative law. As in the previous section, the interactionist approach calls for investigating the scope of agency of all involved actors, because room to manoeuvre, margins of interpretation, and various forms of agency are co-constituted in interactional settings. As will become clearer in the remainder of this section, margins of interpretation are regarded as either elements inbuilt in the legal system (such as administrative and judicial discretion) or deviations from the legally defined 'script' or role that is to be played. Depending on the context, on the actors involved in courtrooms and other settings connected with the administrative process, and on the material and symbolic resources they can mobilize, however, the possibilities for agency and room to manoeuvre, as well as the uses of margins of interpretation, may structurally differ.

In the following, the composite heuristic concept will be presented in more detail with reference to four groups of actors central for this study, namely:

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[63] Procedural law as such exerts a significant structural force on the formation of legal subjectivity since it predefines the scope of action of the claimant. This becomes most obvious when procedural rights are restricted, as in the case of asylum law (Gärditz 2011); see also section 3.5.

- migrants,
- state officials,
- lawyers and legal aid workers,
- judges at administrative and social courts.

With regards to migrants' claims, this concept asks what types of agency, room to manoeuvre, or margins of interpretation actors involved in a legal conflict situation have that enable them to contest, redefine, and/or transform their ascribed legal status during bureaucratic processes and interactions with state officials and legal professionals. In examining the relation between the migrant and the state, we ask how migrants can move from rights and obligations enshrined in legal status – as specified by immigration and naturalization laws or other subfields of administrative law – to ascribed or self-assumed legal subjectivity and further to margins of interpretation and room to manoeuvre in terms of substantive issues as well as procedural rights. Existing socio-legal and ethnographic literature describes such strategies of migrants mostly in the context of interactions with immigration bureaucracies but also with regard to judicial settings and the claiming of rights outside of administrative-legal settings. Several middle-range concepts have been formed that we subsume under our notion of 'room to manoeuvre/margins of interpretation'. Referring to the field of immigration law in general, Tuckett (2015) employs the term 'navigation' to describe how migrants skilfully navigate the Italian immigration bureaucracy by traversing the boundary between legality and illegality and by making use of loopholes in the frequently changing and highly complex laws. Schuster (2005) points to 'status mobility' as a strategy of migrants to secure future life goals by shifting between different types of residence permit and legal status. In an observational study of court hearings, Arndt (2015) analyses the strategies of 'representational self-management' applied by asylum seekers when objecting to the rejection of their asylum requests. Here, margins of interpretation are produced in-between the sphere of actual courtroom interaction and institutionally prescribed procedural structures. Strategic self-management in this context is a strategy in which migrants either take on the role of an autonomous legal subject or employ the role of a passive victim by playing on the existence of a certain 'refugeeness' (see also Graham 2002). Scope for action is also available to migrants in the possibility of 'forum shopping'. We adopt this concept from the legal pluralism debate (Benda-Beckmann 1981); in our context it can mean, for example, mobilizing global norms or legal norms from other countries as part of claim-making through transnational legal consciousness (Schwenken 2013). Studies on the impact of national and European immigration laws on migrant collectives, behaviours, and individual social status either in the host country or upon return to the country of origin (Kohlhagen 2006; Kubal 2012) also demonstrate that room to manoeuvre with respect to one's legal position might arise from these transnational constellations. Finally, while not always easy to observe, strategies such as collective activism by migrants (e.g. refugee protests) and avoidance of state officials or the move into informality, semi-legality, or 'illegality' can figure as strategies used by migrants when their aspirations and individual life plans are hindered by the regulations of administrative law. Both the structural limitations and the transformative potential of such forms of claiming rights have also been described ethnographically and analysed conceptually (Ataç 2016; Caglar 2016; Bhimji 2016; Basok 2010; Kubal 2013; Ataç, Rygiel and Stierl 2016); they, too, form part of our concept of room to manoeuvre/margins of interpretation.

Analysing the margins of interpretation of administrative personnel requires taking into account the elaborate procedural regulations of German administrative law. Thus, literature on discretionary autonomy (e.g. Lipsky 1980; Evans 2010) is of interest for this study. In a similar vein, studies that examine how professional knowledge about migrants, and especially asylum seekers, is constructed and then acted upon, as well as studies that analyse the communication structures that shape distinct sub-cultures of bureaucratic personnel and their influence on individual decision-making processes, are interesting approaches for empirically tracing how margins of interpretation might expand or shrink in certain interactional settings (Jubany 2011; Marx 2012; Eule 2014; Affolter 2017). However, even though these studies show that front-line encounters between administrative practitioners and migrants with a variety of legal statuses are shaped by complex processes of opinion and knowledge formation, negotiation, and discretionary autonomy, the finely graduated system of procedural regulations built into German administrative law also needs to be understood in its own right as part of a doctrinal system that has binding effects. In the German context, the use of indeterminate legal concepts (*unbestimmte Rechtsbegriffe*) in those parts of a norm that describe the facts of the case (*Tatbestand*) and the procedural regulation of discretion (*Ermessen*) in those parts of the norm that determine the legal consequences (*Rechtsfolgen*) are particularly relevant. These two elements define the *margins of interpretation* offered by law to state officials and influence the decision-making processes in local offices that deal with migrants' claims.[64] We incorporate this doctrinal systematization of discretion with its diverse implications for legal action and its forms of judicial control[65] when investigating the decision-making processes of administrative personnel. We postulate that the increased degree of legally mandated discretion (as well as informal discretionary practices) that has been observed in the realm of immigration law (Groß 2014: 427–428; Eule 2014) also leads to an increase in face-to-face encounters between migrants and state officials.[66] In light of this observation, an empirical relational analysis of migrant-state interactions is all the more important, and the relationship between the migrant and 'the state' as it is rationalized by administrative law serves as a fruitful theoretical entry point for our analysis.

The discretionary practices and autonomy of judges are similarly important factors when reflecting on possible margins of interpretation within courtroom interactions. In the (socio-)legal literature, margins of interpretation have been located either in the interpretation and applications of norms (*Norminterpretation*) or in the manner in which the facts of the case are determined (*Tatbestandsermittlung*).[67] Recent empirical studies such as Stegmaier (2009) include perspectives

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[64] Legal actions falling under these concepts are addressed extensively in the doctrinal administrative law literature. The Federal Constitutional Court has declared indeterminate legal concepts to be constitutional as long as they remain within a general principle of determinacy as mandated by the principle of rule of law. There are, however, different opinions in doctrinal scholarship regarding the scope of judicial control of these indeterminate legal concepts: the Federal Administrative Court, for example, has argued for full judicial control; see Maurer (2011: 141–169) and Gerhard (2016). On discretion in migration and asylum law more specifically, see Eichenhofer (2014: 777–778) and Groß (2014). For a conceptual discussion from a socio-legal perspective, see Schweitzer (2015).

[65] Judicial control of discretion extends to the examination of errors of assessment (*Ermessensfehler*).

[66] Generally, appearance in person is required for the extension of any residence permit. In asylum law, refugees are legally required to cooperate in the asylum determination procedure as well as in their removal should the asylum claim be rejected. This duty to cooperate extends to the obligation to appear in person before authorities when asked to do so. Applications for social benefits during and after the asylum determination procedure involve further face-to-face contacts with state officials. Many of these contacts are mediated by social workers, volunteers, and support organizations, so that the boundary between state and non-state actors can become blurred.

[67] See the extensive debate on judges' scope of autonomy in the interpretation of norms which developed around the notions of *Richterrecht*, i.e. the judge-made law (Bumke 2012 with further references) in doctrinal law scholarship. Legal sociology has contributed important insights into how professional identity formation and organizational context influence the process of determining the facts of a case.

from the sociology of knowledge and focus on complex processes of 'negotiations' around individual cases, with the file being their constitutive factor. Similarly, studies on judges' professional identity formation that conceptualize law as an interactive social phenomenon shaped by and shaping its professionals (e.g. Berndt 2010) are crucial for understanding the different judicial approaches towards margins of interpretation and the use of this in the context of courtroom settings. At hearings – in particular during the assessment of evidence in asylum adjudication hearings – professionals' explicit and implicit stereotypes and their inherent expectations, self-perceptions, and worldviews can potentially significantly influence the development and outcome of the interactional dynamics within court rooms (Kobelinsky 2015). On a more aggregate level, the jurisprudential practices of courts – especially higher, but sometimes also first-instance courts – can either narrow or broaden the margins of interpretation that lower judges can exercise in subsequent cases. In particular, judges in first-instance courts are said to preemptively anticipate responses by higher courts. Hence, when they encourage a settlement, conduct courtroom interactions, or reason their decisions with an eye towards potential appeals, they exercise a self-imposed restraint. That judicial decision-making has effects beyond the legal proceeding and thereby indirectly affects the margins of interpretation that are available to the involved parties in successive cases has also been demonstrated with regard to the regulation of migration (Wijkhuijs 2007; Bonjour 2016).

For insight into to the role of lawyers who represent migrants in administrative disputes, literature on legal activism is of further interest for this study. Thus, studies of cause lawyering and strategic litigation as a political and social practice are particularly significant. Their insights need to be applied to migrants' claims and the role of lawyers in mobilizing rights and transforming claims into legal action in the specific German legal context. Cause lawyering as established in the socio-legal literature by Sarat and Scheingold (1998, 2001) describes the use of law that goes beyond a merely functionalist/instrumentalist definition and enters the realm of the political and social sphere. In this sense, cause lawyering connects legal practice with the moral and political convictions of lawyers themselves, thereby turning it into a 'public profession' (see also Krishnan 2006: 577; Marshall and Hale 2014).[68] While the concept of cause lawyering initially focused on the political convictions held by lawyers and how these shaped their professional practice, the twin concepts of 'strategic litigation' and 'public interest litigation' have increasingly been taken up in social movement research to study how individual court cases are strategically constructed and used to achieve a larger sociopolitical impact. These studies are often situated in the field of political science and focus on larger (political, social, or legal) opportunity structures and the framing of public discourses (Sarat and Scheingold 2006; McCann 2006; McCammon and McGrath 2015). Leila Kawar's historical and comparative study of legal activism in the field of immigration policy in the United States and France combines these two strands and demonstrates that the ability to achieve socio-legal change by means of legal activism is historically contingent and context-specific (Kawar 2015, see also Kawar 2012). Recent anthropological works have contributed a microlevel perspective that highlights the important role of not only lawyers but also legal aid organizations as intermediaries (James and Forbess 2014; Cabot 2014). They ethnographically demonstrate how lawyers build (strategic) ties to legal aid organizations, administrative personnel, judges, and interpreters who facilitate their work and thereby influence the outcome of disputes. Following this, the role of intermediaries, legal aid organizations, or other

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[68] See Müller (2011) on this phenomenon in Germany.

forms of service providers for legal (and social aid) is crucial for rights' mobilization and the transformation of ordinary demands/private interests into legal terms/public claims (McDermont 2013). Lawyers, legal professionals, social workers, and volunteers in legal aid organizations play an important role in preparing their clients for courtroom interactions and bureaucratic encounters, informing clients about rights and procedures and (trans)forming the clients' and their own legal subjectivities. Thus, they might draw their clients towards margins of interpretation, strategically manoeuvre their narratives into claims that stretch bureaucratic structures, or guide them into taking legal action.

Harking back to our initial premise that law transforms those who use it but is also transformed in the very process of its application, and having developed the composite concept 'room to manoeuvre/margins of interpretation' to examine those moments in which reinterpretation and re-inscription of legal norms becomes potentially possible, we now turn to conceptualizing how this affects perceptions and practices of *Rechtsstaatlichkeit* among the actors involved in administrative disputes.

3.5 *Notions of* Rechtsstaatlichkeit

With our last concept, 'notions of *Rechtsstaatlichkeit*', we aim to trace transformations of the perception and practice of administrative law, as well as the shifts in notions of statehood that accompany this. Since this last composite heuristic concept builds on an empirically saturated refinement of the previous concepts that will be undertaken as part of ongoing fieldwork, it is not yet as clearly defined at this point.[69]

To briefly recapitulate: We expect that the concept 'graduated citizenship' will allow us to empirically capture the interplay between the highly fragmented set of legal statuses available to migrants and the markers of difference that become relevant in administrative categorization practices. 'Legal subjectivity' then focuses our attention on the understandings that migrants (and other actors participating in the dispute process) hold regarding their own legal capacities and status. 'Room to manoeuvre/margins of interpretation' directs our attention to spaces for manoeuvring (including individual strategies as well as structural possibilities/restraints) between legal statuses, administrative categories, and self-ascribed or attributed legal subjectivities. 'Perceptions of *Rechtsstaatlichkeit*' finally shifts the empirical gaze to the reverse side of the state-citizen relation: from legal subjectivity and graduated citizenship to the state and administrative law as its functional order. This concept will allow us to ask, firstly, what kinds of understandings of the German state under the rule of law emerge as a result of interactions during and in connection with the administrative dispute. And secondly, it will allow us to trace the transformations that emerge when negotiations of concrete administrative practices and norms and evolving understandings of legality among the involved actors are viewed from a more aggregated and diachronic perspective.

With this investigation of how *Rechtsstaatlichkeit*, as one of, if not the core ordering principle of administrative law, is practiced and negotiated in interactions between migrants, state officials, lawyers/legal aid organizations, and judges, we perform a decentreing move with regard to migration and integration research as described in the introduction. We move from a focus on

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[69] But see Gehrig (2004) for a similar argument on how *Rechtsstaatlichkeit* and its counterpart 'illegality' are constituted through administrative application of legal categories. Her argument is based on ethnographic research among Afghan asylum seekers in Hamburg.

migrants as social actors attempting to realize their visions of life in Germany to a focus on the doctrinal ideas, legal instantiations of these ideas, and normative practices that undergird contemporary statehood in Germany. As in the previous sections, we develop this *composite* heuristic concept through a process of juxtaposing legal and social science concepts and debates.

German public law scholarship commonly regards the principle of *Rechtsstaatlichkeit* as a central pillar of modern European statehood, though it acknowledges different national traditions (Hofmann 1995; Grimm 2009). Although the German constitution, the *Grundgesetz* (GG), explicitly mentions the principle of *Rechtsstaatlichkeit*/rule of law only in two articles (Art. 23(1) und Art. 28(1) GG) and does not provide a definition of the principle itself, German public law scholarship has developed an elaborate doctrinal reasoning around it (e.g. Sobota 1997; Schmidt-Aßmann 2004). In standard legal commentaries, the principle of *Rechtsstaatlichkeit*/rule of law is defined as the aggregate of all the constitutional norms and institutions that contribute to this principle (e.g. Scholz 2016). Its main elements are the division of power, the protection of human dignity and the guarantee of individual basic rights, the binding of the state to the law (*Vorbehalt und Vorrang des Gesetzes*), and access to courts (*Rechtsschutzgarantie*), as well as the principle of proportionality (*Verhältnismäßigkeit*) and the principle of legitimate expectations (*Vertrauensschutz*). The principle of *Rechtsstaatlichkeit* is further concretized in the realm of general administrative law. Procedural safeguards and legal remedies (such as the right to instigate legal proceedings, the right to be heard, and the right to a preliminary injunction) are contained in both state administrative laws and the federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*) and Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*). Field-specific modifications of these provisions can be found in the sectoral laws governing specific subfields of administrative law. They are particularly pronounced in the field of asylum and immigration law, where in many instances the procedural step of pre-judicial objection has been removed, deadlines for submission substantially shortened, and the possibilities of appeal limited. Some authors (e.g. Gärditz 2011) go so far as to call asylum law an exceptional field of administrative procedural law (*Sonderverwaltungsprozessrecht*).

Despite dispersed manifestations of the principle of *Rechtsstaatlichkeit* in legal norms and modifications of it in some subfields of administrative law, public law scholars consistently describe it as an encompassing net of interrelated provisions that form a core underlying structural principle of the German constitutional state;[70] this makes it a particularly intriguing starting point for anthropologists interested in the interplay between (cultural) representations and actual practices of statehood. As outlined in section 2.3, the (new) anthropology of the state has developed a strong focus on studying images and practices of statehood in postcolonial contexts. These ethnographic studies demonstrated that (often disenfranchised) citizens participate – through their everyday encounters with state officials – in the constructions of powerful discourses on bureaucracy, politics, and statehood (e.g. Gupta 1995; Nuijten 2003; Paley 2008; Gupta 2012). These discourses – or to use another often-used term, cultural representations – of the state were regarded as significant because they could be related back to state practices; they were then used to make an argument against the universal validity of the rational Weberian state and for a theoretical

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[70] Public law scholarship speaks of a core principle structuring German constitutional statehood (*Staatsstrukturprinizip*); the quality of an interdependent fabric of legal norms and doctrinal interpretations is emphasized by Schmidt-Aßmann, who writes of an '*umgreifenden Wirkungszusammenhang*' (2006: 47) and of '*Rechtsstaatlichkeit als Struktur*' (2006: 80).

reconceptualization of statehood (Hansen and Stepputat 2001; Krohn-Hansen and Nustad 2005; Migdal and Schlichte 2005).

Few ethnographic studies, however, directly address the notion of rule of law or *Rechtsstaatlichkeit*. In an early publication Nader and Mattei (2008) critically investigate the ideology of rule of law in the expansion of global capitalism, but they do not specifically address the citizen-state relation. More relevant to our argument about the co-construction of notions of rule of law by citizens in the course of interactions with courts, though not ethnographic in its approach, is Upendra Baxi's (2004) dissection of the rule-of-law discourse in India. Socio-legal scholars, too, have only recently begun to call for an empirical investigation of conceptions of rule-of-law (Krygier 2009; Hertogh 2013, 2016). So far, most legal scholars, as well as political and social scientists, have been concerned with defining thin or thick rule-of-law concepts[71] and analysing – sometimes in a critical vein – attempts to transfer Western rule-of-law instruments to other contexts (Grimm 2009; Palombella and Walker 2009; Schulze-Fielitz 2011, Humphreys 2012; Kötter and Schuppert 2014). Current transformations of *Rechtsstaatlichkeit* in Germany (or other European countries) as they evolve through social practices, everyday interactions, and the ascription of new meanings by different actors in an increasingly pluralized society remain a blind spot within both legal and anthropological research.

We therefore plead for looking ethnographically at actual rule-of-law practices and their relation to rule-of-law perceptions in the German context of administrative law. Approaching rule of law as practiced upon those that are among the most vulnerable and marginalized (as we have shown, migrants' legal status is often fragmented and temporarily unstable, and even after achieving a secure legal status they are still at risk of being discriminated against) is likely to throw into sharp relief the tensions, contradictions, and negotiations that take place within the overall assemblage of rule-of-law elements. From such a perspective the doctrinal construction of *Rechtsstaatlichkeit* as a *Staatsstrukturprinzip* and underlying ordering principle of administrative law can be re-conceptualized as the product of social interactions and ascriptions of (contested) meanings by different actors. It then becomes an empirical question whether the co-produced perceptions of rule of law that emerge through interactions remain dispersed, fragmented discourses and social practices, or whether, on the contrary, they have a cumulative or incremental transformative effect on the established legal order (*geltende Rechtsordnung*) precisely because of their embeddedness in social practices and interactions. Should the latter be the case, these transformations would then have to be taken into account in a critical normative (re)assessment of uneven levels of rule of law and diverging rule-of-law standards in the various subfields of administrative law.

4   Methodological Choices and Research Design

By juxtaposing legal concepts from German administrative law such as 'citizen', 'subjective rights', 'discretion', and 'rule of law' with social science concepts derived from earlier qualitative social research, we have taken the former apart and opened a space for reconsidering the underlying doctrinal reasoning in light of new meanings derived from the interactive and relational negotiation of administrative law. We now turn to key methodological choices that allow us to

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[71] A formal understanding– i.e. thin conception – of rule of law refers to situations in which the principle of *Rechtsstaatlichkeit* is realized by means of mere formal, e.g. procedural guarantees of the aforementioned elements; when substantive values such as fundamental rights or the welfare state are subsumed under the principle of *Rechtsstaatlichkeit,* a substantive understanding – i.e. thick conception – is applied (Tamanaha 2012: 91–113).

apply these reconfigured composite heuristic concepts to our own field research in such a way as to generate answers to the initial research questions.

While classically geared towards "[grasping] the native's point of view, his relation to life, [realising] his vision of the world" (Malinowski 1922: 25) in non-Western societies, today ethnographic fieldwork is applied as a method for collecting data and generating middle-range theoretical concepts in a wide variety of settings and in combination with a range of epistemic orientations and research questions. Nevertheless, participant observation remains a core method, complemented by various forms of interviewing, collection of written documents (and sometimes also audio and visual records), techniques for surveying and mapping social relations, socioeconomic conditions, or other relevant structural features, and more recently, participatory and collaborative forms of data generation (Beer 2008; Holmes and Marcus 2008).

In our own fieldwork, we draw on these techniques in a manner that Breidenstein et al. (2013: 34) have called 'field-specific methodical opportunism', meaning that we will make use of conversation analysis, interviewing, document analysis, the mapping of social networks, and other techniques depending on what is possible in a given situation and most suitable for answering our research questions.[72] Working in a team and carrying out fieldwork 'at home', we have opted for a research design in which periods of data collection through immersion in different social fields alternate with periods of joint analysis and reflection that are partially carried out in collaboration with a variety of actors. Our adaptation of the classic model of ethnographic fieldwork and our commitment to a methodical opportunism should not, however, be misunderstood as resulting in an arbitrary manner of conducting research: three core methodological choices guide our fieldwork – a processual approach, an interactionist-relational perspective, and a reflexive mode. In the concluding paragraphs, we explain how these translate into an integrated methodological approach.

4.1 The Processual Approach: situational analysis, extended case study, and conflict phases

The processual approach derives from our interest in the dynamics of socio-legal transformation. Within this frame, we make use of various traditions of data collection and analysis that are all geared towards capturing social change at the micro-level; we then generate middle-range theory/theoretical concepts from this particular vantage point. These traditions include: the ethnomethodogical study of interactions in professional settings (developed largely within sociology), the extended case method (a classic research frame for collecting and analysing data in legal anthropology), and the model of conflict phases (taken from the socio-legal study of disputing in the context of formal court systems).

Centred around the observation of face-to-face interactions, the ethnomethodological approach and the related conversation analysis illuminate how professional and non-professional actors perform social conventions and professional norms in individual situations; this microsocial work is often taken for granted und thus remains invisible. There is a rich body of studies on courtroom hearings and on lawyer-client interactions (see section 2.3, fn. 25) from which we draw techniques of observing, documenting, and analysing interactions between administrative judges and the participating parties in courtroom hearings, exchanges in law offices and legal aid organizations, and encounters between migrants and state officials in bureaucratic settings.

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[72] Other authors, leaning towards a slightly more positivist understanding of the employment of qualitative methods as part of a research design, prefer to speak of a 'mixed-method approach' (Nielsen 2012). As we emphasize the generation of middle-range theoretical concepts through the creative process of doing ethnographic fieldwork in which participant observation is central to grasping meanings as they emerge in social practice, we do not adopt this terminology.

The extended case study method, as developed by Jaap van Velsen, Max Gluckman, and other members of the so-called Manchester School of British Social Anthropology, also starts with the observation of individual situations but focuses on ethnographically tracing conflicts over time across a series of events/situations and within evolving networks of social relations (see van Velsen 1967; Gluckman 1940; Barnard 2000: 84–87; Kempny 2006: 180–201; Werbner 1984: 157–185). Gluckman had a strong interest in social change, and his focal points of analysis included the role of conflicts within such processes of social change and how they related to maintaining social orders. Analytically, the extended case method calls for examining a combination of empirical details and structural regularities, which implies an approach in which there is a dialectical relationship between empirical data and theory-building (Evens and Handelman 2006: 1–13; Gluckman 2006: 13–22). In our study we will collect cases related to migrants' claims vis-à-vis the state through fieldwork in four different settings (see section 4.2), with a focus on selected fields of special administrative law. We will observe actors and the cases they constitute in interconnected webs of face-to-face encounters while also taking into account the differentially structured contexts in and through which they move.

Lastly, we follow Felstiner, Abel, and Sarat's (1981) classic contribution to the study of disputing by analytically distinguishing between distinct stages in the emergence and transformation of a dispute. This frame allows us to trace how disputes between the state and migrant/citizens emerge, are interpreted, and are resolved; it also allows us to observe how networks of actors come into being or are affected by different phases of a conflict. In line with Felstiner, Abel, and Sarat we distinguish between the stages of 'naming', 'blaming', and 'claiming', but adapt these to the specific context of administrative disputes. We take the first stage, 'naming', to be a conflict situation between a migrant and an administrative body which has made some decision that the migrant considers to be problematic (i.e. naming this as a perceived injustice) but where he/she might nevertheless decide against taking any action. In the second stage of conflict, 'blaming', a migrant has decided to contact a lawyer or a legal aid organization and he/she files a prejudicial objection or submits a case at the administrative court (thus blaming a state body). The third phase, 'claiming', then consists of the actual trial and the court's verdict (by which the migrant either successfully claims his/her right or the administrative body's original decision is reaffirmed). To this model we add a fourth phase, which comprises the (inter)actions that follow upon a court decision (i.e. the implementation of the decision on the side of administrative bodies, the decision of the migrant to appeal at a higher court, or the setting of a precedent by judges). This fourth stage is where we locate the most visible form of transformative dynamics for the existing legal order. In each phase we allow for the possibility that the conflict is taken out of the juridical setting and pursued in other forums not or only partially determined by German administrative law.

While some authors argue that ethnomethodology and the extended case study method privilege different explanatory models for the causal link between situated social (inter)action and external forces or structural regularities and are therefore, in principle, incompatible with each other (e.g. Burawoy 1991), others have developed composite approaches for linking individual events to larger processes (e.g. Thomas Scheffer with his proposal for a transequential analysis: see Scheffer 2007, 2015). We believe that – though they evolved out of specific methodological traditions – these processual, microsociological heuristics and their techniques for data collection and analysis can be fruitfully combined in order to trace socio-legal change. Drawing on these different traditions of data collection and analysis directs our fieldwork towards the following foci:

observing the production and negotiation of normative meanings in individual situations/encounters; tracing the consolidation or transformation of such normative meanings in social practice through a series of events in interconnected webs of social relations that are shaped by and shape the larger social context; and, finally, comparing the consolidation or transformation of social practices and normative meanings across changing situations, different phases of a dispute, and various legal fields.

This heuristic frame also allows us to answer our more specific research questions: We can identify, first, those moments in the disputing process in which migrants mobilize or do not mobilize administrative law and/or other normative orders, and, second, the conditions under which they can or cannot do so. Third, we look at the effects that interactions with other actors involved in their lawsuit have on their legal subjectivity and their perceptions of statehood under the rule of law (*Rechtsstaatlichkeit*). And finally, we can observe the changes in legal practice and notions of rule of law that evolve in interactions and negotiations among participating actors.

Tracing administrative dispute processes and their effects in this manner requires consciously selecting settings in which to observe interactions, as well as conceptualizing what connects different settings and field sites. We therefore complement the processual approach with a relational perspective in order to conceptually link a variety of field settings and sites of observation.

4.2 *The Relational Perspective: settings, semi-autonomous social fields, and webs of relations*

Although our initial empirical point of entry was disputes adjudicated at administrative courts between migrants and administrative bodies, we do not limit our fieldwork to this setting. Instead we take heed of methodological debates regarding the nature of the 'field' in ethnographic research and understand the field as constituted by the research process as well as by the involved actors.[73] Thus we focus our attention on the different groups of actors that are involved in administrative court cases and follow these actors into their lifeworlds. Besides the administrative or social court, other important interactional settings in which we conduct fieldwork are migrant organizations, migrants' lifeworlds and other relevant social contexts, administrative bodies, and law offices or legal aid organizations. During fieldwork it will become apparent how central these settings are for our research and whether they need to be complemented by other settings and sets of actors.[74] Shadowing these actors in the manner suggested by Barbara Czarniawska for doing fieldwork in modern societies (Czarniawska 2007) will help us to gain insight into the webs of social relations and to determine to what extent they constitute semiautonomous social fields in Sally Falk Moore's sense. Moore has argued that the semiautonomous social field is a suitable way of defining areas and sites for conducting social anthropological research in complex societies. According to her, such a field is defined less by its organizational or social boundaries but by the fact that it "can generate rules and coerce or induce compliance" (Moore 1973: 742). Using this conceptual frame,

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[73] The basic theoretical premises of the classic model of stationary fieldwork in locations that are geographically distant and separated from the researchers' home base have been challenged (Gupta and Ferguson 1997), and various alternative methodologies and conceptualizations of the field have been put forward. To name a few, 'urban ethnography' (Sanjek 2000) was developed as an answer to the move from island/village studies to urban field sites, 'anthropology at home' (Jackson 1987) aimed to turn the researcher's gaze towards his/her own society, 'multi-sited ethnography' (Marcus 1995) has been advocated as a means to capture forces of globalization, and 'transnational social fields' (Glick-Schiller, Bass and Blanc-Szanton 1997) has been proposed as the appropriate unit of research for ethnographic migration research.
[74] If other actors, such as interpreters, informal advice-givers, or professional bodies, become relevant for our research, they will be approached in the same manner. For the central role of interpreters in asylum determination and adjudication see Scheffer (1997) and Gibb and Good (2014).

the ethnographer's attention is directed to "the connection between the internal workings of a social field and its points of articulation with a larger setting" (Moore 1973: 742). In our fieldwork, the notion of semi-autonomy highlights the fact that such social fields might coincide with specific institutional settings or be structured by the specific field of administrative law in which a dispute takes place, but that they are also likely to cut across such formal structures to encompass the realm of the informal, semi-legal, or illegal and to reach beyond the German context to include other national and transnational points of normative reference.

Keeping this in mind, asylum and immigration law, as subfields of German administrative law with their substantial modifications of rules and procedures of general administrative law, can be presumed to be of central importance to recently arrived migrants and those who have not yet achieved a secure legal status. For migrants who have a secure legal status or German citizenship (2nd or 3rd generation), other subfields of administrative law such as business regulations, social law, or education and police laws become increasingly relevant. Here again, field-specific modifications structure legal proceedings, institutional settings, and social interactions within these settings and may generate different transformative dynamics. The degree to which they do so nevertheless remains a question for empirical study. Our research therefore aims to assess the role of specific administrative law regulations in predetermining legal subjectivities and perceptions of *Rechtsstaatlichkeit* and the ways that other norms emerging from within migrant communities and broader fields of social life (that are being (re)produced and negotiated in relational webs) intersect with and impact these subjectivities and normativities.

With a view to the transnational dimension, it has been noted that not only migrants, but increasingly also state officials and lawyers/legal aid organizations act in and through transnational networks and draw on various normative meanings and logics of governance (Lahusen 2016; Tsourdi 2016). National immigration policies are, moreover, shaped by the jurisprudence of the European Courts, so that judges, too, make their decisions in a multi-level field of jurisprudence (Psychogiopoulou 2014). Again, observing how professional actors navigate in and across these different scales by building communities of practice or social networks (in which legal experiences and information are exchanged, legal knowledge is co-produced, and legally relevant situations and documentation are negotiated) will allow us to better understand how legal subjectivities and notions of *Rechtsstaatlichkeit* emerge in semiautonomous social fields that extend across national borders.

In this manner, the transformation of German administrative law can be empirically studied beyond the limits of methodological nationalism and without preconceived notions of what constitutes proper settings for studying transformative dynamics in German administrative law. When webs of social relations and semiautonomous social fields replace the notion of studying a bounded, spatially and topically predefined field, the social position of the researcher within this field and the social relations he or she builds in the course of research as a means to generate data become a matter for methodological consideration. We reflect upon this in the following section.

4.3 The Reflexive Mode: positionality, inequality, and critique

In ethnographic fieldwork, the researcher uses his or her own person as the instrument to generate data. Interviewing consists of communicative interactions and participant observation is based on gaining access to interlocutors' social networks and actively developing social relations of one's own among different sets of actors (who, in our research, are more often than not antagonistically

positioned in the administrative dispute). Not surprisingly, much methodological discussion in anthropology has therefore concerned the researcher's negotiation of fieldwork relations and his or her positionality. Resulting from the reflexive turn in the 1980s, positionality denotes the conscious and self-reflexive attempt to shed light on the power relations that shape a researcher's interactions with the persons he or she works with and to assess how these affect the kind of information that can be gathered. The term positionality also refers to the subjective experiences, worldviews, and epistemic assumptions that the ethnographer brings to the field and how one's own subjectivity affects the interpretation of collected data. Having made the legal subjectivities of actors in our field of study a cornerstone of our analytical interest, we now come full circle by turning our attention to the researcher's subjectivity, which in our case is shaped by more than one disciplinary framework as well as the particularities of doing fieldwork 'at home'.

With regard to the disciplinary frameworks we draw on, we can identify different notions of reflexivity: whereas migration and integration research, socio-legal studies and legal anthropology/the anthropology of the state link reflexivity to an epistemic frame that critically questions existing power structures and points to social inequality as a source as well as a result of exclusionary regimes of governance (Mecheril et al. 2013; Frankenberg 2009; Buckel 2016; Marcus and Fischer 1986), no such conjunction of critical and reflexive traditions has developed within the (new) administrative law scholarship, which generally tends to be more affirmative of existing structures of state rule (Schulze-Fielitz 2013: 21–23). Here, reflexivity seems to hinge less on questions of representation and unequal relations of power, but is primarily understood as concerning the relation between doctrinal scholarship as the discipline's 'proprium' and the opening towards other disciplines (Hilgendorf and Schulze-Fielitz 2015: 1–2). Before returning to the question of reflexivity in administrative law scholarship, we therefore begin with an examination of how the researcher's positionality and subjectivity has been dealt with in critical ethnographic migration research.

Nicolas de Genova (2016) has highlighted the ambivalences surrounding the quest for a 'native's point of view' in anthropological migration research. Alongside lingering tendencies to understand migrants as either 'dislocated' or 'mobile' natives, he observes a lack of acknowledgement of the problematic effects that the researcher's position as a native (i.e. national citizen) doing research in his or her own (migrant-receiving) country has on the ethnographic encounter (de Genova 2016: 228–229). Even if the anthropologist champions him- or herself as a defender of migrants' rights (as many do), his or her own politico-juridical status as a citizen constitutes a privileged relation to the state. Doing research from this inverse vantage point of nativeness without making it part of the analysis risks, in de Genova's view, re-inscribing into the ethnographic encounter the global inequalities captured in immigration policies and border regimes. It also contributes to re-producing the "migrant" as an object of study while leaving unexamined the inequality at the heart of an understanding of citizenship that constructs it as membership in a nation state (ibid.: 235). Hence his programmatic call that "[f]or an anthropology of migration to be able to grasp anything of the celebrated 'native's point of view' of disciplinary legend – to be able, in other words, to apprehend the critical perspectives and lived experiences of migrants – the anthropologist-as-native is now compelled to systematically repudiate his own 'native's point of view', the self-evident standpoint of the 'native', that is the epistemic burden of his birthright" (ibid.). How does one do this? In his answer, de Genova shifts away from the immediate ethnographic encounter to an aggregated theoretical position: "A truly critical anthropology of migration must", according to

him, "be capacious enough to *theorize* migration" in terms of transnational class politics as well as in terms of a global postcolonial politics of race – both transposed into ostensibly national immigration policies and politics of citizenship (ibid.: 236). This shift from the anthropologist-as-native who is to apprehend the lived experiences of migrants in direct ethnographic encounters to a critical anthropology of migration which provides a theoretical antidote to the anthropologist's 'epistemic burden of citizenship' curiously relegates the ethnographic encounter (together with the knowledge produced therein) to a secondary position in regard to critical theorizing.

Another strand of critical migration research in German academia, known under the heading of the 'autonomy of migration' approach, has argued along a similar line.[75] They propose using the creative and self-determined aspect of autonomy that lies in the very mobility of migrants and their subjective hopes for a better life as the vantage point from which to study a securitized but flexible border regime; this, they suggest, helps to resist the danger of taking a state regulatory perspective and the researcher's legal status as a citizen of this state as an un-interrogated base line. Methodologically, they advocate an ethnographic border regime analysis (Hess and Tsianos 2010; see also Bojadzijev and Karakayali 2007) to bring to light and critically examine the complex, porous, and stratified (b)ordering logics of multi-level European Union border control and management – logics that are increasingly also pushed into diverse administrative contexts within the nation states, thereby reenforcing the underlying classifications (Hess and Lebuhn 2014; Bojadzijev and Römhild 2014: 20–21). While critics of this approach have pointed out that it risks romanticizing migrants' scope for self-determined agency in the face of state regulation (Schwenken and Benz 2005; Scheel 2015), we read it first of all as a methodological intervention. As such, it helps us to clarify our own approach. Sabine Hess and Vassilis Tsianos (2010) present a sophisticated proposal for blending a theoretical perspective – a regime theory that foreshadows de Genova's call for theorizing transnational class politics as well as the global postcolonial politics of race – with an activist self-understanding of the researcher, who fully and consciously aligns her- or himself with the migrants' perspective and – through mobile, multi-sited research techniques in border zones understood as spaces of negotiation – extracts him- or herself from the situated research position of the home nation state (Hess and Tsianos 2010: 252–260). Much as we do, they insist that the research field must emerge during the research process and that the analysis of discursive constructions must be complemented with an analysis of situated and interactively negotiated social practices. At close reading, however, the methodological choice of an activist position aligned with a perspective that starts from migrants' acts of border-crossing also poses some dangers. Unwittingly, the researcher's home fades from view as a site of ethnographic encounters, as do interactions with the ethnographer's co-nationals who internally co-produce and implement the classificatory distinctions that undergird external border regimes. When regime analysis becomes a matter of the ethnographer being confronted with his or her own subjectivity in encounters taking place in border zones at the periphery of Europe, the persons encountered as others, perhaps unsurprisingly, turn out to be primarily migrants (Hess and Tsianos 2010: 257–258). And it is in encounters with migrants that ethnographic knowledge is collaboratively

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[75] The approach, which draws on the work of French economist Yann Moulier Boutang, was developed and put forward most strongly by a group of researchers participating in the joint academic and artistic project "Transit Migration" (2004–2006); see Transit Migration Forschungsgruppe (2007). Debates were then carried on in the journal *movements* and the publications of a network of critical migration and border regime studies, the Netzwerk kritische Migrations- und Grenzregimeforschung – kritnet (e.g. Hess and Kasparek 2010, Hess et al. 2014, Hess et al. 2016). See also Karakayali and Tsianos (2005).

produced and migrants' strategies of legal and political subjectivation become visible and are subsequently contextualized by the researcher – once he or she is back home – by means of a discursive analysis of hegemonic relations of representation and forms of subjectivation. (Hess and Tsianos 2010: 258–259). Like the shift from the ethnographic encounter to anthropological theorizing that we observed with de Genova, here we find a curious split between the observation of (migrants') social practices in the border zone and an *ex post* discursive analysis of the hegemonic relations of the representation of such practices in the centre. The actual social practices by which administrative law is enacted at home disappear from view in such an approach.

Having shown some of the (perhaps unavoidable) dilemmas of a fieldwork practice that is mindful of its own implicatedness in representations of juridified, asymmetrical state-migrant relations and of the situatedness of knowledge thus produced, for our own research design we shift the perspective in two ways. Firstly, instead of the notion of a single-stranded ethnographic encounter between the citizen-researcher and the non-citizen migrant, we adopt that of a multi-stranded web of fieldwork relations and situated encounters among actors with varying and graduated legal statuses, socioeconomic positions, experiences of (im)mobility, and perceptions of statehood. Secondly, from the starting point of a researcher who has turned mobile and joins the migrant in his/her negotiation of border zones, we relocate to a position that makes the multi-stranded negotiations taking place in the realm of administrative law at the researcher's place of residence the initial entry point. The decentring move advocated by Boris Nieswand and described above has helped to also turn our gaze towards the judges, administrative officials, legal professionals, activists, and volunteers that implement administrative and immigration law. Here, the challenge, as we see it, lies in scrutinizing our own subjectivity and positionality as researchers not by means of a discursive analysis of hegemonic structures of representation but by means of ethnographic encounters taking place in these multi-stranded, often conflictual relational webs, in which the all-too-familiar social practices and subjectivities of co-native judges, administrators, lawyers and volunteers are collaboratively explored and questioned alongside, in relation to, or in juxtaposition with migrants' social practices and subjectivities. Rather than replicating the anthropological reflex to study a marginalized group of persons from a position of socioeconomic and legal privilege, we study down, up, and sideways in ethnographic encounters with all involved actors who, depending on context and situation, might not only have different legal statuses and amounts of socioeconomic capital, knowledge, or authority than the researcher, but who also situationally and performatively address each other and are addressed as migrant-other, native researcher, or state representative in their interactions – thus adding layers of representation as well as critiques of their own to our interpretation.

George E. Marcus, a key contributor to debates about the crisis of representation in anthropology, observed in 1999 that the positioning of ethnographers in these kinds of novel fieldwork situations requires rethinking the project of critical anthropology. He speaks of a 'circumstantial activism' resulting from the negotiation of fieldwork relations with different constituencies that is best understood as a practice embedded in the ethnographic encounter rather than in the theoretical frameworks of the 'left-liberal scholar'. He uses the term 'citizen-anthropologist' to describe the "shifts in contexts, constituencies, and agendas" (Marcus 1999: 15) that take place in ethnographic research and entail multiple, conflicting, and ambiguous involvements. This is not the anthropologist-as-native-citizen that de Genova has in mind, but an anthropologist engaged in relational practices, negotiations of claims, and interventions in multiple sites in which "the

concepts of elites, anthropologists and subalterns get rearranged" and in which the capacity for critical perspectives and self-reflexivity is not reserved for the anthropologist or, for that matter, the subaltern (ibid.: 16). This is a kind of citizenship practice or circumstantial activism in which public issues get addressed in intimate fieldwork encounters and the anthropologist's subjectivity is politicized alongside the subjectivities of his or her interlocutors.

How can such an understanding of the citizen-anthropologist be inserted into the proposed interdisciplinary research agenda and made productive? First of all, it suggests a more radical questioning of scholarly knowledge production, which can no longer be perceived as a domain of practice separate from the social worlds that surround it. This insight can – and must – be extended to administrative law scholarship. Doctrinal reasoning, with its closely linked manifestations as a form of scholarly activity and as a judicial practice, lends itself to such a rethinking: what for the anthropologist is the examination of his or her positionality in a web of field relations should, for the legal scholar, be the recognition of doctrinal reasoning as an embedded social practice. The interdisciplinary researcher who aims to conjoin both disciplines is then faced with an enormous challenge: she or he has to simultaneously explore administrative law doctrine as the empirical condition shaping migrants' perceptions of self and state, take on administrative law's logic of classifications and systematizations as an object of analysis in itself, and finally, reflect upon his or her own use of these categorizations and systematizations in academic practice. Fieldwork in such an encompassing sense entails an engagement with legal categorizations and systematizations in which it becomes increasingly difficult to disentangle the analytical vocabulary from the socially productive forces, and thus from the tangible effects of such categorizations and systematizations in legal practice and scientific discourse.

In our attempt to master these challenges, we draw guidance from the ethnomethodologically inspired social-constructivist concept of 'un/doing difference' first developed by West and Fenstermaker (1995) and recently elaborated by Hirschauer (2014).[76] It understands social difference as being produced in mundane everyday interactions in all kinds of social contexts (from family, workplace, or school to administrative authority, court, or academia) and provides an analytical lens for understanding when and what kinds of difference are made socially significant. The concept makes it possible to empirically trace how a situationally produced socially significant difference can turn into a consolidated structure of inequality and exclusion, but also brings into view the undoing of differences that results from having to choose between various markers of difference (such as class, gender, ethnicity, age, education, legal status etc.) in each social interaction. By consciously and repeatedly applying this concept to all fieldwork encounters in the relational web described above (i.e. interactions with migrants, activists, lawyers/legal aid providers, state officials, judges) as well to the anthropologist's and administrative law scholar's positioning in these, we can make the 'doing and undoing of difference' visible and thereby locate the moment of self-reflexivity and social critique in the encounter and among the participating actors themselves.

Such a reflexive research practice turns the academic involvement in the reproduction of unequal relations and mechanisms of exclusion during the course of research and knowledge production itself into an object of investigation. Here, we see an opportunity for integrating this approach in

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[76] In a different context, research undertaken in the Department 'Integration and Conflict' of the Max Planck Institute for Social Anthropology has also emphasized that difference and sameness can both be understood as modes of integration or inclusion. Depending on context, they can also both operate as modes of exclusion. Ethnographic research is needed to capture the situatedness of such processes of in- or exclusion (cf. Schlee and Horstmann 2018, Eidson et al. 2017)

administrative law studies, where it can be linked to administrative law scholarships' existing reflexive concern with the nature of doctrinal reasoning and interdisciplinarity. Understanding scholarly doctrinal activity as a contextualized social practice in a field of unequal power relations and making the social practice of producing doctrinal knowledge an object of reflection can provide an opening for forms of social critique from within legal scholarship. While such a move partially deconstructs the position of doctrinal reasoning in legal scholarship, it is constructive in the sense that it ultimately (re)affirms the function of doctrinal reasoning.

5   Summary and Outlook

In this paper we proposed an interdisciplinary research agenda for studying transformative dynamics in German administrative law through the lens of migration and based on the premise that Germany can be considered an immigration society. We aligned ourselves with a research paradigm that insists on a decentring move in migration research – away from questions of how to incorporate migrants and towards the study of how core institutions of such a (post)migrant society are transformed. We adopted a broad notion of socio-legal transformation as an analytical angle, the contours, forms, and scope of which are to be empirically and inductively investigated rather than normatively determined. As a particularly promising, but by no means only possible aspect of these transformative dynamics, we suggested changing notions of citizenship and the state under the rule of law (*Rechtsstaatlichkeit*) as they evolve from interactions in and around administrative justice disputes.

We have invested considerable energy in laying the groundwork for an interdisciplinary dialogue, which we believe to be necessary for adequately addressing contemporary questions about the functions of state law in the creation and maintenance of a plural social order that offers equal chances of participation. We identified conceptual frameworks and debates in (new) administrative law studies, legal sociology, and socio-cultural anthropology that have hitherto been largely separate. On this basis, we put forward a proposal to overcome the disciplinary boundaries of knowledge formation as well as the resulting blind spots concerning the interdisciplinary nexus of administrative law, migration, and socio-legal transformation. Our proposal rests on a theoretically and methodologically integrated approach for the ethnographic study of this nexus. Thus, we first explicated our understanding of theory-building in relation to empirical research on the one hand and doctrinal reasoning on the other. We then proceeded to develop composite heuristic concepts. For this, we took inspiration from the use of bridging concepts in the reform approach to administrative law (*Neue Verwaltungsrechtswissenschaft*), but reversed the flow of the interdisciplinary exchange of knowledge – from a concern with how to incorporate extrajudicial (empirical) knowledge into doctrinal reasoning to a process in which existing doctrinal concepts are challenged by juxtaposing them with middle-range theoretical concepts that have emerged from previous qualitative social science research. In our work, these composite concepts function as heuristic devices that generate theoretical insights precisely by shaking up accepted knowledge and calling for a repeated change of perspective. As anchoring foci of research, composite heuristic concepts consequently bind together theoretical, doctrinal, and empirical perspectives in a recursive loop. Finally, we outlined three methodological choices that go hand in hand with such a recursive loop and with our aim to explore the role of administrative law in the production and transformation of social order from an interdisciplinary, yet distinctively ethnographic vantage

point. Our ethnographic fieldwork is guided by a processual approach, an interactionist-relational perspective, and a reflexive mode. These choices translate into an integrated methodological frame.

A final remark is needed regarding our particular interest in the rule of law as a core ordering principle of administrative law and its potential transformations in perception as well as practice. While this is only one among a number of potential avenues of exploration, we find this one especially rewarding and necessary given the current global circulation and promotion of rule-of-law models. It is an empirical question whether our exploration of rule-of-law ideas and rule-of-law practices in the German context will reveal recognizable patterns of socio-legal transformation. Yet if it succeeds in unveiling the contradictions, tensions, and negotiations between how rule of law is represented and how it is actually practised with respect to segments of the population with a fragile legal status or contested membership, this finding will already be a much-needed counterpoint to theoretical and practical rule-of-law interventions elsewhere.

While our four composite heuristic concepts – 'graduated citizenship', 'legal subjectivity', 'room to manoeuvre', and 'notions of *Rechtsstaatlichkeit*' – are arranged in an order that mirrors this interest in the state-citizen relation as governed by the rule of law, they also offer the potential for a broader interdisciplinary debate on migration and public law. Each of these concepts can be taken as an independent starting point for explorations into different constituent aspects of the contemporary social order and transformations of it. 'Graduated citizenship' can provide an entry point to studying social participation, belonging, and inclusion in democratic decision-making processes. 'Legal subjectivity' can be expanded to probe notions of individual autonomy and collective responsibility, as well as definitions of private claims versus the common good/public interest. 'Room to manoeuvre' lends itself to an exploration of the problematics of structure and agency, formality and informality, and legality and illegality. Looking ahead, we hope that the testing of these and the development of new composite heuristic concepts provides a fertile ground for advancing the interdisciplinary study of administrative law and migration.

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7 Glossary

GG – Grundgesetz (German Basic Law)

VwGO – Verwaltungsgerichtsordnung (Code of Administrative Court Procedure)

VwVfG – Verwaltungsverfahrensgesetz (Administrative Procedure Act)