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Administrative Guidelines as a Source of Immigration Law?

Ethnographic Perspectives on Law at Work and in the Making

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Introduction

This chapter suggests that closer ethnographic attention to *practical* standardization and codification as part of the everyday activities of bureaucrats can contribute to a better understanding (and critique) of the complex realities and politics of migration governance.[1]

Central to such an approach is the ethnographic study of administrative guidelines as a unique genre of documents. Studying how various actors, who are embedded in multiplex social relations and textual webs of references, produce, use and circulate legal meanings and act upon such legal meanings requires an ethnographic approach that takes into account the legal content and context of a variety of documents as well as the diverse forms of practical work done with and upon these documents.

The chapter contextualizes the conceptual and methodological discussion on how migration is governed through paperwork into two broader fields: understandings of state and non-state law in debates about legal pluralism, and the more recent interest in street-level bureaucrats' discretionary practices and paperwork in the anthropology of the state. How bureaucratic

paperwork becomes key to migration governance then emerges through ethnographic data.

First, I trace the doctrinal ordering of different sources of law in order to highlight the (contested) legal quality of administrative guidelines according to this doctrinal systematization and to sketch the larger system of ideas in which bureaucratic action is embedded. I next map out how the administrative guidelines of the Foreigners' Registration Office of the city state of Berlin (Ausländerbehörde Berlin – ABB)[2] and the visa guidelines of the Federal Foreign Office (Auswärtiges Amt – AA) come into being, how they are being used by various actors and continuously adapted based on practical experience. Then I demonstrate that they become an important 'source of law' in the everyday governance of migration, by focusing on judicial and political processes during which instructions in these guidelines are contested. In these processes, the micropolitics of the making of immigration law through paperwork, in which a plurality of actors partake, becomes most visible. The chapter argues that an understanding of the politics and practices of lawmaking that emerge around administrative guidelines paves the way for a form of critique that differs from current trends in critical ethnographic scholarship on migration.

The Anthropology of Law and the State – Conceptual Resources for Studying Immigration Governance

When the paradigm of legal pluralism brought the state and its law into the purview of anthropologists (F. von Benda-Beckmann 2008: 87), it also led to a lively, if not heated, debate between legal anthropologists and more doctrinally oriented legal scholars (cf. Griffiths 1986, Tamanaha 1993, F. von Benda-Beckmann 2002). Proponents (mostly anthropologists) and opponents (mostly legal scholars) differed on whether the state was to be seen as the ultimate source and enforcer of law, or whether norms not emanating from and sanctioned by the state could be considered law. Legal anthropologists, who argued for an analytical perspective that was open to the possibility of plural normative orders and who ethnographically documented the widespread practice of actors to resort to different normative orders, shared an underlying epistemological orientation towards a non-state-centric conception of law. They found themselves defending such a stance against what John Griffiths called the ideology of 'legal centralism' (Griffiths 1986: 3–4, see, also, F. von Benda-Beckmann 2008: 97–98). Unwittingly though, the terms of this debate had the side effect of shielding the various norm-making processes through which state law comes into being from ethnographic scrutiny and conceptual analysis. Finding themselves in opposition to overly state-centric visions of law, legal anthropologists by and large did

not examine the inner workings or the making of official state law in its own right and with the same fine-grained ethnographic attention that they devoted to other normative orders (be they local or transnational in scope).[3] As a somewhat paradoxical effect, abstract conceptualizations of state law as developed within political or legal theory and put forward by doctrinally oriented legal scholars remained the unchallenged dominant legal ideology, particularly in research settings characterized as 'anthropology at home' and certainly for such legal fields as administrative law (including immigration and asylum law). Closer attention to the inner workings of state law only became more frequent with the gradual acceptance of 'legal pluralism' and 'governance' not merely as analytical but also as normative concepts within mainstream legal scholarship (K. von Benda-Beckmann and Turner 2018: 260, 265–66).

While the making and inner workings of state law in such legal fields as public law, and by extension administrative law, have thus remained relatively understudied within the paradigm of legal pluralism, state actors and their interactions with citizens have received ample attention in the expanding subfield of the anthropology of bureaucracy and the state.[4] Here, theoretical and methodological approaches to studying state bureaucracies quickly diversified and scholars soon called for a closer study of the practices of street-level bureaucrats, their thought-work in shaping organizational worldviews (Heyman 1995), their practical norms (Bierschenk and Olivier de Sardan 2014; Olivier de Sardan 2015) and moral subjectivities (Fassin et al. 2015, Eckert 2020, Andreetta et al. 2022), and their embeddedness in social relations as well as the boundary work they perform in upholding the idea of a division between state and society (Thelen, Vetters and K. von Benda-Beckmann 2018). While these studies often focused on the interactions between bureaucrats and citizens, another strand of research within the emerging anthropology of bureaucracy and the state took an interest in the materiality and generative force of documents as well as the internal documentary practices of bureaucrats (Cabot 2012; Hull 2003, 2012b; Göpfert 2013; Mathur 2016). Central to the first line of study is the role of bureaucrats' discretionary decision-making. Authors such as Jean-Pierre Olivier de Sardan (2015) for the African context, Fassin et al. (2015) for the French context, Tobias Eule (2014) for the German context, or Eule and colleagues (2019) in the European context have taken up Michael Lipsky's (1980) conceptualization of street-level bureaucracy and interpreted the use of discretion as a form of administrative policy-making – rather than the mere execution or implementation of policy. Central to the second line of study is an argument – often, but not always, inspired by actor-network theory – about the co-constitutive or productive force of documentary practices and bureaucratic objects when it comes to the implementation

of state laws by bureaucrats and judges (Latour 2002; see also Riles 2006: 21). Authors have variously focused on list-making (Dorondel and Popa 2018), the use of identity documents (Cabot 2012), police records and report-writing (Göpfert 2013; Komter 2006) and letters (Mathur 2016), or the production of case files (Hull 2003; Scheffer 2007) and their role in judicial decision-making (Kubal 2019: 78–101; Latour 2002; Oorschot 2014). Increasingly, this second strand has also been extended to studying the role of 'bureaucratic inscription' and the 'transformative potential of documents' in migrants' interactions with state officials and laws (Horton 2020: 3; Abarca and Coutin 2018: 7).

Though these ethnographies of law, state and bureaucracy have significantly expanded our conceptual vocabulary, they share a tendency to locate sociolegal change and transformative agency outside the parameters of codified law. Conceptually, transformative agency tends to be located either in the everyday, informal social practices of bureaucrats (shaped by workplace constraints, worldviews and moral judgements or webs of social relationships) or in the material, affective and aesthetic dimensions of documents that – by binding together actors, events and decisions – become constitutive of bureaucratic rules and subjectivities. Thus, the ways by which street-level and backstage bureaucrats standardize and codify their own practices in relation to existing codified law, and the effects this has on the wider web of 'state law', remain underexamined.

Building on the insights provided by legal pluralism and the anthropology of the state, while also addressing their blind spots, this chapter offers an in-depth exploration of the role of administrative guidelines in the doctrinal system of legal ideas, in the inner workings and in the practical making of immigration law.

Ethnographic Engagements with Law and Immigration Bureaucracies

That administrative guidelines are a documentary genre that warrants closer ethnographic attention became apparent during a research project exploring transformative dynamics in German immigration and – by extension – administrative law. This sociolegal and ethnographic project aimed to study immigration law in action, hypothesizing that transformative dynamics emerged in interactions and negotiations between migrants, bureaucrats, lawyers, legal-aid providers and judges around specific immigration and asylum claims (Vetters, Eggers and Hahn 2017). As such, it largely shared the conviction of Bierschenk and Olivier de Sardan (2019: 246, 249) that ethnographic methods – such as participant observation, interviews in a conversational mode and socializing both in and outside of the workplace – are

ideally suited to investigating how informal practices, pragmatic rules and practical norms interact with formal rules in formal organizations such as bureaucracies and courts. During a 3-year period, from 2015 to 2018, a team of three researchers consisting of myself, another anthropologist and a lawyer observed hearings at the administrative court and interacted with judges on a regular basis, accompanied legal-aid providers and lawyers in their counselling, and carried out internships as well as short-term visits in select branches of the administration concerned with issues of migration and integration in the city of Berlin. We also participated in a range of events and meetings where these actors interacted and conducted additional semi-formal interviews and informal conversations. However, the omnipresence of documents in our field meant that obtaining, reading and understanding the documents our interlocutors used, produced or referred to also constituted an integral part of fieldwork. Like in other bureaucratic and legal research settings (Kubal 2019: 78–101, Latour 2002, Lowenkron and Ferreira 2014), where documents become important ethnographic artefacts, 'ethnographing documents' (Lowenkron and Fereira 2014: 81) is as much part of fieldwork as participant observation. In this context, frequent referrals to the administrative guidelines of Berlin's Foreigners' Registration Office attracted our attention. They became a topic of recurrent conversation and opened a window into a larger system of legal meanings held by our interlocutors. To understand this larger system of legal meanings, we complemented our original ethnographic focus on what actors did and how they interacted with an immersion into the world of doctrinal legal reasoning.[5] Legal texts such as constitutions and statutory laws, but also scholarly commentaries and legal opinions or court judgments, which we encountered through acts of reference by our interlocutors (c.f. Latour 2002; Oorschot and Schinkel 2015), formed part of our ethnographic field. Textual artefacts, therefore, require a double ethnographic engagement that builds on methodological traditions in both fields – the anthropological study of street-level bureaucrats and the anthropological study of law. Tracing how these artefacts (which form distinct documentary genres) are practically constructed and used by our interlocutors, generate socialities and subjectivities, and acquire a performativity of their own became as important as understanding the web of legal meanings emanating from such texts and how actors navigated this web of meanings. The following section portrays the larger web of legal meanings, of which administrative guidelines are a part.

State-Law Ideology

Our interlocutors noted that a well-defined hierarchy of sources of law is central to the function of law in a democratic society and that this core notion is held in high regard by German public-law scholars and practitioners of the postwar era. Next to the constitutional text conceived by the *pouvoir constituant*, the highest authority has traditionally been accorded to a nation-state's elected legislative body. In principle, therefore, a democratically elected parliament is seen as the highest lawmaking authority in society and all state action has to be grounded in parliamentary law in order to be legitimate. This parliamentary lawmaking prerogative must be fully realized and represented in the organizational set-up of the state apparatus. According to the equally central principle of the division of powers, the administration then merely implements parliamentary laws but has no legislative power. Only under certain – legally specified and strictly circumscribed – conditions are executive state bodies granted permission to act as a norm-producing authority and to pass sublegal acts such as ordinances (*Verordnungen*), statutes (*Satzungen*) and administrative guidelines (*Verwaltungsvorschriften*). Described by some legal scholars (e.g. Wahl 2003: 571) as a third layer of norms, administrative guidelines are the most widespread executive activity with a regulatory character. In the hierarchy of norms, these are not considered legal sources in the strict sense but are rather seen as internal provisions of a general character issued by a higher administrative authority for subordinate authorities, or by the head of an administrative authority to provide guidance on how to implement relevant laws and carry out tasks. Administrative guidelines appear under a range of different designations such as directive, decree, administrative circular, internal instruction or procedural guidance (*Richtlinien*, *Erlasse*, *Rundverfügungen*, *innerdienstliche Weisung*, *Verfahrenshinweise*).

Traditionally, administrative guidelines are not to be understood as a legal norm but only as a declaration of intent of the issuing administrative body (Sachs 2018: margin number 111). They are considered to have only an internally binding character, without any *direct* external effects on citizens. The internal character of administrative guidelines also shields them from judicial control, and thus they can be neither the object of nor a standard for judicial control. The breach of an administrative guideline does not qualify an administrative act as unlawful and an administrative guideline cannot be subjected to an abstract judicial-review procedure (Maurer and Waldhoff 2017: 686). According to this doctrinal ideology, administrative guidelines are clearly demarcated from statutory law.

However, in recent decades, a vibrant doctrinal debate has developed on the question of the legal quality, the external effects and the

extent of judicial control over administrative guidelines (Baars 2010; Ossenbühl 2007; Sauerland 2005; Saurer 2006; Wahl 2003). Jurisprudence of the higher courts and legal scholarship have together created ever finer differentiations within the category of administrative guidelines, with different approaches accounting for the *indirect* external effects of administrative guidelines and determining their legal quality in relation to statutory administrative law. First, organizational and staff regulations are distinguished from guidelines providing guidance on the application of a concrete law. The latter are further differentiated into 'norm-interpreting guidelines' (*norminterpretierende Verwaltungsvorschriften*), clarifying indeterminate legal concepts in those parts of a norm dealing with legal facts, and 'discretion-steering guidelines' (*ermessenslenkende Verwaltungsvorschriften*), providing guidance on making use of legally mandated discretion in those parts of a norm determining legal consequences. Different degrees of judicial control are then posited for norm-interpreting and for discretion-steering guidelines.

In a second line of argument, an indirect external effect (allowing for judicial control) is deduced by considering the principle of equality before the law (art. 3, par. 1 German Basic Law). Here it is the actual uniform administrative practice (*Behördenpraxis*) which establishes a right to equal treatment, because the administration is bound by its own acts. Though the existence of an administrative guideline is a strong indicator of a uniform administrative practice, legal doctrine is careful to emphasize that it is the actual practice and not the guideline which establishes a right to equal treatment (Maurer and Waldhoff 2017: 689; Sachs 2018: Rn 111). Another line of reasoning having recourse to the general principle of protection of legitimate expectation has somewhat limited traction among courts and scholars in Germany, as it is not seen to emanate directly from a constitutionally enshrined right.[6] Finally, some legal scholars have advocated recognizing a direct external effect of administrative guidelines based on the argument that the administration has an original lawmaking/regulatory competence (Ossenbühl 2007; Wahl 2003; see also Maurer and Waldhoff 2017: 693). This is a clear departure from the traditional doctrinal view.

At the core of these doctrinal arguments is an attempt to patrol the boundaries between statutory law and an executive norm-making activity (traditionally portrayed solely as a form of interpretation and implementation). What is contested is the scope and intensity of the binding force of administrative guidelines as a type of norm that does not emanate from the democratically elected legislature and therefore creates plural sources of normative authority within the state. This debate attests to the difficulties that legal scholars, judges and public bureaucrats face in upholding and

adhering to the traditional theory of hierarchy of norms as well as to the principle of separation of powers within public-law doctrine.

A closer look at state-law ideology thus shows that it provides, on the one hand, a set of ideas that offers legitimacy and a space for the actions of bureaucrats that is clearly demarcated from parliamentary lawmaking. On the other hand, this set of ideas is much less stable than assumed and constant doctrinal work[7] is necessary to uphold the coherence and legitimacy of this system of meaning. It is within this universe of doctrinal ideas and tensions that immigration bureaucrats carry out their daily work. As discussed below, they simultaneously refer to classic notions of the separation of powers or the hierarchy of sources of law and actively take part in norm-making activities through the use and production of administrative guidelines as part of their everyday work.

State Law at Work

When we met officials of the Foreigners' Registration Office (Ausländerbehörde Berlin – ABB) acting as legal representatives in immigration hearings at the Administrative Court of Berlin, they frequently complained about the quick pace of legislative change and the increasing number of package amendments. 'I no longer acquire new digest copies of the relevant laws, since they become outdated so quickly', confided Mrs Beier[8] and – pointing to a stack of printouts – continued, 'I consult our administrative guidelines and, if necessary, print out the relevant norm in its latest version.' Ethnographers doing research in immigration bureaucracies are often struck by the complexity of rules governing migration and find that this sense of complexity is shared by their interlocutors, who seem to be equally overwhelmed with having to keep track of regulatory changes at different levels of the hierarchy of legal sources (Eule 2014: 43–54; Eule et al. 2019; Gill and Good 2019: 21–22). While some researchers have pointed to the oral transmission and production of legal knowledge (Eule 2014) or to the formation of local epistemic communities of interpretation (Affolter, Miaz and Poertner 2019), my interlocutors often highlighted the role of written administrative guidelines as a means to counter this complexity. Norms regulating immigration can be found in national German laws, in European directives and in international treaties, which together form a complex, multilevel and often quickly changing legal landscape. Many of these legal sources contain indeterminate legal concepts and provide room for executive discretion. Comparing the field of immigration law with the field of construction law, one judge, who heard cases in both fields, explained to me that the comparatively large number of ordinances and administrative guidelines in immigration law was not surprising given the

need to concretize legal concepts in these various norms and to steer the use of executive discretion according to political and social conditions in specific localities.

In the city state of Berlin, the ABB had published such guidelines for the application of several laws in the form of a compendium, the so-called Procedural Instructions of the ABB (*Verfahrenshinweise der Ausländerbehörde Berlin* – VAB), since 2005. My analysis of VAB versions published in the past has shown that the volume of instructions has steadily increased: in 2005, the guidelines consisted of 233 pages; by the autumn of 2018, this had risen to over 800 pages. Updated versions of the VAB were published on the ABB's website. Each new version contained a host of changes to individual stipulations that had accumulated over the preceding weeks or months, and the frequency with which new versions were published also steadily increased over the years. As Mr Klaus, a member of the ABB's litigation team, pointed out, changes in the VAB can be systematized according to whether they result from changes in legislation, are a response to a (higher instance) court decision, are based on instructions of the Senator of the Interior of the city state of Berlin or are the outcome of an internal decision-making process within the ABB.

I turn to field data to demonstrate how this internal decision-making process takes place. Asked how new instructions are incorporated into the VAB or older ones adapted, Mrs Koenig, the head of the legal division of the ABB, first portrayed this as a relatively structured top-down process in which the policy-issues department drafted such changes in anticipation of and in response to changes in legislation or to directives from the Senate of Berlin. However, when our conversation continued, it became apparent that there were other avenues for change as well. She noted that if, for example, a practice specified by instructions in the VAB is challenged in the course of a claim at the administrative court, this will be reported back to the office by the attending Foreigners ABB's representative. As head of the legal division, she might then decide to introduce a proposal for changing this instruction in the regular meetings of heads of sections. In fact, she continued, every employee can suggest improvements, but only the heads of sections could submit such proposals for discussion at their meetings. Such a meeting occurs every four weeks and, considering previous meetings, she confirmed that proposals for changes in the VAB were frequently on the agenda.

With regard to how the VAB were used by front-line officials, Mrs Koch from the legal division commented:

> These guidelines are the bible on which front-line employees base their daily work. They can't look up everything in the constitution, now, can they? Of course, this does not mean that we ask them to disregard the constitution, but it is *our* task to make

> sure that the guidelines are in line with the constitution and existing laws, so that our front-line staff does not have to worry about this.

In practice, therefore, administrative guidelines, such as the VAB, become the law that is applied, and executive actors participate in the construction of this 'law at work' by standardizing their own convictions, practical experience and informal norms and inserting them into the written guidelines in a bottom-up manner.

A similar in-house process of proposing, drafting and implementing changes to the administrative guidelines regulating the issuing of visas (*Visumshandbuch des Auswärtigen Amtes* – VAA) was explained to us during a discussion in 2017 with members of various sections of the AA dealing with migration policy, visa processing and visa litigation. These civil servants confidently spoke of their legal division as a kind of specialized in-house law firm, and emphasized that because of the circumscribed nature of their mandate they were able to acquire an in-depth expertise in all questions pertaining to visa regulations. In a weekly meeting, cases that were proving problematic in the daily practice of German missions abroad were jointly discussed. Often, they said they were confronted with having to deliberate on the meaning of a sub-subclause of an article in the Residence Act, which previously had no relevance simply because such cases did not occur, but now – due to new circumstances such as the war in Syria – such constellations arose on a daily basis. These civil servants felt they simply could not wait until German courts had established a uniform jurisprudence, and they had to provide guidance to the missions abroad that decided on visa applications. They thought it was best done through instructions in the VAA – a compilation that today runs to over 500 pages; is regularly updated; and, since 2016, has been published as an online document.

When discussing their own active role in the transformation of particular immigration norms, these civil servants pointed to an internally much-debated example describing a complex interplay of repeated cycles of administrative interpretations, judicial reviews, administrative reformulations and legislative changes. This example demonstrates how immigration officials simultaneously navigate a multilevel universe of legal meanings that both underlies their work and is challenged in that immigration officials insert their own practical, situated experience and convictions into the interpretation and reformulation of specific immigration norms. In 2004, a European directive (2004/114/EC) regulating the admission of third-country nationals to European Union (EU) member states for the purpose of study had been passed and subsequently transposed to German immigration law. The respective passage in the German Residence Act had been phrased in language that provided immigration officials with a degree

of legally guaranteed (*de jure*) discretion for either granting or denying a student visa. In the AA, guidelines were formulated to further specify how to exercise this *de jure* discretion. These instructions built on a shared conviction among front-line officials (forming an organizational worldview based on personal experience as well as hearsay) that student visas were frequently merely a means to enter Germany, not so much with the intention to study as to seek employment or family reunification before applying for a more advantageous residence title from within the country. While proof of successful enrolment at a German university was a prerequisite for a visa application, embassy officials doubted that university administrations were qualified to assess the validity and authenticity of the submitted certificates, suspecting further opportunities for fraud.

To counter this perceived abuse of student visas, the guidelines encouraged officials to make broad use of their *de jure* discretion, critically reviewing and even rejecting applicants who fulfilled all formal requirements. This restrictive practice was challenged in court by one visa applicant who had been repeatedly rejected and the case was eventually referred to the European Court of Justice (ECJ), which, in a preliminary ruling in 2014, rejected the manner in which the stipulations of the European directive had been transposed to the German Residence Act. Subsequently, discretion in determining the legal outcome was formally reduced: if all formal requirements were met, a visa *had* to be granted, whereas before, according to the German wording, authorities *could* grant a visa but were not obliged to do so. Subsequently, the AA changed its legal opinion and revised the VAA. These now provided extensive instructions on how to assess the supporting evidence needed to complete an application in order to evaluate whether applicants sincerely intended to study in Germany. A comprehensive plausibility review was introduced, and embassy officials were counselled to consider a wide range of circumstantial evidence as indicators that applicants might intend to enter Germany for other purposes than university studies. If indicators of intentional abuse could be found, then applicants should be rejected. However, now the rejection was no longer founded on *de jure* discretion but needed to be justified with reference to a *de facto* discretion deriving from the assessment of facts.

We can appreciate the reformulation of this particular part of the visa guidelines as an attempt to move away from a form of *de jure* discretion that was challenged by the ECJ towards a form of *de facto* discretion in the manner in which evidence for meeting the requirements set out in the norm is requested and assessed. This latter form of discretion is still subject to judicial control, but now assessed according to the standards of German administrative law, which provides some leeway. This shift allowed immigration officials to largely uphold their original practice based on the

perception that – as one of our interlocutors phrased it – embassy officials saw themselves as 'the last instance of control against inexperienced admission staff at universities and the abuse of student visas'. At the same time, they remained within the margins of interpretation that the doctrinal systematization of different forms of discretion and judicial control within German administrative law offered them. Noting that a new directive for student visas had just replaced the old one at the European level and was now being put into effect through amendments to the German Residence Act, our counterparts in the Federal Foreign Office saw future opportunities for asserting their point of view.

Demonstrating how immigration norms are internally assessed and guidelines made and reformulated by bureaucrats within a larger web of legal ideas, which are at once created by and contained in a variety of cross-referring legal texts originating at different levels (EU directives, national laws, EU and national court decisions, guidelines, administrative decisions), adds to current discussions of the role of street-level discretion in the governance of migration. Beyond the finding that street-level bureaucrats exercise *de facto* discretion in the face of uncertainty, complexity and resource constraints, I consider the formulation of administrative guidelines as an attempt by astute bureaucrats to codify their practical norms and to shield these from external challenges by inserting them into the space that the larger web of public-law doctrine provides for bureaucratic margins of interpretation. What Josiah Heyman (1995) describes as bureaucratic thought-work in relation to worldviews and Julia Eckert (2020) refers to as bureaucratic ethics tied to specific notions of the commonweal is momentarily standardized and codified trough what could perhaps be called 'second-order' doctrinal work – the skilful navigation of public-law doctrine. In this ongoing process of inserting practical norms and convictions into the guidelines and either defending them successfully against external challenges or having to reformulate them, *state law at work becomes state law in the making* – as discussed below. Publicly available, these administrative guidelines attract the attention of external actors and become yet another source of reference. As an object of reference and contestation, they connect migrants and their lawyers, legal-aid providers and interest organizations, as well as bureaucrats and judges, in an ongoing struggle of interpretation and norm-making.

State Law in the Making

Immigration lawyers who want to contest the outcome of administrative decisions based on the visa guidelines or VAB have to do so by filing an appeal in an individual case, claiming that the ABB or the AA incorrectly exercised its discretion in that particular case. In conversations with lawyers,

contrary to my initial expectation, the VAB or VAA were not perceived as problematic in terms of limiting the procedural and substantive rights of their clients or restricting the scope of judicial control. On the contrary, relatively frequently, lawyers saw them as a resource that could be strategically mobilized as one element among a variety of documentary practices, which Susan Coutin (2020: 136–40) has described as the "legal craft" of lawyers and legal-aid providers. Lawyers often commented positively on the fact that the ABB published the VAB on its web page,[9] and used them as a standard to which bureaucrats could be held accountable by insisting on the legal principal of equal treatment.

Regarding another agency, the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge – BAMF), we witnessed one such challenge in an asylum case at the administrative court of appeal, which involved an assessment of the situation in Syria. The presiding judge, the lawyer and the representative of BAMF became involved in a verbal exchange over a handwritten note in the administrative file of the applicant's daughter, who had lived with her in Syria. While the mother had only been granted subsidiary protection, the daughter had received full asylum status. The daughter's file contained a note saying that – as established by internal guidelines – the region in which she resided in Syria was generally considered unsafe territory (since it was held by oppositional forces and its residents were therefore considered opponents of the regime). In the German wording, the term 'internal guidelines' (*Leitlinien*) was ambiguous, making it unclear whether a formal administrative guideline was meant; upon being questioned by the presiding judge, Mr Baum, the BAMF representative vehemently denied that such an internally binding guideline had existed. He repeatedly said the note in the file did not represent a generalizable and standardized decision-making practice of BAMF. Mrs Kofti, the lawyer, on the other hand, challenged this account, insisting that some form of standardized internal guidelines on how to treat various categories of Syrian asylum applicants must have existed. She saw the fact that BAMF had temporarily issued standardized written decisions without further oral hearings or individual evaluations as further proof that such internal guidelines must have existed, and explicitly likened their legal character to the VAB of Berlin's Foreigners' Registration Office. In this case, the judge did not follow up on Mrs Kofti's line of argument. Had she been successful in convincing the judge that a standardized decision-making practice had existed – and even been laid down in written guidelines – she would have had grounds for requesting equal treatment of mother and daughter. The guidelines would then – as proof of a general practice and by means of a detour through judicial control – have acquired a binding force for BAMF.

In Berlin, lawyers and their migrant clients were acutely aware of the immense practical importance of the VAB for immigration officials' decision-making. While they attempted to strategically use the VAB and other administrative guidelines to their advantage in individual appeals (thereby judicializing their content), they also, together with migrant interest organizations, lobbied for more external oversight and stakeholder participation in the actual process of formulating and updating these administrative guidelines. When, in 2016, a new government was elected for the city state of Berlin and a governing coalition comprising the Green Party, the Left Party and the Social Democrat Party was formed, this coalition was receptive to the proposals of migrants' and lawyers' associations. In the coalition contract, the establishment of an expert committee that would advise on VAB revisions and submit its own suggestions for revisions was agreed. The committee was to be formed by delegates from local migrant associations, the refugee council of Berlin, the so-called Härtefallkommission – a governmental committee for hearing petitions in cases of hardship in immigration law – large welfare organizations, trade unions, employer associations and professional lawyers' associations, but also representatives of the ABB and of other public agencies tasked with carrying out immigration- and integration-related activities. As guiding principle for the committee's work, the coalition partners affirmed their intention to make full use of their scope of discretion in implementing federal law at the city level according to an integration-oriented liberal local policy vision that considered the humanitarian aspects of cases.

It took a year and a half until the committee was fully established, and only at the end of 2019 did it issue its first batch of recommendations, which were then yet to be either accepted or rejected by Berlin's Senator of the Interior. It was thus difficult to assess the impact of the committee's work on the reformulation and revision of the VAB, but its internal dynamics illustrate the complex and contested micropolitics around the implementation and (re)formulation of immigration law at this local level.

On the one hand, the establishment of the committee indicates that an internal and non-transparent process of executive norm-making, to which bureaucrats significantly contribute by standardizing and codifying their own practical norms, is being brought back into a public form of political deliberation. Importantly, this is not the deliberation of elected representatives, who have the legitimate democratic mandate to debate on and pass parliamentary laws, but rather a deliberation among representatives of several interest organizations and stakeholders. Among them are organizations representing the interests of migrants (who largely lack direct political representation), but also representatives of federal and state bureaucracies and other societal interest groups. The consultative participation of this

expert committee in the continuous reformulation of the VAB further pluralizes the range of norm-making actors involved in the field of immigration governance at the local level.

On the other hand, even this merely consultative participation was – according to some of my interlocutors among the civil society and migrant associations – met with strong resistance by the ABB, which did not want to relinquish its authority over and authorship of the VAB. Very few of the recommendations put forward by the representatives of refugee and migrant associations were supported by the representative of the ABB.

Viewing the social life of administrative guidelines, such as the VAB or the VAA, through the ethnographic lens has, thus, revealed how this documentary genre connects various social actors. It shows how they were drawn into a process of mutually interdependent activities of norm-interpretation; norm-contestation; and, ultimately, norm-making in the ambiguous and contested space between deciding on individual cases and abstract, general codification. It also shows how individual and collective actors struggle to have their diverging interests incorporated into a pluralized norm-making process. This process is by nature political and shaped by the unequally distributed legal, institutional, material and symbolic resources of those attempting to govern and control migration and those who, as migrants, are being subjected to this governance.

Law, Paperwork and the Critical Study of Migration Governance

This chapter has offered a closer ethnographic look at how German immigration law is produced as a subfield of administrative law. Administrative guidelines that are doctrinally theorized as an ambivalent source of law in need of constant doctrinal maintenance work are, in practice, produced as a complex form of executive norm-making to which street-level bureaucrats and legal advisors of immigration authorities actively contribute in a bottom-up process. They are contested and brought back into a process of political deliberation in which the interests of different social actors – among them (non-naturalized) migrants, who are excluded from the formal legislative process – are renegotiated. Actors variously engage with and contribute to the formulation of administrative guidelines, and become enmeshed in a larger web of legal meaning. This finding reveals a plurality of norm-making actors and norm-making processes at different levels and sites. It defies a conceptualization of state law as a monolithic and hierarchical source of authority and instead resonates with conceptualizations of normativity developed in anthropological research on legal pluralism.

I have also suggested shifting attention from *de facto* discretion or deviation from formal norms (the focus of much of the literature on street-level bureaucrats' discretionary practices) to a broader continuum of interpreting and remaking norms in which bureaucrats partake in their daily decision-making. Studying that continuum has highlighted attempts of immigration bureaucrats to standardize and codify their own practical norms. This calls for new research questions about the effects of street-level bureaucrats' discretionary power, and about state power more generally. As outlined in this volume's introduction (Andreetta and Borrelli), research on street-level bureaucrats' discretion in the field of immigration governance often explores the operating of power exactly through the unreadability and unpredictability of paperwork. What from the perspective of those who are subjected to it is too often experienced – at best – as unreadable and arbitrary (Nakueira, this volume) and – at worst – as structural violence within a discriminatory and racialized 'system' (Lindberg and Borrelli, this volume), can from another perspective be ethnographically unpacked as social practices within a larger system of meaning built on doctrinal notions of public law that are intended to safeguard individual liberty, equality, democratic representation and the legitimacy as well as the accountability of state actions (see also Andreetta, this volume). Understanding how bureaucrats and other social actors, motivated by complex and situated bundles of interests, act in reference to this system of meaning, how they make use of the margins of interpretation it offers and contribute to its practical reformulation, can provide another critical edge to ethnographic research on immigration law and bureaucracies: it complements ethnographic studies, which explore the power nexus between state and migrants as materialized in documents and experienced by migrants (Heyman 2020: 229), with a perspective that focuses on the experiences and documentary practices of state officials. Rather than taking a standpoint external to the legal-professional worldview of bureaucrats, such a critical exploration starts from within the normative universe they inhabit (see also Bierschenk and Olivier de Sardan 2019). Thus, my ethnographic account of administrative guidelines as a documentary genre intimately tied to bureaucratic practice has served to connect with and illustrate how core notions of democracy – such as the rule of law, legitimacy and political representation – that are taken to constitute pillars of our social order and have been enshrined in public law are (re)constructed and can become intertwined with forms of exclusion and inequality in and through the daily practice of immigration law. Along with Heyman (2020: 242), who argues that identity documents for migrants are a vital avenue to penetrate citizenship inequalities and therefore warrant critical anthropological attention, I call for equal critical attention to inner-administrative documentary genres and

practices that structure the interpretation, application and transformation of immigration law.

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Notes

1. I do not follow the frequent distinction made by policy-makers (and researchers) between forced and voluntary migration and between immigration and asylum law, but instead favour a holistic approach to the study of migration governance that builds on a growing literature critically questioning this distinction. See Crawley and Skleparis (2018) and Vetters (2022).
2. In January 2020, the ABB was renamed the Berlin Immigration Office (Landesamt für Einwanderung).
3. While state actors were part of ethnographic analyses from early on (K. von Benda-Beckmann and F. von Benda-Beckmann 1998), the inner workings of state law often only came into view when contested by (marginalized) citizens and in situations where sub- or supranational norms were levied against state norms (e.g. Eckert 2006, Randeria 2007). Recently, Zenker and Hoehne (2018) have fruitfully brought together the legal-pluralism lens with insights from the anthropology of the state in an edited volume discussing the application of customary law within state law by African bureaucrats.
4. For overviews on the anthropology of the state, see Sharma and Gupta (2006); Stepputat and Nuijten (2018); and Thelen, Vetters and K. von Benda-Beckmann (2018). For the ethnographic study of public-service delivery and bureaucracies, see also Bear and Mathur (2015); Bierschenk and Olivier de Sardan (2014, 2019); Hoag (2011); and Hull (2012a).
5. This immersion into doctrinal reasoning was further facilitated by our project's institutional affiliation to the law faculty of one of the two major universities in Berlin. This affiliation not only offered the anthropologists among

us a space of learning and guidance on doctrinal matters but also played an important role in easing our access to (legally trained) interlocutors in various settings in Berlin. In the process, the boundaries between academic 'home' and 'ethnographic field' became blurred.

6. The publication of a guideline, however, establishes a strong legitimate expectation.
7. I take inspiration from Josiah Heyman's (1995) notion of bureaucratic thought-work here, but refashion it in a manner that reflects my specific analytical interest in bureaucrats' self-understanding as 'law implementers' or 'law makers'. This particular interest notwithstanding and as will be shown below, thought-work as doctrinal work cannot be separated from thought-work on substantive worldviews and moral evaluations (see also Heyman 2000; Eckert 2020).
8. All names are pseudonyms.
9. Many other federal and state immigration agencies did not publish their guidelines, since – if published – this would strengthen the argument for their external effect. With the introduction of freedom of information legislation (1999 in Berlin, 2006 on the federal level), citizens could, however, demand publication. The AA began publishing its visa guidelines following the judicial order to comply with requests for information made under the Freedom of Information Act.

References

Abarca G.A. and S.B. Coutin (2018), 'Sovereign Intimacies: The Lives of Documents within US State – Noncitizen Relationships', *American Ethnologist* 45(1): 7–19.

Affolter, L., J. Miaz and E. Poertner (2019), 'Taking the "Just" Decision: Caseworkers and Their Communities of Interpretation in the Swiss Asylum System', in N. Gill and A. Good (eds), *Asylum Determination in Europe. Ethnographic Perspectives*. Cham: Palgrave Macmillan, pp. 263–83.

Andreetta, S., L. Enria, P. Jarroux and S. Verheul (2022), 'States of Feeling. Public Servants' Affective Entanglements in the Making of the State', *Cambridge Journal of Anthropology* 40(2): 1–20.

Baars, A. (2010), *Rechtsfolgen fehlerhafter Verwaltungsvorschriften*. Baden-Baden: Nomos.

Bear, L. and N. Mathur (2015), 'Introduction. Remaking the Public Good: A New Anthropology of Bureaucracy', *Cambridge Journal of Anthropology* 33(1): 2–17.

Benda-Beckmann, F. von (2002), 'Who's Afraid of Legal Pluralism?' *Journal of Legal Pluralism and Unofficial Law* 34(47): 37–82.

_____ (2008), 'Riding or Killing the Centaur? Reflections on the Identities of Legal Anthropology', *International Journal of Law in Context* 4(2): 85–110.

Benda-Beckmann, F. von and K. von Benda-Beckmann (1998), 'Where Structures Merge: State and Off-State Involvement in Rural Social Security on Ambon, Indonesia', in S.N. Pannell and F. von Benda-Beckmann (eds), *Old World Places, New World Problems: Exploring Resource Management Issues in Eastern Indonesia*. Canberra: Australian National University, Centre for Resource and Environmental Studies, pp. 143–80.

Benda-Beckmann, K. von and B. Turner (2018), 'Legal Pluralism, Social Theory, and the State', *Journal of Legal Pluralism and Unofficial Law* 50(3): 255–74.

Bierschenk, T. and J.-P. Olivier de Sardan (eds) (2014), '*States at Work. Dynamics of African Bureaucracies*. Leiden: Brill.

Bierschenk, T. and J.-P. Olivier de Sardan (2019), 'How to Study Bureaucracies Ethnographically?' *Critique of Anthropology* 39(2): 243–57.

Cabot, H. (2012), 'The Governance of Things: Documenting Limbo in the Greek Asylum Procedure', *PoLAR: Political and Legal Anthropology Review* 35(1): 11–29.

Crawley, H. and D. Skleparis (2018), 'Refugees, Migrants, Neither, Both: Categorial Fetishism and the Politics of Bounding in Europe's "Migration Crisis"', *Journal of Ethnic and Migration Studies* 44(1): 48–64.

Coutin, S.B. (2020), 'Opportunities and Double Binds. Legal Craft in an Era of Uncertainty', in S.B. Horton and J. Heyman (eds), *Paper Trails: Migrants, Documents, and Legal Insecurity*. Global Insecurities. Durham, NC: Duke University Press, pp. 130–52.

Dorondel, S. and M. Popa (2018), 'Workings of the State: Administrative Lists, European Union Food Aid and the Local Practices of Distribution in Rural Romania', in T. Thelen, L. Vetters and K. von Benda-Beckmann (eds), *Stategraphy. Toward a Relational Anthropology of the State*. New York: Berghahn, pp. 124–40.

Eckert, J. (2006), 'From Subjects to Citizens: Legalism from Below and the Homogenization of the Legal Sphere', *Journal of Legal Pluralism and Unofficial Law* 38(53–54): 45–75.

_____ (2020), 'The Office. Ethos and Ethics in Migration Bureaucracies', in J. Eckert (ed.), *The Bureaucratic Production of Difference. Ethos and Ethics in Migration Administrations*. Bielefeld: Transcript, pp. 7–26.

Eule, T. (2014), *Inside Immigration Law: Migration Management and Policy Application in Germany*. Farnham: Ashgate.

Eule, T., L. Borrelli, A. Lindberg and A. Wyss (2019), *Migrants Before the Law. Contested Migration Control in Europe*. Cham: Palgrave Macmillan.

Fassin, D. et al. (2015), *At the Heart of the State. The Moral World of Institutions*. London: Pluto Press.

Gill, N. and A. Good (eds) (2019), *Asylum Determination in Europe. Ethnographic Perspectives*. Cham: Palgrave Macmillan.

Göpfert, M. (2013), 'Bureaucratic Aesthetics: Report Writing in the Nigerian Gendarmerie', *American Ethnologist* 40(2): 324–34.

Griffiths, J. (1986), 'What is Legal Pluralism?' *Journal of Legal Pluralism and Unofficial Law* 24: 1–55.

Heyman, J. (1995), 'Putting Power in the Anthropology of Bureaucracy. The Immigration and Naturalization Service at the Mexico–United States Border', *Current Anthropology* 36(2): 261–87.

_____ (2000), 'Respect for Outsiders? Respect for the Law? The Moral Evaluation of High-Scale Issues by US Immigration Officers', *Journal of the Royal Anthropological Institute* 6(4): 635–52.

_____ (2020), 'Conclusion. Documents as Power', in S.B. Horton and J. Heyman (eds), *Paper Trails: Migrants, Documents, and Legal Insecurity*. Global Insecurities. Durham, NC: Duke University Press, pp. 229–47.

Hoag, C. (2011), 'Assembling Partial Perspectives: Thoughts on the Anthropology of Bureaucracy', *PoLAR: Political and Legal Anthropology Review* 34(1): 81–94.

Horton, S.B. (2020), 'Introduction. Paper Trails: Migrants, Bureaucratic Inscription, and Legal Recognition', in S.B. Horton and J. Heyman (eds), *Paper Trails: Migrants, Documents, and Legal Insecurity*. Global Insecurities. Durham, NC: Duke University Press, pp. 1–26.

Horton, S.B. and J. Heyman (eds) (2020), *Paper Trails: Migrants, Documents, and Legal Insecurity*. Global Insecurities. Durham, NC: Duke University Press.

Hull, M. (2003), 'The File: Agency, Authority, and Autography in an Islamabad Bureaucracy', *Language & Communication* 23(3–4): 287–314.

_____ (2012a), 'Documents and Paper', *Annual Review of Anthropology* 41: 251–67.

_____ (2012b), *The Government of Paper. The Materiality of Bureaucracy in Urban Pakistan*. Berkeley: University of California Press.

Komter, M.L. (2006), 'From Talk to Text: The Interactional Construction of a Police Record', *Research on Language and Interaction* 39(3): 201–28.

Kubal, A. (2019), *Immigration and Refugee Law in Russia. Socio-legal Perspectives*. Cambridge: Cambridge University Press.

Latour, B. (2002), *La Fabrique du droit, une ethnolgie du Conseil d'Ètat*. Paris: La Découverte.

Lipsky, M. (1980), *Street-level Bureaucracy. Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation.

Lowenkron, L. and L. Ferreira (2014), 'Anthropological Perspectives on Documents. Ethnographic Dialogues on the Trail of Police Papers', *Vibrant. Virtual Brazilian Anthropology* 11(2): 76–112.

Mathur, N. (2016), *Paper Tiger. Law, Bureaucracy and the Developmental State in Himalayan India*. Cambridge: Cambridge University Press.

Maurer, H. and C. Waldhoff (2017), *Allgemeines Verwaltungsrecht*, 19th edn. Munich: C.H. Beck.

Olivier de Sardan, J.-P. (2015), 'Practical Norms: Informal Regulations within Public Bureaucracies (in Africa and Beyond)', in T. de Herdt and J.-P. Olivier de Sardan (eds), *Real Governance and Practical Norms in Sub-Saharan Africa. The Game of the Rules*. New York: Routledge, pp. 19–62.

Oorschot, I. van (2014), 'Seeing the Case Clearly: File Work, Material Mediation, and Visualizing Practices in a Dutch Criminal Court', *Symbolic Interaction* 37(4): 439–57.

Oorschot, I. van and W. Schinkel (2015), 'The Legal Case File as a Border Object: On Self-Reference and Other-Reference in Criminal Law', *Journal of Law and Society* 42(4): 499–527.

Ossenbühl, F. (2007), '§ 104. Autonome Rechtsetzung der Verwaltung', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* Bd. V. Heidelberg: C.F. Müller, pp. 305–51.

Randeria, S. (2007), 'The State of Globalization: Legal Plurality, Overlapping Sovereignties and Ambiguous Alliances between Civil Society and the Cunning State in India', *Theory, Culture and Society* 24(1): pp. 1–33.

Riles, A. (2006), 'Introduction: In Response', in A. Riles (ed.), *Documents. Artifacts of Modern Knowledge*. Ann Arbor: University of Michigan Press, pp. 1–38.

Sachs, M. (2018), '§ 40 Verwaltungsverfahrensgesetz, Ermessen', in P. Stelkens, H.-H. Bonk and M. Sachs (eds), *Verwaltungsverfahrensgesetz Kommentar*. Munich: C.H. Beck, margin numbers 1–238.

Sauerland, T. (2005), *Die Verwaltungsvorschrift im System der Rechtsquellen*. Berlin: Duncker & Humblot.

Saurer, J. (2006), 'Die neueren Theorien zur Normkategorie der Verwaltungsvorschriften', *Verwaltungsarchiv* 9(7): 249–69.

Scheffer, T. (2007), 'File Work, Legal Care and Professional Habitus – An Ethnographic Reflection on Different Styles of Advocacy', *International Journal of the Legal Profession* 14(1): 57–80.

Sharma, A. and A. Gupta (eds) (2006), *The Anthropology of the State. A Reader*. Malden, MA: Blackwell, pp. 1–44.

Stepputat, F. and M. Nuijten (2018), 'Anthropology and the Enigma of the State', in H. Wystra and B. Thomassen (eds), *Handbook of Political Anthropology*. Cheltenham and Northampton, MA: Edward Elgar Publishing, pp. 127–44.

Tamanaha, B.Z. (l993), 'The Folly of the "Social Scientific" Concept of Legal Pluralism', *Journal of Law & Society* 20(2): 192–217.

Thelen, T., L. Vetters and K. von Benda-Beckmann (eds) (2018), *Stategraphy. Toward a Relational Anthropology of the State*. New York: Berghahn.

Vetters, L. (2022), 'Making Sense of Noncitizens' Rights Claims in Asylum Appeal Hearings: Practices and Sentiments of Procedural Justice Among German Administrative Judges', *Citizenship Studies* 26 (7): 927–43.

Vetters, L., J. Eggers and L. Hahn (2017), *Migration and the Transformation of German Administrative Law: An Interdisciplinary Research Agenda*. MPI for

Social Anthropology Working Papers 188. Halle/Saale: Max Planck Institute for Social Anthropology.

Wahl, R. (2003), 'Verwaltungsvorschriften: Die ungesicherte dritte Kategorie des Rechts', in E. Schmidt-Aßmann et al. (eds), *Festgabe 50 Jahre Bundesverwaltungsgericht*. Cologne: Carl Heymanns, pp. 571–98.

Zenker, O. and M.V. Hoehne (eds) (2018), *The State and the Paradox of Customary Law in Africa*. London: Routledge.