

The Afghan experience of asylum in Germany : towards an anthropology of legal categories

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The Afghan experience of asylum in Germany



Towards an anthropology of legal categories

Tina Gehrig

Providing protection for the persecuted is a foundational value of Western-European liberal democracies¹. Nevertheless, while refugee protection remains an uncontested moral duty, nationalist logics of state sovereignty and exclusion are increasingly brought to bear on asylum seekers, as right-wing populist formations portray asylum as a loophole for immigration. Political asylum is at the intersection of these two powerful logics and represents a fundamental ethical quandary, for liberal democracies. This article examines how the underlying moral principles of political asylum are transformed and undermined as they are implemented through legal categories and administrative practices. More specifically, it throws light on the lived consequences of this quandary and illuminates the performative work of German legal categories as they constitute the (il)legitimacy of asylum seekers and the lawfulness (*Rechtsstaatlichkeit*²) of the state.

Coutin, Maurer and Yngvesson (2002: 801) have examined how global processes

are constructed to «order, include, exclude persons, goods and practices», drawing boundaries between the legitimate and the illegitimate. Law and illegality are revealed as mutually constituting and interdependent, as they operate to form a coherent world. Law, policies, and legal statuses configure a shared yet contested cosmology, a set of foundational ideas and rules informing the way a group of people envisions and acts upon other people (Merry 1992). What role do legal categories play as they classify the migrants entering a country? What are their effects and how are they experienced by their subjects? I suggest that the legal categories of asylum not only order and (de)legitimize asylum seekers, but also constitute the state administration as the gatekeeper of the nation-state in the eyes of the population. A confrontation of the ethical foundations of this juridico-administrative structure with the experiences of the subjects it is supposed to manage will throw light on the social consequences this structure may entail. The asylum

¹ This essay is based on twelve months of ethnographic field research in Hamburg (Germany). The research was generously supported by grants from the German Marshall Fund of the United States and the Institute on Global Conflict and Cooperation.

² *Recht* signifies «law» in German, and *Staat* the «state». The composite word can be translated as the «Rule of Lawness» or constitutionality.



seekers' experiences of the contingency and, at times, tyranny of the state destabilize the legitimacy of the idea of the Rule of Law (*Rechtsstaatlichkeit*).

Afghans have been fleeing their country since 1979 and have been among the main national groups of asylum seekers in Europe for the last fifteen years. Their experience of changing asylum policies is particularly revealing, since it covers the full range of possible legal statuses open to them over the last twenty years: some are naturalized German citizens (*Staatsbürger*), others are «political refugees» (*Flüchtlinge*), temporarily accepted asylum seekers, or illegal aliens living with a *Duldung*, a temporary suspension of deportation. Furthermore, as an educated urban elite that is familiar with the Western discourse of universal human rights, they challenge the stereotypes associated with asylum seekers in Europe (Centlivres and Centlivres-Demont 2000).

The contemporary regime of international refugee law was developed in response to the massive numbers of displaced people in Europe generated by World War II. It represents a moral and legal attempt to redress the atrocities perpetrated by fascist regimes and avoid future misdeeds (Fulbrook 1999: 67). Within the European historical context, the case of Germany is particularly interesting because of the moral responsibility of the German nation-state towards refugees in the aftermath of the atrocities committed by the Nazis. By inscribing the phrase «Anybody persecuted on political grounds shall have the right to asylum»³ in the German Constitution (art. 16), the German state grants each foreigner an individualized right to apply for asylum. No other country has inscribed this right into its legal system on the level of the constitution. This high degree of protection is usually brought into relation with Germany's moral responsibility to «make up» for its dark past (Bundesamt für die Anerkennung ausländischer Flüchtlinge 2001: 54). Nevertheless, only 4,7% of all asylum candidates have been granted full refugee status in the last ten years⁴. The steady

increase in numbers of applicants since the late 1970s has created a growing gray zone populated by individuals who are neither granted the status of political refugee nor deported.

German legal classifications

Germany defines itself as a *Rechtsstaat*. This concept defines a state founded on a constitution and ruled by law. The idea of *Rechtsstaatlichkeit*, or constitutionality, founds the legitimacy of the German state, as it does all European nation-states. The moral duty of providing protection for the persecuted is the only right given solely to aliens. Recognition of one's status as a political refugee is conferred by an independent auditor (*Einzelentscheider*) of the Federal Office for the Recognition of Foreign Refugees. Only state persecution on political grounds is taken into consideration. General hardship such as poverty, civil war or natural disasters do not give access to asylum rights. A negative decision can be contested in court. If the recognition of refugee status is achieved on the basis of §16 of the constitution, the foreigner receives a permanent resident permit and enjoys the same rights as German citizens, except for voting. Refugee status can be revoked under certain conditions (i.e. when the individual is deemed a threat for the security of the country). Five years of residency in the country as well as financial independence and a few other requirements (such as disposing of adequate housing and a basic mastery of the German language) open up the possibility of naturalization. It is only at that point that the right to reside in Germany becomes inalienable.

The 1993 reform of Germany's asylum law introduced the concept of «secure third states». Asylum seekers are supposed to seek protection in the first secure state they pass through during their flight.

³ Politisch Verfolgte genießen Asylrecht.

⁴ This is the mean from the years 1994 to 2003. The highest percentage was 9% in 1995, the lowest 1,6% in 2003. The mean percentage of individuals who were granted Convention refugee status (the so-called «little asylum» based on §51 of the Aliens' Act) amounts to 5,6% for the years 1995 to 2003 (www.bafl.de).



Germany is surrounded by secure third states, so constitutional refugee status cannot be conferred to asylum seekers who enter the country via a land route. When these countries remain unknown, because the asylum seekers did not know where they were or refuse to identify the route they took, these individuals may be considered as refugees on the basis of the Geneva Convention of 1951⁵ if they fulfill the criteria for refugee status. As a result, they receive the so-called «little asylum», based on §51 of the Aliens' Act (*Verbot der Abschiebung politisch Verfolgter*). This legal status conveys temporary resident status (*Aufenthaltsbefugnis*).

The 1993 reform of Germany's asylum law confirmed the increasingly restrictive application of refugee rights. In 2002, 71'000 individuals applied for asylum for the first time. Of the 130'000 cases decided, 1,8% received the constitutional right of asylum, and another 3,2% were recognized as Geneva Convention Refugees (§51) and were protected against deportation. Many asylum seekers do not achieve refugee status, but for humanitarian reasons cannot be sent back to their country of origin. This principle of «non-refoulement» has created a growing gray zone populated by individuals with an in-between status. Paragraph 53 of the Aliens' Act, for example, offers temporary protection to rejected asylum seekers who are deemed in need of protection because of the state of war, poverty or violence reigning in their country (1,2% in 2002)⁶. This leads to two very different possible legal statuses: the *Aufenthaltsbefugnis* and the *Duldung*.

The *Aufenthaltsbefugnis* is a renewable temporary residence permit. The periodicity of the renewal of this temporary permit can vary from six months to two years. The time spent in the country with this permit is taken into account and may lead to an improved status. After eight years, the holder of this permit may apply for a permanent resident status and for naturalization. Rejected asylum seekers who have been granted temporary protection on the basis of §53 of the Aliens' Act may also receive a *Duldung*. This depends

on the prevalent local administrative practice. The *Duldung* is not a residence permit (*Aufenthaltstitel*). The individual who holds a *Duldung* is residing illegally in the country. Paradoxically, this means that the German state can at the same time recognize the need for protection for an individual on its territory and nonetheless withhold the authorization to reside there. This particular status is only defined by the negative. It signifies a temporary suspension of the deportation of a person residing illegally in Germany. Work is limited to two hours per day in the cleaning, newspaper, or restaurant businesses. Mobility is limited to the district one resides in. People with a *Duldung* cannot improve their status. The number of years spent in Germany makes no difference. Their only option is to leave the country or to petition the local political authorities⁷. Even if one marries a European national, one would have to leave and reenter the country to regularize one's status.

Because of the two decades of war in Afghanistan, Afghans in Germany were protected by the principle of non-refoulement. Even if their petition for asylum or temporary protection was rejected, they could remain in the country as documented illegal aliens with a *Duldung*. As a result, individuals spent years, if not decades, in a semi-legal space that precluded full legal personhood. The German Aliens' Act and, more specifically, the *Duldung* suppressed the possibility of developing a life project. Yet, this was a central reason for leaving Afghanistan in the first place: to regain a secure future for oneself and one's children. As people who had entered the country illegally, *Duldung*-carriers were not really «there». They had not quite entered the realm of law and of the nation-state. They remained on the threshold, suspended in time (Gehrig 2003). Ironically, the suspension of deportation was called *mehman* by the Afghans, the Persian word for guest. The contrast between the severity of the restrictions they faced – and the feelings of unwelcomeness these have conveyed – and the lavishness of Afghan hospitality

⁵ The Geneva Convention of 1951 (art. 1A) defines a refugee as a person with a «well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular group or political opinion...»

⁷ A specific commission decides on the outcome of each petition. This decision is based on the commission members' goodwill. It is an act of charity, not of right. Nevertheless, the petitions formulated by illegal aliens in Hamburg were systematically refused on the grounds that there was no judicial basis left to improve their status, defeating the very purpose of the petition: to provide help in certain cases when all legal means have been exhausted.

⁶ The statistics for this paragraph are based on www.bafl.de/template/index_asylstatistik.htm



could hardly be greater. Nevertheless, their translation did convey the temporary nature of their stay, since a guest is always expected to leave eventually.

The work of the law

What are the social consequences of this legal classification of asylum seekers as «refugees», «temporarily protected persons» or «tolerated⁸ persons»? The main difference among these various legal categories lies in the degree of permanence they confer to the stay in Germany. These various statuses leave key questions unanswered: For how long will the status avert deportation? Will it be possible to improve one's status and ultimately remain in the country? When will access to the labor market and to freedom of movement be conferred?

Rather than being clearly accepted or rejected, most asylum seekers are put in a provisional space of partial acceptance, where their presence is neither acknowledged as permanent or long-term, nor deemed outside of the law and legality. In 2001, 30% of the Afghan population in Germany was living with an *Aufenthaltsbefugnis*, 15,4% was living with a *Duldung*, and 21% was still awaiting an answer to the asylum application (all figures are from Tietjens 2002: 12). The latter would almost certainly receive a negative answer and join the ranks of those living with a suspension of deportation as the Federal Office for Refugees worked through the backlog. Two-thirds of the Afghan population were thus living with a temporary and therefore insecure status. The prevalent aspect of their situation was not the illegal or legal character of their presence in Germany; it was the temporary nature of their stay: some had to renew their papers every three months, others every two years. This temporality defined to what degree the various desires and strategies for building future were open or not (i.e. access to higher education, to mobility or to the labor market). The more

insecure the status, the higher the dependency on the state, the more passive and depressed many Afghans were. Afghans living with a *Duldung* were reduced to collecting their welfare check (or work clandestinely, if they were young and strong). Those who were granted permanent resident permits, on the other hand, often revealed themselves as dynamic entrepreneurs, running grocery stores, used car dealerships, or even hotels. Papers would open up or freeze hopes, dreams and desires.

The provisional nature of these legal categories (the suspended time of the *Duldung*, the potential of improvement over time provided by a *Befugnis*, the immediate possibilities opened by the status of refugee) recently increased greatly for the Afghans living in Germany. Until 2001, no one thought of deporting Afghans back to their war-torn country in the near future. They had no sense of a threat of being forced to return. This threat became a very pressing reality for 66% of the Afghans living with an insecure status when the first Afghan, a convicted criminal, was sent back to Kabul from Hamburg in June 2002. I sensed a mixture of disbelief, resignation and great anxiety, especially among women. Various rumors circulated that could not be confirmed or invalidated since it was impossible to get clear information as to who would be sent back when. Women would tell me: «they can't send us back, because we can't go back! We have no place to go. We sold everything. There is nothing there for us.» Despite its inevitability for many of the rejected asylum seekers, the imminence of an actual forced return could only be denied. There was very little political mobilization to protest⁹. Given the large number of rejected asylum seekers with no permanent residence permits and the increasing pressure to implement forced returns, many Afghans are now being turned into refugees once more, as they strive to leave again. In a sense, they had never arrived, remaining displaced despite years of residence in Germany.

⁸ *Dulden* means to tolerate in German.

⁹ Afghans are famous for their factionalism. Furthermore, those with the means to organize (those who master the language and have the connections and knowledge) often enjoy a secure status, whereas the recently arrived do not have the means to organize.



The performative work of legal categories operates in the reverse sense as well. Documents and legal categories not only constitute the legitimacy of foreigners, transforming them into refugees, illegal aliens, or something in between, they also found the legitimacy, the *Rechtsstaatlichkeit* of the state. The legal taxonomy regulating the status of non citizens establishes the state as an ordering apparatus that in- and excludes. It creates the illusion that legitimate political refugees are recognized and protected while economic migrants are rejected and face deportation. As such, legal categories, and the mass media echoing them, reverse the disorder created by the arrival of these foreigners. The documents received establish a legal status and thus perform a truth about the reasons why a foreigner is residing in the country, something that «lies beyond the documents themselves» (Coutin, Maurer and Yngvesson 2002: 824). They have the power to constitute persons, a power that is nevertheless incomplete because the diverging, contradictory logics underlying the transitions from one category to the other (i.e. the passage from a *Aufenthaltsbefugis* to a *Duldung* described below) reveal the status of these legitimating documents as «just paper» (Coutin, Maurer and Yngvesson 2002: 824). The papers simultaneously bear the power of the state and reveal its tenuous nature.

This polarized taxonomy builds the legitimacy of the state; it establishes political asylum as a system wherein a few deserving individuals receive protection and the opportunistic masses are fended off. The presence of foreigners is constructed as either legitimate or illegitimate. In so doing, the legal categories constitute the orderliness of the state in an inverse hailing, where the «hey you!» pronounced by the policeman not only transforms the hailed individual in the street into a suspect, but also constitutes the shouting man in uniform as a *police-man* (see Althusser 1976: 126¹⁰). This operation upholds the transcendent nature of the state, maintaining it above the arbitrariness of various localized decision-

making processes that take place in offices of the state administration (i.e. the Office of Foreigners or the Federal Office for Refugees) and in German courts. It establishes the legitimacy of the state through the cultural belief in the Rule of Law (*Rechtsstaatlichkeit*) and obfuscates what Taussig has called the «conjuncture of violence and reason» that characterizes Statecraft (Taussig 1993: 221-222). If the majority of the German population upholds the belief that the state apparatus is selecting the legitimate and illegitimate foreigners on an ethically sound foundation, the Afghan experience of state power provides a very different perspective on these issues. The target population experiences these same operations as contingent and arbitrary, not as coherent.

Afghan experiences of state power

Legal procedures of asylum are encapsulated in bourgeois law and build on liberal notions of the individual (Coutin 2000; Collier, Maurer and Suárez-Navaz 1991). Attributing political asylum presupposes an acting, rational individual with an objective, provable history marked by a series of actions. These need to be established to obtain asylum. Asylum law obfuscates the fact that the outcome of the processes (the legal status attributed) is more the product of contemporary geopolitical and national contexts and legal structures than that of an individual past that can be established. «Having» a case of persecution is constructed in a way that is similar to «having» an essential identity – all you need to do is bring your «inside» out. However, in the Afghan experience, this is rather the result of chance than a right that can be claimed.

Lawyers, refugee counselors, and Afghans alike perceive the allocation of refugee status as a very contingent result of a process where some are lucky and others not. The fluctuation of the per-

¹⁰ Althusser uses this example of an individual hailed in the street by a policeman to define his notion of ideology: «I shall then suggest that ideology “acts” or “functions” in such a way that it [...] “transforms” individuals into subjects (it transforms them all) by that very precise operation which I have called interpellation or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: “Hey, you there!” Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a subject. Why? Because he has recognized that the hail was “really” addressed to him, and that “it was really he who was hailed” (and not someone else).» (1976: 10)



centage of accepted refugees is telling in itself. These changes may be justifiable in strictly legal terms, as political asylum requires proof of persecution by the state while many Afghans fled a more generalized form of violence and were not specialists in refugee law when they left. In the 1980s, Afghans experienced a high percentage of recognition of their status as refugees. This then fluctuated around 15% and dropped to less than 4% after 1998 (Kothen 2002). A brief spell of numerous recognitions occurred in 2001, when the repression perpetuated by the Taliban against a part of the population was recognized as a quasi-state-like form of persecution. The US intervention in Afghanistan in the aftermath of September 11th, 2001, caused a suspension of all decisions regarding Afghan nationals. The decision-making process picked up again in May 2003 and applications have generally been rejected since, as Kabul was deemed to provide sufficient safety and opportunities for returnees. The crucial element to be successful in an asylum application was the production of a detailed, logical, chronological account of an individually specific persecution by the state during the asylum interview (see Coutin 2000). But even if the narrative conformed to established norms, the outcome remained uncertain. A lawyer mentioned to me the case of a former minister of the Communist government who fled to Germany with his family after the Soviet retreat in 1989. He was denied full refugee status but received temporary protection (§53). After several years, his *Befugnis* was transformed into a *Duldung*, a temporary suspension of deportation, because the situation in Afghanistan was deemed safe enough for return. His son got full refugee status on behalf of the fact that he was the son of this famous minister. Eight years later, he became a German citizen. His father faces the threat of deportation.

Concrete local experiences of the law are conveyed via the administration. The transformations undergone by law when it shifts from written form to administrative practices of the local government

agencies is of crucial importance because it is on this local level that law is experienced by its subjects. Although these administrative directives are at the bottom of the hierarchy of rules, they can have a significant impact on a situation such as the legal status of foreigners.

In 2002, the Hamburg Office for Foreigners formulated an internal directive stipulating that the temporary residence permits (*Aufenthaltsbefugnis*) of Afghans were to be replaced by a *Duldung* if they concerned welfare recipients. The majority of Afghans were on welfare because it was very difficult to find full employment in Hamburg as an unqualified foreigner. Following the rhythm of renewals of their permits, this internal directive shifted a large proportion of the Afghan population in Hamburg (roughly 30%, or about 6000 individuals) from a space of legal existence, with a possible evolution towards betterment, to a «space of nonexistence» (Coutin 2000), with no other possible outcome than deportation or going underground¹¹. Through this administrative decision, the presence of these Afghans became illegitimate over night. This example illustrates how official yet internal local administrative decisions can modify legal statuses with tremendous subsequent consequences. Temporary protection was revoked and large parts of a national group were illegalized, not on the basis of a reevaluation of the situation of the home country, but by an internal decision based on financial considerations.

The local administration also exercises power in a different, more hidden way, outside the domain of rules, laws and directives. Xenophobic attitudes become intertwined with bureaucratic power imposed on an individual with no legal personhood. The rationality and regulation of bureaucracy has left space for «little sovereigns» decreeing mini-spaces of exception (Agamben 1998), in particular when targeting those considered illegitimate. The experience of one informant of mine in Hamburg illustrates how tyrannical attitudes can develop in a bureaucratic setting.

¹¹ This going-off-record is called *untertauchen* (diving under).



Yussuf, a young Afghan from Kandahar, arrived in Hamburg for the first time and registered at the Office for Foreigners. He was told that he had already entered the country before and would be deported again. His fingerprints cleared him, as they were unregistered, and he gained access to the shelter for incoming migrants, a transformed ship. Three months later, he was informed of his transfer to an asylum shelter. Unlike other asylum seekers, he had to go to the municipality (*Bezirksamt*) rather than directly to the shelter. A civil servant informed him that as he had no free place for him, he should return to the first shelter. But this ship never takes people back, as the employee certainly knew. This developed into a cat-and-mouse game where Yussuf was shuttled back and forth three times within three days until he finally found a place to stay. The registration for welfare assistance caused another series of misunderstandings and comings and goings. The administrator insisted on receiving a de-registration form from the ship, when all Yussuf got was a transfer notice. At the ship, he was told that all they ever issue are these transfer notices. Nevertheless, the civil servant almost called the police to denounce him as an illegal alien (which he was anyway, since he had not applied for asylum yet). He finally obtained his monthly €200 for living expenses when he returned to the Welfare Office and a different worker was in charge.

These encounters with the tyrannical or the incomprehensible are moments of exception. They do not last, but they have a profound effect on how state power is experienced. They imply a hailing in the Althusserian sense, where the hailed is constituted as a nobody, or rather, only a body or «bare life». For someone accustomed to thinking of Germany as a *Rechtsstaat*, these moments are profoundly disturbing, since the rule of law is temporarily suspended in these interactions¹². In calling them moments of exception, I refer to Agamben's concept of states of exception. Agamben argues that the sovereign is defined by the fact that he can suspend the validity of the law and

proclaim the state of exception, placing himself legally outside the law. He is therefore at the same time outside and inside the juridical order (Agamben 1998: 15). I suggest that these moments of tyranny have a similar role in constituting state sovereignty. They are much more than simple accidents, glitches that should not have happened and thus do not undermine the legitimacy of the government administration. Rather, they very much constitute the sovereignty of the administrator who can decide when to start or stop these power games.

Conclusion

Asylum seekers with temporary admission in Germany can provide a revealing perspective on the role of time as a factor of exclusion. The asylum seekers' past (as the time of persecution), their present (in the host country), and their future (often put on hold if full asylum status is not granted) are key dimensions to understanding the political and temporal aspects of asylum processes and the lived experiences of exile. Diaspora and transnational studies have contributed to the critique of the implicit association of culture and space (Glick-Schiller, Basch and Szanton Blanc 1994; see also Gupta and Ferguson 1997). As a result of these theoretical innovations focusing on space, the complex temporal dimensions of exile may have received less attention than deserved. Contemporary anthropology insists on the dynamic and fluid aspects of socio-cultural processes. This is an important awareness, but immutability is also a noteworthy fact that easily goes unnoticed. Western bourgeois notions of personhood presuppose a generic (rational, male, acting) adult moving along his life trajectory: a career takes shape, a destiny unfolds, and lack of development, growth or change is a sign of stagnation and decay (as in the capitalist economy). In this view, rejected asylum seekers become non-

¹² This story is probably more disturbing to me than to Yussuf, who has experienced moments of lawlessness and manipulation before, in Afghanistan and during his journey. Having previous experience of these moments does not, of course, diminish their cruelty.



persons, as their possibilities for developing a life project, a future, have been suppressed by law.

How do Afghans react to these various instantiations of law and the state? On a very general level, there is no strong sense of an overarching legitimate moral order, grounded in the state and its representatives, regulating everyday life in Germany. Afghans appreciate the law and order reigning in Germany, but there is no sense that fairness and justice presided over decisions concerning their legal status or that of their relatives. The experience of many Afghan migrants who have not gained official recognition of their refugee-ness is one of contingency and constraint rather than permanence and opportunities. Their lives are not endangered anymore, but they have exchanged one uncertain future for another. Despite the fact that Germany remains a relatively desirable place to seek refuge¹³ because of the extensive if slim welfare coverage, those who can attempt to go elsewhere. They become refugees again, in the heart of Europe. Afghans I knew would suddenly disappear. Others would tell me: she left. Where to, I would ask? Often they would not say.

In the EU jargon, this floating population is called «asylum-shoppers», a label that constructs them as maximizing individual agents, hunting for better opportunities – the stereotypical «economic refugee». Such a notion, emphasizing calculation and choice, obfuscates the simultaneously constrained and contingent nature of the geographical location of these people: they have no choice but to move, just as the place they are in is determined by factors outside of their control. They remain displaced persons. In a sense, many Afghans have never «arrived»; they remain refugees on the run, in search for a place that will give them some sense of permanence in an ever-contingent world.

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¹³ This may be changing: the number of asylum seekers has been decreasing constantly since 1995.



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performative work of German legal categories as they constitute the (il)legitimacy of asylum seekers and the lawfulness of the state.

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Abstract

The Afghan experience of asylum in Germany: towards an anthropology of legal categories

Providing protection for the persecuted is a foundational value of Western European liberal democracies, but political asylum poses an ethical quandary today to nation-states. On the one hand, refugee protection remains an uncontested moral duty, on the other hand, nationalist logics of state sovereignty and exclusion are increasingly brought to bear on asylum seekers in Europe, as right-wing populist formations construct asylum as a loophole for immigration. Taking as a starting point Afghan refugees' experiences of exile in Germany over the last two decades, this paper examines how Afghans experience the laws and policies that classify and manage foreign migrants and asylum seekers. Granted only temporary protection, numerous Afghans find themselves in a legal limbo that precludes future perspectives. Based on ethnographic research in Hamburg (Germany), this paper throws light on the lived consequences of this situation of perpetual suspension and explores the