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Differential inclusion of non-citizens in a universalistic welfare state

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ABSTRACT

The regulation of legal statuses and differentiation of non-citizens' rights within the states has become a significant site in the management of migration, yet the actual operations of differential inclusion remain an underexamined issue in the migration research. This article provides an empirically grounded analysis of the differential inclusion of non-citizens and demonstrates the legal hierarchies between non-citizens' entitlements using Finland as a case study. I argue that in addition to the regulation of residence and the access to labour markets, the unequal access to the welfare system represents a significant sphere of differentiation in the immigration process. Non-citizens' social entitlements differ depending on the nationality, the type of legal status and the form of employment, affecting their position in the labour markets and in the society. The article highlights the role of immigration law in manipulating the residence status of non-citizens, consequently invalidating the universalism of rights and a residence-based welfare system. Immigration controls, rather than representing a neutral framework of regulation of immigration, function as an institution, which produces conditional subjects and asymmetrical social relations in the sphere of universal citizenship.

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Introduction

In this article, I examine the differential inclusion of non-citizens and the hierarchization of rights in the intermediate period before a person becomes a permanent immigrant. The figure of undocumented migrant has dominated critical discussions of immigration controls, and consequently, legal status is conceived mainly as the right of residence. Undocumented migrants are the paradigmatic example of an internally excluded group, but even they have access to necessary health care, and undocumented children may have the right to receive formal education. Thus, 'illegalization' is a particular form of inclusion (De Genova 2002). Although several scholars have pointed out the fluctuation between legal and illegal statuses (e.g. Calavita 2005; Menjivar 2006), the production of legalities has remained secondary in discussions of migration management. Instead, in the migration literature it is often assumed that there is little difference between the social rights of legally residing non-citizens and

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citizens (Sainsbury 2012, 129). Yet obtaining legal status as such does not imply a secure position because immigration law institutionally creates conditional and precarious legal statuses (Goldring and Landolt 2013). In other words, states legalize migrants in particular ways, and consequently, some foreign citizens find themselves as being ‘more foreign’ than others.

In the critical migration research, the concept of differential inclusion is used to demonstrate the selective inclusion of migrants within the sphere of rights in the receiving society in contrast to the idea of borders as devices of exclusion or inclusion (e.g. Andrijasevic 2009; Mezzadra and Neilson 2013; Papadopoulos and Tsianos 2013). Yet differential inclusion remains an often indeterminate concept due to the theoretical nature of the discussion and the lack of references to specific systems of migration governance. Empirically grounded analyses of immigration controls, carried out mainly in Anglo-Saxon countries (e.g. Anderson 2010; Goldring and Landolt 2011; Walsh 2011; Robertson 2014), demonstrate how immigration controls stratify the labour markets and generate insecurity and conditionality for non-citizens. However, also the type of welfare regime affects economic and social well-being of non-citizens and their position in the society (Sainsbury 2012; see also Carmel, Cerami, and Papadopoulos 2011). The role of the conditionality of legal status in limiting non-citizens’ access to social benefits has been addressed in the field of social policy (Corrigan 2014; Shutes 2016), although without examining the differences between legal statuses in detail. In this article, I argue that in order to understand the operation of differential inclusion and immigration policies, the regulation of entitlements needs to be examined in its entirety because of the interrelations between the legal status, labour market access and social rights, and more important, because the regulation of rights concerns the indivisible life of non-citizens.

The present article contributes to the discussion on differential inclusion by providing an empirically grounded analysis of the proliferation of legal statuses, with social rights included in the analysis. As a Nordic social democratic welfare state,¹ Finland offers an interesting context for examining the differentiating and hierarchizing structures of immigration controls by virtue of the substantial differences in social entitlements between various forms of non-citizenship and citizen status as compared to liberal or conservative corporatist welfare regimes (see Sainsbury 2012). In principle, the universal residence-based welfare system in Finland implicates a model of ‘hard on the outside, soft on the inside’ (see Bosniak 2006), where inclusive social policies are combined with strict regulation of immigration. Nordic welfare states are often considered as model countries in the integration of immigrants (e.g. Wiesbrock 2011); it is even suggested that irregular migration is a non-existent phenomenon in the Nordic countries because of the highly regulated labour markets and effective immigration and removal policies (see Jørgensen and Meret 2012). This rather idealized view is reflected in the prevalent discourse on integration, where immigration controls appear as a neutral inclusionary–exclusionary mechanism and thus external to the position of those ‘included’. Yet, as elsewhere, immigration controls contribute to the hierarchization of rights within the sphere of universalism by differentiating non-citizens’ entitlements.

In this article, I examine how immigration controls differentiate the rights and societal position of non-citizens and how immigration law operates as an exclusive instrument in the sphere of universalism. Based on the empirical analysis of immigration legislation in Finland and drawing on both theoretical and empirical studies of immigration controls, I examine differential inclusion with respect to the preconditions of residence and the access

to social rights and labour markets; I also consider the wider consequences of conditional legal statuses for the social position of non-citizens. My intention is to contribute to the discussion of differential inclusion in the migration research in two ways. First, instead of limiting the analysis to particular migrant groups, I examine the proliferation of legal statuses as a whole to highlight the scope of differential inclusion of non-citizens. Secondly, I address the significance of social rights as an important sphere in differential inclusion and discuss the relevance of social security for the societal position of non-citizens. Although residence permit systems and legal entitlements vary across countries, the article provides insights into the role played by the regulation of residence and rights within a society as a significant site in the management of migration.

Differential inclusion and the regulation of immigration inside the state

Increased differentiation and selectivity of human mobility are characteristic features of contemporary immigration controls. The proliferation of categories based on motivation attributed to movement has complicated the constitutive division between humanitarian and labour migration in immigration policies. As Geddes (2008, 9–12) observes, the term ‘immigration’ possesses little analytical utility for distinguishing among the diverse forms of migration because categories such as labour migrants, family unification migrants, asylum seekers or student migrants can be broken down into subcategories. These categorizations reflect the aim of states to redefine the deservingness rather than the personal qualities or characteristics of migrants. There is a tendency towards ‘naïve empiricism’ (De Genova 2002, 432) or ‘sociological realism’ (Agier 2011, 12) in migration research, meaning that categorizations of migrants are employed as identities or explanatory factors instead of addressing the productivity of immigration law in generating forms of migration and in differentiating the position and rights of non-citizens after their entry into the immigration system.

According to Balibar (2002, 81, 82), borders are designed ‘not merely to give individuals from different social classes different experiences of the law, the civil administration, the police and elementary rights, [...] but actively to differentiate between individuals in terms of social class.’ ‘The polysemic nature of borders’ is apparent in controlling movement, where borders become almost distinct entities dependent upon the people who cross them (ibid.). However, migrants’ ‘physical presence inside the territory is polysemic’ (Volpp 2013, 457), because borders follow migrants into the national space through legal status and transform the ‘soft inside’ into a range of restrictions and impediments. As Rigo (2011, 207) emphasizes, ‘the main function of borders is less about the separation of aliens from the space allocated to citizens than with their differentiation within the same legal and political space.’ The residence permit system is an extension of borders and allows the regulation of migration by other means within the state, given that this is not always possible at the territorial borders.

Immigration law is the main instrument in the differential inclusion of non-citizens: ‘Migration law is at its core a border construction site’ (Dauvergne 2008, 7) that defines system boundaries and contributes to the increasing differentiation of immigration. Immigration law establishes legal statuses and respective legal identities (see Basaran 2008) through which states can regulate non-citizens’ rights and access to various institutions and public resources. In migration research, the relevance of legal status has been addressed mainly with regard to legal presence and access to labour markets. For example, Freedland

and Costello (2015, 4) write how ‘migration status takes the migrants’ alienage, and attaches to it conditions governing not only the migrants’ entry on the territory, but also their presence and work there’. However, the enduring consequences of legal status extend to family reunification and access to welfare benefits, which in turn shape the social position of legal non-citizens in significant ways. In addition to hierarchization of labour markets and precarisation of migrant labour (e.g. De Genova 2002; Noll 2008; Mezzadra and Neilson 2013; Papadopoulos and Tsianos 2013), immigration controls have a productive function in creating ‘institutionalized insecurity’ (Anderson 2010) and mediating the position of non-citizens in a hierarchized order of relations.

Following Rigo (2005, 4), I understand borders as an institution that produces relations ‘immediately over the people who come from outside the political system’. The state sanctions the residence of foreign citizens, which renders them deportable subjects by definition. Immigration controls are characterized by asymmetrical exchange relations between the state and non-citizens, who can acquire access to legal residence on the basis of a particular ground, which may or may not be sufficient for acquiring rights or full membership. Immigration controls contribute to what Somers (2008) calls the ‘contractualization of citizenship’ in that immigration controls imply the exchange of a valid activity for a residence permit, and ultimately, for membership in the political community, which is ‘the primary good that we distribute to one another’ (Walzer 1983, 31). Yet labour migrants, family reunification migrants and asylum seekers encounter a different path to citizenship as they experience a different relationship between territorial borders and the organizational borders of the labour markets and the welfare state, which entail a different balance between rights and responsibilities among migrant types (Geddes 2005, 789). Immigration controls determine a ‘new economy of power relations’ (Foucault 2000), whereby the proliferation of legal statuses corresponds to different subject positions in relation to the state.

In addition to regulation of legal presence and access to the labour markets, differential allocation of public resources for non-citizens constitutes a significant site in immigration policies. Immigration controls and welfare controls can be conceived as separate institutions, yet they are intertwined, as the type of legal status directly affects a person’s eligibility for welfare services (Sainsbury 2012; see also Corrigan 2014). Social rights represent an embodiment of citizenship in the twenty-first century (Marshall 1992), but non-citizens may have access to social security before acquiring political rights as a citizen. Through differences in the distribution of rights, including the differential inclusion in the welfare system, new kinds of legal hierarchies and subjects emerge into the sphere of citizenship. Differential access to the necessary resources during the intermediate period before becoming a permanent immigrant modifies non-citizens’ position in the labour markets and in society. I argue that it is necessary to examine the productive role of immigration legislation also in establishing legal hierarchies in distribution of public resources, because limited access to the welfare services contributes to the formation of asymmetrical social relations inside the society.

Finland as a case study

In this article, I examine the differential inclusion of non-citizens using Finland as a case study. Finland has not been a primary destination for migrants, owing to its peripheral location in northern Europe. The steady increase in immigration in the 1990s consisted

mainly of humanitarian and family reunification migrants and returnees with a Finnish ancestry from areas of the former Soviet Union. Finland's membership in the European Union (EU) in 1995 and its participation in the Schengen Area since 2001 have facilitated the mobility of EU citizens to Finland. Labour migration has gradually increased, yet remains strictly regulated despite the official goal of facilitating labour migration. Student migration has been a significant form of immigration, thanks to the free graduate programmes in English at Finnish vocational schools and universities.² Yet the number of immigrants remains moderate: there are around 22,000 applications each year submitted by third-country nationals for first-time residence permits for work, study or family reasons. The number of asylum applications has ranged from 3000 to 6000 in recent years, although 32,476 asylum applications in 2015 represented a dramatic increase from the 3651 submitted in 2014. (Immigration Office 2016.)

Instead of numbers, I am interested here in the role of immigration controls in differentiating immigration trajectories and non-citizens' rights within the state. Table 1 illustrates the differential inclusion and hierarchies between legal statuses of non-citizens in Finland, summarizing the empirical analysis of legislation. Despite similarities to the point-based systems in Australia, Canada or the United Kingdom (e.g. Anderson 2010; Walsh 2011), legal statuses and their associated entitlements in Finland are not explicitly defined in the Finnish legislation. The Alien Act (301/2004) is the primary law regulating the precondition of residence, access to the labour markets and family unification, yet it forms an intricate body of regulations because of its numerous amendments and the application of EU directives. Access to social security and welfare services is regulated separately on the basis of the Municipality of Residence Act (201/1994) and the Act on the Application of Residence-based Social Security Legislation (1573/1993), both of which operate on a concept of residence of their own. Because of the complexity of the legislation, the table is limited to the preconditions and rules in the allocation of rights. While this article focuses on the legal hierarchies, the insights into the significance of legal status draw on the extensive voluntary work in migrants' rights networks in Finland and on empirical research conducted by the author (see Könönen 2014).

The proliferation of legal statuses and the differentiation of rights are manifested primarily in cases of third-country nationals, and for that reason the analysis focuses on their position. Unlike EU citizens, who can move freely within the Schengen Area, third-country nationals usually need a visa for a short-term visit, and they are obliged to apply for a residence permit on the basis of work, studies or family relations for visits lasting longer than three months. The asylum system is an exception in immigration policies in that the asylum applicant is not required to possess valid travel documents on arrival. In Finland, first-residence permits are issued for a fixed term, usually one year, and they can either be 'continuous' (A) or 'temporary' (B), depending on the permanence of the settlement. A permanent residence permit can be applied for after four years' residence with an A-status, but only half of the residence time accumulated with the B-status is acknowledged for acquiring permanent status. One can apply for citizenship after five years of continuous residence with A-status if language skills and financial and legal probity can be proven. While the residence requirement for citizenship is relatively liberal in Finland, immigration law disqualifies many resident non-citizens from permanent settlement and citizenship (Dauvergne 2008, 124).

Below, I examine how the legislation differentiates the positions of non-citizens and how the regulations, which policy-wise are administered as separate issues, interact. Immigration

controls establish different subject positions and respective legal identities based on the assigned category for migration, which directly affect the position in the labour markets and the access to welfare services. As Table 1 demonstrates, a legal status as such does not unequivocally confer inclusion, and a de facto residence is ultimately irrelevant as a qualification for rights. As Sainsbury (2012) emphasizes, the interrelation between the incorporation regime and the welfare regime significantly shapes the outcomes of immigration policies. In the following sections, I examine the differential inclusion of non-citizens with respect to the regulation of right to residence, access to social rights and labour markets, and discuss the consequent asymmetrical social relations and conditional positions.

Differentiation of immigration trajectories

Immigration policies are designed on the presumption of linearity: non-citizens follow the immigration trajectory either towards permanent residence or towards exiting the country when the residence permit has expired or the valid activity has been terminated. First-residence permits are transient in nature (Freedland and Costello 2015, 4); in other words, they necessitate a change in legal status in the immigration process. With the exception of quota refugees, all migrants are initially in a conditional position. Resident permits issued on the basis of international protection or family ties are ‘temporarily temporary’ (Rajkumar et al. 2012) in that they entitle a person to apply for permanent residence in Finland. For different categories of labour migrants, residence is contingent on the length of employment, with temporary labour migrants excluded from permanent residence. Status mobility (Schuster 2005) between categories is necessary for au pairs and non-EU students, who receive only a one-year extension after graduation to find new grounds for residence. Although the extension of residence permits can be merely a bureaucratic inconvenience, deportability (De Genova 2002) forms a common horizon for all third country nationals without a permanent residence permit.

In principle, the immigration law imagines the applicant residing abroad (see Volpp 2013), yet a residence permit can be applied for in Finland. Legalizing strategies usually refer to undocumented migrants’ struggles (Coutin Bibler 2003), but legal migrants may also need to create similar strategies in order to stay in the country. Thus, immigration controls have a performative function given that third-country nationals have to modify their behaviour and translate their lives into juridical language in order to obtain a residence permit. Goldring and Landolt (2013) call residence permit systems ‘chutes and ladders’, whereby one can climb upwards to a more secure position or slide downwards to illegality. Conditional legal statuses constitute temporal borders that disrupt the linearity of immigration in cases where circumstances change; for example, unemployment or divorce can lead to ‘illegality’ with respect to work or marriage permits. The residence permit system divides the residence of non-citizens into periods around which the future of one’s residence is potentially at stake. A transient legal status determines a kind of probation period in which the failure to fulfil the residence requirements can lead to legal sanctions (i.e. deportation).

In addition to the personal right of residence, the form of legal status determines the pre-conditions for family reunification. Even the definition of family members differs, depending on whether a person is a third-country national or an EU citizen whose dependent relatives and children under 21 years of age are regarded as family members in contrast to the core family model stipulated for non-EU citizens. In Finland, family reunification for

Table 1. The main legal statuses of non-citizens in Finland.

Legal identity	Residence status	Specific requirements	Labour market	Family reunification	National social security	Municipality services
Nordic citizen EU citizen	Resident by registration Registration requirement if residence longer than 3 months	Clarification of means of support (non-specified), employment or other valid reason	Unrestricted Unrestricted	Yes Yes (including children under 21 and dependent relatives)	Yes Yes, if employed or a regular resident	Yes Yes, if employed or a regular resident
EU Posted workers	Temporary worker, maxi- mum 2 years		Restricted to work with the foreign service provider	Yes	Non eligible (covered by the social system in the country of origin)	Non eligible
Expert worker	Blue Card, issued for 2 years or for the employment period	Academic degree, salary at least 1.5 times average wage	Skilled work	Yes	Yes	Yes
Skilled worker	Temporary or continuous permit depending on the work contract	Academic degree, salary at least above average wage	Skilled work	Income requirement	Gradual (coverage depends on the length of the em- ployment)	Yes, if a residence permit is for at least one year
Low skilled worker (work permit)	Temporary or continuous permit depending on the work contract	Labour market research, salary at least at the level of minimum subsistence	Sector-based	Income requirement	Gradual (coverage depends on the length of the em- ployment)	Yes, if a residence permit is for at least one year
Self-employed person	Continuous permit	Assessment on the profita- bility of the business	Own business (part-time work during the first year allowed)	Income requirement	Gradual	Yes
Seasonal worker	Tourist visa, maximum 3 months		Seasonal work (berry pick- ing, agriculture)	Non eligible	Non eligible	Non eligible, only neces- sary health care
Au pair	Temporary permit, maxi- mum 1 year	Age requirement (17–30 years old)	Max 30 h per week domestic work in the host family	Non eligible	Non eligible	Non eligible
Family member	Temporary or continuous permit (depending on the status of the sponsor)		Unrestricted (but only skilled work if non-registered relationships)	Non eligible	Yes, excluding family mem- bers of temporary residents	Yes
Student	Temporary permit for the duration of the study programme + 1 year extension after graduation	Clarification of means of support (€6720 a year) + health insurance	Unrestricted (approximately 25 h a week during the semesters)	Income requirement	Non eligible	Yes, excluding health care
International protection	4 years continuous permit		Unrestricted	Yes (income require- ment if subsidiary protection)	Yes	Yes
Asylum applicant	Legal resident during the process		Unrestricted after 3 or 6 months ^a	Non eligible	Non eligible	Non eligible, only reduced income support and necessary health care
Undocumented	'Illegal'		(Grey economy)	Non eligible	Non eligible	Urgent health care

^aAn asylum seeker can work after 3 months if he/she possesses valid id-documents on arrival, otherwise after 6 months.

a third-country national is contingent upon income requirements, excluding recognized refugees, if they make the family reunification application during the first three months after the positive decision. The income requirement depends on the family size: for a family consisting of two adults and two minors, for example, the required income is currently €2600 per month. In practice, family reunification is a privilege given to skilled workers, owing to their higher salaries, while the income requirement limits family life for low-paid workers. Family reunification migration has been a significant channel of immigration in Finland, yet the new legislative amendment in 2016 expanded the income requirement for those with subsidiary protection status. Restrictions on family reunification illustrate the role of legal status as a governmental instrument that allows the state to tighten immigration policies by modifying the rights of non-citizens within the state.

Along with the regulation of movement, the entry regime targets permanent settlement by differentiating immigration trajectories and imposing restrictions on residence time. Similar to the function of borders in decelerating movement on the territorial edges of Europe (Papadopoulos and Tsianos 2013), the residence permit system delays permanent settlement by establishing 'diachronic borders' within the state (Rigo 2005). Immigration controls direct non-citizens into different juridical subsystems based on the cause of migration or, in the case of labour migration, depending on the sector and the salary. 'Migration policies instantiate conditional spatialities – that is, spaces that exist only for some categories of mobile people' (Tazzioli 2014, 37). In other words, the legal status designates personal borders for non-citizens in the immigration process, whereby the legal status prescribed in the residence permit card becomes a kind of travel pass, limiting or enabling access to welfare services and modifying mobility on the labour markets. While EU citizens are not subjected to the entry regime, they confront internal borders in the welfare system.

Legal fictions of residence in the welfare state

The regulation of social rights represents a significant site in the differential inclusion of non-citizens despite the fact that the Finnish Constitution guarantees the right to necessary subsistence for all residents without distinction. The universal welfare state designates undifferentiated basic social security for residents, although in Finland the unemployment and pension system includes contributory employment-based benefits (Koikkalainen et al. 2011). The reduced income support for asylum seekers is an exception to the otherwise equal distribution of benefits for those entitled, whether citizens or not. The welfare system operates on the basis of assessment of permanent residence, yet the immigration law becomes an exclusive instrument in the sphere of the universalism of rights and deterritorializes some non-citizens by affixing to them a temporary status. The fictional nature of residence in immigration law is already apparent in the case of temporary statuses, where only half of a person's residence counts towards the acquisition of permanent status. Although tourists and seasonal workers are temporary visitors in a proper sense, for many non-citizens the permanence of residence is contingent on the residence permit process and thus can be defined only a posteriori. In fact, access to social security can be established retrospectively (KELA 2016).

Immigration law aims to prevent foreign citizens from becoming a financial burden on the state by stipulating their ability to demonstrate economic self-sufficiency as a general precondition for issuing a residence permit, excluding asylum seekers. Also EU citizens

need to present clarification of means of support at the time of registration, and their access to social security is in practice employment-based (see Shutes 2016). Income requirements target non-EU students and family members (excluding dependents of refugees) because the precondition for a work permit is a salary that is at least equal to the level of minimum subsistence. In addition to an annual income requirement (currently €6720), non-EU students need private health insurance. Failure to meet income requirements or repeatedly resorting to income support can lead to cancellation of a residence permit. In Finland, the state has been reluctant to formalize access to health services for undocumented migrants, including non-registered EU citizens, whose eligibility for short-term emergency income support is in practice bound to voluntary return. The exclusion of undocumented migrants from the welfare services demonstrates the restrictive approach to temporary non-citizens' entitlements.

Immigration law differentiates access to the welfare system by manipulating the residence status of non-citizens. In Finland the national social security system covers tax-funded benefits, including unemployment and housing benefits, family allowance and health insurance, whereas municipalities organize education, health services and some social services as means-tested forms of social assistance. The national insurance institution determines eligibility for social insurance by application based on an 'overall assessment'. In practice, third-country nationals need to possess a permanent or a continuous residence permit in order to qualify for the social security system (see Kiuru 2014). Yet, the Nordic Convention on Social Security and bilateral social-security agreements³ provide Nordic citizens and certain nationals with facilitated access to social security, whereas so-called posted workers remain covered by the social security system of their country of origin. While elsewhere access to public services can be obtained via registration as a resident in a local municipality, regardless of legal status (Calavita 2005, 30), official residency in a municipality requires a residence permit in Finland. In contrast to the case of social security, a temporary permit can be approved based on the different definitions of residence in social security and municipality laws (see Kiuru 2014). Thus, some temporary non-citizens, such as non-EU students, may be included in the municipality services, although they are excluded from the national social security system.

Despite not being considered as a resident in Finland, also a temporary non-citizen may have access to the social security system on the basis of employment, which activates access to some social rights from the beginning for the duration the employment. If the employment lasts at least four months, then a person is eligible for health insurance benefits, sickness and parental benefits; at least 6 months of employment qualifies one for unemployment allowance and child benefits and child home care allowances for accompanying children (KELA 2016). Yet working EU citizens are entitled to certain benefits, such as child allowances, even if the family members reside outside Finland (Koikkalainen et al. 2011, 149). In the case of labour migrants the social security coverage remains equivocal, due to the intersection of residence rights and the social welfare system. For non-EU labour migrants, the residence permit is contingent on the length of the employment contract. Thus, whether an unemployed work permit holder is obliged to leave the country or is eligible for unemployment benefits depends on the length of the current residence permit and the assessment made by officials. The authorities have wide discretionary power in determining the access of non-citizens to public services due to the incoherencies in legislation, whereby non-citizens appear foremost as targets of administrative power rather than as rights-bearing subjects.

Owing to the significant levels of entitlements in the social democratic welfare system, access to the national security system constitutes an important threshold in the immigration process. The welfare state has an important function in decommodifying labour (Esping-Andersen 1990; Sainsbury 2012), i.e. providing means of subsistence without market participation. In the case of non-citizens, instead of *de facto* residence, the entitlements are derived from the combination of legal status and regulatory decisions, which determine the legal fiction of ‘residence of a permanent nature’. Additionally, employment generates access to some social benefits for working EU citizens and third-country nationals. Immigration controls generate a particular kind of workfare system for non-citizens, whereby both residence and social rights may be dependent on economic activity. The substantial differences in welfare conditions create hierarchies among non-citizens that can complicate the integration process and undermine their position in the labour markets.

The hierarchization of labour markets

Immigration law is a significant instrument in the political and juridical constitution of labour markets. In EU countries like Finland, a national labour market exists only with regards to third country nationals, because EU citizens can move and apply for work without restrictions. Labour migration is often defined tautologically on the basis of the possession of an employment contract before arrival, ignoring the fact that other legal statuses also provide entitlement to legal employment. For example, asylum seekers and students are allowed to work within certain time restrictions in Finland. The regulation of labour migration is legitimized on the basis of the protection of labour standards in the low-paid sectors, yet in addition to regulating the supply of labour, immigration controls function as an instrument in the stratification of labour (Anderson 2010; Mezzadra and Neilson 2013; Dauvergne and Marsden 2014; Robertson 2014). Restrictions on residence and rights are not external to migrants’ position in the labour market due to the intersections of immigration controls and labour markets. On the contrary, a migrant’s conditional legal status transforms the terms of agreement between the transacting parties in the labour market.

As elsewhere, class distinctions characterize labour migration in Finland (see e.g. Shachar and Hirschl 2014) insofar as restrictions target low-paid work, while a faster and less burdensome bureaucratic process exists for ‘top or middle management positions or tasks requiring special expertise’. This vague definition of skilled workers corresponds in practice to positions that require an academic degree and provide a higher than average salary.⁴ In Finland posted workers and seasonal workers – who resemble tourist entrepreneurs because of their exemption from income tax – are quantitatively the most significant categories of organized labour migration (see Sippola 2012). The work permit system for unskilled work is a combination of market-driven and state-regulated policies in which the issuance of work permits is subjected to labour market research. The sector-based work permit system sanctions employment in a prescribed low-paid sector (such as cleaning), thus limiting work permit holders’ mobility in the labour market. The work permit system represents a Fordist economic planning model, in which demand for labour should be determined well in advance. Indeed, compared to work permit holders, other temporary resident non-citizens, like students and asylum seekers, offer more mobile and flexible labour in Finland, and are thus more suitable for variable demands, especially in the service sector (Könönen 2014).

The entry regime directly differentiates non-citizens' positions in the labour market, directing migrant workers to particular sectors or occupations (see Table 1). In fact, there is no such thing as a generic 'labour migrant' because immigration controls commodify labour in different ways. From a juridical point of view, immigration controls produce different types of worker-citizens, or what Mezzadra and Neilson (2013) call 'multiplication of labour'. The work permit represents the most explicit intersection between immigration controls and the labour markets, yet differential inclusion also designates different configurations of labour outside the labour migration channels, such as migrant-student workers, migrant-tourist workers, undocumented workers and so on. In addition to ethnicity, class and gender, legal status has recently been recognized as a factor shaping 'the new migrant division of labour' (Wills et al. 2010). Immigration controls reproduce social divisions, but they also create new juridical hierarchies, which can have long-term effects on migrants' labour market position (see Goldring and Landolt 2011). Also in Finland, migrants with a temporary legal status often work in precarious conditions, which affect their possibilities to apply for a residence permit on the basis of employment (Könönen 2014) – indicating a reciprocal relationship between employment precariousness and legal precariousness (Chauvin, Garcés-Masareñas, and Kraler 2013, 127).

Freedland and Costello (2015) emphasize how migration law produces divisions in labour law. In Finland, labour law is universal in nature as it guarantees the same labour standards and the labour rights for everyone, regardless of legal status. Immigration policies create particular kinds of dependent workers through restrictions on mobility in the labour market and tying the residence to the continuation of employment. Immigration controls differentiate the dynamics of labour supply and demand: employers may prefer to recruit flexible migrant workers because a precarious legal status decreases the bargaining power of migrants and increases their dependency on work and employers (Anderson 2010, 312). Yet, in addition to deportability, limited access to social security is a significant factor in increasing the dependency of migrants' subsistence on a salaried income, which also affects the labour market position of EU citizens. In the context of the welfare state, social security legislation rather than labour law(s) is the main instrument in the regulation of labour markets by allowing a certain degree of independence from salaried employment for those covered by the social security system.

Emergence of asymmetrical social relations

The conditional status and related asymmetrical power relations that emerge as a combined effect of the regulation of non-citizens' presence and access modify non-citizens' position in society. In addition to undocumented migrants, conditionality, insecurity and dependency characterize the situation of legal non-citizens in varying degrees (Goldring and Landolt 2013, 18, 19). Cvajner and Sciortino (2010, 397) suggest 'that an immigrant's legal status is significant, indeed relevant, only when and if – and to the degree to which – the legal reality constrains the relationships and actions of the actor'. While the legal status does not constitute a 'total identity' (ibid.), the negative conception of power as external restrictions dismisses 'the world-configuring function of borders' for non-citizens (cf. Balibar 2002, 79). One's legal status can become an embodied condition because migrants 'incorporate into their subjectivity the various institutional fields they enter and confront' (Latham 2010, 186). I argue that the differential inclusion of non-citizens have effects beyond the legal constraints

in that conditional statuses modify non-citizens' orientation in the world and mediates their relationships to other people, particularly in the case of third country nationals.

In principle, the residence permit system increases dependency on a person or institution with which the authorization of residence is connected. In the case of labour migrants, the right to reside in the territory becomes part of the employment transaction, consequently transforming the employer into an agent of residence authorization alongside the usual role of the state (Rigo 2011, 208). The work permit is a manifestation of triangular labour relations (Freedland and Costello 2015) in which the state intervenes directly in the relation between employer and employee as a third party. Similar triangular social relations emerge with respect to other legal statuses, which can exacerbate the subordinate position of non-citizens. The residence permit system delegates the means of control to employers and spouses on the basis of their role as sponsors for the residence of migrant workers and marriage migrants. For example, divorce can endanger the residence right of marriage migrants during the first years of residence, which restricts their possibility to leave from abusive relationships. Contrary to the idea of the Nordic welfare state as 'woman friendly' (see Mulinari et al. 2009), immigration controls strengthen patriarchal family relations with respect to immigrating family members whose residence is dependent on the breadwinner responsible for providing the family's living costs (see Eggebo 2010; Luibheid 2015; Pellander 2016).

In the case of third-country nationals, the state intervenes in private issues by regulating the preconditions of family life and by limiting their freedom to make contracts, such as marriage or employment, which are regarded as self-evident, inviolable rights for citizens. The conditionality imposed upon non-citizens limits the possibilities for an autonomous life and can transform the abstract, asymmetrical relation between state and non-citizen into a personal, dependent relation. Balibar (2004, 40) compares migrants to colonial subjects: while partially incorporated into the rights and duties of citizenship, migrants are kept in a state of legal tutelage (also Rigo 2005). To a certain extent immigration controls form a parallel institution to legal guardianship. Immigration controls are technologies of citizenship (Isin 2002), which keep third-country nationals especially as subjects in need of control and guidance or as a kind of underage citizen incapable of shouldering the responsibilities required for full membership. In addition to legal subject positions, immigration controls involve a subjective element in constructing 'obedient employees', 'submissive partners' and 'hard-working students' (see also Anderson, Sharma, and Wright 2009, 7). In a way, the police assume the role of work supervisor, university tutor or marriage counsellor in the lives of non-citizens due to the latter's conditional status.

In addition to the conditional residence right, the limited access to social rights differentiates the non-citizens' position in a political community. The collective insurance system protects members from vulnerabilities related to social risks, such as unemployment or illness, which in the case of non-citizens may cause subsistence problems and also has serious consequences for their residence rights. Restrictions on public services increase inequality and vulnerability, and contribute to the expansion of informal economies, thereby strengthening the role of ethnic communities as providers of surrogate welfare. According to Castel (2003), the primary objective of a welfare state does not concern as much struggles against inequality than the objective of creating the juridical guarantees for personal independence and through that, the preconditions for relationships of mutual dependencies. In a society of peers everyone possesses the required resources and rights to maintain relations

of mutual dependency with everyone else. Thus, the protected status and social rights are essential for the exercise of civic rights (see Marshall 1992). Immigration controls advance conditions of personal subjecthood and dependency that the welfare state seeks to overcome.

Conclusions

Using Finland as a case study, this article has demonstrated the complex operation of differential inclusion of non-citizens and hierarchization of rights, summarized in Table 1. The empirically grounded analysis presented in the article highlights the significance of the type of legal status, not only for residence rights and access to labour markets, but also with respect to social rights and family reunification. While non-citizens' entitlements differ in each country, new legal hierarchies have emerged in Europe not only between EU citizens and third-country nationals, but also within both groups: the position of EU citizens differs depending on employment and family situation, whereas the various categories of non-EU students, labour migrants, humanitarian migrants and their family members all encounter differentiated paths to permanent residence and access to labour markets and social benefits. In addition to the external impediments, differential inclusion in the sphere of rights is reflected in asymmetrical social relations in the society. A non-citizen has an intimate relation to the law in the sense that the legal status can become an internalized condition, even though the relevance of restrictions on work, family life or social security depends on one's personal situation and available resources.

Empirically, this article contributes to the discussion on differential inclusion of non-citizens by highlighting the relevance of social rights in the analysis of immigration policies and the management of migration. In the migration literature, the hierarchizing effects of immigration controls are addressed primarily with respect to the legal residence and the position on the labour markets. Yet the access to welfare benefits can significantly modify non-citizens' bargaining position on the labour market, as employment can become an instrument for accumulating social rights and can also directly affect family reunification. While the type of welfare state regime defines different levels of decommodification of labour (see Sainsbury 2012), social rights are nevertheless an essential site for the differential inclusion of non-citizens. Restricted access to social security limits autonomy and intensifies insecurity and precarity for non-citizens, increasing their dependency on salaried employment. In the context of the Nordic welfare state, inclusion to the social security system is essential for non-citizens' economic and social well-being due to the substantial implications of welfare conditionality.

In addition to the preconditions of movement, the regulation of entitlements inside the state has become an important site for differentiating immigration trajectories and toughening immigration policies (see Sharma 2006). The proliferation of legal statuses offer an instrument for the states to selectively restrict permanent settlement, tighten the preconditions for family migration or restrict non-citizens' access to social security system and increase work-related conditionality. Immigration controls function as a difference machine (see Isin 2002), which produces various subject positions and propagates a hierarchized order in society. In addition to the type of legal status, the income requirements for different permit types and family unification can significantly complicate the immigration process for third-country nationals. Thus, along with preferential treatment of skilled workers and EU citizens, immigration controls imply an implicit racialized aspect in that

income requirements target migrants especially from the global south. While race, class and gender intertwine with immigration controls, the legal status can fundamentally shape non-citizens' social position regardless of personal attributes. Borders not only reflect and strengthen pre-existing inequalities, but also produce a new set of differences. Consequently, migrants from similar backgrounds can find themselves in unequal positions, depending on the type of residence permit granted.

I argue that the transient period between entry and permanent residence is fundamental in shaping migrants' positions in society and thus the hierarchization of rights should be considered essential in the discussion of immigration policies and citizenship. For non-citizens, accumulation of rights is not a linear process; rather the immigration process consists of diverse transitions in socio-legal categories. Owing to the temporary nature of legal statuses and differentiated entitlements, concepts such as 'immigrant' or the binary distinction between 'legal' and 'illegal' migrant are insufficient for understanding immigration policies. Theoretical debates about acts of citizenship and non-citizenship have contributed to rethinking the boundaries of belonging and membership (Isin and Nielsen 2008; Tambakaki 2015), but migrants' negotiations of citizenship are always conditioned by the type of residence permit system in that active citizenship does not prevent deportation unless 'activity' is translated into a valid residence permit. While governmental categorizations are external to migrants' subjectivities and personal aspirations (Mezzadra 2011), nevertheless they are compelled to navigate the immigration system in order to stay in the country.

In theory, the universal residence-based welfare system represents what Bosniak (2007) calls 'ethical territoriality'. The welfare state aims to protect residents from social risks and advance equal opportunities in the society by providing necessary resources and juridical guarantees for personal independence. As this article demonstrates, immigration law invalidates the universalism of the residence-based welfare system through legal fictions of residence. Contrary to the ideal of universalism and equality, immigration policies establish a hierarchized status-based model of rights for non-citizens within the residence-based welfare state (ibid., 390, 391). As a consequence, bounded or nationalist universalism characterizes the welfare state: non-citizens are incorporated into the sphere of production and taxation, but are only selectively included in the sphere of public services, regardless of their contribution to financing the welfare state. Immigration controls institutionalize precarious transient statuses, which have long-lasting effects, not only on non-citizens' position in the society but also on the ideal of a universal welfare state.

Notes

1. Despite the country-specific policy differences, the social democratic welfare regimes have in common substantial levels of welfare benefits and inclusive social policies. The welfare state system in Finland is broadly in line with the Swedish model (see Sainsbury 2012).
2. In 2016, the government introduced tuition fees for non-EU students starting from 2017.
3. Finland has bilateral social security agreements with USA, Canada, Chile, Israel, Australia and India.
4. There are also separate resident permit processes for the purpose of academic research, internship and professional sports and coaching, but in these cases the determination of rights follow the same principles as in the case of skilled workers.

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