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Speaking of Rights. The Influence of Law and Courts on the Making of Family Migration Policies in Germany

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Abstract

The impact of the judiciary on immigration policies has been simultaneously overestimated and underestimated. Migration scholars broadly assume that courts have forced liberal states to admit unwanted migration. Based on an analysis of family migration policy making in the Federal Republic of Germany (1975-1990), I show that the direct policy impact of court rulings was limited, as courts were reticent to impinge upon democratic sovereignty. However, the indirect impact of the courts was substantial. Political actors amplified the implications of rulings by interpreting the jurisprudence selectively and expansively. Thus, they turned speaking of rights into a powerful political resource.

Introduction

In migration studies, it is broadly assumed that courts play a crucial role in immigration policy making. In particular, courts are considered key to explaining the “control gap” paradox, famously coined in 1994 by Cornelius, Martin and Hollifield. This vexing paradox is that liberal states have allowed the large-scale settlement of immigrants, even though neither their governments nor their publics considered this immigration desirable. For over twenty years, political scientists in Europe and North America have been seeking to

understand “why liberal states accept unwanted migration” (Joppke 1998). So far, the most favored explanation is that national governments have lost the power to control immigration to judges. By zealously defending the rights of individual migrants, the judiciary is argued to have curbed governments’ capacity to refuse or expel immigrants (Cornelius, Martin, and Hollifield 1994; Joppke 1998, 1999; Guiraudon 2000; Guiraudon and Lahav 2000; Hollifield 2000).

In this paper, I argue that this is both a gross overestimation and a serious underestimation of the role of the courts, resulting from an overly narrow conception of the way in which courts and legal norms influence policy making. This contention is based on an analysis of family migration policy making in the Federal Republic of Germany from the 1970s to the early 1990s. My argument is two-fold: on the one hand, I will show that the *direct* policy impact of court rulings has been much more modest than assumed in most of the “control gap” literature. Courts have been very reticent to encroach upon democratic sovereignty in this sensitive policy field. Policy development was determined primarily by political contestation, not by judicial rulings. On the other hand however, I will show that the *indirect* policy impact of the judiciary was substantial. As constructivist sociolegal scholars point out, “courts produce not only decisions but also messages” (Galanter 1983, 126). These messages were used as resources in policy struggles, and thus contributed to shaping the outcomes of political decision making.

This paper consists of five sections. In the first section, I discuss theoretical perspectives on the role of the courts in both migration studies and constructivist sociolegal studies. In the second section, I explain my case selection and methodology. In the third section, I set the scene by briefly describing family migration policy developments from the 1970s until the early 1990s in the Federal Republic of Germany. In the fourth section, I present the first part of my argument, by analyzing the jurisprudence of German federal

courts and their direct policy impact. In the fifth and final section, I assess the indirect policy impact of court rulings, by investigating how and by whom legal norms and jurisprudence were used as arguments in the context of decision-making.

Theoretical Perspectives : The Impact of Courts

The question why countries in Western Europe and North America have accepted the large scale settlement of migrants, against the express wishes of their politicians and publics, has been answered in many different ways. Scholars have pointed to pressure exerted on national policy makers either by international organizations such as the European Union or the World Trade Organization (Sassen 1999) or by domestic interest groups such as employers who stand to benefit from immigration economically (Freeman 1995; Messina 2007). The explanation most broadly adhered to however, is that from the 1970s onwards, liberal legal norms have been applied by courts in such a way as to expand the rights accorded to migrants, which in turn has reduced the possibilities for national governments to refuse entry to migrants or expel them. In other words, courts are argued to have reduced the capacity of national policy makers to control immigration.

When they launched the debate on the “control gap” paradox in the introduction to their standard work *Controlling Immigration* in 1994, Cornelius, Martin and Hollifield pointed to the constraining influence of “a liberal type of republicanism that has taken shape (...) most important of all, in judicial rulings” and that “continues to constrain the executive authorities of democratic states in their attempts to achieve territorial closure” (1994, 9; cf. Hollifield 2000). Sassen (1999, 184) also stated that “the extension of rights, which has taken place mostly through the judiciary, has confronted states with a number of constraints in the area of immigration and refugee policy.” Likewise, Joppke (1998, 271) has argued that “the legal process is crucial to explaining why European states continued accepting immigrants

despite explicit zero-immigration policies since the early 1970s.” According to Guiraudon and Joppke (2001, 9), “liberal norms, not free trade, are specific to the contemporary era and therefore key to understanding the constraints on migration control.” Guiraudon finally has argued that the “expansion of rights” which explains in part why “restrictive immigration policies were not wholly successful” has been brought about both by bureaucracies operating outside of public view, and by “courts which have become key actors in migration policymaking as of the 1970s” (2000, 221,225; cf. Guiraudon and Lahav 2000).

The impact of the judiciary on migrants’ rights is argued to have been expansive and inclusive primarily because courts base their rulings on fundamental rights which are universal in nature, and thus protect the individual as a person, regardless of his or her nationality. As a result, courts are argued to have confirmed the duties of national governments to protect the fundamental rights not only of their own citizens, but also of foreigners present on their territory (Sassen 1999, 185; Hollifield 2000, 163; Guiraudon 2000, 221). Joppke (1998, 271) also emphasizes that judges may tend towards more lenient positions than politicians because they are “generally shielded” from the “populist anti-immigrant sentiments” which push politicians to opt for restrictive migration policies.

Many of these authors ascribe an “activist” attitude to the judiciaries involved in migration court cases, implying that judges zealously sought to counter national governments’ attempts at implementing restrictive immigration policies (Cornelius, Martin, and Hollifield 1994, 9; Guiraudon 2001, 33). Joppke in particular describes the courts as “aggressive” (2001, 358), “actively and expansively interpreting and defending the rights of foreigners” (1998, 284) and “taking on the role of active policymaker.”

More recently, some doubts have been raised as to the supposedly decisive role of the judiciary in migration policy making. In the introduction of the second edition of *Controlling Migration*, Cornelius and Tsuda no longer describe judicial rulings as the “most important”

source of liberal constraints on democratic states' capacity to control migration, as the introduction to the first edition did (Cornelius, Martin, and Hollifield 1994, 9). Instead, they state much more tentatively that "draconian measures (...) may be overturned by the courts as unconstitutional or as a violation of civil rights" (Cornelius and Tsuda 2004, 13). Messina (2007, 236, 240-241) has questioned the crucial role attributed by Joppke to German courts in obliging the government to accept unwanted migration, arguing that "German policy makers have historically been fairly pragmatic about and even receptive to mass migration", in spite of official "zero immigration rhetoric", to accommodate a "structural demand for foreign labor." In my own previous work on the making of family migration policies in the Netherlands since the 1950s, I found that the influence of the courts, while certainly not negligible, has been much more modest than assumed in the literature. Dutch policy makers did not allow family migration because the courts forced them to do so, but out of their own, often morally or ideologically based considerations (Bonjourand 2009; 2011). However, such questioning of the impact of the courts remains a minority view. Overall, even scholars such as Geddes (2003, 22) who hesitate to adopt the "rosy view" that "courts have always and at all times been progressive bastions of migrants' rights", still hold that "judicial cool heads have tempered restrictive policies that contravened legal or constitutional provisions."

All of these contributions to the debate on the role of courts in immigration policy making share a very similar conception of the impact of courts. This is a positivist conception, which portrays the relation of courts to governments as a hierarchical power relation, and sees court rulings as commands expressing the courts' coercive power over policy makers. The impact of courts is then measured by evaluating the extent to which policies have been adapted to conform to judicial rulings. However, there is an extensive sociolegal scholarship which conceptualizes the impact of law and courts very differently. This constructivist approach takes a much broader view of the possible social and political

effects of court rulings. It considers courts as makers of social meanings and “focuses on the discursive and political power of courts' pronouncements” (Nejaime 2011, 954).

Already in 1983, Marc Galanter stated that “the effects of a court (...) cannot be equated with the dispositions in the cases that come before it”, but have a “host” of other “radiating effects” (1983, 123-124). Courts produce not just decisions, but “a whole set of messages that can be used as resources in making (or contesting) claims, bargaining (or refusing to bargain), and regulating (or resist regulation)” (1983, 134). Likewise, McCann (1992, 732) argues that “judicial decisions express a whole range of norms, logics, and signals that cannot be reduced to clear commands or rules.” Thus, courts are seen as co-producers of meaning. Their decisions are seen “not as interventions independent of the policy process but as steps deeply embedded within that process; and not as commands, but as ideas or as normative resources available for use by participants in that process” (Epp 2008b, 602). When court rulings are used by non-judiciary actors as resources in ongoing struggles over policy, they may be interpreted in very different ways, as a “single judicial action may radiate different messages to different audiences” (Galanter 1983, 126). These interpretations may deviate substantially from the original intentions of the courts, since “judicially articulated legal norms take a life of their own as they are deployed in practical social action” (McCann 1992, 733). Indeed, the impact of courts does not depend on victory in the court room or even on the existence of rulings (McCann 1992, 738-739; Nejaime 2011): what matters is that people in power come to believe that a certain take on a policy problem is supported by law and courts (Epp 2008a, 46; Scheingold 2004, xix).

Until now, this constructivist perspective on the impact of courts has been absent from the migration politics literature. The sole exception is Leila Kavar's recent book *Contesting Immigration Policy in Court*, in which she investigates the impact of litigation on immigration policy making in France and the United States. Based on an analysis of the

efforts of activist networks of immigration lawyers in both countries to change immigration policy through litigation, she concludes that the *direct* effects have been very limited. Court room victories were “often only narrow or partial” and litigation “seems to have produced only marginal and sporadic changes in policy making” (2015, 157-158). However, she argues that this narrow view of the impact of courts obscures the crucial ways in which litigation has contributed to social meaning-making about migration, as “rights-based discursive framings were appropriated and reassembled into broader political narratives.” For instance, Kavar (2015, 73-76) describes how in France in the late 1970s, a government proposal for restrictive legislative reform was successfully blocked by immigrant rights defenders who deliberately interpreted a Constitutional Court ruling very expansively, so as to construe the political argument that any restrictionist migration policy reform would imply illegitimate and authoritarian “rule by exception.” Thus, “legally assembled framings became forceful and widely meaningful because activists glossed their content and actively disseminated their interpretations, and because social movement organizations, administrative elites, and other political actors chose to accept these readings as statements of ‘law’” (2015, 77).

In this paper, I will analyze the impact of the courts on German family migration policy making from a sociolegal perspective. In doing so I will examine whether Kavar’s finding that the direct impact of courts was limited but their indirect impact substantial applies to migration policy making in Germany. However, my empirical approach will differ from the one adopted by Kavar and most other sociolegal scholars engaged in gauging the policy impact of litigation. These scholars analyze the process of litigation and the parties involved in it, with a particular attention for the relations between legal and social mobilizations. In contrast, my analysis focuses on the policy-making process. Through a detailed reconstruction of administrative and political decision making, I will trace when,

how, by whom and with what consequences judicial rulings or legal norms were invoked to influence the policy outcome.

Case Selection and Methodology

Family migration policy making in the Federal Republic of Germany is a “most-likely” case to evaluate the hypothesis that the courts have obliged liberal states to accept unwanted migration, in the sense that it is a case that “ought (...) to invalidate or confirm theories if any cases can be expected to do so” (Eckstein 1975, 118).

First, the ‘control gap’ paradox is clearly present in the German case. In the second half of the twentieth century, the Federal Republic of Germany was *the* most important destination country for immigrants in Europe. In addition to millions of refugees who found their way to Germany from Central and Eastern Europe and other parts of the world, some fourteen million foreign workers were recruited for the booming German economy from the late 1950s until the mid-1970s. About three million of these “guest workers” stayed and were joined by their families. Today it is estimated that about twenty per cent of the German population is a migrant or a (grand)child of a migrant (Hanewinkel and Oltmer 2015). At the same time however, Germany was probably the European country most reticent to accept immigration. In fact, Germany was well-known among migration scholars for its “no country of immigration doctrine” (Joppke 1999) and its exclusive, ethno-cultural conception of nationhood (Brubaker 1992). In the context of the Cold War, the Federal Republic defined itself as home country to all Germans, living on German territory or abroad, i.e. as a safe-haven for all Germans fleeing the Communist dictatorships of Eastern Europe. German citizenship law dating from 1913, which based German citizenship exclusively on descent, made it possible to consider not only the citizens of the German Democratic Republic but also the millions of persons of German descent living in the countries of Central and Eastern

Europe as Germans, with a constitutional right to settle on German territory. As a result, the traditional German definition of nationhood, based on descent and on belonging to a cultural and linguistic community, was confirmed and institutionalized in the new Republic (Joppke 1999, 62-65; Brubaker 1996, 168-171; Green 2001, 86). This had major consequences for the way German politicians dealt with migration and integration. As the CDU/CSU put it in a parliamentary motion in 1982:

As part of the divided Germany, the Federal Republic of Germany bears the historical and constitutional responsibility for the German nation. Considering its history and its self-image, Germany cannot be or become an immigration country.¹

Within this frame of thought, there was very little room for accepting foreigners as members of the national community. Until the 1990s, access to German citizenship, even for children or grandchildren of migrants, remained not an entitlement but an exceptional privilege, granted under strict conditions at the discretion of the state (Neuman 1990, 44-45). Access to citizenship was eased in the 1990s and 2000s for persons born or raised in Germany, but until 2014 they were still obliged to relinquish their parents' citizenship to become German citizens (Hailbronner and Farahat 2015).

It is extremely paradoxical that a country so profoundly reticent to accept foreigners as members of its national community has allowed millions of foreigners to settle on its territory. Indeed, while irregular migration to Germany was not entirely negligible, the very large majority of immigrants has moved to Germany legally, with the explicit permission of the German state. A major proportion of these foreigners came through the family migration channel. Both because of its numerical importance and because it almost invariably leads to long-term stay, family migration is utterly undesirable in a country that refuses to be an

immigration country. Family migration policy making in Germany is therefore an example *par excellence* of the paradox of migration policy in liberal states.

Moreover, the hypothesis that courts have obliged liberal states to accept unwanted migration is extremely likely to apply in the German case. In the comparative literature on courts and political institutions, judicial review in Germany is described as “firmly established”, in comparison to US, French or Dutch constitutional review. According to Koopmans, the German Constitutional Court is “one of the constitutional courts which have a great authority”, as “its judgments have a profound influence on legal and political developments in the country” (Koopmans 2003, 69). There is much less debate about the democratic character of judicial review in Germany than in the United States, because “distrust of politics is greater”: there is a notion, strengthened by the experience of Nazi rule, that democratic governance might result in unjust laws. As a result, it is considered the task of the judiciary to protect certain fundamental legal principles from infringement at “the whim of whoever happens to be in power” (Koopmans 2003, 106-107). In contrast with the US “plenary power doctrine”, German federal courts have never, as a matter of principle, considered immigration policy too close to the heart of national sovereignty to be subjected to judicial scrutiny (Neuman 1990). In the migration literature, Germany is the country most often quoted as an example of the courts having obliged policy makers to admit immigration to Western Europe (Guiraudon 1998; 2000; Guiraudon & Lahav 2000; Joppke 1998; 1999). Joppke (1998, 292) bases his point that Germany is an “extreme case of self-limited sovereignty”, as a result of its strong constitutional review of laws and policies, on an analysis of German family migration policies. Indeed, since the German Constitution protects the family life of both citizens and foreigners residing in Germany, German family migration policies are particularly likely to have been impacted by the scrutiny of the courts. Thus, if even in the case of family migration policy making in Germany, the impact of the judiciary

would prove more limited than hitherto assumed, this would provide solid ground to question the accuracy of the broadly shared proposition that the courts have forced liberal states to admit unwanted migrants.

Most existing migration literature focuses on court cases – often famous cases that triggered a great deal of public and political debate – and strives to evaluate their policy impact. However, this approach makes it difficult if not impossible to assess how the impact of rulings relates to other factors determining the outcome of decision making. Therefore, I will start from a careful reconstruction of the policy-making process as a whole and consider the role of the judiciary in it. This reconstruction is based on my analysis of over a thousand documents selected from German parliamentary archives as well as the archives of the Chancellor’s Office and the federal ministries of the Interior, Social Affairs, and Justice. I focus on the period between 1975 and 1990, first because ministerial archives are not available for more recent periods, and second because, as we shall see in the following section, these fifteen years after the end of large-scale labor recruitment formed a crucial episode in post-war German migration history in terms of German politicians coming to terms with the long-term consequences of migration.

My analysis starts from a constructivist approach to the study of policy making, meaning that I assume that a policy problem is not an objective given but shaped by the “frames” (Schön and Rein 1994; Bleich 2002) or “policy paradigms” (Hall 1993) held by different policy actors. These frames are clusters of perceptions, assumptions, value judgments and causal interpretations, that mostly remain implicit but determine which aspects of a policy problem are considered relevant and how it is normatively evaluated (BONJOUR 2009, 18). I have therefore investigated which actors were involved in the making of German family migration policies, how they framed family migration as a policy problem, and to which extent they were able to influence decision making. This detailed tracing of the policy-

making process allows me to identify whether and in which way court rulings influenced policy developments.

The Politics and Policies of Family Migration in Germany, 1975-1990

In the Federal Republic of Germany, the 1950s and 1960s were years of unprecedented economic growth. To fulfill the labor demand that accompanied this *Wirtschaftswunder*, foreign workers were recruited, first from Italy and other South-European countries, later mostly from Turkey. In 1974, the economic crisis led the government to put an end to large-scale labor migration. At this time, almost four million foreigners were living in Germany. The question of whether or not these foreign workers should be allowed to bring over their families would divide German politicians and civil servants for over a decade.

Two conflicting frames

Following Schön and Rein (1994, 28) I contend that enduring controversy between policy makers is best understood as a “frame conflict”: “symbolic contest over the social meaning of an issue domain, where meaning implies not only what is at issue but what is to be done.”

The question at issue in German political debates over family migration was more fundamental than the regulation of flows. Family migration is not just about outsiders seeking permission to enter; it is about persons who are already residing on national territory asking for their family members to be allowed to join them. The extent to which these residents are considered members of the national community is crucial for the family migration rights granted to them: the more they are considered to “belong”, the less it will be deemed justifiable to force them to choose between living in their home country and living with their family. This is why citizens or foreigners with permanent residence permits are usually granted much easier access to family reunification than seasonal workers (Block 2015). The

debate on whether and under which conditions the former ‘guest workers’ should be allowed to bring their families to Germany was in fact a debate about whether these migrants ‘belonged’ in Germany and should be accepted as full and permanent members of the national community. The question was, in essence, whether Germany was an immigration country.

On the one side of the conflict were those who held that Germany was not and could not become an immigration country. Building on the ethno-cultural conception of nationhood described above, they assumed that belonging to the German national community depended on descent and on shared culture and language. If at all, foreigners could only become part of this national community after a lengthy and profound acculturation process. From this perspective, the very large majority of migrants remained outsiders who could reasonably be expected to leave Germany if they wanted to reunite with foreign family members. This was the prevailing view among conservative Christian-Democrat CDU/CSU in the 1970s and the 1980s; perhaps more surprisingly, this was also the dominant view within the Social Democrat SPD in the 1970s. Although new urban middle class members with left-libertarian values were on the rise within the party, in the 1970s the “socio-culturally traditional” faction representing the labor class party supporters was still dominant in the SPD (Ohlert 2015, 276-288). As a result, CDU/CSU and SPD held very similar policy preferences when it came to family reunification for migrants: they wanted to restrict it to a minimum.

On the other side of the frame conflict stood the much smaller Liberal FDP. While the FDP had been a Conservative Liberal party in the 1950s and 1960s, it responded to the secularization and cultural liberalization of German society in the 1960s by adopting a much more progressive course, so as to cater to the new urban middle classes and their “post-industrial” values. As part of this open, cosmopolitan worldview, FDP politicians were the first to acknowledge, already in 1973, that the Federal Republic had “de facto become an

immigration country” and that migrants should therefore be considered “fellow citizens” who should be granted full access to the *Rechtsstaat* and the *Sozialstaat*, i.e. the constitutional state and the welfare state (Ohlert 2015, 365-372, 381-382). This logically implied that migrants should be allowed to live in Germany with their families.

Policy making on family migration was particularly difficult in the Federal Republic from the mid-1970s until the late 1980s, because these two opposing frames were continuously represented within the Federal government. From 1974 until 1982, FDP governed together with the SPD in the Schmidt coalitions. From 1982 until 1994, the FDP remained in office, forming coalitions with CDU/CSU under the leadership of Helmut Kohl. Dynamics within center-Left Schmidt coalitions and the center-Right Kohl coalitions were strikingly similar: even though the FDP was the minority partner in both coalitions, it successfully blocked the large majority of restrictive reform proposals put forward by its coalition partners.

Policy developments

Since 1965, labor migrants were allowed to bring their spouses and minor children to Germany if they fulfilled basic housing, income, and residence conditions. Starting immediately after the recruitment stop of 1974, SPD minister Arendt of Social Affairs, supported by other SPD ministers and parliamentarians, launched a series of proposals for restrictive reforms, including a full prohibition of family migration, a maximum age of 16 or even 6 years for children to reunify with their parents in Germany, a prohibition for migrants without a permanent residence permit (which very few migrants possessed) to bring over their families, and a prohibition for second generation migrants to bring in foreign spouses. FDP minister Maihofer of the Interior however, supported by the other FDP ministers, was adamantly opposed to any restrictive reform of family migration policy. He argued that

family reunification was a constitutional obligation and an “absolute condition for integration” and that the government could not break the promise it had made to labor migrants to allow them to bring over their families.² Civil servants of the Interior Ministry predicted that disagreement in the cabinet would remain “unbridgeable” as long as the “fundamental question” remained unsolved, “whether we strive for integration of the foreigners present here, or should retain the possibility to get rid of the foreigners.”³ This illustrates clearly that conflict over family reunification was in fact conflict over the acceptance of migrants as members of German society and over the acknowledgment of Germany becoming an “immigration country.” Over the following years, a series of working groups and committees were set up at different administrative and political levels to try to reach a compromise, but to no avail.

By the early 1980s, several *Länder*, impatient with the federal government’s incapacity to act, had started implementing their own restrictive policies. This made the federal government, including the minister of the Interior, eager to reach a compromise. In 1981, after seven years of fruitless negotiations, the SPD-FDP coalition finally agreed on a restrictive reform of family migration policies. On 2 December 1981, the federal government adopted guidelines according to which children could be admitted if they were no more than 16 years old, and second generation migrants could only bring over a foreign partner if they had lived in Germany for at least eight years and had been married at least one year.⁴ However, the *Länder* did not apply these new guidelines uniformly. In Baden-Württemberg and Bayern, the minimum marriage duration was set at three years rather than one year of marriage. Berlin and Niedersachsen only required five instead of eight years of residence for marriage migration.⁵

After Helmut Kohl was elected Chancellor by FDP, CDU, and CSU parliamentarians in 1982, he promised Parliament to make the restriction of family migration one of the top

priorities of his government.⁶ The new minister of the Interior, CSU-politician Friedrich Zimmermann, put forward the same policy proposals as those defended by the SPD ministers in the last Schmidt cabinet: a maximum age of 6 years for children, and a prohibition of marriage migration for second generation migrants. However, FDP minister Genscher of Foreign Affairs and Commissioner Funcke of Foreigner Issues were not inclined to accommodate the wishes of their Conservative coalition partners, any more than they had the wishes of the Social Democrats.⁷ Until the end of the 1980s, every year or so, minister Zimmermann would launch a new restrictive reform proposal, which would inevitably be blocked by the FDP members of cabinet, with the support of SPD parliamentarians, as well as migrant organizations, trade unions, and churches. Debates were fierce and well-covered in the press.

In 1988, Zimmermann's latest proposal for a restrictive reform of immigration law met with particularly fierce and broad opposition. This bill required for instance that migrants adopt German citizenship before they would be allowed to bring their families over, except if they were unable to naturalize for reasons beyond their control. Zimmerman's proposal was vocally rejected not only by the usual coalition of opposition parties, migrant organizations and welfare organizations, but also by a substantial faction within the CDU. In 1989, Zimmermann resigned as Minister of the Interior, to be replaced by Wolfgang Schäuble, who was less of a hard-liner than his predecessor. After seven years in government, CDU, CSU, and FDP were finally able to reach a compromise. While restriction of immigration remained the overall goal, the rights of resident migrants were strengthened. The new Foreigner Law of 1990 created a legal right to family migration, liberalized conditions for marriage migration, and strengthened the resident rights of spouses and children (Herbert 2001, 250-284).

The Direct Impact of Court Rulings

The German Constitution proscribes that the administration shall respect the rule of law (*Rechtsstaatsprinzip*) including principles such as proportionality (*Verhältnismäßigkeit*) and the “protection of legitimate expectations” (*Vertrauensschutz*) (Koopmans 2003, 66). These principles apply no less to the administration’s dealings with foreigners than to its dealings with German citizens. Moreover, the Constitution states, in its article 6.1, that “marriage and family are under the special protection of the state.” From the 1950s onwards, the Constitutional Court made it clear that this protection also applied to marriages and families involving foreigners, and therefore had implications for immigration law and policies (Weber 1983, 284). However, the nature and scope of these implications only became clear gradually and partially in the course of the 1970s and 1980s, as jurisprudence of both the Federal Constitutional Court and the Federal Administrative Court in immigration cases increased.

Citizen’s right to family migration

Already in the 1960s, the courts stipulated that the constitutional protection of family life was to be taken into account in the regulation of entry and stay of family members of German citizens. These citizens had a right to remain on German territory based on article 11 of the Constitution, and a right to state protection of their family life based on article 6. If the state was to expel the foreign partner of a German citizen, then the citizen spouse would be “forced to either give up his home country, or accept the separation of the marital community” (*Bundesverfassungsgericht* 1973 at 229). While this did not imply that “marriage with a citizen provides a foreigner with absolute protection from expulsion” (*ibid* at 229), the public interest in the regulation of migration was to be balanced against the interest in maintaining marriage and family (*Bundesverfassungsgericht* 1966). This “public interest must yield, if it is not weighty” (*Bundesverwaltungsgericht* 1980 at 2658). To take this jurisprudence into account, but also in response to pressure by interest groups and parliamentarians, the

Foreigner Regulations were adapted in 1972, to stipulate that the foreign spouse of a German citizen could only be expelled on “weighty” grounds, and again in 1977 to clarify that this strong residence right also applied to foreign parents of German children.

However, with respect to families which consisted only of foreigners, the limits set to the state’s discretion in migration matters by the constitutional protection of family life remained wide and rather vague throughout the 1970s and 1980s, firstly because rulings from the federal courts were scarce. The Constitutional Court did not rule in the matter until 1987. Before that time, the only jurisprudence available at the federal level came from the Federal Administrative Court.

The Federal Administrative Court

Building on the Constitutional Court’s jurisprudence with regard to foreigners married to German citizens, the Federal Administrative Court held that foreigners’ family life was protected by the Constitution (*Bundesverwaltungsgericht* 1973) and that in application of the principle of proportionality, a balance was to be struck between this protection of family life and the public interest in regulating immigration (*Bundesverwaltungsgericht* 1975).

However, in comparison with citizens, the protection of migrants’ family life could “claim less weight”: expulsion of a family member did not “unsettle the existing family life [of a foreign resident] in that special way” it would for a German citizen: a foreigner could be “expected to return to the shared country of citizenship to continue marital or family life, if there are no extraordinary circumstances at hand” (*Bundesverwaltungsgericht* 1975 at 2156). Only refugees, whose life would be endangered if they were forced to return to their home country to reunite with their family, enjoyed the same protection as German citizens (Hailbronner 1983; Weber 1983).

In terms of the two competing frames that shaped political and administrative decision-making about family migration in the 1970s and 1980s, the Federal Administrative Court thus struck a middle ground. The Court did not regard migrants as outsiders who had no claim whatsoever to protection of their family life in Germany; neither did it consider them insiders with an absolute claim to family reunification. Its position was something of a compromise between the two frames, as it acknowledged both the migrant's right to protection of family life and the state's right to control migration, and required the administration to find a reasonable balance between the two. The Federal Administrative Court leaned slightly towards the restrictive policy frame, in its assumption that the family life of resident migrants was less deserving of state protection than citizens' family life. It thus did not follow the claim by proponents of the inclusive policy frame that migrants were "fellow citizens" and should be treated equally. Tellingly, the Court consistently referred to migrants' country of citizenship as their "*Heimatland*" (home country), regardless of whether they had ever lived there. Even children of migrants born in Germany were thought to be 'at home' elsewhere and could be required to leave Germany to "create a marital or family life in their home country" (*Bundesverwaltungsgericht* 1984 at 979). However, the Court acknowledged a certain degree of membership of the German community for migrants, as it acknowledged that "migrants have been permitted to build an economic and social existence here with a fundamental right to permanent stay, and that this position is worthy of protection" (*Bundesverwaltungsgericht* 1984 at 978).

This careful maneuvering of the court between two opposing policy frames resulted in a great deal of uncertainty, debate and speculation about the policy implications of its rulings, even among law scholars (Deibel 1982; Weber 1983; Hailbronner 1983; Franz 1984; Gusy 1986; Weides and Zimmermann 1988; Zuleeg 1988; Huber 1988). For instance, some assumed that a migrant's claim to family life in Germany would increase along with the

duration of his residence in Germany (Weber 1983; Weides and Zimmermann 1988), but where the tipping point lay remained unclear. It was also assumed that family life which existed already before the foreigner was admitted to Germany (family reunification) was better protected than new families that were formed once the foreigner lived in Germany (family formation) (Hailbronner 1983) but once again, there was no jurisprudence to clarify this point (Gusy 1986).

Uncertainty about the policy implications of jurisprudence was further reinforced by the fact that the positions adopted by the Federal Administrative Court shifted over time. According to the legal scholar Hailbronner (1983, 583) administrative courts granted more and more leeway to the state in the course of the late 1970s and early 1980s, to take into account the “considerable problems caused by the massive immigration of foreigners” (see also Gusy 1986; Deibel 1982). This is notable also in the jurisprudence of the Federal Administrative Court regarding family reunification. For instance, in 1973, the court ruled that the government’s “duty of care” towards foreign workers resulting from the “*Sozialstaatsgrundsatz*” (welfare state principle), implied that a Spanish grandmother should be allowed to move to Germany, to ensure that her grandchildren were well taken care of while their parents were at work (*Bundesverwaltungsgericht* 1973). This was a very far-reaching decision, in that it forced the state to allow family migration beyond the nuclear family. Never again would the court adopt such a lenient position. The contrast is stark indeed with the 1982 ruling in which the court approved the prohibition of family reunification for adult children. Admittedly, the stakes were very different in that adult children are likely to seek employment in Germany, while the grandmother in the 1973 case was above retirement age. However, there is a significant shift also in the considerations put forward by the court. While in 1973, the court focused predominantly on the situation of the individual migrant family, in 1982 it discussed the general consequences of migration for

German society at length. The court considered it justified to “limit the inflow of foreigners so that it stays within the bounds befitting the reception capacity and interests of the Federal Republic of Germany. This should prevent the dangers which arise in case of massive inflow of foreigners especially in economic and social fields.” The court considered immigration a “danger” not only in view of rising unemployment, but also because of the “problems encountered by the Federal Republic of Germany in adequately integrating foreigners and their families, who (...) partly originate from alien cultural environments (*aus fremden Kulturkreis*)” (*Bundesverwaltungsgericht* 1982 at 1958-1959). In this negative appraisal of the consequences of immigration and its characterization of foreigners as culturally ‘alien’, the court came very close to the exclusive policy frame held by the most restriction-minded policy makers.

In 1985, the Federal Administrative Court approved the restrictive family migration reforms of 1981, i.e. the maximum age of 16 years for reunifying children, and a minimum residence period of eight years for children of migrants who wanted to bring a foreign spouse to Germany (*Bundesverwaltungsgericht* 1985a; 1985b). The Court even approved the requirement implemented by Bayern and Baden-Wuerttemberg that children of migrants be married for at least three years before being allowed to bring their foreign partner to Germany. The court acknowledged that children of migrants who fulfilled the income and residence requirements could be assumed to have “found their economic and social existence” in Germany. However, the court still described them as “persons who either spent a significant part of their life in the home country or grew up in Germany in a foreign family and therefore have ties with their country of citizenship. If they choose their spouse there, this illustrates that they are not completely alienated from this country” (*Bundesverwaltungsgericht* 1984 at 978). In thus construing children of migrants with foreign

spouses as outsiders with a very weak claim to family life in Germany, the Federal Administrative Court once again came very close to the exclusive policy frame.

The Federal Constitutional Court

With the Federal Administrative Court leaving increasing leeway to the German government to regulate family migration, migrants rights defenders had set all their hopes on the Constitutional Court. When that Court finally ruled in 1987 however, these hopes were disappointed. Like the administrative courts, the Constitutional Court attributed great weight to the state's sovereign right to protect the German economy, labor market, social infrastructure and social cohesion by controlling immigration. Therefore, the Court started by emphasizing that no right to family reunification could be deduced from article 6 of the Constitution. Arguing that "the Constitution allows for attributing considerable weight to the reduction of the inflow of foreigners", the Court approved the federal guidelines on family migration policy adopted in 1981, including the maximum age of 16 years for the admission of children, and the requirement of eight year residence and one year marriage for the admission of foreign spouses of second generation migrants. Like its administrative counterpart, the Constitutional Court deemed it justifiable for a child of migrants with a foreign spouse to be "required to seriously investigate whether he might not opt for conjugal life in the home country. For he has shown an (enduring) connection with this country through his choice of spouse." However, the Court condemned the requirement of a minimum marriage duration of three years which was applied in Baden-Württemberg and Bayern, which in view of the Court posed a disproportionate "threat to young marriages" (...) "in the first years of conjugal life, often characterized by the birth of children and in which the duties of marriage and parenthood are first experienced and mastered" (*Bundesverfassungsgericht* 1987).

This ruling is often quoted to illustrate the impact of judicial review on family migration policies in Germany (e.g. Joppke 1998; Guiraudon and Lahav 2000). However, the ruling's complicated and nuanced argument clearly reflects the reticence of the judges to encroach upon state sovereignty in this sensitive policy field. Migrants rights defenders among legal scholars were deeply frustrated by the ruling, which crashed their hopes of using the Constitution as a weapon to strengthen migrants' family migration rights: according to Zuleeg (1988, 587; 594) the Court's decision "leaves behind a constitutional heap of rubble", which allows the administration to just "regulate away" ("*ins Blaue hinein regulieren*") where family migration is concerned (see also Huber 1988).

Perhaps the strongest proof of the limited impact of this famous ruling lies in the Foreigner Law of 1990 adopted just three years later. While the Constitutional Court had deemed it admissible to require second generation migrants to be married at least one year before being allowed to bring over their spouse, this condition was abolished by the new Foreigner Law. Moreover, the Law stipulated that foreigners had a legal entitlement (*Rechtsanspruch*) to family migration if they fulfilled the conditions laid down in law. Thus, through the Foreigner Law, the government did what the Constitutional Court had refrained from doing: it curtailed its own discretionary power over family migration.⁸

The direct impact of court rulings

In sum, the German federal courts, very far from adopting the activist role attributed to them in the 'control gap' literature (Cornelius, Martin, and Hollifield 1994, 9; Guiraudon 2001, 33; Joppke 2001, 358; Joppke 1998, 284) were very reticent to encroach upon the government's sovereignty in the field of family migration. Far from imposing a liberal approach on policy makers, the courts carefully sought a middle ground, tending more often towards exclusionary than towards inclusive policy frames.

Considering the vague and lenient nature of court jurisprudence, it is not surprising that its direct policy impact remained very limited. Its impact was strongest where the courts had been most assertive, namely with regard to the family migration rights of citizens. However, even the strengthening of residence rights of foreign spouses and parents of German citizens as of the 1970s was the result of combined political and judicial pressure.⁹ The three year marriage requirement practiced in Bavaria and Baden-Württemberg was abolished after the 1987 Constitutional Court ruling. It is probably no coincidence however, that this was a policy formulated at the *Länder* level in divergence of guidelines issued by the federal government, whose prerogative it is to determine the goals and modalities of migration policies. The courts *never* overturned a family migration law or regulation adopted by the federal government. Thus, if we conceive the role of the courts narrowly as coercive power over policy makers, then their role was very limited (cf Kavar 2015; BONJOUR 2009; 2011). In the following however, we shall see that this conception is *too* limited: court rulings impacted decision making substantially, but in a different way.

Speaking of Rights: the Indirect Impact of Legal Norms and Court Rulings

Speaking of rights as a political resource

As of the mid-1970s, the emerging jurisprudence about family migration – scarce, vague, and shifting as it was – became a key reference in policy debates. It was introduced into these debates by the proponents of generous family migration policies, who came to routinely sustain their arguments by pointing to migrants’ right to family life. Within political circles, it was first and foremost the FDP members of government who routinely sustained their objection to any restrictive reform by referring to migrants’ constitutionally protected right to

family life.¹⁰ The ideological reorientation of the FDP from a conservative to a progressive liberal party in the 1970s was shaped by a new political culture that revolved around notions of democratization and empowerment of citizens vis a vis the state, notably through legal security and access to courts. As a result, from the very start, the FDP's positioning in defense of migrants' inclusion in Germany was formulated in terms of rights.

This same broad ideological shift of the late 1960s and 1970s towards inclusion and democratization affected a very large part of civil society in Germany as well. Civil society groups pleading for generous family migration policies, ranging from the Red Cross, Terre des Hommes, and the Association of Binational Families and Partnerships (IAF) to a myriad of Christian associations and local initiatives, came to adopt a similar 'rights discourse' and consistently referred to the possibility for migrants to lead their family life in Germany as a "fundamental" right, a "constitutional" right, or a "human" right.

It is important to note that what we observe here is not the political adoption of a policy frame developed in the courts. As we saw above, the courts sought to strike a balance between restrictive and liberal approaches to family migration, with a slight tendency towards restriction rather than inclusion. The inclusive framing of migrants as full and equal members of German society has its roots in progressive political and civil society circles in Germany, not in the courts. However, court rulings introduced the possibility to discuss the family reunification of migrants in terms of rights: this possibility was grasped by proponents of generous policies, who built a political weapon out of speaking of rights.

Turning rights into resources: amplification

Considering the careful treading of the federal courts in matters of family reunification for migrants, it took some work to turn reference to rights and rulings into a powerful political resource. The scarcity and vagueness of the jurisprudence left a great deal of room for

interpretation: proponents of generous family migration policies used this room to amplify the implications of court rulings significantly.

An early and important example of such “amplification” (Sterett, in this volume) is the argument made again and again by the FDP-led ministry of the Interior in the second half of the 1970s that any restrictive reform of family migration policies beyond existing housing and income requirements would be unconstitutional. The federal courts had acknowledged that migrants’ family life was protected by the Constitution. The FDP construed this to imply that “the state’s duty of care towards foreign workers residing here and its duty to protect marriage and family dictate the admission of family reunification.”¹¹ To build this argument, it referred recurrently to the May 1973 ruling of the Federal Administrative Court that a Spanish grandmother should be admitted to care for her grandchildren. However, the court did not use the constitutional protection of family life in this ruling: it was based on the welfare state principle. Moreover, this ruling was exceptionally liberal in comparison to other rulings of the Federal Administrative Court. For instance, the FDP members of government never referred to the June 1975 ruling, which stated that “the constitutional protection of marriage and family has less weight in a purely foreign family, than in a marriage with one German spouse” and that a balance should be struck between the state’s interest in controlling migration and the migrant’s family life (*Bundesverwaltungsgericht* 1975). Thus, favorable interpretations of carefully selected rulings allowed the FDP to amplify the implications of jurisprudence into the strong political statement that restriction of family migration was unconstitutional.

Other policy and civil society actors deployed very similar strategies. For instance, the welfare work association argued that “if living together as a family is understood as a human right, then requirements aimed at migration control cannot be included”, while the German bishops stated that “jurisprudence confirms that the state’s interest in stopping migration

weighs less heavily in the balance than the family's interest in living together.”¹² There is a wide gap between the actual reticence of courts to limit the state's sovereign control of migration and such bold political “rights speak.”

Proponents of generous policies also appealed to “rights” never recognized by the courts. For instance, the Red Cross claimed that since “constitutional principles do not depend on nationality (...) the requirements for family reunification should be identical for foreigners and Germans.”¹³ However, the courts never acknowledged any right to equal treatment of citizens and foreigners: to the contrary, they always emphasized that German citizens' family life enjoyed stronger protection than migrants'. Similarly, Caritas stated that “as a natural right (*Naturrecht*), the right to family reunification is not at the disposal of the state.”¹⁴ However, the courts never recognized a right to family reunification, let alone a *natural* right to family reunification: they merely recognized a right to family life which was to be balanced with the public interest in migration control.

Finally, politicians as well as civil society actors supported their claims about migrants' family migration rights with reference not only the Constitution but also to a whole series of international treaties and conventions, including the European Social Charter, the European Convention of Human Rights, the UN Declaration of Human Rights, and the UN Declaration of the Rights of the Child.¹⁵ However, the federal courts repeatedly confirmed that no family migration rights could be derived from these international legal sources beyond the protection awarded by the German constitution (*Bundesverwaltungsgericht* 1984; *Bundesverfassungsgericht* 1987).

Interpretation of rulings depends on political position

In response to the rights discourse of proponents of generous family migration policies, their opponents developed their own interpretations of the implications of rights and rulings. As a

result, legal norms and court rulings became an unavoidable reference in German policy debates.

In the process of interpreting jurisprudence, proponents of restriction also engaged in speculation and amplification. For instance, in 1977, the SPD-led ministry of Social Affairs argued that even a full prohibition of family migration would be constitutional, since labor migrants had the possibility to realize their family life in their home countries. It especially challenged the notion of a constitutional obligation to let minor children join their parents, since in many cases “tearing children away from their familiar environment to a strange society” constituted “abuse” rather than respect of parents’ rights. There was no jurisprudence to either justify or disprove this interpretation.

Likewise, in the early 1980s, SPD members of government argued that lowering the maximum age for children to join their parents in Germany to 6 years would be constitutionally admissible. They argued that children’s well-being and integration prospects were best served with their immigration at the youngest possible age, so that they would benefit from a full German education. Again, even experts could only speculate whether a maximum age of 6 years for the admission of children would indeed be approved by the Constitutional Court. Nevertheless, years later CSU minister Zimmermann would still describe the notion that it was unconstitutional to prohibit minor children from joining their parents as “an absolutely nonsensical notion. It is constitutional for children to join their parents in the right age, not only at the moment when their parents think they can earn some money (...) Thus misunderstood and misinterpreted, the Constitution leads to delinquency, to the opposite of what is humane.”¹⁶

Thus, speaking of rights was a political weapon that could be wielded by actors on different sides of the debate. Also, it was a versatile weapon, that could be used to argue against or in favor of restriction as one’s political positions changed. For instance, in the

1970s the FDP-led Interior Ministry stubbornly stuck to the position that the Constitution commanded that all minor children be allowed to reunite with their parents. However, after changing political circumstances had brought the ministry to accept the compromise of a maximum age of sixteen for reuniting children in 1981, it presented an elaborate legal argument to explain why this was not in breach of the Constitution. The ministry stated that the Constitution obliged the state to protect children's well-being, which was ill served by migration to Germany at the age of sixteen or seventeen, at which they were no longer obliged to go to school and their prospects of successful integration were hence very poor.

Political parties in parliament made even starker U-turns. In 1982, SPD MPs declared that lowering the maximum age for the admission of children to six years would be constitutional.¹⁷ Seven years later, in 1989, SPD parliamentarians referred to the Constitution and the OSCE Final Act to argue that all foreign spouses and minor children should be admitted unconditionally.¹⁸ Shifting in the opposite direction, in 1979 the CDU/CSU said “yes to family reunification, because it is part of our understanding of fundamental human rights that families should not live durably separated.”¹⁹ Three years later, in 1982, the CDU/CSU argued that “the right for a family to stay together is an important right. There is no contradiction whatsoever if my party holds that this right can primarily be realized by stimulating return [to the home country].”²⁰ The way in which the interpretation of rights and jurisprudence shifted along with political positions illustrates clearly that speaking of rights was a resource in a political game.

Effectiveness of speaking of rights

Proponents of generous family migration policies brought rights into the debate to strengthen their position in the fierce political struggles about the admission of the families of the former “guest workers” to Germany. This speaking of rights contributed to enabling the FDP, a

minority partner in both the 1970s Schmidt coalitions and the 1980s Kohl coalitions, to block the large majority of restrictive reforms proposed by the powerful SPD and CDU/CSU. What made speaking of rights so effective?

First, it offered a common language for an broad array of civil society actors, ranging from trade unions via migrant organizations to churches, to speak out in favor of generous family migration policies. Whether their inclusive perspective was based on Marxism, Christianity, or cosmopolitanism, they all phrased their claims in terms of rights. The support of this increasingly vocal societal movement significantly strengthened the position of the FDP vis-à-vis its restriction-minded coalition partners.

Second, invoking legal norms and jurisprudence implied invoking an authoritative institution in German society and politics, namely the courts. Whatever their political position, no-one questioned the authority of the courts to determine the constitutionality of family migration policies. Pointing to the risk of adverse court rulings was therefore a convincing argument with which to counter a reform proposal. For instance, the FDP Commissioner for Foreigner Affairs Funcke repeatedly argued that lowering the maximum age for the admission of children to six would lead to a “massive amount of judicial procedures with uncertain outcomes.”²¹ Importantly, the effectiveness of speaking of rights was not diminished by the scarcity, variability or vagueness of court rulings: to the contrary, most often, it was uncertainty about what the courts would decide which sustained the fear negative rulings, which in turn made speaking of rights politically powerful. This confirms sociolegal scholarship’s contention that the political impact of the courts does not depend on court victories (Kawar 2015; Nejaime 2011; McCann 1992).

A third aspect of the effectiveness of speaking of rights was its moral weight. Reference to the Constitution served to point out that the value at stake – family life – was a fundamental value of German state and society. In this sense, reference to the constitutional

protection of family life was very much a way of expressing a moral conviction. It is no coincidence that the FDP-led ministry of the Interior routinely argued that it opposed restriction because of “constitutional and humanitarian principles”, as if these legal and moral norms were inextricably connected.²² In a newspaper interview, FDP Interior Minister Baum argued that “this is not just about workers, this is about human rights, about the right to and protection of family life. Since we have said A to the recruitment of foreign workers, and everyone said A, then we must also say B and accept the humanitarian consequences.”²³ The way in which moral and legal arguments are conflated here shows that in the eyes of minister Baum, they amount to the same thing: acknowledging migrants’ right to family life in Germany is acknowledging both the moral weight of family life and the moral obligation of Germany towards the workers it recruited. Joppke (1998, 287) regarded German politicians’ sense of moral obligation towards recruited foreign workers as working independently from legal constraints in their decision making about family migration. However, Baum’s arguments quoted above illustrate that moral and legal norms were not independent, but highly interdependent and mutually co-constitutive.

Fourthly and finally, speaking of rights was effective because it placed German family migration policies in the context of international relations. German politicians feared losing face internationally. As an FDP parliamentarian put it: “shall we allow ourselves to be charged with violating human rights, we of all people, who rightfully point out again and again the human rights violations in the other part of Germany and the rest of the world?”²⁴ It is telling that the legal source most often quoted by proponents of generous family migration policies, besides the Constitution, was the 1975 Helsinki Final Act of the Organization for Security and Cooperation in Europe (OSCE), which states that “participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family.”²⁵ The 1975 Final Act marked the creation of the OSCE,

which was intended as a forum for dialogue between East and West. In the context of the Cold War, this Final Act was a crucial reference in the Federal Republic's relations with countries on the other side of the Iron Curtain. The ministry of the Interior pointed out that by restricting the admission of minor children, Germany would "drop below the international standard" as set by the Helsinki Final Act.²⁶ In particular, as the German bishops emphasized, ignoring the Helsinki Final Act's call to facilitate family reunification for labor migrants would be highly detrimental to the German government's efforts to get Eastern European governments to allow ethnic Germans living in Eastern Europe to reunite with their family members in the Federal Republic.²⁷ As the Federal Commissioner on Foreigner Affairs Funcke (FDP) put it: "the human right to family reunification, which we claimed for Germans living in Poland, the Soviet Union, or Romania, should also apply to foreign fellow citizens in the Federal Republic."²⁸

Conclusion

The political science literature on migration policies has misunderstood the way in which courts influence policy making. As a result, it has substantially overestimated the direct impact of court rulings. Even in the Federal Republic of Germany with its powerful judicial review, administrative courts as well as the Constitutional Court were very reticent to encroach upon the sovereign right and duty of their government to protect the public interest by regulating family migration. Far from adopting the "aggressive" or "activist" attitude attributed to them in the "control gap" literature, judges left the German government plenty of room to impose housing, income, integration, age and residence conditions.

At the same time however, the "control gap" literature has underestimated the role of the courts, because it has overlooked the indirect "radiating" effects of legal norms and court rulings (Galanter 1983). As of the 1970s, speaking of rights became a crucial discursive

resource for proponents of generous family migration policies in government, parliament, and civil society organizations. These actors amplified the implications of rulings by interpreting the jurisprudence selectively and expansively. Thus, from the courts' acknowledgement that the Constitution protected migrants' family life, they built the political claim that migrants should not be hindered from bringing their family to Germany.

The courts did not create a new and inclusive way of thinking about family reunification: the courts sought a balance between restrictive and inclusive views. If anything, the courts tended towards restriction. The inclusive framing of family migration has its roots in progressive movements in German politics and society, not in the courts. However, the courts offered the proponents of generous family migration policies a new way of expressing their claims, namely in terms of rights. Speaking of rights turned out to be a powerful resource in policy struggles. On the one hand, speaking of rights carried authority and legitimacy, since it appealed to the weight accorded to law and courts in German politics. On the other hand, it gave a great diversity of social and political actors a common language to express their claim, strengthening the visibility and strength of that claim.

Importantly, the effectiveness of speaking of rights was not diminished by the absence of major court victories or the general scarcity, variability, and multi-interpretability of jurisprudence. To the contrary, it was the uncertainty about what the courts would decide which allowed room for strategic interpretation and amplification.

Furthermore, the effectiveness of speaking of rights was highly dependent on political context. The effectiveness of appealing to legal norms was shaped by the intersection of these legal norms with moral and ideological values, such as the moral weight of family life or the moral obligation of Germany towards its recruited workers. Also, speaking of rights was a way of putting the family migration debate in the context of international relations, where it

affected Germany's international reputation and the effectiveness of its human rights policies, so crucial to the Federal Republic's international politics in the context of the Cold War.

In sum, the impact of the courts on German family migration policies can only be understood if we conceive of court rulings not as commands, but as raw material from which political claims can be fashioned. Courts and politics should not be studied as isolated spheres: instead, legal norms and jurisprudence should be analyzed as an inherent part of the political process of meaning-making.

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¹ Bundestag (further: BT) Drucksache (further: DS) 9/1288.

² Letter Bundesministerium des Innern (further: BMI) to Bundesministerium für Arbeit und Soziales (further: BMAS), 3 September 1976. Bundesarchiv Koblenz (further: BAKo) B106/69850.

³ Memorandum BMI, 5 December 1975. BAKo 106/69850.

⁴ Memoranda BMAS, 27 November 1981 and 2 December 1981; Letter BMAS and BMI to Bundeskanzler (further: BK), 1 December 1981. BAKo B149/59889.

⁵ Memorandum BMAS, 18 December 1981. BAKo B149/62515.

⁶ BT Plenarprotokol (further: PP) 9/121: 7219-7220.

⁷ Memorandum BMAS, 24 November 1982. BAKo B149/83806.

⁸ Gesetzentwurf der Bundesregierung zur Neuregelung des Ausländerrechts, Bundesrat (further: BR) DS 11/90, pp. 46-47; Gesetz zur Neuregelung des Ausländerrechts vom 9. Juli 1990, Bundesgesetzblatt 1990-I, No 169, pp. 1354 ff.

⁹ BT DS 7/2175.

¹⁰ E.g. press release FDP, *Freie Demokratische Korrespondenz*, 2 November 1976, BAKo B106/69850; BR PP 459, pp. 154.

¹¹ Letter BMI to BMAS, 3 september 1976. BAKo B106/69850.

¹² Position paper *Arbeiterwohlfahrt*, 16 November 1982; Letter *Kommissariat der Deutschen Bischöfe*, 20 January 1983. BAKo B149/83848.

¹³ Position paper *Deutschen Roten Kreuz*, 30 November 1982. BAKo B149-83848.

¹⁴ BMI, report hearing of civil society groups, 1 December 1982. BAKo B149-8348.

¹⁵ For instance: Letter Pax Christi to BMI, 20 December 1977, BAKo B106/81039; *Themen des Deutschen Caritasverbandes*, 6 July 1982, BAKo B149/83847; Position Paper *Diozesanrat der Katholiken im Bistum Aachen*, 8 May 1984, BAKo B149/83756; Memorandum BMI, 13 January 1977, BAKo B106/81038; BT DS 10/1330.

¹⁶ Deutsche Welle, transcript interview with Friedrich Zimmermann, 5 July 1983. BAKo 106-93422.

¹⁷ *Entschliessung der Konferenz der Vorsitzenden der SPD-Fraktionen des Bundes under der Länder*, 20-22 May 1982, BAKo B149-83841.

¹⁸ BT DS 11/5637.

¹⁹ BT PP 8/161, p. 12884.

²⁰ BT PP 9/83, p. 4964.

²¹ Memorandum AS2, Commissioner for Foreigner Affairs, 20 November 1981. BAKo B149/59888.

²² For instance: BMI Position paper for coalition negotiations, 2 November 1976, BAKo B106/69850; Letter BMI to BMAS, 8 November 1978, BAKo B149/59884.

²³ *Die Zeit*, interview with Gerhart Baum, 25 February 1977. BAKo B106/81038.

²⁴ BT PP 9/83. p. 4899.

²⁵ For instance: Letters *Deutschen Bisschofskonferenz* to BMI, 24 January 1977, BAKo B106/80138; Letter COFACE to *Bund-Länder-Kommission*, 16 March 1977, BAKo B149/121732; Position paper IAF, *Initiativgruppe Sindelfingen/Nordschwarzwald*, 2 March 1983, BAKo B106/301520; BT DS 10/1330; BT DS 10/1356; BT DS 11/4466; BT DS 11/5637.

²⁶ Memorandum BMI, 13 January 1977, BAKo B106/81038.

²⁷ Letter *Deutschen Bischofskonferenz* to BK, 21 November 1981, BAKo B149/59888.

²⁸ *Handelsblatt*, Interview with Liselotte Funcke, 3 March 1982. BAKo B149/83840.