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## **The Growing Influence of the Courts over the Fate of Refugees**

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### **Abstract**

A number of migration scholars suggest that domestic courts have become the key protective institution for refugees. How can we explain this claim? One prominent explanation identifies group litigation as the key source of the increasing influence of the courts. How well does this explanation travel empirically? The article evaluates this explanation by examining the puzzling behaviour of German refugee NGOs. They have not entered the legal arena directly (either as parties or as interveners), nor have they concentrated on developing extensive litigation campaigns. Still, they are remarkably 'judicialized': their frequent engagement with the law in other respects has heightened their legal consciousness. Why have German refugee NGOs made such different choices than their North American counterparts and what do these choices tell us about the expanding influence of the courts over the fate of refugees in Germany and North America? To make sense of the different choices that these organizations have made, we need to understand the role that institutional norms and procedures, in particular policy legacies, have played in directing the behaviour and identity of these groups. For a number of reasons, German refugee NGOs historically have been discouraged from directly accessing the courts in favour of indirect participation. Since Canadian and American refugee organizations follow a pattern closer to the expectations of the (largely North American) literature on the subject, we need to be more careful in thinking through our presuppositions when constructing a theory of the worldwide expansion of judicial power.

## **Introduction**

Scholars of citizenship and immigration have recently begun to argue that the domestic courts have grown to become the key protective institution for immigrant aliens, including refugees, for it has been the courts that have tended to strengthen rather than deny or curtail access to rights traditionally granted exclusively to citizens (Hansen, 1999:428; Jacobson, 1997:13). “Immigration matters across the West,” writes Matthew Gibney, “have been increasingly judicialized in the last few decades” (2001:12). “[The immigrant] right expansion,” Christian Joppke explains further, “originates in independent and activist courts, which mobilize domestic law (especially constitutional law) and domestic legitimacy discourses, often against restriction-minded, democratically accountable governments” (2001:339).

This is quite a remarkable development, considering that immigration-related matters have historically been excluded from the reach of the courts in a number of advanced industrialized countries such as Canada and the United States (Hawkins, 1972:103; Legomsky, 1987). In Europe, the courts have expanded their reach, both procedurally and substantively, over immigration and refugee matters. As in North America, until the 1970s, “the handling of immigration in [France and Germany] was characterized by ...the arbitrary power of the administration,” as Virginie Guiraudon puts it, which has meant multiple, obscure regulations, often not made public and without judicial oversight (1998:298). In many European countries, this change did not go undisputed. In Germany, historically home to a large number of asylum seekers, a number of commentators have long bemoaned the loss of state sovereignty in asylum matters and criticized the dominance of the judiciary and due process norms in this area (Korbmacher, 1987:906).

Despite the recent rise of national security concerns, the general trend towards a judicialization of the refugee determination procedure seems to be here to stay. A recently approved Directive by the Council of the European Union reflects “a basic principle of [European] community law” that decisions taken with respect to refugee status are “subject to an effective remedy before a court or tribunal”.<sup>1</sup>

That refugee matters have been judicialized may not seem initially surprising given that refugees are governed by a number of international agreements, in particular the 1951 Convention relating to the Status of Refugees (‘the Convention’) and the 1967 U.N. Protocol Relating to the Status of Refugees (‘the 1967 Protocol’). Yet translating international treaties into domestic reality remains fundamentally problematic, even for states that have incorporated these agreements into domestic legislation. More precisely, international norms do not inherently mandate a judicialized refugee determination procedure. In short, international factors alone cannot explain the increasing judicialization of this policy area. How do we then explain this trend? What are the factors driving this expansion of judicial power? How exactly did such an expansion occur in these different national environments?

North American scholars interested in the expansion of judicial power have identified domestic interest groups (and/or social movement) litigation as a key source of the courts increasing influence. Interested in “the systematic, policy-oriented use of judicial power,” the ‘Court Party’ - as Canadian writers Ted Morton and Rainer Knopff (2000:59) have termed a variety of equality seeking, civil libertarian and post-materialist groups – is attracted to the courts for political reasons and pursues litigation opportunistically out of what they term ‘immediate self-interest,’ i.e. with goals in mind that are judged to only benefit their direct constituency (2000:63). Ultimately, they, and other writers argue, it is the efforts of these groups in the courts

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<sup>1</sup> (Commission of the European Union 13.12.2005) See also chapter V, Art. 39, " Appeals Procedures." For the latest comment by the EU Commission on the implementation of the CAES with respect to appeals, see (European Communities 15.07.2004)

that have shifted political debate away from the legislative arena, where discussion reigns, into the judicial arena, where coercion is the rule, by transforming any and every political issue into a rights-based claim, thereby inflating “a policy claim with higher, indeed ultimate, moral status” (Knopff & Morton, 2000:155).

Normative implications aside, how well does this explanation travel empirically? And what do the differences we might find in applying this explanation to different national contexts and policy areas tell us about the global expansion of judicial power more generally? In this article, I evaluate the interest group explanation by critically analyzing the role that refugee support organizations play in the expanding influence of the courts over the fate of refugees in Germany. My case analysis focuses on developments in Germany, though the larger goal is comparative. Germany is a particularly interesting case for studying the increasing influence of the courts over the fate of refugees since it is not only a federal country with a highly developed court system and an influential constitutional court, but also has traditionally been the destination of choice for a large number of asylum seekers. Though Germany can be characterized as a reluctant immigration state with a low refugee (Geneva Convention) acceptance rate, it has consistently topped the list as “the most generous country in the European Community” due to the large volume of migrants it receives (Devine, 1993:801). More recently, German officials have also taken the lead in shaping the harmonization of asylum procedures within the European Union (‘EU’).

Germany, like Canada and the United States, where the interest group explanation I want to examine in more detail is most popular, is likewise a federal state with influential interest groups and social movements, a high rate of litigation, a strong system of constitutional rights protection with a Constitutional Court whose jurisprudence has left few areas of life untouched, as Donald Kommers (1994:485) put it. Yet in contrast to the North American literature, few

German writers have discussed interest groups and the courts in one breath, foreshadowing that a growth of judicial power in Germany may have taken place without interest groups as key agents, or at least with them playing a very different role.

The behaviour of German refugee support organizations ('refugee NGOs') is indeed puzzling in comparison to their North American counterparts. Refugee NGOs have not entered the legal arena directly (neither as parties nor as interveners), nor have they concentrated on developing extensive litigation campaigns similar to the NAACP in the United States. Still, they are remarkably 'judicialized'; their frequent engagement with the law in other respects has heightened their legal consciousness (Sarat, 1990:483). Why have German refugee support organizations made different choices than their North American counterparts and what do these choices tell us about the expanding influence of the courts over the fate of refugees in the two countries?

My analysis suggests that German refugee support organizations have significantly contributed to the expanding influence of the courts over the fate of refugees. To understand the differences in their contribution, it is not enough to merely look at their litigation efforts, as most of the North American literature suggests. To make sense of the different choices these organizations have made, we need to understand the role that institutional norms and procedures, in particular policy legacies, have played in directing the behaviour and identity of these groups. German refugee support organizations have been historically discouraged from directly accessing the courts by the cultural script underlying access to this institution: A notion of neocorporatism, together with a set of legal rules and procedures that prevent groups from directly engaging or appearing in litigation as parties or interveners, have led these groups to not only seek other avenues of conflict resolution first, but to circumvent direct engagement with the law in favour of indirect participation.

The following argument is divided in two sections, beginning first by connecting the increasing influence of the courts over the fate of refugees to a larger debate in the social science literature on the global expansion of judicial power. I begin by showing how judicial power over the fate of refugees has expanded in Germany over time. I then move on to evaluating the importance of interest groups (here also called ‘refugee support organizations’ or ‘refugee NGOs’) in contributing to the growth of judicial power. The final section urges us to look beyond the case study and to continue to explore the implications of applying institutionalist approaches to a comparative study of law and public policy. Overall, I suggest that we cannot make sense of the different behaviour of political actors and their effect on the growth of judicial power without taking into account the crucial, independent effect that institutions have had on the path that judicial empowerment takes in the different national contexts and policy environments.

### **Conceptualizing and Explaining the Growth of Judicial Power**

The recent expansion of judicial power around the globe has generated a flurry of writing, largely among legal observers based in North America. “An expansion of judicial power is under way in the world’s political systems,” noted Neil Tate and Torbjörn Vallinder in an influential collection of articles. They suggest, this development has brought about “an infusion of judicial decision-making and of court-like procedures into political areas where they did not previously reside”(1995:13). Considering that as Ran Hirschl (2004:1) notes “more than eighty countries and ... several supranational entities” have experienced this infusion of judicial power, the rising influence of the judiciary around the globe is often referred to as one of the most dramatic institutional transformations of the last century (Gibson et al, 1998:343; Hirschl, 2004:1; Tate and Vallinder, 1995:5). Yet establishing the empirical basis for this institutional shift is still a work in progress, particularly from a global perspective. I want to begin by distinguishing between three

different types of judicial power before moving on to a more detailed discussion of the role of interest groups and the independent effect of institutions already mentioned above.

Most academics interesting in tracing the growth of judicial power so far have concentrated on an expansion of the courts' adjudicative function. The ability to settle disputes and to review legislative and executive actions (adjudicative function) is the most visible demonstration of judicial power. Writers have studied the growth of this type of judicial power by assessing the depth and breadth of the increasing penetration of government policy. Some writers refer to this expansion as a 'judicialization from without' (Vallinder, 1995:16). Secondly, judicial power is also transmitted and institutionalized through a set of norms and procedures. If government decision-making arenas are transformed or judicialized, often together with an increase in the presence of legally trained actors, we observe a 'judicialization from within' (Vallinder, 1995:16). This expansion of judicial power has been less frequently studied. Thirdly, judicial power can expand into the societal realm. We will either find an increase in the number of actors attracted to law and the official legal realm or societal actors transformed (or 'judicialized') by their encounter with law or the courts. Marc Galanter (1983) refers to this type of expansion as the radiating power of the law. Since courts are part of the political system of government, they possess a great degree of legitimate authority, including the power of coercion. These three components are presented separately here largely for heuristic reasons. Certainly in the real world, they are interrelated. Judges comment on norms and procedure, the type of decision making arena will lead to new litigation involving societal actors and so on and so forth. One may even offset the other. The central point is that concentrating on judicial decisions is simply not enough to fully understand the growth of judicial power over time, especially in a comparative context. Finally, there are also important limitations to the courts' powers. For example, the often-cited lack of control over 'sword and purse' (Trochev 2005:7, 46) is but one

important constraint on their influence. The degree of institutional independence, public and political support are further examples of important limitations on the power of the judiciary.

Writers studying law and the courts in the social sciences have identified a broad range of actors involved in political life as responsible for judicial empowerment, with not much agreement so far. The activities of interest groups in the courts have received particular attention. Numerous authors have discussed the success or failure of these groups in court, shed light on access requirements and support structure needed, detailed a groups long-term strategies, tactics and resources and debated the impact of their involvement on social change. Groups provide information about the preferences of societal actors that judges take into account when crafting their decisions. With their frequent appeal to the courts, groups not only enhance the quantity and quality of litigation, they also give the courts an increased opportunity to exercise their decision-making powers. They may even lobby for procedural changes, in particular due process, thereby facilitating a judicialization from within. The fact that courts have become more open to influence by organized interests also represents a “democratization of access to the courts,” notes Charles Epp (1998:203). This democratization does not leave these groups unaffected. Courts are transmitters of important symbolic information, including norms and procedures, which confer upon parties a set of regulatory powers or “bargaining endowments,” which “enable the law to be educative even where there is no direct participation [by the party in a dispute before a court].”<sup>2</sup> In other words, the power of the courts may be transferred to actors outside the courtroom. This type of societal empowerment will lead to changes in the actor’s attitude and behaviour. Not only that, if actors are transformed in their identity or behaviour by such contact with the courts, then the judiciary’s sphere of influence or power has grown as well.

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<sup>2</sup> Galanter refers to a concepts introduced by Robert Mnookin and Lewis Kornhauser in a classic article here. See (Mnookin and Kornhauser 1979) In (Galanter 1983)



Yet social movement scholars have pointed out that a movement's identity and tactics also develop independently from state structures. As Smith underlines, movements not only make demands of the state, they often also challenge the wider society's values and culture(1999:7,15). In short, litigation is only one political tactic among many for these groups, making their involvement with the law, more particularly with litigation, less than automatic. Not all groups are automatically drawn to the courts, as Smith (2002:16) points out, some groups even consciously decide against litigation. Alter and Vargas, in their study of challenges to equal opportunity laws in Britain notes that many women's groups had shunned a litigation strategy for ideological and organizational reasons but eventually turned to one after other efforts of influencing the national political agenda failed (Alter and Vargas, 2000:457). Historic institutionalists further note that the past "informs how political actors define what they want to accomplish," as Katzenstein put it (1996:ix). Timing and sequencing of actions and events matter; previously enacted policies (or 'policy legacies') imprinted themselves on the identity of political actors to such an extent that some choices become much more viable than others (and thus influences behaviour). Moreso, opportunities for change do not occur in a vacuum. In the end, political actors bring about this change by choosing a certain path of action over another based on a set of institutional norms and procedures imprinted on them over time. Ultimately, an expansion of judicial power will occur only slowly over a long period of time, notwithstanding more dramatic change at critical junctures. The evolved institution represents a gradual adjustment (via a process of institutional 'layering' or 'conversion') to the cultural script underlying the institution (i.e. the shared norms and procedures that allow a society to function) but not necessarily the will of its creators (Thelen, 2004: 225ff).

## **The Expanding Influence of the Courts over the Fate of Refugees in Germany**

German Courts play a vital role in all aspects of today's refugee determination process. Refugees support organizations play an equally important role as most refugee claimants are particularly dependent on external support to make sense of the bureaucratic maze that is the refugee determination process and, if necessary to launch an appeal of their (initially unsuccessful) claim in the courts.<sup>3</sup> With respect to the courts, their jurisprudence has shaped all substantive aspects, from the definitions (i.e. who is considered a refugee? What is political persecution?) to the procedural side (i.e. what rules and procedures are used to determine refugee status?). As appeal bodies, administrative courts ('Verwaltungsgerichte') around the country are involved in reviewing the initial status determination by the Federal Office for the Recognition of Refugees ('Bundesamt für Flüchtlinge und Migration') and removal orders. Asylum law cases makes up over 50 percent of the business of administrative courts in Germany today - a weighty presence indeed that has only increased with the coming into force of Germany's first Anti Terrorism Act ('Terrorismusbekämpfungsgesetz') in 2001. Numerous disputes have made it all the way to the Federal Constitutional Court ('Bundesverfassungsgericht') due to a constitutional right to asylum added to the German Basic Law ('Grundgesetz') in 1948. In 1995, refugee cases brought before the Federal Constitutional Court peaked at an all time high of 1192 submissions, representing 20 percent of all cases brought before the Court that year.

Viewed over time, the courts' expanding influence mirrors major shifts in Germany's approach to asylum. Major policy changes were typically reactive, driven by changes in migrant flows and later on, an increasing politicization of the asylum issue and even violence against foreigners, including refugees. Jurisprudence not only responded to these changes but filled a void left by an executive reluctant to get into the 'thick and thin' of both substantive and

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<sup>3</sup> In the two countries under review here, most cases that end up in the legal system are appeals of previously denied cases. In Canada, only about 2 percent of cases are government appeals, i.e. appeals of cases initially decided in the claimants favour.

procedural refugee determination issues (see for example, (Renner 1987)) which lead to a judicialization from without. Although a judicialization from within began in earnest during the 1960s, it was a later shift to controlling (and ultimately reducing) access to the courts for refugee claimants in the late 1970s and 1980s that not only became an important tool for parliamentarians in their battle to stem the flow of refugees to Germany, it also expanded the power of the courts. Judges at all levels of the administrative court hierarchy were granted more and more control over their caseload, further facilitating the reach of the courts and the law over the fate of refugees.

The oldest refugee support organizations in Germany are church-based agencies. They have traditionally provided varying types of social assistance to refugees upon arrival since the 1950s, yet underwent a process of politicization in the late 1970s to early 1980s due to the government's increasingly restrictive admission procedures. In Germany's neocorporatist system of governance, they further hold a privileged status in terms of representation and access to political power. Other NGOs (typically those with a broader human rights mandate founded in the 1960s and 1970s, e.g. Amnesty International) also turned their attention increasingly to refugee advocacy during that time (Ferris, 1989:162). New NGOs, specifically dedicated to refugee advocacy were also founded during that period. These NGOs have comparatively less institutionalized access to political power, though the rise of the Green Party has offered these group a new opportunity for opposition and change. While these differences in origin and entrenchment in German society have influenced their choice of political tactics and specifically, their willingness to go to court, they have nevertheless contributed to the increasing influence of the courts over the fate of refugees.

Overall, in the 1950s and 1960s, courts became involved in the refugee determination procedure to clear up confusion due to a lack of executive direction on both substance and

procedure in determining asylum vis-à-vis an overzealous administration. Beginning in the mid 1970s, courts served as reminders of procedural standards and historic commitments in light of increasing government restrictiveness. Due to ever lower initial acceptance rates and activism by the Federal Representative for Asylum ('Bundesbeauftragter für Asylangelegenheiten), administrative courts (in particular administrative courts of the first instance) became a de-facto step in the determination procedure in the 1980s, since under the basic principles of German administrative law, the administrative courts possess the power to re-hear a case in its entirety, i.e. they can re-assess existing facts, consider new evidence and call witnesses if they deem it necessary (Par. 86 ff VwGO, Par. 74-83 b AsylVfG). Though the constitutional amendment negotiated at the end of 1992 was interpreted as an 'expression of the executive's deep distrust of the courts' by some (Plaff cited in Bosswick, 1995:51) it only partly succeeded in reducing the influence of the courts since the amendment concentrated on reducing access to the determination procedure but did not substantially alter the norms and procedures governing it. Still, many refugee activists argue that the constitutional amendment represents a paradigm shift because it started a more conservative period in the rulings of the Federal Constitutional Court.<sup>4</sup> Not only that, the centre of policy initiatives in the area of immigration and asylum shifted to the EU level. The EU argue some observers, was in fact crucial for subsequent policy changes because it serves as a moderator and an creator of independent norms and expectations.

Although it is easy to imagine that the judicialization of the German refugee determination procedure is anchored in the constitutional right to asylum put in place in 1948, this provision would have been of little effect later without the procedural guarantees put into place earlier on which assured access to the administrative court system for refugee claimants, together with an expansive interpretation of said constitutional provision by the Federal

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<sup>4</sup> This was the unanimous conclusion drawn from a number of interviews I conducted with various NGO activists between July and September 2002.

Constitutional Court. In fact, the 1953 Asylum Decree completely ignored the constitutional provision and referred instead to the Geneva Convention, which began a long period of diverging interpretations over the proper scope of protection that was ultimately not resolved until the Federal Administrative Court ('Bundesverwaltungsgericht') finally ruled on it in 1983. The 1953 legislation also created the Federal Office and placed it in charge of refugee determination. The local administrative court in Ansbach, and the Bavarian Administrative Court were put in charge of any appeals. During this early period (1953 to 1972), Germany saw only a small, annual flow of refugees of 5,000 (1950s and 60s) to 8,000 (mid 1970s). Early on, traditional 'free' welfare organizations, such as the Caritas, the social policy and welfare arm of the Catholic Church in Germany, became involved in offering support to refugees.

An important step to a judicialization from within was laid with the 1965 Foreigner's Act ('Ausländer Gesetz'). It created a quasi-judicial process for judging asylum applications (independent jury with one chairperson and two lay members) and also offered rejected claimants an appeal option at the Federal Office before further action was taken up the judicial appeal ladder of the administrative courts. The late 1970s and early 1980s saw a first dramatic peak in refugee flows (in 1980, around 107,000), largely refugees from outside the EU (e.g. Turkey) and from Asia (e.g. Vietnam, Chile, Thailand), the latter brought in through special amnesty programs ('Kontingentflüchtlinge'). During this period (1972-1987), the government's and the German public's response to the flow of asylum seekers gradually changed from accommodation to deterrence. A key decision of the Federal Administrative Court in 1971 signifies this accommodation: the 'Republikflucht' decision allowed more (communist) refugees from Eastern Europe recognition and status (BVerwGE v.26.10.71, "Republikflucht"). Similarly, in 1975, asylum seekers from Eastern Europe were issued work permits, although the government had just stopped issuing the same to guest workers in 1973 (Höfling-Semnar, 1995: 11). Refugee support

organizations responded to the increased flow of refugees by expanding the service they offered. Aided by funding from a 1979 federal refugee program, the number of lawyers employed by the Caritas alone tripled between the 1970s and the 1980s ((e.V. 1985)).

Yet it did not take long for the political tide to turn. First violent attacks on foreigners appeared. The discourse (in government and in public) also shifts to a language that increasingly focused on asylum abuse and criminalized asylum seekers. Government measures in the late 1970s and early to mid 1980s (shortly before and after Kohl's CDU took power in 1982) were aimed at dramatically reducing the flow of asylum seekers into Germany. Work permits were permanently denied in 1980, and housing and social benefits made less attractive. Carrier restrictions and visa requirements were increased. Jurisprudence did not necessarily follow this trend: for instance, the 1980 and the 1987 'Ahmadi' decisions by the Federal Constitutional Court clarified treatment of religious minorities and changes in an asylum seekers circumstances after leaving the country (BVerfGE 54, 341-36; BVerfGE 76, 143-170). But key measures of the 1978 and the 1980 Acceleration Laws ('Beschleunigungsgesetz') also lead to a further judicialization from within. Administrative courts significantly expanded their scope of influence in 1978 when the government decided to decentralize the processing of refugee appeals and distribute decision-making for the first instance to administrative courts country-wide. Subsequently, individual judges at each level of the appeal ladder gained substantial control over the fate of refugee claimants through the introduction of special leave requirements, the creation of a 'manifestly unfounded' category and the institution of single judge panels. Interestingly, the return of bureaucratic control over the refugee determination procedure with the introduction of independent decision-making officers ('Einzelentscheider') in 1980 would in the long run only strengthened the influence of the courts, as the high number of negative decisions at the bureaucratic level led to a large number of appeals.

NGOs responded to the turning tide, both at the local, state and national level. For instance, in 1980 the Berlin Refugee Council was founded. It has its origins in a number of meetings organized by the foreign aid committee of the protestant churches in the region of Berlin-Brandenburg. These meetings attracted a diverse audience, ranging from affected migrants to social workers, church representatives, to more ‘radical’ refugee activists<sup>5</sup> and local politicians and eventually, a loose coalition of individuals and representatives of organizations formed that began to get involved in refugee politics. The Caritas refugee lawyers’ network also expanded further. In 1982, it started offering legal aid funds. In 1985, the program was further expanded with funds from UNHCR and additional support from the German Red Cross, having previously gained support from the Diakonie, the German protestant church’s welfare arm. In 1986 a national working group for refugees, PRO ASYL (‘pro asylum’) was founded, that began to successfully employ different techniques for attracting public attention than other refugee support groups, in particular vivid ad campaigns and direct use of the media, and quickly attracted significant amounts of funding (donations/membership dues).

The subsequent period between 1987 and 1996 represented a key turning point in the relationship between the German legislature and the courts in the area of refugee policy. Arguably, it was the most dramatic engagement of the legislature and the judiciary on the issue thus far. After an extended period of sticking its head in the sand and letting the judiciary guide the way (Korbmacher, 1987),<sup>6</sup> German legislators finally asserted their authority in a policy area dominated by a murky historical legacy of intolerance and exclusion, though not necessarily to the benefit of the claimants. The Kohl government began this engagement by arguing that changing Art. 16 was inevitable and in fact, the only solution to the German asylum problem, yet

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<sup>5</sup> There is a word for these more radical activists in German (‘Autonome’) that connotes their extremely critical attitude to ‘established’ organizations, their ideological position, their goals and tactics. For a discussion of similar organizations in the British context see Kaye, 1992.

<sup>6</sup>See also Sendler (1987) who calls the dominant perception of substantively regulating refugees by the legislature a “forbidden act,” although legal experts agreed that there was in fact room to act for the legislature.

without the support of the opposition, this was not possible according to the German rules of constitutional amendment. Yet after a period during which violent attacks against foreigners increasingly made the headlines and the number of refugee claimants kept rising (reaching an all time high in 1991), politicians of all political stripes began to engage in a heated debate. This eventually led to a compromise between the parties and a constitutional amendment of Art. 16 of the German Basic Law in December 1992. Previously an amendment of this article was considered an absolute taboo, yet it slowly moved to the centre of the debate as some saw it as the cause of all evil that had paralysed the government, preventing it from making substantive, rather than merely procedural changes to its asylum policy and legislation.<sup>7</sup>

The amendment allowed the German government to fully implement three key diversion policies based on recently concluded conventions with its European neighbours. This in effect shifted some power away from the courts towards border officials and other neighbouring states. Yet ultimately, the amendment was more about preventing asylum seekers from reaching German soil and from distributing the burden among the EU member states, than about reducing the influence of the courts. First, the so called ‘airport procedure’ holds most claimants at the point of entry (especially those from ‘safe country of origin’ and those without proper documentation) and severely limits their access of recourse mechanisms (by imposing extremely short time limits on the claimant) in case of a negative decision while increasing the threat of deportation, prompting some NGOs to start up emergency legal services at major airports (Heinhold, 2000:41). The so-called ‘safe third country’ provision basically refuses to accept all claims by those arriving from neighbouring countries. Although an appeal exists, similar time limits have been put in place. The Federal Constitutional Court, in a trilogy of cases,

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<sup>7</sup> A prominent Berlin senator publicly campaigned against the power of the courts over asylum. In a chapter in his book titled “the paralyzed Parliament – how our asylum law became judge-made law,” he states: “No other parliament in the world has had its ability to act taken away in such an important policy area.” See Lummer, 1992.



subsequently sanctioned this constitutional amendment in 1996.<sup>8</sup> NGOs and other refugee advocates agree that the constitutional amendment has made it much more difficult to obtain asylum in Germany (Bosswick, 1994) . Observers have argued that the sanctioning of the constitutional amendment in 1996 represented a paradigm shift in German asylum policy in a number of respects. While refugee activists reacted with shock and exhaustion to the change, politicians were glad to have the asylum question out of the headlines for a while.<sup>9</sup> Since 1996, the main impetus for policy change has come from discussions around the harmonization of asylum proceedings in the EU. The change to a green/social democratic government in 1998 also lead to a number of policy changes, notably the introduction of an immigration law ('Zuwanderungsgesetz') in 2001.<sup>10</sup>

### **Evaluating the impact of refugee support organizations:**

Refugees are particularly dependent on external support to make sense of the bureaucratic maze called the refugee determination process and, if necessary to launch an appeal of their (initially unsuccessful) claim in the courts.<sup>11</sup> The circumstances of their departure may not have allowed them to prepare for navigating a complex bureaucratic procedure in a foreign country, language and culture, let alone to transfer sufficient funds for a lawyer or a potential court challenge.<sup>12</sup> Hence, refugee claimants often turn to supportive organizations (e.g. exile communities or other refugee support organizations) or family members and friends already in the host country for help. This external support becomes even more important if the refugee

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<sup>8</sup> For a discussion of the decisions see for example Hailbronner, 1996.

<sup>9</sup> Interview with NGO activist, 22. August, 2002. Interview with refugee lawyer, 20. September, 2002.

<sup>10</sup> Entered into force January 2005. For a critical evaluation, see Pelzer, 2005; Roßkopf 2001.

<sup>11</sup> In Germany, the number of government appeals of initially successful cases is substantial, some estimate it to be as high as 60 percent because the government pursues a much more aggressive litigation strategy via the Federal Commissioner for Asylum Affairs ('Bundesbeauftragter'). For some of the controversy around this office and estimates of appeal rates, see Heinhold, 2000; Liebau 2000.

<sup>12</sup> For a detailed discussion of the cultural and psychological difficulties refugee claimants face after arrival see for example, Laier 1999 ; Macklin 1997.

receiving state is a reluctant state of immigration, as is Germany. NGO representatives point out that over the years, German state officials have closed down most of the traditional avenues of communication with refugee support organizations, though the change in government in 1998 seemed to reverse this trend somewhat.<sup>13</sup> Historically, restrictive standing laws have also prevented German refugee support organizations (or ‘NGOs’) from directly entering the legal arena as parties or interveners.<sup>14</sup> More surprisingly perhaps, refugee support organizations have also not developed litigation campaigns similar to the NAACP behind the scenes.<sup>15</sup> Instead, German refugee support groups have founded a refugee lawyers’ network and regularly send affiliated lawyers to court on their behalf to provide expert testimony. These groups also fill a gap in the official system by taking on the role of legal aid providers, with the operation of (albeit limited) private legal aid funds since government-funded legal aid is not only insufficient but also very hard to come by.<sup>16</sup> Some groups with the relevant expertise also furnish courts directly with expert advice on country conditions. All in all, groups not only connect refugee claimants with affiliated (and funded) lawyers, regularly educate their own staffers and others as part of a broad refugee advocacy network on the latest developments in refugee case law, they also hold seminars and conferences to train judges and bureaucrats – mostly without appearing in the official legal realm themselves.<sup>17</sup>

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<sup>13</sup> This is a historical assessment and does not mean that no communication exists. For example, the Federal Office and the Department of Foreign Affairs both participate in working groups on asylum questions (‘Gesprächskreis’ or ‘Arbeitsgemeinschaft’). Moreover, communicating does not imply listening.

<sup>14</sup> These restrictive standing laws are not based in Germany’s civil law system. Other civil law systems, for instance the Netherlands, have developed interest group litigation similar to North America. See Groenendijk 1985.

<sup>15</sup> Interview with refugee lawyer, 20 August, 2005

<sup>16</sup> For more detail, see Dagmar Soennecken, "Justice Served?" Legal Aid and Access to the Courts for Refugees in a Comparative Context” (paper presented at the annual meeting of the Law & Society Association, Chicago, June 2004).

<sup>17</sup> There is very little published on their activities in academic journals. For an example of NGO publications discussing their activities, see (ISM, 2001. See also Dagmar Soennecken, “The Judicialization of Refugee Support Organizations in Germany” (paper presented at the annual meeting of the Law & Society Association, Las Vegas, Nevada, June 2005).

In light of a reluctant and unresponsive state, it would be easy to imagine that German refugee support organizations would have turned to the courts, as the North American literature would suggest. The obvious explanation for the differences would be differences in standing laws. German standing laws have indeed posed a significant barrier for interest groups participation in the courts. Yet not only have similarly restrictive standing laws been challenged and subsequently softened somewhat, standing only refers to direct participation in a lawsuit. German intervention rules are less restrictive, yet there is no evidence to suggest that organizations have obtained access to the courts in this manner either. Nor have they been particularly concerned with mounting litigation campaigns behind the scenes. What else explains their choices? I will first make the case for Germany as a reluctant state of immigration before moving on to a discussion of Germany's standing laws. Subsequently, I want to suggest that the answer to their behaviour can be found in Germany's neocorporatist heritage.

German refugee NGOs face a historically reluctant immigration state, as exemplified in Germany's low acceptance rates for refugee claimants and in the government's historic disinclination to consider Germany a country of immigration (Joppke,1999). Government officials have also done their utmost to use the fact that the refugee determination procedure is highly front-loaded and path-dependent to their advantage, trying for the most part to obtain a refugee claimant's story of flight 'fresh' and uncoached as quickly as possible and ideally, without prior consultation with a lawyer or NGO representative, officially because they believe that this practice aids in assessing the credibility of the claimant. In reality, however, contradictions between evidence obtained early on in the determination process and statements made later on in the process are often used against the claimant, without taking into consideration possible trauma, exhaustion and cultural differences.<sup>18</sup> The 'reluctant state' stance is further exemplified by the fact that refugee claimants entering Germany via air are contained by the

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<sup>18</sup> For a similar discussion in the Canadian context, see Macklin, 1997.

border police and a first assessment of the case takes place right at the airport, making it difficult for outsiders, be they relatives, lawyers or NGO staff, to access get them. However, the transit area of the Frankfurt airport is also home to the airport social welfare office ('Flughafensozialdienst'), which is operated collaboratively by the welfare branches of Germany's two major churches. It functions as an important point of reference for refugee claimants, offering advice about everything from procedure to contacting a lawyer to applying for legal aid, if time permits.<sup>19</sup>

Once in the country, refugee claimants are not only forbidden from working while their claim is being assessed, they also need to spend at least the first two months (max. three months) of their (official) stay in the country in a government-operated reception centre, although they are eligible for welfare and (at least technically) legal aid. While at the Centre, their freedom of movement is restricted, often times making it more difficult to meet with a lawyer or others interested in assisting them with their claim.<sup>20</sup> As a consequence of these practices, refugee claimants coming to Germany often do not come into contact with refugee NGO representatives until close to their determination hearing or even until their all important first hearing is already over. A prominent refugee lawyer noted that since a number of procedural changes implemented with the constitutional amendment in 1993, most of his clients do not come to him until after the hearing before the Federal Office for the Recognition of Refugees (BAFL), leaving him to do mainly 'damage control.'<sup>21</sup>

As a result, many German refugee NGOs have increasingly concentrated on increasing the refugee claimant's knowledge about the highly complex determination procedure – whenever they

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<sup>19</sup> The office started operations in 1975 with the mandate similar to Traveler's Aid. However, over the years the office has increasingly catered more and more to refugee claimants. As a consequence, it also obtains funds from both the state of Hesse and the Frankfurt airport authority to be able to better fulfill the growing need in this area. For a detailed discussion of the airport procedure and the function of the airport's social welfare office, see Laier, 1999.

<sup>20</sup> For a critique of the reception centres, see for example Heinhold 2000; Joppke 1999.

<sup>21</sup> Interview with refugee lawyer, 19. September, 2002.

can get access to the refugee claimant. Indeed, over time, German refugee NGOs have become judicialized themselves; as their engagement with the law on behalf of refugee claimants has not only politicized them but also transformed their relationship with the law. Instead of leaving legal matters entirely to outsiders (i.e. NGO friendly lawyers) and concentrating on traditional NGO functions of reception and integration of newcomers, they have not only made themselves very knowledgeable about refugee law and the asylum procedure, including court appeals, but have reoriented their behaviour and organization towards law and the courts. Still, unlike many of their North American counterparts, they have not entered the legal arena directly, nor have they mounted substantial litigation campaigns behind the scenes.<sup>22</sup> As a prominent refugee lawyer put it when asked to reflect on the surprising lack of legal mobilization around the 1992 constitutional amendment:

I spent some...time thinking about the surprising fact that the German refugee movement, lawyers etc. did not prepare itself better and with more concentration for the legal fight before the Federal Constitutional Court...I think that a more concerted effort would not have achieved anything anymore, since the main groups in society had already yielded to the pressures of the political pundits and election fighters. In some sense our behaviour in Germany was a reflection of the reality: the fight was already lost.<sup>23</sup>

This observation already suggests that standing laws are not the true reason for the lack of legal mobilization in the courts. The cause can be found in an older pattern of how conflicts are resolved in German society. I will now turn to a discussion of Germany's standing laws before moving on to a discussion of the importance of Germany's neocorporatist legacy for shaping the choices of refugee support organizations.

Under German standing laws the ability of interest groups to launch a lawsuit of their own is severely limited. The fundamental principle behind this restrictive stance is wariness towards excessive litigating which may arise from allowing "popular" or citizen suits ("Popularklagen").

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<sup>22</sup> The Legal Advisors' Conference ('Rechtsberaterkonferenz'), constituted of refugee lawyers, meets four times a year. The board discusses political demands and legal strategy. Even lawyers participating in the network remarked that the conference serves more as a place to exchange information and are less of a forum for legal strategizing. Interview with refugee lawyers, 19. and 22. September, 2002.

<sup>23</sup> Personal written communication with refugee lawyer dated 21. August, 2002.

German law is based on a very strong individual rights principle, which constitutionally guarantees access to the courts (and by extension standing to sue) only to those individuals whose personal rights have been violated by a government authority (Art 19 (4) GG). This does not mean that organizations cannot sue. But they must conform to the same standards as an individual person, which in administrative law means that they have to demonstrate that an administrative action has injured them in their personal rights in order to gain standing to sue (Par. 42 (2) VwGO). Someone whose broad economic, cultural, ideational or political interests only have been affected will regularly not be granted standing to sue, unless legislation allows for an exception.<sup>24</sup> However, under certain circumstances so called ‘neighbour’ suits or ‘third party’ suits allow for someone affected by the actions of a neighbour to launch a law suit if they can demonstrate a legitimate (and personal) danger to them emitted from the neighbour’s actions, for example if there are plans to build an alternative energy (power) station nearby.<sup>25</sup>

Germany has undergone a liberalization of standing laws, similar to other Western European countries, although environmental groups and local citizen associations have not managed to transform the law of standing more generally (Greve, 1998:197). The environmental movement, Greve argues, has been at the forefront of attempts to liberalize standing laws to initiate group-based litigation for strategic purposes. Judges exercised their power to grant standing to sue by either allowing or not allowing NGOs to launch legal challenges in this area or by gradually expanding the definition of ‘neighbourhood.’ Eventually, legislators created limited opportunities for grassroot NGOs to become involved in specific laws, primarily concerning environmental protection and construction. However, after this period of moderate expansion in the 1970s, German legislators and administrative courts (in whose turf environmental battles

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<sup>24</sup> See discussion in Schmidt, 1998; Greve 1989.

<sup>25</sup> Apparently, the construction of windmills to generate alternative (wind) energy particularly in the North of Germany has lead to a flurry of lawsuits by neighbours. See for example VG Oldenburg decision 23.07.01, Az.: 4 B 1916/01; VG Oldenburg decision 27.03.03, Az.: 4 A 4333/00. See also OVG Rheinland-Pfalz, decision 01.03.05, 8 A 11492/04.OVG/5 K 173/03.TR.

were fought) and legislators grew increasingly reluctant to further liberalize standing laws in administrative law. Some highly publicized cases, for example about the viability of nuclear reactors were argued all the way up to the Federal Constitutional Court, yet without the direct involvement of environmental groups (See 49 BVerfGE 89 (“Kalkar”), Greve, 1989). Interestingly, no other groups have stepped into the fold demanding standing to sue in other policy areas since, despite considerable public debate and a favourable political climate for making changes to the standing laws at the time.

Germany’s provisions for obtaining intervener status may (Muldoon, 1989) also shed light on the choices interest groups make. Intervention as a ‘friend of the court’ under the common law and under most procedural court rules in Canada and the United States allows a ‘friend’ (as opposed to a ‘party’) to offer assistance to the court, often in the form of the right to make (written) representations before the court (Muldoon, 1989: 4). Intervener rules can thus represent important ‘push’ or ‘pull’ factors for interest group participation in the courts. Although German law generally recognizes the conception of intervention or ‘co-invitation’ (‘Beiladung’) to an ongoing case, it does not know intervention as a friend of the court (*amicus curiae*). Suffice it to say here that the absence of this provision does not prevent German courts from consulting with experts of their choice either orally or by requesting their written opinion, yet the absence of such a provision eliminates a popular North American avenue for direct interest group participation in court proceedings.<sup>26</sup> German administrative law does however recognize the concept of ‘added party intervention,’ which is also known in Canadian (and American) law, yet not discussed in the judicial empowerment literature. This type of intervention is more powerful than *amicus*

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<sup>26</sup> It would be difficult and labour intensive to get a *quantitative and qualitative understanding of the number and kinds of people consulted by the courts* as they only appear in judgments if the judge writing the decision refers to them in the summary of the proceedings, which may or may not be the case. The same goes for interveners. See Par. 87, 93a, 96, 97 VwGO for recruitment of experts before the administrative courts, Par. 404 ff. ZPO for expert involvement before civil procedure courts and Par. 27a, 28 and 29 BVerfGG for expert opinions to assist the Federal Constitutional Court. Par. 65 and 66 VwGO govern intervention before the administrative courts and Par. 64 to 66 ZPO interventions before civil procedure courts.

curiae intervention in that it grants party status to the former ‘stranger’, which allows the new participant to fully participate in the case. The new participant has a right to file motions and raise new issues, as long as they are in keeping with the general tenor of the case as it was set by the original parties, i.e. the added party intervener cannot dramatically change the fundamental nature of the dispute between the parties. The court is even required to invite certain parties to participate in the legal proceeding if their legal interests are affected. Other parties may be added at the discretion of the court.<sup>27</sup> In contrast to the debates about loosening the standing to sue requirements in the 1970s, there is no indication in the German literature on intervention that interest groups have tried to gain access to court proceedings by requesting ‘added party’ status. Similarly, none of my interviewees even raised this point as a possible strategic option. However, a number of German interviewees confirmed that they personally or their organization had served as experts for court proceedings related to asylum seekers. Indeed, this is probably the most direct form of participation for NGOs, in particular affiliated refugee lawyers, before the courts in Germany. Note that the invitation to appear or to provide expert advice to the court is either directly made by the court or, if one of the parties requests to have an expert heard, the decision to grant the request is similarly made by the court.

Two other pieces of legislation need to be discussed because they directly influence the NGOs and their lawyer’s engagement with the law on behalf of a client. First, persons offering legal advice must comply with the Legal Counselling Act (‘Rechtsberatungsgesetz’) from the 1930s, which grants lawyers a monopoly over offering legal advice.<sup>28</sup> The law states that non-lawyers cannot regularly and in a “business-like fashion” offer legal advice to individuals, including refugee claimants. This law not only prevents German NGOs from opening community

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<sup>27</sup> See Par. 66 VwGO for details on the rights of the added party intervener.

<sup>28</sup> Rechtsberatungsmisbrauchsgesetz, RGBI. I S.1478; since 1980: Rechtsberatungsgesetz (RberG), Bundesgesetzblatt Teil III, Gliederungsnummer 303-12, veröffentlichte bereinigten Fassung, zuletzt geändert durch Art. 21a des Gesetzes vom 21. Juni 2002 (BGBl. I S. 2072).



law clinics similar to the ones found in Canada and the United States, it also sets boundaries for the kind of advice staff in refugee service centres are able to provide.

However, two of Germany's largest welfare organizations, *Caritas* and *Diakonie*, are technically not subject to the restrictions of this legislation due to a difference in the legal status of their 'mother' organizations, Germany's two major churches. Yet NGO activists note that many of these organizations do not make 'expansive' use of their somewhat privileged position in this respect, i.e. they are not known to regularly push the boundaries of this legislation. According to the Federal Social Assistance Act, all of Germany's free welfare organizations are even explicitly allowed to offer advice, including legal advice, similar to government agencies, when it comes to broader matters concerning social assistance, including matters involving the Alien Act. However, they may not assist their client with the preparations of a court proceeding, including providing legal representation. The Legal Counselling Act and related provisions certainly represents yet another important barrier for growth of direct NGO involvement in the courts but as we will see German refugee NGOs are also not big on indirectly sponsoring test cases either. This suggests that Germany's long history of restrictive regulations of interest group participation in the courts conditions the larger behaviour and preferences of the groups in question.

This excursion into standing laws is important for our discussion of the role of interests groups in the growth of judicial power because it underlines the comparative importance of the political opportunity structure - to use language utilized in the study of social movements - or shifts in the formal and informal structures of power relations in a given political system (McAdam, 1996:26). As a brief glance across the border to the Netherlands further proves that this difference is not due to the obvious common law versus civil law system difference, as the Netherlands have developed interest group litigation similar to that expected by the North

American literature, even in the area of immigration and asylum (Groenendijk,1985:337-50).The discussion further underlines that the power to include participants in court proceedings remains firmly (and restrictively so) within the hands of the judges and legislators. In fact, both courts and legislators have ultimately rejected the efforts of organized interests (in particular, environmental groups) to broaden German standing laws.

While it would be easy to conclude that refugee support groups have therefore not played a significant role in furthering the growth of judicial power, I want to suggest that we need to look beyond Germany's restrictive standing laws to understand their choices and ultimately, their impact on the growing influence of the courts. An older, institutionalized script about the way in which conflict is resolved has further discouraged these groups from directly entering the legal arena: Germany's neocorporatist system of governance has privileged some groups dealing with refugees over others, making them more reluctant to confront the state in the courtroom, instead preferring a different kind of opposition.

In the neocorporatist model, interest groups are formally incorporated into the process of governance and therefore occupy a prominent role in state-society relations. Such groups enjoy a large degree of access and influence over policy making, suggesting that they may also be less likely to want to mount litigation campaigns for political gain.<sup>29</sup> Groups in Germany are organized into a few unified organizations, which are "recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and controls" (Schmitter, 1982: 65). Large associations represent most socioeconomic forces in German society. German political parties also hold significant, traditional ties with a number of these unified organizations. This system of organization implies that certain groups will remain outside and without such institutionalized influence. Germany possesses a long history of citizen

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<sup>29</sup> Karen Alter (2000) has recently argued that groups may actually prefer to work through political channels.

protests along with a number of strong social movements, particularly environmental groups, which have largely operated outside of the neocorporatist model. Nevertheless, many scholars point to the rise of the Green Party as an important avenue of institutionalizing some of these protest groups and their concerns, which in turns points to a pattern of conflict solution focused on the classic, 'political' realm.

The neocorporatist model is also evident in the administration of German welfare state policy and in the organization and incorporation of migrant groups (Soysal, 1994:37). Research has shown that settler societies possess stronger migrant networks, which will advocate for an expansive immigration policy alongside labour and business associations, while many European states lack such powerful migrant associations, making migrants and their supporters overall weaker political actors in European states, such as Germany (Freeman, 1995:441ff). Germany has a history of a strong welfare state that is largely operated by a significant voluntary or 'third' nonprofit sector, with influential churches and powerful labour unions.<sup>30</sup> The six organizations are: Caritas (Catholic), Diakonie (Protestant), Arbeiterwohlfahrt (or AWO, labour movement basis), Red Cross (humanitarian), the Jewish Welfare Agency and finally the Parity Association, a nondenominational organization largely comprised of grass-roots, self-help groups (Anheier & Seibel, 2001). All were largely founded during Germany's age of industrialization but did not achieve their privileged status until the 1950s and 1960s, "when the political constellation at the time favoured a weak state and the development of a buffer zone between state and citizen," as Anheier and Seibel explain (Anheier & Seibel, 2001:97). A 1967 decision by the Federal Constitutional Court further entrenched the privileged position of the group of six by sanctioning the so-called 'subsidiary principle,' which proclaims: "The state takes on only those functions that the private sector cannot meet, and that large units, such as the central government, concern

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<sup>30</sup> As Hesse and Ellwein (1992) note, the two major churches react a bit 'allergically' to being called mere 'interest groups,' since they occupy a special tax and legal status. On the relationship between the churches and their welfare arms see Broll, 1999.

themselves only with tasks that are beyond the capabilities of smaller units” (Boeßenecker, 1998; Anheier & Seibel, 2001; BVerfGE 22, 180 (decision from 18.07.1967)).

Compared to grassroots organizations, such as human rights groups dedicated to the cause of refugees and migrants (for example, Amnesty International) as well as other grassroots organizations (i.e. PRO ASYL), these organizations dwarf the others in the number of refugee service centres, funding available for litigation and lawyers sponsored as part of the refugee lawyers network. The older organizations have traditionally been much more reluctant than smaller advocacy groups to confront government officials on refugee policy, as they have much more to lose (i.e. substantial government funding for their other welfare-state activities, e.g. the operation of hospitals and day-care centres), preferring instead to oppose the increasingly restrictive refugee policy more ‘indirectly,’ which includes providing funding for litigation and access to activist lawyers.<sup>31</sup> Smaller advocacy groups have opposed the state’s restrictive policy towards refugees and migrants more openly (often with the backroom support of the older refugee support organizations)<sup>32</sup> and have further thrown their support openly behind Germany’s traditional ‘protest party,’ the Greens, in hope of a friendlier, more inclusive immigration policy, though some analysts have felt let down once the Greens came to power.<sup>33</sup> Some human rights organizations also display a strong wariness of the courts, pointing to their conservative jurisprudence and the limited impact of their decisions on the ground.

Overall, the NGOs involved in the refugee field in Germany vary greatly in their size, level and source of funding, aims, stance and degree of influence. In fact, there is a dizzying, ever shifting array of formal organizations and associations, working groups, networks and coalitions.

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<sup>31</sup> I conducted a total of 20 formal interviews with NGO representatives, lawyers, bureaucrats and judges (lower and upper administrative court, Federal Constitutional Court) while in Germany. I also attended refugee hearings, both at the bureaucratic level and in court during which I spoke to other participants more informally. These conclusions are largely based on my interviews and on documents given to me by NGOs.

<sup>32</sup> Interview with NGO activist, 6. August, 2002.

<sup>33</sup> Interview with NGO activist 22. August, 2002.

Individuals are often members of multiple groups and some of the leading activists have been involved in refugee work for over 20 years. The UNHCR further occupies an important position in the larger network. Strengthening national NGOs (also called ‘capacity building’) through financial contributions and developing a solid body of jurisprudence in “in favour of a liberal interpretation of the 1951 Convention” has been part of UNHCR’s strategy for years (UNHCR, July 1998:19-20. Not only that, UNHCR holds a more advantageous position when it comes to access to government officials; their Nuremberg office, for instance hold close, informal ties to officials of Federal Office there. According to one observer, Friday afternoons are regularly used for discussing important policy issues and emergency cases with UNHCR.<sup>34</sup>

Although I have highlighted individual organizations in my discussion so far, it is important to see them as complimentary and overlapping members of a larger refugee network in order to fully understand their judicialization or their ‘radiating’ influence on the courts. As suggested earlier, we need to look beyond litigation to understand their transformation and their ultimate importance. Many refugee NGOs employ legally trained staffers and belong to formal or informal networks distributing detailed information about the latest case law developments together with related conference announcements, reports on legislative work of interest, country-specific information, etc. Many NGO staffers also meet regularly among each other and with government officials to discuss latest developments in law, politics and NGO activities. Moreover, the language, publications and legal focus of these NGO networks are a key aspect of the radiating effect of the courts as described by Galanter. Sifting through the stacks of publications, interview notes and web page links I obtained as part of my research, I noticed repeated references to and detailed, sophisticated engagement with court decisions.<sup>35</sup> Moreover, publications distributed by the free welfare organizations dealing with immigrants other than

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<sup>34</sup> Interview with government official, 10. September, 2002.

<sup>35</sup> Interestingly, the word ‘rights’ appears only infrequently. More common are the words ‘obligation’ and ‘responsibility.’

refugees were almost free of such references. This is an important observation as it underlines significant differences in two related policy communities and it also somewhat fends off the charge of selection bias (I did set out to examine refugee NGOs that focus on the law after all). Although NGO activities and organization discussed here also highlight the absence of direct engagement with the courts, the centrality of law and the courts to German refugee NGOs in their communicative activities is a more subtle indicator of their heightened legal consciousness. As already discussed earlier, this awareness exemplifies the radiating power of the law, which creates “bargaining endowments,” that “enable the law to be educative even where there is no direct participation [by the party in a dispute before a court].<sup>36</sup>”

## **Conclusion**

To sum up, German and Canadian refugee support organizations have significantly contributed to the expanding influence of the courts over the fate of refugees but in a way surprising to most North American observers. To understand the differences in their contribution, it is not enough to look at their litigation efforts. Organizations that have become sufficiently judicialized themselves can equally foster the growth of judicial power. To make sense of the different choices that these organizations have made, we need to understand the role that institutional norms and procedures, in particular old policy legacies, have played in directing the behaviour and identity of these groups. German refugee support organizations have been historically discouraged from directly accessing the courts by the cultural script underlying access to this institution: a notion of neocorporatism, together with a set of legal rules and procedures that prevent groups from directly engaging or appearing in litigation as parties or

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<sup>36</sup> Galanter refers to a concepts introduced by Robert Mnookin and Lewis Kornhauser in a classic article here. See Mnookin and Kornhauser 1979, In, Galanter 1983.

interveners, have lead these groups to not only seek other avenues of conflict resolution first, but to circumvent direct engagement with the law in favour of indirect participation.

In a seminal piece in 1988, Roger Smith suggested that new institutionalism represents an important unifying force for students in public law because it balances “the dialectic of meaningful actions and structural determinants”(Skocpol cited in Smith, 1988:90). Following Smith, new institutionalism offers a theoretical and empirical avenue of inquiry that promises to overcome the existing divisions among those studying law and courts in the social sciences. A number of works have since heeded Smith’s call and made important contributions to overcoming this impasse using insights from both the rational-choice and the historic institutionalist variety of new institutionalism, yet more work needs to be done, in particular in understanding the global expansion of judicial power. Both the German and the Canadian government at times have explicitly tried to limit the influence of the judiciary over the fate of refugees by reducing the scope of judicial review and by limiting access to the courts, with varying results. The point in engaging in a detailed analysis of the sequence of events, the changing institutional context and the behaviour of the political actors over time, is it precisely to highlight “the combined effects of institutions and process,” as Pierson and Skocpol (2000:693) put it, which in this case, resulted in a remarkable expansion of judicial power.

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