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# Making sense of noncitizens' rights claims in asylum appeal hearings: practices and sentiments of procedural justice among German administrative judges

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## ABSTRACT

Ethnographically exploring how German judges in administrative courts of first instance navigate the practical, political, legal and ethical dilemmas of deciding on asylum appeals, this article identifies the oral hearing in asylum adjudication as a site of citizenship struggles in which rights claims by noncitizens undergo subtle transformations through the manner in which procedural rules are interpreted and enacted. Building on observations of asylum appeal hearings, conversations and focus group discussions with judges, I show that practices and sentiments of procedural justice among asylum appeal judges are at the core of these transformations. Hence, I argue for renewed analytical and conceptual attention to citizenship struggles that take place in webs of social relations within the realm of state law and across a graduated set of formal legal statuses for noncitizens.

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## Introduction

When deciding on asylum appeals, German administrative judges are charged with upholding a political order that is built on the distinction between citizens and non-citizens and provides few avenues for migrants from non-EU countries to legally enter Germany and acquire formal citizenship. At the same time, these judges are faced with a social reality of global mobility, fragmented and overlapping rights regimes, and graduated forms of social, political and economic inclusion and exclusion of migrants, whose rights claims and forms of enacting citizenship in many ways exceed and challenge existing legal categorizations. In addition, asylum adjudication has increasingly come under public scrutiny, with the legitimacy of judicial institutions and notions of due process being contested from many sides<sup>1</sup> and courts becoming enmeshed in larger debates about the rule of law, migration, and the boundaries of the body politic.

In this article, I explore how administrative judges navigate these tensions within and through the framework of administrative law principles and procedural rules. Engaging with literature that investigates noncitizens' social, political and legal relationships with the state (Tonkiss and Bloom 2015) and conceptualizes citizenship as a practice that is performed and enacted through rights claiming, rather than as a legal status conferred by

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the state (Isin 2008; Nuijten and Lazar 2013; Caglar 2015), I aim to make the oral hearing in asylum adjudication visible as a site of struggles over enacting and interpreting citizenship, focusing particularly on judges rather than on noncitizens in this ‘performative game of domination and emancipation’ (Isin 2021, 94).

The citizenship-as-performance approach constitutes an important step forward in conceptualizing contemporary forms of citizenship beyond the conventional liberal nation-state-centric understanding (Caglar 2015, 637). Its insistence on the processual, practice-based, and relational character of citizenship has opened the door to understanding how citizenship is claimed, constituted and contested in ‘acts of citizenship’ in different sites and at different scales, not only by actors holding formal citizenship but also, and particularly, by those without it (Isin 2009). Under headings such as ‘insurgent citizenship’ and ‘activist citizenship’, scholars have called for studying citizenship from marginal spaces and sites, paying particular attention to how excluded and marginalized subjects claim rights and demand inclusion through informal and/or illegal acts that constitute a rupture – thereby transforming the established field of rights claiming (Holston 2008; Isin 2008; Ataç, Rygiel, and Stierl 2016). However, this turn away from a state-centric citizenship conception seems also to entail a partial turn away from the state and formal law as sites of citizenship struggles.<sup>2</sup> Retaining a focus on citizenship as performed and enacted, I return to the state and state law as sites of struggle and contestation, showing that there is much to learn about how both ‘the state’ and the ‘the noncitizen’ are enacted and transformed in German administrative courts in a web of social relations that also encompasses judges (and lawyers) as performative agents. In line with this special issue, which focuses on citizenship as it is performed in the interactive space between noncitizens and state actors, I pay particular attention to how professional practices and sentiments of procedural justice that emerge in these interactions shape the scope and substance of asylum seekers’ rights claims.

Rather than denoting merely an absence of citizenship, noncitizenship as a formal status is characterized by an internal plurality and diversity, with particular rights and obligations selectively combined according to various regulatory purposes. It is within this differentiated landscape of formal noncitizenship statuses that acts of citizenship take place and rights are claimed. In Germany, as in many countries, asylum and immigration laws are built on the idea of a clear separation of distinct channels of immigration entailing two different and separate rights regimes: on the one hand, a selective immigration regime that is based on the country’s economic interest in attracting highly qualified human capital; on the other hand, an asylum regime that results from international, European and national humanitarian obligations. This categorization is enshrined in international and EU law and has been doctrinally consolidated in Germany under the rubric *Trennungskonzeption* (‘doctrinal notion of separation’). It draws a seemingly clear line between asylum and immigration: they serve different purposes, require different arguments and, in principle, it should not be possible to change tracks from an asylum to an immigration procedure (Langenfeld and Lehner 2020, 217; for the broader European picture, see Crawley and Skleparis 2018).

However, in the course of ethnographic research, my colleagues and I observed a substantial number of asylum appeal hearings in which arguments for a right to remain in Germany were made that went beyond the asylum claim and extended into the field of immigration law. These arguments were taken up by judges to a greater or lesser extent.

In the following sections, I explore this slippage. Against the backdrop of rising numbers of asylum appeals in administrative courts, I first trace the emerging professional culture of managing the oral hearing – a core procedural safeguard – in asylum appeals. I then elucidate the situated procedural practices of administrative judges that provide an opening for the transformation of asylum claims into immigration claims. Next, I discuss how judges' reflections about these practices reveal equally contingent and situated sentiments of procedural justice that speak to the underlying challenge of having to pass decisions not solely on humanitarian protection, but more fundamentally on asylum seekers' claims to become part of the body politic, with the rights attached thereto.

Throughout the article, I develop the argument that the oral hearing constitutes a significant site for reshaping and transforming asylum claims into alternative substantive rights claims in a co-constitutive process involving judges and claimants (as well as other parties that are not at the core of my analysis, such as lawyers, representatives of the administrative body whose decision is challenged, interpreters, supporters, family members, etc.). Significantly, these citizenship struggles take place within the realm of state law and across a graduated set of formal legal statuses, with the threat of deportation at one end and a permanent residence permit or naturalization at the other end.

### Conceptual toolbox and methodology

Asylum adjudication (and administrative law more generally) can be read as a site of citizenship struggles, where citizenship studies are brought into conversation with socio-legal studies and the anthropology of the state. Recent work in the subfield of the anthropology of the state has made state law and bureaucratic practice visible as a site of fragmentation and contestation in which both the state and the citizen are relationally (re-)constructed through specific interactions (Thelen, Veters and Benda-Beckmann 2018). Sociolegal studies have similarly emphasized the coproduction of the 'legal' and the 'social' (Yngvesson 1993; Kawar 2015), amply demonstrated how judges and claimants engage in discursive registers ranging from rule-oriented to relational (Conley and O'Barr 1990), explored the transformative nature of disputing in judicial settings (Mather and Yngvesson 1980/81), and pointed to the importance of managing emotions in bureaucratic and judicial procedures (Anleu and Mack 2005; Bergman Blix and Wettergren 2019; Bens and Zenker 2019).

Building on these research strands, I approach administrative judges as representatives of a polymorphic state configuration who are embedded in webs of social relations in which (contested) ideals of justice and everyday practices of procedural justice are mediated, reproduced or transformed. I understand administrative law to be simultaneously socially embedded and socially productive. Within the broader literature on law and emotion in the courtroom, I follow Bens and Zenker (2019) in using the concept of sentiment to denote the entanglement of thinking and feeling in the emergence and stabilization of a practical regime of judging. This approach emphasizes how emotions are an integral part of judicial decision-making and affect the substantive outcome of this decision-making process. Bringing these conceptual considerations together, I use the conjoined concept of 'practices and sentiments of procedural justice' to express the

interplay of practices, emotions and normative ideas, the merging of social and legal factors, and the slippage between formal procedures and informal routines.

Ethnographic studies of asylum determination and adjudication in Europe share many of these underlying methodological and conceptual starting points and constitute an invaluable resource for comparative analyses of the differences and similarities in locally emerging cultures of asylum determination and adjudication within a common European regulatory framework (Gill and Good 2019). Individual studies examine different dimensions of the interactions between asylum determination officers or asylum adjudication judges and asylum seekers, such as communication and translation issues (e.g. Gibb and Good 2014), the nature of credibility assessments (e.g. Johannesson 2012; Kobelinsky 2019) and bureaucratic discretion (Miaz 2017), the use of country-of-origin information (e.g. Gibb and Good 2013; Liodden 2022; Feneberg et al. 2022), and the formation of professional values and the management of emotions (Affolter 2021a). Many of these studies converge in their demonstration of asylum seekers' structurally disadvantaged position in these administrative and judicial procedures (Eule, Loher, and Wyss 2018; Gill et al. 2021) and highlight the reproduction of an institutionalized culture of mistrust (Fassin and Kobelinsky 2012; Jubany 2017; Affolter 2021b; see also Bohmer and Shuman 2018). I seek to add further comparative insights from Germany to these debates and more firmly contextualize asylum adjudication in the state–citizen relationship inscribed in administrative law.

Data for this article were collected intermittently between 2014 and 2020. As part of a larger collective research project (2015–2018), our team observed public hearings and conducted interviews, informal conversations and a focus group discussion with judges at the administrative court of a large city (Vetters, Eggers, and Hahn 2017). The topic was further explored during additional individual visits by the author to other administrative courts in smaller cities, as well as during judicial trainings on cultural diversity in the courtroom and a one-week combined research and judicial training seminar on the challenges of asylum adjudication at the administrative court of a mid-sized city, which I co-organized and which included observations of hearings, individual discussions with judges, and another focus group discussion.

Within this inductive, ethnographic approach, we increasingly experimented with forms of collaborative ethnography (Vetters and Foblets 2016). While we cannot claim that this approach produces representative findings, it does allow the researcher to identify types of patterned behaviour, shared emotional responses, and (reflexive) forms of reasoning that are often only articulated internally (if at all). The judges who participated in our research activities had their own motivations for doing so. These ranged from the wish to learn more about intercultural communication and the uses of anthropological knowledge in difficult asylum cases to discovering blind spots in their routines through an external perspective, having the opportunity to talk openly about the difficulties of deciding on asylum appeals, presenting their work to a larger public, and engaging in a more theoretical, scholarly dialogue based on their own academic activities. Our interlocutors were diverse in terms of age, gender, professional experience and personal beliefs. While a substantial number of them were relatively young and had started their careers rather recently, some of our most outspoken discussion partners were senior judges who had witnessed changes in asylum policy and judicial reforms over

the past decades. A shared trait among our interlocutors was their visible engagement and identification, if not struggle, with professional ideals.<sup>3</sup>

### The context: Asylum adjudication in Germany since 2015

In the wake of the summer of migration in 2015, the Federal Agency for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) decided on more asylum applications than ever before in its history, and asylum appeal cases at administrative courts likewise proliferated accordingly (Bpb 2022). Public debates on asylum intensified, and asylum laws were amended to streamline the asylum procedure (Berlit 2017, 86–99). These legislative changes were accompanied by renewed public attention to a supposed distinction between the ‘real asylum seeker’, who is fleeing persecution, and the alleged ‘economic migrant’, who instrumentalizes the asylum procedure to enter the country in hopes of establishing a better life (Bade 2015). This debate is reflected in the structure of Germany’s asylum and immigration laws, with their underlying doctrinal distinction between asylum and immigration as different types of legal claims. There are, however, instances where humanitarian or personal grounds, or considerations of public interest, need to be taken into account.<sup>4</sup> From time to time, policies are proposed that would allow for some sort of overlap between asylum and immigration law. Some of these have been taken up in recent legislative amendments, but restrictions or additional requirements were subsequently reintroduced (Langenfeld and Lehner 2020, 217, 221–22).<sup>5</sup> These proposals, which blur the boundaries between humanitarian protection and integration into the labour market and society as justifications for granting the right to remain in Germany, and counterproposals for a more restrictive policy towards asylum seekers both found expression in a rapid succession of legislative amendments. These developments have been characterized as ‘legislative hyperactivity’ in reaction to public pressure and specific events, leading to an incoherent and fragmented legal framework with contractionary and exclusionary effects (Hruschka and Rohmann 2021), or as a symbolic reordering of priorities whereby notions of economic performance and integration are introduced into decisions regarding granting the right to residence on humanitarian grounds (Will 2019). While these analyses are restricted to legislative processes and larger public discourses, Vianelli, Gill, and Hoellerer (2022) take a closer look at how judges apply this legal framework in asylum adjudication. They note that integration-based criteria have permeated asylum appeal decisions in Austria, Germany and Italy, either via formal legal mechanisms (most often national, non-EU-harmonized protection statuses that allow member states to introduce specific notions of humanitarian protection and integration) or informal judicial practices (particularly in the case of Germany). Their argument builds on *waiting* as a type of governmentality leading to conditional inclusion, based on a period of probation during which asylum seekers have to demonstrate entrepreneurship, autonomy and self-improvement. I follow their lead but apply a different conceptual lens in exploring how administrative judges pass decisions on asylum appeal claims in a fragmented, quickly changing legal framework, in the context of unprecedented caseloads and in a climate of highly politicized and contested debates about migration and the meaning of integration.

Asylum adjudication in Germany is integrated into a three-tiered structure of general administrative justice within the federal system. As the residence of a claimant determines where an appeal against a negative decision by the BAMF is lodged, first-instance administrative courts in all federal states handle asylum appeal cases, and it is a matter of a court's internal regulations how these cases are distributed to its chambers. Chambers are usually assigned cases of asylum seekers from one or more countries of origin, while also handling cases from other fields of administrative law.

Administrative courts were relatively unprepared for the rapid increase in asylum appeals that started in 2015, so they were often understaffed, and in many courts only a few chambers had accumulated any knowledge and experience in asylum law. At the time, mainstream law schools offered no specialized classes on asylum and immigration law; thus, graduates of law schools entering careers as judges had no prior knowledge of this field. During our fieldwork we observed a number of organizational responses, including the internal reorganization of tasks, with more chambers being assigned asylum appeals and more experienced judges working together with those who had no prior experience in this field or with a specific country of origin. Additionally, new judges were hired or existing judges were delegated from other courts, more external training was sought (by, e.g. the UNHCR), and training in asylum and immigration law was increasingly provided through refugee law clinics at universities. However, a professional culture regarding how to deal with asylum appeal decisions developed in an ad hoc fashion within each administrative court, mainly on the job through exchanges between new and more experienced colleagues and in direct interaction with claimants. Though chambers consist of three to four judges, the overwhelming majority of asylum appeals were decided by a single judge,<sup>6</sup> meaning that advice from colleagues, if desired, had to be actively sought, and different styles of conducting a hearing could be observed.

Depending on the case (e.g. whether for an individual or a family), the hearings we observed lasted from thirty minutes to three hours, and most judges tended not to schedule more than three hearings on the same day.<sup>7</sup> The overwhelming majority of our interlocutors considered the oral hearing an indispensable and central procedural element in deciding on an asylum claim.<sup>8</sup> This is in line with the special importance that German administrative law scholars and practitioners attribute to the hearing as a key procedural safeguard (Ortloff and Riese 2019). Sections 103 and 104 of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung* – VwGO) contain rules for conducting a hearing that require the judge to present the essential content of the file, to allow the concerned parties to provide reasons for their applications, and to discuss the case in factual as well as legal terms with them. After this discussion the judge might ask the parties to state their final claims (possibly revised in light of the discussion) and then closes the hearing by either announcing his/her decision or telling the parties that they will be informed of the decision in due course in written form.

Below I provide ethnographic illustrations of how judges practically manage their hearings and analyse how certain dynamics that emerged in these hearings contribute to making the oral hearing a site of enacting citizenship and the state within the realm of administrative law.

## Procedural practices

### *Providing procedural and substantive advice*

Judges frequently used their opening statements to explain the procedure and the legal issues at stake (especially when claimants were not represented by a lawyer). Here is an example of a fairly standard opening explanation given by Judge Steininger, who had recently joined the chamber, during a hearing with a young man from a war-torn country:

I assume that you have not yet participated in a German court hearing, so I will explain our procedure to you first. I will summarize what I know about your case from the file, then I will ask you some questions on the facts in the file and then I will discuss with your lawyer the legal issues. Mr. D. will interpret everything. If anything is incorrect or unclear, please say so immediately.

Such explanations of the procedure were often coupled with some personal advice or attempts to ease fears of immediate deportation. In the hearing of a young Syrian man who already had a subsidiary protection status<sup>9</sup> but was submitting a request for full refugee protection status, Judge Weiss, who was among the younger generation of recently hired judges, explained the legal test she would have to apply to his case: 'It is my task to assess what would happen to you if you were returned to Syria now – but this is only hypothetical, as you already have a subsidiary protection and we are now only here to see if you qualify for the full refugee status. So, you are safe'. In her closing statement, she returned to this point:

You will receive my written decision by post, but I can tell you that according to the existing jurisprudence there is no scope to grant you refugee status. I know this is difficult to understand, especially when you see that other persons you know have received the refugee status, but this is the legal situation as it stands now and I am bound by it. I can only tell you that the difference between subsidiary protection and refugee status is not so big and, in my personal opinion – this is now advice I am giving you as an individual – the better and quicker you integrate, the better are your chances to stay here in Germany.

At another court, a hearing on the same legal matter turned into an even more extended legal counselling session. It concerned an underage asylum seeker with subsidiary protection who was also requesting full refugee status. The notification for the hearing had been sent to the minor's parents, who – not understanding the formal language of the letter – believed they were being summoned and had appeared without their younger son, but had brought for their support the older brother, who was able to communicate in German. During Judge Müller-Weinstein's attempt to clear up this confusion, it transpired that while the younger brother had only been granted subsidiary protection, the older brother had been granted full refugee status (while also still being underage), and the parents had just arrived in Germany through a family reunification procedure initiated by the older brother. While the family was clearly most concerned with the apparent injustice that the two brothers had received different protection statuses, Judge Müller-Weinstein's initial questions also revealed that the parents themselves had not yet applied for asylum, but remained on a temporary and derivative status as family members. The young, visibly engaged judge then set aside the hearing, suggesting that he would reschedule a hearing with the younger son. He then explained to the parents



that a particular stipulation in immigration law allowed family members to initiate their own independent asylum claims upon arrival in Germany, but that this had to be done within a tight timeline. Lacking experience with such cases, he himself was not entirely sure about the technicalities of this legal stipulation, but emphasized that it was important for the parents to take advantage of this option to achieve the best possible legal status, especially as there might be further legislative amendments with regard to family reunification in the future, and one could not foresee their implications. A ‘better’ – because independent instead of derivative – legal status would offer them more security. Turning to the older brother, the judge advised him to take his parents to the local branch office of the BAMF.

In these vignettes, we begin to see that while the Code of Administrative Court Procedure provides an initial structure for conducting the hearing, there are additional dynamics at play in the routinized practice of structuring a hearing. Advice of various types is offered by judges, some of it of a personal, common sense nature, some of it related to providing procedural information, and some of it in the form of substantial legal advice that has the potential to change the claims that are being raised. While in these examples graduated sets of rights were at stake, connected to subsidiary protection versus full refugee status or an independent versus a derived status as family member, in the next section I look at claims that transcend the doctrinal distinction between asylum and immigration law.

### *‘Changing track’ dynamics and the transformation of asylum claims*

While the first phase of the hearing is clearly dominated by the judge, who explains the procedure, reports the facts from the file and questions the claimant – often structuring it in such a way as to leave little leeway for the claimant to assert any control over the proceedings – there are some moments in the hearing when claimants can assume more agency. One such moment can occur at the end of the determination of facts stage, when a judge has finished the questioning and might ask the claimant whether he/or she would like to add anything. While this is intended as a last opportunity for claimants to explain something of relevance to the asylum claim that might not be contained in the file, claimants may instead use this opportunity to make a statement that reaches beyond the asylum claim.

In the hearing of a young Afghan man, after having finished her questioning with regard to persecution in Afghanistan, Judge Michaels (again one of the younger judges who joined the court only recently) first asked the lawyer and then the claimant whether he would like to add anything. The lawyer declined, but the claimant responded by saying in German that he had studied German intensively and had just been accepted at a local university. Turning to the judge, he reached for a paper and eagerly asked if she wanted to see it. The judge responded, ‘No, this might be relevant for other immigration authorities, but here it is not relevant’, and quickly closed the discussion. In another case, middle-aged Judge Scharpf, who had been a judge for a while and took great care to explain the procedure and the legal issues at stake during his hearings, was more hesitant when the same procedural question led to the following exchange:

Judge Scharpf: Is there anything you would like to add?

Claimant: No, I only want to say that I would like to stay here and live here . . . I mean, I want to be formally allowed to live here. I already work . . .

Judge Scharpf: . . . You are working!? Where do you work?

Claimant: I have been working in a bakery, a German bakery, for over a year now.

Judge Scharpf pondered this new information for a while, seemingly unsure of how to proceed, and said, 'I will put this in the record as well'. He reiterated the legal issues and his assessment of them, concluding, 'These are serious obstacles to a refugee status, but I will think carefully once more about what you have now told me and you will receive my decision by post'.

In another hearing, the appeals of a mother and her grown-up son from a country in the Caucasus were jointly deliberated. It became apparent during the session that the seasoned and experienced Judge Maurer, who conducted her hearings in the manner of a stern but benevolent figure of authority, had taken an even more proactive approach. During the discussion of facts, Judge Maurer did not hide that she was not fully convinced by the son's and mother's explanations about their persecution and flight, and that she also did not believe the mother's medical condition was severe enough to justify a leave to remain. She then asked the mother and son if they would like to add anything to their explanations. The mother launched into an emotional appeal:

Mother: We left our country for a serious reason, but now my son also has a family here and for this family I beg you to let us stay here. Their second child will be born in a few weeks, and we will have a certificate of paternity. If we have to leave, these children will have to grow up without a father . . .

Judge Maurer [interrupting]: This is the one thing you can be sure about, the family will not be separated. Either you all remain here, or you all leave. Where does the child's mother come from?

Mother: She comes from [a neighbouring country]. She has also applied for asylum and we believe she has good chances. She has received a letter for a hearing . . .

Judge Maurer: Yes, I saw in the file that there was a (customary) marriage and a child. I could not determine the nationality, but I have already submitted a request to the central registry of foreigners to clarify the legal status of your son's wife. So far, I have not received a reply. I will inquire again, before I write the decision.

In hindsight it appeared that Judge Maurer had already anticipated that for this family the solution might not lie in the field of asylum law, but that their prospects for remaining in Germany might be better based on a right to family life, and she had proactively tried to further explore this option.

We can even better understand how an asylum claim is transformed and how the right to legally remain in Germany can be realized through an alternative path when we look at the trajectory of persons whose asylum appeals have already been rejected and who remain in Germany on a temporary suspension of an existing deportation order, the so-called *Duldung*. A claimant from a West African country had submitted an appeal to be granted a residence title according to section 25 par. 5 AufenthG (residence on humanitarian grounds for specific personal reasons, when an order to leave would cause undue

personal hardship). He was represented by a lawyer and, since this claim now fell under the competence of the local immigration office, a representative from the immigration office was also present. The claimant was married and lived with his wife, a co-national, and her child from a previous relationship with a German. The mother had a derived residence right through her child, and the claimant submitted that both he and the biological father have significant social ties with the child, and that it would be in the child's and the family's best interests for him to remain in Germany and to be granted a derived residence title as the social father. Disregarding the right to family life and the right to private life, he argued, would violate his fundamental rights and cause personal hardship. After asking the claimant questions about his relationship with the child, Judge Braikowski, the claimant's lawyer and the representative from the immigration office entered into a lively discussion, looking at the different legal statuses the claimant had held in the past, the duration of his relationship with his wife and the child, and a testimony the German biological father had submitted. Encouraged by the judge, a settlement was reached whereby the claimant withdrew his appeal and the representative from the immigration office in turn promised to alter the original negative decision and grant the claimant a residence title for two years.

Cases such as this seem to fall under the 'changing tracks' discourse that was described above. While in public discourse they tend to be portrayed as an abuse of the legal system by asylum seekers, from an ethnographic perspective we see how, during the hearing, a variety of actors can actively contribute to producing such an outcome. But even when judges were receptive to an alternative right to remain or actively explored the possibility of finding such a right under the current circumstances of the claimant's life, they still did not have the power to grant it, as this would require lodging a separate claim. But by providing advice and discussing the best way to proceed, they actively participated in the subtle transformation of the asylum claim into subsequent claims under immigration law and thereby into 'acts of citizenship'. When I consulted the written decisions for these hearings, they contained little trace of these transformative dynamics during the hearing; the reasoning was solely concerned with the submitted asylum claim. Thus, on the level of formal judgments, the doctrinal distinction between asylum and immigration for other purposes is upheld and reproduced, even if in practice the oral hearing constitutes a significant site for reshaping and transforming migrants' rights claims in a co-constitutive process involving judges and claimants.

## Sentiments of procedural justice

### *Competing notions of justice*

When asked about how they understand their role in the hearing, many judges voiced a double concern. On one hand, they want claimants to leave the court 'with a good image of the justice system', to 'feel they have been listened to and given room to tell their story', and to 'leave the hearing with a good feeling', even if the final decision is not what they had hoped for. Closely echoing Tyler (2007), perceived procedural justice is thus an important consideration in their management of hearings.

On the other hand, judges speak about 'being able to face oneself in the mirror in the evening', 'having to carry around the weight of difficult decisions', and 'the hardship of

those cases in which they cannot reach a decision with full conviction'. This need to find peace with difficult decisions was candidly addressed during a focus group discussion: 'Of course, it is tempting and a relief if I can point to other options. . . . One can pacify the bad conscience one might have. There is so much empathy involved in some cases – sometimes I have young men the age of my own sons sitting in front of me. Asylum claims are emotionally stressful'. Seeking a solution that lives up to one's personal sense of justice is thus also an important consideration.

The judges we met were also concerned about the legitimacy of the justice system in general and the perception of administrative courts in particular – not only in the eyes of claimants, but also in the perception of the general public. A young female judge emphasized the high level of stress in asylum adjudication due to competing evaluations of their work by the wider public: 'The outside view on our work is, of course, also very important and a big strain. It is so political, asylum is not perceived well. We often hear, "These are all criminals! What are you doing?" And then we have to explain'. Other judges joined in and expressed their difficulties in making the intricacies of asylum and immigration law understandable even in their personal social circles: 'Most people outside the court see this in a very black and white manner. If there is even a minor criminal record, they shout, "Deport! Deport!" But on the other hand, activists ask us, "How can you issue such harsh decisions?"'

Administrative judges thus see themselves as exposed to various – and conflicting – notions of justice on an individual, collective and institutional level, and both by those who are members of the polity and those seeking to enter it. While there are clearly individual differences in the styles of conducting hearings and judges' willingness to look beyond the narrow asylum claim, the dynamics in the practical management of the hearing that I have described here seem to offer a way to (partially) balance and reconcile these competing expectations and manage the emotional strain of asylum adjudication.

### *Balancing interests and durable solutions*

Judges are acutely aware that asylum adjudication is not solely a decision on humanitarian protection, but implicitly and more fundamentally also on a noncitizen's claim to become part of a polity with the rights attached thereto (see Johannesson 2022, this issue). This came to the fore when we asked for explanations in focus group discussions of the transformative dynamics we had observed.

An experienced and slightly disillusioned judge highlighted the specific legal trajectories of noncitizens seeking to build a life in Germany, explaining:

I know that if I reject an asylum claim, I might face the same person again a few years down the line. . . . Just think of stateless Palestinians in the '90s. . . . They did not get refugee status and we saw them again and again with new claims under immigration law. It doesn't matter if I write a long negative judgment now, because the person will remain here and I might just save myself some work by considering this now. So, for me this has a very practical side as well.

With an ironic, self-deprecating smile he concluded, ‘I know this does not sound very much like the lofty concept of legal concord, . . . but it might be the most durable solution’.

This quote highlights a concern with long-term solutions for noncitizen claimants. In this case, it is expressed in terms of workload management rather than as a critique of the legal framework, linking the judge’s personal interest in the efficient handling of cases with the claimant’s interest in a durable solution. A sentiment of procedural justice emerges that builds in equal parts on a sense of disillusionment, a pragmatic interest in efficient procedures, a fuzzy notion of legal concord, and a perceived need to balance competing interests in favour of a long-term, durable solution.

In an exchange preceding this quote, two judges had justified the slippage between asylum and immigration law not with workload concerns, but with reference to larger legal principles:

One judge fresh from law school had remarked:

I think it is almost like a form of mediation to strive for a solution that creates legal concord [*Rechtsfrieden*]. I mean, if one tries to do justice to this person, as a human being, then it is the right approach to check what the options in immigration law are. But one has to say that these are two completely different fields of law!

To which a seasoned member of the court replied:

I am a big fan of saying that asylum law is part of general administrative law, and . . . the same rules apply: we are (if possible) flexible and try to see the human being and his/her request in context. And if you do that and find a solution, that is a lot of satisfaction and fun! This is where I get a sense of professional satisfaction, to say, ‘I have created legal concord under the rule of law.’

A number of legal concepts that are part of judges’ professional formation converge on this point. Among them are classic general principles of administrative law, such as the rule of law and due process (Schmidt-Aßmann 2004). The notion of legal concord originates in legal philosophy and, although it is not an established doctrinal principle, it nevertheless appears in many legal commentaries, textbooks and official court websites asserting the state’s monopoly, capacity and legitimacy to solve conflicts and offer legal protection to its citizens, thereby ensuring social peace. Judges in particular are tasked with generating and maintaining legal concord through their decision-making (Kreth 2008, 476). Mediation has recently become more fashionable as an alternative form of dispute resolution that seeks solutions accepted by all parties. It is increasingly being formalized and offered alongside adjudication in state courts (Walther 2019).

Concepts such as mediation, legal concord, rule of law and due process are much less clearly defined than the doctrine of separation of asylum and immigration law. They refer to the manner in which disputes are resolved, and thus operate more on a procedural than a substantive level. At the same time, they suggest the possibility of ensuring long-term social peace by finding durable solutions for disputes while reinforcing the legitimacy of state law as a means to solve social problems. With these connotations, such larger legal ideas are well suited to accommodate competing demands that judges feel they are faced with: on the one hand, to do justice to noncitizen claimants who know little about the legal system and rely on the judicial system to claim their rights. This can mean

helping to find a (more or less) durable solution for a rejected asylum seeker who might otherwise remain in Germany on a legally precarious toleration status, thereby defusing the potential of future social conflicts arising from continued exclusion and marginalization. And, on the other hand, to find solutions that maintain the legitimacy of a judicial system and are accepted by the citizenry at large in the context of highly polarizing debates about migration.

Sentiments of procedural justice thus not only emerge as a response to the emotional strains of asylum adjudication, but also feed on established legal concepts that can be mobilized as guiding notions. Thinking and feeling, legal and extra-legal considerations, and formal rules and informal practices are entangled in the emergence and stabilization of a practical regime of procedural justice. In this way, an element of court procedure such as the hearing can become an arena for judges to renegotiate and realign the meaning of administrative justice with their own professional self-understanding in such a manner as to at least partially acknowledge noncitizens' claim to be able to 'live a normal life',<sup>10</sup> regardless of their legal categorization as recognized refugees or rejected asylum seekers.

## Conclusions

This article has highlighted the situated and contingent practices and sentiments of procedural justice that emerged among those administrative judges who participated in our research when having to decide on difficult asylum cases in a context of heavy caseloads, accelerated legal change, and heated public debates in which competing notions of justice, rights, and membership in a polity clashed with each other. I have argued that these practices and sentiments of procedural justice not only allowed judges to navigate these political, ethical and practical dilemmas, but in effect constitute the oral hearing as a significant site for reshaping and transforming asylum claims into alternative substantive rights claims by noncitizens in a co-constitutive process in which judges and claimants take part.

My point of departure – that is, understanding citizenship 'as practices of becoming claim-making subjects in and through various sites and scales' (Isin 2008, 16) – can now be further nuanced by adding two important elements. First, claim-making subjects do not exist in a vacuum. Much as subjectivities are formed in the process of making claims, rights claims take shape in webs of social interactions. State actors, and the legal status categorizations they enforce, often hold central positions and thus co-constitute the nature of the claims being made. Second, this requires renewed attention to administrative law – in terms of substantive as well as procedural law – as a site of citizenship struggles.

Exploring the practices and sentiments of procedural justice among German administrative judges yields a Janus-faced picture that highlights how asylum adjudication can simultaneously hold emancipatory potential and reproduce noncitizens' marginalization and exclusion from rights. Many of our interlocutors were not averse to engaging in and co-producing the transformation of asylum claims into claims that focus on a right to residence and gradual status consolidation, thereby potentially enlarging the space for alternative rights claims by migrants (to be decided in a separate administrative or judicial procedure). However, this slippage from asylum

to immigration law can easily feed into the public discourse of abuses of the asylum system. In this discourse, migrants are depicted as the sole strategizing party, abusing 'loopholes' in the legal system. The transformative dynamics that occur during the hearing remain largely invisible in written judgments, thus obscuring subtle transformations in administrative law as practised by judges, upholding the doctrinal conception of separate immigration paths, and further naturalizing notions of law-abusing noncitizens in the public perception. Moreover, the provision of procedural and substantive advice that may help asylum seekers legalize their situation if their asylum claim is rejected might also have unintended repercussions on the judges' task of fully examining the substantive right to asylum in each individual case. This shift – when perceived as a fall-back option for claimants – might, in fact, contribute to hollowing out the right to asylum, thereby also restricting the scope of rights claims that can be successfully made in this very critical site of citizenship struggles.

These findings point towards the continuing need to observe and theorize citizenship struggles in the contested site of asylum adjudication as practised in various EU member states, i.e. within the remit of the national administrative law and at the heart of the state. Such a broader comparative perspective can contribute to a better understanding of how procedural rules and specific procedural elements such as the oral hearing – which constitute the 'rules of the game' and are regulated in the Common European Asylum Policy – are interpreted and enacted locally.

## Notes

1. For example, in 2018, a conservative politician claimed that lawyers were actively aiding an anti-deportation industry by finding legal loopholes for their clients (see <https://www.zeit.de/politik/deutschland/2018-05/alexander-dobrindt-abschiebung-deutscher-anwaltverein-kritik>). An executive deportation decision that was found to be unlawful by an administrative court in the same year likewise led to public debate (see [www.faz.net/aktuell/politik/fall-sami-a-der-kampf-um-den-rechtsstaat-15741579.html](http://www.faz.net/aktuell/politik/fall-sami-a-der-kampf-um-den-rechtsstaat-15741579.html), <https://www.zeit.de/politik/deutschland/2018-07/andreas-vosskuhle-praesident-bundesverfassungsgericht-rhetorik-csu-fluechtlinge>).
2. But see contributions in the edited volume by Isin and Saward (2013) for a stronger analytical focus on and ethnographic engagement with formal law and state institutions.
3. All names are pseudonyms. Original quotes and the profiles of judges and claimants have been altered to prevent identification.
4. These grounds for a temporary residence title are regulated in section 25 par. 4ff of the German Residence Act (*Aufenthaltsgesetz*, *AufenthG*), which also allows extending and renewing residence permits in individual cases where extenuating circumstances would cause exceptional hardship if the person concerned were forced to leave Germany.
5. *AufenthG* allows for deportation orders to be suspended for young asylum seekers for the duration of vocational training (section 60c), and for rejected adult asylum seekers who had found employment during the asylum determination process and are self-sufficient (section 60d). Section 25b *AufenthG* offers residence permits to rejected asylum seekers with long-term toleration status (*Duldung*) who are self-sufficient and can show evidence of permanent integration.
6. In line with section 76 of the Asylum Act (*AsylG*).
7. These hearings are generally open to the public (section 55 *VwGO*).
8. As mandated by section 101 *VwGO*, which leaves room for exceptions.
9. Subsidiary protection is an international protection status regulated in the EU Qualification Directive and transposed into German law. It applies when a person is not recognized as a refugee, but is threatened by serious harm in the country of origin. It offers fewer rights

than the refugee status. Claims such as the one above were thus colloquially referred to as ‘upgrade claims’. For further information on subsidiary protection for male Syrian asylum seekers and changing jurisprudence, see the blog entry at <https://verfassungsblog.de/am-schutz-orientiert/>.

10. The UNHCR’s classic definition of a ‘durable solution’ reads, in part, ‘any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to live normal lives’. Interestingly, this has meanwhile been replaced by ‘the means by which the situation of persons of concern to UNHCR can be satisfactorily and permanently resolved through ensuring national protection for their civil, cultural, economic, political and social rights’ (<https://www.unhcr.org/glossary/#d>), thus further highlighting a receiving state’s responsibility to acknowledge these noncitizens’ claims to classic citizenship rights.

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