

Gaygusuz v. Austria: Advancing the rights of non-citizens through litigation¹

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Abstract

Focusing on migrant rights in Austria, this article illustrates how local actors use courts and litigation as avenues to claim rights for non-citizens. Adding to studies that have stressed the role of the international court in this process, I analyze such changes as a result of the interplay between international human rights frameworks and the capacities of local actors to mobilize resources, knowledge and expertise. This article presents two case studies in Austria, in which the entitlement to unemployment assistance (Notstandshilfe), and the right to stand as a candidate for works councils (Betriebsrat) and for the Chamber of Labour (Arbeiterkammer) were expanded to non-citizens.

Keywords

Litigation, social and political rights, Austria, Human Rights, Migrant rights

Gaygusuz gegen Österreich: Rechtsstreit als Mittel zur Ausweitung der Rechte von Nicht-StaatsbürgerInnen

Zusammenfassung

Mit Fokus auf die Rechte von MigrantInnen in Österreich beschreibt dieser Artikel, wie lokale AkteurInnen Gerichte und Rechtsstreit als Plattform nutzen um Rechte für Nicht-StaatsbürgerInnen zu fordern. Aufbauend auf Studien, die die Rolle der internationalen Gerichte in diesem Prozess betonen, analysiere ich diese Veränderungen als Ergebnis des Zusammenspiels von internationalen Menschenrechtsrichtlinien einerseits, und andererseits den Kapazitäten von lokalen AkteurInnen, die relevante Ressourcen, Wissen und Expertise zum Einsatz bringen. Der Artikel schildert zwei Fallstudien in Österreich: die Ausweitung des Anspruchs auf Notstandshilfe sowie des passiven Wahlrechts zu Betriebsräten und Arbeiterkammer.

Schlüsselwörter

Rechtsstreit, soziale und politische Rechte, Österreich, Menschenrechte, MigrantInnenrechte

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¹ This paper discusses two cases. The title only mentions one case because of the symbolic significance of the first case for the second case.

1. Introduction²

Improvements to the social and political rights of non-citizens in European countries are a result of disputed processes involving different actors on multiple levels. Concerning access to welfare services, Yasemin Soysal (1994) argues that social, civic, and some political rights are extended to a country's foreign population. This leads to a decreasing relevance of national citizenship and towards a more inclusive model of membership, in which notions of universal human rights play a decisive role, accompanied by denationalization of rights (Sassen 1996). In her elaborations on this transition from national to post-national citizenship, Soysal stresses the role of the international courts, which implement human rights norms so that they effectively protect the rights of non-citizens. I build on this argument, adding that it is not only courts and governments who effectuate such extensions of rights, but our analysis has to include the diverse actors behind these processes, who push individual cases and thereby activate the courts. This leads me to a processual understanding of rights, and a focus on how rights of non-citizens are claimed and negotiated with reference to international human rights and regulations. My analysis centers on the role of local actors in these processes. As Basok and Carasco (2010) emphasize, the role of transnational human rights activists in forcing governments to adopt international norms for disadvantaged groups has been explored (Muñoz 2009; Risse et al. 2009). Similarly to their analysis, I underscore the role of litigation, focusing on how local actors use litigation to translate international law into domestic laws and practices in improving the rights of non-citizens.

In Austrian migration policy, higher courts have played a decisive role in the improvement of some social, residence- and family-related rights of non-citizens, which led to a paradigm change towards the extension of rights for this group (Perchinig 2009). The implementation of these rights was introduced on the national level by the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH) and the Higher Administrative Court (Verwaltungsgerichtshof, VwGH), and on the European level by the European Court of Human Rights (ECtHR), building on the European Convention of Human Rights (ECHR), as well as the European Court of Justice (ECJ)³. In addition, European regulations, especially those concerning the rights of third country

nationals, were particularly relevant in the extension of social and residence-related rights in Austria (Bauböck/Perchinig 2006; Kraler 2011). These processes of improvement of rights of non-citizens in Austria have not been investigated, especially not with a focus on the role of local actors and on how these processes are embedded in political debates. Instead, analyses have focused on protest movements against the expulsion of asylum seekers (Rosenberger/Winkler 2014).

This article discusses two cases in the Austrian context, in which rights were extended to non-citizens through litigation procedures: unemployment assistance (Notstandshilfe) in 1999, and the right to stand as a candidate for works council (Betriebsrat) and Chamber of Labour (Arbeiterkammer, AK) elections in 2005. I reconstructed detailed chronologies of these two cases, triangulating information through the use of a wide range of data sources. These included interviews with the key actors who were involved in the campaigns and litigation procedures, court and legal documents, as well as campaign material of activist groups, counseling centers and trade unions. These case chronologies were complemented by a systematization and content analysis of relevant newspaper articles from the early 1970s until the late 1990s, taken from the media archive of the Austrian Press Agency and the newspaper archive of the AK. Together, these data sources enabled thick case descriptions, as well as the reconstruction and analysis of the roles, stakes and arguments of the actors involved in these cases.

In analyzing the rich data, I focused on three relevant research questions: First, which actors were involved in these processes? In addition to courts and governments, we can also identify actors such as counselors in advisory centers, lawyers, translators, and trade unionists as key actors who pushed the legal disputes towards extending non-citizens' rights. Second, I am particularly interested in the knowledge and skills that actors needed in order to contribute to these processes, as well as their motivations, for example, moral opposition to injustice. Third, which networks were activated in the collaboration and knowledge exchange between these actors?

Overall, this article highlights the transformative role of litigation in struggles for rights. By emphasizing the importance of litigation, I focus on agency and the relevance of networks. I also discuss the role of governments and their use of tactical concessions aimed at decelerating processes of extending non-citizens' rights. My research shows that the implementation of these rights is a contested process. A focus only on the verdicts of higher courts is insufficient to explain how the extension of rights comes about.

2 The research for this project was financed by the Vienna Institute for International Dialogue and Cooperation (VIDC) and Wienwoche. The first result of this research was presented as a performance on 13 September 2014 under the title „Gaygusuz gegen Österreich“ in the Schauspielhaus Wien. Many people have contributed to the realisation of this event. Most of all, I want to thank Katharina Kronhuber who worked as a research assistant for this project.

3 The decision of the higher courts in Austria did not only lead to an expansion of the rights of non-citizens. In addition, there were cases which aimed at halting such expansions. For example, in one case the VfGH abolished a regulation through which the City of Vienna attempted to introduce voting rights for persons with permanent residence rights.

Instead, this process is made up of several steps, initiated by diverse actors, and slowed down by deceleration tactics of the government.

In the next chapter I outline my theoretical approach, followed by the description of the two case studies. The main themes that arise are summarized in a concluding analysis.

2. Theoretical Considerations

Human rights have been discussed as a value system, as international law, and as a decisive framework that motivates human rights activism (Barber 2012; Jacobson/Ruffer 2002; Kaleck 2012). Additionally, international human rights law has altered political dynamics, “as states unwittingly presented openings for civil society actors and civil society actors in turn adroitly used these opportunities to advance human right goals” (Tsutsui et al. 2012: 375f.). In this way, international human rights law has increasingly become a platform of political activism towards implementing human rights. Activists and social movements use legal norms and mechanisms for implementing social justice and rights through litigation strategies, thereby translating political principles into a legal language of human rights.

Human rights norms and institutions have proven a useful tool for extending rights and protection to non-citizens across Europe. However, as Morris shows, states construct forms of civic stratification in which specific migrant categories have different access to rights, and thereby create limits for the ability of human rights norms to protect the rights of non-citizens (Morris 2002). By contrast, scholars emphasizing “post-national” rights discuss how migrants’ rights are derived from transnational rights located outside of the nation state (Soysal 1994) and show that government decisions on migration policies are constrained by international human rights and constitutional norms (Hollifield 1992; Joppke 2005; Sassen 1996). The role of the courts in the creation of non-citizen’s rights has been discussed as “torn between two opposite imperatives” (Joppke/Marzal 2004: 827) to protect non-citizens on the basis of human rights provisions, and to draw a distinction between aliens and citizens.

In the European context, the legal density and influence of the ECtHR, its scope and caseload, as well as the influence of the ECJ have increased significantly since the 1990s (Jacobson 2002: 82). At the same time, the density and relevance of nongovernmental organizations (NGOs) has grown. The ECHR and the growing legislative body of European Union (EU) have been important sources for the expansion of rights of non-citizens beyond national states in European countries. Nevertheless, Guiraudon (2000) highlights the limited legal

basis on which European courts can apply human rights to protect non-citizens and finds that “they did rule on certain specific areas, such as family life and protection against inhuman treatment, that are directly relevant to state discretion in expelling foreigners” (114).

International human rights instruments have become effective in improving human rights practices and gaining greater authority over states’ domestic affairs (Kaleck 2012: 377). However, these instruments alone are not sufficient to bring about change. Rather, the increasing relevance of human rights instruments is part of a process initiated by actors such as activists, lawyers, and migrant advocacy organizations. Consequently, litigation activities reflect the growing agency of these actors, understood here as the extent to which these actors can intervene in political and legal affairs by using legal institutions. This is also discussed as ‘strategic litigation’ (Barber 2012). Kawar (2015) analyzes political mobilizations and legal activism in France and the United States around litigation campaigns and shows the ability of legal rights activism and how legal contestation reshapes the law and policymaking. Litigation activities reveal the extent of agency and thereby can be seen as an indicator for “a growing legal and social readiness and ‘recognition’ of rights” (Jacobson/Ruffer 2002: 82).

The proliferation of legal forms and mechanisms altered the nature and location of political engagement. In a self-reinforcing process, this growing legal density promotes and facilitates agency. When migrant organizations and lawyers use legal institutions as a tool to gain rights, and thereby exercise agency, they simultaneously reinforce the conditions that enabled these forms of agency in the first place. Indeed, as Jacobson observes, there are parallels between the idea of agency and the concept of human rights, in that both presume universal and individualistic values (Jacobson/Ruffer 2002: 81). Consequently, it is not only previous success experiences of litigation procedures that promote and encourage actors’ capacity to intervene in political and legal processes, but also the universalistic and individualistic notions of the subject matter of human rights.

The following pages give an overview of the two cases that stand at the center of this article: the struggle for the extension of unemployment assistance, and the right to stand as a candidate for works council elections for non-citizens. These case studies highlight the role of actors and networks in litigation procedures aimed at implementing the rights of non-citizens.

3. The case of unemployment assistance

Long-term unemployed persons are entitled to unemployment assistance (Notstandshilfe) after the expiry of their unemployment benefits (Arbeitslosengeld) if they

are financially destitute. Church organizations were the first to demand the extension of unemployment assistance to foreigners in the mid-1970s (Neues Volksblatt 1975). This demand made an increased appearance in the media and in parliamentary debates during the mid-1980s. The Green Party and the Social Democratic Party also raised this issue. In 1987, the Green Party put forward the demand for unemployment assistance for foreigners, combined with other demands, such as the right to stand as a candidate for elections in works councils, as well as the introduction of the right to vote in municipal elections (APA 1987a; APA 1987b). Also in 1987, Alfred Dallinger, Minister of Social Affairs from the ruling Social Democratic Party, together with Sepp Rieder, judicial spokesperson of the Social Democratic Party, announced their aim to extend unemployment assistance to foreigners (APA 1987c; Arbeiterzeitung, 1987).

Until 1989, Austrian citizenship was the precondition for access to unemployment assistance. The amendment of the Unemployment Insurance Act (Arbeitslosenversicherungsgesetz) from 1 August 1989 made it possible for the first time for unemployed foreign workers, who were entitled to an exemption certificate and had worked in Austria for eight years, to receive unemployment assistance for 39 weeks (APA 1989a). However, despite the amendment, access remained limited, and about two-thirds of foreigners remained excluded from unemployment assistance (OTS 1991). The situation did not improve until 1992, when the Austrian government adapted regulations to European Union standards (Stern 2010, 243). The possibility to receive special unemployment assistance was extended from 39 to 52 months. Additionally, it was extended to other target groups such as refugees and stateless persons, and the required duration of employment in Austria was reduced from eight to five years (Kurier 1992, 6). However, Austrian citizenship remained the categorical requirement (Stern 2010, 243).

The debates on unemployment assistance consisted of two major opposing positions, which also accompanied the debates on non-citizens' access to social benefits. The first position advocated a "net-contributor" discourse and was brought into the public debate by academic studies from the Austrian Institute of Economic Research (WIFO) and the AK. It mainly argued that foreigners pay more taxes and other contributions than they receive in social benefits, which counters the image of migrants as a cost factor and therefore supports arguments in favor of their access to social benefits.⁴ Studies

4 There are several contributions showing that foreign workers paid more into state funds than they received. One title in the newspaper Kurier from the year 1975 reads, "Guest workers helped everyone earn more." Referring to experts from the social partners the article emphasizes that the salaries and wages of Austrian citizens would

that supported this argument were published from the mid-1970s until the end of the 1990s. They advocated the right to unemployment assistance for foreigners based on data, thus following the logic of "those who pay should also receive" (APA 1989a; Der Standard 1991, 21). Trade unions, pro-migrant associations and counseling centers referred to this line of argumentation to strengthen their claim for non-citizens' access to unemployment assistance. Simultaneously, they reached beyond the economic cost argument and framed the right to social benefits as a matter of political representation and rights of non-citizens as denizens (APA 1989b). In 1994, members of the Green Party called for the introduction of a resident citizenship, which was supposed to include the right to stand as a candidate for elections and full access to social benefits, such as unemployment assistance (APA 1994).

The second position opposed non-citizens' access to social benefits, and especially since 1992, promoted a "welfare scrounger" discourse. This discourse was used in the right-wing Freedom Party's (FPÖ) demands for a stop on immigration and in its initiative on a referendum regarding foreigners (AusländerInnenvolksbegehren) (APA 1992). Issues like "misuse of income support," as well as discussions about undocumented employment partly shaped the debate on "welfare scrounging," which gained relevance after 1995.

3.1 A Migrant Worker Goes to Court for Unemployment Assistance

Cevat Gaygusuz,⁵ a Turkish worker born in 1950, lived and worked in Upper Austria since 1973. Some years later, his wife and children moved to Austria as well. He intended to work and live in Austria until his retirement (Interview 1). He started his first job in Austria in the textile industry. Because of his very low wage, he switched to the construction sector, where he worked in a company until it went bankrupt. Finally, he worked in the metal industry in the assembly line of one of Austria's biggest factories. One day at work he fell from a height of four meters and, as a result, broke both of his feet and crushed his heel. After this accident in October 1984, he had to undergo several surgeries and walked with crutches for 19 months (Interview 1).

have increased less without guest workers. It stresses the fact that the state too profits from guest workers: foreign workers turned out to bring relief to the retirement insurance. In 1984, die Furche headlined: "No parasites. Guest workers are more often supporters than beneficiaries of our social systems". The article cites a study by the Vienna Chamber of Labor from the same year which concludes: "For the fact that foreign workers and their families are excluded from many social benefits financed by tax and social security contributions, there is a considerable income surplus in favor of the guest workers."

5 The real name of Gaygusuz is Kaygusuz. It was misspelled in official documents.

Consequently, he remained on sick leave for more than one year until he found himself unemployed. Initially, he received unemployment benefits for nine months. After his claim for benefits ran out, he applied for an advancement of his pension in the form of unemployment assistance (Interview 2). The employment agency in Linz and the employment agency of the state of Upper Austria both rejected his request on the basis of his Turkish citizenship. When filing the application for unemployment benefits and unemployment assistance, he was counseled by Şenol Şentürk and Barış Yalçın,⁶ who also helped him with translation (Interview 1).

Şenol Şentürk moved from Turkey to Austria in the late 1960s and worked to advocate for the rights of non-citizens and overcome discriminatory regulations. During the time he helped Mr. Gaygusuz with interpretation, he worked for the AK and the Trade Union Federation and provided counseling and translation for migrants in the field of residence permits, social and economic rights (Interview 4). In 1985, when he was still counseling Mr. Gaygusuz, he co-founded the association “Migrare”, initiated by migrants and supported by the Upper Austrian Trade Union Federation. In his vision, the association should not only offer charitable counseling, “but also in relative political independence take up a self-confident and critical stance in matters concerning migration in the interest of migrants” (Migrare 2010, 2). At a later point, he worked for the Upper Austrian Trade Union Federation, where he was assigned the task to further involve migrants in the Trade Union’s work (Interview 4). Şenol Şentürk played a key role in the legal case of Mr. Gaygusuz. He was the one who contacted Herbert Blum, a dedicated lawyer from Linz, who represented Mr. Gaygusuz in court (Interview 2). Shortly after giving Mr. Blum full power of attorney, Mr. Gaygusuz returned to Turkey, because the government’s refusal to grant him unemployment assistance deprived him of his financial basis in Austria (Interview 1). His attorney never met Mr. Gaygusuz in person, since all communication went through Mr. Şentürk. “I had known this counselor and translator already for a while, since he repeatedly acts as an interpreter and campaigns strongly for the rights of his Turkish colleagues” (Interview 2).

Herbert Blum is a committed lawyer, who has been involved in various cases relating to foreigners, asylum and migration, as well as in cases of expulsion and prohibition of residency. He explained his reasons for accepting the case: “Due to the legal situation, Mr. Gaygusuz had no entitlement to unemployment assistance, because he did not meet the criteria. I am always interested in investigating whether legal norms are really in accordance with the constitutional order, the European Convention on Human Rights and EU law” (Interview 2).

The lawyer had the idea to take the case before the VfGH and to plead for a violation of the equality principle (Interview 2). The VfGH refused the treatment of the complaint in February 1988, arguing that the “alleged violation of rights” was “so unlikely,” that its assertion had “no sufficient prospect of success” (Netzer 1996, 6). According to Andreas Netzer, there is a system behind the VfGH’s refusal of the motion: Especially with regards to legal cases relating to non-citizens, he observes that politically controversial cases are increasingly refused approval for entering the legal system of complaints (Netzer 1996). The VfGH instead referred the case to the VwGH, which, however, found the complaint to be of constitutional matter and decided that the complaint fell outside its jurisdiction (Stern 2010).

The decision of the VfGH came as a surprise to the attorney (Interview 2). After the negative decision, the attorney and the counselor decided in agreement with Mr. Gaygusuz to bring the case before the ECtHR in Strasbourg. At this time, the attorney already had experience with the ECtHR (Interview 2). Furthermore, the Austrian Trade Union Federation covered the procedural costs. The complaint referred to Articles 6 (1) (right to fair trial) and 8 (right to respect for family life) of the ECHR and to Article 14 of the ECHR taken in conjunction with Article 1 of the Protocol No. 1 (principle of non-discrimination taken in conjunction with the right to property).

3.2 The Decision of the European Court of Human Rights

On 20 April 1995, the Gaygusuz case was assigned to the ECtHR. On 22 May 1996, the hearing took place in Strasbourg. A lawyer delegated by the Turkish government as a member state of the Council of Europe also participated in the trial to lobby for the rights of Turkish citizens and to argue in favor of an association agreement between Turkey and the EEC (Interview 2). The trial took place shortly after Austria joined the EU. On 16 September 1996, the ECtHR decided in favor of Mr. Gaygusuz: Refusing unemployment assistance to Mr. Gaygusuz because of his foreign citizenship violated Article 14 of the ECHR taken in conjunction with Article 1 of Protocol No.1. The unequal treatment between Austrian and non-Austrian citizens “that Mr. Gaygusuz fell victim to” was “not objectively and reasonably justifiable” and the regulation, according to which only Austrian citizens were entitled to unemployment assistance,⁷ violated the ECHR (ECtHR 1996). As a third-country national, Mr. Gaygusuz paid unemployment insurance contributions, which were dedicated to a specific purpose, but for which he had never been compensated. This illegitimate

⁶ The names of the counsellors are anonymized.

⁷ The terminology used in the ruling of the ECtHR refers to unemployment assistance as “emergency assistance”.

discrimination in comparison to Austrian citizens represented a violation of the principle of non-discrimination regarding the right to property⁸. The Republic of Austria was sentenced to a monetary compensation for pecuniary damage of 200,000 Schilling, as well as cost and expense reimbursements of 100,000 Schilling.

This verdict initiated a tug-of-war between the Austrian government and the VfGH, accompanied by activities of counseling centers. According to the court's decision, unemployment assistance had to be granted independently from the applicant's citizenship. The government consequently revised the regulations regarding unemployment assistance, introducing a new criterion: Applicants had to either be born in Austria or have spent half of their life or school time in Austria. For Stern, these conditions presented a "classic example of indirect discrimination that excluded naturalized Austrians" (Stern 2010, 243). Through the change, the restriction stayed intact in a different form. However, the amendment of the Unemployment Insurance Act was to come into effect no earlier than the year 2000. The VfGH continued to promote the decision of the ECtHR, arguing that discrimination against foreigners regarding unemployment assistance was a violation of the ECHR. The federal government reacted to the court's decision by putting the new discriminatory regulations into effect early. At this time, counseling centers for migrants in Vienna and Linz organized 25 complaints and brought them before the VfGH.

In July 1999, the VfGH declared for the second time that the regulations in the Unemployment Insurance Act, according to which entitlement to unemployment assistance was subject to the applicant's place of birth or school attendance in Austria, were unconstitutional. In their verdict, the VfGH argued that unemployment assistance did not represent a welfare benefit, but rather was to be considered as a right worthy of protection. Since 1 August 1999, the entitlement to unemployment assistance in Austria is subject to the applicant's resident status.

4. The right to stand for election in Chamber of Labor and Work Councils

The debate on voting rights for migrant employees started in 1972 with internal discussions in the Social Democratic Party (APA 1972). In the same year, migrants gained the right to stand for election as works council

(Betriebsrat) members in Germany. In Austria, individual groups started demanding that all employees have the right to stand for elections to the Chamber of Labor, as well as to works councils. In the beginning, these demands were raised by charity organizations and migrant groups (Salzburger Nachrichten 1972; Kurier 1973). In 1974, migrant workers in Austria received the right to vote for their works councils; however, they could not themselves stand for election as members of the works council (Pühretmeyer 1999: 18).⁹

According to Pühretmeyer (1999: 3), it was only in the 1980s that demands for the right of all employees to stand for election were raised publicly by several actors, including the Viennese Chamber of Labor, political parties, and migrant organizations (Profil 1984; Die Presse 1985; Tiroler Tageszeitung 1988). In the 1990s, initiatives advocating for implementing the right to stand for election gained traction. The trade union HGPD (Hotel, Gastgewerbe, Persönlicher Dienst), the women's and youth organizations of the Trade Union Confederation ÖGB, self-organized migrant groups, as well as individual persons in all trade unions supported this demand. The year 1991 marked a turning point in the approach of the ÖGB. At the 12th Federal Congress, delegates unanimously voted in favor of the right to stand for election. However, the implementation of this right was not high on the ÖGB's list of priorities (Pühretmeyer 1999: 21).

4.1. Political Campaign

In this context, several initiatives emerged on the local level in order to push this demand forward. In 1992, five members of the Trade Union for Private Employees (GPA) founded the project group "Open Sesame!" (SÖD). This group aimed at implementing trade union decisions concerning the introduction of the right to stand for election. The foundation of this group can be traced back to efforts towards founding a works council in a language school, initiated by Caroline Grandperret (Grandperret/Nagel 2000, 33ff; Griesser/Sauer 2014, 60). Being a non-citizen employee at the time, she could not stand for election to the works council. Over the course of seven years, SÖD took action within GPA towards implementing trade union decisions concerning the right to stand for election. This work included a petition on the right to stand for election, which was submitted to the Viennese Chamber of Labor in 1993.

The first campaign which took the form of strategic litigation was coordinated by individuals working for

⁸ Gaygusuz v. Austria is widely considered to be a leading case of the European Court of Human Rights. Dembour (2012) discusses why this case did not lead to the development of a significant case law. While the judgment merely targeted the exclusion of legally resident migrant workers from social security benefits, it did extend the principle of equality between regular and irregular migrants.

⁹ On 17 December 1970, the Austrian Trade Union Confederation and the Federal Chamber of Commerce signed a "Collective Agreement on Regulations of Employment Conditions for Foreign Workers." This agreement allowed migrants to elect their own "Gastarbeiter" representatives. These persons, however, could only act based on specific permission of the works council, and were protected neither from dismissal nor from discrimination.

the Association for Support to Foreigners in Linz, Upper Austria. In the early 1990s, this was a small organization with ten employees who supported non-citizens in legal and social matters. They also supported demands for migrants' right to stand for election to works councils, taking actions such as a signature collection at the trade union congress, which led to 10,000 signatures (Interview 3). Despite several campaigns and initial euphoria in the early 1990s, they had to acknowledge that there was a lack of political will to implement these rights. Therefore, the association decided to enter a legal dispute over migrant workers' right to stand for election and use this as the basis for a political campaign (Interview 3). They planned a strategy involving several steps in order to bring the case to the European Court of Human Rights.

The first step was that two employees founded a works council within the association. The candidates were Mümtaz Karakurt, who had Turkish citizenship, and Vladimir Polak, who had Croatian origins and Austrian citizenship. Karakurt won the election by a narrow margin (Interview 3). As part of the overall strategy, Polak reacted to Karakurt's victory with the legal claim to disallow the latter's election, which he submitted to the Regional Court in Linz on 21 June 1994. In September 1994, the Court ruled that foreign workers did not have the right to stand for election, and therefore could not be elected as members of the works council. Karakurt's mandate in the works council was denied. Karakurt subsequently, and as part of their strategy, went through all legal levels: He appealed to the Higher Regional Court, which in turn refused the appeal based on the same argument (Interview 3). As a next step Karakurt submitted a revision in April 1995 to the VfGH, making an application to revise Article 53 (1) I of the Austrian Labor Constitution Act based on Article 11 of the ECHR, which has constitutional status in Austria. This appeal was again refused. In its justification, the VfGH argued that the works council, as designed in the Austrian Labor Constitution Act, was not an association in the sense of Article 11 ECHR. In this process, Karakurt received legal and financial support from the GPA in Upper Austria (Interview 3).

On 24 July 1996, Mümtaz Karakurt submitted a complaint to the ECtHR, claiming a violation of Article 11 (1) ECHR on the freedom of association (Interview 3). The case was struck out of the list since a staff association such as the works' council in the respective case could not be considered an 'association' within the meaning of Article 11 (1) ECHR (Buchinger et al. 2009). They did not give up, and submitted an individual complaint to the Human Rights Committee of the United Nations, building on Article 26 of the International Covenant on Civil and Political Rights, which guarantees the right of equality before the law. Accordingly, the UN Human Rights Committee came to the conclusion that Austria

violated a human right in 2002. Excluding non-EEA citizens from the right to stand for election to the works council in Austria was categorized a violation of Article 26 of the International Covenant on Civil and Political Rights. In their statement, the Human Rights Committee of the United Nations demanded that the Austrian government revise the respective laws so that no unjustified distinction be made between non-citizens and Austrian citizens. Additionally, Austria was obligated to publish the verdict on a webpage.

Although this decision did not lead to immediate legal change, it did have political effects. Following the verdict of the UN Human Rights Committee, political pressure increased. The chairperson of the GPA, Hans Sallmutter, advocated for the right to stand for election (APA 2002). The Green Party submitted an inquiry titled "Breach of Law by the Republic of Austria" in the parliament asking why migrant workers' right to stand for election was still not implemented despite several requests by the EU and the UN Human Rights Committee (Der Standard 2002).

It took another campaign and another conviction until the respective laws were revised. This happened in the context of Austria's admission to the EU. Already, in 1997 and in 1998, the EU Commission criticized Austria on this matter, pointing to the fact that EEA citizens were not granted the right to stand for election to works councils in Austria despite contradictory EU and EEA regulations (Pühretmeyer 1999: 3). The election to the Chamber of Labor in 1999 was the first election after Austria's entry to the EU.

The exclusion of third country nationals from the election to the Chamber of Labor was challenged by candidate lists which included migrants from Turkey in 1999. In Vorarlberg, the list "Joint Zajedno/Birlikte Alternative and Green Trade Unionists" (Wählergruppe Gemeinsam) stood for election, and it included five Turkish citizens (Die Presse 2009). The association „Wählergruppe Gemeinsam“ was founded in 1993 as a common platform of migrants and "green" activists and stood for election in AK for the first time in 1994. One of the founders, Mario Lechner, explained that for the election of 1999, since EU law was effective, including the association agreement between the EU and Turkey, Turkish citizens had the right to stand for election to the Chamber of Labor (Lechner 2009). However, the FPÖ submitted a formal objection against the list. The principal election committee decided to delete the five Turkish nationals from the list of candidates submitted by „Wählergruppe Gemeinsam“ on the ground that they did not have Austrian citizenship.

The responsible Federal Minister rejected the complaint of the Wählergruppe Gemeinsam in November 1999. Although the Minister acknowledged that Turkish workers were eligible for election to the general assem-

bly of the AK, he argued that the deletion of the names of the Turkish nationals from the list was not expected to influence the results of the election, since in a non-personalised list voting system, the individual candidate is of little importance to voters (ECJ 2003).

The Wählergruppe Gemeinsam then took the dispute to the VfGH. It claimed that the principal election committee's decision of 8 February 1999 should be declared unlawful and annulled, since the five Turkish candidates were deleted. It also claimed that the electoral procedure as a whole should be declared unlawful and annulled, and that fresh elections should be held (ECJ 2003). The VfGH turned to the ECJ in order to determine how to interpret the Association Agreement between Turkey and the EU. This led to a decision by the ECJ in 2003, in which the exclusion of Turkish employees from the right to stand for election to works councils and the Chamber of Labor was deemed illegal (ECJ 2003). This verdict opened the path for a lawsuit of the European Commission against Austria, categorizing this form of exclusion as a violation of the EU treaty. Subsequently, the law regulating the Chamber of Labor, as well as the Labor Constitution Act were changed so that all third country nationals have the right to stand for election.

5. Analysis

A joint overview of the two cases highlights a number of themes that shaped the conditions and outcomes of these processes. First, it is clear that policy changes and improvements of rights were realized through decisions made by international higher courts: the ECtHR and the ECJ. In the case about the right to stand for election, the litigation strategy also moved beyond the European level and an individual complaint was submitted to the Human Rights Committee of the United Nations, which convicted the Austrian government of human rights violations in 2002. This did not lead to immediate legal change. It took another campaign and another conviction by the ECJ until the respective laws were revised.

A second important theme is the interplay between political campaigning activities and litigation strategies. In the unemployment assistance case, NGOs and migrant associations made some claims in the public sphere before the case entered the legal path. However, these demands and campaigns were not as prominent as in the second case. The right to unemployment assistance was not as universally approved as the right to stand for election. Rather, the discussion was shaped by strong arguments in favor and against unemployment assistance for non-citizens, the latter being based on populist claims and economic reasoning. By contrast, litigation activities in the case on the right to stand for election were preceded not only by political claims and

demands by several actors, but also by prominent campaigns and activities of powerful trade unions.

Third, the detailed chronologies of the two cases highlight the broad range of different actors that shaped the processes, as well as the extent of their agency. In the unemployment assistance case, one migrant advisor who worked as translator and consultant for trade unions, and who brought the case to the lawyer, played an important role. He had the local knowledge and he had been active in different forums for improving the rights of the migrants. A second very important actor in this case was a dedicated lawyer who had acquired the relevant skills and experiences through his earlier involvement. After this case, he successfully brought other cases to the European courts. The case on the right to stand for election was shaped by a broader number of advisors, who were fiercely determined to fight for this right, and identified litigation as a strategic opportunity to effectuate political change. These actors were part of political campaigns aiming to achieve political change on different levels, and used litigation as a strategic tool because other intervention strategies failed. Simultaneously, they continued to exert other forms of political pressure, such as collecting signatures, mobilization and raising public attention.

Building on the analysis of actors and their agency, a fourth theme becomes obvious: the specific knowledge that actors could mobilize, which constituted one of the key resources that enabled them to exercise agency in the form of litigation procedures. In both cases the core actors were connected to the counseling center in Linz, which was established in order to improve the legal situation of migrant workers and their access to social services. The specific work of counseling centers equips their members with insight into the Austrian legal system and into the relevant legal cases, as well as with connections to the dedicated lawyers. Additionally, they knew the specific problems that migrants were faced with, and they were motivated by the idea of social justice and the aim to challenge injustice. Their knowledge and expertise enabled them to turn this case into a litigation procedure. It also proved to be an important resource in later collaborations with other counseling centers, which aimed at finding further cases and bringing them to the ECJ and VfGH.

For litigation activities, technical expertise in human rights law was critical to draft legal documents and to issue formal complaints. The legal expertise needed for human rights work was transmitted through networks connecting individuals and organizations, which were created by the translators, activists and further individuals at the local level. The case studies show how access to these networks and to the relevant knowledge enabled these actors to incorporate international human rights law on the local level. Mümtaz Karakurt stresses that the

case of unemployment assistance was a milestone for subsequent legal struggles, since this was the first time that someone came up with the idea of bringing such a case before the ECtHR. He therefore highlights the attorney's decision to take this step as highly significant in the fight for migrant rights (Interview 3).

Finally, the case studies also show strategies of the governments, aiming at deceleration of the procedures and delays in putting into effect the decisions of higher and international courts. In both cases, the Austrian government used tactics to evade immediate implementation of the required changes. One strategy was to reformulate discriminatory regulations so that specific criteria were modified but exclusionary effects essentially stayed the same, as done in the case on unemployment assistance. A second strategy, which the government applied in both cases, was to keep the laws which were judged to be violations of international agreements intact and unchanged as long as legally possible, and partly even longer, although it was clear that higher courts would repeatedly demand change. Although in both cases the litigation procedures finally led to the implementation of rights of non-citizens, these deceleration and delay tactics prolonged the procedures, requiring even higher levels of expertise and resilience on the part of human rights advocates.

6. Conclusions

With this article, I aim to contribute to the debate on the role of local actors in the advancement of human rights and in the improvement of rights of non-citizens. I build on Basok and Carasco (2010) who highlight the contribution of domestic rights groups in bringing national laws in line with international standards. In this article, I point out the importance of litigation and judicial agency in this process. My focus lies on the role of a multitude of actors who initiate, coordinate and advance or decelerate these procedures. Through detailed case studies, I highlight how their agency, their ability to use established legal channels, depends on specific kinds of knowledge and expertise, as well as on their networks and relationships with other actors in the field.

The thorough analysis of these two cases in Austria, in which actors used litigation strategies to advance rights of non-citizens, led me to one core conclusion. Changes in migration policy are not solely effectuated by international courts and human rights regulations. Rather, they have to be analyzed as the result of interplay between these international frameworks and the capacities of local actors who use courts and litigations as avenues to intervene in law-making processes. Consequently, the implementation of rights cannot be explained solely "from above", i.e. as an effect of higher courts and human rights

agreements on nation states. Rather, a movement "from below" is needed in order to implement these rights.

However, my analysis has also shown that decisions and verdicts of international courts alone do not lead to immediate implementation of rights. As illustrated by the two case studies, especially by the case on unemployment assistance, implementation of issues that are subject to contested debates is delayed and has to be pushed forward through additional legal channels such as the VfGH. We can also observe delay strategies by the government in the second case, in which the right to stand for election was widely supported. The implementation of rights takes a lot of time and energy, and even the road to successful rights extensions is marked by failures and dead ends. This was not the main focus of this study; however, further research in this area is warranted. The current restrictive approach to migration policy, as well as the increasing relevance of human rights frameworks and instruments provide a context in which the research approach advanced in this article can provide a useful lens for studying human rights. This research approach takes into account the contested and dynamic nature of the processes leading to the implementation of rights. In doing so, it promises an improved understanding of the mechanisms through which international rights frameworks can come to life on the local and national level.

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Appendix 1: List of Interviews

Interview 1 Cevat Gaygusuz, April 25, 2014, Izmir, Turkey.

Interview 2 Helmut Blum, May 27, 2014, Vienna, Austria.

Interview 3 Mümtaz Karakurt, June, 03, 2014, Vienna, Austria.

Interview 4 Şenol Şentürk, April, 03, 2014, Vienna, Austria.

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Appendix 2: Newspaper List

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APA (1987a): APA0214 5 II, Parlament/Budgetdebatte/Soziales, 25.03.1987.

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