

Immigration Policy in the Federal Republic of Germany

Negotiating
Membership
and Remaking
the Nation

Douglas B. Klusmeyer and
Demetrios G. Papademetriou

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Abbreviations

BAFL	Federal Office for the Recognition of Foreign Refugees
BAMF	Federal Office for Migration and Refugees
BITKOM	German Association for Information Technology, Telecommunications and New Media
BSHG	Federal Social Assistance Law
CDU	Christian Democratic Union
CSU	Christian Social Union
COE	Council of Europe
DGB	German Federation of Labor
DM	German Mark
DVU	Democratic People's Union
EBP	European Border Patrol
EC	European Community
ECJ	European Court of Justice
ECHR	European Court of Human Rights
ECPHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (or the European Convention on Human Rights)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
FDP	Free Democratic Party
FRG	Federal Republic of Germany

GB/BHE	All-German Bloc/German Fellowship Bloc of Expellees and Victims of Injustice
GDR	German Democratic Republic
NPD	National Democratic Party
PDS	Party for Democratic Socialism (formerly SED)
QMV	Qualified Majority Voting
REP	<i>Republikaner</i> Party
SED	Socialist Unity Party of Germany
SPD	Social Democratic Party of Germany
TEU	Treaty on European Union (or Maastricht Treaty)
USSR	Union of Soviet Socialist Republics
ZDJ	Central Council of Jews

Introduction

Despite the reception of many millions of foreign-born persons since the late nineteenth century, the Federal Republic of Germany (FRG) for most of its history has declared itself officially to be “not-an-immigration-land.”¹ In reality, nothing could have been further from the truth. Between 1950 and 1994, approximately 80 percent of the increase in the West German population resulted from migration. This proportion amounted to 12.9 million persons (Münz and Ulrich 1997: 65–66). In 2006, the Federal Statistical Office, counting the second and third generations of immigrants in Germany, reported that nearly one-fifth (19 percent) of the population in Germany had a migration background (*Migrationshintergrund*). This number did not include the approximately 12 million ethnic German refugees and expellees, who came to Germany as a result of World War II and its aftermath, and the even larger number of their offspring, whose roots also lie outside of modern Germany. Recognizing this reality, most analysts over several decades rejected the FRG’s official self-characterization and routinely described the FRG as a de facto immigration land long before the federal government did (Bade 1994a). Nonetheless, governmental policy has been slow to address the civic, legal, and sociocultural ramifications of this fact.

As Christian Joppke observed in 1999, the most striking feature of the government’s response to the FRG’s post-war migration experience was not its persistent reluctance to acknowledge the reality of large scale immigration,

1. This stance was first officially adopted in a 1977 policy report of a joint commission of the federal government and the states on migrant workers. The report recommended that future policies be guided by (among others) the fact that the “Federal Republic of Germany is not a country of immigration. West Germany is a country in which foreigners reside for varying lengths of time before they decide on their own accord to return to their home country” (translated excerpts of this report are contained in Katzenstein 1987: 239–240).

but rather its continual insistence on grounding its policy on a self-conception of national identity defined by a perceived counter model, namely, the immigration land.² For decades, German government policy was framed around a portrait of national identity that highlighted the absence of characteristics associated with a presumed opposing type of society. This kind of dichotomy always presupposed a polar model that is all the more striking in an era that some have labeled “the age of migration.” In their study of this era, Castles and Miller have emphasized the ways that the international movement of people has constituted a “key dynamic” within that complex of sweeping transformative changes associated with “globalization” (Castles and Miller 2003: 1). While sharing some general common features, the causes, character, and impacts of these movements have varied considerably according to time, place, and local conditions. In his history of the modern European migration experience, Klaus Bade identifies the period from the late 1950s as a pivotal moment in the “historic transition from a continent of emigration to one of immigration,” which has had profound effects on the economy, politics, and cultures of the receiving states (Bade 2003: 217). Trying to come to terms with such changes through the lens of a starkly drawn dichotomy between immigration societies and non-immigration societies obscured far more than it illuminated the nature of these changes.

The concept of an “immigration land” can be understood as an “ideal type” in the manner that Max Weber had advocated (Weber 1973a: 201–205; 1973b: 535–540). Ideal-typical models are deliberately constructed in a one-sided fashion to accentuate certain features of the phenomenon under investigation while obscuring many other features in order to clarify particular causal relationships and facilitate comparative analysis. But for Weber, such analytical constructs are intended as heuristic devices that provide a means for sharpening lines of empirical inquiry and thereby do not stand as ends in themselves. Employed properly, they are not to be treated as descriptive representations of reality, but rather must be understood as informed theoretical fictions. In other words, they are highly stylized conceptual artifices that—by design—grossly oversimplify the complexity and contingent variability of actual phenomena as they exist in different empirical contexts. When such models are divorced from their role as analytical guides for social science research, they entirely leave the ground of facts and enter the realm of political ideology and public myth. At this level, they may prove effective as a rhetorical tactic and may find resonance in popular sentiment, but they do so at the expense of abandoning any claim to social science validity. To the extent that one believes that sound

2. “While Germany is not alone in Europe in not defining itself as a nation of immigrants,” Joppke writes, “it is the only country that has not become tired of repeating it, elevating the no-immigration maxim to a first principle of public policy and national self-definition” (1999: 62).

polymaking requires a strong social science foundation, basing policy on the juxtaposition of fictions with counter fictions seems like a political strategy more calculated to evade hard facts than to address them.

The German government's perception, that managing migration well poses significant political challenges, is hardly unusual. Its long arch-defensiveness in response to these challenges, however, crippled its ability to chart a positive policy agenda and to build public support for that agenda. As a result, major government policy initiatives in this area too often have been reactive rather than proactive. Senior German migration scholars such as Klaus Bade have long lamented this failure, observing in retrospect: "Ethno-national thinking and the *jus sanguinis* tradition had severely retarded the general course of development, leading to a quite belated acceptance of social reality on the levels of programmatic and legal declarations" (Bade 2001: 42). During the 1990s, for example, the government liberalized highly restrictive naturalization rules, but only after all other perceived alternatives had long since failed and continued inaction had become untenable. The sudden, rapid pace of reunification at the outset of the 1990s understandably caught the government unprepared, but it also offered an unprecedented opportunity to reassess its post-war experience in charting a positive, new direction for the future. Only in the late 1990s did the federal government fully begin to take up this challenge.

Starting with the reform of the FRG's citizenship law in 1999, the federal government has begun to come to terms with the challenges and opportunities and has begun to craft more proactive policy strategies—albeit all too slowly. This reassessment has led to rethinking the legal basis for immigrant incorporation and the fundamental terms in which both the challenges and rewards of immigration are understood. In a remarkably thoughtful and candid 2001 report, a well-balanced Independent Commission on Immigration, impelled by the Social Democrats but chaired by a distinguished Christian Democrat, former Minister and Bundestag President Rita Süßmuth, opened its report by flatly declaring, "Germany needs immigrants." It pointed out that Germany has actually been an immigration land for a long time, but lacked a positive integration strategy to reap the full benefits from this fact. Shortly after the federal government submitted a draft of an immigration law for the first time in the FRG's history based largely on the Commission's report, Wolfgang Thierse (SPD), President of the Bundestag, recognized that, "after denying and ignoring it for decades, we have finally reached a consensus that Germany is a country of immigration and that we must bear the consequences of this" (Thierse 2001: 7).

A few years and many missteps later, the law that emerged bears little resemblance to the Commission's vision and insights. Although this new approach is a major step in the right direction, changing fifty years of history and ninety years of self-identification cannot be done overnight. In understanding the

challenges that lay ahead, it is as important to stay mindful of how such problems as immigrant integration took their current shape, as it is to address pragmatically the realities of the present and the needs of the future. There is no better place to start exploring such issues than by reexamining the formulation of membership in the German constitutional order.

This study is divided into four main parts. Part 1 offers a critical reading of the FRG's constitution to distinguish five different, and sometimes conflicting, dimensions of membership. These aspects are an international dimension, a federalist dimension, a civic/political dimension, a social dimension, and an ethnonational dimension. Part 1 argues that any coherent migration policy must take all these different dimensions into account to comprehend the FRG's experience with migration and to assess reform alternatives. By distinguishing among these dimensions, it seeks to underscore the importance of an ethnonational perspective for understanding the character, barriers, and opportunities for membership in the FRG. But this section also seeks to emphasize that this perspective has hardly been the sole determinant of German membership policy and that the normative basis for a more inclusive policy already exists.

Part 2 provides a concise history of immigration to West Germany in the post-World War II era to emphasize the powerful impact of this history and to offer those new to German studies a solid foundation for understanding the FRG's current migration dilemmas. The section begins by tracing West Germany's experience in receiving millions of ethnic German refugees and expellees. To situate the FRG's approach to ethnic German minorities in Eastern Europe and Russia, this section also looks back at German diaspora politics and the problem of minority rights in Europe from the foundation of the Second Empire in 1871 through to the end of World War II. It then compares and contrasts the integration of refugees and expellees with West Germany's uncomfortable shift to a country of imported labor against the historical background of a much longer tradition. Paying particular attention to the development of German law, part 2 then moves to examine the implementation of the guestworker model. As this model became increasingly untenable during the 1970s, the FRG began to grapple with the problems of integration. However, the struggle to reform aliens and citizenship policy were repeatedly stymied by partisan politics, leaving the Federal Constitutional Court as the most influential agent of reform. By the late 1980s, the FRG was facing not only mounting integration challenges, but also rapidly rising numbers of asylum seekers and *Aussiedler*. The FRG's attempts to come to grips with migration and the growing diversity of its society had always been tied to its overarching goal to reunify the German homeland. This section concludes by looking at the achievement of this goal.

Part 3 discusses the importance of EU institutions in the development of the German migration regime in the post-reunification era. The section takes a

dual approach by placing the development of German migration policy within the evolving framework of EU-level migration policy. The section illuminates the problems that Germany faced after the collapse of the Soviet Union and the implosion of Yugoslavia, which generated massive flows of both those claiming ethnic German status and refugees. It also highlights the FRG's critical stance toward the European Commission's attempts to "harmonize" migration policy and the FRG's resistance to adopt forward-thinking, long-term policy initiatives on migration and immigrant integration. This section concludes by examining Germany's demographic dilemma and the contributions immigration can make to mitigate this dilemma.

Part 4 addresses the migration issues facing Germany at the beginning of the twenty-first century, including the need for high-skilled labor and the challenge to integrate new and earlier generations of immigrants. This section begins by looking critically at the ethnonationalist rhetoric that reemerged around the concept of *Leitkultur*. The failure of this kind of culturally focused approach to come to grips with the integration and migration challenges facing the FRG becomes clear when the discussion turns to an examination of Germany's demographic problems and the bold report of the Independent Commission on Immigration. Unfortunately, many of the Commission's most promising reform proposals were sharply truncated in the making of the 2005 Migration Law. Whatever its shortcomings, however, the enactment of this law represents the end of an important phase in the FRG's long struggle to rethink its approach to migration and to develop a constructive policy basis for managing its rewards and costs. This section concludes by considering the ramifications of this new law for integration policy.

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Part 1

Membership and the Basic Law

The Basic Law of 1949 established the Federal Republic of Germany (FRG) as a liberal-democratic polity that is subject to the rule of law. While originally conceived as a provisional document, the framers intended this constitution to establish a supreme, authoritative set of norms for the new political and legal order they were seeking to construct. Because all policymaking is guided by normative considerations, we begin by examining some of these foundational principles and values to establish the framework for our analysis. This section uses the Basic Law as a starting point to investigate five fundamental dimensions of membership in the FRG: an international (or transnational) one grounded on universal human rights; a federal one that more fully reflects the complex character of German political traditions than any abstract notion of unitary national sovereignty; a civic/political one that distinguishes between citizens and foreign residents; a social one that provides collective insurance against individual risk; and an ethnonational one based on shared descent and cultural affinities. These dimensions express both complementary and conflicting membership norms. The ambiguous relationships among these norms reflect not only the particulars of German history, but also the multiple modes of membership that every modern liberal-democratic polity must confront. These norms have framed the debate over membership issues in the FRG, and have determined the constraints and alternatives available to public policymakers dealing with these issues.