Forumsbeiträge

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Who is Recognised as a Refugee? Insights from Diverse Disciplines

Abstract

The implementation practices of ‹who is a refugee› vary widely in their approaches and outcomes. Scholarship in legal anthropology, sociolegal studies and comparative political science aims to understand and to explain the different (and often inconsistent) outcomes of when individuals seek asylum. In this forum article, I provide an overview of this scholarship, critically reflecting its benefits and limitations. The multidisciplinary research on refugee status determination shows that outcomes depend heavily on extraneous political factors, institutional design, and the personal predispositions of individual decision-makers. It is, however, often limited to European asylum systems, with a strong focus on decision makers' discretion. In light of these limitations of the existing scholarship, the article concludes with a brief overview of the *RefMig* project's research, which has aimed to offer a more global view of practices.

Keywords: asylum, refugee status determination (RSD), multidisciplinarity, unequal recognition, unfairness

Wer ist ein anerkannter Flüchtling? Einblicke aus verschiedenen Disziplinen

Zusammenfassung

Die Praxen der Flüchtlingsanerkennung unterscheiden sich stark in ihren Ansätzen und Ergebnissen. In der Rechtsanthropologie, der Rechtssoziologie und der vergleichenden Politikwissenschaft wird versucht, die unterschiedlichen (und häufig inkonsistenten) Ergebnisse von Asylverfahren zu verstehen und zu erklären. In diesem Forumsartikel gebe ich einen Überblick über diese Forschung und

reflektiere kritisch ihre Vorteile und Grenzen. Die multidisziplinäre Forschung zur Anerkennung Schutzsuchender zeigt, dass die Ergebnisse in hohem Maße von externen politischen Faktoren, dem institutionellen Design, der institutionellen Gestaltung und den persönlichen Neigungen der einzelnen Entscheidungsträger abhängen. Diese Arbeiten sind jedoch häufig auf europäische Asylsysteme und einen Schwerpunkt auf dem Ermessensspielraum der Entscheidungsträger beschränkt. In Anbetracht der Limitationen bisheriger Forschung schließt der Artikel mit einem kurzen Überblick über die Untersuchungen des *RefMig*-Projekts, die darauf abzielen, einen globaleren Blick auf Anerkennungspraktiken zu werfen.

Schagworte: Asyl, Feststellung des Flüchtlingsstatus, Multidisziplinarität, ungleiche Anerkennung, Ungerechtigkeit

1. Introduction

Across the globe, the question of ‹who is a refugee?› is understood as a question of legal definitions. However, those legal definitions require implementation, and the implementation practices vary widely in their approaches and outcomes. In this short piece, I reflect on the scholarship in legal anthropology, sociolegal studies and comparative political science that seeks to understand the outcomes of when individuals seek asylum – which claims are recognized and which are not, and for what reasons. Much of this scholarship focuses on Europe, or indeed, a narrow set of Western European states in the main. It provides important insights, most of it a direct challenge to any who would assume the determinative or even constraining character of legal rules. Rather, the outcomes are shown to depend heavily on extraneous political factors, institutional design, and indeed, the personal predispositions of individual decision-makers.

As well as seeking to convey some of the key insights from this multidisciplinary scholarship, I also reflect on its inherent limitations, geographical and institutional. The richness of this scholarship has inspired the European Research Council (ERC) project *RefMig*,[1] while its limitations prompted us to look beyond Europe to study the refugee recognition practices of United Nations High Com-

1 This research was conducted under the *Refugees are Migrants: Refugee Mobility, Recognition and Rights (RefMig)* project. The project is a Horizon 2020 award funded by the European Research Council and runs between January 2018 to December 2022 (grant number 716968). The author thanks Mitali Agrawal, Dr Jessica Breaugh, Dr Derya Ozkul, Dr Caroline Nalule and Dr Natalie Welfens for their insights. In particular, this article draws on the Ozkul and Nalule's RefMig literature review (Ozkul/Nalule [2023]).

missioner for Refugees (UNHCR) globally, an ideal testing ground to assess some of the insights of the existing scholarship and remedy its limitations.

This article proceeds as follows. Part I identifies some of the key contributions in legal anthropology and sociolegal studies, which tend to focus on practices in individual states, with a few comparative studies. Part II sketches some of the key findings in comparative political science on recognition practices. Part III concludes, noting some of the main limitations in the scholarship. In light of the limitations of the existing scholarship, the article concludes with a brief overview of the research conducted in the *RefMig* project, which has aimed to offer a more global view of practices, but also confronted their selective illegibility.

2. Refugee Recognition Practices in Legal Anthropology and Sociolegal Studies

Most of the anthropological and sociological/sociolegal studies in this field tend to focus on particular national systems, and often lack a comparative or transnational frame. There is a significant body of such work in the UK (Gibb/Good 2014; Jubany 2017; Campbell 2017) France (Fassin 2018; Fassin/D'Halluin 2005; Spire 2007; Kobelinsky 2014), Germany (Scheffer 2001; Lahusen 2016; Lahusen/Schneider 2017; Baade/Gölz 2023), Norway (Fuglerud 2004; Liodden 2016; Liodden 2020), and the Netherlands (Wagenaar 2004). Two recent noteworthy books examine the processes up-close in Austria and Switzerland respectively. Julia Dahlvik's 2018 book, *Inside Asylum Bureaucracy: Organizing Refugee Status Determination in Austria*, shows how decision makers find themselves in a contradiction between providing a human rights-based assessment and ensuring administrative productivity (Dahlvik 2018: 369–388). Affolter's (2021) study of caseworkers in the Swiss Secretariat for Migration emphasises how caseworkers develop their own approach to decision making allowing for observation patterns to emerge, falling somewhere in between traditional top-down legal instrumentalism and street-level bureaucratic conceptions (Affolter 2021). An important new set of perspectives on the role of emotions in judging asylum appeals emerges in Büchsel's contribution to this special issue, based on her extensive ethnographic study of the judges and judging of asylum appeals in two German cities drawing on her sociolegal doctoral study.

Ethnographic work tends to focus on thick description, rather than attempt to isolate causal factors. For instance, Didier Fassin's ethnographic work in France has made use of extensive observation of everyday work of the National Court

of Asylum, exploring the range of documentary materials found in asylum seekers' files, including medical and psychological reports. His study is based on interviews with asylum seekers, lawyers, rapporteurs, activists, decision-makers, as well as physicians from non-governmental organisations (Fassin 2013; Fassin 2018: 1–10). Together with D'Halluin, they show how asylum seekers' autobiographical accounts were not adequate for their asylum case and how they needed to demonstrate their physical sequels and mental traumas to be able to make their claims (Fassin/D'Halluin 2005). They also investigate how NGOs dealt with these requirements to provide proof and how medical officers' ‹objective› accounts and medical certificates gradually substituted asylum seekers' autobiographical accounts. The turn to expert evidence has been explored by many other scholars, including Anthony Good, in his leading work *Anthropology and Expertise in the Asylum Courts* (Good 2007), showing how anthropologists themselves took on the role of experts in asylum. Lawrence and Ruffer's edited volume explores some similar themes (Lawrence/Ruffer 2015). Notably, Galya Ruffer's own chapter ‹Research and Testimony in the «Rape Capital of the World»: Experts and Evidence in Congolese Asylum Claims›, provides critical reflection on the role of ‹field expertise› and the challenges for ‹experts› in supporting asylum narratives that turn on demonstrating harms to fit the individualised approach to Refugee Status Determination (RSD), while generalised and pervasive risks are really at issue (Ruffer 2015).

Nick Gill and Anthony Good's 2019 *Asylum Determination in Europe: Ethnographic Perspectives* brings together studies on ten different European countries, mainly inviting authors of the pre-existing anthropological studies mentioned above (Gill/Good 2019). The chapters provide a legal overview of asylum determination procedures in each state, followed by sections on a broad description of actors that are involved in the process. Further chapters examine the specific roles of translation, communication, narration, and lawyers' representation. While the richness of the volume is evident, as Gill acknowledges the volume has a limited geographic focus, the 10 European countries being skewed to the west. While recurring themes and tensions are identified, notably the tensions between efficiency and fairness, and between consistency and variety, there is no systematic comparison. The richness of ethnographic work, and its commitment to close attention to detail and ‹thick description› brings many important insights that challenge traditional legal conceptions of decision-making. To that extent, these works are valuable. Without wishing to oversimplify the richness and diversity of these accounts, alongside their focus on single systems, they tend to employ Lipsky's ‹street-level› bureaucracy frame, emphasising how deci-

sion-makers structure the considerable discretion at their disposal, in particular by constructing diverse forms of external expertise, while also focusing on the applicant's testimony and credibility as an overarching concern.

Asylum adjudication employs not only various sources of expertise to assess individual credibility, there is a complex set of institutional actors that formally report in various formats on the conditions in countries of origin. Country of Origin Information (COI), as this expertise is known, is produced in order to enable decision-makers to take consistent and reliable decisions in light of objective evidence. However, to the extent that its standardising impact has been studied, it appears to be limited. Femke Vogelaar's work on COI is noteworthy, particularly for highlighting different approaches to its compilation and use, often departing from established ‹quality› standards (Vogelaar 2021). Feneberg et al. provide a valuable case study of a point of contestation in German asylum law, a set of asylum appeals where the refugee status of those evading conscription in Syria was at stake (Feneberg et al. 2022). The preponderant view in COI materials is that such claims are properly regarded as ‹political›, so applicants generally ought to be regarded as Convention refugees. Notwithstanding this preponderant view, of the 14 Higher Administrative Courts' decisions analysed (issued from December 2016 to June 2018), seven rejected the argument for refugee recognition due to political persecution, while six recognised the applicant as a Convention refugee. The analysis demonstrated that judges drew very different conclusions from the same evidence using various tools to interpret, reframe and marginalise the persuasiveness of COI. The overall conclusion is that judges retain considerable discretion and form their judgements independently of the COI in many cases.

Most of the studies mentioned thus far tend to lack a comparative or transnational frame. They are either single-sited, or set out various national practices side-by-side. There are relatively fewer comparative studies. Gibb and Good have compared British and French practices, for instance comparing the role of interpreters in shaping intercultural communication between asylum applicants and the different administrative and legal actors who assess and defend their claims (Gibb/Good 2014). Gibb and Good have also examined various dimensions of the French and British practices in comparison. They have explored COI in RSD processes in both countries, finding vast difference in how it is compiled and used (Gibb/Good 2013; Good 2015).

In sociology in contrast, there is some genuinely multi-sited transnational work. Concerning German practices in particular, the sociological work of Lahusen, Schittenhelm and Schneider (2022) offers comparative insights on Europeanisation, with comparative case studies of practices in Germany and Sweden

(Lahusen et al. 2022). They identify three modes of Europeanisation, though norms, procedures and digital tools. Although national officials thought of themselves as being embedded in domestic institutions, their work was routinely shaped by EU law, the Dublin system and the EU digital tools. Eule, Borrelli, Lindberg and Wyss's co-authored book *Migrants Before the Law: Contested Migration Control in Europe* demonstrates the recurrence of certain practices across Europe (Eule et al. 2019). They focus on three sets of people with insecure migration status (asylum seekers, labour migrants and family migrants undergoing divorce). The inclusion of asylum seekers is noteworthy and the pervasive impact of the Dublin system in generating fear and precarity is captured. This leads to a further observation on the other anthropological and socio-legal studies of asylum: They tend to focus heavily on the process of actually deciding on substantive claims, be that at first instance or appeal level. However, access to those processes is not always readily secured, and a wider set of practices could be integrated to capture the decision-making processes that determine access to the actual asylum determination.[2]

In contrast to anthropology and sociology, comparative political science uses comparison instrumentally, seeking to explain the causes of variation. In quantitative political science, several studies identify variation in the outcomes of asylum procedures for applicants from the same country of origin, both across and within countries. These studies generally use published data on recognition rates and assume that those of the same nationality should be recognised at similar rates at the same time, all else being equal. Neumayer's important early study (2005), for example, notes considerable divergences in the treatment of asylum-seekers from the same nationality in his study of Western European asylum systems (1980–1999), which he in part explains due to domestic conditions in the asylum states, taking into account their economic and political conditions, as well as the numbers of asylum-seekers, both factors that from a strictly legal point of view, should not influence the recognition rates.

More recent studies on the impact of EU harmonisation have found some convergence. For example, Toshkov and de Haan (2013) find some evidence for convergence of the overall asylum recognition rates but important national differences in recognition of applicants from the same country of origin persist. Most recently, Hatton (2022) examines the outcomes of asylum claims across Europe, examining the impact of both the Qualification and Procedures Directives, and their recasts. Using panel data concerning recognition rates for claimants for 65

2 See the contributions of Johanna Günther and Lena Riemer in this issue.

countries of origin in 20 European states from 2003 to 2017, Hatton demonstrates varied impact of the two key EU Directives and their recast versions. Overall he concluded that the net effect of the Directives is positive, and that «contrary to prevailing impressions, average recognition rates have been increasing, and not only in the migration crisis of 2015–16» (Hatton 2022: 2). Most of the increase is due to the deterioration in the country of origin conditions, but his analysis demonstrates that «the EU directives also contributed to the upward trend despite pressures to impose ever more restrictive policies» (Hatton 2022: 2). Nonetheless, he notes that large differences in recognition rates between destination countries remain. In common with the other literature examined below, he suggests that the remaining divergences are attributable to diverse institutional constellations across Europe. His conclusion is that convergence requires a «Europe-wide integrated asylum system» (Hatton 2022: 2).

Hatton's conclusion is foreshadowed in other studies which seek to isolate and explain variation in light of the institutional design of the asylum system. An important set of insights concerns the impact of institutional design, in particular the degree to which asylum decision-makers have decisional autonomy and are insulated from political pressures. For instance, Sicakkan (2008) demonstrates that RSD institutional arrangements matter. Comparing EU15 member states, Norway and Switzerland over the period 1990–1999, he illustrates the impact of whether decision-making bodies comprise only national officials, or if they also include UNHCR or pro-refugee NGOs. His finding, perhaps intuitive, is that the presence of UNHCR and indeed NGOs leads to higher recognition rates. Thielemann and Zaun (2018) show that the delegation of asylum policy to supranational institutions allows individual states to depoliticise policies that may be unpopular with domestic populace, and prevent the proverbial ‹race to the bottom›.

Transnational comparative studies illustrate that shared norms do not lead to convergent outcomes. This finding is even more striking when comparing decision-makers within a single state. The authors of the leading US study, *Refugee Roulette,* Ramji-Nogales, Schoenholtz, and Schrag, identified that, in many cases, «the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge» (Ramji-Nogales et al. 2007: 295, 378). They analyse the outcomes of c. 400.000 decisions and judgments in the US asylum system, and find high levels of variation even within the same office, that was explained not by the strength of the claim, but the identity of the decision-maker, including her gender and previous professional activity. Deep divergences are also revealed in studies on Germany (Riedel/Schneider 2017). A 2020 study on the German federal system

by Schneider, Segadlo, and Leue uncovers «considerable spatial inequities», not only amongst authorities, but even at court level (Schneider et al. 2020: 576). Holzer and his colleagues find that in Switzerland recognition rates vary in different cantons due to the various ways the asylum administration is organised as well as the share of the foreign population residing in that state and thereby the attitude of Swiss citizens toward immigrants and asylum seekers (Holzer et al. 2000).

Working in qualitative comparative political science, the leading comparative study of RSD processes is that of Rebecca Hamlin (2014). Her book *Let Me be a Refugee* compares asylum in Australia, Canada and the US, comparing three particular sets of claims – Chinese one-child policy claims, gender claims, and claims from those fleeing war under complementary protection systems. She notes divergences in recognition rates and explains these by reference to the degree of institutional autonomy in the asylum system, that is the extent to which decision-makers were insulated from political pressures. She is comparing systems that are fairly similar, and also quite legible in terms of being able to isolate the recognition rates for particular types of claims. The work of identifying the outcomes of particular sets of claims depends precisely on being able to access this data, and then develop explanations by engaging qualitatively with decision-makers about their approaches and institutional constraints. Hamlin's insights have been used to generate new hypotheses to test in wider quantitative studies. For instance, Van Wolleghem and Sicakkan (2022) have recently tested a hypothesis about the impact of the «features of a given administration» on recognition rates (Van Wolleghem/Sicakkan 2022: 2). They demonstrate that a capable administration with significant experience in asylum questions displays higher refugee status recognition rates, and yet with enduring differences across statuses.

In this respect, comparative studies offer greater insights than single-sited qualitative studies, which often confirm that ‹street-level› decision-makers exercise ultimate discretion over the outcome of claims, but cannot beyond that explain the differences across sites *or* decision-makers. Quantitative comparative political science tends to explain the causes of variation by regression analysis, using external data sets to trace whether particular factors have a causal effect on outcomes of cases. Hamlin's qualitative comparative work employs a ‹most similar case› design to seek an explanation across the three ‹cases› (i.e. systems) for the variation (Hamlin 2012; Hamlin 2014).

While most of the comparative studies focus on comparisons within or across European states, the US and other high-income countries, Issifou's recent study

for the World Bank examines the recognition rates in 201 origin and 113 destination countries from 2000 and 2017 (Issifou 2020). It finds that political factors in the destinations countries (examining polarisation and election cycles in particular) reduce the efficiency and «generosity» (his term for higher recognition rates) in high-income countries, while these effects are not seen in middle- and low-income countries (Issifou 2020: 23).

In contrast to traditional quantitative methods in political science, digital methods offer researchers the opportunity to ‹read› the entire corpus of asylum decisions and indeed evidence on file, and identify problematic variation from within the system. To illustrate, drawing on archival records of a large representative sample of asylum applications filed in France between 1976 and 2016, Emeriau finds that Muslim applicants are 30 per cent less likely to be granted asylum than Christian applicants. However, she finds that the effect dissipates over time, with decision-makers' years of work experience (Emeriau 2022). The French asylum office made available all of its archive to researchers, and she used digital and traditional quantitative methods to digitise a representative sample of cases (including an anonymised marker for each individual decision-maker), as well as the transcript of the testimony and the text of the decision. With machine learning, she developed a system to categorise the strength of claims and then assess whether claims of equal strength were treated equally. Unlike the previous studies, which tended to assume that cases from the same country of origin ought to be treated the same, she identifies claims of similar strength and found discriminatory outcomes. With these new methods and tools, researchers can identify particular problems in decision-making, and indeed offer solutions. Rather than the abyss of discretion, we find particular blind-spots in reasoning that are open to correction.

3. Gaps in Institutional and Geographical Coverage

Striking limitations of the scholarship remain. Most studies focus on the practices of handful of states in the Global North, with the exception of Issifou (2020). There has also been a tendency to ignore the role of UNHCR, both as a decision-maker in over 50 states, and an entity with a role (both formal and informal) in domestic systems (with the exception of Sicakkan's (2008) assessment of the impact of UNHCR as part of some European asylum systems). There is relatively very little ethnographic study of UNHCR Mandate RSD, with one exception (Fresia/von Känel 2016).

Despite empirical findings related to RSD at the national level, there is very little empirical scholarship on mandate RSD by UNHCR. Some legal scholars examined UNHCR's RSD practices in the late 1990s and early 2000s, notably Michael Alexander and Michael Kagan. (Alexander 1999; Kagan 2002). Two recent scholarly movements have also assessed mandate RSD, albeit in a limited fashion. The significant body of work on ‹global administrative law› includes one study of mandate RSD (Chimni 2005). Similarly, the scholarship on ‹international public authority› includes one contribution to these practices (Smrkolj 2010). Both contributions share the negative assessment of UNHCR practice from a procedural justice point of view.

Thirdly, there is a tendency to focus on the practices of dealing with asylum claims once they are subject to a full examination, ignoring the various processes that determine access to that examination (such as registration and admissibility proceedings), or even recognise refugee *en masse* without individual recognition (Ozkul/Nalule [2023]; Wood [2023]). The aim of the *RefMig* project has been to engage with the breadth of practices that make up the recognition regime, including registration and mass recognition. We found that in many contexts, these practices are less legible than formal RSD, which generally tends to result in published recognition data.

Nonetheless, given that refugee protection is mainly the business of states in the Global South, with some considerable delegation to UNHCR, studying these practices is literally vital. Some recent contributions in comparative political science have explained the puzzle of ‹discrimination and delegation› in light of domestic political factors, most notably Lamis Abdelaaty's ground-breaking 2021 book (Abdelaaty 2021). Based on global statistical analysis and three casestudies (of Egypt, Turkey and Kenya), she offers an explanation as to why states welcome some refugees and not others, and why they delegate refugee protection (including RSD) to UNHCR. Her explanation identifies two key explanatory factors, both rooted in domestic political concerns, one as regards ‹affinity› with the potential refugees, and the other concerning geopolitical relations with the refugee-producing state. Her unique contribution is to consider the puzzling delegation of RSD to UNHCR, which defies many conventional accounts of state-International Organization relations.

In the *RefMig* project, we initially aspired to do a selection of case studies of key host countries, comparing refugee recognition regimes, and the practices whereby UNHCR hands over RSD to states, often assisting with the construction of the state asylum regime. As well as employing a range of qualitative methods, *RefMig* researchers have also used the classic methods of quantitative com-

parative political scientists: recognition rates. In particular, Mitali Agrawal has studied the influence of politics on recognition rates in UNHCR Mandate RSD compared to state-led RSD mechanisms, exploring the extent to which UNHCR may be characterised as less politicised than national decision-making bodies (Agrawal [2023]). As well as interviews with protection seekers and refugees in key sites, we also interviewed UNHCR decision-makers, current and former, Jessica Breaugh conducted the first survey of those decision-makers, and the legal aid providers who represent applicants in these proceedings (Breaugh [2023]). Analysis of this data is ongoing, and provides much needed comparative and transnational insights into the practices that determine access to refugeehood globally.

4. Conclusions

The studies cited above provide invaluable insights into asylum decision-making. Overall, the empirical evidence suggests that outcomes depend somewhat on the legal rules and strength of the cases, but also on extraneous political factors and the identity of the decision-maker. The extent to which the individual decision-maker is determinative could be framed as the question of discretion, which dominates sociolegal studies of asylum systems. These studies tend to emphasise above all the discretion of the street-level decision-maker, but do not generally treat this as a question of degree. In contrast, in comparative political science, the scholarship on institutional design in particular suggests that the scope and nature of discretion is a factor of institutional design, and so may be limited and constrained.

To conclude, the high degree of variation in asylum outcomes is a challenge for legal scholars, who imagine that officials apply rules to cases in a manner that determines outcomes. While Hatton (2022) demonstrates that EU rules do have an impact on the outcomes of cases, the high degree of variation remaining across EU Member States, and indeed more strikingly, the high degree of variation within states, demonstrates that the rules do not determine the outcome. Some of the remaining explanations are a frontal challenge to the normative assumptions of the rule of law: Most of the evidence points to a huge impact of the decision-makers' identity, including her politics and previous professional background. This leads Noll to conclude that «[E]vidential assessment in the asylum procedure is dysfunctional. […] [I]ts rules on the burden and standard of proof are inconclusive at best, deceptive at worst; and its protective track record is

dismal with significant variations between individual decision-makers persisting over years. This puts into doubt the larger project of rendering asylum outcomes more predictable and harmonized, be it through international or regional law» (Noll 2021: 620). Noll's conclusion is not that law is generally an illusion for the power of bureaucrats, but rather that the particular failures in asylum law to regulate evidential assessment appropriately contribute to the high level of discretion afforded to decision-makers. However, Noll rules out many of the apparently easy fixes for this predicament, including training for decision-makers. In contrast, Emeriau's multimethods approach identifies both a tractable problem, and its possible solution. Her approach entails digitising an entire corpus of decisions, and identifying discriminatory patterns within a single centralised bureaucracy. In the particular case, she finds that this ‹problem› dissipates with decision-makers' greater experience (Emeriau 2022), suggesting that improvements are possible over time.

In the *RefMig* project we have confronted a wider range of institutional actors and practices, and have tended to focus on practices of mass recognition, where the role of the individual decision-maker is reduced, and a general political decision taken to recognise refugees *en masse*. With the EU's unprecedented collective decision to offer ‹temporary protection› to those who fled Ukraine since the unlawful Russian invasion of 2022, practices of mass recognition have been visible also in the EU. As we draw our various findings together, with a range of global practices in view, we suggest that it may well be time to treat highly individualised asylum procedures are inherently prone to arbitrary variation, rather than embodying the rule of law as often assumed in the EU.

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