“Should I stay or should I go?”

Irregularly somewhere in the middle

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Refugees and migration are a great challenge in world politics. The global challenge of refugees and human rights is a complex and broad topic within the international law to which the States are trying to find effective measures and solutions fast. This thesis is about to provide knowledge and better qualified arguments for discussions as well as for sustainable legislation and practices, taking also the process economic point of view into the consideration. This thesis is especially an analysis of the asylum interview´s significance, and its role as a fork on the road of becoming irregular migrant.

This research deals with asylum processes among national, regional and international legal frameworks, and clarifies how Finland and Finnish legislation, regulations, policies and practices are positioned into the international legislation and regulations. The research focusses on the role of national and international legislation and practices in creating irregular migrants. Epistemic violence and challenges in linguistic exchanges are of great importance in this thesis.

With this research, I will show how the society, consciously or unconsciously, creates a group of people living in a vulnerable situation, and show the importance of the asylum interview in terms of process economy and legal security by bringing together elements from legal dogmatics as well as from sociology of law. As a material I have used mainly primary and secondary sources, mostly law and politics documents.

The main purpose is to provide critical, yet constructive and pragmatic views on migration.

Key words

International law, irregular migration, epistemic violence, access to justice, process economy

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Abbreviations

CJEU	Court of Justice of the European Union
CLS	Critical Legal Studies
CRF	Charter of Fundamental Rights of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
UN	United Nations
UNCHR	Office of the United Nations High Commissioner for Refugees
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 The Story

> *"…My only option was to escape from Iraq. Our security was constantly threatened. Pressure and the lack of life opportunities made me accept a human traffickers' offer. I gave them a large amount of money. They took my passport. I don´t want to go into the details but many of us had to sacrifice even their physical integrities without any certainty of survival, or what was waiting for us. I was hiding in the trunk, small boxes and apartments. We were not allowed to ask any questions, nor speak to anyone. The desperate road .to Europe lasted so long that I lost my sense of time, I did not know where ever we were…"*
>
> - *35-year-old man from Iraq in Finland*[1]

The entire asylum process and the asylum decision are based and depend on the *story.*[2] The processes and decisions are based on individual history, and on how the person has told it. The *story* needs to be personal, coherent, well-founded, credible and detailed. The situation changes all the time. Asylum seekers´ personal qualities, the ability to understand the asylum system and individual perseverance are emphasised in the processes. It is very difficult to know how the story of this individual will be understood in the asylum procedure; how the interpreter translates it and how the interviewer then interprets it. Taking into account, moreover, the fact that the applicants are often times traumatised, the qualifications for a coherent storytelling are somewhat unlikely.

Asylum seekers themselves have very few possibilities to manage and govern their own processes. Authorities of the receiving country have the power to govern and control the possibilities and lives of the asylum seekers. This somewhat hegemonic control seem to include and involve making the asylum-seekers unaware of their own situation and

[1] Yle, 26.8.2015
[2] Kymäläinen & Nordström 2010, p. 80

processes.[3] The processes, interviews and meetings are constantly being postponed and transferred, and there is not always proficient interpreter in the asylum interview, which in my point of view, is the most important part of the whole process.

Refugees and migration form a great challenge in world politics. Few years ago, migration flows rose sharply to the top of discussions in media as well as in the day politics. Until now, the political, legal and social discussion have based distinctively on gut feelings, ideologies and, in the media discussions they have rarely had a scientific backround. The tightening amendments on legislation has been made in extremely fast timely manner.[4] This thesis is about to provide knowledge of the migration and asylum processes for the benefit of more sustainable legislation and of better qualified arguments on media and political discussions also from the process economic point of view.

In 2015, approximately 32 746 people came to Finland to seek an asylum.[5] Finnish authorities were not prepared well to this flow and as a result, the conditions for obtaining asylum and other residence permits to Finland have been constantly tightened since then. This progress often lets the asylum-seekers feeling themselves insecure and unconscious about their own processes and about their possibilities to continue or start a new life here in Finland. Finland also started to give deliberately poorer picture and image of itself to outside to avoid more migration flows like the one in 2015.

Some of the asylum seekers who came to Finland in 2015 were legally entitled to receive asylum in Finland. However, majority of them were not. In 2016, the Finnish Migration Office (Migri) made a total of 28 208 asylum decisions granting asylum and residence permit to 4 586 persons, residence permits on the basis of subsidiary protection for 1 789 persons, and humanitarian protection for 50 persons.[7] Residence permits could be obtained on the basis of humanitarian protection if the conditions for asylum or subsidiary protection were not fulfilled but the applicant could not return to their home country due to a poor security situation or an environmental disaster.[8] This possibility was removed from the law later in 2016. These statistics are showing how important these asylum

[3] TERRA, 2017, p. 54
[4] HE 32/2016 vp.
[5] Migri 2016
[7] Migri 2017
[8] Aer, 2016, p. 253

processes are also from a process-economic point of view as the great number of asylum applications go back and forth between different instances.

As the European Union (EU) and Finland are tightening their asylum policies, more people become irregular migrants as not all who get a negative decision to their asylum requests want to leave or feel that they could leave.[9] Also, because of the tightening of the external border control in the EU, it has become more difficult for non-EU nationals to access legally the EU territory to seek employment opportunities or to seek international protection. Actually, in Finland, asylum applications can only be submitted to the Finnish authorities after crossing the border.[10] The principle of international law is that an alien does not have the general right to settle in another country. The need for international protection is generally examined in relation to the country of origin, country of nationality.[11] Sometimes it means a country in which the asylum-seeker has never even truly lived, or from where he or she has fled as a child.

For the first time, the phenomenon of irregular migration has been recognized as a political challenge many decades ago.[12] People have always sought safety, better future and better possibilities, and migrated, moved abroad. In 1944, approximately 56 000 Finnish refugees fled to Sweden. In the late 19th century, 370 000 Finnish migrants fled to the Americas due to unemployment, social problems, Russification politics and the spirit of adventure.[13] According to the Swedish historian Mikael Byström, stereotypes that refugees do not want to work and they use and take advantage of the receiving state´s system, and weaken conditions already existed at that time. The dependence, social position and reality of the asylum-seekers are often times based on these stereotypes, and historical narratives.

In this thesis I will deal with asylum processes, specifically asylum interviews, the creation of a group of people living in an irregular situations and epistemic violence as a part of international law. Epistemic violence is a useful concept in the research concerning asylum-seekers, migration and irregular migration as the difficulties in linguistic

[9] Düvell, 2011, p.288
[10] Aer, 2016, p.259-261
[11] Aer, 2016, p.272-273
[12] De Genova, 2002, p. 419-447
[13] Institute of migration (2011)

communication, conditions and real life possibilities of migrants are of great importance on the credibility and success on administrative processes such as asylum process.

This research deals with asylum processes among national, regional and international legal frameworks and clarifies how Finland and Finnish legislation, regulations, policies and practices are positioned into the international legislation and regulations.

This thesis focuses on the role of national and international legislation and practices in creating irregular migrants. I approach the topic by answering the following research questions:

1) How Finnish practices, policies, regulations and laws are positioned in the international legislation?
2) What rights asylum-seekers have regarding representation and to whom these rights are directed, and whether these rights are fulfilled or not?
3) How asylum-seekers own voice, own personal reality and situation affect on his / her asylum process and decision?
4) Does the subaltern have a voice in asylum processes?

Through these questions, I will show how the society consciously or unconsciously creates a group of people living in a vulnerable situation, and show the importance of the asylum interview in asylum processes in terms of process economy and legal security.

1.2. Conceptual framework – terms and definitions

The concept and phenomenon of migration in general, migration policies, asylum processes and irregular migration in particular form a complex theme. There is no legal and internationally agreed definition for irregular migration in the whole world nor in the Finnish legislation. The authorities use these terms the most variable ways depending on the situation. The use of definitions of migrants, asylum seekers, refugees, persons who have received positive asylum decision and the ones who have got the negative one, vary

highly, and their use is often times incoherent and misleading in public discussion and even among people working in the field. To be able to truly understand and perceive the situation, phenomenon and practices, I find it important to clarify the definitions and conceptualise clearly the terms used in this research.

Migrant is any person who moves to a foreign state, including all of the migrant groups from the labour based migration to the refugees. According to United Nations Educational, Scientific and Cultural Organisation (UNESCO), the term is a narrow definition for any person who lives temporarily or permanently in a country where he or she was not born.[14]

Asylum-seeker is a person who defines himself / herself as a refugee but whose claim has not been definitively evaluated. An asylum-seeker is seeking protection and the right of residence from another state.[15] Every individual has right to seek asylum but the grounds for a state to grant asylum remain under the state control.[16] The states have not any obligation to grant asylum according to international law. In Finland, the law on reception of persons seeking for international protection deals asylum seekers.[17] The asylum seeker receives asylum if he / she fulfils the criteria for refugee status based on the asylum procedure.[18] Asylum-seekers are individuals who are escaping but who are not defined as a refugee according to the Western normative framework.[19]

Refugee is a person to whom the United Nations High Commissioner for refugees (UNHCR) has granted refugee status or to whom this status has granted by some state.[20] According to the Geneva Convention, a refugee is a person who has a legitimate reason to fear of being persecuted in his country of origin because of his / her origin, race, religion, nationality or opinion or because he / she belongs to a particular social class.[21] He or she must reside outside his / her home country, and because of such a justified threat, cannot or is unwilling to return there. The person can also be without any nationality.[22]

[14] UNESCO
[15] Crawford, p.529-, see also Cholewinski etc. 2007
[16] e.g. Crawford, p.374, 498
[17] Reception Act, 17.6.2011/746
[18] see also Hakapää, 2010, p. 245
[19] Zetter 2007, p.172-
[20] UNHCR, see also Koskenniemi
[21] 77/1968, Geneva Convention
[22] Crawford, p 373-396

Even if the term refugee is usually used in media as a general term for migrants, it means actually just one group of migrants deserving protection by a host state under international law.

A quota refugee is a person to whom UNHCR has already granted a refugee status and who arrives in the country under the state-determined refugee quota.[23]
It has been said that the legal definition of refugee has done as much to exclude people in grave need.[24]

Irregular migrant, illegal migrant, undocumented migrant, paperless … this heterogeneous group of people has been called in variable ways. There are not any internationally agreed term or definition for this group of people. In Finland, there is not even any law regulating their rights. In this thesis, I use the term irregular migrant / migration because in scientific literature it seems to be the most neutral term. So, irregular migrant is a person living in a state without full legal right for his / her stay, and whose stay in that State is not accepted by the authorities of that particular State.[25] The paths into the irregularity are numerous. Sometimes the authorities do not even know about the stay of an individual. In Finland, there are not any specific regulations related to the migrants in irregular situations in particular so the concept of the phenomenon is also still open. However, public discussion and everyday perceptions of irregular migration have become more intense as the phenomenon is becoming more and more likely to produce side effects.

This category also includes *the new paperless* people. A group of people in an irregular situation that the State´s authorities may even know about, but which cannot be legally removed from the state.[26] Some of the irregular migrants are legally stateless, and the problem is that their nationality is not effective in enabling them to return home, or in giving them diplomatic protection and assistance while they are abroad.[27] Some of the scholars studying irregular migration, includes also persons who are just not willing to

[23] UNHCR, see also Migri/quota refugees: Finland has received 750 quota refugees/ year since 2001. The quota was increased in 2014 and 2015 due to the situation in Syria.
[24] Kennedy, 2004, p. 134
[25] Crawford, see also Gadd, 2017, p. 133-135
[26] Jauhiainen & Gadd, 2017, p.11
[27] Grant, 2007, p. 29 and 42, see also Crawford

leave the country but who can be expelled when caught up, in this group of new paperless people.[28] I will clarify this phenomenon more specifically in the following chapters.

The paths into the irregularity are numerous. Somebody may stay in the country even the visa has expired. One has paid to the smuggler and reached the border without a passport. The other has not received asylum and has remained silent in the country hiding himself / herself. They are like a shadow society that citizen and decision-makers do not notice. Few know that there are more irregular migrants in Europe than Finnish people.

Because of a real or perceived danger of detection, migrants in an irregular situation often refrain from approaching medical facilities, sending their children to school, registering their children´s births or attending religious services.[29] These day-to-day challenges drive migrants even further underground, depriving them of access to public services and making them more vulnerable to exploitation and abuse. These migrants in an irregular situation will rarely be treated as victims of crime.[30] Their voices seem to be silenced as their abilities to run their own rights are made tenuous as they are often times afraid of detection and return.[31] This effectively bars their access to justice. Especially migrant women in an irregular situation are at heightened risk of exploitation and abuse because of the cultural backround, lack of education and information.[32]

Subsidiary protection is a secondary, subsidiary protection status for third-country nationals that is not linked to the refugee status but to the ban of removing from country. This status is primarily based on the case law of Article 2 of the European Convention on Human Rights. According to Finnish law,[33] a foreigner residing in Finland is granted a residence permit on the basis of subsidiary protection if the conditions for asylum are not met but there are significant reasons for believing that if a foreigner was returned to his country of origin, he would be in serious danger of serious harm, and he or she is incapable or because of the serious risk, reluctant to resort to the protection of that particular country.[34]

[28] Jauhiainen & Gadd, 2018, p.11-20
[29] FRA, 2016, p. 6
[30] Ibid, see also Weissbrodt, 2007, p.221-235
[31] I will clarify this claim in the 3rd chapter, see also Dotson and Spivak etc.
[32] Piper, 2007, p.237 and 251
[33] Aliens Act, 88§
[34] Aer, p. 249-252, see also Byrne, p. 165-167

Numerous terms and definitions already show how broad the issue is and the wide spectrum of different situations that often times are put together in one umbrella term. In this thesis I conceptualise irregular migration as a process that is constantly evolving. This definition enables a comprehension of irregular migrants as active agents whose own acts, practices and voice and presence transforms societies but also whose existence is transformed by the same societies. As a whole, the backgrounds of asylum-seekers for a residence permit are diverse.

1.3. Research design, material and methods

Through a formative evaluation, this exploratory research provides an illumination and better understanding[35] of the asylum processes and the asylum interview in particular as a fork in the road of becoming irregular migrant. The name of this thesis: "*Should I stay or should I go?" Irregularly somewhere in the middle,* describes the migration and the stay in a foreign country, above all, as a migrant´s own decision, and therefore asylum-seekers and irregular migrants as a part of our social environment, whose realities need to be taken into consideration as a part of the decision-making. The question is about the decision that some of the asylum-seekers make regardless of the result of the official asylum process.

This thesis is based firstly on primary and secondary sources, mostly law and politics documents. With these sources I review the first two research questions dogmatically and analyse how the interpretation of law has evolved in legal literature and, in particular, in case law. As a research material I have also used the migration office´s instructions, preparatory and explanatory documents of laws and public debates. European Union law has emphasised a teleological interpretation of law. On the other hand, the fundamental and human rights-friendly law doctrine highlights value-based interpretation.[37]

I use the information produced by my legal-sociological empirical research to help legal interpretation, systematisation and weighing.[40] With this empirical and qualitative

[35] Hart, C. 2006
[37] Hirvonen, 2011, p. 40
[40] Siltala, 2003, p.134-135

approach to the topic, my goal is to truly understand the subject studied and the phenomenon (Aristotelian tradition).[41] This empirical approach ensures the possibility to look at legal phenomena from different perspectives.[43] As a method, I use discourse analysis of legal texts. Discourse Analysis is a social science research tradition interested in producing texts and their meanings in their social context.[44] The analysis is motivated by social problems that the researcher seeks to better understand.[45] [46]

Ethnographical research on this topic, physical real life observations by being present in people's surroundings and in concrete interaction situations with people studied would be fruitful and extremely meaningful.[48] However, to have a limited and structured focus in this Masters´ thesis, the ethnographical approach to the topic has been left out of this research.

Empirical legal research has been practiced in the Western countries since the 1960´s but the approach has been extremely limited in Finland.[49] In my opinion the traditional law doctrine needs the information about the real world, and real situations. According to Ervasti, there is a need for empirical research both from a practical and a scientific point of view.[50] The mere internal view of the law is not sufficient to outline the change of law and the changing environment.[51]

To determine the world refugee situation, I have relied in a great deal on the UN Refugee Agency publications and on scientific articles on the theme from different angles. Regarding to the statistics on irregular migrants arriving in Europe and in Finland, I have taken advantage of the up-to-date statistics provided by Frontex and Eurostat and Finnish Migration office. As a basis for analysing case law, I have used the recommendations on cases and reports on country-specific asylum situations prepared by the UN Refugee Organisation. The European Court of Human Rights (ECtHR) as well as the Courts of the Member States use also these documents in their own case-law.

[41] Kainulainen, 2004, p.17
[43] Kainulainen, 2004, p. 26
[44] Jokinen etc, 1993, p. 9-10, see also Lähteenmäki, p.98
[45] Van Dijk, 1993, p.252-253
[46] see also Hirvonen, 2011, p.52
[48] Ferell & Hamm, 1998
[49] Ervasti, 2004, p. 9
[50] Ervasti, 2004, p.14
[51] Ervasti, 2004, p.15

According to the refugee agreement, the UN Refugee Agency is responsible for monitoring the application of international conventions on the protection of refugees, and also for "enforcing international conventions on the protection of refugees".[53] Furthermore, Article 35 of the Convention and the 1967 Protocol set a special obligation for Member States to cooperate with the UN refugee agency. The UN Refugee Organisation also provides different guidance and recommendations to the Member States. Although these recommendations are not formally binding, they may, however, have factual relevance.[54]

The role of the United Nations Refugee Organization depends greatly on the willingness of acceding States to the refugee agreement to cooperate with the UN refugee agency.

I point out the possible growth of the group of irregular migrants living in Finland even if it is not possible to say exactly how many people are living in such circumstances.[55] Most of the official statistics are merely assumptions due to the characteristics of this vulnerable group. Many of the authorities are also unwilling to give more information about this phenomenon. However, for a research on undocumented migrants in Finland in 2017, 100% of the Finnish municipalities responded to a poll according their notions and practices with irregular migrants in their territory.[56]

In the last chapters of this thesis I will analyse and make my own conclusions on the issue: on practices, especially during the individual asylum interviews, on tightening regulations and on the case law. I will also handle the current system, point out few suggestions, and discuss how the processes could be developed in terms of process economy and legal security.

This thesis is located into the area of international refugee law. On one hand it is dogmatic review clarifying what is the content of the current legislation and regulations on asylum processes and on irregular migrants, and on the other hand it analyses how the Finnish practices are situated and positioned into the international law and the binding international agreements. Therefore, I will deepen the topic both, at international and national level. This research focusses in particular on asylum-seekers own role and

[53] Refugee Agreement, preamble (6)
[54] Goodwin-Gill – McAdam, 2007, p. 217
[55] Grant, 2007 p.30
[56] Jauhiainen, Gadd, 2017, p. 23-

representativeness in the asylum process, and on these elements in relation to asylum decisions. Particularly important here is the significance of the interview. That is the reason asylum interview has its own subchapter in the second chapter.

I also highlight how the interpretation and representativeness have changed in the reality through tightened regulations. The other part of this thesis and subject is part of legal politics and I use the means of Critical Legal Studies when dealing critically, yet constructively and pragmatically, with the current system by challenging and overturning accepted norms and standards. The underlying notion in Critical Legal Studies is that the law is part of politics and regulations require political will, and therefore, is not neutral or value free.[57] Critical Legal Studies has questioned also the determinism of law, and objectivity as well as its impartiality.[58] To wake up the reader to pay more attention to effects, this thesis links legal and sociological approach together bringing up elements of Critical Legal Studies on the side of legal dogmatics.

It is justified to approach the topic of migration and epistemic violence by the means of Critical Legal Studies as the phenomenon contains hierarchical power. Moreover, the structures and the law and administrative processes as an instrument can potentially be used to direct the social, economic and legal effects of the migration in different directions. I will discuss the existence of epistemic violence also discursively by raising up asylum-seekers own voice, which has been silenced.

The legal order and the legal rules are ambiguous and inconsistent. The rule of law is greatly dependent on the surrounding society, and therefore, in law, the power and power relations and dependences of the society play a major role. Justice is therefore constantly changing and strongly dependent on the applicant.[59] The decisions are based on the values of a certain society and often on the national interests of the nation state.[60]

Epistemic violence experienced by asylum-seekers and irregular migrants has not been studied in legal literature and from legal bases in Finland, and that underlines the need for pragmatic scientific research for the benefit of sustainable decisions and regulations.

[57] Alvesalo & Ervasti, 2006, p.40
[58] Petman, 2002, p. 73
[59] Petman, 2002, p.73-77 and Koskenniemi, 1999
[60] Abbot,1999, p. 366

I review epistemic violence as a legal, yet as a socially interactive, phenomenon creating a group of people living in vulnerable and irregular situations.

Although the importance of asylum interviews is widely underlined, their role in the asylum processes in general and especially in partly generating irregular migration, has not been directly studied. This kind of research is needed to develop our, as well as global, asylum processes to be more sustainable in legal, economic, human and process-economic sense.

Through the case law that I have brought up, I look at the importance of this first asylum interview, and point out the existence of epistemic violence suffered by asylum-seekers and the difficulty of these processes for the asylum-seekers. I don´t look at the cases for the result itself, but for the significance of the possible mistakes and misunderstandings in the conversations or translations.

Because of the complexity and special characteristics of both, refugee law and international law, my methodological approach to the research is somewhat multidisciplinary. The law-making, especially in international field, always means balancing between the different interests, and therefore, I believe that the interdisciplinarity is needed in this field too. Interdisciplinarity improves the perception of international law´s relevance bringing many fields together.[61] In the scientific researches of law, legal dogmatics has traditionally emphasized as the core area of law to which legal scholars should focus on.[62] Tapio Määttä has highlighted that the law can be described inwardly excluding other approaches, or outwardly open seeking interaction with other disciplines.[63] I believe that many of the phenomena and effects are missed when limiting too much disciplinary borders.[64] This interdisciplinary research broaden the consciousness of reality of migration and response to the fundamental international challenges of the phenomenon.

As an advantage of the interdisciplinarity, one can see the notion that it can improve the perception of international law´s relevance by showing the numerous perspectives of the

[61] Korhonen, 2017, p.623
[62] Ervasti, 2004, p.10
[63] Määttä, 2000, p.333-355
[64] see also Korhonen, 2017, p.631-

issue pragmatically and constructively.[65] It is important to notice that the legal phenomenon has also direct implications on politics, economics and on security, and therefore, interdisciplinarity increases the value and significance of this research. Interdisciplinarity requires scrutiny and strong substance knowledge to ensure that the disciplinary borders would not be blurred too much, and that the research would not lack of focus.[66] Being a extremely complex theme, the interdisciplinarity requires a lot of studies and readings and repetition for not losing the red line during the process.

However, I find it important, firstly, to have a strong disciplinary substance knowledge to then be able to benefit from crossing influences. Therefore, the central research methodology in my thesis is legal dogmatic, as it aims to clarify the content of valid law systematising current situation and legal doctrine, and to present justified interpretative views on regulations. This is a qualitative research as it concentrates on some cases rather than solely on large statistical data.

I will concentrate on the voice and abilities of asylum-seekers in their own processes, representation and on the phenomenon of creating the group of people living in vulnerable and precarious circumstances – as irregular migrants. Even if these terms, asylum-seeker and irregular migrant, might seem linearly distant to each other within asylum procedures, I will show their close connection and meaning in transforming each other in the following chapters.

Although the law is understood in this study, as in a legal-sociological approach, broadly, the focus is mostly directed on formal law and its actors. From the legal point of view this timely research is significant showing how the migration politics and legislation might create a group of people living in vulnerable and precarious circumstances.

First this research analyses and systematise the laws on migration and asylum processes and the policies that lay the preconditions for irregular migration. Second it examines the epistemic violence suffered by asylum seekers as a path into irregularity and as a practice that contribute to the growth of the group of irregular migrants. Finally, it interprets the results within the frameworks of international case law.

[65] Korhonen, 2017, p.626
[66] Hirsch, 2015, p.185

For many of the theories of the international law, raising the decision-makers and –making to the centre is a common thing. According, for example, to the New Haven school of thoughts, international law is a decision-making process in which authority and control are greatly connected to. Authority, hegemony means that the decision-making process can only be participated in the competence conferred by the Community.[67] This school raises up the hegemonic structure of competences from colonial times. In a system where decision-makers, their interests and the balance of power are crucial, it is difficult to ensure that all equally binding human rights are secured.

The third question is related to asylum-seekers´ individual situation. The object is to search whether the asylum-seekers´ own situations, voices and the abilities to tell the story affect on the success of the process or not.

It is important to understand, within the refugee-related issues too, the special characteristics of international law. Great part of the key issues in international law, e.g. human rights violations, are far more than just legal issues. That is why it is justified to deal the issue from a larger perspective too. The challenge of international law is to broaden the doctrine´s understanding and to find a better understanding of the law, so that issues such as injustice can also be dealt within international law.[68]

In spite of different stories, situations and paths into migration and irregularity, the experience of precarious conditions and uncertainty of stay combine the individuals. The conditionality of the stay is a connecting element, and for that reason, it is justified to look at the different *types* of aliens together.

1.4. Researcher´s position and interest

The topic of this thesis was chosen because of its timely significance. I had already participated in doctoral dissertation research about marginalised groups and I had written my Bachelor of Laws´ thesis about Human Rights within cross-cultural relations. I was worried about the quality of the public debates on migration and by the growing polarisation and tighter opinions without actual argumentation being grounded

[67] Lasswell and MacDougal, 1971, p.384-385
[68] Goodrick, 2008, p. 334

reasonably. Right after deciding on my research topic, I got a job as a legal assistant and trainee in a company with the majority of its customers being asylum-seekers. Getting acquainted with new investigations, cases, legislation and with the process itself, I wanted more and more to find concrete solutions to the challenges which emerges in my day-to-day work. As a part of my job was to go through clients' decisions and to notify asylum-seekers about their situations together with the lawyer.

I started to see high-quality communication as one of the biggest challenges at the various stages of the process. Therefore, as a part of my own work, I wanted to challenge myself and to develop practical ways to correct the possible grievances and weaknesses. These experiences shaped my final research questions. Concerns and my own work experience were therefore the key researcher contexts that led to this research. The research context also involves reflections on why I am studying exactly what this research is about, and what is the outset which, as a researcher, I bring with me to the research process.[69]

My position working in the field as well as the data I have used: literature, case-law and legislation documents therefore all affect how I parse and see the reality and challenges. From this position, I look at the results. This is characteristic in qualitative research: the researcher never make analysis of the content in a complete vacuum but our knowledge of reality is constantly socially constructed[70] and the processing and analysis of the data are intertwined.[71] I have had to recognise the subjectivity involved but at the same time, I wanted to challenge myself to be able to, in a emancipatory way, create better solutions to the challenges.

Working on this topic has brought me a strong *a priori* information, which is why I have had to consider the question of how much, and in which manner I am able to scientifically use my knowledge for the benefit of this research. I have confronted difficulties on defining what is experience-based information, that I can not escape from. That is why I have strictly limited the empirical material used to legal texts, current legislation, case law and to previous scientific researches of the topic. Ethically, however, it is important to highlight the challenges identified in the asylum processes in order to raise the interests and rights of vulnerable groups.

[69] Pietikäinen & Mäntynen, 2009, p.148
[70] Alvesalo & Ervasti, 2006, p. 41, see also Harding, 1995 p. 331
[71] Alvesalo & Ervasti, 2006, p.28

Researcher's subjectivity in the research process has been the topic written especially in the field of feminist research. However, these reflections are possible and fruitful to apply to any research.[72] Insider research approach is justified so that new challenges can be met, and therefore insider research has become more common in various disciplines.

Insider research has been most common in ethnographic field research e.g. in the discipline of sociology, and it is said that it can help to reach a deeper level of introspection in researches.[73] In this research, I have positioned myself as a *insider-outsider* having strong prerequisite information on the asylum processes, practices and working in the field,[74] without being part of the vulnerable, social group of people such asylum-seekers.

The ability to see the challenges and to have more profound knowledge of the practical happenings of the field are seen as an advantage in insider research.[75] However, there are also critics arguing the lack of objective perception and analysis,[76] and highlighting the risks of the assumptions based on researcher prior knowledge and experience.[77] That is why I chose a theoretical concept, epistemic violence, through which I have scientifically examined the data.

My position as a specialist working among asylum processes gives a standpoint to articulate the challenges of these processes, and by reflexivity I provide a great utility of incorporating my experiences in the construction of academic knowledge.[78] Kusow has articulated that the objective knowledge is dependent upon the way researcher finds a balance between nearness and remoteness.[79] To keep myself a bit more distant to the topic, and to guarantee the quality and scientific trustworthiness of the data, I have used techniques and tools provided by Harding[80] and Greene.[81] I have carried out techniques such as debriefing, reflexivity and self-critique, throughout the research project. By

[72] Stanley & Wise, 2001, p.20-60, see also for example Harding and Haraway
[73] Sikes & Potts, 2008
[74] Merriam, etc, 2001
[75] Chavez, 2008, p. 481, see also Bell 2005
[76] Aguiler, 1981, p.15
[77] DeLyser, 2001
[78] Madden, 2010
[79] Kusow, 2003, p.591.599
[80] Harding,1995, p. 331-349
[81] Greene, 2014, p.8

debriefing I mean a technique whereby I have shared findings and elements of the research with my colleagues as well as other researchers[82] of the theme by attending several seminars and events on the topic. Reflexivity has provided me my own consciousness about my position.[83] I have actively explained my experiences to myself aiming on construction of new knowledge and discovery of new perspectives. The prospects that rose up by reflecting my own experiences and by discussing with others constructed my understanding of the importance of studying epistemic violence as part of the paths into the irregularity.

The importance of being reflexive has been acknowledged within social science researches. According to Nightingale and Cromby, reflexivity requires an awareness of the researcher´s own contribution to the construction.[84] For me, this has meant the understanding of me being also an epistemological agent within asylum processes as well as a researcher. Hellawell has argued that self-critique and reflexivity are usable techniques that can allow the researcher to gain distance from the issue.[85] The distance, however, does not in itself guarantee scientificity in my opinion. For me, these techniques, especially conversations with other scholars for example from the URMI (Urbanization, Mobilities and Immigration) project have guaranteed broader understanding of the difficulties within the asylum processes, and wider perspectives. These discussions have contributed to the idea of the occurrence of the epistemic violence.

Insider has been defined by Robert Merton as an individual who possesses a priori knowledge of the phenomenon.[86] However, this definition having prior knowledge of the community does not imply that the researcher needs to be a member of the community.[87] I position myself as a researcher according to these definitions as an insider-outsider. Lejla Voloder etc., have brought together a great collection of on international perspectives on researcher positioning in the field of migration and mobility.[88] As mentioned before, insider research has been used mostly in ethnographic researches. In this research, my somewhat insider position has acted as an incentive for doing this

[82] Harding, 1995, see also Van Heughten, 2004
[83] Van den Hoonaard (2002), p.88
[84] Nightingale and Cromby, 1999, p.228
[85] Hellawell, 2006, p.487
[86] Merton, 1972
[87] Hellawell, 2006
[88] Voloder etc., 2014

research, and provides practical insights to the challenges and to the processes themselves.

As a result of my work I wanted to challenge myself and to be able to understand and explore the field to the maximum. That has guaranteed great knowledge of the topic. By being truly present in my research, I have provided a unique opportunity for myself to reflect, through my own position and a priori knowledge, the important and globally challenging phenomenon such migration. I find this very important in order to develop pragmatically asylum processes and systems.

2. The asylum process as part of the international law

This chapter shall give a legal dogmatic overview on migration legislation, and especially on asylum process as part of the international law. It will clarify the progress of the process itself in Finnish judicial system giving a special attention on asylum interview. In this chapter I will also show the importance of the asylum interview, an oral hearing. International law and agreements give the frames and set the limits to the regulations and practices on asylum process. However, states have their sovereignty and power to regulate more directly in these matters. Having said that, in this chapter I discuss the position of the Finnish legislation in the international legislation and thus, consider the research question number one: How Finnish practices, policies, regulations and laws are positioned in the international legislation?

2.1. Legal framework

This subchapter is structured by approaching firts international regulations as they are of a great importance on setting frames and limits to the national legislation and practices, and because migration and asylum policy always has cross-border implications. After introducing the international field, I will approach Finnish national regulations and practices.

International regulations

Refugee law is a part of international law regulating the rights and protection of refugees. Refugee law has become a key element of international law only in the 20th century, even though refugees have existed for centuries.[89] Refugee law, even being an own and separated legal field, has strong connections on human rights.

International law in general and the migration or refugee law in particular are very complex and contradictory fields, in which many different interests, rights and opinions need to be balanced and negotiated. It is needed to find a fair balance between the interest and rights of the individual and the interests in general. The question of migration brings its effects on various fields at international as well as national level. These matters and challenges are global issues but the individual concerns and problems occur in specific legal contexts and need to have reference to the relevant applicable law in the national context.[90] The international law does not provide easy measures and answers to the current situation or simply application to concrete issues.

Especially the crises in Syria, Afghanistan and Somalia have caused migration in recent years.[91] It has been estimated that in 2015 there were approximately 21, 3 million refugees in the world.[92] Over the years the situation has been increasing. The Europe has been struggling with the so called refugee flow, however, approximately 86% of the world´s refugees are said to be living in developing countries and moving neighbouring states.[93]

In European Union, in 2015 there were almost 1,3 million asylum seekers. In 2015, UNHCR estimated that there were 40,8 million persons fleeing their homes within their home country´s territory.[94] The Internally Displaced Persons are in a disadvantaged position in a sense that they do not meet the official definition of the Convention and thus, do not enjoy similar legal protection.[95] In 2015, over 32 000 migrants came to Finland.[96] From many Finnish perspectives it was considered a large number. It meant, however,

[89] Joly etc, 1992, p.5
[90] Crawford, p.530
[91] UNHCR ,2015, p.8-9
[92] Ibid, p.2
[93] ibid, p.2
[94] IDP, Internally Displaced person
[95] Aer, 2016, p. 253-255, see also Achiron 2001, p.20
[96] Migri, 2016, see also Terra 129:1 2017

merely 3% of the all EU asylum-seekers, a small part of a broader entity. The majority has got the negative asylum decision – many of them has left the country independently or with the assistance of the authority.

The challenge is not a new one and we are talking about large numbers of people living in vulnerable situations and therefore, there is a great need for pragmatic decisions on regulations and politics relating to these masses of people. To provide clarification for practices and interpretative legal guidance for state governments, legal practitioners, decision-makers and the judiciary, UNHCR have produced guidelines on international protection and produces up to date information on countries and crises areas.[97]

The Council of Europe has long recognised the political and legal challenges posed by migration. The migration issues include tension between various interests. The tension exists also between the national sovereignty of the state and the human rights of migrants. Attention has also been paid to the plight of irregular migrants. The asylum processes and epistemic violence experienced by asylum seekers as a part of the paths into irregularity have, however, not been extensively researched by legal means. Moreover, the European Council's legal instruments, the most importantly the European Convention on Human Rights and the European Social Charter, have very limited measures to that group. The difficult and vulnerable situation makes the whole society more unstable.[98]

International migration is a great global challenge and it is governed to a large extent by principles of international law. However, according to international law, each sovereign state makes decisions based on its own regulations that concerns aliens in the state´s territory.[100] The states have the jurisdiction over both, nationals and foreigners, within its own territory. However, these rights of a great international character involve international responsibility.[101] States determine what is regular and what is not.[102] Politics and law set the conditions under which people can cross borders and stay and work.

[97] e.g. Guidelines on international protection: Religion-based Refugee Claims under Article 1A(2) of the 1951 Convention and/ora the 1967 Protoko rellutin to the Status of Refugee provides important information and guidance on practices handling claims to regugee status on one of the most complex bases, religion, that raises the difficulty on assessing possible persecution from epistemic point of view. HCR/GIP/04/06

[98] Frode, 2009, p.60

[100] e.g. Aer p.3

[101] Crawford, p.421, issues of responsibility are determined in e.g. the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights etc.

[102] Crawford, see also Düvell

The general principle of migration is that the state has the jurisdiction in its territory and can decide independently who can enter and stay in the state. However, the right to asylum constitutes an exception as the international treaty obligations of the state restrict its sovereignty.[103] Everybody has the right to seek an asylum. If a person who has legally or illegally arrived in Europe wishes to apply for asylum, the EU Dublin system will determine which Member State is responsible for processing the asylum application. The purpose of the Dublin system is that the asylum seeker would make only one application for asylum, which would be processed in only one Member State. I will not go into the Dublin system in more detail in this research.[104]

The decisions behind the migration legislation have been based mostly on economical reasoning and also underlining security. However, the debate can not be limited solely to these aspects, but must include also the rights of migrants, the responsibilities of states to secure these rights, and the positive contribution of migrants to the society in social and cultural levels.[105] The 1951 Convention on the Status of Refugees (hereinafter Geneva Refugee Convention) and the 1967 Protocol provide refugees with the same economic and social rights as the states own nationals. The agreement was seen as a milestone for the rights of refugees and still remains one of the most important international agreements on the rights of refugees.[106]

The Geneva Refugee Agreement defines the conditions for refugee status, the rights of refugees and the obligations imposed by the Member States. The refugee agreement was born above all on the need to resolve the refugee problem caused by the Second World War. As a matter of international law, the refugee agreement is the most important agreement on refugee law in the world, although the development of the international human rights system has in particular shaped the protection of asylum seekers and refugees in recent decades.[107]

In terms of human rights, regional agreements, including for example The European Convention on Human Rights (ECHR), the European Social Charter, the Charter of

[103] Goudappel – Raulus, 2011, p.1
[104] see EU: European Commission, 2014 for further information
[105] UN special rapporteur, 2002, point 3
[106] Hakapää, 2010, p.246
[107] Lavrysen, 2012, p.199

Human and Civil Rights in Africa and the American Convention on Human Rights, also play an important role. International agreements are either directly part of national legislation or, alternatively, their incorporation into national law must be regulated separately by national law.

The agreement on Economic, Social and Cultural Rights sets goals and obligations rather to State than for individuals.[108] The role of the international courts for these rights is quite weak as agreements in which economic, social and cultural rights are secured, are usually not related to the individual complain procedures. On a regional level, the situation is somewhat different. The additional protocol to the European Social Charter, signed in 1995 on the system of NGOs appeals, allows access of the appeals concerning economic, social and cultural rights guaranteed under the European Social Charter, to the European Committee of Social Rights.

The Universal Declaration of Human Rights is a Declaration (UDHR) adopted by the UN on 10 December 1948. Although the Declaration is not an agreement, many of its articles reflect the general legal principles. The Declaration contains many rights that are protected in subsequent documents. The adoption of the declaration has been seen as a turning point in relations between the states and individuals by quickly affecting agreements that protect different groups, such as refugees.[109]

Various elements guaranteeing legal certainty, especially fair trial, are explicitly expressed in international declarations and agreements, such as UDHR and the ECHR. The elements are also addressed in numerous Constitutions throughout the world. However, the significance and the content in the reality varies. The Article 6 of the ECHR regulates the fair trial. Everyone has the right to a fair and public hearing within a reasonable time in an independent and impartial lawfully established tribunal when deciding on his rights and obligations.

The refugee agreement is supplemented by the 1967 Protocol on the Status of Refugees. The 1967 Protocol is a separate agreement from the refugee agreement so the states that are parties to the agreements are not necessarily the same.[110] In the 1967 Protocol, time

[108] Scheinin (2009), p.22-23
[109] Goodwill-Gill, 2013, p.653
[110] Cape Verde, Venezuela and the United States are the only countries that have joined the 1967 Protocol but not the refugee agreement.

and geographical restrictions were abolished as it was noted that the refugee problem was far more serious than it was originally conceived.[111] Otherwise, the 1967 Protocol is largely based on the Geneva Convention on Refugees, as the Member States engage on applying Articles 2-34 of the Refugee Convention.[112]

According to Article 1A (2) of the Refugee Convention, a refugee must have a legitimate reason to be afraid of persecution. Because the feeling of fear is subjective, the refugee definition includes a subjective element. There must be a justified reason for this fear, that is, an objective situation should support this fear.[113] The justified, well-founded fear of persecution means that it is not enough that a person is subjectively scared of persecution, but that fear of persecution must also have real, objective grounds.[114] The legitimate fear of persecution therefore includes both a subjective and an objective element, and both elements must be taken into account in determining whether there is a genuine fear of persecution.[115]

As stated in The Hague Declaration on the future of refugee and migration policy from 2002, no matter how long a migrant resides in the country, everyone should be able to take care of their own lives and develop the skills necessary to enable independent living in a new environment. This should be the case even if the migrant´s prospects for returning home are very likely. The Hague Declaration emphasizes that the adaptation of refugees, migrants and other non-nationals is in the interest of all parties, especially the receiving state.[116]

International law includes a non-refoulement clause, according to which no one can be returned to an area where he / she may become subject to the death penalty, torture, persecution or any other detriment of human dignity.[117]

The Geneva Refugee Convention does not usually arise in legal debates on irregular migrants. Its application to them is not quite clear. Article 31 requires irregular residents

[111] Achiron 2001, p.12
[112] Protocol of 1967, Article 1 (1)
[113] UNHCR 2011, p.11
[114] Pirjola, 2002, p. 753
[115] UNHCR, 2011, p.11
[116] Bogusz etc, 2004, p.xiv
[117] UN Universal Declaration of Human Rights, art. 14(1), available on http://www.un.org/en/universal-declaration-human-rights/

to make themselves known to the authorities and present acceptable reasons for their irregular arrival or stay without delay. The question of regular stay as such is unclear. According to the Genova Refugee Conventions preparation documents, a migrant who has entered the country without a permit but for which the process of applying an asylum has not been finished, should be considered as regular resident. However, some of the Member States has found that an irregularly entered migrant is *regular* only after an explicit decision has been given. Legislation in many member states punishes irregular entry with sanction in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state.[119] However, according to the Convention related to the status of refugees,[120] states must not impose penalties on refugees who enter without authorisation if they come directly from a territory where their life or freedom was threatened.[121] Several EU member states have resorted to criminal law measures to deter migrants from entering or staying in their territory in an irregular manner.[122]

According to the Convention[123] and European Convention on Human Rights[124] as well as to various other international agreements, no one should be tortured nor treated or punished inhuman or degrading way. In the case *Soering v. United Kingdom* the European Court of Human Rights referred to this Article. The Court considered that the State violated the Convention on Human Rights by alienating a person to another country, to the conditions laid down in Article 3.[125] Similarly, the EU Charter of Fundamental Rights, Article 19 (2) prohibits returning, expulsion or extraditing anyone to a country where he / she is in severe threat with the death penalty, torture or other inhuman or degrading punishment or treatment.[126]

In addition to the abovementioned international commitments and the Finnish Constitution, international protection is also based on the EU law and the EU´s power in this area has expanded constantly. There are a lot of EU legislation on asylum and migration policy and the EU Court´s interpretation lines naturally bind Finland. The EU

[119] FRA, 2016,
[120] Art31 refugee status convention 1951
[121] council framework decision 2002/046/JHA
[122] FRA, 2016, p.1
[123] Genova Convention, article 33, SopS 77/1968
[124] ECHR, article 3
[125] *Soering v. United Kingdom, 7.7.1989*
[126] EU CFR, EUVL C 326, 26.10.2012, p. 391-407

legislation has been implemented into Finnish legislation mainly through the Aliens Act.[127]

The standards of international protection form a complex set in which the decision-maker must, in addition to national laws, take into account the international legislation, human rights conventions and EU legislation as well as their enforcement practice in case-law. The international norms have also an independent significance as a binding international obligations, although the norms has been taken into account by amending the Aliens Act.[128] However, the criteria for granting asylum and residence permit, and the procedures for applying for such permits are not regulated consistently in European Union.[129]

In 1999, in Tampere, the European approach in the field of migration took a step forward. The intention was to establish a more coherent approach in the field of migration, asylum system, legal migration policy and the fight against irregular migration.[130] In addition to the establishments in Tampere, the European Council in Brussels searched solutions to more effective removal. These policies were about to base on common standards. As a cornerstone of the EU policies has been seen the mutual recognition of judicial decision in both, civil and criminal cases. The objective of the EU has been to maintain and develop an area of freedom, security and justice by this principle of mutual recognition.[131]

According to the EU directive on requirements for the reception of asylum-seekers applying for international protection in the Member State,[132] everyone must be guaranteed a sufficient standard of living and protect the physical and mental health. However, in principle in international law, alien does not have the general right to settle in another country.[133] According to the Finnish Constitution, alien´s right to enter and reside in Finland is regulated by law.

The EU directive on victim´s rights has recognised the importance of understanding and of being understood.[134] The directive gives an obligation to the member states to ensure

[127] Aliens Act, 30.4.2004 / 301
[128] Saarikkomärki, etc, 2018, p.4
[129] Aer, 2016, p.73
[130] Official Journal of the EU, L348/101
[131] Official Journal of the EU, L315/75
[132] 2013/33/EU
[133] Crawford, see also Aer, 2016
[134] 2012/29/EU, Article 3

simple and accessible linguistic or written exchange in proceedings where information is provided by an authority. The Member States need to ensure that such communications take into account personal characteristics of the victims including any disability which may affect the ability to understand or to be understood. Victim has also the right to be accompanied by an assistant if needed to understand or to be understood.

Rights concerning irregular migrants. The Intergovernmental work group on Human Rights in migration, working together with the UN Commission on Human Rights instructed the states already in 1999 to guarantee access to vital public services for all, including irregular migrants, and urged states to ratify the UN Convention on Migrant workers and the agreements concluded within the International Labour Organisation (ILO) on migrants.[135] The European Council has also raised the issue of irregular migrants. In 2006, the Council adopted a resolution on the human rights of irregular migrants, expressing their concern to the fragmentation of international law on this growing phenomenon.

The directive adjusted in 2008 on returning irregularly staying third-country nationals established an a horizontal set of rules applicable to all migrants who do not, or no longer fulfil the requirements for entry, stay or residence in a Member State.[136] According to this directive, when having no reasons for believing that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced one. The period for voluntarily leave the country should be provided for when considered necessary because of the specific circumstances of an individual case.[137]

The European Union (EU) has established its aims to prevent irregular migration developing a common migration policy.[138] The work of the European Commission and the European Court of Human Rights has produced a set of legal concepts within the framework of the European Convention for the protection of Human rights over a long time.[139] In order to create a common procedures for granting and withdrawing international protection, European Union established a directive[140] in 2013. The

[135] ILO convention on migrant workers (1949), ILO additional agreement on migrant workers (1975), see also the Intergovernmental working group paper on human rights (1999), 43,102,155
[136] 2008/115/EC
[137] Ibid.
[138] Art. 79 of the TFEU
[139] Crawford, p.549
[140] 2013/32/EU

directive´s main purpose was to develop the minimum standards for procedures further in Member States with the objective to establish an area of freedom, security and justice open to those who, *forced by circumstances, legitimately seek protection in the Union.*[141]

The European Council has affirmed that the access to justice, legal security and efficient asylum procedures need to be guaranteed to everybody, including asylum-seekers, regardless in which Member State the asylum-seeker applies for an asylum.[142] By establishing the directive on common procedures, the European Council also highlighted the need of competent personnel in the first phases and the first instances of the asylum-processes – the authorities making decisions on asylum must have *the appropriate knowledge and have received the necessary training in the field of international protection.*[143] According to the directive, the requirements for the processes: legal aid, assistance, effective access to these procedures, communication, etc need to be ensured already at the first instances of the processes.

In Europe, the necessity of legal aid has been considered on various directives. According to the Return Directive, the necessary legal aid should be made available to those who lack sufficient resources and when it is considered *necessary.* The difficulty arises when determining whether it is necessary or not. In my opinion, all of the migrants has a justified reason to ask for legal aid from someone who is familiar with the legislation and judicial system in general in the Member State.

The return directive applies directly also to aliens staying irregularly on the territory of a Member State. When establishing the directive, the European Council addressed the situation of those living irregularly but who cannot yet be removed from the Member State. According to the Council, the basic conditions of these aliens should be defined according to national legislation.[144] The Council has also highlighted that such persons living irregularly but without possibility to be removed, should be provided with written confirmation of their specific situation. Finnish legislation does not recognise this kind of documents.

[141] Official Journal of the European Union, L 180/60
[142] Stockholm Programme, EC 12/2009
[143] Official Journal of the European Union, 2013, L 180/ 61
[144] Official Journal of EU L348/99 (12)

Although a common asylum system has been set up in Europe, the Member States' legislation on asylum has only been harmonized partially.[145]
The common European asylum system is based on the idea that the outcome should always be the same regardless of the Member State where the asylum application is made.[146] However, the various Member States interpret the Geneva Refugee Agreement and the relevant EU standards differently. There are also major shortcomings in compliance with the rules.[147]

Position of the Finnish legislation in the international law

The most important national law in Finnish foreign legislation is the Aliens Act. According to the 2 and 3 § of the Aliens Act, the law applies to the entry, departure, residence and employment of non-nationals in Finland. The international protection (asylum regulation), temporary protection and refugee quotas are also regulated by Aliens Act. Adjustment of refugee quotas was one of the most significant changes in the 2004 reform of the Aliens Act.[148] According to the 5§ of the Act, alien´s rights must not be restricted more than is necessary. The underlying principle of proportionality is generally followed in administration.[149]

Finnish legislation is formed in relation to various international laws and agreements. The Finnish Constitution guarantees everyone the right to have their case handled properly and without undue delay by a lawfully competent court or other authority, and the right to receive a decision on their rights and obligations to a court or other independent judicial body. Under European Union law and international agreements, Finland has committed itself to providing international protection to asylum-seekers who fulfil certain conditions.[150]

According to Article 95 of the Constitution, Finland enforces the international obligations it has committed by law or by the act of the President of the Republic. Finland is a

[145] Brouwer, 2013, p.145
[146] EU: European Commission 2014, p.3
[147] EU: European Commission 2016, p.2
[148] Kuosma 2004, p.49
[149] HE 28/2003, p.119
[150] HE 32/2016, p. 3

contracting party to the relevant agreements on migration issues, such as International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Geneva Refugee Convention and the Additional Protocol, the other Geneva Convention, the Convention on the Elimination of Racial Discrimination and the international agreement against International organised crimes.

In principle, the matters relating to the aliens within the state territory is a matter of domestic jurisdiction. The states themselves decide whether to accept aliens or not, and in which circumstances and conditions.[151] Setting the limits of the legality and illegality is governed by the state.

Behind the Finnish Aliens Act there is an underlying idea to implement and promote good governance and legal security in foreign affairs, and to promote controlled migration and providing international protection respecting human rights and fundamental freedoms taking also into account the binding international treaties. The tightened regulations and practices have raised concerns, also internationally, whether our practices are in conformity with the binding treaties.[152]

According to Finnish Administrative Procedure Act and Alien Act the obligation to investigate is with the authorities. Nevertheless, this principle has turned over in the reality of asylum processes in a great extent. Also according to the asylum guidelines, the authority must take its own initiative and determine all the relevant aspects of the matter. In my opinion, this guideline is in conflict with the current practices – asylum-seekers should inform all matters they wish to invoke in their application by their own initiative.

Effective judicial remedies in the court and access to justice must be provided also to the asylum-seekers. Because the phenomenon of migration is a broad issue, the international as well as national legislation, is highly fragmented in its respect. Fragmentation causes ambiguity and at worst creates gaps in regulation and particularly in differing practices.

The decision-making process on the asylum seekers´ rights is of particular importance for the individual fundamental and human rights, and ultimately the right to life and the

[151] Düvell, see also Crawford p.498
[152] Court decisions made in France, https://yle.fi/uutiset/3-10066708

decent treatment. According to the recently published research, the realisation of such a fundamental rights should not depend solely on the general interpretations of the authorities and the possible political and administrative guidance.[153]

Aliens resident in Finland may be granted an asylum under Article 87 of the Finnish Aliens Act, if he / she is residing outside his / her own country due to justified fear of being persecuted there because of his / her origin, religion, nationality, belonging to a particular social group or because of a strong political opinion. In addition, the asylum-seeker is required to not be able to or to be reluctant to resort to that particular country due to his / her fears. Asylum can therefore be granted to a person who is afraid of becoming persecuted specifically for the above-described reasons. This is in line with the EU Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.[154]

According to the Aliens Act, acts seriously violating fundamental human rights by their quality or a repetition are considered as a persecution by their nature. The law describes examples also of minor human rights violations that can be considered as persecution if they are abundant. These actions may include physical or mental violence, including sexual assault; discriminatory author measures; improper or discriminatory prosecution or punishment; absence or refusal of appeal, and as a result is an unreasonable or discriminatory punishment; prosecution or punishment because of a person refusing military service in a conflict where carrying out military service would involve offences against peace, war crimes or crimes against humanity; and the acts on gender or children. These declared rights are based on the international law.

In Finland, if an asylum-seeker does not meet the requirements of the Aliens Act to obtain asylum and it is considered that he / she is not persecuted for these reasons, he may be granted a residence permit on the basis of subsidiary protection.[155] In this case, it is required that significant grounds have been presented for believing that if an alien is returned to his / her country of origin, he / she would be in a real danger of suffering

[153] Saarikkomäki, etc. 2018, p.35
[154] 2011/95/EU
[155] Aliens Act, 88§

serious harm and because of such a risk, the person is either incapable or reluctant to resort to the protection of that particular country. A serious disadvantage is considered to be for example death penalty, execution, torture of otherwise inhuman or degrading treatment of punishment, or serious and personal danger caused by arbitrary violence in situations of international or internal armed conflicts. The protection requires that the state of origin or an international organisation do not require effective and permanent protection to the asylum-seeker.

Assessing the need for international protection, in addition to the persecution experienced in the past, decision-maker of the possible asylum also assesses whether the asylum-seeker would be in danger of being persecuted if he / she would be returned to the country of origin. Therefore, the decision-maker must be able to assess what will be happen in the future. The assessments of this type are extremely difficult to make and there are times in which these evaluations do not meet the reality.[156] Merely the fact that an asylum-seeker has previously experienced persecution or serious threat is not enough for the grounds for international protection.[157] However, in international refugee law, the experienced persecution or danger has consistently been considered as a strong indication of continuing threat.[158] According to the directive, the decision-maker needs to demonstrate some kind of fundamental change in the situation and circumstances that will eliminate the risk of serious harm in the future if the presupposition of the danger is not found valid. According to the directive, the asylum-seeker must be able to demonstrate a real risk, while the decision-maker must be able to demonstrate the essential and fundamental change of the circumstances.[159] This situation is challenging as in the worst case there is a word of the asylum-seeker against the one of the decision-maker. Nevertheless, this power-laden moment is crucial determining whether the asylum-seeker will get his rights fulfilled or not.

Article 21 of the Finnish Constitution expresses an important element of legal protection of Finnish legislation: it sets a requirement to deal with the matter without undue delay.

[156] Iraqi man was turned back to Iraq, was killed right after deportation. https://yle.fi/uutiset/3-10068103
[157] Aer, 2016
[158] Qualification directive, article 4
[159] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, 2011, p.126-127

The right to a fair trial guaranteeing legal certainty has also been included in the Finnish Charter of Fundamental Rights. According to the Finnish Constitution, everyone has the right to have his / her case handled properly and without undue delay by a lawfully competent court or by other authority, as well as the right to receive a decision on his / her rights and obligations from a court or other independent judicial body. The publicity of the hearing, the right to be heard, the right to get a reasoned decision and to appeal, as well as the other guarantees of fair trial and good administration are secured by law.[160]

Legal aid is also granted to an alien whose case is dealt with in the Finnish courts or where legal aid is of particular cause. According to the Article 9 of Aliens Act, aliens´ right to legal aid is regulated by the Legal Aid Act. Legal aid is provided by state funds to a person in need of expert assistance in legal matters and who, due to his financial position, is unable to carry out the demanding expenditures himself.[161] Legal aid includes legal advice, the necessary measures, assistance in the court and in other authorities, and exemption from some of the administrative costs involved. The regulations on legal aid were in line with the EU and international regulations, which defines the minimum level of legal aid for asylum-seekers applying for international protection, until the amendments made in 2016. I will discuss these amendments in more detail in chapter 4.2 of tightening legislation and practices.

Legal assistance is provided by a public legal adviser on the basis of Legal Aid Act. However, in court matters, a private lawyer may also be appointed as an assistant. A private assistant must be a lawyer or an authorized attorney referred in the law on legal aid advocates, and therefore, is obliged to adhere to the principles of good advocacy.

In cases where an alien has applied for a residence permit on the basis of international protection, the Migration Office´s decision to refuse may not be enforced until the case has been finally legally resolved in the courts.

Before making the decision on a 12 years old child, a child should be heard unless the hearing is obviously unjustified. The opinions of the child should be taken into account in accordance with his / her age and level of development. In my opinion anyone involved

[160] Finnish Constitution, 731/1999
[161] Legal Aid Act, 257/2002

in the proceedings should consider cultural differences and development levels of all individuals, being child or adult.

According to the Aliens Act 60d§, when submitting an application for asylum, the authority shall take fingerprints of each finger of the asylum-seeker.[162] The Member States are obliged to transmit the fingerprints of the asylum-seekers of at least 14 years of age, and the data of the asylum-seeker without delay to the Eurodac Central Unit.[163] This procedure is being done to ensure that the asylum-seeker has not filed an asylum application before in another Member State.[164] Medical measures on determining asylum-seeker´s age require that the asylum-seeker has given his / her permission in his / her free will and given a written consent for it.[165] As a result for the refusal of the medical study, the asylum-seeker is treated as adults unless there is a justified reason for the refusal of the medical study. The refusal alone can not constitute grounds for rejecting an application for international protection. However, this undermines the credibility of the asylum-seeker´s story in practice, and therefore the success of the asylum process in the Administrative Courts.[166]

National and international regulations that are meant to prevent unwanted migration often have unwanted side-effects and instead encourage irregular migration.[167] This has been conceptualised as a policy gap and policy failure. Migrants in an irregular situation rarely report a crime to the police, either as a victim or as a witness, as they are afraid of detection and return.[168] This effectively bars their access to justice, leading to perpetrator impunity. This in turn is in direct conflict with their fundamental rights.

The National Police Board has stated that there is a particularly high risk of irregular migrants living irregularly in the country to commit crimes to live, and on the other hand, to be exploited by criminals and criminal groups.[169] For this reason, it is of great importance that political choices should be made pragmatically and sustainably to prevent as much as possible the creation of such a group.

[162] HE 104/2010 vp
[163] EC N:o 2725/2000
[164] Aer, 2016, p.267
[165] Aer, 2016, p.268
[166] Ibid
[167] Düvell, 2011, p.275 and 289
[168] FRA, 2016, p.6
[169] Poliisihallitus, 2017

The National Police Board has also assessed that such a group also pose challenges to Finland's internal security. Tightened practices are often justified in both, political and public discussions, with security arguments. However, in the government´s proposals and in the reasoning of the law, this security argument has been underlined remarkably little comparing to, for example, economic aspects.

The reasoning of the Procedures directive states that the explicit object of the directive was to improve and clarify the necessity to take greater account to the vulnerability and to provide effective remedies on legal protection. It seems to me that the reality has gone in the opposite direction with the tightened practices and the general tightening of the atmosphere.

Adequate hearing should be properly organised in all situations.

According to the explanatory document of the Finnish Aliens Act, the aim of the reformation of the law was to ensure both, the asylum procedures and the legal protection of asylum-seeker´s as applicants. According to the document, the Government requested that the changes would clarify the procedures and, in particular, improve the legal protection of vulnerable groups of people, which is an obligation stated in international agreements. If the legal protection is seen to include more that just the speed of the process which is demanded in the Finnish Constitution as well as in the ECHR, I find this contradictory as legal protection might be jeopardized if the main aim is to finalise a process as fast as it can be finalized in theory.

The Administrative Committee has also stated in its report that the Aliens Act, with its numerous changes, is very complex and difficult to understand. Over the years, there have been several changes in making, which has made the overall picture of the legislation and the effects of the changes introduced extremely difficult.[170] The clarity of legislation and practices is essential to the legal protection of aliens, but also to the law enforcement authorities and the Courts.

[170] HE 218/2014vp

In terms of legal protection of individual asylum-seekers I consider it crucial that the authorities dealing with applications, and particularly the authorities responsible for providing the hearings for asylum, would have the relevant information and training corresponding to their duties and responsibilities. Everyone working in the field should have a good understanding of the cultural and personal backgrounds of asylum-seekers so that cases do not lose the real connection with the actual human conditions and experiences of the asylum-seeker – the connection to the story on which the whole process is based.

Article 22 of the Finnish Constitution obliges a human rights-friendly interpretation of all provisions on human rights that are binding Finland.[171] The Constitution provides for the equality of people before the law and forbids any discrimination amongst others for example because of the origin, language, religion or health of the people. According to the 6§ and 7§ of the Constitution, everyone has the right to life as well as personal freedom, integrity and security, and no one should be offended with degrading human dignity. The mentioned rights are guaranteed without any distinction between citizens, non-citizens, nor between the aliens staying legally or illegally. These laws are indeed in line with international regulations.

According to the Finnish Constitution, the right of an alien to come to Finland and reside the country is regulated by law. According to the Article 9 (4) of the Constitution, an alien shall not be expelled, released of returned if, for that reason, he/ she is threatened with a death penalty, torture or other human rights violation. Otherwise, there is no mention of the rights of aliens in particular at the level of the Constitution.

2.2. The asylum process

> "*I will remember that moment for the rest of my life. My father said: Why our country is like this, one can not bring your own life forward."*

[171] Tuori & Kotkas, 2008, p. 185

The decision to migrate. The process starts by planning to seek asylum or fleeing the home country and ends gradually when official asylum process ends and the individual is granted with the asylum or not.[172] In Finland, the Administrative Act regulates the processing of asylum applications.[173]

The EU´s directive on asylum procedures[174] is important source of law regulating asylum procedures. The aim of the Union asylum policy has been to establish a common area of protection and solidarity based on a common asylum procedure and a uniform status for international protection.[175] Thus, this binds Finland as well as a member or European Union. All persons in need of international protection should be guaranteed access to legally secure and effective asylum procedures.

To make a convincing asylum application, an asylum seeker must prove why he / she would be tortured, who would torture him, why he could not move elsewhere, and why he / she could not seek protection from the country he / she came from.[176] The Migration Office in Finland has issued harmonization guidelines on the application of the Aliens Act on asylum procedures. These procedures have tightened greatly last years.

A complex asylum system increases uncertainty of one´s own status and there are times when the asylum-seeker his / herself does not know at what phase his / her application is going, or even whether the application still is under discussion, or if a migrant has a residence permit, how it is like.[177] In the literature, the continuous uncertainty of especially irregular migrant´s life has been referred to as ontological insecurity.[178] This uncertainty affects the situation of those having a residence permit granted too, and therefore has been said that the residence permit system produces institutionalised uncertainty.[179] The categories of residence permits are performativily *materially constructing the behaviour of people when trying to fulfil the administrative process*.[180] The asylum process changes the relationship also with time in a radical way. Especially

[172] Koistinen, 2017, p.43-45
[173] Aer, 2016
[174] 2013/32/EU
[175] Aer, 2016, p.259
[176] Kelly, 2011, p.190
[177] Könönen, 2014, p.177
[178] Ali Nobil Ahmad, 2008,
[179] Anderson, 2010, p.300-317
[180] Karakayali & Rigo, 2010, p.130

for young adults seeking asylum, waiting for a long time, often means time when life is lost. Asylum-seekers may spend for years without knowing what to do next day.

Making an application. The asylum application, including the grounds for international protection, is processed at the boarder or within the territory of Finland according to the Aliens Act 94§.[181] The asylum-seeker can not be removed from the country without taking the need of international protection into account. Delays in filling the application may, however, effect negatively on the credibility of the asylum-seeker´s arguments.[182] I consider that from the asylum-seeker´s point of view, the question which Member State is responsible for examining the application, is significant. Various Members States interpret the Genova Convention in different manners. Even though, the European Union has tried to create a common system on refugees, the outcome of the individual asylum application may differ greatly depending on the Member State in which the application is processed.[183] According to the comparative study by Finnish Migration Office, the number of positive decisions of Afghan asylum-seekers have varied in different countries between 30-95 percent and Iraqi asylum-seekers between 20-100 percent.[184]

After registering into the system, comes the asylum investigation including two sessions of hearings: one investigating aliens´ identity, itinerary and entry to the country, another clarifying reasons and motives for being granted with an asylum. The grounds for the persecution, violations and threats in the home country are interrogated personally at this point. I see this step, the one of the interview or hearing, as one of the most important phases in these procedures as well from the process-economic point of view as for the realisation of the asylum seekers´ legal certainty. Especially this phase links the phenomenon greatly with epistemic violence and with the paths into the irregularity. I will clarify this connection in more detail in next chapter.

In principle, the authority has the obligation to search in the administrative process. However, the burden of proofs has turned to the asylum seeker his / herself, even if these applicants not necessarily have the conditions to do this. In principle, the applicant is obliged to bring up all the elements that gives grounds for his / her asylum application.[185]

[181] see also 2013/32/EU, 2b art.
[182] HE 28/2003 vp.
[183] Pirjola 2012, p 258
[184] Migri 2015
[185] Aer, p.265

We get back to *the story*. The applicant tells his / her story and the story should be endorsed with documents and other elements that confirm the information given in the story. For these documents to be valid, they need to be proved as official. The applicant has also the burden of proof of the grounds for the application to be believable. If the application is unbelievable, the application will be dismissed.[186]

Before the hearing the applicant receives instructions on the hearing procedure, obligations and rights relating to the hearing. Already at this stage, the significance of this hearing is highlighted for the success of the matter. The instructions given by Migration Office highlight also that applicant him / herself need to *orally* bring out the grounds and elements.[187]

In Finland, as well as elsewhere, the Migration Office together with administrative courts have done great work and struggled with a massive asylum flow for few years now. The flow of 2015 especially has loaded our systems and procedures heavily, and required a lot of resources and for example professionals interpreting that have not always been available. From the asylum seekers´ legal protections´ side the situation is indefensible and might have great side effects that need to be studied. Emancipating people as rights holders, moreover, stresses their individual claims, their personal relationship with the state.[188] Individual claims brings us again to the story. You need to have your own voice to tell *your own* story.

> *"Time passes away from your life, you know. Because the decision [of residence permit] will totally change your life. You can not think about what you are going to do, do you plan to study, find a job, set up a home, you can not think of your future. You can not think of it before you know, you can not dream about such things because you have no decision in your hand."*[189]

After the hearing, asylum-seeker needs to be patient and wait approximately 6-8 months for the decision. However, in the beginning of the year 2018 there still where asylum-

[186] Aer, s.273-274
[187] Migration office´s instructions
[188] Kennedy, 2004, p.132-133
[189] Könönen, 2014, p.184-185

seekers who came in 2015 without decisions to their cases. The asylum-seeker does not have much to do more than try to integrate even without knowing whether he / she will ever be allowed to stay in the country. Moreover, the uncertainty of basically everything makes the integration extremely difficult. Some times it is difficult to motivate oneself for example to learn a new language when you can not say, how many months you have in that specific country.

The decision. The processing of an asylum application is an administrative matter regulated by Administrative Act.[190] The EU procedural directives require that the authorities also obtain information about the applicant´s home country.[191] After evaluating all elements and solving the asylum application, Migration Office in Finland gives its decision to the asylum-seeker. The asylum-seeker is informed by the Migration Office or by the police. The decision is informed in asylum-seeker´s own mother tongue or in a language he / she understands.[192] If the decision is positive, the asylum-seeker gets a refugee status and is therefore granted with an asylum, receives subsidiary protection or a residence permit on compassionate grounds.[193] If the decision is negative, the asylum-seeker has right to appeal against the decision to the Administrative Court. If the asylum-seeker decides not to appeal, he / she has 30 days to leave voluntarily and apply for assisted voluntary return. The decision will become final when the appeal period expires and then the asylum-seeker may be removed from the country. The EU has encouraged Member States to promote voluntary departure. In order to promote leaving voluntarily, the Member States should provide for assistance and counselling for those truly willing to enter into program of voluntary departure.[194]

Court proceedings. The Administrative Courts acts as a first instance in administrative appeals, such as appeals of the negative asylum decisions. The appeal to the Administrative Court needs to be submitted in 21 days after the notification of the decision.[195] The appeal letter can be submitted to the Migration Office or directly to the competent Administrative Court.[196] The Administrative Courts evaluate again all the elements of the asylum application and migration office´s decision, and give its own

[190] Administrative Act, 6.6.2003/434
[191] Aer, 2016, p.271-272
[192] Migri, an asylum and subsidiary protection are granted for four years
[193] Ibid, a residence permit on a compassionate grounds is permitted for one year
[194] EU 2008/155/EC,
[195] Aliens Act 190§
[196] Ibid, 197§

decision. This phase takes normally another 6-8 months. However, these deadlines have narrowed considerably in recent years.[197] The Administrative Court has the obligation to ensure that the case is resolved[198] and the asylum-seeker has the right to put forward new arguments in support of his/her claim as long as the case does not change significantly because of these new elements.[199] The Administrative Court may give a positive decision by overturning the decision given by Migration Office and sending it back to the Office for new processing and for granting international protection.

If the decision is negative and the Administrative Court reject the appeal, the asylum-seeker has still an opportunity to continue appealing. The asylum-seeker can still ask for Supreme Administrative Court to grant a leave to appeal within 14 days after the notification of the decision. If the appeal does not have significant additional elements that the Supreme Court can not evaluate as a first instance or it does not have elements on becoming a precedent, the Supreme Court does not give its permission for appealing. A factor of very large financial or other significance for the applicant may be such a relevant ground for appealing. I find this paragraph quite technical as all of the decisions relating to asylums are in great significance for those applying. It is also worth underlying that the decision of the Administrative Court is already enforceable even when appealing to the Supreme Administrative Court.

Application renewal refers to a new asylum application made by an alien after receiving a negative decision on his/her previous application[200] or to an application that has been made based on new grounds. In discussions at the seminars concerning the topic, I have encountered fallacies even among persons operating with asylum seekers on the effects by making a new, renewed application, and on the other hand, by suspending the processing of the first asylum application.[201] Some of the asylum-seekers has withdrawn their application and made another in the hope that the negative decision would not be enforceable.

[197] https://yle.fi/uutiset/3-8295512
[198] Administrative Act, (586/1996) 33§
[199] HE 32/2016 vp
[200] Aer, 2016, p.261
[201] Discussion on paperless-seminar, on 12 March, in Helsinki. Also heard from clients about the *advices* they have received

If a new application is made in the case in which the earlier application is still pending either in the Finnish Migration Office or in the courts, the additional information submitted by the asylum-seeker as a new application, will be forwarded to the processing authority as an addition to the pending asylum case.[202] This fact without seeing the bigger picture may give an idea of the *necessity* to withdraw the first application. However, this is not the case. The fact that an appeal is withdrawn and an immediate application is made is likely to indicate that there exists a matter of delaying the removal of the country referred to in the Procedural Directive.

Asylum-seeker can have only one simultaneously pending asylum application. However, if he / she has new grounds for a residence permit, for example job, studies or family ties; he / she got married or got children, he / she can always apply for residence permit for these reasons. If the new element just complements the grounds and the story for getting asylum, it would be better to make an addition to the pending appeal. If the application is expired, and then submitted again with the significantly same grounds, the application will be processed in accelerated process according to Aliens Act and the first enforceable decision will be valid until other significant elements appear. This possibility has been addressed also in government's proposals for new legislation.[203] If an alien has new grounds for obtaining international protection, he / she may submit them directly to the Court and no new application is necessary to do. If it is significant enough for the grounds for international protection, it has to be taken into consideration and granted protection or at least sent back to the Migration Office´s evaluation as a first instance. As the coherency of the story is at the great importance in these processes, expiring and applying again have effects on the process negatively rather than positively.

At the latest, when all national instances have been gone through the asylum-seeker can be deported and/or he/she can appeal to the European Court of Justice. Whatever the authorities decide, some of the migrants decide to remain in the country. Remaining in the country and the status of asylum-seekers depend on the authorities´ assessment of the need for international protection. Asylum-seeker may obtain a permanent or temporary residence permit instead of an asylum, depending on the degree of personal persecution and the situation in the country of origin.[204]

[202] Aliens Act 102 § 2mom
[203] HE 218/2014 vp. and HE 28/2003vp
[204] Nykänen, 2008, p.351

Even though the asylum seekers that have got a negative decision are strived to instruct to return voluntarily, some of them have declared that they will remain in Finland despite a negative decision. Many of them feel that returning to the home country is not an option because of the life threats in the former home country are real, whatever the authorities decide about the individual situation.[205]

If staying within the state borders when a residence permits ends or is initially denied, an alien will not even have the opportunity to leave the state legally. He / she has to live in the margins of the society, developing the prerequisites to survive independently.[206] Irregular migrant, who does not want to be found, has to come up with the sometimes uneven actors to rely on. This phenomenon raises parallel activities outside the control of the society.[207]

Some asylum seekers are tired of waiting for the the slow and stressful asylum process and the uncertain future and leave Finland. This causes a situation in which the Finnish authorities are unaware of the presence of thousands of foreigners, whether they have remained within the borders of Finland of left the country.[208] Such challenges in one country will soon and often be visible internationally, especially in neighbouring countries as these asylum-seekers strive to apply for an asylum again.[209]

An irregular migrant willing to adjust his or her legal status have to meet certain requirements given by the state.[210]

François Crépeau, UN Special Rapporteur on Human Rights Issues, has stated that the challenges of irregular migration are not a new or unique phenomenon. Migrants seeking better future prospects or fleeing persecution have always crossed borders around the world.[211]

[205] TERRA129:1 2017
[206] Ibid. P.63-65
[207] Ibid. p.64
[208] TERRA, 129:1 2017
[209] TERRA 129:1 2017
[210] IOM, 2017, p.161
[211] UN General Assembly 2012, p.3

An asylum and a permanent residence permit remove also the concerns of deportation and guarantee better social rights of citizen, and therefore creates a minimum legal requirements of independence as a person.[212] Although migration is generally understood as a linear process from entry into the nationality, where rights increase with the time spent in the country, residence may also end up being removed, irrespective of the length of stay and the person's actual ties to Finland.[213]

As I have showed, the asylum interview and the situation of irregularity can be linearly distant to each other in the whole process. However, the quality and success of the interview have an important role for the legal protection and certainty regarding to assessing the consistency and coherency of the story, and thus, to the ability to success. From the case law, that I will approach in the chapter four, we can see how important the story-telling is, in terms of consistency and credibility, for the final settlement of the matter.

2.3. Asylum interview

The EU directive on common procedures for granting and withdrawing international protection applying to all applications for international protection made in the territory of the Member States, sets the minimum standards for the national asylum interview. The asylum interview has a central significance in the asylum processes. According to the Alien Act 97§, the Migration Office is obliged to determine the identity and the route to Finland of a person seeking for international protection. In addition, authorities will ask for information to help to determine whether asylum-seeker´s application can be processed in Finland. Then the asylum-seeker can tell all the reasons why he / she is seeking asylum in Finland.

According to the Article 15 (3) of the EU procedures directive, the Member States must ensure that the interviews are conducted under conditions which allow asylum-seekers to present the grounds for their asylum applications in a comprehensive manner. The Article addresses the procedural requirements for interviews by giving special importance on

[212] Könönen, 2014, p.183-184
[213] Hammar, 1990

personal capability and competent to take account the personal and general circumstances related to the asylum application such as the asylum-seeker´s cultural origin, gender, sexual orientation, gender identity or vulnerability.

The asylum interview clarifies applicant´s grounds for persecution and other violations he / she has confronted in his / her home country or the threat of them.[214] The individual conditions for a residence permit as well as the country-specific informations on asylum-seeker´s home country are taken into consideration in the decision-making process of the application for international protection.[215] In the interview, asylum-seeker is given an opportunity to tell personally about his / her own country or his / her country of residence and about the experienced threat.

In this interview, the object is to find out the violations of rights in the asylum seekers´ past. On the other hand, the possible violations and threats in the future, are also of the particular interest.[216] The purpose is that all matters and elements relating to the acquisition of the applicants residence permit would be clarified already at this stage.[217] This emphasises the importance of the successful interrogation and interview.

The decision of an asylum is made based on the information received specially from the interview and on the other material that the asylum-seeker has submitted. According to the instructions given by Migration Office, the interviewer assess also what parts of the story and the asylum-seeker´s documents are important in his / her case. If necessary, *the interviewer asks questions to guide asylum seeker to talk about the most important things.* When the office makes a decision on an asylum application, they also assesses whether the story is credible.

The Migration Office arrange an interpreter for the interview. In the beginning of the asylum interview, the interviewer asks whether the asylum-seeker understands the interpreter or not. Based on the case law that I have studied, this is a difficult part that is also, in my view, important when discussing about epistemic violence. Sometimes it is very difficult to find and address the misunderstandings. However, the Article 16 of the EU procedure directive, guarantees the right to the opportunity to give an explanation

[214] Aer, 2006
[215] Aliens Act 98§
[216] Aer, p.266
[217] 2013/32/EU, 4 art. procedure´s directive

regarding elements which may be missing and / or any inconsistencies or contradictions in the asylum-seeker´s story.

> *"Correction at the check-up phase: the woman had just given birth, not pregnant."*

Sometimes misunderstandings are merely minor errors between the words, sometimes the word has totally different meaning in different tribes and families. This fact highlights the importance of the quality of the interpreter and his or her suitability to each particular case. This is also highly relevant in terms of the legal protection.

The asylum-seeker has right to get legal aid. The legal council is allowed to be present during the interview but after tightening regulations, the council will only be paid if there are special, weighty reasons why he / she needs to be present. The legal aid office decides whether the office will compensate the legal counsel´s costs. Legal aid of asylum-seekers under 18 years of age entering in Finland alone, is always compensated.[218] I will assess the problems arisen from the changes in legal aids and the representation in general more in the following chapters

3. Epistemic violence

This chapter shall introduce the international approach on epistemic violation. In this chapter I will also clarify the epistemic violence experienced by the subaltern, in this context: asylum seekers during asylum processes and [as a *result*], irregular migrants.

3.1. Introduction on epistemic violence

The *subaltern / other and epistemic violence* have been defined in few ways in the history. The philosophical term *episteme* derives from the Ancient Greek and has been discussed also by many philosophers such as Western philosophers Michel Foucault and Gilles

[218] Legal Aid Act

Deleuze. The term has been referred to knowledge, understanding or to the conditions and the possibility of reaching them. According to Foucault: "in any given culture and at any given moment, there is always only one episteme that defines the conditions of possibility of all knowledge, whether expressed in a theory or silently invested in a practice."

Philosopher Gayatri Spivak raised the discussion on epistemic violence up by questioning if the subaltern has a voice.[219] What are the conditions of the marginalised groups to speak, express themselves and for example give a testimony? This is a crucial point linking the concept of epistemic violence to my research topic. Epistemic violence has been researched especially within feminist studies. In this context too, women´s vulnerable situation is emphasised.[220] However, it is important to raise the problem in this context in general too.

The phenomenon explained by Spivak is to damage the subaltern´s ability and possibility to speak, express him / herself and be heard. This oppression may be intentional as well as unintentional.[221] In general, the epistemic violence has been seen as a failure. In her research, Kristie Dotson conceptualise epistemic violence as a failure, owing to pernicious ignorance, of the audience to meet the vulnerabilities of speakers in linguistic exchange.[222] The difficulty is that this form of violence is highly difficult to be addressed.

Korhonen has highlighted the phenomenon of *forgetting* the personal traits due to efficiency requirements. In numerous cases, the personal traits are contrasted with court´s efficiency requirements and the psychological elements on assessing and hearing which are underrated prioritising the quantative productivity targets of the judgments.[223]

Spivak has defined the subaltern as the lowest strata of the urban sub proletariat.[224] Dotson has researched epistemology and epistemic violence especially through different practices of silencing testimony given by oppressed individuals and has highlighted

[219] Spivak, 1988
[220] see also: Securing Afghan Women: Neocolonialism, Epistemic Violence and Rhetoric of the Veil, NWSA Journal, Volume 17, Number 3, Fall 2005, p.112-133
[221] Dotson, 2011, p.240
[222] Dotson, 2011, p.236
[223] Korhonen, 2011, p. 373
[224] Spivak, 1988, p. 282-283

practices that silence, de facto, speakers.[225] The true participation of the audience is necessary because speaker vulnerabilities exist always in linguistic exchanges. In the contexts of migration these vulnerabilities multiply. The role of the individual in society greatly affects on what he / she perceives in his / her environment and how he / she perceives his / her surroundings.[226] According to Spivak, the subalterns cannot represent themselves; they must be represented. *Their representative must appear simultaneously as their master, as an authority over them, as unrestricted governmental power that protects them from the other classes and send them rain and sunshine from above.*[227] This signify that the subaltern his / herself would not have own voice, and imply a critique of the subject as individual agent in this sense. In fact, one can question, like Spivak, if the subaltern, an asylum-seeker, has had a voice when the interpreter is incapable of translating a specific dialect. Being heard and understood or not, the individual is notwithstanding an active agent in society.

The complexity and the positioning and structures have been seen as a heritage of the Colonial era within the international law discussions.[228] Anghie A. has shown how the colonial origins of international law still remain within the regulations and realities.[229] The epistemic violence is in a way based on the colonial heritage on hierarchies and narratives. The narratives, images are established as the normative ones.[230] According to Foucault and Deleuze (unlike Spivak), the subaltern, oppressed groups of people can speak and know their conditions if given a chance.[231] However, they bypassed the representativeness in their analyses. The requirements to make processes more time efficient do not give much space to providing asylum-seekers a full understanding of the asylum process which in fact is very complicated even for the professionals. As already mentioned, the role and the position in the society affects on how person perceives his / her surroundings and possibilities.

Jennifer Hornsby identifies such dependency relations and analyses a successful linguistic exchanges.[232] To be able to successfully communicate, there need to exist reciprocity

[225] Dotson, p.237
[226] TERRA, 129:1 2017, p.64-65
[227] Spivak, 1998, p. 71
[228] Anghie A, 2016
[229] Ibid.
[230] Spivak, 1998, p.76-77
[231] Spivak,1998, p.78-79
[232] Hornsby, 1995, p. 134

among people. She underlines the relations of dependence speakers have on audiences as a fundamental feature of linguistic communication.[233] This can be seen in the very stage of the asylum interview. Does the interviewer have a common goal with the asylum-seeker to make the story as strong as possible? Does the interviewer intend to ask, based on his / her expertise, the right questions benefiting the individual asylum-seeker? This relation of dependence is emphasised on asylum processes as the whole life of the asylum-seeker is in the hands of the listener, interpreter and authorities. For the successful acts to be performed, there is a great need of reciprocity not only to understand the *speaker´s words but also in taking the words as they are meant to be taken.* This brings us to the fact that each of the different actors´ ability and understanding gain an emphasised significance within processes.

The need of necessary qualifications and capabilities of the *audience* is considered in the governments´ proposal on legislative amendments on Finnish Aliens Act when the functions of the Administrative Courts were distributed.[234] The next sub chapter will link the approach on epistemic violence with asylum processes especially with the first phase, asylum interview.

3.2. Epistemic violence suffered by asylum seekers as a path into irregularity

> *"The migration office does not believe in my story. They believe Cabinda is safe place for me. I have tried to explain why I did not have the courage to tell the whole truth when I was 18 years old: Until then [hearing], the whole my life I had frightened the authorities and I had done my best to not reveal anything about me to the police or to the soldiers. They were the ones chasing me and willing to hurt me."*
>
> *-Angolan man in Finland* [235]

[233] see also Dotson, 2011, p. 237-241
[234] HE:
[235] paperittomat, 2010, s. 176-189

In the contexts of this research I have defined the marginalised group of asylum seekers (and as an end result, irregular migrants) as the *subaltern.* Greater geographical mobility creates new challenges and obscure traditional forms of social control.[236] A precarious legal status means that life is not in your own hands. This status is followed by being with the mercy of other people and with the system. Aliens are forced to make choices about on who they can count on when entering into another country as well as when crossing the borders.[237] The asylum-processes have showed to cause inability, shame and feeling oneself guilty of the situation that is not under one´s own control.[238]

Previous researches shows that many of the asylum seekers has never trusted on authorities and have encountered oppression directly on the behalf of them.[239] I believe that the flaws in the first phases of the process, especially in the asylum interview, and the reality of silencing are likely to strengthen these fears and opinions also in Finland and to weaken the trust in our structures. The fact that these persons in the cases I have analysed have often been traumatised by experiences of persecution or abuse before, need to be taken into consideration. It does not help the situation that these persons are treated like criminals.[240] The phenomenon and its elements are organised by narratives, the stories, where they can be shown to favour the results of our functions and interests.[241] Even being widely recognised in codified and customary law, various human rights, also established by international law and its institutional structures, greatly contribute to violations of these human rights.[242]

The principle is that the legal status, stay, and thus the entire future, of the migrant depends on and is determined by the residence permit system, and therefore, by the state´s authorities.[243] The state's relationship with an alien is a one-sided power relationship – hegemony versus subaltern. This asymmetrical relationship creates a strong facility to potential existence of epistemic violence: States have the power to decide on the admission and stay of an alien, whether to stay and under what conditions. The asymmetric relationship between the alien and the state has its reflections in social

[236] Kagan, 1995, s.140-141
[237] Könönen, 2014, p.184
[238] Könönen, 2014, p.186
[239] see e.g. researches of Gadd, Jauhiainen and Saarikkomäki
[240] Weissbrodt, 2007, p.231
[241] Korhonen, 2011, p. 375
[242] Pogge
[243] Könönen, 2014, p.171-189

relations too causing feelings of gratitude and even debt for more powerful ones.[244] The dependence can be transformed to a personal relation of dependence and lay the person open to the exploitation and manipulation.[245]

The possibility to be expelled from the country is the central element in creating such a vulnerable and precarious role in a society. The uncertainty surrounds all aliens who have not a permanent right of residence but especially those in irregular situations.[246] As a result, the life is not under persons own control. However, despite circumstances, people seek to continue their lives seeking the possibilities to independent living. Regardless of the likelihoods of the told consequences of the return, the uncertainty and the fear associated to the past and to the future invoke a major anxiety.[247] The great anxiety and fear of expulsion make some asylum seekers to change their story in order to better respond to the requirements of asylum.

Each asylum application and process requires assessing its valuation on the basis of the individual´s particular situation.[248] It does not happen rarely that the asylum seeker relies on the grounds that has no legal validity.[249] The asylum or a refugee status can not be granted under these elements and with the words of Janne Aer: "in these situations it is indifferent if the story is real or not."[250] The applicant has the obligation to rely on the elements he / she wants to ground the application. To these elements and facts to be believable and to the story to be coherent, well-founded, consistent and reliable, they need to be expressed already in the interview.

According to the Finnish Administrative Law, the Administrative Court has the obligation to investigate for all the facts to be clarified. The party, asylum-seeker, must also be given the opportunity to present his / her views on the documents relevant to the case. However, according to the case law, the Courts have not been considered to be obliged to hear asylum-seeker about the country information used in his / her particular case even if these particular informations are evaluated together with the asylum-seeker´s own story.[251]

[244] Back, 2007, p.42
[245] Könönen, 2014 p.
[246] Könönen, 2014, p.176
[247] Könönen, 2014, p. 176 and 186
[248] HCR/GIP/04/06, p. 5
[249] Aer, 2016, p.274
[250] Aer, 2016, p.274
[251] Aer, 2016

Especially in the religion-based asylum applications, the interview and clarifications are of great complexity: the asylum-seeker needs to clarify his / her individual profile and personal religious experiences, beliefs, ways of practising this religion, personal reasons of having faith, explanation on what effect the restrictions have on the life of individual, whether these religious activities have been or could be brought to the attention in one´s home country, and particularly, of the persecutor etc. These requirements impose high obligations and expectations on the applicant´s ability to communicate and bring all the elements up. One might ask, how the individual asylum-seeker could know what is relevant and what is not and therefore have a real possibility to direct and govern his / her own case. This lack in such knowledge can be seen as epistemic violence as the rights of the asylum-seeker are depending on those relevant factors.

If the asylum seeker has, for a reason or another, lost his / her identity documents, or for some reason does not want to show them, the applicant weakens his / her credibility as an asylum seeker.[252] According to my work experience, this is the reality of many applicants. Sometimes even the credibility of official documents given by applicants' home state authorities are questioned.

In many countries from where most of the asylum seekers come to Finland such as Iraq, they have used to note the birthday in to the cover of Koran. If the Koran has been lost or left home when fleeing from home, the birthday as well as the whole identity is based on the word and on the story of the asylum seeker. Taking into account the very different concept of time and different calendar, the applicant may truly lack the knowledge of his / her real birthday. This might seem weird to the Western people and therefore the story might not seem credible. The credibility has also been estimated when assessing different ways of spelling one´s name. Originally, the name may have been spelled in other alphabets and therefore, there might have been more than one way of spelling one´s name in Roman alphabet. In some cases, these differences have been seen as an incoherency.

Migrants often have to confront discrimination, collectively and individually in various manners. Such behaviours have the possibility to trigger further misconceptions and suspicion that culminate in hostility towards and discrimination against migrants.[253]

[252] Aer, 2016, p.275
[253] Perruchoud, 2007, p.71

Destitute migrate women in an irregular situation and those employed in the domestic work sector are at heightened risk of exploitation and abuse.[254] The UNHCR has also highlighted the need of particular attention to the impact of gender.[255] The UNHCR has noted that women and men may fear and experience persecution in different ways comparing to each other. In the name of culture, religion and traditions girls and women may confront more requirements on their day-to-day life and on their future.[256] In order to truly know the situation, these differential aspects need to be taken into consideration. When establishing the directive on common procedures on international protection, the European Council highlighted these elements too and asked for gender-sensitive processes ensuring substantive equality between female and male asylum-seekers.[257] The European Council stated that the interviews has to be organised in a way that makes it possible for asylum-seekers to tell about their experiences and fears.

Even if the story is quite coherent, well-founded and streamlined, the asylum can not be granted merely based on the story if it is not realistic and does not give a reasonable and clear picture of the situation applicant left in his / her home country.[258]

A particular concern is also that the residence permits of the asylum-seeker, and of possible victim of various violations, may be dependent on the perpetrator. Actually, all of the permits are dependent on someone else which brings us to the question of whether the subaltern really has voice or not. The migrants have just a little power to participate their own processes. They are left without the effective means to challenge the violations of their rights.[259]

The use of criminal sanctions and imprisonment to fight irregular migration harms not only the persons concerned, but also casts a negative light on how society as a whole perceives them.[260] It creates narratives on their existence.

[254] FRA, 2916, p.7
[255] see e.g. UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and / or its 1967 Protocol relating to the status of refugees- , HCR/GIP/02/01 May 2002 and UNHCR Guidelines on International Protection: Religion-Based Refugee Claims under the same article and the protocol, HCR/GIP/04/06, April 2004
[256] HCR/GIP/04/06, p.8
[257] Official Journal of the European Union, 2013, L 180/63
[258] Aer, 2016, s.276
[259] Weissbrodt, 2007, p.229
[260] FRA, 2016, p.2

If there are mistakes in the documents from the interviews, asylum-seekers have experienced a considerable difficulty in correcting these mistakes.[261] If asylum-seekers have managed to correct the mistakes in the documents from the interviews, they may have been considered to be weakening their credibility.[262] The burden of proof that the grounds for the application are credible is on the applicants' side.[263] The story and other explanations must be considered as a whole, taking into account both, the facts supporting the story and those suggesting that the story does not correspond to the reality. I see that an essential question is, whether the applicant's story is realistic as a whole.

According to the Qualification Directive[264] the story can be considered credible, even if all the details can not be verified, if the following conditions are fulfilled:

1) The applicant has genuinely tried to raise the grounds for supporting his application
2) The applicant has highlighted all the relevant factors for which he has been able to rely on and has given a satisfactory explanation of the other relevant factors that are missing
3) The story has been found to be coherent and plausible and the story does not conflict with the particular and general information available on the applicant´s case
4) The applicant has found to be generally credible

The question is about so called *benefit of the doubt*-principle: in a case of doubt, the case should be solved in favour of the asylum-seeker.[265] All of the cases depend on the individual story and the personal history, and their credibility are always evaluated in the process.[266]

[261] see e.g. Koistinen 2017
[262] Koistinen, 2017, see also TERRA, 129:1 2017
[263] Aer, 2016, p.273-274
[264] 2011/95/EU, art 4 (5)
[265] UNHCR, handbook: 203-204
[266] case concerning directly the credibility: KHO:2003:8 – N. *v. Suomi*

The UNHCR reports draw attention to the fact that all persons have rights, including migrants who enter or stay in the EU without permission. In practice, however, such persons are often deprived of their basic rights.[267] It has been said that prejudice and preconception may reflect in a state´s legislation and practices – prevail, and even serve to deny asylum-seekers the rights they are guaranteed by international law. That may leave them subject to harassment and abuse by the society at large, political parties, officials, and by the media.[268] Khalid Koser has also argued that this kind of *stamping* can lead to the omission of the human dignity and fundamental human rights.[269]

Under 38§ (3) of the Administrative Procedure Act, where a party requests an oral hearing, he / she must state the reasons why it is necessary and what explanation he / she would give at the hearing. Arranging an extra hearing for an asylum-seeker is very exceptional. This is a clear example of epistemic violence in practice. I see that if there was no epistemic violence and subaltern would always have a voice, then there would be an obligation for such a hearing. Now asylum-seekers, the subalterns voice is limited to the specific interviews in which they have to be able to express everything meaningful for their case.

When giving his / her statement, telling the story, it is necessary to feel reciprocity to be able to successfully express oneself.[270] The structure of the asylum interview creates vulnerability, threat of failure and being returned to the home country. Based on my understanding, some times the asylum seekers do not feel like being understood nor even heard. Sometimes there are smaller and bigger errors left in the documents from the interviews, which are difficult to retrieve afterwards.[271]

In some cases, we lack in both, capability and desire to hear and particularly, understand the stories presented. Reciprocity requires that the audience understand a speaker´s words and understand what the speaker is doing with the words.[272] The ability and understanding of every agent involving asylum processes get an emphasised meaning.

[267] FRA, 2016, p.2
[268] Weissbrodt, 2007, p.228
[269] Koser, 2005, p.5
[270] Hornsby, 1995, p.134
[271] see e.g. Koistinen and Aer
[272] Dotson, 2011, p.237

The UNHCR has given instructions on examining asylum-seeker´s claims concerning epistemic difficulties. The procedural instructions of UNHCR has particularly addressed the need on assistance of independent experts with particularised knowledge of the country, region and context of the claim, capable of objective interpretation and evaluation.[273] In the epistemic point of view, the vulnerabilities, especially of in the gender-, culture- and religion-based applications need to be taken into consideration in selectioning interviewer and interpreter in order to fulfil the cabs on understanding between the subaltern and the audience / hearer, and in order to better support and corroborate the asylum-seeker´s ability to speak and tell his / her story.

In this sense, from the asylum-seeker´s side there exist a great epistemic fear in order to have the courage to fully explain the whole situation, and on the other hand to be understood correctly. As the asylum-seeker´s claims often times are related to issues strongly based on cultural, traditional and religious aspects, the interviewer and interpreter should be able to act objectively without making conclusions and interpretations basing on narratives and upon their experiences and general assumptions. If the interpreter has the same cultural or religious background as the asylum-seeker, the asylum-seeker may be afraid of being interfered or judged by the interpreter. On the other hand, without having this understanding on the background, it is highly difficult to be able to hear the full story and to understand it clearly. These aspects create a real danger of intentional as well as unintentional epistemic violence, and the possibility to hinder open communication. Even little misunderstandings and differences in the terminology used can create a highly relevant effects on coherency and credibility of the asylum-seeker´s story.

Irregular migrants. Authorities set in the lives of irregular migrants variety of constraints: irregular migrants have to hide and seek social and health services and houses from somewhere, either legally or illegally.[274] In their research, Koistinen and Jauhiainen have demonstrated with the example of Moria, how people are geographically controlled through the state and the EU borders and biopolitically by transforming asylum-seekers

[273] HCR/GIP/04/06, p. 10
[274] Gadd, 2017, p.139

placed in a camp into a mass that can be ruled out of humanity´s category and of human life.[275]

Because of a real or perceived danger of detection, migrants in an irregular situation often refrain from approaching medical facilities, sending their children to school, registering their children´s births or attending religious services.[276] This will drive these migrants even further underground, depriving them of access to public services and making them more vulnerable to exploitation and abuse.[277] Also, migrants in an irregular situation will rarely be treated as victims of crime.

Irregular migrants, those who are detained or in detention or has already been deported face major challenges in solving their legal problems.[278] The residence permit system can be understood as a continuation of boundaries in a national state, which at the same time produces various legal subjects.[279]

The residence permit system determines the conditions of legal residence, which in turn creates the possibility of illegal residence. Irregular migration is one of the special *legal* status produced and created by the system. Scholars talk about producing irregular migration when referring to the fact that ultimately, there is no irregular migration without legislation on aliens.[280] Therefore, a more rigorous asylum policy is more likely to increase rather than reduce irregular migration.[281] In addition, people seek to build an independent life, work and make partnerships regardless of the narrative category of the status.

The residence permits application should be submitted to the police station personally. This causes a problematic situation for the irregular migrants but also for the asylum-seekers who have received a refusal on one application. Even if a person has a reason for a residence permit (such as an employment or a place of study), filing an application may result in detention and removal.

[275] Koistinen/ Jauhiainen, 2017,
[276] FRA, 2016, p.6
[277] Ibid
[278] Dembour, 2015, p.506-507
[279] Anderson, 2010
[280] e.g. De Genova, 2005
[281] Oikeus 2014 (43): 2:172-191

According to Peter H. Schuck, migration is an exceptional area of legislation in which the authority´s significance is highlighted and individual rights are at their lowest.[282] Based on this research it is not difficult to agree, at least partially.

For example, the de jure or de facto stateless individuals´ rights are poorly implemented because they are rarely in the interests of those who have the ultimate decision-making power and leadership. Living outside the society or in margins, it is difficult to get the competence from the society, and therefore opportunities to ensure that one's own rights are taken into account. For example, taking rights into account at international agreements or other decision-making levels, is highly difficult.

Kennedy has stressed out the importance of giving a global voice to individual pleas to engage individuals directly with the human rights tradition.[283]

Authorities can also make decisions for the benefit of the applicant in unclear situations, however, the application of the possibility seems very strict.[284] The uncertainty caused by the conditionality of legitimate status has a strong connection also with the precarious labour market position. The other side of the alien´s unstable position, apart from the uncertainty of the stay, is the limited social and economic rights.[285]

The implementation of the Finnish Aliens Act can not equivocally be restored to the law as the act leaves a considerable descrenary power to the authorities. The conference on migration, held in Helsinki in September 2002, underlined interstate cooperation in the fight against irregular migration, and highlighted the vulnerable status of the irregular migrants and the poor human rights situation.[286]

The epistemic violence has side effects that take more time to appear and occur gradually across time and space.[287] These side-effects of violence need to be approached for better understanding the phenomenon. The current politics, regulations, practices and realities have great impacts on our society. They have direct effects as well as slow effects that

[282] Schuck, 1998, p. 19
[283] Kennedy, 2004, p.133
[284] Saarikkomäki, etc. 2018,
[285] Könönen, 2014, p.175
[286] see EC conference of Migration Ministers, final declaration (2002)
[287] Nixon R

will show their existence after many years. I see these types of violations introduced by Nixon and Spivak as interlinked, but also independent examples of great violation of fundamental rights.[288]

Going forward into the problem, into the effects of weak migration politics, there are group of people, migrants in an irregular situation beside our official society. These migrants have very rarely a real voice to report a crime to the police either as victim or as a witness, as they are afraid of detection and return.[289]

There exist serious asymmetries that causes violations of law and significant side effects if the existence of more vulnerable, their unique identity and cultural practices have not been taken into consideration.[290]

4. International case law as illustration on the epistemic violence in the asylum-cases

This Chapter shall give an overview to the case law on migration. I have chosen some case law examples illustrating the features and the type of epistemic violence I have encountered also in my day-to-day work. The following examples illustrate the effects of elements of epistemic violence on the particular asylum-processes. The second sub chapter shall analyse the tightening policy, legislation and practices on migration as a partial path into the irregularity and increasing vulnerability.

4.1 International case law in the light of international law

As I have mentioned earlier, the difficulty in epistemic violence is to address the violation occurred. Although the violence is not directly articulated in the case law, all of the cases have a strong link to the challenge of successful linguistic exchange and therefore epistemic violence. In almost every case, the interpreter has been used and the asylum-

[288] See e.g. Nixon, Spivak
[289] Düvell, 2011, p.275-295
[290] Anghie, 2006, p.742-749

seekers are from the different cultural, legal and social background and therefore there exist great possibility to lack of knowledge and understanding on both sides: on hearer, interpreter as well as on the asylum-seeker.

> *"I don´t know anymore who am I. I don´t no longer spend the Muslim Ramadan. I am not Serbian, Albanian nor Swedish. I am just a human being without country, without voice, without face…"*[291]

The subjective elements are of great importance on evaluating the story of the asylum-seeker. In every instance of the legal system of the state, the credibility of the asylum-seeker´s story is evaluated.

One case concerning directly Finnish practices and the credibility was about the citizen of Zaire.[292] The Finnish Supreme Administrative Court rejected the asylum-seeker´s application for international protection. The case was about the citizen of Zaire who had served in the security forces of the Zaire´s last President, Mobutu. The European Court of Human Rights ended up with a different outcome in terms of credibility and considered the applicant to be in great danger if he was returned to his home country.[293]

Since the subjective element is given so much importance in general, the assessment of the credibility of the story is necessary if the case is not sufficiently clear on the basis of the evidences. When assessing subjective fear, asylum-seekers family and personal background; membership in a given racial religious, national or political group, asylum-seeker´s own interpretation of his / her personal experience, personality and other elements need to be taken into account. This have an important link to the epistemic violence – to the ability to express these elements and, on the other hand, the hearer´s ability to understand them.

With regard to the objective element, the authorities must evaluate the asylum seeker's statements and compare them to the data of the circumstances of the country.[294] In

[291] Paperittomat, 2010, p.74-75
[292] KHO:2003:8
[293] ECtHR, N. v. *Finland*
[294] Ibid, p.11-12

principle, the burden of proof is with the asylum-seeker to produce evidence showing that he / she has a real risk of being subject to a treatment contrary to Article 3 of the directive if he is returned.[295] In principle, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.[296] The ECtHR has also considered that the threat of the complainant must be individual.[297]

The ECtHR has also considered that past abuses are a strong indication that there is a real threat that a person will be exposed to treatment contrary to Article 3 of the Convention in future. For that reason, the person needs to tell a coherent, well-founded and plausible story about the inconvenience that has occurred.[298] The story needs to be consistent also with the country data given for example by UNCHR.

I reckon that the official and reliable evidences are often times difficult to obtain, the asylum-seeker´s own story about the incidents, torture and violations become the most important evidence in the process. For this reason, the asylum-seekers own ability to represent all the elements play a crucial role. If the important elements are missed, the outcome may be totally different.

According to the UNHCR, the credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.[299]

The asylum-seeker's story's individuality was considered in the ECtHR´s decision of *Vilvarajah v. United Kingdom*. The Court noted that the situation in Sri Lanka was unstable, but the personal situation of the asylum-seeker was not worse than of the rest of Tamil people. Therefore, the asylum-seekers were restored back to Sri Lanka and three of them were reportedly mistreated. However, the Court noted that their cases had no

[295] ECtHR, *Soering v. UK (14038/88), para. 91*
[296] ECtHR: Saadi v. Italy (37201/06), para.129
[297] Pirjola, 2002, p.754
[298] ECtHR, J.K.etc v. Sweden (59166/12),para. 102: "The Court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue."
[299] UNHCR, 1998, p.3

special features that would have allowed the United Kingdom Secretary of the State to anticipate such treatment.[300]

The possible implications of the case have been speculated in legal discussions. It has been speculated that behind the decision there has been possible political affecting element, and that the Court might have been afraid that if the decision was positive for the asylum-seekers, the decision would have become a precedent which numerous asylum-seekers would have used.[301] This shows clearly the epistemic violence an asylum-seeker can face during his / her process. The power to determine about his / her life is in the hands of the more powerful, and the voice of the subaltern has substantially less power in the particular matter.

These cases show the high complexity of the situations and requirements which must be met in the processes. If these situations are complex to the lawyers that are familiar with the national, as well as international, legislation and legal systems, we can only assume how *difficult* or impossible it is to the asylum-seekers who do not speak the same language, and have the same background *and voice.*

An asylum-seeker can be returned to his / her home country if he / she can not convince the authorities that he / she is in a real danger of being subjected to persecution in their home country. There can be several reasons for that as can be seen in these cases presented in this chapter. An asylum-seeker may not be able to obtain evidence convincing enough to prove the abuses in his / her past. There are cases in which an asylum-seeker has bruises and scarfs but the Finnish authorities have considered these as single cases that do not prove the constant abuse and threat based on individual reasons. The story may not be entirely credible. There are several such cases among the cases studied. The asylum-seeker may not stand out from other people from the country where a generally violent situation is apparent. There may not be enough reasons to believe that he / she would be in danger personally even if the danger does exist.

Also the asylum-seeker may not have had any problems in his / her *country of origin* to which the need of asylum is evaluated. There are cases in which the asylum-seeker has

[300] ECtHR: Vilvarajah etc. v. UK (13163/87; 13164/87; 13165/87; 13447/87; 13448/87), para.111-112
[301] e.g. Dembour, 2015, p.231

never even visited his / her country of origin.[302] Refugee status or subsidiary protection status will not be granted if the asylum seeker has an opportunity to escape internally within the borders of his/her home country.[303] The need for international protection is generally examined in relation to the country of the nationality of the asylum-seeker.[304] If the asylum-seeker is found to be in need of international protection, it is necessary to examine whether he / she can return to his / her country of nationality, whose primary duty is to protect him / her.[305] This is especially problematic in the cases of Afghan people fleeing for example from Iran. In such cases person would be deported to Afghanistan where the person has never lived.

If the asylum-seeker has already got an asylum from another country, the application will be investigated in Finland in respect of the violations of the asylum country.[306] Problems appear when the asylum-seeker was in another country irregularly, may not have even visited his country of the nationality in his / her life and the violations against him / her have happened in that other country. He / she may have never been in the country of origin and therefore have not experienced any personal and real violation there. He / she will be sent to the country where he / she may have nothing.

The ECtHR has also considered asylum-seekers as members of a particularly vulnerable group. According to the ECtHR, vulnerable groups are people with mental health problems, HIV-infected and asylum-seekers. The ECtHR is no longer using the term vulnerable group speaking of the asylum-seekers but the term *particularly vulnerable group.* The ECtHR case law shows that the concept of vulnerability is so nuanced, flexible and complex that it is impossible to create a precise definition for the term.[307] All asylum seekers are therefore considered to be in need of special protection. This need has been addressed in the regulations on rights to legal aid and assistance in legal processes. The vulnerability in the context of this research and particularly of epistemic violence, causes difficulties on communication and on linguistic exchanges. The evaluation of such vulnerabilities and their credibility, however, has changed dramatically in the case-law.

[302] see e.g. Jauhiainen
[303] Aer, 2016.p253
[304] KHO 12.12.2008, t. 3224 (LRS)
[305] KHO 2015:130
[306] Aer, 2016, p.239
[307] Venturi, 2016, ch.14

The ECtHR has justified the vulnerable position with all the traumatic experiences the asylum-seekers were likely to have experienced in the past.[308] "The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection - ." In the present case, the Court must take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously -."[309] This makes it easy to understand that individual experiences would be of the great importance for the asylum seeker's vulnerability.

On the basis of the case-law I have dealt with, it can be concluded that several factors affect simultaneously the ECtHR decisions. And all of these factors and elements need to be expressed in a right manner for the result in an asylum process to be successful.

4.2. Tightening policies, legislation, practices and epistemic violence - forming a path into the irregularity

I have gone through the Government´s proposals on laws and their explanatory documents regarding the Finnish Aliens Act. In this research, I focus, moreover, on the central amendments that I find most relevant in terms of the epistemic violence.

Stricter asylum policy will possibly reduce slightly new incoming asylum seekers.[310] However, the solution to the challenges of migration and irregular migration can not be found by tightening the living condition, legislation and practices.[311] Contrarily, almost all scientific studies show that as a result of the tightening measures, irregular entry increases.[312] In the Great Britain, fears of removal or the difficulties in legalising the stay have led people to a situation where they feel more *secure* to operate outside the system of organised society than to try to legalise their stay in the country.[313] These are few of the side-effects that should be evaluated in more detail when regulating migration.

[308] ECHR: M.S.S. v. Belgium and Greece (30696/09)
[309] Ibid, ch. 251, 232
[310] Jauhiainen, Gadd, Jokela, 2017, p. 20
[311] Ibid, p. 54
[312] Czaika & Hobolt, 2016, p. 345-365
[313] Schweitzer, 2017, p. 317-331

As I have mentioned, the Finnish Migration Office received over 32 000 applications for asylum signifying a great increase comparing to the last years. The increased number of asylum-seekers posed, and is still posing challenges. The extended processes caused frustration among numerous asylum-seekers and some of them decided to leave independently the country. However, it also raised the concern[314] about the phenomenon where the authorities did not have the exact knowledge of whether the asylum-seeker has left the country independently or remained within the borders of the state. As a result, the Interior Ministry sought to prevent all of the services from these migrants.[315]

The government sought to ease the burden of the asylum system by reforming both legal aid and the legislation and practices on aliens. According to Päivi Nerg, former Secretary of the Finnish Interior Ministry, the aim of our system and policy is to reduce migration costs and to protect the human rights of asylum seekers.[316] The tightened attitude of the Member States in the European Union towards asylum seekers and the polarised public dialogue on migration raise potential concerns of the equal treatment and the realisation of human rights.[317] The actions of the Finnish Migration Office and Finland's tightened asylum line have been widely debated in public. Changes have also been reflected in the activities of the courts.

In Finland, the broadest amendment on the legislation concerning migration was made urgently in 2016. The purpose of the amendment was primarily to enhance the efficiency of courts and to provide for access to legal assistance when dealing with issues of international protection while at the same time reducing the cost of government finances.[318] These are noble ideas and goals, however, the preparations were made too urgently for the proper evaluation on the side-effects to be possible.

The costs incurred to the government finances were taken into account, but in my opinion, the governments presentation for the law did not observe sufficiently the specificity of handling these specific cases, nor the process in general with all its effects.

[314] Päivi Nerg, seminar on 10.10.2017, Helsinki
[315] TERRA: 129 1 2017, p. 48
[316] seminar: Soste kouluttaa: Kansainvälisen sosiaalipolitiikan iltapäivä, Helsinki. 10.10.2017
[317] Nykänen 2013, p.359
[318] HE 32/2016 vp

Firstly, the changes were made to the time to appeal and to the urgency. It was notified in the preparations that the despatch is one of the major elements for the legal certainty. In my opinion, however, the despatch of the process should not be realised by undermining other elements of the legal certainty and the real possibility of the asylum-seeker to appeal. The amendments were technically justified well: It is true that the increased asylum applications caused a process-economic challenge, and the solutions need to be searched and found. However, I can not see it rational to speed the process by weakening the legal protection and certainty as a whole and by increasing the possible epistemic violence among asylum-seekers – I find it economically short-sighted.

The appeal time is one of the most concrete and important formal requirement in the regulations concerning asylum-seekers and processes. According to the amended law, the assistance of a legal aid in the asylum interview is no longer possible unless the presence of the assistant is necessary for particularly serious reasons or if the asylum-seeker is under 18 years old and in the country without a guardian.[319]

The amendment shortened also the appeal period for appeals to the Administrative Court and the Supreme Administrative Court for obtaining international protection. As a result of the amendment, the appeal period for administrative court was shortened from the general 30 days to 21 days and also to the Supreme Administrative Court from 30 days to 14 days from the date of notification of the decision.[320] These deadlines are very short, especially for asylum-seekers who, in principle, have no idea or understanding of Finnish legal system or the content of the decisions, nor impacts and their own opportunities, even if they were professionally interpreted to them. To respond to these decisions, require a little longer so that the situation could be properly gone trough with a lawyer. These time constraints also cause unnecessary pressure on lawyers assisting asylum processes, as it often takes a bit more time to contact the client, arrange an interpreter, notify the decision and clarify the contents of the decision. Shortening time inevitably increases the possibility of epistemic violence encountered by asylum-seekers.

The despatch process is indeed, an internationally agreed fundamental right but with this amendment it was realised by narrowing the claimants' possibility and the scope to act. In practice, court processing times have stretched considerably, yet asylum-seeker, whose

[319] Changes on Aliens Act 9§ and the Legal Aid Act
[320] 12.8.2016/646

life is directly and concretely affected, these deadlines bind strictly. The prolongation of processing times was taken into account in the Governments proposal through savings.[321] Since the issue is a matter of economically large amounts of public resources and money, and for securing the fundamental rights of an individual and security of the society in general, it is important that the impact assessment is done in an appropriate way.

From the point of view of this research, the particular importance needs to be given to the restrictions contained in the amendment to limit the possibilities of aliens to receive legal aid in the field of international protection. After the changes into the law, legal aid no longer includes the presence of a lawyer in an asylum-interview, the most important phase in the process, unless the lawyers´ presence is necessary for particularly weighty reasons as mentioned earlier in this thesis. The arguments of the restrictions of legal aid were justified mainly relying on financial resources.[322] Nevertheless, this change in the law can be seen increasing the risk of the asylum-seekers to experience epistemic violence during their processes and thus, can be considered as compromising the quality of the Finnish legal system. I can not see positive long-term implications to process economy – on the contrary, I find these changes more likely to reduce pressure on appeal instances.

In order to be able to understand and know the asylum-seekers story and therefore be able to appeal successfully, the legal assistant need, in any cases, orientate his- / herself on the interview material and the asylum-seekers story in the stages of the appeal. The possible mistakes and discrepancies in the previous phase are likely to bring more work in the appealing phases, and these corrective measures are weaker in terms of legal security and certainty. I think it would be more durable, sustainable and more effective to prevent such mistakes by emphasising the importance of the interview.

The purpose of allocating the resources of legal aid in truly necessary situations in order to seek for clarity and fluency of the process is somewhat difficult in my opinion. The first asylum interview phase is exactly the phase within asylum process in which the necessity and the grounds are evaluated for the first time. I would therefore ask, how the *special necessity* for the legal aid in this phase is evaluated?

[321] The purpose of the amendment was to curb the growth of processing times and thus to achieve savings throught the reduced time spent in the reception centers.
[322] HE 32/2016, p. 10-11

Together with the changes to the remuneration criteria, these amendments have made the assistance in the asylum-processes considerably difficult for lawyers and other legal practitioners.

The governments proposal notified that due to the new material and documents gathered over prolonged time waiting for the decisions, the Courts return an increasing amounts of cases back to the review of the Migration office. The time passed has been seen as a reason for double processes.[323] As a answer for these double processes can be seen the ensuring effective professional legal aid proved already in the first phases, as stated in the EU Directive on common procedures. This estimation supports the importance of the lawyer, legal aid, assisting the interview phase. This also reflects the strategic goals set by the Ministry of Justice to remove delays in court proceedings and differences in treatment times in an effective way, yet guaranteeing the realisation of the fundamental rights of the individual.

The amendment raised up the problem of understanding mistakes, interpreting errors and difficulties and of cultural misunderstanding at the first and most important phase during the process, the asylum interview. With regard to the deadlines, the experts raised their concerns in the preparatory phase of the amendment by addressing that a deadline should not be set at any specific time, or at least they should be longer.[324] Together these two amendments meant a significant changes to the processes.

The amendments were also made to the configuration rules of the Courts. The fact that broader, more demanding and socially more important matters have come to the Administrative Courts settlements was mentioned in the Government´s proposal for the new law. However, the Government´s proposal for the new law introduced changes to Administrative Court´s configurations enabling decision-making in only one and two-member configurations. This was argued by process-economic arguments. I find it very important to develop our systems to be more effective in terms of process-economy, but the efficient allocation of resources requires more comprehensive review and analysis on actual implications of the costs.

[323] HE 32/2016, p.14
[324] HE 218/2014 vp

A recent empirical pilot study on decisions of international protection at the Finnish Migration Office[325] (hereinafter pilot study) reveals the changes made, and the tightened environment and increasing epistemic violence suffered by asylum-seekers. I consider that the Government tried to respond quickly to the fast-growing challenge by rushing the amendments and therefore the preparations lacked of sufficient evaluation on side-effects. This lack of such evaluation was clearly addressed on the commentaries to the Governments proposal.[326] The arguments in the preparatory documents of the Act also contain opposing arguments for the law. It was mentioned that insufficient consideration was given to the drafting of legislation and that no effective remedies were provided to comply with the absolute *non-refoulement* clause, and to secure essential fundamental and human rights. Despite the opposing arguments and observations of insufficient preparations, the new law was adopted and implemented without transitional provisions. On 1 September 2016, an amendment to the Aliens Act entered into force.

According to the pilot study, the number of negative decisions increased markedly in 2017 comparing with the year 2015. The objectivity of the story evaluated by migration office was more difficult to reach in 2017 than in 2015.[327] The pilot study revealed significant changes on how Finnish Migration Office considered whether the fear is objectively justified or not by looking at all the decision that showed what the asylum seekers scare.[328]

In 2015, the arguments of the decision emphasised the credibility of the asylum-seeker´s story. The pilot study has presumed that the threshold was quite high in giving a negative decision because of the lack of credibility. Instead, in 2017, the argumentations were based mainly on emphasising more the inaccuracies and details.[329] I see these changes revealed by the pilot study illustrating the increasing epistemic requirements addressed to the asylum-seekers. The asylum-seekers are required to more accurate and detailed linguistic exchange in their processes.

In the material of 2017, instead, the argumentation was emphasised of overall credibility

[325] Saarikkomäki, etc. 2018
[326] LaVM 7/2016 vp
[327] Saarikkomäki, etc, 2018 p. 27
[328] Ibid, p.20
[329] Ibid

to assess the inaccuracies and details of the applicant's report.[330] The Migration Office has argued a lot that the asylum-seeker´s story is *superficial, ambiguous* or *lacking in personality.* Such grounds for negative decisions were invoked also in more than half of the decisions assessed in the pilot study. [331] The pilot study proves that the existence of epistemic violence has increased considerably in two years. In the light of the pilot study, it seems that although the quality and the quantity of the required evidences have changed: in 2017 the asylum-seeker was required much more detailed evidence of the grounds as in 2015.[332]

The purpose of the strict border control has seen to help preventing the entry of irregular migrants into the country and thus access to the asylum processes.[333] However, the resources placed in border management signify that irregular migrants have to take even more risks to reach the border.[334] The resources put in place for border management mean, at the same time, that irregular migrants are increasingly taking risks to reach the border.

In 2015, the Finnish Migration Office considered the asylum-seeker´s fear objectively justified in the simple majority of the cases. Again in 2017, every fifth case was successful based on these same elements.[335] Argument in which the asylum-seeker´s story is considered *clearly unconvincing* occurred in approximately every third decision. Every fourth decision argued that the asylum-seeker did not submit *any evidence in support of his story.*"[336] In approximately every third decision, the migration office has invoked to *other unconvincing features.*

The number of positive asylum decisions has dropped significantly.[337] The factors that explain the tightening asylum processes can be found at least from political and administrative guidance as well as the weakening legal security of the asylum-seekers.[338] The fact that the administrative courts have returned a great deal of the decisions of the Finnish Migration Office for re-examination can be seen as a proof of that too. Regarding to the evaluations made by the Administrative Courts, in matters relating to aliens, the

[330] Ibid
[331] Ibid, p.28-29
[332] Ibid, p.33
[333] Atak- Crépeau, 2013, p.228-229, 240
[334] Dembour-Kelly, 2011, p.5
[335] Saarikkomäki, etc, 2018, p. 21
[336] Ibid, p. 28
[337] Ibid, p.30
[338] Ibid, p. 35

investigation of the circumstances and other facts relating to the case is generally emphasised. Therefore, I find questionable in terms of legal security of an individual, the changes as a result of which the Administrative Court is the only Court instance assessing the circumstances and the facts as these matter were centralised to the Administrative Courts.[339]

Alignments of the Finnish Migration Office on the country information, is also of great importance on the rights of an asylum-seeker.[340]

The EU Directive on common procedures for granting and withdrawing international protection emphasises that Member States must ensure that the need for specific procedural rights such as right to legal aid and the right to be heard are also taken into account. This is important in terms of the coherency and consistency of the required story.

Particularly, it is important to take into account how experiences and trauma affect the ability to communicate and / or remember things, and above all to express these things in a consistent and open manner. Elements such as challenging experiences and the causes of the traumas are likely to have significant impacts on the safety aspects in the country of origin despite the fact that the individual is unable to tell them in the right way during the process.

Until 2016, a person could get residence permit in Finland also on the basis of humanitarian protection.[341] Residence permit on this basis could be granted if there were no conditions for granting asylum or subsidiary protection but the asylum-seeker, however, could not return his / her country of origin or permanent residence state due to the afflictions, bad human rights or security situation, or because of a bad humanitarian situation or similar circumstances. The possibility to the protection based on humanitarian grounds was removed from the Aliens Act in 2016.[342] By abolishing this possibility, legal security of the asylum-seekers in such circumstances was restricted.

The government justified its decision to remove the possibility of humanitarian protection because the conditions for subsidiary protection were subsequently revised by the case-

[339] HE 32/2016, p.23
[340] Saarikkomäki, 2018, p. 35
[341] Aer, 2016
[342] 29.4.2016/332

law of the European Court of Justice (ECJ). According to the government, there was no need for humanitarian protection any longer. In addition, with the remove of the protection category the Finnish government wanted to ensure that Finnish legislation does not seem to be more favourable than other EU member states.[343] These amendments, however, did not change the fact that there were, and still are, asylum-seekers fleeing such circumstances.

At the same time, the conditions for granting a right to appeal to the Supreme Administrative Court were changed. Since then, the appeal can be granted only if the law is applied in other similar cases, or if it is important to give a precedent due to coherence of the case law or, if there is some other particularly significant reason.

As a positive amendment in terms of the asylum-seeker´s legal security, I find it worth mentioning that after the amendments, only attorney or licensed lawyer can act as a legal assistant of the asylum-seeker in the cases of appealing. Therefore, all of the lawyers giving legal aid for the asylum-seekers are subject to supervision and control.[344]

The model of productivity often times has three aspects: efficiency, economy and effectiveness, i.e. power, savings and effectiveness.[345] This model, however, lacks sustainability and the quality of better practices, better legislation and qualitative criteria. To find solutions, and therefore, to create more longstanding productivity and sustainability, there is a great need of understanding the phenomenon better from many perspectives, not merely applying quantative and direct economic measures.[346] It is likely that all the gaps in successful linguistic communication[347], in hearing and especially in understanding the subalterns' stories can not be detectable and therefore remedied. However, by approaching the phenomenon with more qualitative manner, the gaps and their effects can be reduced.

This necessity to the more pragmatic approach can be address to the broader discussion on Human Rights and Humanitarian law. *Humanitarians need to face the dark sides of*

[343] HE 32/2016 vp. P.5-7-
[344] HE 32/2016, p.14
[345] Korhonen, 2011, p.373
[346] Korhonen, 2011, p. 372
[347] Dotson, 2011, p. 246

our humanitarian tradition by acknowledging costs that can sometimes swamp our activism and policy-making efforts.[348] We need to look honestly at the consequences of our work to take the full responsibility.

5. Concluding remarks

The question that remains: what do we want politically support?

My aim in this Masters thesis was to increase knowledge of migration and in particular of the asylum process in order to be able to evaluate the current, and to develop a new sustainable legislation. My aim was that this thesis could be used to form qualified arguments in the political discussions from the process economic point of view but also in the media in general. I have achieved these aims by answering my four research questions.

I have introduced *the story* of asylum process and introduced the international field on refugee law and the legal grounds for international protection by answering dogmatically, yet ”pragmatic-critically”, to the first research question (1) *How Finnish practices, policies, regulations and laws are positioned in the international legislation,* and by clarifying the asylum-processes themselves.

Most of the international agreements have been adopted into the Finnish legislation and regulations. However, especially after the tightened regulations, the practices have violated asylum-seeker´s legal security and international rights related to asylum-seeker´s representation and fundamental rights to justice. International law and agreements give the frames and set the limits to the regulations and practices on asylum process. However, states have their sovereignty and power to regulate more directly in these matters. These matters and challenges are global issues but the individual concerns and problems occur always in specific legal contexts and need to have reference to the relevant applicable law in the national context.

[348] Kennedy, 2004, p.132

I have firstly introduced the international and EU legislation and agreements on migration and on refugees, and followed these regulations bringing up Finnish practices, policies, regulations and laws, and analysed how they correspond to each other. The international and the EU legislation have been implemented into Finnish legislation mainly through the Aliens Act. After tightening regulations, there have appeared concerns, also internationally, whether Finnish practices are still in line with the international agreements or not. According to my evaluation, especially the regulations on legal aid and practices during Court proceedings are violating asylum-seekers rights.

My second research question (2) was *What rights asylum-seekers have regarding representation and to whom these rights are directed and whether these rights are fulfilled or not?* I have clarified the rights that asylum-seekers have and the asylum process itself dogmatically. Legal aid is provided by state funds to a person in need of expert assistance in legal matters and who, due to his / her financial position, is unable to carry out the demanding expenditures himself. Legal aid includes legal advice, necessary measures, assistance in the court and in other authorities, and exemption from some of the administrative costs involved. All of the asylum-seekers have the right to the legal aid and therefore to have a representative. This second research question is greatly connected to the last two questions and to the epistemological challenges in the processes. As already mentioned, by tightening regulations and practices, asylum-seeker´s rights regarding their representation are being violated. There are times when asylum-seekers are not aware if they have someone representing them or not, and if there is someone, who is he / she.

As a positive result to this challenge, after the amendments to the Aliens Act in 2016, lawyers representing asylum-seekers are all under surveillance of the supervisory board of the Lawyer Association.

I have also introduced the approach of epistemic violence and analysed the practices and legislation through the difficulties of linguistic communication. I have situated the approach of epistemic violence in the context of asylum policy, and analysed (3) *whether the individual's own personal reality and situation affect his / her process and decision* and (4) *whether the asylum-seeker has his / her own voice or not.*

The asylum process is extremely complex. Therefore, to understand the proceedings and practices, it requires a lot from the asylum-seeker his- / herself. The tightening processes

have great impacts on asylum-seeker´s lives, and often times let the asylum-seekers feeling themselves insecure and unconscious about their own processes and about their possibilities. The challenges in the day-to-day life drive them even further underground and make them even more vulnerable to exploitation and abuse. To be able to tell one´s story, the asylum-seeker´s own personal reality needs to be somewhat balanced. The requirements for a successful linguistic exchange, story telling, impose high obligations and expectations on the applicant´s ability to communicate and to bring all the elements together.

In addition to the asylum-seeker´s individual reality, ability and situation, my research brought up the importance and the need of reciprocity, and therefore also the listeners' ability in the processes. For successful acts to be performed, there is a great need for reciprocity not only to understand the speaker´s words but also in taking the words as they are meant to be taken.

I chose examples from the international case law illustrating challenges in the processes and aspects I have also encountered as a *insider* working in the field. The subaltern, an individual asylum-seeker, intentionally or intentionally, does not have a voice, particularly after the regulations on legal aid being reduced, and after the tightening the ways in evaluating the *stories'* credibility. Likewise, as Spivak has highlighted, asylum-seeker as a subaltern does not have his / her own voice and ability to a symmetrical communication and linguistic exchange as he / she always needs an interpreter and representative.

However, trying to respond to Foucault´s claims that subaltern could speak if given a change, I believe that these linguistic gaps can be reduced in process-economic ways. The requirements to make processes more time efficient do not give much space to providing asylum-seeker a full understanding of the asylum process which, in fact, is very complicated even for the professionals. That is one of the meaningful reasons to evaluate the true implications of good intentions broadly in terms of better legislation.

It is important to sharpen what we want to promote, and what results are to be achieved. This will allow the pragmatic and tangible progress of the selected objectives without hiding important factors and leaving them uncontrollable and unpredictable.[349]

It has been said that legal students and scholars are limited in providing opportunities to learn the methods of empirical research[350] and that is the reason I believe many law students do not challenge themselves more in such a scientific ways. These limitations became the most significant challenge in my research process. My position as an insider-outsider forced me to examine the relationship between the a priori knowledge provided by my day-to-day work and the data that I used in this particular research. These challenges, however, provided me a great personal progress and academic growth during the whole process guaranteeing better qualification for possible upcoming scientific approaches.

Even if the strongest asylum-flow has calmed down a little, the global situation is still accompanied by uncertainties and the basic questions creating migration flows, their effects and consequences have not disappeared. Through pragmatic decision-making, a set of actions need to be created that can be used to manage and reduce the pressure of migration in a sustainable way. All the elements, including epistemic violence and the realities of the migrants who decide to remain in the country irregularly even after final legal proceedings, need to be taken into account.

Through the international and national literature, I have also strengthened the perception of the role of the State and its processes on residence permits in producing institutionalised uncertainty.

The Finnish decision makers reacted to the situation in Finland, and in Europe, through tightening migration and asylum policy as well as by legislative changes based on these policies. Finland's objective was to "cut off in the short term the uncontrolled flow of asylum seekers to our country, to obtain asylum costs and effectively integrate asylum seekers."

[349] see also Korhonen, 2011, p.375

[350] see e.g. Alvesalo & Ervasti, 2006 and Hirvonen 2011, guides provided also by Sutela, Määttä & Myrsky from University of Joensuu. Empirical Law research has been taught at the University of Eastern Finland since 2004.

The field of refugee and human rights law is a complex and broad area within the international law. The states try to find effective measures and solutions to the global challenge fast. That is a noble idea. However, more sustainable and pragmatic measures are needed for effectiveness. It would be important to put more resources on the quality of linguistic exchange, the speech and the assistance of lawyers in the asylum interview in order to prevent the creation of the group of irregular migrants as well as to use resources sustainably in a process-economic sense. The success of the interview is of a great importance on the quality of the process in general. The quality requires also training and instructing lawyers working in the field.

I have emphasised that the changes in the legislation were made in a very urgent time frame and therefore, the possible side-effects of the amendments were not researched extensively enough as Vedung´s model on side-effects require.[351] The phenomenon of unwanted side-effects caused by the decisions made too fast, has wide-ranging impacts for various fields. Dotson has also argued[352] that the harmful results need to be analysed pragmatically case-by-case and from various perspectives. The interdisciplinarity of this thesis has assured an illumination and understanding of the topic from many angles.

The ignorance of epistemic violence experienced by the subaltern has the potential to be very harmful, as well to the asylum-seekers and migrants themselves, as to the society in general, and that is the reason, these epistemically violent elements can not be hided by making fast decisions without evaluating their consequences widely. It is important to allow asylum-seekers a legitimised voice for them to be able to answer reciprocally to the requirements created by the societies.

I believe the policies have created a group of people in more vulnerable situations. Vulnerability of an alien is an ambiguous phenomenon that is influenced not only by the legal status, the life situation and personal resources, but also by gender, age, class and ethnicity.[353] However, the importance and dependence of the legal status for an alien has been seen as mechanism to structure as well as unravel social inequalities and hierarchies in the case of migration.[354]

[351] Vedung, p. 45
[352] Dotson, 2011, p.276
[353] Könönen, 2014, p.176
[354] Bosniak, 2006, p.11

The epistemic violence experienced by asylum seekers is likely to create a vulnerable, irregular group, which itself is the subject of even more serious epistemological violations. The voice of asylum-seekers as a subaltern has de facto silenced in practice. However, I believe that it can be raised up with political and legal decisions and guidelines.

Creating a new, better system requires a broad political will. Even if there existed a will, the effects of the new system might prove to be worse than expected. In spring 2016, the European Commission announced that it would seek to reform the existing EU asylum framework, to establish a sustainable and equitable system for determining the Member State responsible for examining asylum applications, to enhance the Eurodac system, to promote the convergence of the rules of the asylum system, and therefore prevent further movement.

The European Council, at its 1999 meeting in Tampere, set the objective, in longer term, to establish a common asylum procedure and to unify the status of an asylum-seeker throughout the Union. So far, this goal to establish a common and unifying asylum procedure has not been reached, but the situation may change in the future. During the presidency of the EU in 1999 the objective was set. Now, for the upcoming presidency, in 2019, Finland should set clear goals for reaching a true realisation of the goals set 10 years ago.

Consequently, it is necessary to make clear what are the aims that the regulations seek to promote, and then pragmatically evaluate the actual consequences of different interpretation options. In my view, these economic and security implications of the epistemic violence occurred in our asylum processes, as well as of the group of irregular migrants, have not been sufficiently explored, even though the decisions are largely based on these arguments.

I have objective-teleologally taken into account, comprehensively and pragmatically, different legal purposes, and brought some observations up that should be considered more closely also from the process-economic point of view for the better fulfilment of the legal protection of asylum-seekers. For example, if the asylum processes are constantly tightened, and if the voluntary return to home country are aimed by means of extortion,

the impacts of a situation in which a person does not leave despite the extortion should be closely considered.

With this thesis I have enabled a better understanding of the concrete consequences of the adopted migration policies and legislation and provided knowledge about the phenomenon for the benefit of regulation. I have also raised awareness of the state´s own role in the lives of irregular migrants.

The systematic scientific study of the creation of a group of irregular migrants and their life in Finland has been remote, and therefore it is important to support more scholars to approach this phenomenon as long we have the possibility to reduce the new challenges that the phenomenon creates.

It is necessary to provide support in the first phases of the process, especially in the asylum interview, to the asylum-seeker to be able to benefit from their rights and to fulfil their obligations during asylum procedures. If these procedural and fundamental rights to be heard are not guaranteed, they will need to be placed in the following stages of the process at the Courts which could otherwise be avoided by effective guidance, qualified representation and policies. This would also decrease the possibility of epistemic violence.