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Introduction

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1

Introduction

Nick Gill and Anthony Good

Asylum as a Moral Panic

In his introduction to the third edition of *Folk Devils and Moral Panics*, Stanley Cohen (2002: vii–xxvi) gives fresh examples of ‘moral panics’ that arose in the 30 years following the first appearance of his book; one of these examples concerns refugees and asylum seekers. He characterises such panics as focused on issues that are actually new forms of older worries and concerns, and in these terms the ‘asylum panic’ is understood as a particular manifestation of a long-running, perhaps immemorial, fear of strangers or outsiders (Simmel 1976). Indeed, the policy approaches of European governments display both of the classic responses to outsiders identified by Zygmunt Bauman (1997). ‘Anthropophagy’—‘devouring’ strangers and ‘metabolically transforming them into a tissue indistinguishable from one’s own’ (ibid.: 18)—is evident in the long running penchant for ‘assimilationist’ strategies towards immigration in various European countries (Vertovec and Wessendorf 2010). At the same time ‘anthropoemy’—‘vomiting’ out strangers and ‘banishing them from the limits of the orderly world’ (Bauman

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1997: 18)—has been vividly exemplified in recent years by the erection of new barriers. Hungary, for example, faced with the receipt of significantly more first-time asylum applications in the first half of 2015 than in previous years, famously constructed a wire fence along its 175-kilometer border with Serbia in order to deter new entries (Migration Policy Centre 2016), resulting in the onward migration of thousands of rejected would-be immigrants.

Cohen (2002) suggests, however, that the moral panic surrounding asylum is ‘crucially different’ (ibid.: xxiii) from his other examples of moral panics, including those surrounding benefit cheats, paedophiles and high school massacres. Rather than being focused on ‘specific newsworthy episodes’ (Cohen 2002: xxiii), the moral panic about asylum seekers has been long drawn-out, characterised by a ‘virtually uninterrupted message of hostility and rejection’ (ibid.: xxii). Asylum is a rare example of a moral panic that is chronic rather than acute in nature. Tyler (2013) dates the more or less continuous moral panic about Britain as a ‘soft touch’ for criminals and bogus refugees to the early 1990s. Similarly, talk of ‘crisis’ in France dates back to at least the mid-1980s, when annual numbers of asylum claims trebled within a few years (Legoux 1995: xxiii).

Cohen also argues that the moral panic surrounding asylum is ‘more overtly political than any others’ (Cohen 2002: xxiii). For example, although the 1951 Refugee Convention is a recognition of the special moral claims of refugees, as persons suffering persecution because of their beliefs or ethnicity, the political purpose of the Convention has altered significantly since its inception. Despite the popular impression that it safeguards refugees, its continued observance is a paradoxical confirmation of the legitimacy of immigration controls more generally in modern liberal democracies.

Furthermore, the asylum issue is deeply contested as a result of an inherent contradiction between the need for Western states to portray themselves as representing shared communities with common values, including recognition of basic human rights such as the right not to suffer persecution; and the discretionary right assumed by modern states to decide who can enter and reside in their territory. This tension accounts for what Gibney (2014) terms the ‘schizophrenic response’ (n.p.) of European states, whereby they ‘continue to embrace asylum but spurn the asylum seeker’ (n.p.) and offer protection only grudgingly. It has also resulted in the occasional eruption of pro-asylum voices from various quarters over the last two decades, and especially since the summer of 2015, which gives the asylum issue a particularly disputed feel (see Conlon and Gill 2015).

This contestation relates to what Goodwin-Gill conceptualises as two competing models for approaching refugee issues: a model that focuses on

the need to treat every individual asylum applicant on their own merits; and an instrumental security model that emphasises control of refugees on the basis of the balance between the perceived risks they pose and the opportunities they offer to receiving countries (2001: 14–15). This book is full of examples wherein particular administrative and legal systems display one, and sometimes both, of these tendencies.

The Asylum System ‘in Crisis’

One manifestation of this schizophrenia is the repeated invocation of the trope of ‘crisis’ in relation to asylum. Thus, the ‘refugee crisis’ that dominated European political attention in 2015–2016—provoked largely by the unusually large numbers of people entering Europe in flight from the Syrian conflict—was a particularly intense form of the moral panic that has surrounded the questions of asylum and immigration more generally over the last few decades. This ‘crisis’ is commonly portrayed, by politicians and in the media, using either fluvial or animal metaphors, such as likening the arrival of asylum seekers to a ‘flood’, ‘tide’, ‘torrent’ or ‘wave’ that threatens to ‘swamp’ the recipient society (Charteris-Black 2006: 570–572), or alternatively likening it to a ‘stampede’, ‘flock’ or ‘swarm’ of arrivals with a similar potential to overwhelm receiving countries. Both types of metaphor are clearly dehumanising, but they also both employ a rhetorical ruse in relation to the notion of disaster. On the one hand, immigration itself is represented as a ‘natural’ disaster (Charteris-Black 2006). This view implicitly relieves liberal democracies of their own responsibilities for the immigration pressures they experience: responsibilities rooted in the often invisible ‘systemic violence’ (Žižek 2009: 8) of global capitalism, historical exploitation, unequal trading relationships and neo-colonialism of which they are a part. On the other hand, immigration *systems* are portrayed as the disaster: bureaucrats are typically portrayed as inept and inadequate to the task of responding effectively to the challenges migration poses.

This elision of asylum *as* crisis—whereby asylum seekers are seen as cultural, economic, or security threats; and asylum *in* crisis—whereby the administrative systems for controlling the numbers of applicants, deciding on the validity of their claims, and deporting those whose claims are deemed to be false, are seen as inadequate—‘serves as an important mechanism in the reproduction of dominant asylum discourse’ (Moore 2010: 145). Specifically, it affords the opportunity to project the supposed disaster of migration onto an evidently disastrous administration. This slippage is extremely expedient politically

because it provides a particularly direct way for sensationalist media and opposition parties to portray the ‘crisis’ as stemming from the incompetence of politicians. The obvious subtext is that the challenging political party will provide a more competent administration by being more efficient and, typically, more exclusionary. Over time this configuration of ‘crisis’, political critique and policy response results in an inexorable ratcheting up of immigration controls as power either swaps hands between parties who make increasingly bold and ambitious promises about control whilst in opposition, or as incumbent parties become more exclusionary in order to hold on to power.

This discourse of crisis can also be linked to distrust, political alienation and the rise of the political right in Europe in recent years (see *New York Times* 2017). Paying attention to why large sections of liberal society have turned towards right-wing, immigration-restricting parties in recent years is crucially important for understanding the development of immigration and asylum law. Working class, low skilled voters in many Western economies are facing unemployment, falling real wages, rising personal debt and a mismatch between their own skills and those required by largely tertiary and quaternary industrial economies. The rise of right wing populism in the United States and Britain, for example, has been driven by structural changes in their economies that have rendered this social group disillusioned and feeling politically unrepresented (Ford and Goodwin 2014). Similarly in much of continental Europe, the economic difficulties of the late 2000s, including the sovereign debt crisis that erupted at the end of 2009, produced rising unemployment levels, fuelling right wing sentiments and increasing pressure on politicians to restrict numbers of immigrants, including asylum seekers and refugees (Greven 2016). Although radical right-wing parties are once again ‘a force to be reckoned with’ (Akkerman et al. 2016: 3), the most notable feature of the right-wing parties that have benefitted from these developments is their strengthened *mainstream* appeal; policies and rhetoric that might once have been considered radically right-wing are becoming more acceptable and politically potent.

The issue of refugee migration to Europe played a part in the United Kingdom Independence Party’s (UKIP) successful campaign for Britain to vote to leave the EU in 2016 for instance, which involved poster images of refugees making their way on foot across the Balkans alongside the caption ‘Breaking Point: The EU has Failed us all’, a tactic which opponents interpreted as ‘exploiting the misery of the Syrian refugee crisis in the most dishonest and immoral way’.¹ Moreover, those governments that welcomed

¹Yvette Cooper, British Member of Parliament, quoted in The Huffington Post (Hopkins 2016).

the most refugees in 2015, such as Germany and Sweden, have faced harsh criticism from sections of their electorates in the following years as racial tensions, poverty among incumbent populations and the fear of terrorism nurtured a backlash of anti-refugee sentiment. In consequence, attention has gradually turned towards measures to contain refugee flows in Turkey or other locations closer to the source of the migratory movements.

As in many other contexts the term ‘crisis’, which was ‘once a signifier for a critical decisive moment’, has ‘come to be construed as a protracted historical and experiential condition’ (Roitman 2013: 2; see also Agamben 2005). Its widespread use, says Roitman, subordinates particular events, in all their singularity and uniqueness, to a ‘generic logic’ that seems ‘self-explanatory’ (2013: 3). Its use also inevitably entails explicit or implicit judgments about what a normal state of affairs would look like: ‘crisis compared to what?’ (ibid.: 4). In the case of asylum in Western Europe this may be the situation at the height of the Cold War, when asylum seekers came mostly from the Soviet Bloc and ‘each one constituted a vote for the political system of the West and a reproach to that of the East’ (Schuster 2003: 190). Consequently almost all such refugees were granted asylum with very little individual scrutiny, reinforcing the presumption that they must, therefore, ‘have been authentic refugees fleeing authentic persecution’ (Legoux 1995: xxiii). Use of crisis discourse also, importantly, legitimates and supports the redistribution and extension of state power (Strasser 2016: 48; Klein 2007; Mountz and Heimstra 2014), allowing the adoption of measures of governance that would otherwise seem excessively authoritarian (Buzan et al. 1998: 21–23).

In the Cold War period security threats were commonly presented as political or military in character, and the entity posing the threat was a state or some supra-national grouping like ‘the Soviet Bloc’. The focus was on material factors such as the scale of a state’s military capacity. More recently, however, it has become common to identify threats in economic, environmental and health-related contexts too as part of a pandemic of anxieties that seem to accompany modern everyday life (Furedi 2002; Pain and Smith 2008; Beck 1992). Popular understanding of the consequences of migration is an important form of this heightened sense of social fear. Furthermore, when a strong state response is seen as the antidote to the fearful condition in question, it becomes in the interests of state bureaucrats, as well as their contracted agencies, to confirm and reproduce the sense of unease that provokes an appeal to them (Bigo 2002; see also Isin 2004). From this perspective the increasingly common tendency among politicians to identify refugees and migrants as, on the one hand, threats to the ‘culture’ or

'identity' of the indigenous population and, on the other, as posing criminal or terrorist threats to citizens' personal safety and security, is unsurprising (Huysmans 2000: 751).

The constructivist approach to securitisation pioneered by the Copenhagen School of Security Studies foregrounds the performative aspects of security discourse. Buzan et al. define securitisation as a perlocutionary 'speech act'—whereby some particular issue is 'presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure' (1998: 23–24)—that is accepted as valid by its target audience. In other words, securitisation is the inter-subjective process whereby a phenomenon like migration becomes a security issue, not because it necessarily poses an actual or significant threat, but because it is successfully presented as doing so.

During the post Cold War era of the 1990s and early 2000s, immigration was one area wherein securitisation 'opened up a number of discursive opportunities to correlate terrorism with immigration, thereby helping to legitimise practices and technologies in migration control that were usually reserved for emergencies' (Boswell 2007: 589; see Buzan et al. 1998: 23–26; Huysmans 2000). Here it is helpful to distinguish analytically between securitisation as framed in political discourse and securitisation as manifest in administrative action (Boswell 2007: 591). Unlike in the United States, it is at this latter level in particular, argues Boswell, that securitisation has been most apparent in Europe. Furthermore, rather than counter-terrorism practices having been incorporated into practices of migration control, the process has been rather the reverse, namely that tools developed in furtherance of migration policy, such as databases on foreign nationals, airline passenger lists, and frontier passport controls, 'have been harnessed in order to enhance the surveillance of suspected or potential terrorists' (2007: 601).

In short, for all the reasons identified above, national and supra-national legal and administrative structures for processing and assessing asylum claims, and controlling or deporting those who make them, have been portrayed on the one hand as increasingly important to the economic and social well-being, and even the physical safety, of citizens; and on the other, as grossly inadequate and inefficient, and in urgent need of root and branch reform. In such circumstances it is remarkable that so little empirical research has been carried out into how these structures actually operate in practice. The great bulk of the research that has been done on administrative and legal systems of asylum determination falls under the heading of legal studies rather than social science and is thus primarily normative rather than critical in its stance. The present volume seeks to help remedy these lacunae.

The 'Refugee Crisis' in Perspective

The crisis rhetoric surrounding asylum seeking in Europe was exacerbated by the civil war in Syria, compounded by the human rights abuses perpetrated by the self-styled Islamic State (IS) in Syria and Iraq. These had resulted in the deaths of over 250,000 people by mid-2015 (BBC 2016) and produced one of the largest human migration events in history. Around 11 million people were forced to leave their homes and seek safety between the beginning of the civil war in March 2011 and mid-2016 (www.syrianrefugees.eu 2016). It is well known that attempts to reach Europe often end in tragedy, underscoring the lengths to which migrants have been forced to go to find safety. 3700 people lost their lives in the Mediterranean in 2015, and over 4900 died in the same way in 2016 (IOM 2016). The risk of dying along this route was estimated at one in 269 arrivals in 2015 and one in 88 (one in 47 between Libya and Italy) in 2016 as migrants turned to more perilous routes and smugglers resorted to more dangerous tactics in an attempt to avoid heightened border controls (UNHCR 2016a).

Yet for all the crisis talk about refugees in Europe, it is notable that the vast majority of Syrians affected by the violence in their country sought safety either within Syria itself or within Turkey, Lebanon, Jordan, Egypt and Iraq. It is estimated that 6.6 million Syrians were internally displaced within Syria, and a further 4.8 million sought safety in the region, between March 2011 and the end of 2016 (www.syrianrefugees.eu 2016). Despite this, the United Nations High Commission for Refugees (UNHCR) had received only just over half of the required aid needed to respond to the humanitarian needs of the displaced in mid-2016. This shortfall contributed to inadequate living conditions in refugee camps and cities² in the region around Syria. For its part, the European Union received 1.18 million applications for asylum from Syrians between April 2011 and September 2016 (UNHCR 2016b). Although this helps to explain the substantial increase in total asylum claims received by the European Union illustrated in Fig. 1.1 it is only a fraction of the total numbers displaced.

Indeed, as Moreno-Lax (2017a) demonstrates in her comprehensive analysis of EU asylum law, although there is a right to asylum enshrined in EU law, the EU is highly active in curtailing access to this right. This is achieved through a panoply of pre-border, extra-territorial and preemptive

²Koizumi and Hoffstadter (2015) note that many of the world's refugees live in urban areas rather than dedicated camps, posing distinctive policy challenges that are only belatedly beginning to be addressed.

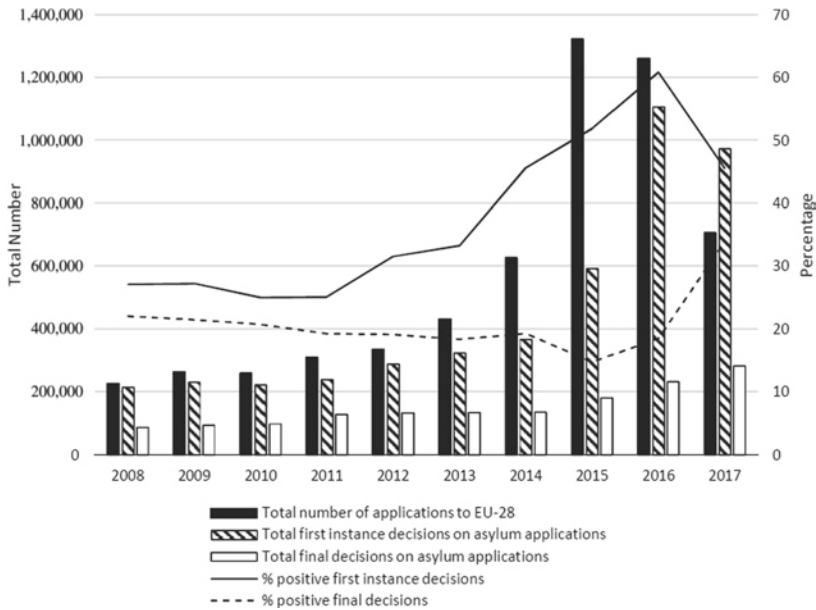


Fig. 1.1 Total number of asylum applications, first instance decisions and final decisions for EU-28 countries, and percentage of positive first instance and final decisions, 2008–2017

Sources Eurostat ‘Asylum and first time asylum applicants’—annual aggregated data (rounded)—tps00191, ‘First instance decisions on asylum applications by type of decision—annual aggregated data’—tps00192, and ‘Final decisions on applications by citizenship, age and sex Annual data (rounded)’—migr_asydcfina, all at <http://ec.europa.eu/eurostat/data/database> (accessed 21 June 2018). ‘Positive’ decisions include Geneva Convention, humanitarian, subsidiary and temporary protection status. Note what are referred to as final decisions in the graph are decisions taken by administrative or judicial bodies in appeal or in review and which are no longer subject to remedy. The true ‘final instance’ may be, according to the national legislation and administrative procedures, a decision of the highest national court. However, these statistics refer to what is effectively a final decision in the vast majority of all cases: i.e. that all normal routes of appeal have been exhausted

measures, including offshore border checks, outsourced visa processing, privatised pre-boarding controls, and maritime interdiction. These ‘remote control’ activities effectively limit access to asylum in Europe and introduce a fundamental inconsistency between the lofty aspirations of the Union as articulated by its commitment to asylum, effective judicial protection and non-refoulement (that is, a commitment to not return anyone to a situation in which they will face persecution), and the practical barriers that asylum seekers face in attempting to access Europe.

It should also be noted in the context of the development of the preemptive, extraterritorial controls that Moreno-Lax (2017b) describes, that the rising death toll in the Mediterranean is part of a broader and longer-term escalation in the number of migrants dying in and *en route* to Europe. The European Network against Nationalism, Racism, Fascism and in Support of Migrants and Refugees (UNITED) has kept a ‘list of deaths’ since 1993, which includes reported deaths that have occurred as a result of European border militarisation, asylum laws, poor accommodation conditions, detention, deportations and carrier sanctions. It stood at 22,394 on 19 June 2015 (UNITED 2015), roughly two months before the publication of the photograph of the dead body of Alan Kurdi, the drowned toddler whose death ignited a renewed round of moral panic surrounding the “refugee crisis” in Europe.

Asylum determination—meaning the process of reaching a decision on a claim for international protection on the grounds of asylum—has long played an important role in European politics, but during 2015 and 2016 it rose in prominence as the refugee issue took centre stage. Figure 1.1 charts the number of applications, first instance decisions and final decisions reached on asylum claims to Europe between 2008 and 2017, as well as the percentage of positive first instance and final decisions.³ First instance decisions refer to decisions on asylum claims usually made by a government official in the country of asylum. Where asylum seekers receive a negative decision on their first instance claim, they have the right to appeal, in European countries at least, either through legal or administrative means depending on the country in question. The decision on appeal is usually⁴ the final decision on an application and Fig. 1.1 illustrates how significant these final decisions are. In 2011 for example, the number of final decisions reached through appeal totaled over half the number of initial decisions, underscoring how indispensable appeal processes are to the overall decision-making system.

Figure 1.1 reveals various facets of the politics surrounding European asylum determination. Firstly, the volume of decisions, both first instance and final, increased markedly between 2008 and 2016, as indicated by the striped and white bars respectively. Over that period the volume of final

³It is worth noting that because of the time it takes to administer asylum claims, many first instance decisions made in 2016 will have concerned applications received in 2015 or earlier, and many final decisions made in 2016 will have concerned applications made even earlier. The same point could be made for the other years shown.

⁴Unless there are specific matters of law that can be appealed to higher courts.

decisions more than doubled and the volume of initial decisions more than quadrupled. An expansion of this scale and pace in any decision-making system is likely to introduce challenges in terms of staff stress and turnover, resources and training (see for example, Sorgoni, this volume, who describes an increase from ten Territorial Commissions in Italy—which examine initial asylum claims—to 45 between 2010 and 2016). Secondly however, this rapid acceleration in decision-making lagged behind the increase in the number of applications (the black bars). In 2008 there was virtual parity between the number of new applications received and the number of first instance decisions made, but for every subsequent year before 2017 this parity was not restored. This led to criticism that the European asylum determination system is ill-equipped to cope with rapid increases in applications. It has also produced delays for applicants, which have been associated with mental ill health by various studies (Laban et al. 2005; Coffey et al. 2010). From the perspective of decision-makers, the period from 2008 to 2016 therefore constituted something of a perfect storm: an extremely rapid increase in decision-making frequency coupled with a demoralising generation of backlogs, delays and associated criticisms.

The plotted lines in Fig. 1.1 reveal another interesting development in asylum determination in Europe: the divergence between the rate of success at first instance and the rate of success at the point of a final decision between 2010 and 2016. During this period the rate of success at first instance more than doubled, from around 25% to over 60% (illustrated by the solid line in Fig. 1.1). During the same period the rate of success on appeal declined however (the dashed line), falling below 20% in 2011 and remaining there until 2016. There are various possible explanations for this development. It may be that the first instance procedure improved in terms of its ability to detect legally well-founded⁵ claims. This could help to explain why the appeal system was less likely to deliver positive decisions on asylum claims: because fewer claims that reached this stage are legally well founded. Alternatively however, it could mean that decision makers at the appeal stage simply *perceived there to be* an improvement in the ability to detect well founded claims at the initial stage, because the proportion of claims granted at the initial stage had risen. Appeal stage decision-makers might reason that if a claim has not been granted at the initial stage when so many other claims are, there must be something wrong with many of the

⁵Although it is necessary at this point in our argument to talk about ‘well-founded claims’ the discussion elsewhere in the introduction makes it clear that we perceive serious shortcomings in what the law asserts a well-founded claim to be.

applications that reach them. What this reasoning misses, however, is the possibility that there may simply be more legally well-founded claims overall. If this is true, there is a risk that the increase in first instance positive decisions is misinterpreted by appeal stage decision makers as a signal that first stage procedures have improved in their ability to detect well-founded claims, when in fact there may have been no such improvement and therefore no particular reason for appeal decision makers to be more conservative.

By 2017 the system seemed to be catching up again: the total number of first instance decisions exceeded the number of new claims for the first time during the period shown in Fig. 1.1 for instance. But if criticism about slowness and delays was not enough, the asylum determination system has also drawn objections based on its inconsistent treatment of claimants over the same period (for example AIDA 2013). International law dictates that refugees can only be recognised as such if they fulfil the specific definition set out in Article 1(A)2 of the 1951 Geneva Convention, as modified by the accompanying 1967 Protocol, namely that a refugee must be someone who:

owing to well-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. (italics added)

Yet none of these five italicised ‘Convention reasons’ are precisely defined, either in the Convention itself or in the UNHCR *Handbook* that provides guidance on its application,⁶ nor are the key notions of ‘well-founded fear’ and ‘persecution’. Consequently these have all been subjected to legal interpretation by a whole range of national courts across Europe and beyond, not always with congruent results.

What is more, both first instance and appealed decision-making across the countries of Europe have in practice been approached in very different ways reflecting the different legal cultures and political circumstances of the member countries. This results in uncomfortable geographical anomalies both in the rate of ostensibly similar refugee claims that are recognised and granted refugee status (or another form of positive status such as humanitarian status, subsidiary or temporary protection status), and in the procedural approach that different countries take to asylum determination.

⁶UNHCR (1979, Annexes updated 2011). *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*. Available at: <http://www.unhcr.org/uk/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [Accessed 31 July 2016].

The proportion of Syrian asylum seekers who were awarded some form of positive status in 2015 was 97% in the EU-28 as a whole for example, but particular countries deviated significantly. For instance, Hungary, Italy and Romania each awarded some form of positive status in fewer than 60% of cases.⁷ In the same year, the recognition rate of Afghans—the second most common nationality of asylum claimants to Europe after Syrians⁸—varied from 78, 83 and 96% in Austria, France and Italy to 16, 14 and 5% in Hungary, Romania and Bulgaria, respectively.⁹

International inconsistency is also evident procedurally. Figure 1.2 illustrates the variability in procedures among 17 member countries of the EU as well as three non-members,¹⁰ based on surveys carried out by the European Council for Refugees and Exiles (ECRE) in 2017.

As can be seen from Fig. 1.2, procedural inconsistency is evident in relation to whether or not time limits apply to asylum claims, whether asylum seekers have access to free legal assistance on appeal against a negative decision in practice, the use of video-conferencing and the degree to which appeals are suspensive¹¹ and judicial, among other things. In fact, there is only unambiguous uniformity of approach concerning three out of the 12 procedures shown.

If inconsistencies between countries are not troublesome enough, individual countries also often have more than one legal process through which asylum claims can be determined, typically including both a regular process and a fast-track process for applications that are deemed to be easier to determine or less likely to be well-founded. The proliferation of different processes introduces complexity and inconsistencies within countries as well as across them. Greece, for example, has at least five procedures including the regular procedure, border procedure, fast-track border procedure, accelerated procedure and Dublin procedure (Asylum Information Database 2018). The current form of the fast-track border procedure has been made possible by the European Union's application of

⁷Statistics refer to first instance decisions only. Eurostat table migr_asydcfsta, 'First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded)'. Available at: <http://ec.europa.eu/eurostat/data/database>; published 6 June 2018 [Accessed 22 June 2018].

⁸Eurostat (2016). *Asylum Statistics*. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics; published 20 April 2016 [Accessed 6 January 2017].

⁹Statistics refer to first instance decisions only. Countries that delivered fewer than 100 first instance decisions are discounted. Eurostat table migr_asydcfsta, 'First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded)'. Available at: <http://ec.europa.eu/eurostat/data/database>; published 6 June 2018 [Accessed 22 June 2018].

¹⁰The 17 European Union (EU) Member States comprise Austria, Belgium, Bulgaria, Croatia, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Spain, Sweden and the United Kingdom, and the three non-EU countries are, Serbia, Switzerland and Turkey.

¹¹If an appeal is suspensive then a deportation will not be carried out until it is completed.

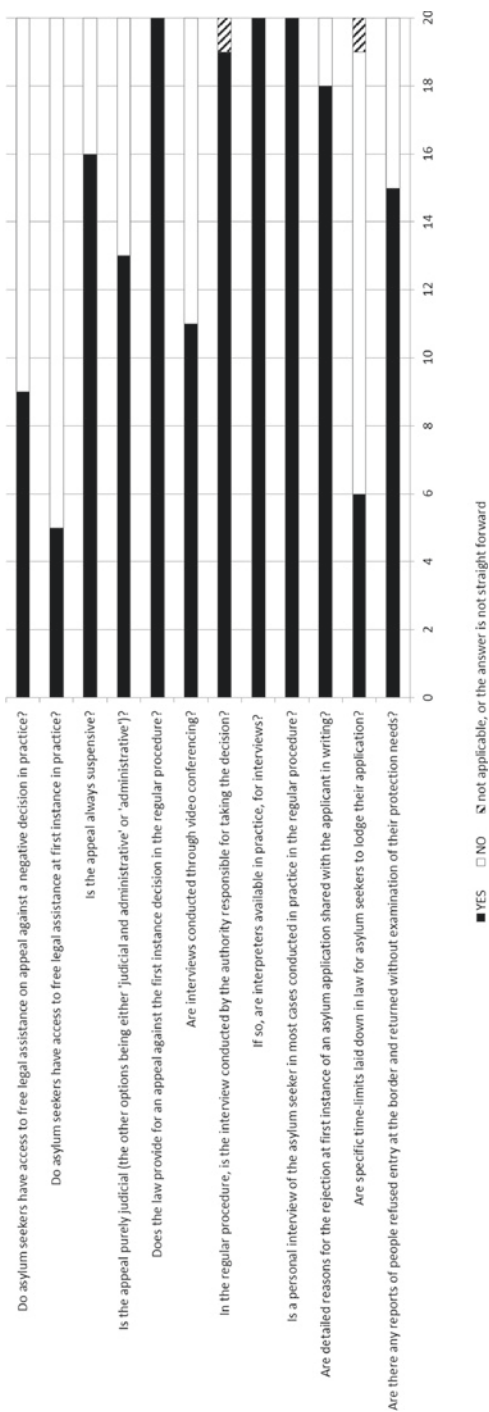


Fig. 1.2 Chart showing variability in regular asylum procedures among 17 EU member countries and 3 non-members

Note For the questions 'Do asylum seekers have access to free legal assistance on appeal against a negative decision in practice?' and 'Do asylum seekers have access to free legal assistance at first instance in practice?' the 'No' count includes the response 'With Difficulty'. For the question 'Are there any reports of people refused entry...?' reports include NGO reports, media, testimonies, etc. For the question 'Are interviews conducted through video conferencing?' the 'Yes' count includes responses 'Frequently' and 'Rarely'. More procedures were surveyed but it was not possible to illustrate them in this format. Source Asylum Information Database managed by ECRE. Available at: <http://www.asylumineurope.org/reports%20> (Accessed September 2018)

the concept of hotspots to migration in 2015,¹² which allows various European agencies to ‘assist’ countries that are receiving ‘disproportionate migratory pressures’ in order to help them ‘fulfil their obligations under EU law’ (European Commission 2015; see also Giannopoulou and Gill, this volume). This innovation, ‘supersedes the national in favour of hybrid, super-national governance’ via a process of what has been called ‘super-state’ formation (Painter et al. 2017: 259). In conjunction with the EU-Turkey deal that came into force in 2016 to facilitate the assessment of asylum claims received by the EU in Turkey, the fast-track border procedure has generated an ‘extremely truncated asylum procedure with fewer guarantees’ (Greek Council for Refugees 2017: n.p.), effectively turning the Greek Eastern Aegean islands that have been designated hotspots into sites of containment and deportation back to Turkey (Tazzioli and Garelli 2018).

Under these conditions asylum interviews undertaken by officials working for the European Union have been reportedly different to those conducted by Greek officials. Cases have been reported in practice where European Asylum Support Office experts lack knowledge about countries of origin, lack cultural sensitivity, employ closed and suggestive questions, use repetitive questions akin to interrogation, and conduct unnecessarily exhaustive interviews (Greek Council for Refugees, 2017).

The assessment of vulnerability is often crucial to which legal track is taken by an asylum application. In Greece for example, if an applicant is considered to be vulnerable then their application can be transferred out of the fast track border procedure. But deciding on what constitutes vulnerability is itself highly variable and, in the absence of conceptual clarity, can depend upon who is making the assessment (AIDA 2017). The definition of vulnerability employed by the member countries of the European Union varies markedly: although most recognize being a child, being an unaccompanied child, being disabled, being a victim of torture and being pregnant as forms of vulnerability only a subset recognize being a victim of human trafficking, serious illness, mental disorders, lack of legal capacity and post traumatic stress disorder as forms of vulnerability (AIDA 2017: 16).

One of the most contested and protracted areas of controversy in relation to the consistency of procedures used to determine refugee status in Europe, and more broadly to ensure common standards for the treatment of asylum seekers and refugees, concerns the Common Europe Asylum System (CEAS), a series of directives intended to harmonise the procedures and standards of member countries, both at the first instance stage of their claim and during their appeal.

¹²The ‘EU introduced the term “hotspots” in policy conversations addressing crime and natural disasters, long before its deployment in the field of migration’ (Tazzioli and Garelli 2018: 6).

Although hailed as a milestone on the road to integration in Europe, the system has been roundly critiqued, largely on the basis of its widely acknowledged inability to ensure a harmonious approach to asylum seeker protection and refugee claim determination as the number of applications the EU received increased markedly in 2015. So prominent was the CEAS's failure to unite the countries of Europe at the height of the increase in asylum claims in 2015 that the European Union hurriedly sought to strengthen and reform it via a series of additional measures proposed in mid-2016, including turning a series of its 'directives' into 'regulations': in other words rendering them binding obligations on member states rather than merely suggestions. The politics and legal significance of these developments is central to the issue of asylum determination in Europe, and is discussed more extensively in the next chapter.

Legal and Ethnographic Approaches to Asylum

The statistics and charts provided above hint at the extent and complexity of the contradictions and tensions within the European asylum system, as well as the extraordinary degree of discretion available both to countries and individual decision makers within the broad rules set out by the Union. There are a number of existing comparative studies of European asylum systems, both in the scholarly literature (Joly 1996; Cherubini 2014; Guild and Minderhoud 2011); and in reports or web-sites curated by NGOs, such as the excellent interactive online resources made available by ECRE through their Asylum Information Database.¹³ Generally, however, these are written from a legal standpoint rather than the ethnographic perspective adopted in this volume.

There are important differences between the doctrinal study of law and the approach favoured by ethnographers (Kandel 1992), partly because, as Twining neatly puts it, 'judges have a duty to *decide*... scientists and historians mainly *conclude*' (Twining 2006: 53, italics added). Doctrinal legal scholarship is fundamentally normative, both because its subject-matter is focused on norms, and because it generally locates itself within the legal paradigm, studying law in relative isolation from its social and political context (Anders 2015: 413).¹⁴ Legal scholars are concerned with teasing out the 'correct interpretations of general legal abstractions' in particular cases (hence the emphasis in legal education on the study of written judgments, at least in common

¹³Available at: <http://www.asylumineurope.org/> [Accessed 6 January 2016].

¹⁴There are exceptions to this, such as the critical legal studies movement, and of course socio-legal studies constitutes a very different approach to studying the law.

law traditions), and with ‘philosophical reflections on what and how law should be’ (von Benda-Beckmann 2008: 94). By contrast, the ethnographic approach to law is descriptive, and inherently comparative and relativistic.

The knowledge and forms of reasoning that characterise the formal legal systems of European states are highly esoteric, having diverged from everyday, lay understandings as a concomitant of professionalisation. However, while ethnographers do of course need to understand the legislative and administrative frameworks within which legal actors operate, these are neither their starting nor their finishing point. They approach lawyers or bureaucrats just as they would any other exotic group, trying through prolonged and detailed observation of their daily practices to understand their distinctive modes of thought and the practical actions that express these, or sometimes depart from them. Their analyses seek to set these concepts and practices within a broader socio-cultural context; unlike doctrinal academic lawyers, their ultimate analytical vantage point is located outside the legal paradigm itself. In fact the laws and judgments associated with hegemonic, state-sponsored legal systems are studied no differently from ‘folk systems’ of law underwritten by religious or traditional authorities (von Benda-Beckmann 2008: 97; see also Good 2015, 2017).¹⁵

As that last comment implies, ethnographies of law are almost always concerned with situations of legal pluralism in one or more of the senses identified by Moore (2001). First, states themselves are internally complex, and their institutions compete for legal authority, as with the very different migration policies and aspirations of the Westminster and Scottish governments in the UK.¹⁶ Second, the state may preside over diverse legal systems applying only to specific sub-sections of its population, as with the different family law systems for Hindus and Muslims in India (Solanki 2011); this has been labelled ‘weak legal pluralism’ (Griffiths 1986). Third, the state legal system may be partly implemented by non-state bodies (privately-run asylum detention centres, for example). Fourth, the state legal system vies with the legal systems of other states in supra-national arenas like the CEAS, or with international law vis-a-vis global institutions like UNHCR. Fifth, ‘strong legal pluralism’ arises when the state is enmeshed with ‘non-governmental, *semi-autonomous social fields* which generate their own... obligatory norms to which they can induce or coerce compliance’ (Moore 2001: 107; italics added).

Moore’s notion of a ‘semi-autonomous social field’ has proved crucial for clarifying studies of legal pluralism. She does not see such fields as necessarily corresponding to particular social groupings. Rather, a social field is defined:

¹⁵Where formal state law is concerned ethnographers should avoid the ‘expertise-trap’ of simply accepting what legal experts write about it (von Benda-Beckmann 2008: 101).

¹⁶Available at: <http://www.centreonconstitutionalchange.ac.uk/news/holyrood-and-westminster-could-diverge-immigration> [Accessed 12 December 2016].

by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them... The independent articulation of many different social fields constitutes one of the basic characteristics of complex societies. (Moore 1978: 57–58)

So despite their capacities to generate rules and enforce conformity, such fields can only do so within limits; they are only *semi*-autonomous because they co-exist with, and are affected by, other semi-autonomous social fields that serve to set limits upon their own powers of enforcement. Moore gives the example of the garment industry in New York City, where formal legislation relating directly or indirectly to garment production, such as banking law and labour law, operates alongside the quasi-legal regulations of non-state bodies like trade unions and manufacturers' associations, and less formal rules growing out of 'the interplay of the jobbers, contractors, factors, retailers, and skilled workers in the course of doing business with each other' (Moore 1973: 728). Governments, of course, seek to regulate the social fields within their state boundaries—by means of legislation, for example. But legislation often fails to achieve its intended aims, or has unplanned or unexpected consequences, because it is not introduced into a vacuum, but into a situation that already contains complex sets of social arrangements and obligations, that may distort or even defeat its intended purpose.

We could make a case for how asylum exemplifies each of the sorts of legal pluralism Moore outlines, but her fourth and fifth senses seem particularly pertinent. Asylum clearly exemplifies legal pluralism in the fourth of Moore's senses listed above, for instance. Thus, although the United Kingdom—for example—was an early signatory of both the 1951 *United Nations Convention Relating to the Status of Refugees*, and the subsequent 1967 *Protocol* that made it less narrowly focused on the specific circumstances prevailing after the end of the Second World War, these were not formally incorporated into UK law until the coming into force of the 1993 *Asylum and Immigration Appeals Act*. Since then immigration and asylum have been subject to a growing body of UK national legislation, beginning with the 1971 *Immigration Act* and added to at an increasingly frantic pace over the past two decades. They are also regulated by the *Immigration Rules*, a hugely complex body of quasi-legislative regulatory material that has undergone even more frequent modification.¹⁷ To a large extent, both the plethora of primary legislation, and the rapidly-changing *Immigration Rules*

¹⁷<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum> [Accessed 31 July 2016].

reflect repeated attempts by the state to place yet more national restrictions upon the rights supposedly guaranteed by the international Convention.

Asylum also displays the characteristics of Moore's fifth sense of legal pluralism, 'strong legal pluralism'. Asylum procedures involve complex interactions between different professional actors (administrators, judges, lawyers, doctors and other 'experts', public service interpreters, and so on), regulated in complex ways by national and international legislation; by the rules of procedure developed by or for different bureaucracies or court systems; by the ethical codes of the professional bodies to which these actors belong; and by the unwritten conventions that have arisen through their day-to-day interactions. In addition, these procedures centre on would-be refugees from all over the world, and each asylum applicant carries with them their own 'legal consciousness' (Merry 1990), generally not reflecting any prior experience or understanding of the national legal system within which their claim is being decided.

In short, European asylum systems are prime examples of 'strong' legal pluralism in which, as Griffiths puts it, 'the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and... unpredictable patterns of competition, interaction, negotiation, [and] isolationism' (1986: 39). It is hard to imagine how anything other than an ethnographic approach could hope to successfully disentangle processes of such complexity.

Approaching Asylum Determination Ethnographically

This present collection comes at a crucial time for Europe, when the European Union is consolidating its attempts to implement the Common European Asylum System; when mainland Europe is receiving unusually large numbers of people displaced by violence in the Middle East; when efforts to exteriorise border controls have heightened; and when the consequences for migration patterns of Britain's expected exit from the European Union are still almost entirely unclear. It represents the fruits of years of detailed in-person observations of the often obscured legal and administrative processes by which asylum claims are decided. In what follows, a legal overview of the CEAS (Craig and Zwaan) precedes sections on the diverse actors involved, the means by which they communicate, and the ways in which they make their decisions on a daily basis.

The section on actors covers judges, first instance decision making officials, government legal representatives, and child asylum applicants. We employ the concept of 'actors' because it throws into relief two elements of these processes. Firstly, when considering the whole machinery of asylum

determination the concept of actors helps to make clear the diversity of people involved in making determination processes happen. Determination is not something that is simply conceived and executed by legal elites and politicians—for some people involved in the system of determination it is a daily *practice*, with all the connotations of work, routine, habits and norms that this entails. Secondly, the concept of actors emphasises the agency that each of these people can have within the process of determination. When examined in detail, asylum determination is not simply the application of a set of legal rules to particular cases in a social, economic and cultural void. Rather, the wide range of people involved in determination can each, in their specific ways, also affect the course that the determination takes, for example via their emotional involvement, their bodily comportment, their language and their interactions. As such each of the actors we might identify as being involved in asylum determination is capable of *acting upon* that process, however subtly. A focus on the actors involved in determination therefore offers an antidote to the emphasis on either legal doctrine or outcome in legal studies. There are, in fact, more actors involved in determining an asylum appeal than might be imagined, from solicitors, barristers and judges, to caseworkers, clerks, security personnel, police, youth workers and a range of ‘experts’, not to mention applicants themselves. The mechanics of asylum determination therefore have their own sociology, involving rivalries, alliances, and competing cultures and discourses. Ethnographic analysis of courts, reception centres, tribunals and the back-offices of immigration decision making is ideally suited to examine these phenomena.

In her chapter on the challenges of judging asylum claims, for example, Carolina Kobelinsky critically reflects on the intractable dilemmas that judges face, and the prominent role of personal convictions and emotions in determining life or death cases, drawing on 14 months of ethnographic fieldwork conducted at the French Court of Asylum. Massimiliano Spotti’s analysis of credibility assessments in the Belgian determination system examines how a second crucial set of actors—the immigration officials charged with making decisions about asylum claims at first instance—valorise particular forms of factual truth that often bear little relation to the lived histories of asylum seekers, but which can nevertheless lead to life-threatening forms of identity misrecognition. John Campbell’s work on presenting officers who put forward the legal case against asylum seekers on behalf of the British Home Office during tribunal appeal hearings offers a rare glimpse of the fractious and obscured sociology of a world that is made insular by the adversarial nature of the British legal process. And Chrisa Giannopoulou and Nick Gill take advantage of the street-level perspective

offered by an ethnographic approach to report on the tensions between vulnerability and agency in the context of asylum seeking children in the Greek system of reception centres and camps.

The second section of the book turns to the pivotal issue of communication during the asylum determination process. Communication in asylum cases is frequently inadequate to the task. In particular, the tension between the global processes that produce asylum seekers and refugees and the national and local contexts in which understanding about them circulates, produces the ideal conditions for mutual incomprehension and misunderstanding (Blommaert 2009). Language in asylum claim determination

is dominated by frames that refer to static and timeless (i.e., uniform and national) orders of things. So while asylum seekers belong to a truly global scale of events and processes, the treatment of their applications is brought down to a rigidly national scale, a very modernist response to postmodern realities. This creates many problems—problems of justice, to name just one category. It also lays bare some of the threads of the fabric of globalization—the paradox between transnational processes and national frames for addressing them, for instance. (Blommaert 2009: 415)

These tensions give rise to both constraints over the means of expression and instances of misinterpretation and miscommunication. When communicative mistakes are made in this arena people's lives are put at stake, so it is difficult to think of an area in which clear and effective communication is more important. The diversity of languages involved in processes of asylum claim determination, however, render the area extremely challenging from the perspective of the practical necessity for good quality, reliable and professional interpreters and translators. With all these difficulties in mind, the chapters in this section underscore the unerring serendipity and unreliability of communication even in grave contexts such as asylum determination.

Julia Dahlvik's analysis of the Austrian Federal Asylum Office, for instance, argues that the role and power of interpreters in the administrative asylum procedure is so extensive that renewed attention should be given to professional ethics governing their conduct. Relatedly, Robert Gibb's analysis of asylum interviews and appeals in France settles upon the metaphor of 'power struggle' to capture the ways in which communication is contested within these settings. Matilde Skov Danstrøm and Zachary Whyte corroborate the gravity of communication in the Danish asylum system, by not only highlighting the pivotal role of narrative in asylum appeal processes but

also the way in which the inability to ‘perform’ narratives convincingly can endanger just asylum decisions. Finally, Jessica Hambly examines the work of judges in asylum appeals in the British context from a fresh perspective. Rather than concentrating on their (mis)use of discretion, she examines the non-legal forms of interaction and relationships that judges form with those around them in the course of their work. This approach understands judging as not only a legal act of decision making, but a complex social process of communication and competition between actors, organisations, and institutions.

The third section focuses squarely on the issue of decision making on asylum claims by judges and administrative officials. In all the chapters in this section, the subjectivities of the legal process of decision making are in evidence. For example, drawing on analysis and observation of 230 Italian asylum appeal decisions, as well as interviews with judges, Barbara Sorgoni focuses on the critical concept of credibility, arguing that internal consistency of asylum claims is given too much weight in the deliberations of legal officials in the absence of alternative criteria. Similarly, Tone Liodden finds that Norwegian asylum decision makers tend to turn towards ‘equal treatment’ of claims in the absence of evidence and other criteria upon which to base their decisions, with important implications for the kinds of justice practised in asylum determination. For Laura Affolter, Jonathan Miaz and Ephraim Poertner working in the Swiss context, the key issue is how self-understandings of their official roles inform what asylum system decision makers do and how they understand and enact ‘justice’. And Stephanie Schneider, in her work on the German asylum system, underscores the dilemmas facing system bureaucrats in an environment that overtly pursues productivity but delegates the responsibility for quality onto individuals.

Overall, the contributors offer a series of contextually rich accounts that move beyond doctrinal law to expose the gaps and variances between policy and legislation as they are written down and as they are practised. Not only do they provide empirical depth and innovative insights regarding particular countries but they are also adeptly theorised. What is more, through their proximity and juxtaposition, the contributions offer the reader a comparative perspective covering ten European countries.

Although the contributors write variously from sociological, anthropological, geographical and linguistic disciplinary perspectives, they are united in adopting an ethnographically-based methodological approach. Through this rich empirical and multi-disciplinary lens, they capture the current, contested reality of claiming asylum in Europe, laying bare the confusion, improvisation, inconsistency, complexity and uncertainty inherent to the

process. Their fusion of empirical insights, ethnographic approaches, theoretical reflections and legal subject matter offers a series of windows onto a complex and obfuscated area of law that is nevertheless central to foundational debates about the viability of the European Union and the moral obligations that Western developed states owe to outsiders seeking protection. Most fundamentally, this book addresses the need to find out how, precisely, claims for international protection under asylum law from some of the most marginalised people in the world are being handled.

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