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A Critical Investigation of Legitimacy Claims within the Precedents of Swedish Asylum Law

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Legitimized Refugees

A Critical Investigation of Legitimacy Claims
within the Precedents of Swedish Asylum Law

MARTIN JOORMANN

DEPARTMENT OF SOCIOLOGY OF LAW | LUND UNIVERSITY

WHO IS



Legitimized Refugees

A Critical Investigation of Legitimacy Claims within the Precedents of Swedish Asylum Law

Martin Joormann



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DOCTORAL DISSERTATION

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Title and subtitle: Legitimized Refugees - A Critical Investigation of Legitimacy Claims within the Precedents of Swedish Asylum Law		
<p>Abstract</p> <p>This study focuses on asylum cases decided at Sweden's migration courts. More precisely, it analyses how the highest legal instance, the Migration Court of Appeal (in Swedish <i>Migrationsöverdomstolen</i>, hereafter MCA), legitimizes decisions that concern asylum seekers. Using critical discourse analysis (CDA), the study makes power relations visible. Investigating central discursive claims that are expressed in the precedents of Swedish asylum law, certain power relations are identified as particularly unbalanced. Based on the identification of what I subsequently call the institutionalized power imbalance of the asylum system, the study's findings compel me to challenge this imbalance. After conducting ten interviews with judges at Sweden's four (second-instance) Migration Courts as well as at the (third-instance) MCA, I reviewed 200 precedents (published 2006-2016) that concern people who applied for a residence permit in Sweden. Of these 200, 75 precedents of relevance for Swedish asylum law appear in the study. Drawing on Robert Stake's understanding of a collective case study, the interviews are used to sample six precedents for in-depth analysis. Through a CDA of these last-instance decisions it is demonstrated how precedents of Swedish asylum law discursively represent 1) families with children, 2) class, race, ethnicity and religion, gender and sexuality, and 3) the policy of 'regulated immigration' (<i>reglerad invandring</i>). Building on Norman Fairclough's conceptualization of discursive legitimation strategies, and with the help of Robert Alexy's and Jürgen Habermas' approaches to legal discourse, it is argued that precedents of Swedish asylum law are not only legitimized based on I) the authority of law, but also by reference to II) the rationalization of empirical reasoning, III) the utility of institutionalized actions that can use law as means for political ends, IV) those moral evaluations that permeate legal discourse, and V) the storytelling that appears when legal texts are read as narratives. This argumentation highlights uncertainty, which affects the social reality of asylum processes and which appears to be represented when precedents of Swedish asylum law are legitimized by reference to rationalization, moral evaluation, and/or as narratives. Providing the respective decisions with some meaning, rather than merely making sure that they are legally correct, the analysed precedents are, thus, legitimized not only by reference to the authority of law. Referring to Şeyla Benhabib and her usage of Robert Cover's distinction between 'law as power' and 'law as meaning', a CDA of precedents of Swedish asylum law can, in this sense, illustrate how judges pay notice to the complexity of refugee migration in the world of today.</p>		
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A Critical Investigation of Legitimacy Claims within the Precedents of Swedish Asylum Law

Martin Joormann



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Faculty of Social Sciences

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MADE IN SWEDEN 

To my father, Reinhard Joormann (1949 – 1993)

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Malmö, 24 March 2019

Short List of Abbreviations

AAB	the Aliens Appeals Board (<i>Utlänningsnämnden</i>), the second legal instance of the Swedish migration bureaucracy from 1992 to 2006
CEAS	the Common European Asylum System
COI	country of origin information (sometimes also called ‘country information’, in Swedish <i>landinformation</i>), i.e. information about asylum seekers’ countries of origin
IT	interview transcript (e.g. IT1, IT2...) of one of the interviews that I conducted at Sweden’s migration courts (including the MCA)
<i>Lifos</i>	‘Centre for Country Information and Country Analysis in the Area of Migration’ (<i>Center för landinformation och landanalys inom migrationsområdet</i>)
MB	Sweden’s Migration Board (<i>Migrationsverket</i> , in English since recently called the Swedish Migration Agency)
MCs	Sweden’s Migration Courts (<i>Migrationsdomstolarna</i>)
MCA	Sweden’s Migration Court of Appeal (<i>Migrationsöverdomstolen</i>)
MIG (+ nr)	precedents of the Swedish Migration Court of Appeal
PRPs	permanent residence permits (<i>permanenta uppehållstillstånd</i>)
SAP	the Social Democrats (<i>Socialdemokraterna</i>), i.e. Sweden’s centre-left, social democratic, political party
SD	the Sweden Democrats (<i>Sverigedemokraterna</i>), i.e. the ultranationalist-populist political party that currently holds circa 18% of the seats in the national parliament
SOU	the States’ Public Government Reports (<i>Statens offentliga utredningar</i>)
TRPs	temporary residence permits (<i>tillfälliga uppehållstillstånd</i>)
UM (+ nr)	Swedish legal cases
UNHCR	the United Nations High Commissioner for Refugees, i.e. the UN Refugee Agency
UtlL	the Aliens Acts (<i>Utlänningslagen</i>)

Chapter One

Introduction

In late 2017, ten rejected asylum seekers were ‘coercively expelled’ (in Swedish *tvångsutvisade*), i.e. deported, from Sweden to Afghanistan. As journalist Negra Efendić reports in *Svenska Dagbladet*, it was initially planned to deport 15 asylum seekers, but five of those deportations were stopped. “New circumstances [appeared, based on which] a higher instance shall look at the case one more time”, as the PR-responsible staff of the police in western Sweden is quoted as saying (Efendić, 2017). In Sweden, asylum seekers can appeal rejection decisions to higher legal instances (see e.g. Parusel 2016, pp. 12-14). Since 1 April 2006, the two instances that are responsible for such appeals are the second-instance Migration Courts (*Migrationsdomstolar*, hereafter MCs, see UtIL 2005:716, Chapter 16) and the last-instance Migration Court of Appeal (*Migrationsöverdomstolen*, hereafter MCA, see *ibid.*). The question of how the MCA legitimizes¹ its decisions concerning refugee asylum is the point of departure for this study.

Despite a recent tendency in the Swedish media to limit the discussion about refugees to the question of whether ‘Afghanistan is safe enough’ (see e.g. Hansson, 2017; cf. Larsson, 2017), Swedish asylum policies and their social practices have been the focus of critical research (e.g. Khosravi, 2007; 2009; 2010; 2018; Sager,

¹ As will become clearer when reaching the conceptual discussions of Chapter Four, my starting point when discussing legitimation and legitimacy, and the respective verbs legitimize and legitimize, is Max Weber’s ideal type of the legal form of legitimate ‘rule’ (*Herrschaft*). Central to Weber’s understanding of *legale Herrschaft* is rationality. He distinguishes between ‘rational’ (*rationale*), ‘purpose-rational’ (*zweckrationale*) and ‘value-rational’ (*wertrationale*) forms of legal rule, while he claims that all of these forms – and therefore all law – can be codified. Moreover, he maintains, the ‘legal ruler’ (*legale Herr*) will also obey this law (see Weber, [1909] 1972). Drawing on Weber, and given my interest in the question of how legal decisions are legitimized, this study starts with the premise that legal decisions – and the procedures through which they come about – are always presented as rational (see Habermas, 1987a; cf. Eder, 1988; 1987; 1986). This (implicit) claim of rationality often contains legitimations of statements that are based on the purpose and/or the value of (supposedly always rational) legal arguments.

2011; Noll, 2014; 2016; Wettergren & Wikström, 2014; Wikström, 2014; 2015; Wikström & Stern, 2015; 2016; Sager & Öberg, 2017). Against the backdrop of this academic interest, it is important to remember that “[l]aw is politics by other means” (Banakar, 2016, p. 9; cf. Aubert 1989). Having said this, law cannot, of course, be reduced to politics. In order to be legitimate, law and politics must not “dissolve” (*sich auflösen*) into one another, as Jürgen Habermas (1987a, p. 5) argued. Focusing on the Swedish context, the research listed above has paid attention to the role that law plays within the social processes that result in certain people being legally recognized and included as ‘legitimate refugees’, while others are rejected and excluded as ‘illegitimate asylum seekers’. “[T]he modern nation-state has claimed the right to preside over the distinction between useful (legitimate) and wasted (illegitimate) lives”, as Shahram Khosravi (2010, p. 3) stated in formulating his criticism of an international migration regime based on “politico-juridical discourse and regulation” (ibid.); a criticism to which I will return below.

First, however, a note on terminology: I mainly use the terms applicants and asylum seekers (in the analysed court decisions often called ‘the applicant’, i.e. *den sökande* [literally ‘the seeker’]) and, less frequently, refugees. I use these terms when I write about the residence permit applications of human beings whom Victoria Canning, to avoid the often racialized-politicized term asylum seeker, calls people seeking asylum (Canning, 2017), and whom other critical migration scholars have referred to as forced-displaced people (a term that transcends the dichotomy of [unrecognized] asylum seeker and [recognized] refugee, see e.g. Abram et al., 2017). In support of this pursuit of alternative representations – while remaining conscious of the different political connotations that the words refugee and asylum seeker have in the English language – I also understand (and sometimes use) ‘people seeking asylum’ and ‘forced-displaced people’ as categorizations; categorizations which are strongly linked to those legal classifications that they refer to. To borrow from Gayatri Chakravorty Spivak (1988), I identify all of the terms listed here as different “re-presentations” of those individuals that are often categorized as either asylum seekers or refugees. How representatives of these groups identify themselves is a different question, one which is not addressed in this study (for my research on self-organized refugee activism, see Joormann, 2014; 2015; 2018). In any case, the terms asylum seeker and refugee are simplifications regarding the temporality of these “re-presentations” (Spivak, 1988). Not only is the word immigrant nowadays often negatively loaded and analytically imprecise – many people now migrate not only

from country A to country B, but possibly through country C and, later on, further to country D – even the term refugee entails the risks of essentialism; e.g. when giving the impression that all refugees ‘find a new home’ in the country where they moved to (see Arendt, 1943).

Aim, Research Questions, and Purpose of the Study

In this introduction, an overview of the literature that is relevant for the study and an outline of the study’s chapters are presented. The aim of the study was formulated against the backdrop of the current state of research (see below). This aim is to investigate critically, through an in-depth analysis of precedents² published by Swedish Migration Court of Appeal’s, how decisions that concern asylum seekers have been legitimized. To this end, the following three research questions are answered:

1. How are decisions to grant or to deny the right to asylum legitimized through the discourses³ of the MCA’s precedents?
2. When considering precedents as legal narratives, which discursive representations correspond to gender, sexuality, ethnicity, religion and/or class?
3. Based on such representations, how is ‘the legitimate refugee’ constructed in precedents of Swedish asylum law?

Given the study’s aim and research questions, its purpose is to make power relations visible. Problematizing central discursive claims, such as those expressed in precedents of Swedish asylum law, certain power relations are identified as particularly unbalanced. Based on the identification of what I subsequently call

² On the precedents of the highest legal instances in Sweden, Lars Heuman writes: “According to Swedish law, lower/subordinated (*underordnade*) courts of law are not obliged to follow the decisions of the highest legal instances, which constitute precedents. For example, a judge who assesses a legal question differently than The Highest Court (*HD*) cannot be punished. In practice, however, the precedents are followed carefully by the lower courts. In any case, deviations [from precedents] are most often (*oftast*) corrected through appeals” (Heuman, 1991, p. 111).

³ Following Norman Fairclough (2003), I understand discourses as ways of representing.

the institutionalized power imbalance of the asylum system, the study challenges this imbalance, and asks for change.

Situating the Study

Jonathan Josefsson applies Şeyla Benhabib's theoretical conceptualisations to some of the precedents that have been published by the MCA (Josefsson, 2016). In an article included in his study, Josefsson argues that "Benhabib's concepts *reciprocity* and *democratic iterations* can offer a normative foundation and productive theoretical framework to analyse claims and justifications of asylumseeking children's rights to residence permits in the public sphere" (ibid., p. 70, emphasizes in italics in original). Thus, he sets out to "engage theoretically with the questions about the rights of asylum-seeking children in dialogue with contemporary political philosophy" (ibid., p. 18). In other words, he applies Benhabib's discourse-ethical approach to rights (see Benhabib, 1996; 2004; 2013; 2014; 2016). His data consists of the MCA's precedents that concern asylum-seeking children, plus a sample of articles from the Swedish newspaper *Dagens Nyheter* that discuss the rights of asylum-seeking children. Based on this text analysis of two rather different genres of written discourse (see Fairclough, 2003) – court decisions and newspaper articles – Josefsson (2016, p. 17) puts forward the following argument:

"[...] the MCA and its judges play a critical role as interpreters of children's rights and in the development of domestic legal norms. To study the legal arguments of the MCA is thus ultimately a way of studying the actions of the Swedish state with regard to children's rights and of studying how children's rights figure in a domestic practice of immigration control."

Here I may add that studying the legal arguments of the MCA is one way to explore the Swedish migration bureaucracy's discursive practices of decision-making. By focusing on the exceptions of these practices that affect asylum seekers in Sweden, in an earlier publiciation (Joormann, 2017), I discuss 'security cases' (*säkerhetsärenden*, see UtlL 2005:716, Chapter 1 § 7) and 'the temporary law' (*den tidsbegränsade lagen*⁴, see Lag 2016:752; cf. UtlL 2005:716, Chapter 4 § 3a).

⁴ Lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (Lag 2016:752).

Regarding research on the subject of refugee migration, it can be noted that there are not many empirical studies – Josefsson’s being an exception – that apply an ethical approach to rights as Benhabib does. More often, her work is mentioned when reviewing normative-political approaches to, most prominently, gender, human mobility, borders and citizenship (see e.g. Bosworth, 2016; Pickering, Bosworth & Aas, 2014)⁵.

When it comes to empirical research on the administration of migration, apart from a methodologically relevant study on the discursive legitimization of immigration control in the Austrian context (Van Leeuwen & Wodak, 1999), there are several studies that discuss the Swedish MCs and their decisions (e.g. Westfelt, 2008). There are also legal scholars who address the role of the MCA among the migration courts (Stern, 2014; Noll, 2010), and political scientist Livia Johannesson (2017) has conducted ethnography at Sweden’s MCs. She analyses processes of asylum determination by applying the concept of administrative justice (ibid., pp. 26-30; cf. Henrichsen, 2010). Through the lens of sociological research, Åsa Wettergren and Hanna Wikström (2014) analyse the question of ‘credibility’ (*trovärdighet*, see also Beard and Noll, 2009) in relation to the refugee category. In this research, Wettergren and Wikström focus on the question of how asylum cases that concerned Somali applicants were treated in MC decisions. On the issue of objectivity and legal decision-making concerning asylum applications, Wikström, in another study, argues that epistemic (in)justice (*epistemisk [o]rättvisa*) can be sociologically problematized when investigating the knowledge production about ‘sex’ (*kön*) and culture (*kultur*) in documents that concern refugees (Wikström, 2015). Her constructionist reading of legal categorizations – such as ‘credibility’, ‘legality’ (*rättslighet*) and ‘identity’ (*identitet*) – relates to the epistemological questioning to which Western liberal law in general can be exposed (see Norrie, 2005; cf. Priban, 2002).

Regarding the study of Swedish judges, who work within what he calls Swedish legal culture, Olof Stållvik states the following:

⁵ On pages 6-7 of *The Criminology of Mobility*, Sharon Pickering et al. state: “While Butler was primarily influenced by the work of Michael Foucault and psychoanalysis, other theorists like Seyla Benhabib, Iris Marion Young and Nancy Fraser mined different traditions to develop more explicitly normative and political accounts of gender and identity [...]. For these scholars, it was not a huge jump to examining citizenship and social exclusion. Benhabib (2004) has thus developed a cosmopolitan ethics [...].”

“[...]In Sweden] little research interest has been directed to the study of the judicial profession, in contrast to the situation in the United States or Great Britain. [...] Nevertheless, judges in Sweden occupy very important positions, and not only in courts of law. The judicial system is not an independent branch of government as in, for instance, the United States or Germany. The professional career of many judges includes work in the legislative and/or executive branches of government” (Ställvik, 2009, p. 251).

This argument from Ställvik’s work was confirmed when I interviewed a judge (Interview Transcript [hereafter IT] 1) who engaged in writing precedents at the MCA: The judge had previously worked in the Swedish Foreign Office (*Utrikesdepartementet*), i.e. for the executive branch. By stressing that the role of judges has not been the focus of legal research in Sweden, the above-cited excerpt from Ställvik’s study makes a good argument for research that studies the importance of precedents in relation to the role of Sweden’s judges (see Modéer, 1994; 2003; 2004; cf. Ställvik, 2009). Political scientist Jonas Nordquist problematizes the position of judges within the Swedish political system. He identifies the following tensions:

“Courts consist of judges, judges are not elected (with a few exceptions) and they cannot be removed from office. Judges are not directly accountable to the people, and considering the room for discretion that always exists in connection with the application of law and the interpretation of single provisions, the right for the court to reverse decisions made by popular elected representatives can be seen as a real problem from a popular sovereignty perspective” (Nordquist, 2001, p. 238).

In considering these two contributions to the study of judges and, respectively, courts in Sweden (Ställvik, 2009; Nordquist, 2001), one aspect in relation to the importance of precedents becomes apparent: through the production of precedents, Swedish judges also contribute to law-making (for other national contexts, see e.g. Hammerslev, 2003; Stevens, 2005; White, 2007; Kobelinsky, 2019). In Sweden, legal precedents – such as the asylum cases of the MCA that I focus on – are published and accessible to the public online. However, these texts are highly formalized expert-decisions, written in legalistic language (see Nilsson, 2006, pp. 61-63). The tension between the ambition of being “accountable to the people” (Nordquist, 2001, p. 239) and the democratic problem that “majoritarian decisions cannot be accepted in all areas” (ibid.) becomes apparent when reading the MCA’s precedents.

Regarding research on the situation for noncitizens who live uncertain lives in Sweden, the experiences of imprisonment in ‘migrant detention centres’ (*förvar*) have been investigated (Puthooppambal, Ahlberg & Bjerneld, 2015; Khosravi, 2009; cf. Global Detention Project, 2016). Criminological research has examined legitimacy claims in respect to applying for asylum in Sweden (Schoultz, 2013). The lifeworld and the legal position of asylum-seeking children, including unaccompanied minors, has been examined (Lundberg & Dahlquist, 2012; Lundberg, 2011). The issue has also been problematized from the perspective of public health ethics through an analysis of the medical examinations that determine the age of young refugees (Noll, 2014; 2016). This can be contrasted with the rights to and practices of healthcare that contribute to the social exclusion irregularised migrants in Sweden. Anna Lundberg and Mikael Spång (2017, p. 35) find “separate legislations for different categories of persons, vague accounts of treaty-obligations, absence of discussions on liability, and shifting the responsibility of extending health care to the local government.” As an example of migrants’ psychological as well as physical well-being affected by deportability, the medical condition of refugee children falling into a state of ‘apathy’ (Johansson Blight et al., 2014) has been studied in the context of seeking asylum in Sweden.

Relatedly, the lives of undocumented migrants living in Sweden (Sigvardsdotter, 2012), social work with irregular migrants including unaccompanied minors (Nordling, 2017), and the “design-politics” (Keshavarz, 2016) of borders and migration, have all been analysed. In the recent past, undocumented people’s experiences of urban geography were examined in the local context of Sweden’s second-largest city Gothenburg (Holgersson, 2011), while Khosravi (2010) published an *Auto-Ethnography of Borders*, including a reflection on what I introduced above, as his thoughts on the discursive construction of ‘legitimate’ and ‘illegitimate’ lives.

With Khosravi’s book on his own travel to and arrival in Sweden as my last example from the literature I reviewed, the overview presented here is of course no more than a selection of the most significant publications for my work. From here on, I will refer to these and other relevant studies. The diversity of this research is striking, representing contributions from a variety of academic disciplines. Yet, given the interdisciplinary nature of studying those (refugee) migrations to Sweden that are precarious, contested and/or irregular, and through “politico-judicial discourse” (Khosravi, 2010, p. 3) classified as either “useful (legitimate)” or “wasted (illegitimate)” (ibid.), it is not surprising that sociologists, anthropologists, legal scholars, and criminologists as well as social work, design or

public health scholars, among others, deem it necessary to analyse different aspects of these migrations from their specific theoretical and methodological points of departure. Thus, migration becomes a vantage point from which to study contemporary society and globalisation.

That said, there is a knowledge gap. Given the state of research that I sketched above, there are few studies that critically analyse asylum cases decided at Sweden's migration courts, and even fewer that focus on the MCA's respective decisions. As mentioned above, Josefsson studied some of the MCA's decisions, with his analysis focused specifically on asylum-seeking children. His work did not, however, treat the internal operations of the law – as demonstrated by the MCA's precedents as legal decisions that influence Sweden's practices of immigration control and refugee reception, as well as the public debate about these issues. Due to this lack of research, a study of the asylum law that is 'made' at the MCA is needed. In this context, I see my contribution as a piece that starts to fill this gap.

The study applies qualitative methods of data collection, sampling and interpretation, within the framework of Norman Fairclough's (2003) critical discourse analysis as textual analysis for social research. From a socio-legal perspective, it is a study that addresses the question of how the MCA legitimizes decisions that concern asylum seekers.

Regarding the study's societal relevance, I want to stress the following. I have spoken with people who work at the first-instance Migration Board (hereafter MB)⁶, with lawyers who act as the public counsels (*offentliga biträden*, Utl 2005:716, Chapter 18) of asylum seekers, and with judges who take decisions at the second-instance MCs. In these conversations (and semi-structured interviews with the judges, see Chapter Three), it was confirmed that the MCA's precedents are important sources of law – as last-instance contributions to legal practice, published for the main purpose of guiding the lower instances (see Heuman, 1991, pp. 109f). Furthermore, through conducting interviews at the MCA in Stockholm, I became aware of a certain media interest in the precedents. Not only have the MCA's judges been contacted by journalists about single cases of seeking asylum, but there is a more general mass media attention directed at the MCA. For instance, when I searched for *Migrationsöverdomstolen* (the MCA) in the

⁶ At the time of writing (early 2019), the MB (*Migrationsverket*) calls itself the 'Swedish Migration Agency' (see e.g. <https://www.migrationsverket.se/English/Startpage.html>) in English. Earlier, however, the translation 'Migration Board' was used in documents written in English by Swedish authorities (see e.g. Figure 1 in Chapter Two). Given these different translations of *Migrationsverket*, I have chosen to stick to 'the Migration Board' (and its abbreviation 'MB').

archives of the online news sites of the larger Swedish dailies *Dagens Nyheter* (343), *Svenska Dagbladet* (160), *Expressen* (39), *Aftonbladet* (69) and, as an expert publication, *Dagens Juridik* (111), I found 722 articles that contain this word.⁷

Moreover, since 2015, the MCA has been ‘tweeting’ its precedents. People can follow the Twitter account⁸ of *Kammarrätten i Stockholm*, but the account does not follow any others, and its posts cannot be commented on. I was told during interviews with relevant staff that the MCA also maintains a closed Facebook group as well as a LinkedIn profile. In an interview with the MCA’s ‘public relations officer’ (*informatör*), I learned that journalists from the UK and Germany had contacted the MCA to gain information about certain precedents. In other words, there is a certain audience among representatives of the media that focuses on the decisions that the MCA publishes. When it comes to academic investigation, however, since the establishment of the Swedish migration court system in April 2006 – as I was told by the judges whom I interviewed at the MCA – I had been the first researcher they had met.

Outline of the Study

In **Chapter Two**, the Swedish asylum system is presented in its European, wider international, and historical context. Upon problematizing the refugee category, I put forward the argument that migration is, besides being gendered, racialised and marked by other axes of power, a classed social process. With this noted, the distinction between ‘the refugee’ and ‘the economic migrant’ is drawn into the analytical focus to explain the absence of class in the data set of the precedents. Understanding cross-border mobility and the seeking of asylum as a specific form of migration, the significance of economic capital is stressed by paying attention to the example of so-called Immigrant Investor Programmes in the EU context, and residence permits for the ‘self-employed’ (*egen företagare*) in Sweden. Having thus introduced the Swedish, European and wider international migration regimes, I trace the history of the Swedish asylum system back to the early 1990s. Thereby covering the roughly 25 years between the two ‘refugee crises’ of 1992-93 and 2015-16, the focus is on the emergence of the migration courts in 2006

⁷ Search conducted on 24 October 2016. Numbers in brackets relate to the sum of texts which included the word *Migrationsöverdomstolen* and which were, on that day, displayed via the respective news site’s search function.

⁸ See, in Swedish, <https://twitter.com/KammarrattSthlm> (Accessed 4 May 2017).

and the role the MCA has, since then, been playing as the highest legal instance of the Swedish migration bureaucracy.

Chapter Three deals with methodological considerations. In the chapter's first main section, the two data sets of the study are presented. These include ten interviews at Sweden's migration courts and 200 precedents of Swedish asylum law (2006-2016). I explain how the first data set was used in the process of sampling six cases from data set two. Following Roberts Stake's approach to what he calls collective case study, these six cases were chosen based on three themes. Under these themes it can be exemplified how precedents of Swedish asylum law discursively represent 1) families with children, 2) class, ethnicity and religion, gender and sexuality, 3) the policy of regulating immigration. Having developed one theme for each research question, the three empirical chapters (Five, Six and Seven), which concentrate on one research question each, are outlined. Considering the (de)limitations of such a research design along with reflections on research ethics that came up during this process, the chapter arrives at the detailed overview of the precedents that concern asylum seekers. Finally, in the last main section of the chapter, the method-theory interface of the study is introduced by taking up a passage from an interview with a judge in which a precedent is mentioned that became of interest for the media.

Drawing on this introduction of theory, in **Chapter Four** the conceptual framework of the study is made explicit. Contributions from both Habermas and Alexy are used to sharpen the analytical focus on what Fairclough conceptualises as the four main strategies of discursive legitimation. Building on Wodak's and Van Leeuwen's discourse analysis of the legitimation of immigration control in Austria, I identify Habermas' *Wie ist Legitimität durch Legalität möglich?* ('How is Legitimacy through Legality Possible?') as an analytically prolific piece of socio-legal theory. And while Habermas is applicable to reconstruct non-legal normativity in legal decisions, Alexy's *A Theory of Legal Argumentation* proves useful when one needs to examine factual claims within legal discourse. Through what he calls external justifications, establishing consensus about events and states of affairs in the past, present and future is crucial to almost all legal decisions. Lastly, I turn to Benhabib's work on democratic legitimacy and refugee migration in the global context. Against the backdrop of Habermas' central insight that the 'all-affected principle' of discourse ethics is not applicable to legal discourse, my review of Benhabib's work shows that, from the perspective of moral discourse, there is a 'paradox of democratic legitimacy' inherent to immigration policies. Because of this difficulty in legitizing the control of refugee migration, as I

argue when taking up Benhabib's citation of Robert Cover's distinction between 'law as power' and 'law as meaning', Swedish judges face difficulties when they apply regulations that are meant to order the chaotic processes of seeking asylum in the world of today.

As indicated above, the subsequent three empirical chapters put forward an in-depth analysis of six precedents of Swedish asylum law. Introducing each of these chapters with a discussion that emerged from the interviews, my collective case study of six precedents focuses on the three themes I introduced above. **Chapter Five** contrasts a case where the application of an asylum-seeking family is rejected with a case where such an application is granted. In this chapter several of the study's key-concepts are introduced. **Chapter Six** starts with a review of excerpts from interviews with judges that can be related to the possible importance of social and cultural capital in asylum cases decided at court. Upon this discussion on the traces of social class in the interview material, a precedent that applies legal categorisations of ethnicity and religion is analysed. In contrast, the second case that is examined in depth in this chapter concerns the gender and sexuality of the applicant. Finally, in **Chapter Seven**, two asylum cases that highlight the policy of 'regulated immigration' (*reglerad invadring*) are closely examined. The first precedent concerns an asylum-seeking mother, whose possible expulsion to Malta in accordance with the Dublin-system is assessed against the backdrop of *reglerad invadring*. In contrast, the second precedent deliberates on the question whether a father, who applied for asylum in Sweden as a teenager, can be forced to return his country of origin.

In the concluding **Chapter Eight**, I summarize, interlink and develop the insights of the three empirical chapters. The discussion on (un)certainty is taken a step further by linking it to Cover's aforementioned distinction between 'law as power' and 'law as meaning' as well as Benhabib's thoughts on 'hosts' and 'guests' in the context of refugee asylum. It is with this wider view of the spatiotemporal context of seeking asylum in Sweden within Europe and the world of today that I conclude the study. In line with the main main purpose of the study, I challenge the institutionalized power imbalance that I find built into the Swedish asylum system. Regarding the points on which I criticize the Swedish asylum system as constrained by power relations, I argue that this system should be changed in order to strengthen the legal position of the applicant. Lastly, in view of the need for continued research efforts, I put forward a summary of how the conceptual framework of this study can be utilised by future research that aims to analyze legal decisions sociologically.

Chapter Two

Seeking Asylum in Sweden

“[...] Saeed wondered aloud once again if the natives would really kill them, and Nadia said once again that the natives were so frightened that they could do anything. ‘I can understand it,’ she said. ‘Imagine if you lived here. And millions of people from all over the world suddenly arrived.’ ‘Millions arrived in our country,’ Saeed replied. ‘When there were wars nearby.’ ‘That was different. Our country was poor. We didn’t feel we had as much to lose’” (Hamid, 2017, pp. 161-162).

Before presenting the historical context of the Swedish asylum system from the early 1990s onwards, including a snapshot of the most relevant legal sources, responsible institutions and respective legal actors and processes, this chapter will begin with a problematization of two central issues. Firstly, I discuss the dominant conceptualization of ‘the refugee’ as someone who escapes from war, other armed conflict and/or who feels a ‘well-founded fear of persecution’ (UNHCR, 1998), to summarize the overarching legal norm that defines the refugee category in accordance with international law (Wettergren & Wikström, 2014; cf. McKinnon, 2008; Mayblin, 2014; McAdam, 2017). Oftentimes placed in binary opposition to ‘the economic migrant’, this conceptualization must be contextualized because (refugee) migration is also a classed social process (Mulinari & Neergaard, 2004; Schierup et al., 2006; Holm Pedersen, 2012; Khosravi, 2010; De Genova, 2015). With this focus on social class, I aim to introduce a discussion that is pursued in Chapter Six. Having said this, social class is not the only axis of power that marks (and is being marked by) migration, displacement and cross-border mobility. There is a large body of research on the question of how gender and sexuality (e.g. Freedman, 2015; Shuman & Bohmer, 2014; cf. Bruce-Jones, 2015) as well as race (e.g. Razack, 1998; 2011), among other axes of power, shape the seeking of asylum (see Spade, 2013, p. 1047). Yet, because the binary of ‘the refugee’ and ‘the economic migrant’ is crucial to much

of political and legal discourse about people seeking asylum (Johansson, 2005, pp. 126f; cf. Macklin, 1998; Hamlin, 2014), these two terms are the focus of the first section of this chapter.

Who Can Get Asylum? Problematizing the Refugee Category

Johannesson (2017, p. 1) aptly highlights that “[...] legal scholars have argued that asylum determinations constitute the most complex decision-making in contemporary Western societies [...]”. Against the backdrop of this apparent complexity of asylum determination procedures (Gill & Good, 2019), it is necessary to address the question of who ‘the refugee’ is. While armed conflict and/or persecution are the main grounds to be eligible for (full) refugee status, fleeing from economic hardship is not accepted as a reason to be granted any such status. Shedding some light on this distinction, the following statement originates from one of the interviews I recorded with a judge at the MCA. In this interview, the judge talked about a certain group of unaccompanied minors (*ensamkommande barn*) and their possible reasons for seeking asylum in Sweden:

“[...] those unaccompanied minors, especially in Stockholm, have been the Moroccan children on the street (*gatubarnen*). I can say that I think that we have many LVU [*Lag med särskilda bestämmelser om vård av unga*, i.e. cases that include the treatment of minors] which concern precisely unaccompanied minors, because they have a socially disintegrating behaviour, they are addicted to drugs, they roam around (*vagabonderar*), as one talks about in the Social Service Act (*socialtjänstlagen*), they have not stayed in one place and so on. I think that, in the eyes of the people, this becomes a problem as well. So everything is affected by everything else in society (*allting påverkar ju varandra i samhället*), because it is connected. And it happens a lot – especially the Moroccan boys – that they do not get a residence permit, and then they don’t get any housing or they get housing and then one is so extroverted that one cannot stay at the housing. And so they live at Sergels Torg [a square in central Stockholm], by selling drugs, and by prostitution. This is a vicious circle, because this does lower people’s tolerance, and

then, those who really need protection, they ride along in the same category” (IT9).⁹

When I then asked the judge what was meant by ‘category’, the argument developed as follows: “[...] if one looks at how they have come, then I think that many have an economic [motive] – actually economic asylum seekers – because they need to earn a living, they have already lived on the street, and then they have a perspective of getting a better life” (IT9). In such an understanding, “economic asylum seekers” (IT9) are not refugees because they are not seeking refuge from any war, other armed conflict, or (fear of) persecution. If they are also deemed to be not worthy of subsidiary protection,¹⁰ they are not considered to need any (international) protection. Consequently, these people are often framed as migrants who are fleeing ‘merely’ from poverty, unemployment, lack of prospects. Implicitly, thus, this understanding excludes the consequences of certain class positions in the country of origin as legitimate grounds for cross-border migration (see De Genova, 2015, pp. 192f; cf. Khosravi, 2010, p. 111). Following the same

⁹ Translated from the interview data, in Swedish: ”[...] de här ensamkommande, det har ju varit, framförallt i Stockholm då, de marockanska gatubarnen. Jag kan säga att jag tycker att vi har många LVU som gäller just ensamkommande, för att de har ett socialt nedbrytande beteende, de är drogberoende, de vagabonderar, som man pratar om i socialtjänstlagen, att de har inte stannat på en plats och så där. Det tror jag också, att i folks ögon så blir ju det här ett problem, så allting påverkar ju varandra i samhället, eftersom det hänger ihop. Och där är det ju mycket de här, då framförallt de här marockanska pojkarna, som då inte får uppehållstillstånd och då får dem inget boende, eller så får dem boende och så är man så utåtagerande så man kan inte stanna på boende. Och så lever de på Sergels Torg, på droghandel, prostitution. Det är ju en ond cirkel, för det gör ju också då att folks tolerans sänks, och så, de som verkligen behöver skydd, då åker de med i samma kategori.”

¹⁰ Within the EU’s legal framework on subsidiary protection, i.e. Directive 2004/83/EC and Directive 2011/95/EU, the current Swedish Aliens Act (UtlL 2005:716) makes the distinction between two main statuses of subsidiary protection: *alternativt skyddsbehövande* (‘alternatively in need of protection’) and *övrige skyddsbehövande* (‘otherwise in need of protection’).

An applicant is considered to be *alternativt skyddsbehövande*, if there is the “[...] well-grounded assumption that the alien, when returning to the home country, runs the risk of being punished with death or being subjected to bodily punishment, torture or other inhuman or degrading treatment, or, as a civilian, runs the serious and personal risk of being harmed due to indiscriminate violence because of an outer or inner armed conflict, and 2. the alien cannot or does not want to, because of such risk as stated in 1., take advantage of the home country’s protection” (UtlL 2005:716, Chapter 4§2, my translation).

An applicant is considered to be *övrige skyddsbehövande*, if ”[...] he or she 1. needs protection due to outer or inner armed conflict or, due to other strong antagonisms in the home country, feels a well-grounded fear of being subjected to serious abuse, or 2. cannot return to their home country due to an environmental catastrophe” (UtlL 2005:716, Chapter 4 § 2a, my translation).

logic, the website of the Swedish office of the United Nations High Commissioner for Refugees (hereafter UNHCR)¹¹ uses the term *ekonomisk migrant*. The organization's FAQ page includes 'Who is a refugee?' (*Vem är flykting?*) that answers as follows:

“As a rule, an economic migrant leaves a country voluntarily to seek a better future somewhere else. If the person would choose to return home, they would benefit from the protection of the home country (skulle de åtnjuta hemlandets skydd). Refugees flee (flyr) because of war, conflict or threat of persecution and they cannot return safely to their homes under prevailing circumstances (under rådande omständigheter)”¹² (UNHCR Sweden, 2018).

This definition is obviously rooted in liberal ideas about free will and individual, rational choice. Left without any choices, these ideas suggest, a refugee can only be somebody who had to leave, who was forced, who had no alternative. 'The economic migrant' is, in turn, discursively constructed as the binary opposite of this understanding of 'the refugee'. Every "economic migrant" has a choice, as UNHCR Sweden (2018) suggests in the excerpt. This becomes clearly visible with the keywords "voluntarily" and "choose" (ibid.). These stand in a discursive meaning relation (Fairclough, 2003, pp. 87-98) to 'economic migrant'. In contrast, refugees "flee", a word which conveys the idea of escape, not "to seek a better future" but instead, "because of war, conflict or threat of persecution" (UNHCR Sweden, 2018). This discursive legitimization of refugee asylum fits well with the 1951 Refugee Convention¹³ and the international refugee regime as it

¹¹ One might argue that UNHCR's guidelines, rules and practices do not necessarily influence asylum cases decided within national jurisdictions. Yet, as I will illustrate with quotes from the interviews with Swedish migration court judges throughout this study, the information that UNHCR produces is taken into account also in many Swedish asylum cases. Moreover, all 'quota-refugees' (*kvotflyktingar*) receive the initial decision on their asylum applications from a UNHCR resettlement officer. The first legal instance in such resettlement cases that concern *kvotflyktingar* is, thus, a UNHCR resettlement office (see UNHCR, 2011; Suter & Magnusson, 2015; cf. Scheel & Ratfisch, 2013).

¹² See, in Swedish, via the webpages (of UNHCR Sweden: "En ekonomisk migrant lämnar i regel ett land frivilligt för att söka sig en bättre framtid någon annanstans. Om personen skulle välja att återvända hem skulle de åtnjuta hemlandets skydd. Flyktingar flyr på grund av krig, konflikt eller hot om förföljelse och de kan inte återvända i säkerhet till sina hem under rådande omständigheter."

¹³ Find the "Text of the 1951 Convention Relating to the Status of Refugees", the "Text of the 1967 Protocol Relating to the Status of Refugees" in full-text at <http://www.unhcr.org/3b66c2aa10> (Accessed 23 Oct. 2017).

has been developing since the 1950s (see Barnett, 2002; Mayblin, 2014; McAdam, 2017).

Almost needless to say, it is not always the most socio-economically marginalized who manage to become asylum seekers in Europe. For example, research in the Danish context has shown that refugees from middle class backgrounds in Iraq face the danger of downward class mobility once they have begun to live as (legally recognized) refugees in Denmark (Holm Pedersen, 2012). Furthermore, as Khosravi pinpoints, all forms of forced displacement have economic as well as political dimensions. Even seemingly non-political causes of becoming a forcibly-displaced person, such as climate change, are indeed phenomena that are always political in the following sense:

“In most refugee sending societies, the boundary between politics and the economy is blurred. Not even forced displacement due to environmental disaster can be defined as completely ‘natural’ and ‘non-political’. Famine, for example, is a political as well as an economic phenomenon (supranote: Turton 2003). While drought is a natural condition, famine is a consequence of political circumstances. People who starve in a famine in fact suffer from insufficient entitlement to food; they do not starve because no food is available (supranote: Sen, 1981). They simply do not ‘deserve’ to have food. This is pre-eminently a political issue and not just an economic one” (Khosravi, 2010, p. 111).

Related to the tendency for migrants from the Global South to find themselves in a lower class position once they have moved to Europe (see Mulinari & Neergaard, 2004; Schierup et al., 2006; Holm Pedersen, 2012), in the previously cited interview with a judge at the MCA, the following was stressed regarding public counsels (*offentliga biträden*) who can be assigned as publicly paid-for lawyers that represent the legal party of asylum seekers:

“[...] unfortunately, this business (*den branschen*), if one speaks from the side of the lawyers, is not so lucrative. It is quite a limited number of hours that the public counsels get [paid for], so how one [as a public counsel] writes an application for leave to appeal becomes, maybe, not so stringent, because it is indeed still like this: For us to process this [as an appeal], we need to get help from the [legal] parties, who stress that this question is of interest for a precedent (*prejudikatintressant*). And not only say – sometimes when we get PT-applications [for leave to appeal at the MCA], they say that there are reasons to grant leave to appeal (*skäl att meddela prövningstillstånd*), there is importance for the application of law (*betydelse för rättslämpningen*), or there are special reasons (*synnerliga skäl*), and then they

don't develop it. Instead, one must write indeed why there is importance for the application of law, which specific legal question it is that has importance for the application of law and lends itself to pick up precisely this [legal] case. And we would wish that they were better at highlighting the questions of interest for a precedent (*PT-intressanta frågorna*)” (IT9).¹⁴

In light of Johannesson's ethnography (2017), this excerpt from my interview data confirms the following critique of the procedural organization of asylum cases processed by Sweden's migration courts. The public counsels, who are assigned to many asylum applicants, cannot always sufficiently balance the power relations that emerge in asylum cases decided in court as settings of administrative law (*förvaltningsrätt*, see Bernitz, 1991, pp. 28-53). In these settings, the legal party that opposes the asylum seeker is always the MB. Notable exceptions are 'security cases', in which the Swedish Security Police (*Säkerhetspolisen*) is the opposing legal party (UtlL 2005:716, Chapter 16 § 6). Given this exception, the MB is the state institution that takes the initial decision. Regarding the possibility to appeal these decisions to the MCA as the highest legal instance (see UtlL 2005:716, Chapter 13 § 9-12b), in the same interview I conducted at the MCA, the judge described the problem as such:

“[...] The Migration Board often has better applications for leave to appeal, because they stress precisely that which is of interest for a precedent, and it is not so many cases that they appeal (*mål som de klaga på*). So, often, they [the lawyers of the MB] indeed get – what can one say – a little bit of cream on top (*lite gräddfil*), because they appeal so seldom. So, one looks a little bit more carefully into this [kind of appeal], maybe there is something in it. [...]” (IT9).¹⁵

¹⁴ From the interview data: “[...] tyvärr så är ju den branschen, om man säger från advokatsidan, inte så lukrativ, det är ganska begränsat antal timmar som de offentliga biträden får, så att det kanske inte blir så stringent hur man skriver en ansökan om prövningstillstånd, för det är ju fortfarande såhär: För att vi ska pröva det här, så behöver vi ju få hjälp från parterna, som pekar på att den här frågan är prejudikatintressant. Och inte bara säga - några gånger när vi får PT-ansökningar, så säger de att finns skäl att meddela prövningstillstånd, det är en betydelse för rättstillämpningen, eller det finns synnerliga skäl, och sen utvecklar de inte det. Utan då behöver man ju skriva varför är där en betydelse för rättstillämpningen, vilken specifik rättsfråga är det, som har betydelse för rättstillämpningen, och som lämpar sig för att plocka upp just det här målet. Och det skulle vi önska, att de var bättre på att lyfta de PT-intressanta frågorna.”

¹⁵ From the interview data: “[...] Migrationsverket har ju oftast bättre PT-ansökan, för då lyfter de just det här som är prejudikatintressant, och det är inte så många mål som de klaga på. Så, oftast så får de ju - vad ska man säga - lite gräddfil, eftersom de klagat så pass sällan. Så tittar man ju lite

With these remarks, the judge made a comparison between applications filed by the public counsels, whose work as lawyers for asylum seekers is described as “not so lucrative” (IT9), and those (fewer) appeals that the MB’s lawyers file; appeals which the judge describes as “better applications”. As mentioned, when an asylum case reaches the second legal instance, the MB becomes the applicant’s opponent according to the adversarial procedures of administrative law. Johannesson (2017, p. 98) has called this the “dual role” of those “litigators” who represent the MB both as one of the legal parties, as well as an “expert agency on asylum”. In consequence, when they reach the MCA, the appeals filed by the MB tend to be, in the words of the judge, “better applications” (IT9) compared to those that asylum seekers’ public counsels formulate. The judge explicitly stresses a financial reason for the resulting power relations: To act as a public counsel for an asylum seeker in Sweden is “not so lucrative” (IT9) for a lawyer. Hence my observation that asylum seekers in Sweden, who often depend on the legal aid that is provided through *offentliga biträden*, find themselves in a disadvantaged power position vis-à-vis the MB when it comes to having their case processed at Sweden’s migration courts, including the MCA.

In this context, it is important to acknowledge that it is not only the ‘law in the books’ (Pound, 1910) of national (Swedish), supra-national (EU) and international legal norms (UN Refugee Convention) that determine if an asylum seeker is entitled to international protection in Sweden. In line with other research that criticizes the power relations inherent to asylum cases decided at Sweden’s migration courts (e.g. Martén, 2015; Wikström & Stern, 2016), the empirical data I collected through interviews with judges at the MCs and the MCA suggest the following. The ‘law in action’ (Pound, 1910), which is socially practiced when asylum cases are decided in court, is strongly influenced by the discursive practices – performed by the MB’s lawyers, the applicants, their public counsels and the judges – that ‘make’ this law. This insight, in terms of law being socially produced, is nothing new to socio-legal research. More than 100 years ago, American legal realism publicized the term ‘law in action’ (see Banakar, 2015; Banakar & Travers, 2013; cf. Pound, 1910). And yet I believe that it remains necessary to stress the possible implications of this insight from a perspective that problematizes power relations. In the example of an asylum case decided at a Swedish migration court, it means that an asylum seeker who does not have the money to pay for a private

extra i det, det kanske ligger nånting i det. Men vi säger ju även nej när Migrationsverket klagat, därför att vi tycker: Ja, det är kanske intressant, men inte PT-intressant [...].

specialist asylum lawyer faces the danger of being severely disadvantaged through their reliance on a public counsel.

The European Migration Regime

As Ruben Andersson uses the term in *Illegality Inc.*, “the business of bordering Europe” (Andersson, 2014, pp. 273f) is indeed a business. It is a business more than the sense of ‘the business of smugglers’ – or “migration brokers and facilitators” (Abram et al., 2017, p. 9) as Khosravi has called them – who make seeking asylum in today’s Europe practically possible. With fewer than 2000 refugees resettled to Sweden annually in recent years until 2017 (cf. Chapter Eight), the current situation, in which de facto there are almost no ‘legal ways’¹⁶ into Europe, has led to the following problem. Many protection-seeking individuals and families must risk their lives to be able to reach the EU and Schengen territory, if they want to claim their legal right to file an asylum application. For all those protection-seeking people who would want to but cannot, for financial or other reasons, reach Europe¹⁷, seeking protection either in their countries of origin or in neighbouring countries tend to be the two alternatives.

The first of these two alternatives – seeking protection inside the country where one experiences war and/or fears persecution, murder, torture or other harm – is framed as becoming an internally displaced person (see e.g. Kostelny & Ondoro, 2016). The following has been recorded for the year 2015: “The total number of refugees and internally displaced persons (IDPs) protected or assisted by UNHCR stood at 52.6 million, compared to 46.7 million at the end of 2014” (UNHCR, 2016, p. 5). Therefore, it is important to know something about the approximate ratio of ‘internal’ and ‘external’ refugees; in other words, the proportion of people

¹⁶ Jörgen Carling uses ‘unauthorized entry’ for those border crossings that are completed without any state official checking the traveller. In reverse, an ‘authorized entry’ he defines as the border crossing during which the traveller is checked and allowed to enter (regardless of whether a forged or invalid passport or similar has been used). As it regards people seeking asylum, Carling writes as follows: “Unauthorized entry is legitimate under the 1951 Geneva Convention when it is done for the purpose of seeking asylum. Migration can therefore be ‘unauthorized’ without being illegal” (Carling, 2007, p. 6).

¹⁷ Here referring to, primarily, the geography of the EU, Schengen territory and the Common European Asylum System (CEAS).

who cross national borders in search of protection and those who do not. UNHCR presents the following numbers:

“During the course of 2015 more than 12.4 million individuals were forced to leave their homes and seek protection elsewhere; of this number, some 8.6 million remained within their own countries and around 1.8 million sought international protection abroad. In addition, 2.0 million new claims for asylum were made within the year” (ibid.).

With these statistics in mind, the observation that the clear majority of protection-seeking people remain in their countries of origin is of significance. When connecting this observation to the debate about ‘economic migrants’ as discussed above, I further find that not only a bottom-up but also a top-down perspective on migration as a classed social process is needed.

As investigative journalists and critical researchers have only recently started to problematize, there is an international market on which citizenship is de facto sold (see e.g. Keshavarz, 2016, pp. 136f; Barbulescu, 2014; Boatcă, 2016; Farolfi, Pegg & Orphanides, 2017). For instance, one can read about the law firm Henley & Partners, who advertise their services as follows:

“The Malta Individual Investor Program (IIP), which Henley & Partners was contracted in 2014 by the Government of Malta to design and implement, is the most modern citizenship-by-investment program. The IIP is one of the most exclusive citizenship-by-investment portfolios worldwide. It offers clients the opportunity to acquire citizenship in a country that has one of the strongest, most stable economies of the EU and Eurozone. [...] The combined upfront financial requirement, including applicable government charges and citizenship application fees, is just under EUR 900,000. These costs will increase slightly depending on the family size.” (Henley & Partners, 2019).

Hence it is to wealthy individuals and families that this law firm offers its clients “the opportunity to acquire citizenship in a country that has one of the strongest, most stable economies of the EU and Eurozone” (ibid.). In this way, protection-seeking people do not necessarily need to file an asylum application – if they have the economic capital to ‘invest’ in order to acquire EU citizenship. The example of the Malta – and there are comparable programmes in many other countries of the Global North (Boatcă, 2016) – instead illustrates how upper-class positions open up ways into the EU and the Schengen Area. This example of “mobility

corridors for the ultra-rich” (Barbulescu, 2014) can, thus, provide a glimpse into the world of an upper class that is, apparently, already ‘cosmopolitan’ (cf. Benhabib, 2014).

A Swedish Residence Permit Based on (Self-)employment

As these so-called immigrant investor programmes illustrate, applying for refugee status is of course only one among several options for those who seek to obtain residency in an EU country. In terms of social class, the Swedish regulations for residence permits based on work are analytically significant. In order to be eligible to apply for a temporary residence permit in Sweden based on employment, one must fulfill the following criteria:

“You have a valid passport.

You have been offered work on conditions which are at least on the same level as Swedish collective agreements (*kollektivavtal*) or what is customary in your profession or line of work.

You have been offered salary that is at least on the same level as Swedish collective agreements or what is customary in your profession or line of work.

You are offered an employment which gives you the possibility to provide for your livelihood (*försörja dig*). To fulfil this demand of being able to provide for yourself, you must work to the extent so that your monthly salary reaches at least 13,000 kronor before taxes.

Your employer intends to provide you with health insurance, life insurance, security insurance and pension insurance (*trygghetsförsäkring och tjänstepensionsförsäkring*) when you start working (Migration Board, 2019a).¹⁸

¹⁸ In Swedish original, from the Migration Board’s webpages: ”du ha ett giltigt pass. du ha erbjudits ett arbete med arbetsvillkor som är på minst samma nivå med svenska kollektivavtal eller vad som är brukligt inom yrket eller branschen. du ha erbjudits lön som är på minst samma nivå med svenska kollektivavtal eller vad som är brukligt inom yrket eller branschen. du erbjudas en anställning som gör det möjligt för dig att försörja dig. För att uppnå kravet på försörjning måste du arbeta i den omfattningen att lönen kommer upp till minst 13 000 kronor i månaden före skatt. din arbetsgivare ha för avsikt att teckna sjukförsäkring, livförsäkring, trygghetsförsäkring och tjänstepensionsförsäkring för dig när du påbörjar anställningen”.

Far from every inhabitant of Sweden holds employment that meets these standards. As elsewhere in the neoliberal(ized) world, insecure employment characterized by temporary contracts has become more common in Sweden since the late 1980s (Alfonsson, 2018; Berglund et al., 2017). To be able to show a contract that attests – in advance – that you will earn at least 13,000 kronor per month throughout the coming year is, therefore, a substantial hurdle for many (for example, at the time of writing, I myself could not provide such attested information about my employment prospects). An insecure job (such as cleaning, working in gastronomy, or delivering newspapers – all of which I did for some time when I first moved to Sweden) will, therefore, not be enough to be granted residency based on employment. In other words, the monthly income of an increasing number of individuals – who today make up a large share of Sweden’s working class (see Alfonsson, 2018; Berglund et al., 2017; cf. Mulinari & Neergaard, 2004) – is deemed insufficient for migrants who want to apply for a residence permit based on monthly incomes of less than 13,000 kronor.

Yet there is an alternative for (certain) individuals (and their families): the regulations that define the demands for people who are planning to open their own business in Sweden. When you apply for a Swedish residence permit based on (the plan of) being ‘self-employed’ (*egen företagare*), the rules are the following:

“You have a valid passport.

You show that you have good experience in your line of business (*branschfärdighet*) and previous experience in running your own business.

You show that you have relevant knowledge in Swedish and/or English.

You prove that you are the one who runs the business, have the decisive responsibility and own at least half of the business.

The business’ services or goods are produced and/or sold in Sweden.

You show that you have enough own money to provide for your livelihood and, if applicable, that of your family during the first two years (equivalent of 200,000 kr for you, 100,000 for your spouse and 50,000 for every child).

You show a credible (*trovärdig*) basis of your budget.

You show that you have made customer contacts and/or networks in Sweden.

You show that your business, after the probation time (*prövotiden*) of two years, has its finances in balance and can provide for your livelihood and, if applicable, for that your family ('providing' [*försörjning*] is calculated according to the national standard for providing support [*försörjningsstöd*] plus housing costs)" (Migration Board, 2019b).¹⁹

Sociologically speaking, these regulations define quite clear demands regarding the social, cultural and economic capital of the applicant. Understood in Bourdieusian terms, the class position of a migrant is of great importance for the question of whether this person can be granted a residence permit in Sweden based on being 'self-employed' (*egen företagare*). The cultural capital of the applicant is attested in view of her or his "knowledge in Swedish and/or English". Owning "at least half of the business" as well as "200,000 kr for you, 100,000 for your spouse and 50,000 for every child" are the minimum requirements regarding the economic capital of the applicant. Social capital, on the other hand, is deemed to be sufficient when one can prove that one has "made customers contacts and/or networks in Sweden". Finally, re-framed with the help of Pierre Bourdieu's (1984) overarching concept of 'symbolic capital', you – as an applicant who will benefit from your class background – have to convince the MB that "you are the one who runs the business".

For everyone else from the Global South who wants to access the level of protection that comes with legally residing in Sweden, but who does not have such amounts of cultural, social and economic capital, filing an asylum application is at least a theoretically possible option. The question of how the Swedish asylum system has been approaching such asylum applications since the 1990s is, therefore, the focus of the sections below.

¹⁹ In Swedish original, from the Migration Board's webpages: "du ha ett giltigt pass. du visa att du har god branschfarenhet och tidigare erfarenhet av att driva ett eget företag. du visa att du har relevant kunskap i svenska och/eller engelska. du styrka att du är den som driver företaget, har det avgörande ansvaret och äger minst hälften av företaget. företagets tjänster eller varor produceras och/eller säljas i Sverige. du visa att du har tillräckligt med egna pengar för att försörja dig och din eventuella familj under de två första åren (motsvarande 200 000 kr för dig, 100 000 för din medföljande make eller maka och 50 000 kr för varje medföljande barn). du visa ett trovärdigt underlag till din budget. du visa att du har skapat kundkontakter och/eller ett nätverk i Sverige- du visa att ditt företag efter prövotiden, på två år, har en ekonomi i balans och kan försörja dig och din eventuella familj (försörjningen beräknas efter riksnormen för försörjningsstöd plus bostadskostnad)."

Before delving into this historical context, it is important to stress that the next section has been inspired by Johannesson's (2017, pp. 59-74) chapter *Swedish Asylum System in Political Context*. She presents a more extensive overview of the parliamentary debates – and the different stances of the major parties – that influenced the development of Sweden's asylum system over time. Thus, she covers the period from the 1980s until the 2000s, a period framed mainly by 1989's 'Aliens Law' (Utlänningslagen, in force 1989-2005, i.e. UtL 1989:529). Primarily following her narrative, I have added arguments based on my reading of other scholarly literature and non-academic sources. This is done for the purpose of providing the reader with a historical background of the significant shift that took place in the 2010s or, more precisely, after 2015's 'long summer of migration' (Odugbesan & Schwiertz, 2018; Schwiertz & Ratfisch, 2016).

Sweden's Asylum System from the 1990s to 2005

The right to seek asylum, through applying for international protection as outlined in Article 14 of the 1948 Universal Declaration of Human Rights (UDHR) and as subsequently signed in the 1951 Refugee Convention and its 1967 Protocol (UNHCR, 2010), is a legal right in Sweden. This right is codified, primarily, within Swedish asylum law (*asylrätt*, see e.g. Noll & Popovic, 2006; Sager, 2011; Feijen, 2014). Moreover, since 1 September 1997, the Dublin system²⁰ is central (currently 'Dublin III' [EU Regulation 604/2013]) to the Swedish administration of asylum. With this system, the signatory states²¹ agree that they have the right – not the obligation (*skyldighet*), as one of the judges whom I interviewed stressed²² – to expel asylum seekers to another Dublin signatory state. Thus, this regulation opens up the possibility for expulsions to the country where the applicant is registered to have entered 'Europe', as defined by

²⁰ Until today (28 January 2018), and since the implementation of the Dublin Convention in 1997, the Dublin system has been amended twice, i.e. with 'Dublin II' (EU Regulation 343/2003) in 2003 and 'Dublin III' (EU Regulation 604/2013) in 2013.

²¹ As of today (28 January 2018), the nation states that apply the provisions of the Dublin Convention are the EU-member states plus Iceland, Norway and Switzerland.

²² In an interview that I conducted with a judge at the MCA, this issue was explained as follows: "[...] the country can indeed be generous and nevertheless process the asylum application, and not make use of its right to send the asylum application to another country."

the area that encompasses the territory of a Dublin system's signatory states (see e.g. Brekke & Brochmann, 2014).

Mainly but not exclusively within the legal frameworks constituted by the Dublin system and the Swedish Aliens Act of 2005 (UtlIL 2005:716), it has recently been made more and more difficult for asylum seekers to practically claim their right to apply for refugee status in Sweden (Sager, 2011; 2015; Sager & Öberg, 2017; Barker, 2018). The specific legal norms that regulate the right to some form of international protection status in Sweden have, after all, little value for those asylum seekers who cannot reach Swedish territory and who, therefore, cannot claim their right to a fair, due-process asylum application. Not only Sweden but many wealthy states throughout the Global North have institutionalized this or similar practices (see e.g. Mc Kinnon, 2008; Arndt, 2015; Maroufi, 2017; Canning, 2017; Richards & Gateri, 2017; Gill & Good, 2019). One may seek asylum, but only if one has reached the receiving country's territory – despite the lack of regular, authorized and in this sense 'legal' ways to enter these relatively wealthy geographies (Bhatia, 2017; Mallardo, 2017; Georgoulas, 2017).

From certain perspectives of political theory (e.g. Michael Walzer or John Rawls, see Benhabib, 2004, pp. 73f)²³, this practice is perfectly legitimate. The polity of a given nation state consists of its people in the sense of those citizens and denizens²⁴ who are allowed to vote in national and other significant elections. By electing representatives, 'the will of the people' – or at least of a majority of them – shall be legislated. Thus, the population shall be "not only the *subject* but also the *author* of the laws" (Benhabib, 2004, p. 181, emphases in italics in original). Since nation states in the Global North started to be marked by cultural and ethnic diversity in terms of their inhabitants' birthplaces, however, social theorists started to wonder how "the Other within" (Habermas, 1998) could be included into the democratic decision-making process. By the 1990s (see e.g. Banakar, 1994), the presence, visibility as well as social, economic and political participation of ethnic and cultural minorities had started to disrupt the dominant

²³ On the definition of 'the people' in Rawls' *The Law of People*, Benhabib (2004, pp. 81-82) argues: "Rawls's understanding of peoplehood follows the tradition of liberal nationalism and nineteenth-century idealist sociology, and obscures elements of power, oppression, and ideology through which a common sense of nationality is forged".

²⁴ A citizen of a country holds the citizenship of a country, while a denizen resides within the territory of this country with or without holding the citizenship of this country.

understanding of the democratic legitimacy of governing the, until then, largely homogenous welfare states of north-western Europe²⁵.

Procedurally, in Sweden during the 1990s, the legal inclusion and exclusion of noncitizens²⁶ was administered by a bureaucracy²⁷ that consisted of three instances: 1) the Migration Board (initially called *Invandrarverket* and since 2000 *Migrationsverket*), 2) the Aliens Appeals Board (*Utlänningsnämnden* [1992-2006], hereafter AAB) and 3) the Government (*Regeringen*). At *Invandrarverket*, and later *Migrationsverket*, the initial decisions were taken. When those decisions were appealed, and if it granted leave to appeal, the AAB was also the last legal instance. It was only those cases that the AAB decided to send on to the Swedish Government that became legal decisions formulated by the third and (very) last instance, i.e. the Government. Thus, from 1992 until 2006, both the AAB and the Government produced decisions by either confirming or overturning the initial decisions that the MB had taken.

The installation of the AAB in 1992 fulfilled a twofold purpose: “administrative justice” should be strengthened, while the Government could “distance itself from the often publicly criticized deportations that it took decisions on” (Johannesson, 2017, p. 64). Comparable to the reform 13 years later in 2005-2006, the

²⁵ With North-Western Europe, I refer to those countries of Northern and Western Europe that are not post-communist states and, in this sense, share a history of having developed into welfare states (recently neoliberalized) with a population that is marked by immigration from Global Southern countries: e.g. people from the former colonies in the UK and the Netherlands, (predominantly labour) migrants from Turkey in Germany, or people who came as refugees from various places to the Nordic countries. Thus, ‘Western’ is understood historically, while ‘Northern’ refers to the countries’ geographical location of those countries in the northern half of Europe.

²⁶ Noncitizens here refers to denizens (see above) who are not citizens of the country where they reside.

²⁷ I use the word bureaucracy based on the Weberian definition of it as ‘the rational form of legal rule/authority’ (*die rationelle Form legaler Herrschaft*). This usage of the term has to be contextualized with the help of Weber’s well-known argument about the ‘iron cage’ (a term which is Parsons’ translation of Weber’s original formulation *stahlhartes Gehäuse* [more literally: ‘steel-hard case’]). This argument is important because, according to Weber, a thorough bureaucratization of social order runs the risk of trapping people in modern rationalism or, in other words, in the ‘iron cage of modernity’. It is against this background that I refer to Weber’s idea of bureaucracy as the institutionalisation of social processes of decision-making that shall be characterized by “objectivity, impersonality and predictability” (*Sachlichkeit, Unpersönlichkeit und Berechenbarkeit*, see Kieser, 1999). Thus, I want to stress that I see the bureaucratic ideal of objective, impersonal and predictable decision-making as being marked by the ambivalence that ideals of objectivity always entail, i.e. being rational and not emotional, detached rather than attached, reasonable instead of affective, etc..

procedural changes should have strengthened the Swedish asylum system's legitimacy pragmatically (with fewer cases to be decided by the Government as appeal instance) as well as politically (by diminishing the Government's direct responsibility for unpopular decisions). In contrast to the migration court system that came to be in place from 2006 onwards, the asylum procedure at the AAB was not adversarial, but inquisitorial. This meant that decision-makers at the AAB were appointed by the Government, and that the MB did not become a legal party when the case had reached the AAB. Instead, the case was once more examined by a state institution, the AAB, as the second legal instance above the MB (see Spång, 2008; Stern, 2008).

In this function, the AAB did not formulate decisions for the legal system to use them as precedents. Rather, throughout the 1990s, a practice continued according to which of the Government's decisions were used for legal guidance, even though these decisions were formulated by politicians and their advisors (see Stern, 2008). Asylum seekers could not appeal any decision for it to reach the last instance. Only the MB or the AAB could appeal a case to the Government: "hence the individual asylum applicant could not appeal to a higher instance than the AAB" (Johannesson, 2017, p. 65). In contrast to the competencies of the MCA at the time of writing, the Government received cases from the MB and AAB also in order to establish precedents concerning the factual circumstances in the applicants' countries of origin. This 'country information' (*landinformation*) is crucial for the Swedish asylum system (see Chapter Seven). Until its dissolution in 2006, the AAB produced its own *landinformation*. With different units specialized in different geographical areas, the AAB could take decisions that established certain 'country of origin information' (COI). These decisions were considered to be guiding for the application of law (ibid., cf. Wikrén & Sandesjö, 2002).

Considering the political situation in Europe in 1992, however, this tripartite system of the MB-AAB-Government was challenged from the very start. Due to the Balkan War, considerably increased numbers of asylum applications developed a public discourse about a refugee crisis. This 'refugee crisis' (*flyktingkris*) of 1992-93 was – similar to the situation in 2015-16 – discussed primarily from the viewpoint of Swedish politics, economics and society. Indeed, back then as today, when using the term *flyktingkris* media discourse tends to focus on immigration control and on (refugee) immigration's impact on education, housing and the welfare system (Barker, 2018). This preoccupation with 'our system' obscures the effects on the most directly affected: people seeking asylum.

Moreover, it tends to ignore the wider context, i.e. the supra-national and global politics of migration and forced displacement (Khosravi, 2010; 2018).

In 1992 as in 2015, this discourse entailed political and, subsequently, legal consequences. Exemplifying how tightly intertwined immigration control and the asylum system were, in 1992 the Swedish Government made visa-free entry from several ex-Yugoslav republics impossible. By 1994, this also included citizens of Bosnia-Herzegovina. On the other hand, immigration control was at that time still marked by such “flexibility” (Johannesson, 2017, p. 67) that about 40,000 people from Bosnian-Herzegovina, who had already arrived in Sweden, were granted permanent residence permits through a political decision (see also Appelqvist, 2000). One could argue that this development in the first half of the 1990s marked a discursive shift away from framing the seeking of asylum primarily as a human right – portraying Sweden as humane and generous – towards presenting refugee migration more and more as an issue of national security (Abiri, 2000).

In 1995, Sweden joined the EU and, as mentioned above, the first Dublin Regulation was in force by September 1997. While before 1995 Sweden had already applied the notion of ‘safe third countries’²⁸, as a member state of the EU and of the Dublin system, more asylum seekers were expelled – or ‘returned’ – to the European countries where they had initially been registered (see Spång, 2006). Furthermore, Spång stresses that when Sweden signed the Schengen Agreement²⁹ in 2001, more restrictive immigration regulations were implemented (*ibid.*).

²⁸ Basically, the ‘safe third country’ concept is built on the following logic. If an asylum seeker’s (first) country of origin is not deemed to be safe, while the (second) receiving country has not decided whether the asylum seeker shall be granted any form of residence permit, the applicant can be expelled to a (third) country that is deemed to be safe. Legal scholar María-Teresa Gil-Bazo traces this reasoning back to the following complexity: “Indeed, the ‘safe third country’ concept is founded on the notion that States’ obligations towards refugees who have not been granted the right to enter and/or stay in the country where they seek asylum do not go beyond the principle of non-refoulement, that is, the prohibition not to be returned to a territory where they may face prohibited treatment. States would be obliged to allow refugees to seek asylum – in order to respect the principle of non-refoulement – but its granting would be a discretionary act of the State (in accordance with their domestic legislation) rather than a right of the individual to receive it (in accordance with international law)” (Gil-Bazo, 2015, p. 44).

²⁹ At the time of writing, 26 European countries are located within the Schengen Area. Moreover, the three EU member states Bulgaria, Croatia and Romania are not yet part of Schengen, but they are legally obliged to join in the future. In principle – and lately there have emerged many exceptions to this principle – the Schengen Area has abolished controls at the national borders between the signatory states. In consequence, to enter a Schengen signatory state, a passport holder from outside the Schengen Area has to obtain a Schengen visa.

By joining the EU, Sweden also became part of the Common European Asylum System (CEAS). CEAS regulations, which “Sweden has from the start taken an active part in promoting” (Johannesson, 2017, p. 68), include regulations for carriers such as airlines, as well as train, bus and ferry companies. These carriers are sanctioned if they transport people who do not have a valid visa to EU territory. For asylum seekers this means that the ways to reach the European Global North³⁰ are further limited. In practice, precisely for this reason, many forcibly-displaced people become dependent on “migration brokers and facilitators” (Abram et al., 2017, p. 9) who can help them to reach the European Global North.

According to Christina Johansson (2005), such changes towards a more restrictive asylum policy were, however, not only due to Sweden joining the CEAS in 2001. In 1997, amendments to the Aliens Act of 1987 (Utl 1989:529) had been made. These amendments defined a more restrictive distinction between ‘deserving refugees’ and ‘undeserving economic migrants’. In more explicit terms than prior to these amendments, refugees were framed as a burden to the Swedish welfare state. Based on this framing, the legal categories of international refugee protection in Sweden were amended. Both Johansson and an official government report conclude that asylum seekers were, thus, left with fewer possibilities to receive international protection status in Sweden (Johansson, 2005, p. 91; SOU 2004:74, p. 163).

Until 2006, the last instance to take – often unpopular – decisions was the Swedish Government. As the only instance that could issue precedents, in the sense of formulating decisions that were guiding for the application of law by the lower legal instances, the Government struggled with this *de facto* mixture of executive and judicative tasks; especially when issuing legally binding judgments about complex processes of asylum determination.

³⁰ With European Global North (cf. MacGregor, 2017, p. 3), I am referring to those (comparatively) wealthy European countries that are not developing countries. Thus, I argue that e.g. Switzerland and Norway are part of the European Global North without being EU-member states, while e.g. Romania and Bulgaria are not part of the European Global North despite the fact that they are EU-countries. This can be exemplified with the fact that the EU-countries Bulgaria and Romania are, at the time of writing, not incorporated into the Schengen Area.

The Reform of the Asylum System in 2005/06

On 1 April 2006, the system changed. What I call the Swedish migration bureaucracy³¹ was reformed substantively and procedurally. The implementation of a new Aliens Act in 2005 (Utl 2005:716), and the installation of the migration courts in the spring of 2006, led to the current state of the Swedish migration bureaucracy. When this change was decided in 2005, two main reasons were communicated to the public. Firstly, the decision-making process could be appealed and, if leave to appeal were granted, be decided at court, thereby improving *rättssäkerhet*³², i.e. 'legal certainty' and 'the rule of law'³³. Thus, "asylum

³¹ Drawing on the Weberian understanding of bureaucracy (see above), with 'Swedish migration bureaucracy' I refer to those Swedish state institutions that process residence permit applications, regardless of whether they are courts (the second-instance Migrations Courts and the last-instance MCA) or not (the first-instance MB and, regarding *säkerhetsärenden* [see below], the Government).

³² The Swedish word *rättssäkerhet*, and the way in which I translate it here as 1) 'legal certainty' and 2) 'the rule of law', is one of the central terms that I will take up when I reason around 'the promise of certainty' towards the end of this study. Given the differences between the civil law of Sweden and the common law of for instance the UK or US, it is indeed tricky that *rättssäkerhet* – as the equivalent of the German word *Rechtssicherheit* – can also be translated as 'the rule of law' (see Banakar, 2015, p. 13). In the context of problematizing (un)certainly, Banakar stresses that "[l]aw is amongst the few formal tools we can employ to enhance certitude in human affairs. Central to 'the rule of law' (*Rechtssicherheit*) is the promise of certainty and the uniformity in legal decision-making. Understandably, the focus of legal theory as well as socio-legal research has been traditionally on certainty, i.e. on the mechanisms which help to ensure law's internal operations and safeguard expectations and expectations of expectations in social relations and institutional activities" (ibid.).

In the English abstract of her PhD Thesis (in Swedish) on 'compulsory treatment and care' (*tvångsvård*), Annika Staaf (2005) translates *rättssäkerhet* as 'legal security'. That said, I would argue that this term is rather one of the two appropriate translations of *rättstrygghet* (the other being 'legal safety', see Chapter Seven).

Livia Johannesson (2017, p. 63), on the other hand, states 'administrative justice' (see also Henrichsen, 2010, p. 323) as a possible translation of *rättssäkerhet*, while arguing that "'legal certainty' or 'legal security', but also 'law and order', 'the rule of law', 'process of law', 'due process' and 'due process of law' would sometimes be suitable translations" (Johannesson, 2017, p. 63).

³³ Since 'legal certainty' is also known as one of (at least) three criteria to define 'the rule of law', it is worth noting that Vilhelm Aubert (1989, pp. 66-67) proposes a notion of *rättssäkerhet* defined as "legal security and protection". These ideas on 'security' and 'protection' are in line with Aubert's view of the law's ambition to harmonize "the demands for individual justice with the necessary enforcement of state authority" (ibid., p. 67). Thus, one could argue that he really means 'the rule of law' – which includes legal certainty in the sense of treating like cases alike, but arguably also ethically sustainable decisions – when conceptualizing *rättssäkerhet* as "legal security and protection".

determination should be under judicial control” (Johannesson, 2017, p. 70). Secondly, the two appeal instances of the MCs and of the MCA should curtail asylum seekers’ right to re-apply. Or, as the Migration Minister at the time, Barbro Holmberg, put it in a newspaper interview: “As it looks today, the process has effectively no end because we have a system where the asylum seeker can file new applications again and again after a final decision” (Sydsvenskan, 2005).

These two pronounced aims (improved *rättssäkerhet* and limiting the possibility to re-apply) had in common the objective of further legitimizing the decisions of the Swedish migration bureaucracy. And while the aim of enhanced *rättssäkerhet* through a reform of the procedural organization of Swedish migration law represents a more legalistic understanding of legitimacy, the standpoint of the former migration minister is framed in the language of politics: It was neither effective nor pragmatic, and thus not legitimate, that a rejected asylum seeker could re-apply several times – at least if one follows the minister’s line of argumentation. In this sense, law had once more become “politics by other means” (Banakar, 2016, p. 9; cf. Aubert, 1989).

Regarding the third and highest legal instance from 2006 onwards, Josefsson describes it as follows:

“According to [the 2005 Aliens] Act, the MCA is the final instance for appeal. As a consequence, this court sets the standards regarding legal reasoning and normativity in citizenship and asylum cases. The intention of the legislation was to improve the ‘rule of law, consistency and predictability’ in the asylum process by moving the legal assessment of residence permits from the former system, involving an Aliens Board and administered by the government, to the administrative courts, which are formally independent of the government” (Josefsson, 2016, p. 61).

This noted, I have elaborated elsewhere that the MCA is in fact not always the final legal instance (Joormann, 2017). Exceptions are security cases (*säkerhetsärenden*), which the Security Police define as cases of importance for national security. These cases are securitized in the sense that they become secret (*hemligt*) and are not decided by the MB or at court. Instead, as I was informed during interviews at the MCA, only certain judges have the security clearance to read these cases. The judges’ assessment is not binding for the Government, which takes the final decision. Apart from *säkerhetsärenden* as noteworthy exceptions, since 2006, every rejected residence permit applicant has the right to appeal the MB’s initial decision. If leave to appeal is granted, the case will be decided by one of the four MCs. If this second-instance decision is then appealed once more, i.e.

either by the applicant or by the MB, and if leave to appeal is granted once more because the case is deemed to be (legally) important enough to become a precedent, the last-instance decision will be taken at the MCA (see Noll, 2010). Courts of Sweden (*Sveriges Domstolar*) explain this organization on their webpages as follows:

“If a person's application is rejected by the Swedish Migration Board, the decision can be appealed against. The single largest category of decisions of the Swedish Migration Board that are appealed against are those relating to applications for asylum. A description is provided below of what happens when the Swedish Migration Board has rejected an application for asylum and the person who has applied then appeals to court. In broad terms, this system applies to most decisions of the Swedish Migration Board that are appealed against” (Courts of Sweden, 2014).

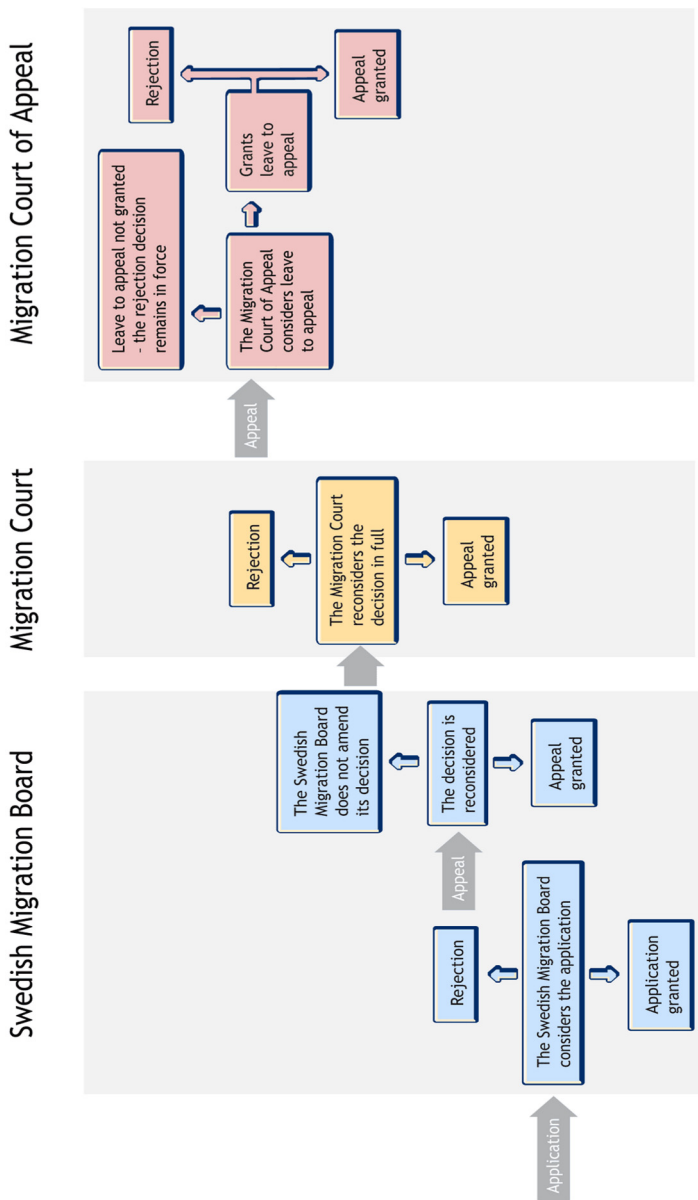


Figure 1: The way that an application for residence permit can take through the Swedish migration bureaucracy’s three legal instances (MB, MCs and MCA), retrieved 22 February 2018 online at: http://www.domstol.se/upload/Arende/Migration/fran_ansokan_till_avgorand_eng_stor.gif

The Politics of Asylum Law Since 2015

Today, apart from sporadic sparks of interest, much of public discourse in Sweden about the ongoing Global Refugee Crisis (UNHCR, 2016) seems to have become more background noise than genuine concern. As previously indicated, in 2015, *flyktingkrisen* became the term that was used to represent the sharp increase in the number of asylum applications that were filed during the second half of 2015. The even sharper decrease from early 2016 onwards (see figure 2 below) – and the political developments that lead to this significant decline – will be discussed below. For now, it suffices to say that while Sweden talked about *flyktingkrisen*, UNHCR established the usage of ‘The Global Refugee Crisis’ (UNHCR, 2016). Arguably, this is more appropriate wording in contrast to the all too narrow, potentially Eurocentric and methodologically nationalist (Michaels, 2013, p. 287; cf. Wimmer & Glick Schiller, 2003) preoccupation with the term ‘refugee crisis’ in the sense of an existential threat to nation, state and welfare.

Certain politicians in Stockholm utilised even more dramatic language. In 2015-16, they proclaimed a daunting ‘collapse of the system’ (*systemkollaps*)³⁴. This discourse was – as could be expected – aggravated by the ultranationalist-populist party *Sverigedemokraterna* (hereafter SD). Their chairman Jimmie Åkesson positioned refugees explicitly in opposition to the welfare state when speaking of “a welfare collapse in Sweden, where vital societal functions stop functioning” (*välfärdskollaps i Sverige, där vitala samhällsfunktioner slutar fungera*, Åkesson cited in Kasurinen, 2015).

³⁴ For a journalistic discussion, in Swedish, about the usage of the notion of ‘systemic collapse’ see <http://flyktingkrisen.aftonbladet.se/chapter/sluta-prata-om-systemkollaps/> (Accessed 5 October 2016).

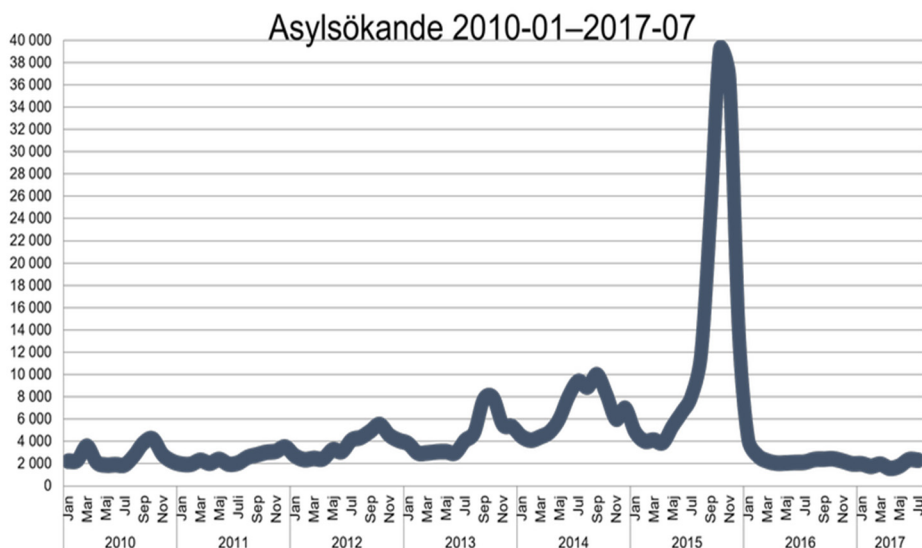


Figure 2: Number of asylum seekers registered in Sweden from January 2010 until July 2017. Image source: The Migration Board, Migrationsverket (Accessed 22 February 2018).

The recent changes to Sweden’s refugee policy can be directly correlated with the graph above. In the winter of 2015–16, border controls were severely strengthened and partially outsourced to Danish territory, with border security guards checking the passports of travellers who were on their way to Sweden across the Öresund Bridge (Canning, 2019). Regarding the reasons for this clear shift of policy, it is illuminating to consider how the opinion polls of Sweden’s political parties developed over the years from 2007 to 2018. At about 40% in 2007, the support for the centre-left Social Democrats (*Socialdemokraterna*, hereafter SAP) was initially strong. At roughly 30% in 2007, the polls of the (neo)liberal ‘Moderate Party’ (*Moderaterna*) were lower. For SD, who have their roots in Sweden’s Neo-Nazi movement of the 1990s, the most striking increase in their support happened in 2015, or more precisely in late 2015. When the numbers of asylum applications peaked (see figure 2 above), SD support rose to around 22%, according to the opinion polls at the time.³⁵ Thus, if only for a short period in 2015–16, and with

³⁵ See, in Swedish, <https://www.svt.se/special/valjarbarometern/> (Accessed 22 February 2018).

only a small margin, SD was Sweden's second biggest party – at least in some polls. From that moment onwards, coinciding with the introduction of the strengthened border controls and the consequential decline of asylum applications (see figure above), the support for SD decreased, while the polls of SAP began to recover slightly. Hence, at the time of writing, there is the observation that the (partial) return of support for SAP to 25-30% and the (relative) decline for SD to roughly 18% are strongly linked to Sweden's refugee policy – of course not as a singular causality, but among others. This is a development that has its roots in the winter of 2015-16, i.e. the moment in time when Sweden closed its borders to almost all people seeking asylum (see Sager & Öberg, 2017; cf. Barker, 2018).

From a more global perspective on refugee migration, by “the end of 2016, there were 67.7 million people of concern to UNHCR worldwide, 3.8 million more than in 2015” (UNHCR, 2017, p. 17). The overwhelming majority of these people sought shelter “in low and middle-income countries close to conflict” (ibid.), often across the border from their countries of origin. It is against this background, where it was indeed developing countries that “hosted 86 per cent of the world's refugees under UNHCR's mandate” (UNHCR, 2016, p. 16), that the term ‘refugee crisis’ could be used analytically in discussions that want to avoid the fallacies of Eurocentrism and methodological nationalism (Michaels, 2013, p. 287; cf. Wimmer & Glick Schiller, 2003).

Yet, as previously mentioned, since 2017 the notion of crisis in relation to refugees has been relegated more to the background of Swedish political discourse. What has remained, instead, is a preoccupation with ‘integration’ – almost exclusively framed as a problem (cf. Rothstein, 2017; Hansen, 2018) – as the issue that currently overshadows other areas of Swedish politics. Arguably, one reason for this recent discursive shift away from ‘refugee crisis’ and towards ‘integration crisis’ is the drastic reduction in the number of people who (can) seek asylum in Sweden today.

The “EU-Turkey Deal” (Eralp, 2016; cf. Kingsley & Abdullatif, 2016) and the significantly intensified border controls along the so-called Balkan Route (Ataç et al., 2017) and on the way north, across Austria, Germany, through Denmark, to Sweden, have largely had their politically-wished-for effect (Barker, 2018; Sager & Öberg, 2017; Georgoulas, 2017; Fratzke, 2017).

Apart from this tightening of the EU's external and internal border controls, since the reform of 2006 much has happened in the Swedish politics of asylum law. The mentioned terms *flyktingkrisen* and *systemkollaps* introduced a significant discursive change in the Swedish-speaking public sphere and its debate about

refugees. To put it briefly, from a discourse still about ‘defending the right to asylum’ (*värna rätten till asyl*) in mid-2015 (Barker, 2018), by 2016 the political establishment in Stockholm – with a few exceptions, such as the Left Party (*Vänsterpartiet*) and a handful of centrist and ecologist MPs (see Atladottir, 2016; cf. Ankersen, 2016) – had adopted the discourse of crisis: ‘exceptional’, ‘threatening’ numbers of migrants and, as it was further framed, the need for ‘breathing space’ (*andrum*); a breathing space to be achieved by decreasing the rights of asylum seekers to, within the EU-context, a ‘minimum level’ (*minimnivå*, see Fratzke, 2017; Joormann, 2017; Sager & Öberg, 2017; Barker, 2018).

This shift in political discourse was followed by the legal changes that were issued on 22 June 2016. These changes were framed as the aforementioned ‘temporary law’ that will be valid until (at least) July 2019. Since 20 July 2016 (respectively 1 June 2016, see section IV below), the four main consequences of the changes are:

I. Mainly temporary residence permits (hereafter TRP): Those applicants who are legally recognized either as refugees (*flyktning*) or as in need of subsidiary protection (*alternativt skyddsbehövande* or *övrig skyddsbehövande*, see above) can no longer receive permanent residence permits (hereafter PRP). From 20 July 2016 onwards, only refugees who are resettled to Sweden – until 2017 on average 1,900 people per year (see Migration Board, 2015) – receive PRPs. In contrast, recognized refugees who came to Sweden outside the resettlement programme receive three-years TRPs, and people who are classified as in need of subsidiary protection receive a TRP that is valid for 13 months (Migration Board, 2016a).

II. Largely limited rights to family reunification: Considering the important detail that the refugee category had already (before 2016) been made into a “highly exclusive status” (Wettergren & Wikström, 2014, p. 567), only applicants who are legally recognized as refugees according to the Swedish Aliens Act of 2005 continue to have the possibility of applying for reunification with members of their nuclear families, i.e. ‘spouses/registered partners or children younger than 18’ (“*make/maka/registrerade partner/sambo och barn under 18 år*”, Migration Board, 2016a). For those asylum seekers who receive a subsidiary protection status, it is only in those cases where an asylum application was filed before 24 November 2015 that the one who has been recognized as in need of protection may apply for family reunification. Asylum seekers who had applied after this date and who received a TRP valid for 13 months (see above) will only in exceptional cases (*undantagsfall*) have the possibility of family reunification. This rule will also

be valid in cases where close relatives of unaccompanied minors, who sought asylum in Sweden after 24 November 2015, apply for family reunification.

III. **Increased requirements to provide (*försörjningskrav*):** To be allowed to apply for family reunification one must, firstly, have received a residence permit and, secondly, be able to provide financially for the livelihood (*försörjning*) of one's family members who plan to move to Sweden. Of further importance in a present-day Sweden with a severe housing shortage, one must find a home that is of sufficient space and standard (*tillräcklig storlek och standard*) for the family to live in. Exempted from these requirements are: 1) a) People with refugee status and b) people who are recognized as being in need of subsidiary protection and whose family members apply for reunification within the first three months after the applicant has received a residence permit; 2) Children (younger than 18); 3) Family members who have applied for reunification until 20 July 2016 (see Migration Board, 2016a).

IV. **Limited assistance to livelihood and housing (*rätt till bistånd*):** In a YouTube video, which ends with the rejected asylum seekers (in the cartoon a dark-haired, brown-skinned couple) boarding a plane that flies from Sweden over a map of Europe towards the Middle East, the MB explains that rejected applicants' rights to receive assistance to maintain livelihood and housing in Sweden are limited. In force since 1 June 2016, this regulation concerns only adults without children (*ibid.*).

2006-2016: Relative Stability at the MCA

The first ten years of the MCA were marked by stability. However, as the preceding section illustrated, the second half of 2015 and the whole of 2016 were not in any sense a stable 18 months for the MB. Furthermore, at the second-instance MCs, the first appeals filed by people who had come during 2015 were processed in 2016. And yet, throughout my fieldwork in 2015 and 2016, the judges I spoke with did not conceive of any considerable increase of their workload linked to asylum cases. It was not until I conducted the last of ten interviews in May 2017 that the interviewed MCA judge confirmed a noticeable change concerning the number of asylum cases that were appealed. Regarding cases which, after applying for asylum in 2015-16, could reach the MCA as the last instance of appeal, a judge stated the following:

“[...] when there was such a rush on the Migration Board, there were certainly a number of [cases] that were not handled sufficiently carefully, and the processing times were long, and also the Migration Courts had many cases. In a way, I think the perception is: yes, but then the last instance is the MCA, which is going to correct what went wrong, but this is not our task, because we have the pure function of establishing precedents (*renodlad prejudikatinstansfunktion*). We cannot pick up cases that have been processed incorrectly, but what we do is we pick up single cases that are appropriate for pronouncing principle statements (*uttala principiella ställningstaganden*)” (IT9).³⁶

In this excerpt, the judge stressed that the MCA’s function was not to “correct what went wrong” (IT9) at the lower legal instances. Instead, in order to take a decision in the form of a precedent, the MCA needed to identify single legal cases “that are appropriate for pronouncing principle statements” (ibid.) and, thus, could become guiding for the application of law by the lower legal instances. Moreover, despite the mentioned increase in the number of decisions on asylum applications that, since mid-2015, have been filed (and appealed), the judge described another development. Contrary to what one might expect, an increased number of asylum cases would not necessarily lead to more last-instance decisions taken at the MCA. The judge elaborated on this as follows:

“In the first years of the MCA, we announced a lot of precedents – perhaps we also thought that there was a need for [legal] practice – not the AAB’s practice, but to create [our] own, and therefore there was a need to grant leave to appeal (*prövningstillstånd*) more frequently. Now, there are fewer and fewer [precedents published], the longer time goes by – if it is not that the state of the world (*världsläget*) changes in ways so that one needs to pick up new ones perhaps, because you need to change what you’ve said earlier, or adjust in a way, what has been said before” (IT9).³⁷

³⁶ From the interview data: “[...] när det blir det en sån här anstormning på migrationsverket, så blev det säkerligen en del som inte hanterades tillräckligt noga, och långa handläggningstider, och migrationsdomstolarna har ju också haft många mål. På nåt sätt så tror jag att uppfattningen är: ja men då sista instans är MIGÖD, som ska rätta till det som blev fel, men det är inte vår uppgift, utan eftersom vi har renodlad prejudikatinstansfunktion, så kan vi inte plocka upp mål som har blivit fel i hanteringen, utan vad vi gör att vi plockar upp enstaka mål som lämpar sig för att uttala principiella ställningstaganden.”

³⁷ From the interview data: ”De första åren när MIGÖD fanns, då meddelade vi massa med prejudikat - då tyckte vi väl kanske också att det fanns ett behov av praxis - inte Utlänningsnämndens praxis, utan skapa egen, och därför så fanns det ett behov av att meddela

In other words, after the initial need to establish precedents in the years immediately after the installation of the current system in 2006, the late 2000s and the first half of the 2010s saw “fewer and fewer” (IT9) precedents. Thus, when looking through the 200 last-instance decisions on asylum cases that have been published from 2006-2016, one can observe a decline in the number of decisions taken over time. Moreover, the sharp increase in the number of asylum applications during 2015-2016 did not directly affect the MCA.

Instead, a judge I interviewed at the MCA in 2017 expected that, in the near future, there would be “fewer and fewer” (IT9) precedents written. The judge made this estimation despite the considerably larger number of asylum cases that, since 2016, had been reaching the second-instance MCs. It is in this context crucial to highlight that, for the clear majority of applicants who are granted leave to appeal after being rejected by the MB, the second-instance MCs are the legal instance where the final decision is taken (see Josefsson, 2016). Hence the current situation, since mid-2015, as a period during which the first (MB) and second (MCs) legal instances have been processing considerably more asylum applications than in previous years. In the meantime, the MCA has not been experiencing a similar increase because this court is dependent on receiving applications for leave to appeal that sufficiently clearly stress the single case’s “importance for the application of law” (IT9).

Summary

In this chapter, I have problematized the refugee category, and discussed the observation that migration is, besides being gendered (Freedman, 2015; Shuman & Bohmer, 2014; cf. Bruce-Jones, 2015) racialised (Spade, 2013, p. 1047; Razack, 1998; 2011) and shaped by other axes of power, a classed social process (Mulinari & Neergaard, 2004; Schierup et al., 2006; Holm Pedersen, 2012; Khosravi, 2010; De Genova, 2015). Illustrated with excerpts from an interview that I conducted with a judge at the MCA in 2017, and against the backdrop of the refugee definition according to national and international legal norms, it became clearer that ‘the refugee’ tends to be presented as a victim who has no

många fler prövningstillstånd. Nu är det ju färre och färre, ju längre tiden går - om det inte är så att världsläget förändras på nåt sätt så att man då har behov av att plocka upp nya kanske, för att man behöver ändra det man har uttalat tidigare, eller justera på nåt sätt, det man har sagt tidigare.”

choice and is forced to flee due to armed conflict and/or a ‘well-founded fear of persecution’ (see Wettergren & Wikström, 2014; cf. McKinnon, 2008; Mayblin, 2014; McAdam, 2017). This discursive construction of the refugee stands in binary opposition to ‘the economic migrant’ who is presented as an active decision-maker. It suggests that ‘economic migrants’ have a choice. Oftentimes, this agency-focused perspective on migration implies that the main aim of ‘the economic migrant’ is searching for employment in the country of destination. Even UNHCR Sweden builds its refugee definition on this binary distinction between ‘the refugee’ and ‘the economic migrant’; a distinction which is essential to the categorizations of the international refugee regime at large (see Barnett, 2002; Mayblin, 2014; McAdam, 2017).

At the same time, along with the expansion of globalizing capitalism, possibilities to ‘invest in citizenship’ exist today in many countries of the Global North (Barbulescu, 2014; Boatcă, 2016; Keshavarz, 2016; Farolfi, Pegg & Orphanides, 2017). For instance, on the webpages of the law firm Henley & Partners (2019), one can find examples of those “mobility corridors for the ultra-rich” (Barbulescu, 2014) that so-called Immigrant Investor Programmes (IIPs) provide. Against this background, an analytically distinct importance of upper-class positions can be identified in the following sense. While racism, sexism and other ‘-isms’ of social exclusion intersect when it comes to the complex question of who can migrate where, a sufficiently large amount of economic capital can provide privileged access to a residence permit and/or citizenship in a country of the Global North. Moreover, possession of the certain amount of economic, social and cultural capital that is deemed to be sufficient to run a business in Sweden by the MB can make it possible to ‘invest’ in a Swedish residence and work permit by becoming ‘self-employed’ (*egen företagare*).

Having thus problematized the refugee category not only in relation to ‘the economic migrant’ but also against the backdrop of the importance of social class when it comes to cross-border mobility, I proceeded to summarize the Swedish asylum system’s development since the early 1990s. In such retrospective, it becomes apparent that the Swedish term *flyktingkrisen* (‘the refugee crisis’) had already been used during the first half of the 1990s when, due to the Balkan War, significantly increased numbers of asylum applications were filed in Sweden. In response, visa regulations were made more restrictive, as were the regulations that legally defined the different protection statuses. That said, I also named international and supra-national legal norms and frameworks, such as the 1951 Refugee Convention, the Dublin system implemented in 1997, and the Common

European Asylum System (CEAS) since 1999, all of which are important for the Swedish asylum system.

Regarding those state institutions and legal actors that administered this system in the 1990s and first half of the 2000s, I described how the Migration Board (first *Invandrarverket* and then *Migrationsverket* [since 2000]), the Alien Appeals Board (*Utlänningsnämnden* [1992-2006]) and the Swedish Government operated an inquisitorial migration bureaucracy. In this system, the applicant could only appeal the decisions of the MB, while the decisions of the AAB and the Government could not be appealed by the applicant. In terms of guidance for the application of law, it was the Government who formulated decisions similar to precedents. After joining the EU in 1995, with certain amendments such as the more restrictive regulations of access to protection status in 1997 and restrictions of visa-free travel due to the Schengen Agreement in 2001, the Swedish asylum system was, until 2005, still primarily working within the national legal framework of the Aliens Act of 1987 (UtlL 1989:529).

This changed in 2005-06. After the reform of substantive immigration law was codified with the new Aliens Act of 2005 (UtlL 2005:716), on 1 April 2006 the procedural organisation of the Swedish migration bureaucracy was re-organized. The second-instance Migration Courts (initially three [Malmö, Gothenburg and Stockholm], and since 2013, a fourth in Luleå) and the last-instance Migration Court of Appeal in Stockholm were installed. This procedural reform of 2006 was legitimized based on the following two main claims. By applying the adversarial procedures of administrative law, the Swedish asylum system ceases to be inquisitorial as soon as leave to appeal the MB's decision is granted. In such cases, the state institution that is also the first legal instance, the MB, becomes the legal party that faces the applicant in court. Thus, (the lawyers representing) asylum seekers oppose (the lawyers representing) the MB.

At an MC it is then always one judge (*domare*) and three lay judges (*nämndemän*) who take the decision. If the three *nämndemän* reach a consensus decision that opposes the judge's decision, their decision prevails (see Martén, 2015). In this way, the responsible MC decides if the applicant's appeal to the MB's decision will lead to a different decision. After such a decision is taken at one of the MCs, either the MB or the applicant can appeal once more for the case to reach the MCA. The MCA, however, will only decide cases that are of general legal relevance for the Swedish migration bureaucracy and, in this sense, 'of precedent-interest' (*av prejudikatintresse*, IT9). The legal party that appeals a second-instance decision must make sure that, in the application for leave to

appeal, it is sufficiently clearly formulated why the case in question has “importance for the application of law” (IT9).

One result of these changes, as I was informed when I conducted interviews with judges and with the ‘public relations officer’ (*informatör*) of the MCA, was that court decisions were questioned less frequently in the media. The *informatör* stated that it was “not that often” (*inte så ofta*, IT3) that journalists contacted the MCA because they wanted additional information about a decision. A judge who works in a leading position at the MCA confirmed this statement. Media representatives contacted the Court “relatively seldom[ly]” (*relativt sällan*, IT2).

Thus, the 2006 reform appears to be a success in the following sense: By moving the decision-making process at the appeals level from the AAB and the Government to MCs and the MCA, the migration bureaucracy’s legitimacy strengthened, because court decisions are perceived to be (more) ‘legally certain’ and ‘abiding to the rule of law’ (both terms being possible translations of *rättssäker[t]*). Consequently, it is no longer the Government or those legal actors that the Government appointed to the AAB who must publicly justify complex decisions on asylum applications. Instead, the public can contact judges at the migration courts, who in their turn may provide a legalistic explanation of why they have decided the case in question in the way they did.

Finally, one should note that the first ten years of the current system have been a period of relative stability regarding asylum decisions that become precedents. The MB was, of course, immediately impacted by the sharp increase in the number of asylum applications during 2015’s ‘long summer of migration’, and while the MCs granted leave to appeal for many of the applications filed in 2016, the judges I interviewed at the MCA did not see an increased workload during 2015 and 2016. Quite the contrary, as one of the interviewed judges explained, the initial need to establish precedents in the first years, from 2006 onwards, abated with the result that “now [in May 2017] there are fewer and fewer [precedents written and published], the longer time goes by” (IT9).

Hence the direct implications for the data that I have collected for this study. While the interviews that I conducted from April 2015 until May 2017 must be read in the context of the events that were discursively represented as the ‘refugee crisis’ (of 2015), the 200 precedents of Swedish asylum law that I collected were not directly affected by those events. Indeed, therefore, it is the first, relatively stable, ten years of the MCA’s asylum law precedents that are in the focus of what follows below.

Chapter Three

Methodological Considerations

In the first section of this chapter, the empirical data is introduced. I discuss how to combine the two sets of data: 1) the interviews conducted with judges at Sweden's migration courts and 2) the sample of precedents that concern asylum seekers. Thus, the question of sampling is addressed in depth. I elaborate on how I develop three themes from the interview data, which represent three phenomena in the terminology of collective case study research (Stake, 1995; 2000). Upon addressing ethical concerns and questions regarding reflexivity, I discuss the study's delimitations. In response to this discussion, I proceed with presenting a detailed overview of data set two. With this overview, it becomes possible to categorize the precedents according to their content and, thus, according to the phenomena they represent.

Data Set One: Interviews at the Migration Courts

Over the period of two years (2015-2017), I conducted ten semi-structured interviews. Initially, my aim was to speak with at least one judge from each of the five Swedish migration courts, i.e. the four second-instance MCs plus the last-instance MCA. As soon as I entered the field by establishing contact with a judge who works at Department Five of the MCA (see first two entries in the table below), I asked about the possibility of conducting an audio-recorded, semi-structured interview. However, first, this judge wanted to speak with me over the phone. It then became clear that, for this judge to participate in a face-to-face interview, permits were needed. Based on the responses from the pilot interview in April 2015 (initial interview guide in the Appendix), I developed my interview questions in order to prepare for a meeting in person. When the necessary permits had finally been granted, I was able to conduct the first interview at the MCA in

Stockholm on 24 September 2015. During these first two conversations (over the phone in April and in Stockholm in September 2015), it became clear that the organizational structure of the MCA included six departments, and only at Department One (*Avdelning 1*) were precedents formulated. It was based on this insight that I returned to Stockholm about a month later when a judge at that department agreed to be interviewed.

After this second face-to-face interview in October 2015, I contacted the four second-instance Migration Courts in Malmö, Göteborg, Luleå and Stockholm. In that order (see table below), I interviewed one judge from each of these four second-instance MCs. Thus, it became possible to interview different judges who work at the different migration courts, including the second-instance MCs as well as the MCA's precedent department. As will be more clearly visible below when I introduce the data consisting of precedents that concern asylum seekers, my interview data includes interviews with four of those second-instance judges whose decisions are often paraphrased in the MCA's precedents.

On one occasion, a judge, whom I had interviewed earlier at an MC, started to work at the MCA. In response to my question of whether we could meet once more for an interview, I received a negative answer. The judge justified the response as follows: Commenting on the new tasks at work would be as if someone, who had been used to building cabins (*stugor*), suddenly talked about building large houses (*stora hus*). The detail that the interview with the judge who works at the MC in Luleå was conducted over the phone is visible in the table below. I had offered to travel to Luleå, but the judge preferred a telephone interview, resulting in a comparably shorter audio recording.

About half a year later, in the autumn of 2016, I decided to conduct follow-up interviews. The first of these was recorded with the judge at the MCA's Department One. Following up the interviews that I had conducted at the MCA was necessary due to the significantly different context a year after 2015's 'long summer of migration'. During this first follow-up interview, I obtained the information that, a year earlier – at about the same time as I had conducted the first interview at the Court – the MCA had started to publish information on social media. Based on this information I asked about the possibility of conducting an interview with the staff responsible for the social media activity. This resulted in the only interview with somebody other than a judge. Then, after several months of waiting for a positive answer, I was finally invited to conduct the tenth and last interview in May 2017. This was with the judge to whom I had already spoken at the MCA in September 2015. In addition to the pilot interview,

the two follow-up interviews and the interview with the *informatör*, I was granted the opportunity to speak with six different judges who work at five different courts. Finally, it needs to be clarified that one of the MC judges asked for anonymity. Therefore, I will refer to the interviews I conducted with MC judges in an anonymized fashion.

Tabel 1:
Semi-structured interviews at Sweden’s migration courts (including the MCA).

Workplace of the interviewee	Time of the interview	Length of the audio recording
Migration Court of Appeal (Stockholm), Department 5 (pilot interview)	April 2015	– No audio recording – (telephone interview, circa 45 minutes, notes taken)
Migration Court of Appeal, Department 5	September 2015	57 minutes 11 seconds
Migration Court of Appeal, Precedent Department 1	October 2015	55 minutes 49 seconds
Migration Court Malmö	October 2015	59 minutes 46 seconds
Migration Court Göteborg	November 2015	80 minutes 57 seconds
Migration Court Luleå	January 2016	26 minutes 02 seconds (telephone interview)
Migration Court Stockholm	February 2016	64 minutes 44 seconds
Migration Court of Appeal, Precedent Department 1 (follow-up)	August 2016	61 minutes 18 seconds
Migration Court of Appeal (<i>informatör</i>)	September 2016	45 minutes 25 seconds
Migration Court of Appeal, Department 5 (follow-up)	May 2017	45 minutes 45 seconds

Doing Interviews with Judges: Reflexivity, Positionality, Power

Interviewing judges is a form of conducting expert interviews (Littig, 2009; cf. Jarembo & Mak, 2014). The outcome of my interviews was influenced by my research strategies and my own role as the interviewer. In order to conduct semi-structured interviews (Brinkmann, 2018), I prepared questions beforehand, with the possibility of posing follow-up questions spontaneously. To give an example of both prepared and follow-up questions, below is a selection of questions asked during an interview conducted with a judge at the MCA:

- How can an outsider imagine [the process] of a precedent being made here at the precedent department?
- [...] now that we meet again, ten months later, has the work changed in any way, with [...] the [increased] inflow [of applications]?
- [...] I am interested in this with regards to the mass media, and journalists taking up certain questions. [...] and my question now goes in this direction: Has it become more common that the mass media takes up cases – is this something that has happened lately, apart from the cases that I have read about?
- [...] are there are other ways that people write academically, scientifically about your decisions – [I mean] that they want to get access to information, that they seek contact, that they call here?
- The next [question] concerns [the part of the last interview] when we talked about NGOs, organizations of civil society. And then we talked about the fact that the Red Cross sometimes has seminars, [for] education. And you said that it doesn't happen often that judges from here attend, but that it is rather judges from the second instance [MCs] who participate in such seminars. And my question is, if it is the case that a judge goes to such a seminar, does the judge go there in the professional role of judge at the Administrative Court of Appeal or [at an] administrative court [in general], is this sort of further education that is part of the court – is this sort of formally organized that, now a judge goes there?
- The last time you said that a part of the work that you do here is to somehow interpret what the legislator thought when they wrote [the laws]. How can an outsider imagine the process of interpreting what the legislator thought?
- The last point, country information: You said that the situation [in countries of origin] does indeed change all the time. So, country information, as I understand it, must be up-to-date, and how up-to-date must it be, and how up-to-date can it be?

As these show, my questions ranged from general attempts to understand (“How can an outsider image...”) to quite specific follow-up questions on certain topics (“[...] when we talked about NGOs [...]"). As the reader might notice, several

questions could have been answered with ‘yes’ or ‘no’. Conscious of this possibility, I used follow-up questions that asked the interviewee to develop such a ‘yes’ or ‘no’. In line with the exploratory purpose of the interviews being the research method that informs my text analysis within the framework of critical discourse analysis (hereafter CDA, see Fairclough, 2003), I used also ‘how questions’ rather frequently. The last question listed above exemplifies this research strategy: First, I introduced a rather complex subject matter (“country information”). Then I presented my understanding of it (“must be up-to-date”). Finally, I asked the judge to comment on, correct or develop my understanding (“How up-to-date must it be, and how up-to-date can it be?”).

This way of posing questions is especially fruitful when conducting semi-structured interviews with expert research participants (see Brinkmann, 2018; cf. Littig, 2009; Jaremba & Mak, 2014). Throughout the research process, when interviewing different people on the same topic and when following up earlier interviews with the same person, the questions can subsequently become more precise (cf. the initial interview guide in the Appendix). Thus, the interviewee can be confronted with the interviewer’s understanding of something, whereupon the interviewee is asked to comment on this understanding. Finally, as soon as possible after every meeting, I sent the interview transcriptions to the respective interviewee, who therefore had an additional opportunity to comment on, correct or develop what had been said. In this way, arguably, the credibility of the interview transcripts as one data set of this qualitative research project was enhanced (cf. Perakyla & Ruusuvuori, 2018).

Having said this, a word on having conducted this research as a white, male PhD student in sociology of law. In other words, I want to share with the reader some thoughts on reflexivity, in line with the critical feminist principle of positionality (see e.g. Haritaworn, 2008). After I had recorded the first interviews with judges, a fellow PhD student, who is from the Global South, made the following (paraphrased) comment: ‘You would probably not have gotten access if you weren’t white.’ By reminding me of my white privilege (see e.g. Kendall, 2012), this observation helps to contextualize the dynamics between ‘researcher’ and ‘researched’ (see O’Reilly, 2012; 2009). Generally speaking, the interactions during the majority of the interviews was as follows. Me, the early-in-career researcher in my early 30s, sat across the table from a middle-aged, well-established judge who works at a Swedish administrative court (of appeal).

Regarding the power relation in the room, these research settings were significantly different to the interviews that I had been used to from my previous

research among refugee rights activists (Joormann, 2018; 2015; 2014). In other words, within society's complex web of power relations at the intersections of – to make an incomplete enumeration – class, gender and sexuality, ethnicity, age, and (dis)ability, I found myself in a rather subordinate position when sitting across the table from those judges. I always made clear that I was doing socio-legal research and that I was not a lawyer. While this might have contributed being perceived as inferior vis-à-vis the judges, during several interviews I nevertheless sensed a certain advantage embedded in this position. When I explained that I would apply a form of text analysis for social research to the precedents, while using the interviews to inform this analysis, several of the judges seemed to be positively interested in the approach. Having said this, upon sending the respective interview transcript to one judge, I had to confirm explicitly that I would not be publishing it in its entirety.

Thus, I came to experience that my position as the interviewer facing an interviewee is always strongly influenced by the respective power relations. Interviewing migrants who participate in political protest – often despite their precarious immigration statuses – entails specific methodological challenges (see e.g. Canning, 2017). Regarding the reflexivity of this study, I identify the research outcome of my interviews with the judges as influenced by such power relations. The judges could choose what to say, and what to withhold. Their training as lawyers and their experience as decision-makers in high bureaucratic positions enables them to choose their words carefully – to “keep the tongue right in the mouth” (*hålla tungan rätt i munnen*), as one of the judges put it (IT5). If I had applied CDA to the interviews, one objective would consistently have been to identify silences, omissions and periphrases (Fairclough, 2003), which are the results of people trying to “keep the tongue right in the mouth”.

Data Set Two: Asylum Cases Decided at the MCA

Almost exactly 200 precedents (see figure 5 below) were collected as the second data set of this study, all of which mention the residence permit applications of people who have sought international protection in Sweden. The majority of all 365 precedents that the MCA published during the years 2006-2016 contain applications for asylum. In the table below, this relates to my first and second categorization and potentially also the fourth category: the security cases. In

contrast, the 154 decisions that I sorted into the category of Residence Permit represent what several judges I interviewed referred to as permit cases (*tillståndsmål*). In these cases, there is no application for asylum mentioned, and therefore they are excluded from the data set. Having stated these numbers, it is important to stress – as several judges mentioned during the interviews – that a clear-cut distinction between asylum cases and permit cases is not possible. For instance, due to the secrecy that surrounds them, it cannot be ascertained whether the three *säkerhetsärenden* concern anyone who sought asylum.

Furthermore, I should clarify that the MCA’s precedents can be read and downloaded,³⁸ as I did, one-by-one. I then categorized them according to the key issue of the decision, i.e. asylum and/or protection and/or work permit and/or family-ties and/or conviction for a crime and/or expulsion based on one of the Dublin regulations, among other key aspects. The table below is the result of categorizing 365 precedents. These are texts that range in length from barely half a page (e.g. the security cases) to decisions of around 15-20 pages (often asylum cases) in standard formatting (Times New Roman, 12 pt font, single-space). Unfortunately, the documents that one can access via Sweden’s Courts’ online database for precedents do not display any page numbers. When I refer to page numbers in a specific precedent, therefore, I refer to the page number in my copy of the precedent.

Table 2:
The precedents published (2006-2016) by Sweden’s Migration Court of Appeal

My categorization of the decision	Number of decisions
Asylum	165
Dublin	36
Residence Permit	161
Security Case	3

³⁸ By the end of 2016, precisely 365 precedents of Swedish migration law could be found when selecting “Migrationsöverdomstolen” in the category of the following search engine: <http://www.rattsinfosok.dom.se/lagrummet/index.jsp> (Accessed 31 December 2016).

Sampling the Data

In surveying the 200 precedents that concern asylum seekers, I read and re-read the interview data in search of the most analytically significant themes. By reading the precedents alongside the interviews, as well as previous studies on processes of asylum determination and relevant literature on discourse theory (see below), I went ‘back and forth’ between my research questions and empirical data. Hence, the study developed iteratively (see O’Reilly, 2012; 2009; cf. Fairclough, 2003). The interviews and Fairclough’s discourse-theoretical conceptualisation of legitimation were especially helpful in refining the research questions, to the extent that each of the three empirical chapters has a clear theme and, thus, a specific focus.

When I approached the first research question, which is focused on asylum seekers’ right to stay, I could see that in almost all of the ten interviews I conducted, cases that involved children were discussed as particularly sensitive. During an interview with a judge at the MCA, “the so-called apathetic children” (*de så kallade apatiska barnen*, IT2) were mentioned. Linked to a discussion in the Swedish media about children whose families were threatened by deportation and who fell into a state of ‘apathy’ (Johansson Blight et al., 2014; cf. Tamas, 2009), the judge touched upon the question of how ‘the best interest of the child’³⁹ could be upheld in cases where families with children were threatened by deportation. Under this theme that emerged from eight of the ten interviews,⁴⁰ I decided to focus the first empirical chapter on the issue of protection-seeking families with children. Furthermore, in line with the first research question’s interest in the rejection as well as acceptance of asylum applications, the two precedents that I sampled represent each of the two possible outcomes: In the first precedent an asylum-seeking family was rejected, while in the other, protection was granted.

The second research question’s focus on class, gender and ethnicity evolved in iteration with what was stated by a judge whom I interviewed at a MC (IT6). To clarify: I did not pose any question that explicitly used the words class or social class, and yet – while speaking about ‘grounds for protection’ (*skyddsgrunder*) –

³⁹ In the MCA’s precedents *barnets bästa* or *barnens bästa* (see Chapter Five; cf. Josefsson, 2016, pp. 62f).

⁴⁰ In my interview data, asylum in relation to children is discussed in the following Interview Transcripts: IT1, pp. 9f; IT2, pp. 10f; IT3, p. 8; IT4, pp. 8f; IT5, p. 18; IT7, p. 2; IT8, pp. 1f; IT9, pp. 4f.

the judge talked about the legal practice of deciding asylum cases in ways that can be analytically linked to Bourdieu's sociological conceptualisations of social, cultural and economic capital (cf. Chapter Two). Moreover, in this interview, the judge explicitly discussed notions of ethnicity, race, religion and sexuality. With my focus placed firstly on ethnicity, I could search through the precedents and found that, in particular, MIG 2007:9, MIG 2007:16, MIG 2007:33, MIG 2011:5 and MIG 2011:26 discuss the ethnic belonging of the applicant as an important aspect of the decision. I chose MIG 2007:33 as a case to focus on in depth because the applicant it concerns was categorized both as Kurdish (ethnicity) and Yezidi (religion). To further deepen this discussion about the complex categorizations of ethnicity and religious belief, I paid attention to the respective formulations used by the MB, by a MC judge who spoke about them in an interview and, in the sampled precedent, by the MCA. This discussion led me to the other categorization that the judge in IT6 described as an "identity concept" (*identitetsbegrepp*), namely "sexual orientation" (*sexuell läggning*). For this purpose, I chose MIG 2013:25 as the only precedent that considers the question of whether the applicant is *homosexuell*. Moreover, this precedent is sampled not only because it takes up both the gender and sexuality of the applicant as significant aspects to be considered, but also because it is a telling example of the re-occurring discussion about asylum seekers' 'credibility', or 'genuineness', (*trovärdighet*) and their ability to perform a 'credible asylum narrative' (*trovärdig asylberättelse*).

In Chapter Seven, guided by the question of how 'the legitimate refugee' is discursively constructed, I decided to discuss this phenomenon against the background of 'regulated immigration' (*reglerad invandring*). While this term is mentioned explicitly in 14 of the 365 precedents of Swedish migration law (2006-2016), these 14 include precisely six precedents that concern asylum seekers (MIG 2007:31, MIG 2011:23, MIG 2011:27, MIG 2014:3, MIG 2014:16 & MIG 2015:21). And while two of the judges (IT4 & IT9) explicitly discussed *reglerad invandring* as a central concept of Swedish migration law, the term is made explicit in MIG 2014:3: "[It is a] fundamental principle of Swedish aliens law (*utlänningsrätt*) that immigration in Sweden shall be regulated" (MIG 2014:3, p. 3). Based on the centrality of *reglerad invandring* as mentioned in both the interview data and legal texts, I reviewed the six precedents which concern asylum applications and explicitly state the term. Among these six, in four of them (MIG 2007:31, MIG 2011:23, MIG 2011:27 & MIG 2014:3), the asylum seeker is also the main applicant. In all four cases, the applicants also base their claims on family

ties to spouses and/or children living in Sweden. Yet it is only in one of these four precedents (MIG 2014:3) that the applicant's claim is processed in accordance with the Dublin system. Having sampled MIG 2014:3 based on this particularity (see Stake, 2000, pp. 438-439), among the remaining three (MIG 2007:31, MIG 2011:23 & MIG 2011:27), one precedent is particularly thought-provoking. In MIG 2011:27 the applicant had already sought asylum in 2003 – as a 16-year-old unaccompanied minor. In order to also include a case that discusses asylum-seeking unaccompanied minors, I therefore sampled this precedent as the last one to analyse in depth.

Methods and Ethics in a Study with Different Sources of Data

As the previous section illustrates, the two data sets of interviews and precedents complement each other. Regarding the strengths of combining discourse theory with other theoretical concepts, Fairclough (2003, p. 16) points out the following:

“Textual description and analysis should not be seen as prior to and independent of social analysis and critique – it should be seen as an open process which can be enhanced through dialogue across disciplines and theories, rather than a coding in the terms of an autonomous analytical framework or grammar”.

Stressing his view of textual analysis as an “open process”, through “dialogue across disciplines and theories” rather than “coding” (ibid.), Fairclough makes clear that CDA by itself constitutes neither a theoretical framework nor a definition of which research methods are used in addition to text analysis. He highlights that “[t]extual analysis is a valuable supplement to social research, *not a replacement for other forms of social research and analysis*” (ibid., my emphasis in italics). In line with this presentation of textual analysis as “a resource for social research” (ibid.), I place my analysis of the precedents as texts in the national and supra-national contexts of refugee migration (see Chapter Two). When analysing my core data of six precedents, following Fairclough's (ibid.) call for “dialogue across disciplines and theories”, discourse theory is embedded in the conceptual framework that I will lay out in Chapter Four.

Regarding the ethics of the interview-based part of my research, I followed a protocol of what I understand as morally responsible conduct by firstly presenting my project via email, asking for permission to audio-record the interview, followed by the assurance that I would transcribe every interview verbatim and then send the transcript to the respective interviewee. My ambition to act responsibly in respect to the collected material coincides with Fairclough's suggestion to do CDA's textual analysis for social research in combination with additional methods. In other words, I think it is an analytically fruitful and ethically sustainable approach to incorporate, through interviews, voices from some of those people who take part in the production of the texts that one analyses. In this way the authors of the analysed texts become active research participants, as they may express their opinions, experiences and expectations in relation to their work.

Methodological (De)limitations: A Collective Case Study

If the analytical aim is to have a critical discussion about how last-instance court decisions that concern asylum seekers have been legitimized, one meaningful way to do this is within the framework of CDA. By applying in-depth analysis to no more than six out of 200 decisions, I am focusing on a limited sample. These texts are part of an almost infinitely larger public debate. However, this conscious delimitation of the study also has its advantages. In a collective case study focused on a handful of cases (see Stake, 1995; 2000), the researcher sets out to accomplish a thick description (cf. O'Reilly, 2012; 2009), thus providing an in-depth interpretation (of the single case) that is difficult to attain in studies that analyse a larger number of cases. Moreover, tracing the narrative of each analysed decision from its beginning to its end, the in-depth focus on a few cases makes it possible to reconstruct the 'story' (Fairclough, 2003) that is told when one reads a precedent as a legal narrative.

Given the choice of cases from which I have sampled, in the hierarchical logic of the legal system, precedents are the most authoritative decisions (Heuman, 1991, p. 109). Regarding migration law in Sweden, they are formulated by the MCA as the highest legal instance, in the legally (most) correct way and, as precedents, primarily for the purpose of universalizability (Alexy, 1989, p. 275).

They are decisions that cannot be further appealed and, in many cases, have a profound impact on the lives of the directly affected people. Regarding my interest in legitimation as an ongoing process in the public sphere, the precedents are, moreover, the only set of Swedish asylum cases that are published and publicized in their entirety. Over the limited period of ten years, they represent the complete collection of precedence in Swedish asylum law (see Josefsson, 2016, p. 62), and the respective amount of text (approximately 1,000 pages) can still be read and re-read as a manageable amount of data from which to sample.

What remains is the important question of why precisely six precedents are analysed. As Robert Stake elaborates his approach, he identifies “three types of case study” (Stake, 2000, p. 437). An intrinsic case study “is undertaken because of an intrinsic interest in, for example, this particular child, clinic, conference, or curriculum” (ibid.). In an instrumental case study, “a particular case is examined mainly to provide insight into an issue or to redraw a generalization” (ibid.). Yet, it is the third of Stake’s three types of case studies that best describes what I have done. On collective case studies, he writes as follows:

“[...] a researcher may jointly study a number of cases in order to investigate a phenomenon, population or general condition. I call this collective case study. It is instrumental study extended to several cases. Individual cases in the collection may or may not be known in advance to manifest some common characteristic. They may be similar or dissimilar, redundancy and variety are important. They are chosen because it is believed that better understanding them will lead to better understanding, perhaps better theorizing, about a still larger collection of cases” (ibid.).

Under the three themes that I introduced above, one phenomenon is analysed per empirical chapter. For example, the second precedent that is analysed in the second empirical chapter, MIG 2013:25, is the only precedent which explicitly discusses both gender and sexuality. Regarding this particular rationale for case selection (ibid., pp. 438-439), it was relevant to analyse this case in the chapter that focuses on class, ethnicity, religion, gender and sexuality. From a different angle regarding analytical significance, in MIG 2007:25 (see Chapter Five) a child and his mother are to be expelled despite the evaluation that the child would receive better healthcare in Sweden. In contrast, in MIG 2012:9 “the right to the unity of the family” (*rätten till familjens enhet*) as well as “the child’s best” (*barnets bästa*) are explicitly stated in a precedent that legitimizes a mother’s and her children’s right to stay in Sweden. Hence through a comparison, I contrast one

case with another. “Many qualitative and evaluative case researchers will provide some comparisons”, as Stake (2000, p. 444) pinpoints, and I have chosen to do so to highlight contrasts: in the first empirical chapter I discuss a case that legitimizes expulsion, in contrast to a case that legitimizes a family’s right to stay; in the second empirical chapter there is a case that mentions the applicant’s ethnicity and religion, in contrast to a case that revolves around the applicant’s gender and sexuality; in the third empirical chapter a case that discusses the expulsion of a father to the country of origin, in contrast to a case that debates the expulsion of a mother to another EU-member state.

A common characteristic (*ibid.*, p. 438) of all six cases is that they present a discussion about the question that is central in every asylum case: Are the applicants ‘legitimate’ and, therefore, allowed to stay? It is in this sense that my CDA of the six sampled cases leads to a better understanding “about a still larger collection of cases” (*ibid.*, p. 437). This larger collection encompasses all precedents that are relevant to Swedish asylum law. It is therefore vital to present this data set in greater detail.

A Detailed Overview of Data Set Two

I separated the cases that concern asylum seekers into two main categories: asylum cases and Dublin cases. As an example, a Dublin case needed to be included in the analysis and, in Chapter Seven, MIG 2014:3 is sampled. Yet what about the data set of Dublin cases as a whole?

One can sort Dublin cases into several geographically defined groups. There are five precedents in which the information that the applicant(s) could be expelled to Italy is of significance (MIG 2007:26, MIG 2013:9, MIG 2013:21, MIG 2013:23 & MIG 2016:20). Similarly, there are five in which the detail that Greece is the country where the applicant(s) had been registered plays a crucial role (MIG 2007:51, MIG 2008:28, MIG 2008:42, MIG 2010:9 & MIG 2010:21). Consequently, in ten of the 36 Dublin cases, it was a possible expulsion to either Italy or Greece that was discussed by the MCA. Given the structure of the European refugee regime(s) (see Chapter Two), there are at least two main reasons for this.

Firstly, being the two countries that have, as of late, been the main points of entry for people seeking asylum in Europe, it is widely known that, within

southern Europe, Italy and Greece have received the largest shares of newly arrived asylum seekers in recent years (see UNHCR, 2017). Secondly, Italy (*Italien*, IT1, IT4, IT5, IT8 & IT9) and Greece (*Grekland*, IT1, IT2 & IT8) were explicitly mentioned in six of the interviews that I conducted. The judges mentioned these countries in relation to both the Dublin-system and the specific needs of asylum-seeking children and families. They explained that, especially when it concerned asylum-seeking families, Italy and Greece could often not guarantee an acceptable reception. Therefore, to generalize and simplify the more complicated respective legal questions, the judges stressed that, relatively often, there was a need to establish precedents on the question of whether or not to expel to Italy or Greece based on ‘Dublin’.

Besides Greece and Italy, there are three precedents which discuss Dublin cases in relation to Hungary (*Ungern*, MIG 2014:29, MIG 2016:4 & MIG 2016:16). As the MIG-numbers of these precedents show, the MCA has been taking decisions in relation to Hungary since 2014. While *Ungern* has been mentioned in four of the interviews that I conducted with judges (IT 2, IT4, IT8 & IT9), regarding the socio-political developments in Hungary, the recent rise of the far-right in the country has had its impact on refugee reception. In this context, it should be highlighted that the three Dublin cases on Hungary were published during the time when the right-wing government headed by Viktor Orbán “systematically constrained its asylum system through restrictive legal measures” (McKinsey, 2017).

Apart from Greece, Italy and Hungary, there are also three Dublin cases that concern Germany (MIG 2007:4, MIG 2007:41 & MIG 2016:17). Yet, having reviewed these and considered the five interviews in which judges mentioned Germany (*Tyskland*, IT1, IT4, IT5, IT6 & IT8), I cannot find any discursive pattern that would explain this relatively frequent occurrence of Germany. In MIG 2007:4 the central question of the precedent regards the practice of oral hearings in Sweden. MIG 2007:41 focuses on the right to appeal the MB’s practice to place the rejected applicant under a specific form of ‘mandatory supervision’ (*uppsikt med anmälningsplikt*). MIG 2016:17 is concerned with the question of whether the deadline (*tidsfrist*) for ‘Dublin transfers’ (*Dublinöverföringar*) can be reviewed in court. One possible reason for this relative frequency of precedents on Germany is that no other country in Europe has in recent years received a larger (total) number of asylum applications (see UNHCR, 2016, pp. 39f). That said, with approximately 82.5 million people, Germany also

has by far the largest population in Europe (if ‘Europe’ is defined by CEAS, ‘Schengen’ and ‘Dublin’, cf. Chapter Two).

As previously mentioned, a clear-cut distinction between asylum cases (*asylmål*) and permit cases (*tillståndsmål*) is not possible. Yet, in the interviews, three judges (IT2, IT7 & IT8) used precisely these terms. From 2006 until 2016, the MCA published approximately 165 precedents which concern asylum seekers whose cases are not decided according to ‘Dublin’. However, as my in-depth discussion of MIG 2012:9 in Chapter Five illustrates, it is not always the applicant’s ‘home country’ (*hemland*, e.g. MIG 2007:9, MIG 2007:33 & MIG 2016:14) or ‘country of origin’ (*ursprungsland*, e.g. MIG 2012:16, MIG 2013:8 & MIG 2015:2) to which the applicants may be expelled. A precedent can discuss the possibility of expelling to a ‘safe third country’ (*säkert tredjeland*, see Chapter Two). This noted, the study cannot cover all the different aspects that the 165 asylum cases include. It is, therefore, important to give the reader an overview of this data.

There are several cases which include both an asylum and a residence permit application based on ‘ties’ (*anknytning*). For instance, while in MIG 2009:23 it is the applicant’s ties to someone who is a legally recognized refugee in Sweden, the two cases (MIG 2014:3 & MIG 2011:27) that are analysed in the last empirical chapter concern asylum seekers who have (family) ties to people with a Swedish residence permit – in these cases their children. Besides these two cases, in MIG 2009:23 the main applicant claims ties to a family member – her daughter, who is living with refugee status in Sweden. The separation of mother and daughter played a vital role in the developments that led to the situation in 2007, when the mother applied for reunification with her daughter in Sweden. Yet, in legal terms, the mother became not an asylum seeker but someone who applied for a residence permit on the grounds of family ties.⁴¹

Another thought-provoking type of asylum case characterizes those in which people applied for protection based on their profession. MIG 2011:7 concerns a Russian judge who claimed that she received threats stating she should quit her job, while MIG 2009:36 discusses a “[medical] doctor, an academic and a musician, all from Iraq” (MIG 2009:36, p. 1). Similar to the MCA’s evaluation of the situation of the Russian judge, the applicants were, however, “not regarded

⁴¹ In Swedish legal terms *familjeanknytning*, see also MIG 2007:31, MIG 2007:48, MIG 2008:10, MIG 2008:40, MIG 2009:1, MIG 2011:5, MIG 2011:23, MIG 2011:27, MIG 2011:28, MIG 2012:1, MIG 2012:21, MIG 2013:16, MIG 2015:1, MIG 2015:8, MIG 2016:2 & MIG 2016:13.

as belonging to a particular social group in the sense of the [Swedish] Aliens Act” (ibid.). With these cases, the MCA presented some concrete examples of what in the Swedish legal context is (not) accepted as fulfilling the requirements of the category of ‘being a member of a particular social group’ (cf. UNHCR, 2002). This consideration is developed against the background of the country information that the Swedish migration bureaucracy produces and compiles about the applicants’ countries of origin. It is based on this information about Iraq that the following reasoning is proposed:

“There is, meanwhile, nothing in the referred-to country information [to support the claim] that musicians in Iraq would be perceived by their [social] environment as such a specifically designated group, [so] that they constitute a social group in the sense of the Aliens Act.”⁴²

Another set of precedents that I clustered are those cases that concern asylum seekers who have been convicted of a criminal offense in Sweden. In six of my interviews with judges, the notion of ‘crime’ (*brott*) in relation to

‘expulsion’ (*utvisning*) was mentioned. For instance, MIG 2014:15 is a case in which the applicant had been sentenced by a Swedish criminal court for “abuse, unlawful threats, attempted theft, sexual abuse and attempted rape in four cases” (MIG 2014:15, p. 1). A feature that this case has in common with others that concern asylum-seeking applicants who were sentenced for a criminal conviction in Sweden⁴³ is the discussion about ‘detention’ (*förvar*). In MIG 2014:15, after the applicant received an expulsion order due to a criminal conviction, he “had been in detention for five years and eight months” (MIG 2014:15, p. 1).

In view of all precedents of Swedish migration law published from 2006 until 2016, however, it is not possible to give a definite answer to the question of which cases include criminal convictions. The two precedents, MIG 2006:3 and MIG 2006:6, which present the aforementioned security cases (Chapter Two), are marked with an additional ‘S’ in their case number. These three⁴⁴ cases (UMS3-

⁴² In Swedish original, from the precedents: “Det finns emellertid inte något stöd i åberopad landinformation för att musiker i Irak av sin omgivning skulle uppfattas som en sådan särskilt utpekad grupp att de utgör en samhällsgrupp i utlänningslagens mening” (MIG 2009:36, p. 16).

⁴³ Criminal convictions of asylum seekers are mentioned in the following eight precedents: MIG 2006:9, MIG 2011:3, MIG 2013:25, MIG 2014:13, MIG 2014:20, MIG 2014:24, MIG 2015:1 & MIG 2015:10.

⁴⁴ UMS3-06 & UMS4-06 are both published under the same precedent number, i.e. MIG 2006:3.

06, UMS4-06 and UMS6-06) do not provide much information about the applicants. They have in common that the applicants were imprisoned in a *förvar* (MIG 2006:3, p. 1; MIG 2006:6, p. 1). Regarding the reasons for this imprisonment and the question of whether the respective applicant committed any criminal offense in Sweden, however, only the following information is public: “In the case at hand, the Security Police has ordered the MB that the claimant be denied residence permit, which is why it [the case] will be processed as a security case” (MIG 2006:6, p. 1). Thus, apropos the question of which precedents of Swedish asylum law concern applicants that have been convicted of a criminal offense in Sweden, one can neither confirm nor reject the view that *säkerhetsärenden* are relevant for the discussion on ‘expulsion because of crime’ (*utvisning pga brott*, see e.g. Westfelt, 2008).

Cases that explicitly discuss *utvisning pga brott* exemplify ‘crimmigration’, i.e. the convergence of criminal law and immigration law (Stumpf, 2006). In the data set, as it regards major offenses, there are precedents in which the asylum-seeking applicant had been convicted for murder (e.g. MIG 2014:13 & MIG 2015:1). In these two cases, the applicant had been sentenced to ten years prison and an unlimited return-ban, and to lifetime prison and an unlimited return-ban, respectively.

In addition to a prison sentence of one year for a minor offense, in MIG 2013:25 the applicant’s gender and sexuality are in the focus – in this instance, a gay man seeking asylum from Nigeria (see Chapter Six). Besides this case that is unique with its focus on sexuality, there are two precedents that explicitly single out the ‘sex’ (*kön*) – i.e. the gender – of the applicant to be a reason for persecution. In MIG 2011:8 (p. 1) it is noted that “refugee persecution on the grounds of sex has been deemed to exist”, and precisely the same formulation is also used in MIG 2008:39. In this case, however, the MCA decided that the applicant had the possibility of seeking protection in her country of origin:

“A reasonable internal alternative for seeking refuge (*internt flyktalternativ*) has been assessed to be adequate, as the individual [the applicant] could be offered the protection of the authorities in another part of the home country – even though she lacked a social network there – because, upon return, she would not face undue burdens from a humanitarian point of view.”⁴⁵

⁴⁵ From the precedents: “Ett rimligt internt flyktalternativ har bedömts tillräckligt, eftersom den enskilda kunnat erbjudas myndigheternas skydd i en annan del av hemlandet även om hon

With this precedent, the MCA decided that, in this case of a protection-seeking mother and her two children, there were “insufficient grounds for granting a residence permit [in Sweden] under Chapter 5 Section 6 of the Aliens Act” (MIG 2008:39, p. 7). In contrast, in MIG 2011:8 the MCA annulled the decisions of both the first and second legal instance and, instead, concluded the precedent with the following sentences:

“The Migration Court of Appeal annuls the judgment (*dom*) of the Migration Court and the decision (*beslut*) of the Migration Board – except for the reimbursement for [the] public counsel – and grants A permanent residence permit. The Migration Court of Appeal grants A refugee status.”⁴⁶

In MIG 2011:8 the MCA did not find an ‘internal alternative for seeking refuge’ (*internt flyktalternativ*) to be reasonable. Instead, the MCA assessed that the applicant ...

“[...] had made it probable that the persecution, which causes her to be seen as a refugee, originates in the first place from her male network (*manliga nätverk*) and [from the circumstance] that the authorities in Somaliland have not been willing to give her effective protection.”⁴⁷

In summary, both MIG 2008:39 and MIG 2011:8 make the assessment that the respective applicant is in danger because she is a woman. In MIG 2008:39 the applicant and her two children are not allowed to stay in Sweden because an *internt flyktalternativ*, i.e. the possibility of protection in the country of origin, “has been assessed to be adequate” (MIG 2008:39, p. 1).

Another part of the data set concerns unaccompanied minors who seek asylum, in Swedish *ensamkommande flyktingbarn*. MIG 2009:8, MIG 2009:9 and MIG 2014:1 are precedents that focus on this particularly vulnerable group. In Chapter

saknade social förankring där, då hon inte vid ett återvändande skulle komma att mötas av otillbörliga umbäranden ur humanitär synvinkel.” (MIG 2008:39, p. 1).

⁴⁶ From the precedents: “Migrationsöverdomstolen upphäver migrationsdomstolens dom och Migrationsverkets beslut - utom såvitt avser ersättning till offentligt biträde - och beviljar A permanent uppehållstillstånd. Migrationsöverdomstolen beviljar A flyktingstatusförklaring.” (MIG 2011:8, p. 8).

⁴⁷ From the precedents: “[...] gjort sannolikt att den förföljelse som gör att hon är att betrakta som flykting i första hand utgår från hennes manliga nätverk och att myndigheterna i Somaliland inte varit villiga att ge henne ett effektivt skydd” (MIG 2011:8, p. 8).

Seven, MIG 2011:27 is analysed as a case that concerns someone who had arrived and sought asylum when he was still considered to be a minor, i.e. younger than 18. Other precedents that concern *ensamkommande* can be summarized as follows. In MIG 2009:8 it is highlighted that being an unaccompanied minor does not constitute, in itself, grounds to claim ‘particularly distressing circumstances’ (*synnerligen ömmande omständigheter*) and, based on that, protection status in Sweden. In MIG 2009:9 such circumstances can be claimed, because the applicant’s “psycho-social development and health, in the future, would be jeopardized in a decisive way, if he was forced to return to the home country” (MIG 2009:9, p. 1). Indicated by the keyword *framtida* (‘[in the] future’), MIG 2009:9 is one of those precedents that reason around the likelihood of certain events in the future. Throughout the empirical chapters, I problematize this practice of making factual claims based on empirical reasoning (Alexy, 1989) that assesses the “future risk of harm” (Johannesson, 2017, p. 177) that an expulsion of the respective applicant(s) could entail. Of course, asylum law is not the only area of law in which decisions are taken (partially) on the basis of assessing risks. Similar and yet different to the central question of many asylum cases, i.e. the question of what would happen if the applicant were deported, Stefan Sjöström has analysed an important rationale applied by the decision makers (in these cases medical doctors) who work in Swedish psychiatric clinics:

“The professionals often focus on what would happen if the patient were discharged. Three major problems are pointed out by the psychiatrists in court; the risk that the patient will fail to accept medication, the difficulties in making her comply with various hospital regulations and the problems the patient might face living on her own in the community” (Sjöström, 1997, p. 317).

In different ways compared with how asylum determination procedures are designed to minimize the above mentioned “future risk of harm” (Johannesson, 2017, p. 177) when rejecting asylum applicants (see also Gill & Good 2019), psychiatric care needs to minimize the risk of harm being done to discharged patients. Importantly, in cases that concern compulsory psychiatric care, the people about whose lives’ decisions are taken are treated as patients,⁴⁸ and not as legal parties (Sjöström, 1997).

⁴⁸ Regarding the regulations on compulsory psychiatric care (in Swedish *Lagen om psykiatrisk tvångsvård – LPT*), Sjöström (1997, p. 311) stresses that “helping the patient” is the pronounced obligation of the psychiatrists as responsible decision-makers.

Linked to another expanse of medical expertise, MIG 2014:1 is an example of legal argumentation in which the decision-making process relies on the outcome of ‘age determinations’ (*åldersbedömningar*, see Noll, 2014; 2016). Similar to the expertise of linguists that is needed to conduct ‘language analyses’ (*språkanalyser*, see e.g. Noll, 2010), for such procedures, factual knowledge is established by specialists as representatives of different “fields of knowledge” (Alexy, 1989, p. 232). Given the research that has questioned the scientific value and, consequentially, the legal validity of age determination procedures (e.g. Noll, 2014; 2016), the following is worth citing:

“An asylum seeker who claims to be a minor (*påstår sig vara underårig*) has the burden of proof (*bevisbördan*) to make their (*sin*) stated age probable (*göra sin uppgivna ålder sannolik*). He or she can be offered the possibility of using a medical examination as means of evidence (*bevismedel*) to fulfil their burden of proof. There is no obligation of the Migration Board to offer a medical examination, only an obligation to inform about the possibility of being examined in such [an examination]. A medical age determination is, however, only one of several means of evidence that the individual [applicant] can use to fulfil their burden of proof regarding the age [of the applicant].”⁴⁹

With this passage of MIG 2014:1, to which I will return at the very end of the study in Chapter Eight, the MCA clarifies that the use of medical examinations to assess the age of an applicant is not the only way to fulfil ‘the burden of proof’ (*bevisbördan*). In line with the discussion on this general layout of asylum cases within the adversarial setting of (administrative) migration law (see Chapter Six), MIG 2014:1 exemplifies some of the differences that become apparent when the legal position of the asylum seeker is compared with the rights and duties of the accused in criminal law. As is widely known from reporting and fiction about ‘crime’ in popular culture, criminal law uses the notion of ‘burden of proof’. In criminal cases, however, it is the prosecutor (as the representative of the state) who proves that the accused is guilty. In asylum cases, the applicants must present it as

⁴⁹ From the precedents: ”En asylsökande som påstår sig vara underårig har bevisbördan för att göra sin uppgivna ålder sannolik. Han eller hon kan erbjudas möjligheten att använda en läkarundersökning som ett bevismedel för att uppfylla sin bevisbörda. Det finns ingen skyldighet för Migrationsverket att erbjuda en läkarundersökning, endast en skyldighet att informera om möjligheten att genomgå en sådan. En medicinsk åldersbedömning är dock endast ett av flera bevismedel som den enskilde kan använda sig av för att uppfylla sin bevisbörda vad åldern beträffar.” (MIG 2014:1, p. 1).

‘probable’ (*sannolikt*) – and have, in this sense, ‘the burden of proof’ (see MIG 2014:1, p. 1) – that they are worthy of international protection status (see e.g. UNHCR, 1998).

Another group of precedents that are linked to the discussion about the intersections of immigration and criminal law are cases that include the notion of illegal stay (*illegal vistelse*). In addition to the case that I analyse in Chapter Seven, namely MIG 2011:27, in which the “long illegal stay” of a young father is discussed, MIG 2007:23, MIG 2007:46, MIG 2008:27, MIG 2008:31, MIG 2012:13 and MIG 2013:24 consider the term *illegal vistelse* in their respective decisions. As a case that includes with the minor offense of shoplifting (*snatteri*) the notion of illegal stay, MIG 2007:46 is another empirical example of the mentioned, de facto conflation of immigration and criminal law. After being caught for shoplifting, the applicant was locked up under police arrest on 7 December 2006. Twelve days later, on 19 December 2006, she was sentenced to a fine (*dagsböter*) and released. On the same day, she applied for asylum in Sweden. Shoplifting was, however, not the only ‘crime’ that the applicant had “become guilty of” (*gjort sig skyldig till*, MIG 2007:23, p. 1). The MCA summarizes the decision of the MB, as the first legal instance to process the applicant’s asylum claim, as follows:

“The Migration Board based its evaluation on that A would probably be expelled (*skulle komma att avvisas*) and that – against the background that she had provided different information regarding her identity, had become guilty of an illegal stay in Sweden over at least three months, and applied for asylum merely in connection with the police authority’s decision to detain her – there was reason to assume that she would go into hiding (*hålla sig undan*) in order not to be expelled. In the decision it was clarified that the detention decision should be reviewed, at the latest, two weeks after the day when she had been taken into [migrant] detention.”⁵⁰

From being detained under ‘police arrest’ (*häkte*) for shoplifting, in MIG 2007:46 the applicant was transferred from the police’s arrest cell to the MB’s detention

⁵⁰ From the precedents: ”Migrationsverket grundade sin bedömning på att A sannolikt skulle komma att avvisas och att det - mot bakgrund av att hon lämnat olika uppgifter gällande sin identitet, gjort sig skyldig till en illegal vistelse i Sverige under minst tre månader och ansökt om asyl först i samband med att hon delgetts polismyndighetens förvarsbeslut - fanns anledning att anta att hon skulle hålla sig undan för att inte bli avvisad. I beslutet upplystes om att beslutet om förvar skulle prövas på nytt senast två veckor efter den dag då hon togs i förvar.” (MIG 2007:23, p. 1).

facility. That the applicant had “applied for asylum merely in connection with the police authority’s decision to detain her” (MIG 2007:23, p. 1) is stressed as a detail that weakened the asylum claim.

In MIG 2007:46, *illegal vistelse* is also a keyword. In the heading of the precedent, it is noted that the period during “which the foreigner has stayed illegally in Sweden is not counted in the evaluation about [the question of] whether there are grounds for residence permit” (MIG 2007:46, p. 1). In other words, there is no advantage – rather, the opposite – for those people who have already stayed for longer periods in Sweden, if such stays have been (partially) without permit. In line with the MB’s and MC’s respective decisions, in MIG 2007:46 the MCA rejected the applicant’s asylum claim as baseless. Regarding the part of the application for residence permit on the grounds of ties that the father of applicant “A” claimed to have to Sweden, the MCA argued the following:

“B has been staying in Sweden for eight years, but of these eight years, four years have been illegal stay-time (*illegal vistelsetid*), i.e. the period [of time] after the expulsion decision became legally valid and until the day for the new application for residence permit [was possible], since the decision to revoke was issued. B has, moreover, deviated from planned enforcement [of expulsion] for which travel had been booked and travel documents had been issued. Thereafter, he has been hiding (*hållit sig undan*) until the decision was revoked. Due to such behaviour there are grounds to depart from the general rule [which would allow] to grant residence permit because the earlier decision about expulsion (*avvisning eller utvisning*) has ceased to be valid, four years after this decision became legally valid.”⁵¹

In less complicated terms, with MIG 2007:46, the MCA decided that the applicant would not be allowed to stay in Sweden, even though he had been living in the country for eight years. Normally, MIG 2007:46 states, there was ‘the general rule’ (*huvudregeln*) that after four years – when an expulsion decision has become invalid because it has been revoked – one could re-apply for residence permit based on *anknytning* to Sweden (cf. Chapter Seven). However, as MIG

⁵¹ From the precedents: “B har vistats i Sverige i åtta år, men av dessa åtta år har fyra år utgjort illegal vistelsetid, dvs. under perioden efter det att avvisningsbeslutet vunnit laga kraft och fram till dagen för den nya ansökan om uppehållstillstånd sedan preskription inträtt. B har dessutom avvikit från planerad verkställighet där det funnits en beställd resa och utfärdad resehandling. Han har därefter hållit sig undan till dess preskription inträtt. Vid ett sådant agerande föreligger skäl för att frångå huvudregeln om att bevilja uppehållstillstånd på grund av att det tidigare beslutet om avvisning eller utvisning upphört att gälla fyra år från det att beslutet vann laga kraft.” (MIG 2007:46, p. 9).

2007:46 clarifies, the ‘behaviour’ (*agerande*) of ‘hiding’ (*hålla sig undan*) in order to pass time can become a reason for not granting any permit.

To summarize, this section provides an overview of the following categories of asylum cases: ‘Dublin transfers’, i.e. expulsions to European countries that are part of the Dublin system; precedents that discuss asylum in relation to (family) ties to Sweden; the need for protection for different professions such as judges or musicians; expulsions because of a criminal conviction; security cases (*säkerhetsärenden*); protection considered on the basis of ‘sex’ (*kön*); ‘unaccompanied minors’ (*ensamkommande [flyktingbarn]*); and, finally, those applicants whose claims might be rejected because of what is called ‘illegal stay’ (*illegal vistelse*). That said, as exemplified by the discussion around ethnicity and religion in Chapter Six, there are certainly more aspects that can be singled out. This overview is, however, sufficient to contextualise the analysis that is undertaken in the empirical chapters.

Legitimate in Public?

Below it is exemplified how precedents can have an impact on the debate in the public sphere. The case that is discussed for this purpose was mentioned in one of the interviews I conducted with a judge at the MCA. It refers to MIG 2015:2, in which an Iranian filmmaker and his spouse refused to leave Sweden because of the repression that they would face upon return to Iran. What makes this case analytically significant is that it also became interesting for journalists who sought to interview MCA-judges about it.

A Judge’s Narrative: Cases of Interest for the Media

The interview goes into a range of issues including country information and other documents that are mentioned in many of the precedents. NGOs such as Amnesty International, Human Rights Watch or the Red Cross can be referred to as sources. The interviewed judge explained this as follows:

“Well, UNHCR’s reports; we have said in some of our precedents that they can be considered as a security source (*säkerhetskälla*), sort of. And then there are indeed a number of NGOs which are sort of – one believes that they have a good overview

of the situation (*bra koll på läget*): Human Rights Watch, Amnesty, maybe there are some more [...]” (IT1).⁵²

Yet, in this context, the judge also mentioned that NGOs were not invited to meetings at the MCA in Stockholm. This was decided consciously and framed by the judge as a principle, since NGOs such as Amnesty International could appear as ‘parties’ (*parter*) in legal cases, or as the ‘representatives’ (*ombud*) of asylum seekers. Conceptualized with the help of Habermasian terminology, maintaining a certain distance between the ‘strong’ public sphere, represented by the Swedish migration bureaucracy, and the ‘weak’ public sphere (see Benhabib, 2004, p. 179), represented by NGOs, was part of a more general policy:

“[...] we are quite cautious with inviting in this way, because many of these [NGOs] also appear as legal parties, or as representatives, I shall say. And it is always tricky to sort of keep this boundary between a person who sort of represents a certain legal party, and the court. So, we are very cautious, I can say, with inviting in this way and the Migration Board is [cautious like] this as well” (IT1).⁵³

A bit further into the interview, concerning the MCAs communication with wider society, I asked the judge about the media. On my question regarding whether journalists were interested in speaking with judges, I received the following longer answer:

“[...] The latest example that I recall is this precedent which was about [religious] conversion and – no sorry: The very last [example of a journalist calling] was this: It was an Iranian man who was a documentary filmmaker and who claimed that there were obstacles against enforcement [of expulsion] (*verkställighetshinder*). He had received an ordinary trial, but no residence permit and then he claimed obstacles against enforcement. And it was decided then here, and that which was actually the question with us, which was – for it is indeed, sort of, these regulations

⁵² From the interview data: ”Alltså UNHCR:s rapporter har vi ju sagt i några av våra avgörande att de får betraktas som en säkerhetskälla liksom. Och sen finns det ju en del NGO:er som er liksom, man anser har bra koll på läget, Human Rights Watch, Amnesty, det kanske kan finnas några ytterligare såna [...]”

⁵³ From the interview data: ”[...] vi är ganska försiktiga med att bjuda in på det sättet, eftersom många av de här också uppträder som parter, eller som ombud ska jag säga, i våra mål. Och det är alltid lite knepigt liksom att hålla den här gränsdragningen mellan en person som liksom företräder en viss part liksom och domstolen. Så vi är väldigt försiktiga kan jag säga med att bjuda in på det sättet och det är ju migrationsverket också.”

of obstacles against enforcement are also quite technical, one can say, very juridical and so. And this question here actually was, if these things that the man was pleading (*åberopade*), now indeed, if he could plead them now, or if this had, in fact, been examined in a previous process process (*prövats i en tidigare process*). For the thought with these obstacles against enforcement is indeed that one shall not be able to plead the same thing again and again [...] But sort of the content of it all was that he was not allowed to stay. And because he himself was a mass media person (*massmedial person*), so to say, he, of course, went out to the media with this. And then I know – I have not myself been involved in the case – but I know that then it became an interview and one posed questions and so on and one had to explain as well – for the question was after all, obviously, why isn't – now I don't remember what he was called – but why isn't John (*Kalle*) allowed to stay, kind of. For this is indeed sort of always the interesting question. But this was kind of not that what our decision was [about] and then one has to sort of explain and so on” (IT1).⁵⁴

This longer excerpt from an interview with a judge who takes part in the production of precedents at the MCA refers to MIG 2015:2. It can illustrate a general problem in which this study is interested. By becoming precedents, the decisions on refugee asylum that are formulated at and published by the MCA discursively represent cases of seeking asylum in Sweden. Journalists, however, are not necessarily interested in the legal correctness (Alexy, 2000, pp. 138f) and the legalistic universalizability (ibid., 1989, p. 275) of the respective decisions. Rather, for the media, the most important question tends to be the following: In this case, is it legitimate to expel the applicant(s)?

⁵⁴ From the interview data: “[...] Senaste exemplet som jag kommer ihåg det är det här avgörandet som handlade om konvertering och – nej förlåt: Det allra senaste var den här, det var en iransk man som var dokumentärfilmare och som gjorde gällande att det fanns verkställighetshinder, han hade fått en vanlig prövning, men inte fått uppehållstillstånd och då gjorde han gällande verkställighetshinder. Och det avgjordes då här, och det som egentligen var frågan hos oss, det var - för det är ju, liksom det här regelverket kring verkställighetshinder, det är ju också liksom ganska tekniskt, kan man säga. Väldigt juridiskt och så. Och den frågan här egentligen var, om den här de sakerna som den här mannen åberopade, nu då, om han kunde åberopa dem nu, om det inte i själva verket redan hade prövats i en tidigare process. För tanken med de här verkställighetshindren är ju att man inte ska kunna åberopa samma sak om och om igen [...] Men liksom kontentan av det hela är ju då att han inte fick stanna. Och eftersom han själv var en massmedial person, så att säga, så gick han ju förstas ut i media med det här. Och då vet jag - jag var inte själv inblandad i det målet - men då vet jag att, då blev det en intervju och man ställde frågor och såhär och man fick liksom förklara så gott - för frågan var ju, förstas, varför får inte – nu kommer jag inte ihåg vad han hette – men varför får inte Kalle stanna liksom. För det är ju liksom alltid den intressanta frågan. Men det var inte liksom riktigt det som var vårt avgörande och då får man ju liksom förklara och sådär.”

Law as Power vs. Law as Meaning

To take this discussion one step further, a conceptual distinction will be of help. On the importance of understanding the law, Benhabib cites Cover as follows:

“[...] there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. *The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking*” (supranotes: Cover, 1983, p. 18; cf. Michelman, 1988)” (Benhabib et al., 2006, pp. 48-49, italics in original).

With my summary of the judge’s narrative linked to MIG 2015:2, I intend to show that recognising the relationship “between the social organization of law as power and the organization of law as meaning” (ibid.) can help to explore the tensions between legality and legitimacy. As introduced above, my study aims to explore how precedents that concern asylum seekers have been legitimized.

It is possible to begin this analysis by proposing the following argument: Legitimations of ‘law as power’ are opposed to legitimations of ‘law as meaning’ (cf. Cover, 1983). That said, I do not understand this opposition as a dichotomy. Rather as an ‘opposition-in-iteration’ (cf. Benhabib et al., 2006, pp. 47f), it can be illustrated when re-visiting the excerpt from the interview I presented above. While one of the purposes of publishing the MCA’s precedents is to communicate them not only to other legal experts, but also to wider society, tensions arise when journalists, as representatives of this wider public, attempt to “comment on” these “very technical” decisions (IT1). As the judge further clarified the point, journalists instead wanted to know the following: “[...] why isn’t John (*Kalle*) allowed to stay, kind of. For this is indeed sort of always the interesting question. But this was kind of not that what our decision was and then one has to sort of explain and so on” (IT1).

In other words, journalists tend to be more interested in the outcome for the directly affected people than in the main legal point that the Court wants to make with the respective precedent. MIG 2015:2 was written with the main purpose of clarifying if applicants could plead obstacles against expulsion, or if “this had, in fact, been examined in a previous process” (IT1). Yet, as the highest legal instance,

the MCA also legitimized the expulsion that had been decided in the lower instances. On the last page of MIG 2015:2, the precedent states: “In summary there are therefore no grounds to grant A and B [the applicants] a review regarding the question of residence permit”.

When journalists asked the judges at the MCA about MIG 2015:2, communication between the mass media and the courts did occur, but not without considerable limitations. The journalists were mainly interested in discussing the legitimacy of the expulsion, while the judges were mainly interested in stressing the decision’s legality, represented by its legal correctness and normative value as a precedent that is guiding for the lower legal instances. One overarching problem that this study addresses is rooted in the tension between legitimacy and legality.

The MCA’s decisions paraphrase, summarize and, thereby, (de)legitimise decisions of the two lower legal instances. This practice is similar to how, for instance, German administrative courts refer to the initial evaluation of the German MB in their decisions on asylum (see Arndt, 2015, p. 138). Higher legal instances such as the MCA (or, in the example, German administrative courts) present a certain amount of published information on the respective legal case (see Josefsson, 2016; Arndt, 2015). Furthermore, the fact that certain precedents on asylum cases refer not only to NGO-reports but also to newspaper articles – which applicants at times bring in as evidence (e.g. MIG 2013:25) – must not overshadow the conscious and systematic distance which judges individually, and the courts institutionally, put between themselves as representatives of the ‘strong’ judicative and journalists as representatives of the ‘weak’ public sphere (see Benhabib, 2004, p. 179).

This distance emerges due to the principles that the courts exercise according to their ideal of being an ‘independent’ (*oavhängig*, IT6 & IT8) branch of the state, i.e. the judicative. The courts hesitate to invite NGO representatives because of the ideal of independence. Or, as the judge cited above put it: “[...] we are quite cautious with inviting in this way, because many of these [NGOs] also appear as legal parties or as representatives I shall say” (IT1). Moreover, inviting organisations that represent the interests of the applicants would go against the courts’ second main ideal: ‘impartiality’ (*opartiskhet*, IT6 & IT8). The legal system is supposed to remain firmly closed to non-legal normativity. When it comes to journalistic comment – or as the judge put it, “having an opinion about our decisions” (IT1) – the third important ideal of the courts, namely ‘objectivity’ (*objektivitet*, IT6 & IT8, or *saklighet*, IT6), becomes crucially important.

Therefore, in view of the complex (and in the social sciences much-debated) term of objectivity (see e.g. Rosenberg, 2016; Chalmers, 2013; Dant, 2004), I decided to explore how legal decisions are formulated so that they appear not only as legally correct, but also as legitimate (see Banakar, 2015, pp. 63-67; Alexy, 2002b; Andersen, 2015).

Now, to conclude this chapter, it is still necessary to elaborate on how the study will be conducted in the form of a critical discourse analysis. To this end, I will discuss Fairclough's CDA as text analysis for social research.

Fairclough's Discourse-Analytical Approach to Legitimation

One way to study how legitimacy is constructed in (and through) legal decisions, is to turn to Fairclough's research agenda of CDA (Fairclough, 2003). He presents his approach by identifying what he calls "four main strategies of legitimation" (ibid., p. 98). These four ideal types emerged from an empirical study, which shows that immigration control can be empirically researched through a discourse analysis of legal decisions read as texts which legitimize expulsions (Wodak & Van Leeuwen, 1999). Importantly, when it comes to the question of how legitimation is conceptualized, Theo Van Leeuwen and Ruth Wodak – as well as Fairclough – primarily rely on Habermas to develop their four ideal types of legitimacy (Van Leeuwen, 1996; Van Leeuwen & Wodak, 1999, pp. 104-111; cf. Fairclough, 2003, pp. 98-100). These are:

1. Authorization ("Legitimation by reference to authority of tradition, custom, law, and of persons in whom some kind of institutional authority is vested" [Fairclough, 2003, p. 98]);
2. Rationalization ("Legitimation by reference to the utility of institutionalized action, and to the knowledges society has constructed to endow them with cognitive validity" [ibid.]);
3. Moral evaluation, ("Legitimation by reference to value systems" [ibid.]);
4. Mythopoesis ("Legitimation conveyed through narrative" [ibid.]).

Departing from ‘the three pure types of legitimate rule’ (*die drei reinen Typen der legitimen Herrschaft*), which Max Weber conceptualized as 1) Legal, 2) Traditional and 3) Charismatic (cf. Chapter One), Fairclough’s discourse-analytical approach to legitimacy adds in the first place the notion of ‘Mythopoesis’, i.e. legitimation through narratives (Fairclough, 2003, pp. 89-100; cf. Weber, [1909] 1972). His conceptualization of four ideal types thus presents one way of going beyond both Weber’s and Habermas’ conceptualizations of legitimacy; conceptualizations which have been influential in socio-legal research (see Dahlberg-Larsen, 2015; Banakar, 2015; Banakar & Travers, 2013).

To be more precise, the discourse-analytical approach to legitimacy was initially conceptualized by Van Leeuwen (1996), then developed by him and Wodak in the aforementioned study on immigration control in Austria (Wodak & Van Leeuwen, 1999), and then adopted and modified by Fairclough (2003, pp. 98-100). On the question of what makes discourse analysis ‘critical’, Van Leeuwen and Wodak describe their understanding of CDA as follows:

“Critical discourse analysis perceives both written and spoken discourse as a form of social practice [...] It assumes a dialectical relationship between particular discursive events and the situations, institutions and social structures in which they are embedded: on the one hand, these situational, institutional and social contexts shape and affect discourse, on the other hand discourses influence social and political reality. In other words, discourse constitutes social practice and is at the same time constituted by it” (Van Leeuwen & Wodak 1999, pp. 91-92).

Yet, rather than the discourse-historical approach, as Van Leeuwen and Wodak define it in their study (*ibid.*), I follow Fairclough’s approach to discourse and social reality, which he describes as “a moderate version of the claim that the social world is textually constructed” (Fairclough, 2003, pp. 8-9). He elaborates on this stance as follows:

“We need to distinguish ‘construction’ from ‘construal’, which social constructivists do not: we may textually construe (represent, imagine, etc.) the social world in particular ways, but whether our representations or construals have the effect of changing its construction depends upon various contextual factors – including the way social reality already is, who is construing it, and so forth. So we can accept a moderate version of the claim that the social world is textually constructed, but not an extreme version (supranote: Sayer, 2000)” (*ibid.*).

When tracing this explanation back to Peter Berger's and Thomas Luckmann's (1966) *The Social Construction of Reality*, it becomes clearer that Fairclough's ontological stance assumes the existence of one social reality. This reality can, however, never be known, described, examined or analysed in its entirety and/or essence. In other words, Fairclough's is an ontology of processes of social change (see Sayer, 2000), which are rooted in the dialectical interplay of social reality and speech-acts about this reality (cf. Berger & Luckmann, 1966, pp. 8f). Thinking of these processes as such an interaction of social reality and discursive representations of that constantly changing reality, Van Leeuwen and Wodak (1999, pp. 91-92) aptly highlight the following. Different situations, institutions and other forms of social organisation have effects on discourses, but this also works the other way around: discourses have impacts on how institutions (e.g. courts of law) are socially organized.

Summary

In the first main section of this chapter, I presented the empirical data to which my analysis is applied. After a description of the interview process, I problematized my positionality and reflected on its impact on the research process. The second data set is comprised of 200 precedents of Swedish asylum (published 2006-2016). To sample six cases from these 200, I use the first data set, i.e. ten interviews conducted at Sweden's migration courts, to develop three themes. These three themes developed together with the three research questions, and they became guiding for the empirical chapters. The result is one theme for each of the three chapters, namely the discussion of the following three phenomena: protection-seeking families with children (Chapter Five); class, ethnicity and religion, gender and sexuality (Chapter Six); the political goal of regulating immigration (Chapter Seven). To be able to analyse these three phenomena, I sample two precedents for each chapter. This choice of two precedents per chapter enables me to contrast two precedents under the same theme in each empirical chapter. An in-depth focus on two such texts per chapter is feasible within the frameworks of CDA (Fairclough, 2003) and collective case study research (Stake, 1995; 2000). Finally, to be able to relate the core data of six cases to the whole second data set of 200 precedents, I concluded the first main section of the chapter with a detailed overview of this data.

In the second main section of the chapter, apart from exemplifying how precedents can become interesting for the media and introducing Fairclough's approach to the study of discursive legitimation, I presented the first conceptual distinction that is directly focused on the law. Based on Benhabib's reading of Cover, I propose to understand 'law as power' and 'law as meaning' as an 'iteration-in-opposition' in the following sense. Legal decisions always legitimize themselves by reference to the law. However, this legitimation by reference to legal authority is not the only source of legitimacy on which legal decisions rely. Trying to give meaning – in the widest sense of the word – to the decisions that they legitimize, these texts written by judges also refer to rationally, morally and/or politically motivated standpoints; standpoints which become more clearly visible once one realizes that every legal decision also puts forward a certain narrative.

The discussion around these first conceptual insights from social theory can be deepened by taking up other relevant arguments from the work of Habermas, Alexy and Benhabib. This is the focus of the next chapter.

Chapter Four

Conceptual Framework

“The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative – history, fiction, tragedy, comedy – are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be"” (Cover, 1983, p. 10).

The preceding discussion, which began with the task of designing an interface of method and theory, is continued in this chapter. Apart from Cover’s conceptual distinction between ‘law as power’ and ‘law as meaning’, the last paragraphs of the preceding chapter focused on discourse theory. Primarily, Fairclough’s (2003) discourse-analytical approach to legitimacy was presented. I clarified that this approach enables me to study the legalistic legitimation of refugee asylum and immigration control (cf. Wodak & Van Leeuwen, 1999). To concretize how this study is conducted, a conceptual framework for studying legal discourse is needed. Therefore, in this chapter, I review the contributions of three scholars who have paid attention to law and legitimacy.

Firstly, I trace the socio-legal study of legitimacy within law back to one of Habermas’ publications that has not been translated into English. By posing the straightforward question *Wie ist Legitimität durch Legalität möglich?* (‘How is legitimacy through legality possible?’) in the title of this text (Habermas, 1987a), he tackled some central conceptual problems. Among a number of crucial insights, he elaborates on the differences between moral and legal discourse. In short, his thought is useful in developing an understanding of the normative aspects of legitimacy claims that emerge when judges write decisions.

Secondly, every legal decision is more or less dependent on establishing a certain truth about material reality. Alexy has addressed this centrality of factual argumentation within legal discourse, while also paying attention to what he calls the temporality of such empirical reasoning. Aside from establishing a certain form of knowledge about aspects of asylum cases that relate to events and states of affairs in the past and present, often it is the evaluation of the future risk of harming applicants by expelling them that is at the centre of asylum cases.

Lastly, in addition to Cover's conceptualization that distinguishes between 'law as power' and 'law as meaning', Benhabib has taken up and developed theoretical insights not only from the work of Cover, but also from Alexy and Habermas (Benhabib, 2004; 2016; Benhabib et al., 2006). Benhabib's political theory, and in particular her focus on migration in *The Rights of Others* (Benhabib, 2004), is therefore the conceptual 'umbrella' under which I conduct my analysis. This analysis examines legitimacy claims in texts (Fairclough, 2003) and through legal discourse (Habermas, 1987a; cf. Alexy, 1989). Engaging critically with Benhabib's theoretical concepts, refugee migration can be meaningfully discussed in the global context. Her ethical approach to rights makes clear that the 'all-affected principle' of discourse ethics should be of importance for political discussions about refugee migration. To understand some of the internal operations of the law and its legitimacy claims, however, the Habermasian conceptualization of legal discourse is my theoretical point of entry.

Habermas' Study of Legitimacy in and Through Legal Discourse

In *Legitimation Crisis*, Habermas (1976) shows interest in the legitimacy of different social systems such as the economic, political and legal. Primarily, he focuses on a legitimation crisis in late capitalism. Hence the original title in German: *Legitimationsprobleme im Spätkapitalismus* (Habermas, 1973), i.e. 'Legitimation Problems in Late Capitalism'. Applied to the recent changes of Swedish migration and asylum law (see Chapter Two), Habermas' arguments from *Legitimation Crisis* can, for instance, support the following interpretation. The 'refugee crisis' – "or more precisely [2015's] 'crisis of solidarity'" (Ålund,

Schierup & Neergaard, 2017, pp. 9-10)⁵⁵ – refers to a crisis of the political system. While Swedish politicians might not have believed in the argument that asylum seekers travelled to Sweden in truly system-threatening numbers, the dominant discourse in the Swedish-speaking public sphere painted, as previously problematized (Chapter Two), the picture of ‘system-collapse’ (*systemkollaps*) as a realistic scenario. To say the least, this discourse made a truth claim supporting the statement that ‘regulated immigration’ (*reglerad invandring*, see Chapter Seven) could no longer be guaranteed. Then, in 2016, with strengthened border controls and the so-called temporary law, the government intervened and changed a number of legal norms (see Chapter Two).

The strengthened border controls were directed against asylum seekers as unwanted border-crossers. Yet, while they had been developed in the political system, the controls’ practices also had an impact on the economic system (see Habermas, 1973). They disturbed the free movement of wanted border-crossers, i.e. primarily commuters, including workers and business travellers in the Öresund Region. Consequently, the rules of border control in southern Sweden were once again changed on 4 May 2017 (Joormann, 2017). This happened with the openly stated aim of facilitating the movement of wanted border-crossers⁵⁶. In Habermas’ (1976) terms, the demands of the political system (keeping and deterring asylum seekers from travelling to Sweden) were balanced with the demands of the economic system (free movement of wanted border-crossers, e.g. workers who commute over the Öresund Bridge).

In 1992, almost 20 years after the publication of *Legitimationsprobleme im Spätkapitalismus*, Habermas published the first edition of *Between Facts and Norms*. The German title of this 1992 edition is *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts* (lit. ‘Facticity and Validity: Contributions to the Discourse Theory of Law’, Habermas, 1992). Returning to the German first edition is a conscious decision because Van Leuwwen’s and Wodak’s work on the

⁵⁵ Carl-Ulrik Schierup, Aleksandra Ålund and Anders Neergaard stress that it was the UNHCR Regional Coordinator for Europe, Vincent Cochetel, who coined the term ‘crisis of solidarity’ (Ålund, Schierup & Neergaard, 2017, p. 10). One justification for understanding 2015’s ‘long summer of migration’ as a ‘crisis of solidarity’ is the fact that several countries – among them EU-countries in Central and Eastern Europe – categorically refused to receive refugees.

⁵⁶ See, in Swedish, a newspaper interview with the Chief of the Border Police, https://www.sydsvenskan.se/2017-05-02/id-kontroller-bort-granskontroller-skarps?utm_content=buffer81f0b&utm_medium=sydsvenskan&utm_source=fb&utm_campaign=bfr (Accessed 21 May 2017).

discursive legitimation of immigration control (1999) refers to the following, aforementioned, section of this edition: ‘*Wie ist Legitimität durch Legalität möglich?*’ (Habermas, 1992, pp. 560-578). The section is unfortunately not included in the English version of the book, *Between Facts and Norms* (Habermas, 1996).

When reading this section,⁵⁷ Fairclough’s (2003) four main strategies of legitimation appear in a different light. In particular, the third – namely moral evaluation as “Legitimation by reference to value systems” (ibid., p. 98) – can be understood on a deeper level. Habermas writes on the issue as follows: “Legality can only produce legitimacy to the extent that the legal order reacts reflexively to the justification demand of positive law, and this in such a way as to institutionalize juridical decision-making procedures that are *permeable* to moral discourses” (Habermas, 1992, p. 565, my translation, emphasis in italics in original).⁵⁸ He develops this thought in relation to the Weberian notion of rational law and puts forward the argument that juridical procedures are almost completely rational (cf. Eder, 1986; 1987; 1988) and, thus, produce a certain form of legitimacy. This is possible, according to Habermas, when juridical procedures “come closer to the demands of complete procedure-rationality, because they are intertwined with institutional and, thus, independent criteria” (*nähern sich aber den Forderungen vollständiger Verfahrensrationalität an, weil sie mit institutionellen, also unabhängigen Kriterien verknüpft sind*, Habermas, 1992, p. 565). Meanwhile, he highlights how the “procedure of moral, legally unregulated, discourse does not fulfil this condition” (*Verfahren moralischer, rechtlich nicht geregelter Diskurse erfüllt diese Bedingung nicht*, ibid.).

In other words, Habermas makes three interrelated claims. Firstly, to be legitimate, legal decisions must also incorporate moral discourses. Secondly, legal discourses can make claims to be generally legitimate because of their implied rationality, which is rooted in procedures that are institutionalized and independent from the single legal case in question. Lastly, moral discourses are

⁵⁷ Published as a sub-section to ‘Recht und Moral (Tanner Lectures 1986)’ in *Faktizität und Geltung*, the straightforward question of *Wie ist Legitimität durch Legalität möglich?* (‘How is legitimacy through legality possible?’) had already been the title of an article that Habermas published in 1987 (Habermas, 1987a).

⁵⁸ Cf., in German, “Legalität kann nur in dem Maße Legitimität erzeugen, wie die Rechtsordnung reflexiv auf den mit dem Positivwerden des Rechts entstandenen Begründungsbedarf reagiert, und zwar in der Weise, daß juristische Entscheidungsverfahren institutionalisiert werden, die für moralische Diskurse *durchlässig* sind.” (emphasis in italics in original).

different from legal discourses because moral discourses are, generally speaking, not institutionalized.

In contrast to legal positivism and its separation thesis, i.e. “the contention that there is no necessary connection between law and morals, or law as it is and law as it ought to be” (Hart, 1983, p. 57, cited in Banakar, 2015, p. 9), Habermas’ view of legitimacy through legality contends that all processes of legal decision-making must be ‘permeable’ (*durchlässig*) to moral discourses. Of further importance for my analysis is the argument that Habermas makes based on this approach to the intersections of legal and moral discourses. He links moral discourses to the ‘all-affected principle’ (Habermas, 1992, p. 566). According to the normative procedures of discourse ethics in moral discourses, the question of whether a norm is obeyed without coercion – and is, instead, accepted based on the “rationally motivated agreement of all those potentially affected” (*rational motivierte Zustimmung aller möglicherweise Betroffenen*, *ibid.*) – cannot be answered in a definite and infallible manner. Moreover, the procedures of discourse ethics cannot guarantee a “result reached in time” (*fristgerechtes Zustandekommen des Resultats*, *ibid.*). Thus, Habermas concludes, discourse ethics are not suitable for giving definite and timely answers to certain, pressing questions. Therefore, legal norms must “absorb the uncertainties which would emerge if these were left to a purely moral steering of behaviour” (*die Unsicherheiten absorbieren, die aufträten, wenn sie einer rein moralischen Verhaltenssteuerung überlassen blieben*, *ibid.*). Clearly influenced by Weber, he calls this the “complement of morality through coercive law” (*Ergänzung der Moral durch zwingendes Recht*, *ibid.*).

These claims lead to the following thoughts on legitimacy through legality. Firstly, processes of legal decision-making must also incorporate moral discourses in order to be legitimate. Secondly, however, the procedures of discourse ethics, which are conceptualized for moral discourses and based on the ‘all-affected principle’, cannot give answers to all questions (Habermas, 1992, p. 566). In reply to pressing questions that need definite and timely decisions, according to Habermas, legitimate answers can instead be reached through legal decisions based on the “complement of morality through coercive law” (*ibid.*).

Habermas locates one source of the legitimacy of legal norms in the law’s position “between politics and morality” (*zwischen Politik und Moral*, Habermas, 1992, p. 567). While a moral norm is always an “end in itself” (*Selbstzweck*), legal norms can also be “means for political ends” (*Mittel für politische Ziele*, *ibid.*). Thus, he elaborates, legal discourses combine arguments of applying the

interpretations of the law with arguments of pursuing political goals as well as moral aims. Following a discourse-analytical approach to legitimacy, certain arguments (particularly of pursuing political goals) can be linked to the second of Fairclough's four types of discursive legitimation, namely "Rationalization" as "Legitimation by reference to the utility of institutionalized action" (Fairclough, 2003, p. 98).

In the interview data, the political goal of 'regulated immigration' (*reglerad invandring*) – to be achieved through the institutionalized action of immigration control (see Chapter Seven) – was explicitly discussed by two of the judges I interviewed (IT4 & IT9). Meanwhile, the term *reglerad invandring* is stated in six of the precedents which concern asylum seekers (MIG 2007:31, MIG 2011:23, MIG 2011:27, MIG 2014:3, MIG 2014:16, MIG 2015:21 & MIG 2016:13). The empirical insight from reading the precedents of Swedish asylum law, i.e. the fact that the clearly political goal of regulating immigration is explicitly and repeatedly mentioned, fits nicely with the following analytical claim. Legal decisions can be critically analysed in order to "reconstruct" (*rekonstruieren*, Habermas, 1992, p. 569; cf. Van Leeuwen & Wodak, 1999) the arguments that are written down to legitimize these decisions. Within precedents, as decisions made primarily for the legal guidance of lower instances, the ambition of producing legally certain decisions – by grounding these primarily in the normativity of legal sources – is particularly strong.

Staying with the empirical data of the precedents, another noteworthy point is that the MCA does not issue any general statements about the factual situation in the countries of origin from which people seek asylum. As mentioned in one of the interviews that I conducted with second-instance MC-judges (IT5), this refusal of the MCA to contribute in any general way to such country information has been criticized – also by judges who work at the MCs. Yet, thinking of Habermas' insights, this refusal is not surprising. Judges in general, and judges at last-instance courts in particular, must legitimize their decisions by "obscuring" (*ausblenden*, Habermas, 1992, p. 569) non-legal normativity "in favor of the [legal system's] implied functional requirements" (*ibid.*).

In terms of Fairclough's four main strategies of legitimation, it is only the legal sub-strategy of authorization, namely "Legitimation by reference to [...] law [...]" (Fairclough, 2003, p. 98), which fulfils the requirement of grounding a decision's legitimacy solely in the law. Given my ambition to write a CDA of precedents of Swedish asylum law, I focus, therefore, specifically on the legitimation strategies which cannot be explained (solely) with functional requirements of the legal

system and the respective legitimation strategy of authorization by reference to law.

In summary, the ideas on discursive construction of legitimacy as they are expressed in Habermas' *Wie ist Legitimität durch Legalität möglich?* can strengthen a CDA of legal decisions with the following three key insights. Firstly, a first-hand reading of Habermas confirms that legal discourse in general, and decisions written by judges in particular, favor the legitimation sub-strategy of authorization by reference to law (Fairclough, 2003, p. 98). This entails that such decisions tend to obscure arguments that are rooted in non-legal normativity (see Habermas, 1992, p. 569).

Secondly, the function of law that Habermas (1992, p. 567) calls "means for political ends" highlights specifically one of Fairclough's (sub-)strategies of legitimation, namely rationalization by reference to the utility of institutionalized action (Fairclough, 2003, p. 98). This insight, which Habermas has developed along with the dual concepts of 'law as medium' and 'law as institution' (Habermas, 1987b, pp. 365-367), is grounded in the premise that the law is located between politics and morality (Habermas, 1992, p. 567). It is in this context that he stresses that laws can be used as means to achieve the goals of the political system (ibid., p. 569). This view on the possible usage of the law must be linked to his overarching conceptualizations of *System* and *Lebenswelt* (Habermas, 1987b): When becoming a means for political ends, the law runs the risk of becoming a top-down 'steering medium' (ibid., pp. 365-367) with which the system colonizes the lifeworld. One clear example of such colonization would be a more restrictive interpretation of Swedish asylum law in order to achieve the political goal of decreasing the number of granted residence permits (see e.g. Lundberg, 2011).

Thirdly, Habermas' Weberian view on the complement of morality through coercive law adds to the conceptualization of Fairclough's third main strategy of legitimation, namely moral evaluation as "legitimation by reference to value systems" (Fairclough, 2003, p. 98). The normative procedures of discourse ethics – most prominently the 'all-affected principle' (see also Fraser, 2008, p. 94), which is also central to what Benhabib (2004, p. 177) calls 'the right to first admittance' for every asylum seeker (see further below) – have been developed in order to apply them in moral and political discourses. Regarding legal decisions on asylum applications in Sweden within Europe, the fact that every asylum seeker who reaches EU territory has the *de jure* right to have their asylum claim processed (there are currently certain exceptions to this rule, e.g. in the 'hotspot' Lesbos, see

Chapter Eight) is the legal equivalent of the moral norm that emerges if one applies the ‘all-affected principle’ to refugee migration. And yet, legal discourse can of course also legitimize the rejection of asylum seekers. This is possible because legal discourse is not limited by the “rationally motivated agreement of all those potentially affected” (Habermas, 1992, p. 566), which is a clear requirement of discourse ethics. Instead, legal discourse is subjected to the functional requirements of the legal system. These requirements produce definite decisions “within deadlines” (*fristgerecht*, *ibid.*). Hence Habermas’ observation that all legal decisions are designed to “absorb the uncertainties which would emerge, if these were left to a purely moral steering of behaviour” (*ibid.*).

For a CDA of legal decisions, the most important words here are “purely moral” (*rein moralisch*, *ibid.*). This formulation is linked to Habermas’ conviction that legal discourses, which aim at being legitimate, cannot be purely legalistic. As I have cited above, to be legitimate, juridical decision-making procedures must be “*permeable* to moral discourses” (*ibid.*, p. 565, emphasis in italics in original).

Finally, with a look at Fairclough’s (2003, p. 98) conceptualization of what he calls the third legitimation strategy of moral evaluation as legitimation by reference to value systems, it becomes clearer how Habermas’ fairly complex discussion about moral and legal discourses can be applied to deepen Fairclough’s scheme of legitimation strategies. Up to this point, it suffices to say that Habermas’ discourse theory of morality and legality in relation to legitimacy will be very useful to link a single legal decision to the debate on refugee migration in the Swedish context.

Some of Alexy’s Contributions to the Study of Legal Argumentation

To start with a term that is used in many of the MCA’s precedents, namely *sannolik(t)*, its English translation ‘probable’ can function as a keyword to introduce Alexy’s discussion of how legal justification uses empirical reasoning and, thus, establishes a certain facticity (Alexy, 1989, pp. 232-233). Throughout chapters Five, Six and Seven, excerpts from the interviews and the precedents make certain claims about reality. In similar ways as other human beings, judges justify their decisions by also making claims about facts. One crucial insight that Alexy’s theory provides is his observation that these claims have a temporality.

Legal texts can display “statements about past, present and future” (ibid., p. 232). Exemplified by two precedents that I analyse in Chapter Five, this temporality becomes central in my study because it is the applicants’ future that is of interest in many precedents. Such an estimation of the likelihood of future events “makes it clear that a thoroughgoing theory of empirical reasoning relevant to legal justification would have to deal with almost all the problems of empirical knowledge” (ibid., p. 233). To put it simply, gaining knowledge about the present and past is difficult enough, while truly knowing the future is, obviously, impossible. Johannesson (2017, pp. 176-177) has addressed the consequentially emerging problem as such:

“Before the reform [of the Swedish asylum system in 2006], the guidance of extra-legal questions was controlled by political actors, but afterwards was handed over to individual judges at the migration courts. This is due to the Migration Supreme Court [the MCA] not viewing their role as providing guidance on factual questions and therefore only conducting precedents on legal questions. By that shift of power, a determining factor in many asylum cases – the interpretation of the socio-political situation [in the applicants’ countries of origin] – moved away from actors who can be held politically accountable. However, the fact that the extra-legal part of the assessment of asylum claims is conducted by the court does not mean that the evidentiary ground of decision-making is based on more firm evidentiary grounds. The judges still have to make an assessment of the future risk of harm based on very sparse and uncertain evidence” (my emphasis in italics).

In addition to Alexy’s theoretically-based critique of legal justifications that make claims not only about the past and present but also about the future, Johannesson (2017) provides the equivalent in the context of her ethnography on asylum cases decided at Sweden’s migration courts. And yet I would like to contend that the issue goes even further than uncertain “evidentiary grounds” (ibid., p. 177). As previously stated (Chapter Three), in two interviews (IT6 & IT8) judges pronounced the courts’ ambitions to remain ‘objective’ (*saklig/objektiv*), ‘impartial’ (*opartisk*) and ‘independent’ (*oavhängig*). However, many of the reviewed precedents display statements about events and/or narratives that are deemed to be ‘probable’ (*sannolikt*) and/or ‘credible’ (*trovärdig*). From the viewpoint of critical social research (see e.g. Dant, 2004), these terms should always ring the alarm bells of the overarching question of ‘What is knowledge?’, i.e. the foundational philosophical problem of epistemology. In the context of legal argumentation, Alexy describes the core of this problem as such:

“[...] the relevance of empirical knowledge for legal reasoning can hardly be overestimated. In numerous legal disputes it is the appreciation of facts which plays the decisive role. There is no disagreement about the normative statements to be accepted; the decision turns only on the facts on which it is to be based” (Alexy, 1989, p. 233).

In the interviews I conducted with judges at the MCA, they stressed repeatedly that they had no ambition to provide guidance on factual questions. They aimed to produce precedents exclusively as responses to legal questions. This ambition might become reality if one reads the precedents from a purely legalistic perspective. If one, however, reads them through the lenses of CDA and, thus, as texts that also legitimize decisions through rationalization, i.e. legitimation “by reference to [...] the knowledges society has constructed” (Fairclough, 2003, p. 98), one can accomplish precisely the “moderate constructivist” (ibid. pp. 8-9) analysis that Fairclough has envisaged. Keeping in mind the usefulness of Habermas (1992, pp. 565-569) for reconstructing normative reasoning (moral as well as legal as well as political) and of Alexy (1989, pp. 232-233) for identifying statements about factual (material) reality, I now continue to link this analysis of legal discourse to the study of refugee migration.

Benhabib’s Work on Refugee Migration

As Reza Banakar and Max Travers have pointed out, “[m]ethods are not simply techniques that can be used in obtaining facts about the social world but are always used as part of a commitment to a theoretical perspective” (Banakar & Travers, 2005, p. 19). In the context of the study at hand, the problem to start with is the question of how Fairclough’s CDA can be linked to the procedural principles of discourse ethics (see Benhabib, 1992, pp. 29-67; cf. Habermas, 1992). Thus, the link between the discursive construction of legitimacy claims within texts and the democratic formation of legitimacy in society at large is addressed. One way to begin this discussion is to approach it with a focus on a Habermasian concept that Fairclough explicitly incorporates in his research agenda of CDA, namely the public sphere:

“The public sphere is in Habermas’ terms (supranote: Habermas, 1985) a zone of connection between social systems and the ‘lifeworld’, the domain of everyday

living, in which people can deliberate on matters of social and political concern as citizens, and in principle influence policy decisions” (Fairclough, 2003, p. 44).

Staying within the Habermasian framework, Fairclough links the public sphere to democratic deliberation. In other words, the public sphere is the space where people can publicly communicate their problems as well as their ideas about how those problems could be solved. The notion of the citizen is central here because it leads this discussion to the following question: Who shall be allowed to democratically solve problems after making them public?

In *The Rights of Others*, Benhabib (2004) referred to Habermas’ (1998) *The Inclusion of the Other*, where he pointed out that social inclusion through citizenship – as the premise of democratic participation – was, normatively speaking, entirely contingent. Habermas argued that there was no ethically satisfying explanation for the fact that certain people are born as citizens with democratic entitlements, while others remain noncitizens or stateless people throughout their lives. It is in this context that Benhabib returns to discourse ethics and highlights that “only those norms and normative arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses” (Benhabib, 2004, pp. 12-17). In other words, she relies on the ‘all-affected principle’ of discourse ethics.

The crucial aspect of this argumentation is its inherently normative character. Benhabib is of course aware that, analytically speaking, not all people are in similar positions of power when participating in open, public and in that sense democratic deliberation. Her feminist, anti-racist and anti-imperialist stances⁵⁹ are clear throughout her work. White Western men, depending on how much of the different forms of capital they could accumulate (see Bourdieu, 1984), have for long historical periods been in privileged positions of power when it comes to communicating their arguments in the public sphere.

⁵⁹ In *Feminist Contentions*, Benhabib lays out her political project as follows: “Politically, we should avoid two problematic alternatives: on the one hand, the placative use of certain norms and ideals to defend really existing capitalist democracies as if they were exempt from critique; on the other hand, the “gauchiste” [leftist] illusion of thinking that one can struggle for the rights of the “permanent minorities of liberalism” on any grounds other than the space created by the universalistic struggles of modernity since the American, French, Russian revolutions and various anti-imperialist struggles. [...] Feminist theory is inevitably caught in the dialectic modernity in which universalistic ideals first emerged, and within which they are continuously contested, evoked, challenged, and changed” (Benhabib et al., 1995, p. 118).

Particularly significant for my work, Benhabib identifies the outright exclusion of certain groups of noncitizens. Detained noncitizens are de facto excluded from the collective deliberation of democratic will-formation that takes place in the public sphere. A detainable and subsequently deportable noncitizen cannot participate in the public sphere of (non-criminalized) political protest on the same terms as is possible for full and native citizens (Joormann, 2018). This noted, the question of who can be the subject of democratic deliberation in the public sphere had, also in Habermasian theory (see Fraser, 2008, pp. 76-99),⁶⁰ for a long time⁶¹ been taken-for-granted as the citizens of a (nation) state.

Giorgio Agamben – building on Hannah Arendt’s (1943) “*We refugees*”, her discussion of ‘the right to have rights’ (Arendt, 1976), and on the Foucauldian notion of ‘biopolitics’ (Foucault, 2003) – criticized this taken-for-granted reality of citizenship. A citizen can live the life of *bios politikos* as a full (political) citizen, while a noncitizen is limited to the ‘naked life’ of *zoe*.⁶² Agamben (1995), in turn, identified ‘the noncitizen’ as *homo sacer* (Agamben, 1998), i.e. the ousted identity of people who are deprived of their rights because they are caught in a continuous state of exception,⁶³ in Agamben’s (2005) usage of this term coined by Carl Schmitt ([1927] 1996).

⁶⁰ On page 77 in *Scales of Justice*, Fraser states: “At least since its 1962 adumbration by Jürgen Habermas, public-sphere theory has been implicitly informed by a Westphalian political imaginary: it has tacitly assumed the frame of a bounded political community with its own territorial state.”

⁶¹ In a more recent contribution, Habermas explicitly argues that every (nation-)state is dependent on a strongly artificial form of solidarity among strangers, which is created through the legally constructed ‘state-citizen-status’ (*Staatsbürgerstatus*). He further maintains that “multicultural settler societies” exemplify how this nexus of state-citizen is constructed. Even in “ethnically and culturally homogenous societies”, the ‘state-citizen-status’ is an administratively supported product constructed through historiography, mass media and compulsory military service, among others (see, in German, Habermas, 2013, pp. 59-70).

⁶² For this distinction between *zoe* and *bios*, Agamben goes back to Aristotle and thereby marks the difference between *zoe* or ‘naked life’ (or “natural life”) that is relegated to the *oikos* of the household, while only the human life (*bios*) that is allowed to take part in the discussions of the *polis*, and in this sense the *bios politikos*, is entitled to those rights which we today refer to as the civil rights of being a citizen (cf. *Internet Encyclopaedia of Philosophy*, Agamben, 3. Politics, <http://www.iep.utm.edu/agamben/#H3> [Accessed 16 December 2016]).

⁶³ Departing from Carl Schmitt’s conceptualization of ‘state of exception’ (*Ausnahmezustand*), Giorgio Agamben developed his critique of an increasing differentiation between the citizen as legally acknowledged body and the noncitizen as *homo sacer* (lit. ‘sacred’ or ‘ousted’ human/man), who’s body is not protected to the same extent as the citizen’s, but instead exists a the aforementioned “naked” (or “bare”) life. In the Roman Empire, a *homo sacer* could be killed by

Notwithstanding the usefulness of these insights for critical migration research, I agree with Nancy Fraser: Habermasian “public-sphere theory” still “offers a clue” (Fraser, 2008, p. 95). It can help to conceptualize not only how things empirically are – and therewith how one can criticize them – but also how they normatively could and should be otherwise:

“If political citizenship no longer suffices to demarcate the members of the public, then how should the inclusiveness requirement be understood? By what alternative criterion should we determine who counts as a bonafide interlocutor in a postwestphalian public sphere? Public-sphere theory already offers a clue. In its classical Habermasian form, the theory associates the idea of inclusiveness with the ‘all-affected principle.’ Applying that principle to publicity, it holds that all potentially affected by political decisions should have the chance to participate on terms of parity in the informal processes of opinion formation to which the decision-takers should be accountable” (Fraser, 2008, pp. 94-95).

Here Fraser also stresses the normative in Habermas’ theory of discourse ethics by reference to the ‘all-affected principle’. Collective, democratic deliberations about what is legitimate and what is not – and subsequently policy and legislation – should rest on the principle “that all potentially affected by political decisions *should* have the chance to participate” (Fraser, 2008, p. 95, my emphasis in italics). In the context of cross-border migration and asylum this would include a large share of humanity, if not all human beings, who could “potentially” (ibid.) become refugees.

Benhabib transferred this consequence of discourse ethics to her politico-legal imperative of what she calls the ‘right to first-admittance’. She defines this ‘right’ as based on the rule that protection-seeking people must not be rejected at national borders and, instead, must have their asylum claims processed. Meanwhile, she stresses that “[f]irst admittance does not imply automatic membership” (Benhabib, 2004, p. 177). To locate where Benhabib stands on migration as a political theorist, the following is clarifying:

“I have not advocated open but rather porous borders; I have pleaded for first-admittance rights for refugees and asylum seekers but have accepted the right of democracies to regulate the transition from first admission to full membership; I

anybody, while “he” could not be sacrificed, as Agamben argues. Thus, ousted and sacred at the same time, a *homo sacer* was legally and simultaneously in- and excluded.

have also argued for subjecting laws governing naturalization to human rights norms and rejected the claim of sovereign people not to permit naturalization and to bar the eventual citizenship of aliens in its midst. For some, these proposals will go too far in the direction of rootless cosmopolitanism; for others, they will not go far enough” (Benhabib, 2004, pp. 220-221).

With ‘porous borders’ Benhabib affirms her view that, in the world as it currently is, national borders are still needed. National borders should, at present and in the near future, neither be closed nor fully opened, she maintains (ibid., p. 220). Regarding refugees, borders should instead be ‘porous’ in the sense that protection-seeking people can file an asylum claim once they reach or cross the border of a receiving country. This normative standpoint in favour of such borders, which includes first-admittance rights for asylum seekers, indeed appears to be close to what in international refugee law is called non-refoulement⁶⁴ (in the data, see e.g. MIG 2012:9). As a “[...] *jus cogens*, that is, a peremptory norm of international law from which no derogation is permitted” (Allain, 2001, p. 533), this norm forbids the signatory states to “expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” (ibid.).

In this sense of ‘non-refoulement’, according to international refugee law (see e.g. McAdam, 2017), all asylum seekers ought to have the right to the protection of the receiving country – at least as long as their asylum claims are being processed. This imperative not to reject asylum seekers – called a “right” by Benhabib (2004, p. 220) and a “peremptory norm” (Allain, 2001, p. 533) in international law – does not, however, solve the main problem of this study. It does not offer any clue about how – after an international border has been crossed, non-refoulement has been respected and first admission has been granted – the legal binary of either ‘legitimate’ refugee, and thus residence permit, or ‘illegitimate’ migrant, and thus expulsion, comes about.⁶⁵ Hence the observation

⁶⁴ In an interview that is part of University of California Television’s series *Conversations with History*, Benhabib explicitly discusses the principle of non-refoulement which, however, “everybody, in many ways, violates” – in her example the USA vis-à-vis Haitian refugees who are, according to her, frequently intercepted on the high seas before reaching US-territory. Yet Benhabib makes clear that, initially through the aforementioned 1951 Refugee Convention, every signatory state (including the USA) is legally obliged not to “send back the refugee into the point of danger” without processing the respective asylum claim (see <https://www.youtube.com/watch?v=nfQqPdcAG60>, minutes 42:00ff).

⁶⁵ There are of course several different legal statuses based on which noncitizens are allowed to stay in Sweden. As the discussion on the ‘temporary law’ in Chapter Two illustrates, statuses for

that neither these concepts from Benhabib's political theory (porous borders and the right to first-admittance) nor this norm of international law (non-refoulement) can explain how certain asylum seekers become legitimized as legally recognized refugees. The overarching question of the study remains unanswered.

Boundaries and Borders

As Benhabib paraphrases the well-known conceptualization from *Wirtschaft und Gesellschaft* (Weber, [1909] 1972) by stressing the state's monopoly of violence, much theorization about state sovereignty – and use of force – is rooted in the Weberian understanding of law as being backed by coercion:

“[...] sovereignty means the capacity of a public body, in this case the modern nation state, to act as the final and indivisible seat of authority within a given territory with the jurisdiction to wield not only ‘monopoly over the means of violence’ [...] but also to distribute justice and to manage the economy” (Benhabib, 2016, p. 134).

This reference to Weber's notion of the state exemplifies Benhabib's rather modernist stance in regard to national boundaries. In a word, she identifies the modern nation state as an improvement compared to the empires of earlier periods in history. Having said this, to make use of Benhabib's thought in a consistent fashion, I must stress that her work also engages with post-structural theorists such as Derrida or Levinas (Benhabib et al. 2006, pp. 155-158; Benhabib, 1992, pp. 16-17), while primarily seeking “a dialectical alliance” (ibid., p. 113) of feminism and Habermasian theory. In *Situating the Self*, she introduces her model of a discursive public space as follows:

“[One] model of public space is the one implicit in Jürgen Habermas' work. This model, which envisages a democratic-socialist restructuring of late-capitalist societies, will be named “discursive public space”. [...] when compared with the Arendtian and liberal conceptions, the strength of the Habermasian model is that

forced-displaced people range from permanent residence permit (currently for ‘quota-refugees’) to merely being temporarily tolerated in Sweden without being granted any formal residence permit. The latter applies to cases where the applicant shall be expelled, but the Swedish migration bureaucracy decides that there are, temporarily, ‘obstacles against expulsion’ (*verkställighetshinder*, see Chapter Five).

questions of democratic legitimacy in advanced capitalist societies are central to it” (ibid., p. 90).

Reading the *Introduction to Situating the Self* against the backdrop of this presentation of a discourse model of public space as dependent on “questions of democratic legitimacy in advanced capitalist societies” (ibid.), it becomes clearer that Benhabib’s thought is a feminist and more generally anti-essentialist development of Habermasian thinking. For instance, while criticizing the standpoint of Bruce Ackermann, she highlights that historically disadvantaged social groups “like women and blacks” (ibid., p. 12) were ignored in liberal conceptualizations of the public sphere. In disagreement with Arendt, moreover, Benhabib challenges the idea of a “natural place” (ibid.) of certain human activities and, consequentially, the distinction between “political” and “non-political” issues (ibid.). This argument echoes the criticism of a dichotomous understanding of public and private,⁶⁶ i.e. one of the core debates of feminist thought. At the same time, it also exemplifies how strongly rooted in Habermas’ ideas many of Benhabib’s concepts are:

“[...] my argument is that the constraint of neutrality illicitly limits the agenda of public conversation and excludes particularly those groups like women and blacks who have not been traditional partners in the liberal dialogue. [...] I plead for a radically proceduralist model of the public sphere, neither the scope nor the agenda of which can be limited a priori, and whose lines can be redrawn by the participants in the conversation. Habermas’ concept of a public sphere embodying the principles of discourse ethics is my model here” (ibid.).

Considering this citation from a book published in 1992, I read it as a passage that already hints at the importance of boundaries and, consequentially, borders, as she puts forward these concepts in *The Rights of Others* (Benhabib, 2004). Thus, when she writes that “I plead for a radically proceduralist model of the public sphere, neither the scope nor the agenda of which can be limited a priori, and

⁶⁶ Regarding this private-public dichotomy, explicitly mentioning processes of “discursive legitimation”, in *Situating the Self* Benhabib makes the following point: “All struggles against oppression in the modern world begin by redefining what had previously been considered “private”, non-public and non-political issues as matters of public concern, as issues of justice, as sites of power which need discursive legitimation. In this respect, the women’s movement, the peace movement, the ecology movements, and new ethnic identity movements follow a similar logic. There is little room in the liberal model of neutrality for thinking about the logic of such struggles and social movements” (Benhabib, 1992, p. 100).

whose lines can be redrawn by the participants in the conversation” (Benhabib, 1992, p. 12), this can be read as a sentence that justifies – at least for a certain historical period – the existence of boundaries in the form of national borders which are porous in the sense of excluding certain human beings. She also explains why she thinks that such borders are needed. In an argumentation going back all the way to Kant, while admitting the possibility that, one day, there might be a world without borders (cf. Abram et al., 2017), she expresses her conviction that, historically and until the present-day, only empires function without borders. To be legitimate, currently every democracy needed borders. Or, as she puts it:

“The intuition that there may be a crucial link between territorial size and form of government is old in the history of western political thought, and it is one that I accept. Unlike communitarians and liberal nationalists, however, who view this link primarily as being based upon a cultural bond of identity, I am concerned with the logic of democratic representation, which requires closure for the sake of maintaining democratic legitimacy. Certainly, identification and solidarity are not unimportant, but they need to be leavened through democratic attachments and constitutional norms. In the spirit of Kant, therefore, I have pleaded for moral universalism and cosmopolitan federalism” (Benhabib, 2004, p. 220).

This standpoint becomes central when discussing migration in general and refugee migration in particular. Her position is complex, and it leaves some question marks. It forbids the outright rejection of anyone who seeks asylum, while it does not specify how the required “closure for the sake of maintaining democratic legitimacy” (ibid.) be achieved in practice. Of course, Benhabib is aware of this and indeed it appears to be the core problem that she, within the limits of political theory, tries to work out in *The Rights of Others*. At the very beginning as well as the very end of the book, she explicitly subscribes to the slogan ‘Nobody is Illegal’. Yet, while advocating “closure for the sake of maintaining democratic legitimacy” (ibid.), she implicitly rejects the ideological standpoint of ‘No Borders, No Nations’ as a viable position – at least for the present or near future (ibid.).

The Paradox of Democratic Legitimacy

The exclusion of rejected noncitizens, which Benhabib’s ‘porous borders’ imply, is explicitly addressed in *The Rights of Others*. Migrants in general and asylum seekers, in particular, are directly affected by immigration laws that are

implemented primarily within national jurisdictions. In parliamentary democracies, she maintains, the legitimacy of this form of law-making should be grounded in the “logic of democratic representation” (ibid.). This leads to an important question: How can laws, which most severely affect the lives of migrants and refugees, become more generally legitimate? Benhabib addresses this problem under the heading *The Paradox of Democratic Legitimacy*:

“[...] This paradox] has a corollary which has been little noted: every act of self-legislation is also an act of self-constitution. “We, the people,” who agree to bind ourselves by these laws, are also defining ourselves as “we” in the very act of self-legislation. It is not only the general laws of self-government which are articulated in this process; the community that binds itself by these laws defines itself by drawing boundaries as well, and these laws are territorial as well as civic. [...] Therefore, at the same time that the sovereign defines itself territorially, it also defines itself in civic terms. Those who are full members of the sovereign body are distinguished from those who “fall under its protection,” but who do not enjoy full membership rights” (ibid., p. 45).

Building on Habermas’ concept of the ‘Janus-face’ of the modern nation state, Benhabib stresses the problematic situation that emerged at the same time as modern, democratic citizen rights came into being (Habermas, 1998, p. 115; cf. Benhabib et al., 2006, p. 32). Those property-owning, white men who became citizens after the French and American revolutions, obviously became either French or US citizens. Indirectly, as Benhabib argues, the inclusion of citizens into the modern nation state (and its constitution of the democratic sovereign) has, therefore, always been dependent on the exclusion of certain groups. In the 19th and 20th century, working class men, non-white men, and women, were only subsequently included as citizens that “enjoy full membership rights” (Benhabib, 2004, p. 45; cf. Benhabib et al., 2006, p. 34).

In this context, the most important insight that she presents is her observation that the historical process of subsequent inclusion for previously excluded groups as citizens, while simultaneously continuing to exclude noncitizens, is a “territorial as well as [a] civic” (Benhabib, 2004, p. 45) side of the same coin. She thereby focuses directly on the question of how legitimacy is constructed at the level of the nation state. As a political theorist, she sees “the general laws of self-government” and “the community that binds itself by these laws” (ibid.) as primarily the interplay of a state’s constitution, its national elections, law-making by the national parliament and the government, all within the framework of

‘checks and balances’ that legislative, executive and judicative shall place upon each other. Notwithstanding the aforementioned fact that the Swedish “judicial system is not an independent branch of government as in, for instance, the United States or Germany” (Ställvik, 2009, p. 251), the independence of the courts is an important ideal even in Sweden (see Chapter Three).

Yet, because the inclusion of citizens is precisely a “territorial as well as civic” (Benhabib, 2004, p. 45) process, the laws of a community are voted on by its citizens exclusively, at least generally speaking (Benhabib [2004] does mention exceptions based on municipal, sub-national and EU regulations). From a Habermasian perspective on deliberative democracy and discourse ethics, the formulation and implementation of immigration policy is, therefore, a democratically and ethically problematic process: How can immigration control, which directly affects those people who are not (yet) citizens of the receiving country, be legitimately formulated and implemented? Consistently, Benhabib stresses that there is a paradox. This paradox comes down to the simple but crucial insight that noncitizens, as the ones whose lifeworlds are most directly affected by immigration law, have no (or very limited) say about the formulation, implementation and application of the respective regulations in the receiving country. If one is to respect the ‘all-affected principle’⁶⁷ of discourse ethics, this is unacceptable.

As is widely known, however, in Sweden as elsewhere in the Global North, there have emerged strong voices in political discourse recently who argue basically the opposite (see Chapter Two). Furthermore, in 1992, Habermas had already shown that legal discourse in the democratic-capitalist nation state does not have the ambition to subscribe to discourse ethics’ ‘all-affected principle’ (see first section of this chapter). Instead, modern – and in this sense rational and positive – law can become legitimate law without paying attention to all those people who are (potentially) affected by it, according to Habermas (1992, pp. 560-578).

In summary, the most important insights from Benhabib’s work for this study are the historical contingency, but also the possible democratic legitimations, of boundary-drawing (see Benhabib, 2004, pp. 45f). Nations are imagined communities (Anderson, 1991), and their definitions of citizenship are normatively “entirely contingent” (Habermas, 1998, pp. 115-116, cited in

⁶⁷ In an attempt of a literal translation of Habermas’ (1992, p. 566) respective formulation from *Faktizität und Geltung*, I would put it as “the rationally motivated consent of all [who are] potentially affected” (*rational motivierte Zustimmung aller möglicherweise Betroffenen*).

Benhabib, 2004, p. 17). And yet, at least in the Global North, the legal systems that operate to control immigration and, thereby, significantly shape a nation state's processes of exclusion, are widely perceived to be legitimate. In Sweden, clearly represented within the term *rättssäkerhet* ('legal certainty' and 'the rule of law', cf. Chapter One), the legitimacy of the Swedish legal system is largely unchallenged (see Nordquist, 2001).

Apart from the external (political) processes through which this system is legitimized, and that I sketched above, it is important to understand how the system legitimizes itself. In other words, while political theory can explain the external sources of a legal system's legitimacy, socio-legal research can critically "reconstruct" (Habermas, 1992, p. 569) some of those internal operations of the law that produce legitimacy claims. In the chapters that follow, my CDA of some of the precedents of Swedish asylum law has precisely this ambition.

Chapter Five

Rejection and Acceptance: (De)legitimizing the Expulsion of Asylum-seeking Families

As elaborated in the previous chapters, this study evolved around the question of how last-instance court decisions that concern asylum seekers have been legitimized. To begin the analysis in this first empirical chapter, I focus on discussing the first research question, which I posed as such: How are decisions to grant or to deny the right to asylum legitimized through the discourse of the MCA's precedents?

As may be expected, in view of Habermas' insight on legitimizing arguments in legal decisions formulated according to the functional requirements of the legal system, legitimacy claims that are constructed "by reference to [...] law" (Fairclough, 2003, p. 98) are the most prominent in the precedents analysed below. The narrative structure (see Fairclough, 2003, pp. 83-86) of each of these precedents is, moreover, consistent with the main task⁶⁸ of the MCA as a last-instance institution of the legal system. Every precedent begins with a short heading. For example, at the start of one of the security cases, MIG 2006:3 (case number UMS4-06), the heading summarizes the MCA's decision as follows:

"Extraordinary grounds for placing the claimant in detention have been deemed to exist when the expulsion order that will be enforced has been made based on the Act (1991: 572) on Special Alien Control (*lagen om särskild utlänningskontroll*)

⁶⁸ In one interview with a judge at the MCA, the task of the Court and the purpose of publishing precedents was described as follows: "That it is of general interest, that it is not only of interest in this [legal] case, but that it has a wider frame of application, that it can give guidance. And then one does indeed try to write the precedents, guiding decisions, in such a way as to not only be a decision on the single [legal] case, but to make a bit of a broader statement" (IT4).

[LSU]). [The decision also takes up the] question about the Migration Court of Appeal's competence (*behörighet*) when the case (*målet*) concerns an alien (*utlänning*) who is waiting for an expulsion order that will be enforced."⁶⁹

In this *säkerhetsärende*, the rationalizing legitimation “by reference to the utility of institutionalized action” (Fairclough, 2003, p. 98), which is evoked by stating “reasons of national security” (MIG 2006:3, p. 1), and which I identify as a rather politically (Habermas, 1992, p. 567) rationalized legitimation,⁷⁰ is primarily legitimized by reference to law. In my translation of the original, it is legitimized “based on the Act (1991: 572) on Special Alien Control”. What remains unknown to the reader of this precedent is the question of whether the claimant had ever sought asylum. What becomes public is the information that the claimant had been “expelled for life [...] and banned from returning [to Sweden] for an indeterminate time by the [Swedish] government” (MIG 2006:3, p. 1). Also, “there is indication that he [the claimant] has engaged in criminal activity in Sweden” (*ibid.*).

Having said this about one of those three *säkerhetsärenden* as exceptional precedents, I now want to proceed towards an in-depth analysis of two cases that represent an arguably central issue: families with children who seek international protection in Sweden (see also Josefsson, 2016; Lundberg, 2011). During the interviews I conducted, all but one judge explicitly mentioned the difficulty of taking decisions that affect asylum-seeking children. Therefore, before delving into the analysis, I present some excerpts from these discussions with Swedish migration court judges.

In eight of the ten interviews (IT1, IT2, IT3, IT4, IT5, IT7, IT8 & IT9), cases that concern children in relation to asylum were mentioned. In the first of the excerpts presented below, an MCA-judge answered one of my questions regarding

⁶⁹ From the precedents: ”Synnerliga skäl för att placera klaganden i häkte har bedömts föreligga när det utvisningsbeslut som skall verkställas har fattats med stöd av lagen (1991:572) om särskild utlänningskontroll. Fråga också om Migrationsöverdomstolens behörighet när målet rör förvar av en utlänning i avvaktan på att ett sådant utvisningsbeslut skall verkställas” (MIG 2006:3, p. 1).

⁷⁰ In comparison, in precedent MIG 2012:9 the issue of asylum vs. national security is legitimized more directly in reference to the respective legal sources. There, the MCA presents the following legal norms that apply when rejecting or expelling someone who is indeed a refugee: “A refugee’s residence permit [application] may be refused if he or she 1. through a particularly serious crime has shown that it would be fraught with serious danger to public order and security to let him or her stay in Sweden, or 2. has engaged in activities that endangered [Swedish] national security (*rikets säkerhet*) and there is reason to assume that he or she would continue with such activities here [in Sweden]” (MIG 2012:9, p. 3).

the political situation at the time. As introduced in Chapter Three, by this time (2015), ‘Dublin transfers’ (*Dublinöverföringar*) to a number of EU countries, notably Greece, Italy and Hungary, had become controversial; and particularly so when they affected children:

“[...] one has refrained from transferring families with children where one has not been able to guarantee that the family would be kept together in the receiving country – how should one place families with children? But if it is young adult men, then one has to look differently at those countries, which can be questioned. It’s a bit like how one treats housing [for refugees], but this has to do with who is making the claim, how the person’s situation (or family situation) looks” (IT9).⁷¹

The here cited judge added a categorisation of gender (“men”) to a discussion that was primarily focused on age (“children”, “young adult”). As becomes visible with these sentences, it is not only the dichotomy of adults versus minors – which has recently (again) been in the focus of public debate regarding the scientific limitations of age determination procedures (see Noll, 2016; 2014) – but also the binary gender categorisation of either female or male that can weigh into the reasoning of judges who take decisions at Sweden’s migration courts. In general, my observation from the interviews, as well as from reading the precedents, is that Swedish migration court judges speak and write according to the dominant gender discourse that is based on the binary of ‘the two sexes’. The terms ‘transgender’ (*transsexuell*) or ‘trans person’ (*transperson*) are entirely absent from the data of this study, including the ten interviews and the 200 precedents.

As it regards expelling asylum seekers to other European countries in line with the Dublin regulations, the same judge argued that the following was a complex question: “[H]ow should one place families with children?” (IT9). In contrast, the judge explained, “if it is young adult men, then one has to look differently at these countries which can be questioned” (IT9). In another interview with a different migration court judge, the markers of gender and age were combined with what can be understood as cultural capital. Contrasting “a well-educated person” with “an elderly illiterate woman from Somalia”, the judge reasoned as follows:

⁷¹ From the interviews: “[...] man har underlåtit att överföra barnfamiljer, där man inte i mottagande land har kunnat garantera att familjen skulle kunna hållas ihop - hur skulle man placera just barnfamiljer? Men om det är yngre vuxna, ensamma män, så har man sett annorlunda på de här länderna som kan ifrågasättas. Lite det här hur man behandlar boende, men det har att göra med vem det är som är klagande, hur den personens situation, eller familjesituation, ser ut.”

“[...] the one who is highly educated can more easily formulate and express his or her situation, but it is indeed a big difference whether one sits in an oral hearing with a well-educated person from Iran – many from there have indeed good school education – in comparison with an elderly illiterate woman from Somalia, she, after all, cannot speak for herself in the [same] way as this well-educated guy (*kille*) from Iran” (IT8).⁷²

Upon stating this, the judge was quick to stress that such differences did not influence the final legal decision. Regarding the procedural setting of administrative law in which such hearings take place, the judge highlighted the importance of ‘public counsels’ (*offentliga biträden*) when it comes to the interaction between the asylum law experts of the MB as one legal party, and the asylum seekers as the other. As I cited an MCA judge in Chapter Two, “[...] often, they [the lawyers of the MB] indeed get – what can one say – a little bit of cream on top (*lite gräddfil*), because they appeal so seldom. So, one looks a little bit more carefully into this [kind of appeal]” (IT9). Against the background of this statement – and given the fact that the MB is the decision-making institution in the first instance – while there is “inequality in arms between the parties” (Johannesson, 2017, p. 110) when the MB challenges the applicant at a second-instance MC, I argue that there appears to be a procedural power imbalance. With the word “hopefully” hinting at this imbalance, the judge who contrasted the “highly educated [...] guy from Iran” to the “illiterate woman from Somalia” (IT8) described the importance of the public counsels as follows:

“[...] hopefully, then, there is a public counsel who can help support this person who has a weaker school education. But for me as a judge, – after all, I treat everyone the same, obviously. Maybe I need to pose more questions, if it is like that too few circumstances of [the life of] this old woman from Somalia become apparent, and the counsel does not pose the questions that I would like to come at [...]” (IT8).⁷³

⁷² From the interviews: “[...] den som är högutbildad har lättare att formulera sig och ge uttryck för hur hans eller hennes situation är, men det är ju en väldig skillnad om en sitter i en muntlig förhandling med en välutbildad person från Iran - många därifrån har ju en god skolutbildning - jämfört med en äldre analfabetisk kvinna från Somalia, hon kan ju inte tala för sig på det sättet som den där välutbildade killen från Iran.”

⁷³ From the interviews: “[...] förhoppningsvis så har man då offentligt biträde som kan hjälpa till och stötta upp den här personen som har en svagare skolutbildning, men, för mig som domare, jag behandlar ju alla likadana, givetvis. Jag kanske behöver ställa mer frågor, om det är så att det

In Chapter Six, I focus in greater detail on categorisations of gender and ethnicity – and social class with the help of the Bourdieusian terms of cultural and social capital. What I want to stress here is that three judges (IT6, IT8 & IT9) contrasted young adult men with other asylum seekers. In one excerpt presented above, it is the formulation “families with children” that is set against “young adult men” (IT9). In this way, (certain) families with children are discursively framed as deserving the protection of the Swedish state through some form of residence permit, while young men are used as a contrast against the background of which the expulsion of ‘undeserving’ asylum seekers can be legitimized. In the concrete example of this excerpt from IT9, this concerns a so-called Dublin transfer, i.e. an expulsion to the European country where the applicant in question had first been registered. The ‘right to the unity of the family’ (*rätten till familjens enhet*), a principle which should ensure “that the family would be kept together” (IT8), can in such cases become an ‘obstacle against expulsion’ (*verkställighetshinder*). One of the judges at the MCA stressed how such principles – but also compliance with the Dublin system and EU directives – have a strong impact on many asylum cases:

“[...] if the legal text (*lagtexten*) and preparatory works (*förrarbeten*) are not compatible, then it is indeed the legal text that applies. Because one is not allowed to legislate through preparatory works (*lagstifta genom förrarbeten*) – but it is after all the legal text that stands for itself. And then it is also this with, what is it called, which complicates it, or makes it more changeable, it is indeed that we are so directive-steered (*direktivstyrda*) in this area, with [family] reunification and the family’s – what is it called – the right to the unity of the family. This means that we become very tied by a number of EU directives and how they are interpreted, how they are implemented” (IT9).⁷⁴

The judge states that the highest Swedish migration court is “so [EU] directive-steered” (IT9). Concerning asylum-seeking families, as the excerpts that I

kommer fram för lite omständigheter om den gamla kvinnan från Somalia och biträdet inte ställer de frågor som jag skulle vilja komma fram till [...].”

⁷⁴ From the interviews: “[...] om lagtexten och förrarbeten inte är förenliga, så är det ju lagtexten som gäller. För att, eftersom man inte får lagstifta genom förrarbeten – utan det är ju lagtexten ska ju stå för sig själv. Och sen är det ju också det här med, vad heter det, som komplicerar det, eller som gör det mer föränderligt, det är ju att vi är så direktivstyrda på det här området, med återförening och familjens - vad heter det - rätten till familjeenheten. Så det gör ju att vi blir väldigt bundna av ett antal EU-direktiv och hur de ska tolkas, hur de ska implementeras.”

presented in this section illustrate, EU directives can obviously contribute to the acceptance as well as to the rejection of the applicants. For instance, EU Regulation 604/2013, i.e. the current ‘Dublin III’, is the legal text which makes ‘transfers’ of asylum-seeking families to other European countries possible. The right to “[family] reunification” (IT9) and the principle of “the unity of the family” (IT9), on the other hand, are examples of transnational legal norms (see Benhabib, 2016; cf. Alexy, 2002a); norms which can contribute to the acceptance of asylum-seeking families, and which one judge explicitly names in the context of the discussion on migration courts being ‘directive-steered’ (*direktivstyrda*, IT9). The question of how such transnational legal norms – in my data often called ‘principles’ – can play a role in the precedents of Swedish asylum is the focus of the following sections.

Protection for a Mother and Her Child

The first precedent that I examine in depth concerns three interrelated aspects of an asylum application: A mother, called “A” and identified as being from Eritrea (1. aspect: persecution), seeks asylum for herself and her son (2. mother-child family ties). The son is called “B” and suffers from epilepsy (3. health of a minor). And while the mother had primarily based her application for protection (filed already in March 2005) on the grounds of not being safe in Eritrea, “the central question” (*knäckfrågan*, IT2), which every precedent should focus on, is the health of her son. As the second sentence of MIG 2007:25 states: “Apart from grounds for protection, it was invoked that B suffered from epilepsy and that he was continuously taking medication” (MIG 2007:25, p. 1). In the heading of MIG 2007:25, the MCA’s decision is summarized as follows:

“The fact that a child suffers from epilepsy and that the care which the child could receive in Sweden is of higher quality than the care the child would receive in the home country has, in itself, not been considered to constitute grounds for granting the child and the child's mother residence permits due to particularly distressing circumstances (*synnerligen ömmande omständigheter*). It has not been shown that the child's **future** development and the quality of life would be compromised in a decisive way if the child returned to the home country. At this point, [the regulation] that the circumstances in the case of a child do not need to have the

same seriousness and weight as required for adults has also been taken into account” (MIG 2007:25, p. 1, my emphasis in bold font).⁷⁵

MIG 2007:25 thereupon proceeds according to the narrative structure of most (security cases are exceptions) of the MCA’s precedents. First, the decision of the MB is summarized, then the reasons for the claimant’s successful appeal to the second legal instance are stated:

“[A] invoked, in addition to previously stated grounds for protection (*skyddsskäl*), particularly distressing circumstances (*synnerligen ömmande omständigheter*) related to her son's illness. Regarding the son's illness, the following was put forward. B is in a serious state of illness that has not yet been medically examined to the fullest (*färdigutrett*). If the question of residence is decided before the examination of his state is done, a precautionary principle should prevail, i.e. he will be granted a residence permit. Given that the medicine he received in the home country (*hemlandet*) was wrong, it should (*torde*) be concluded that he cannot receive adequate care [in the home country]. If his condition is not continuously followed up, there is risk that he gets worse and ultimately suffers from life-threatening seizures. According to a WHO report from 2001, Eritrea lacks neurologists.”⁷⁶

In this passage from MIG 2007:25, the MCA paraphrases the claimant’s grounds for the first-to-second instance appeal. In particular the last sentence illustrates the second sub-strategy of rationalizing legitimation, which Fairclough (2003, p. 98) conceptualizes as “Legitimation by reference to [...] the knowledges society has constructed to endow them with cognitive validity”. In other words, it is not

⁷⁵ From the precedents: “Det förhållandet att ett barn lider av epilepsi och att den vård barnet skulle kunna erhålla i Sverige är av högre kvalitet än den vård barnet erhållit i hemlandet har i sig inte ansetts utgöra grund för att bevilja barnet och barnets mor uppehållstillstånd på grund av synnerligen ömmande omständigheter. Det har inte visats att barnets framtida utveckling och livskvalitet på ett avgörande sätt skulle äventyras genom att barnet återvändes till hemlandet. Härvid har även beaktats att omständigheterna i ett barns ärende inte behöver ha samma allvar och tyngd som krävs för vuxna personer” (MIG 2007:25, p. 1).

⁷⁶ From the precedents: “[A] åberopade, utöver tidigare angivna skyddsskäl, synnerligen ömmande omständigheter hänförliga till sonens sjukdom. Beträffande sonens sjukdom anfördes följande. B har ett allvarligt sjukdomstillstånd som ännu inte är medicinskt färdigutrett. Om frågan om uppehållstillstånd skall avgöras innan utredningen av hans tillstånd är klar bör en försiktighetsprincip råda, dvs. han ska beviljas uppehållstillstånd. Mot bakgrund av att den medicin han erhöll i hemlandet var felaktig torde slutsatsen att han inte kan erhålla adekvat vård där kunna dras. Om inte kontinuerlig uppföljning görs av hans tillstånd finns risk för att han försämras och i förlängningen drabbas av livshotande anfall. Enligt en WHO-rapport från 2001 saknas neurologer i Eritrea” (MIG 2007:25, p. 1).

only the argument that the medical examination of the son should be concluded that is presented as legitimate grounds for granting him and his mother residency in Sweden. The authority (Fairclough's 1st main strategy) of the World Health Organization (WHO), which, according to its webpages, works "through offices in more than 150 countries",⁷⁷ is combined with the rationalizing legitimacy (Fairclough's 2nd main strategy) of the WHO's medical expertise. It is recognized as a transnational expert organisation, with its reports producing "knowledges [that] society has constructed to endow them with cognitive validity" (Fairclough, 2003, p. 98).

This being noted, the passage is discursively legitimized through the authorizing language of legal terms ("particularly distressing circumstances", "precautionary principle", MIG 2007:25, p. 1) rather than through moral evaluation, i.e. "by reference to [non-legal] value systems" (Fairclough, 2003, p. 98). By referring rather to a legal norm than a moral value, the heading summarizes: "At this point [the regulation] that the circumstances in the case of a child do not need to have the same seriousness and weight as required for adults has also been taken into account" (MIG 2007:25, p. 1). To understand this reasoning, it is important to add what is implied, i.e. the two words 'the regulation'. When adding these two words, it becomes clearer that it is the legal norm, rather than the moral value, "that the circumstances in the case of a child do not need to have the same seriousness [...]" (ibid.) which the legal party of the claimant puts forward in order to be "taken into account" (ibid.).

Understanding MIG 2007:25 as a legal narrative, CDA further enables the reader to analyse it as a text "in which a narrator relates the story in a particular medium" (Fairclough, 2003, p. 83). The narrators of the precedents are the judges of the MCA that are responsible for, upon summarizing one legal party's grounds for appeal, the "story" (ibid.) that continued in the summary of the the MB's rejection of the appeal:

"The Migration Board rejected the appeal, arguing, inter alia, the following. As for the boy's state of health, the conditions are not such that they reach up to what is required for the granting of a residence permit due to particularly distressing circumstances (*synnerligen ömmande omständigheter*). He has in the home country been treated with medication which has at least partially been adequate. According to what A stated, they [mother and son] were known at the hospital and often

⁷⁷ See the webpage *About WHO - Who we are, what we do*, <http://www.who.int/about/en/> (Accessed 18 December 2016).

visited the health centre (*vårdcentralen*). There is a children's clinic in Asmara. The length of stay in Sweden has not been as long as needed for adaptation to Sweden (*anpassning till Sverige*) to be observed. This case (*detta fall*) cannot be seen as a single [legal] case (*ett enskilt mål*) since granting a residence permit in principle would entail that all children with the same problem have the right to a [residence] permit in Sweden.”⁷⁸

In the precedent, this paragraph is placed immediately after the one that I quoted one citation above. Thus, if one reads MIG 2007:25 as a narrative, the re-considering function of the higher legal instance becomes apparent. While the story of MIG 2007:25 is narrated, the adversarial principle of the migration courts as administrative courts appears. In this narration, the applicants are the protagonists (cf. Fairclough, 2003, pp. 84-85). This does not mean, however, that legal narratives “are just the same as fictional narratives” – to borrow from Fairclough’s (2003, p. 85) comparison of “news narratives” and “fictional narratives”. Quite the contrary, as I may add to Fairclough’s argument, legal narratives, “like historical narratives (supranote: Callinicos, 1995), have a ‘referential intention’ which makes them open to questions about the relationship between story and actual events, questions of truth” (Fairclough, 2003, p. 85).

In the excerpt above, this is clearly visible with a close look at the third, fourth and fifth sentences: “He has in the home country been treated with medication which has at least been partially adequate” (3rd sentence). This sentence presents a truth claim initially made by the MB. The claim is enhanced through the argument that (even) the claimant’s legal party, here the mother “A”, supported this view: “According to what A stated, they were known at the hospital and often visited the health centre” (4th). This “referential intention” (ibid.) of supporting a certain truth claim by firstly presenting one view, namely the MB’s opinion that B “has in the home country been treated with medication which has at least partially been adequate” (3rd), followed by referring to an utterance from the opposing legal party (“they were known at the hospital and often visited the health

⁷⁸ From the precedents: ”Migrationsverket bestred bifall till överklagandet och anförde bl.a. följande. Vad gäller pojakens hälsotillstånd är förhållandena inte sådana att de når upp till vad som krävs för beviljande av uppehållstillstånd på grund av synnerligen ömmande omständigheter. Han har i hemlandet behandlats med medicin som i alla fall delvis varit adekvat. Enligt vad A uppgivit var de kända på sjukhuset och besökte ofta vårdcentralen. Det finns en barnklinik i Asmara. Vistelsetiden i Sverige har inte varit så lång som krävs för att skall beaktas. Detta fall kan inte ses som ett enskilt mål eftersom beviljat uppehållstillstånd i princip medför att alla barn med samma problematik har rätt till tillstånd i Sverige” (MIG 2007:25, p. 2).

centre” [4th]), is finally verified by a short, simple, declarative clause: “There is a children's clinic in Asmara” (5th). With these three interrelated sentences leading the reader towards the rationalizing legitimacy of knowledge that can be scrutinized, i.e. the information that there is a clinic specifically for children in Asmara, the following point of view is legitimized. The child “has in the home country been treated with medication which has at least partially been adequate”. This legitimacy claim is thus supported by a chain of information which ends with a rationally legitimizing (and easily verifiable) piece of information: “children's clinic in Asmara”.

Hence the observation that legal narratives, like other non-fictional narratives such as news or historical narratives, “have, one might say, an ‘explanatory intention’ which we can liken to ‘focalization’: to make sense of events by drawing them into a relation which incorporates a particular point of view” (ibid.). However, in this passage of the precedent, the narration has not yet arrived at the final verdict of the MCA. While this judgment has been anticipated in the heading, so far only the two legal parties’ conflicting points of view have been summarized.

Another significant strategy of discursive legitimation is present within the last sentence of the excerpt I cited above: “This case cannot be seen as a single [legal] case since granting a residence permit in principle would entail that all children with the same problem have the right to a [residence] permit in Sweden.” This argumentation effectively incorporates and combines the first three of the “four main strategies of legitimation” that Fairclough (2003, p. 98) conceptualized. Primarily focused on the law, it makes clear that a legally authorized decision would legitimize residence for the child in the case-to-case logic of every legal case being unique. In principle, however, granting the child (and the mother) the right to stay would entail “that all children with the same problem have the right to a [residence] permit in Sweden”. Thus, the case-to-case logic is opposed to the logic of principle (“in principle means that all children” [MIG 2007:25, p. 2]). This logic of principle is of importance for precedents, because “the basic reason for following precedents is the principle of universalizability” (Alexy, 1989, p. 275).

Read against the background of Fairclough’s second and third main strategy of discursive legitimation, this reasoning implies the following. A rationalized legitimacy of granting residence is established (“the care the child could receive in Sweden is of higher quality”, MIG 2007:25, p. 1) and a moral evaluation, “by reference to value systems” (Fairclough, 2003, p. 98) such as “the best interests of

the child”,⁷⁹ cannot claim that it is ethically unproblematic to expel a child to a country with lower-quality health care. However, the crucial strategy of legitimation is the following authorizing, legalistic argument (of principle) against granting a residence permit. Legitimizing residence would establish unwanted precedence, because it would mean “that all children with the same problem have the right to a [residence] permit in Sweden” (MIG 2007:25, p. 1). To summarize, while the first three of Fairclough’s four legitimation strategies are identified in this sentence, the authority of law prevails. Moreover, the fourth main strategy of discursive legitimation, namely legitimacy through narrative, is important for rejecting the argument that “all children with the same problem have the right to a [residence] permit in Sweden”. It is important because it is only based on the information which is narrated in the text prior to this sentence that the legitimacy of rejecting the family can be argued for.

From the viewpoint of CDA, of further analytical significance is the way in which the MCA wrote about the second-instance MC’s reaction to the MB’s initial rejection:

“The Migration Court finds, for the same reasons as the Migration Board, that A’s asylum narrative is not credible. Regarding particularly distressing circumstances under Chapter 5, § 6, first paragraph (*första stycket*), Aliens Act (2005: 716), it is noted that the boy suffers from a difficult-to-treat yet not life-threatening epilepsy. It is clear that the treatment has importance for his **future** development and quality of life. He left the home country six months after the illness surfaced (*debuterat*), so there is reason to assume that the doctors in the home country needed more time to find adequate treatment. The information about the care and the medications he received contradicts reports that health facilities and medicine are missing in Eritrea. In Sweden it has now been ascertained more closely which medication is necessary, which can be helpful for medical care in the home country. [Health] care (*Möjlighet till vård*) is available in the home country; it is mainly a question of quality difference. The circumstance that the quality is higher in Sweden cannot constitute grounds for a residence permit. [...] The third lay judge dissented and was of the opinion that it was not made credible that in Eritrea

⁷⁹ Article 3 in the *UN Convention on the Rights of the Child* states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed 18 December 2016).

there was the medical knowledge to give the boy the care he needs” (my emphasis in bold font).⁸⁰

In view of legitimation strategies, this excerpt summarizes the MC’s decision by stating legal terms (“particularly distressing circumstances”, MIG 2007:25, p. 2), followed by references to specific passages from legal texts as sources of law (“Chapter 5, § 6, first paragraph”, *ibid.*). Moreover, a certain factual knowledge is claimed (“difficult-to-treat yet not life-threatening epilepsy”, *ibid.*), which is rationalized and thus legitimized by another assumption about the case’s facts: “there is reason to assume that the doctors in the home country needed more time to find adequate treatment” (*ibid.*). The overall legitimacy of the decision to deny the claimant a residence permit is, however, diminished by a detail that comes last in this part of the narrative: “The third lay judge dissented”. This detail relates to a questioning of the facticity of the claim that “that in Eritrea there was the medical knowledge to give the boy the care he needs.” Finally, the following decision was taken at the MCA:

“That the care which B could receive in Sweden is of higher quality cannot in itself entail that a residence permit is granted. Care is available in Asmara, and it has not been shown in the case that B’s future development and quality of life would be endangered in a decisive way (på ett avgörande sätt) through him returning to the home country. The Migration Court of Appeal further finds that B cannot be considered to have adapted to Swedish conditions in such a way that he would risk his psychosocial health being harmed through, along with his mother (mamma), returning to the home country where his father (pappa) and siblings are. Even by taking into account that the circumstances in the case of a child (omständigheter i ett barns ärende) do not need to have the same seriousness and weight as required

⁸⁰ From the precedents: “Migrationsdomstolen finner, av samma skäl som Migrationsverket, att A:s asylberättelse inte är trovärdig. Vad gäller synnerligen ömmande omständigheter enligt 5 kap. 6 § första stycket utlänningslagen (2005:716) konstateras att pojken lider av en svårbehandlad epilepsi, dock inte livshotande. Det står klart att behandlingen har betydelse för hans framtida utveckling och livskvalitet. Han har lämnat hemlandet sex månader efter att sjukdomen debuterat varför det finns anledning att anta att läkarna i hemlandet behövt mer tid för att finna adekvat behandling. Uppgifterna om den vård och de mediciner han erhållit talar emot uppgifterna om att vårdmöjligheter och medicin saknas i Eritrea. I Sverige har nu närmare kunnat utredas vilken medicinering som är nödvändig, något som kan vara till hjälp för sjukvården i hemlandet. Möjlighet till vård finns i hemlandet, det är främst en fråga om kvalitetsskillnad. Den omständigheten att kvaliteten är högre i Sverige kan inte anses utgöra grund för uppehållstillstånd [...] Den tredje nämndemannen var skiljaktig och ansåg att det inte gjorts troligt att den medicinska kunskapen finns i Eritrea för att ge pojken den vård han behöver” (MIG 2007:25, p. 2).

for adults to be able to receive a residence permit, the Migration Court of Appeal finds with an overall assessment that the circumstances of the case are not such that A and B can be granted a residence permit grounded on particularly distressing circumstances. The appeal shall therefore be rejected” (my emphasis in bold font).⁸¹

Based on this citation, it can now be shown that this section of the decision is primarily legitimized through what Fairclough conceptualized as rationalization. To remind the reader, he defined this as “Legitimation by reference to the utility of institutionalized action, and to the knowledges society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98). The utility of the intuitional action of granting A and B residence in Sweden (on the grounds of B being a small child who is suffering from epilepsy) is not deemed to be legitimate. Having repeatedly considered authorizing (legal) legitimations such as the concept of “particularly distressing circumstances” (*synnerligen ömmande omständigheter*, MIG 2007:25, p. 2) as well as the legal norm “that the circumstances in the case of a child do not need to have the same seriousness and weight as required for adults” (ibid.), the MCA rejects the appeal. Thus, the decision to expel mother and child from Sweden is confirmed and a precedent is established. This is mainly legitimized based on the MCA’s following conclusion: “care is available in Asmara, and it has not been shown in the case that B’s future development and quality of life would be endangered in a decisive way by him returning to the home country”. Combining the rationalizing legitimation of establishing a certain factual truth about the claimant’s birthplace, the ‘best interest of the child’ is the background against which the formulation “B’s future development and quality of life” can be read as both an authoritative legitimation and a moral evaluation. These legitimations are considered, but rejected as grounds for granting the applicants residence permits.

⁸¹ From the precedents: “Att den vård som B skulle kunna få i Sverige är av högre kvalitet kan inte i sig medföra att uppehållstillstånd beviljas. Vård finns att tillgå i Asmara, och det har inte visats i målet att B:s framtida utveckling och livskvalitet på ett avgörande sätt skulle äventyras genom att han återvänder till hemlandet. Migrationsöverdomstolen finner vidare att B inte kan anses ha anpassat sig till svenska förhållanden på sådant sätt att han skulle riskera att skadas i sin psykosociala hälsa av att, tillsammans med sin mamma, återvända till hemlandet där hans pappa och syskon finns. Även med beaktande av att omständigheter i ett barns ärende inte behöver ha samma allvar och tyngd som krävs för att vuxna personer skall kunna få uppehållstillstånd, finner Migrationsöverdomstolen vid en sammantagen bedömning att omständigheterna i målet inte är sådana att A och B kan medges uppehållstillstånd på grund av synnerligen ömmande omständigheter. Överklagandet skall därför avslås” (MIG 2007:25, p. 2).

When linking this discourse-analytical reading to of some of Habermas' (1992) theoretical insights as he presents them in *Fakzität und Geltung* and as I summarized them in Chapter Four, the following findings can be proposed. Despite the ambition of the MCA's judges to base their precedents solely on the authority of the law, my analysis of MIG 2007:25 shows that other legitimation strategies can be identified. The rationalizing legitimation of the utility of the institutionalized action to expell a mother and her epileptic child is present within the following formulation: "granting a residence permit in principle would entail that all children with the same problem have the right to [residence] permit in Sweden." Rationally speaking, as I may paraphrase the argument, it is not reasonable that all children with the same problem have the right to a residence permit in Sweden. Clearly, the legitimacy of this statement reaches beyond the authority of the law. Instead, it is the political aim of 'regulated immigration' (*reglerad invandring*, see also Chapter Seven) that is at stake. Such an instrumental usage of a legal decision for political ends can, however, lead to judgments that contradict strong moral norms. One example of such a norm would be the ambition to help a seriously ill child in the best conceivable way. The tension that consequentially emerges – between the ambition to 'help a child' and the aim to 'regulate immigration' – reminds the reader of Habermas' warning that the law as means for political ends can enable the system to colonize the lifeworld (see Habermas, 1992, pp. 565f).

As the detail of the dissenting lay judge illustrates, it is not crystal clear that it is the one and only (legally and/or morally) correct decision to subscribe to the statement that not "all children with the same problem have the right to a [residence] permit in Sweden" (MIG 2007:25, p. 2). The respective conflict between a moralistic and a legalistic view on this precedent can, in turn, confirm two important points that Habermas makes about decisions formulated within legal discourse (see Chapter Two):

- 1) The 'all-affected principle' does not apply in legal discourse. Surely, legal discourse must be permeable also to moral arguments (Habermas, 1992, p. 565). This is apparent in MIG 2007:25, because the argument that the child could receive better healthcare in Sweden is explicitly considered. To come to definite and timely (*ibid.*, p. 566) decisions that fulfil the functional requirements of the legal system, however, the 'all-affected principle' does not apply in the same way in a legal decision as it should in an ethically motivated argument (see Chapter Four). Within the limits of discourse ethics, it would be difficult to argue anything other than the standpoint that sick children should be allowed to stay wherever

they can get the best medical treatment. In the legal discourse of MIG 2007:25, in contrast, this reasoning is almost reversed, as one important argument for the final decision is the ‘threat’ of every sick child in the world coming to Sweden for healthcare.

2) This is precisely one of the defined tasks of legal discourse: Legality shall “absorb the uncertainties which would emerge, if these were left to a purely moral steering of behaviour” (Habermas, 1992, p. 566).

With MIG 2007:25 the MCA established a precedent that does not legitimize the granting of residence for children with serious illnesses per se. MIG 2007:25 confirms the initial evaluation of the MB and, despite the seriousness of the child’s state of health, the following is stated: “this case (*detta fall*) cannot be seen as a single [legal] case (*ett enskilt mål*), since granting a residence permit in principle would entail that all children with the same problem have the right to a [residence] permit in Sweden” (MIG 2007:25, p. 2). In Benhabib’s (2004) terms, MIG 2007:25 is a legal decision that legitimizes the boundaries of the nation state. In other terms of hers, it does not contribute to international borders becoming (more) porous. To see how this relation between firm national boundaries and porous borders is represented in a precedent that annuls the expulsion of a protection seeking family, I may proceed to the following section of the chapter.

The Unity of the Family and the Child’s Best

The main point of MIG 2012:9 is summarized as follows:

“If there is a country that fulfils the criteria as a so-called safe third country [as stated] in Chapter 5. 1 b § first paragraph 3 Aliens Act, an asylum application can be rejected. If the application for asylum is not rejected, a review (*prövning*) shall be conducted in accordance with the alien’s application and the rules which apply to such a review.”⁸²

With this decision, the MCA established a precedent on the possible expulsion of rejected asylum seekers to a ‘safe third country’ (cf. Chapter Two). Meanwhile,

⁸² From the precedents: “Om det finns ett land som uppfyller kriterierna för ett s.k. säkert tredjeland i 5 kap. 1 b § första stycket 3 utlänningslagen får en asylansökan avvisas. Om asylansökan inte avvisas ska en prövning ske i enlighet med utlänningsansökan och med tillämpning av de regler som gäller för sådan prövning” (MIG 2012:9, p. 1).

MIG 2012:9 clarifies legal practice for cases in which the initial “application for asylum is not rejected” (MIG 2012:9, p. 1). As this might sound confusing – the applicants are not rejected, and yet the issue of ‘safe third countries’ is discussed – looking deeper into the decision becomes necessary in order to understand it:

“A and her children B and C applied for asylum in Sweden in April 2009. A is a citizen of Senegal, while the children are both Senegalese and Nigerian citizens. As grounds for asylum against Senegal it was invoked that they converted from Islam to Christianity and therefore risked persecution there [in Senegal]. A’s husband and the children’s father, who is a Christian Nigerian, was reported missing. The family had been residing (varit bosatt) in Senegal but visited the husband’s parents in Nigeria. They [the parents] wanted the spouse and the children to stay there, but for A to be sent back to Senegal. The entire family therefore chose to leave Nigeria. As grounds for asylum from Nigeria (asylskäl mot Nigeria) it was invoked that the husband or his parents could take the children from A, that she risked vengeance (hämnad) from his relatives if he were dead (om han skulle vara död), and that they risked persecution because of the conflict between Muslims and Christians in the country. They also stated that they lacked sufficient ties to the country”.⁸³

With this information, at the level of content, it becomes clearer why the notion of ‘safe third country’ is of importance. The mother (“A”) is a citizen of one nation state (Senegal), her two children (“B” and “C”) are dual nationals (Senegal and Nigeria) and the father is a Nigerian citizen, and a Christian. It is of further importance to the case that the mother and the children converted from Islam to the father’s faith: “As grounds for asylum from Senegal it was invoked that they had converted from Islam to Christianity and therefore risked persecution there [in Senegal]” (MIG 2012:9, p. 1). Another piece of information that is then put forward is the threat posed by the father’s relatives:

⁸³ From the precedents: “A och hennes barn B och C sökte asyl i Sverige i april 2009. A är medborgare i Senegal, medan barnen är både senegalesiska och nigerianska medborgare. Som asylskäl mot Senegal åberopades att de konverterat från islam till kristendomen och därför riskerade förföljelse där. A:s make och barnens far, som är kristen nigerian, uppgavs vara försvunnen. Familjen hade enbart varit bosatt i Senegal, men besökt makens föräldrar i Nigeria. Dessa ville att maken och barnen skulle stanna där, men att A skulle skickas tillbaka till Senegal. Hela familjen valde därför att lämna Nigeria. Som asylskäl mot Nigeria åberopades att maken eller hans föräldrar där skulle kunna ta barnen från A, att hon riskerade hämnad från hans släktingar om han skulle vara död och att de riskerade förföljelse p.g.a. konflikten mellan muslimer och kristna i landet. De uppgav också att de saknade tillräcklig anknytning till landet” (MIG 2012:9, p. 1).

“As grounds for asylum from Nigeria (asylskäl mot Nigeria) it was invoked that the husband or his parents could take the children from A, that she risked vengeance (hämd) from his relatives if he were dead (om han skulle vara död), and that they [mother & children] risked persecution because of the conflict between Muslims and Christians in the country” (ibid.).

The mother’s asylum application is based on the fear of persecution as a (Christian) convert in Senegalese (predominantly Muslim) society, the fear of persecution due to the threat that is posed by the husband’s relatives in Nigeria – especially “if he were dead” – and the fear of persecution “because of the conflict between Muslims and Christians in the country [Nigeria]” (ibid.). Of further importance is that the mother is applying not only for herself: “A and her children B and C applied for asylum in Sweden in April 2009” (ibid.). In the then following sentence, the pronoun “they” relates to the mother and her children. “They also stated that they lacked sufficient ties to the country [Nigeria]” (ibid.). In this way, the applicants (“A”, “B” & “C”) argue for being granted protection in Sweden: Mother and children, while having certain ties to both Senegal and Nigeria, were not safe in either of those two countries. But this evaluation was rejected by the MB; a decision that the MCA describes as follows:

“The Migration Board rejected the asylum applications on 21 May 2010. The Board assessed that A, B and C were refugees in relation to Senegal (i förhållande till Senegal) due their religious beliefs, but they lacked need of protection from Nigeria (skyddsbehov gentemot Nigeria). It was not considered probable (sannolikt) that the husband or the parents-in-law would take the children away from A, or that she, in an eventual custody case (vid en eventuell vårdnadsprocess), would lack the possibility to seize the children’s rights to visit her. A custody or visitation dispute (vårdnads- eller umgängestvist) was assessed not to constitute grounds for need of protection in itself. Neither could the general situation in Nigeria, even if there are conflicts between Christians and Muslims, constitute grounds for need of protection. The [Migration] Board’s perception (uppfattning) was that they had sufficient ties to Nigeria so that it could be considered fair (rimligt) and relevant that they settled there, because B and C and their father were Nigerian citizens, and A had the possibility to obtain citizenship or a residence permit there. They spoke English and A was assessed to have the possibility of

being able to support the family materially (möjlighet att kunna försörja familjen).”⁸⁴

In terms of discursive legitimation strategies, in this passage the MCA invests the MB’s initial expulsion decision with the legitimacy of the applicants’ religious belief as a part of their social identity (see Tajfel & Turner, 1986). Religion relates to their identity in the following sense. Their religion is 1) established (rationalizing legitimation through “knowledges society has constructed to endow them with cognitive validity” [Fairclough, 2003, p. 98]) and 2) respected as it can neither ethically nor legally be expected of people to change their belief (moral evaluation as “legitimation by reference to value systems” and authorizing “legitimation by reference to authority of tradition, custom, law” [ibid.]).

However, while applying the authorizing legitimation of the legal term ‘need of protection from’ (*skyddsbehov gentemot*), the passage does not grant much legitimacy to the claim that the mother and her children were also (sufficiently) endangered in Nigeria. With the keyword probable (*sannolikt*, lit. ‘like-the-truth’), which comes up in almost every precedent, certain facts are approximated. This approximated factual knowledge is discursively constructed by making a rationalizing legitimacy claim which, supported by those “knowledges [that] society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98), deems it to be rather not ‘like-the-truth’ (*sannolikt*) that the claimants could experience a well-founded fear of persecution in Nigeria. The threat that mother and children could be separated is also seen as less likely. A certain facticity is thereby invested with rationalized legitimacy, not in terms of ‘what has happened’, but ‘what will probably happen’. Furthermore, the mother’s fear of persecution in Nigeria was assessed by the MB both in terms of a personalized threat (the husband’s relatives) as well as a generalized threat. Or, as the MCA

⁸⁴ From the precedents: “Migrationsverket avslog asylansökningarna den 21 maj 2010. Verket bedömde att A, B och C var flyktingar i förhållande till Senegal p.g.a. sin religiösa uppfattning, men att de saknade skyddsbehov gentemot Nigeria. Det ansågs inte sannolikt att maken eller svärföräldrarna skulle ta barnen ifrån A eller att hon vid en eventuell vårdnadsprocess skulle sakna möjlighet att ta tillvara barnens rättigheter till umgänge med henne. En vårdnads- eller umgängestvist bedömdes inte grunda ett skyddsbehov i sig. Den allmänna situationen i Nigeria, även om det förekommer motsättningar mellan kristna och muslimer, kunde inte heller ligga till grund för skyddsbehov. Verkets uppfattning var att de hade tillräcklig anknytning till Nigeria för att det skulle anses rimligt och relevant att de bosatte sig där, eftersom B och C samt deras far var nigerianska medborgare och A hade möjlighet att själv erhålla medborgarskap eller uppehållstillstånd där. De talade engelska och A bedömdes ha möjlighet att kunna försörja familjen” (MIG 2012:9, p. 1).

puts it: “Neither could the general situation in Nigeria, even if there are conflicts between Christians and Muslims, constitute grounds for need of protection” (MIG 2012:9, p. 1).

When it comes to the assessment of this threat, however, there seems to be a preoccupation with institutions. Using Fairclough’s terms, there is a focus on the institutionalized action of a custody case being filed: “It was not considered probable that the husband or the parents-in-law would take the children away from A or that she, in an eventual custody case, would lack the possibility to seize the children’s rights to visit her” (MIG 2012:9, p. 1). Then it is the fourth strategy of legitimation, namely legitimacy through narration, which unfolds as the next sentence of MIG 2012:9 states that a “custody or visitation dispute was assessed not to constitute grounds for need of protection in itself.” Read as a narrative, this section of the precedent, which summarizes the MB’s initial expulsion decision, highlights one scenario (a custody dispute decided at court). In the meantime, it omits other possible scenarios, and subsequently makes a legitimacy claim based solely on this one scenario: “a custody or visitation dispute was assessed not to constitute grounds for need of protection in itself”. In discourse-analytical terms, this omission hints at “what is ‘unsaid’ but taken as given” (Fairclough, 2003, p. 40). The unsaid, but given, hypothesis seems to be the following. If there is a dispute in Nigeria, this issue is going to be decided at court. Yet, what could the mother’s and her children’s ‘grounds of need for protection’ be, if one assumes it to be more probable that the husband and his relatives would kidnap the children? As the directly following sentence leads the narrative to the issue of the claimants being generally endangered in Nigeria (“Neither could the general situation in Nigeria, even if there are conflicts between Christians and Muslims, constitute grounds for need of protection” [MIG 2012:9, p. 1]) the possibility that mother and children could be separated forcefully, yet without any involvement of the law, is not further considered in MIG 2012:9.

“[...The MB’s] perception was that they had sufficient ties to Nigeria so that it could be considered fair and relevant that they settled there, because B and C and their father were Nigerian citizens, and A had the possibility to obtain citizenship or a residence permit there” (MIG 2012:9, p. 1).

The details that the father is Nigerian (while his relatives are living in Nigeria), and that both children are Nigerian citizens, are stressed. These details provide the MB’s decision with authorizing and rationalizing legitimacy as well as moral

evaluation. The children could be expelled to Nigeria, legally speaking, because they hold the citizenship and, rationally and morally speaking, because the MB considered it “fair [...] that they settled there” (ibid.). That the father and his relatives could be a threat to the well-being of mother and children is not further considered. Instead, it is claimed that the mother “had the possibility to obtain citizenship or a residence permit there [in Nigeria]”, because the claimants “spoke English and A was assessed to have the possibility of being able to support the family materially.”⁸⁵ This reasoning, which stems initially from the MB and which is taken up by the MCA, concludes with a rationalizing legitimization strategy, as the following approximate facticity is presented: the mother could also (probably) become a Nigerian citizen.

At this point of the analysis it helps to see how Alexy understands legal discourse. In *A Theory of Legal Argumentation*, he presents the following insight:

“As a special case of general practical discourse, legal discourse includes the rules and forms of general practical discourse. Their application as criteria for correct decisions necessitates reference to hypothetical discourses and hypothetical consensus” (Alexy, 1989, p. 294).

Given Alexy’s understanding of legal decisions as driven by the aim of establishing a claim to correctness (see Banakar, 2015, p. 65; cf. Alexy, 2000, p. 146), his concepts of “hypothetical discourses and hypothetical consensus” are useful tools. In view of the excerpt from MIG 2012:9 that I started to analyse above, the scenario “that the husband or the parents-in-law *would* take the children away from A” (my emphasis in italics) is considered in the form of hypothetical discourse. When this possibility is then entirely left aside, while the argumentation focuses on an alternative possibility, namely “an eventual custody case”, a

⁸⁵ From the precedents: “Migrationsverket avslog asylansökningarna den 21 maj 2010. Verket bedömde att A, B och C var flyktingar i förhållande till Senegal p.g.a. sin religiösa uppfattning, men att de saknade skyddsbehov gentemot Nigeria. Det ansågs inte sannolikt att maken eller svärföräldrarna skulle ta barnen ifrån A eller att hon vid en eventuell vårdnadsprocess skulle sakna möjlighet att ta tillvara barnens rättigheter till umgänge med henne. En vårdnads- eller umgängestvist bedömdes inte grunda ett skyddsbehov i sig. Den allmänna situationen i Nigeria, även om det förekommer motsättningar mellan kristna och muslimer, kunde inte heller ligga till grund för skyddsbehov. Verkets uppfattning var att de hade tillräcklig anknytning till Nigeria för att det skulle anses rimligt och relevant att de bosatte sig där, eftersom B och C samt deras far var nigerianska medborgare och A hade möjlighet att själv erhålla medborgarskap eller uppehållstillstånd där. De talade engelska och A bedömdes ha möjlighet att kunna försörja familjen” (MIG 2012:9, p. 1).

hypothetical consensus is established. In other words, the way of reasoning in MIG 2012:9 was first put forward as a binary of two hypothetical threats: the relatives could take the children by force, or it could come to a legal dispute about custody. Privileging, from the outset, these two scenarios over any other scenario that could lead to the separation of mother and children, MIG 2012:9 subsequently implies that a custody dispute was a more probable threat to the unity⁸⁶ of mother and children. Thus, MIG 2012:9 assesses the case against the following, hypothetical background: “A custody or visitation dispute was assessed not to constitute grounds for need of protection in themselves.”

Now, if I link Alexy’s understanding of legal discourse to Habermas’ discussion on legitimacy through legality, the following is central. Habermas states that judges must legitimize their decisions by “obscuring” (*ausblenden*) non-legal normativity “in favor of the implied functional requirements” (Habermas, 1992, p. 569) of the legal system. When it comes to assessing the probability of certain events that might occur in the future, judges obscure not only certain normativities but also certain future scenarios. Naturally, no legal decision can possibly imagine, present and take into account every possible future development. Thus, if needed, judges firstly present a certain selection of possible scenarios of what might happen in the future, and then decide on the basis of these which are more or less probable future events. If one reads Alexy’s term “hypothetical discourse” in this context, i.e. as a conceptualization of those argumentations in legal discourse that depend on establishing a certain idea about what is likely going to happen in the future, one cannot but agree with his following conclusion: “[...] a judgment as to the correctness of a decision (except in the realm of the discursively necessary) is always provisional in nature – that is, it can always be contested” (Alexy, 1989, p. 294).

Against the backdrop of Habermas’ discussion on legitimacy through legality, Alexy’s view of legal judgments and decisions as “always provisional in nature” (Alexy, 1989, p. 294) is, therefore, congruent with the following, standpoint: “Legality can only produce legitimacy to the extent that the legal order reacts reflexively to the justification demand of positive law, and this in such a way as to institutionalize juridical decision-making procedures [...]” (Habermas, 1992, p.

⁸⁶ On the issue of the right to/principle of the unity of the family (*rätten till/principen om familjens enhet*), one judge I interviewed at the MCA stressed that “the [EUs] family reunification directive” (*familjeåterföreningsdirektivet*) is of central importance, because it sets the legal norm “that one shall not separate nuclear families” (*att man ska inte dela på kärnfamiljer*, IT4).

565, see also Chapter Four). Regarding the rationality of these procedures, Habermas further stresses that they can merely “come closer to the demands of complete procedure-rationality” (ibid.). This is due to the fact that completely rational juridical procedures would have to solve problems such as the following. When it comes to estimating the probability of certain scenarios in the future, in the above analysed decision it is simply stated that a certain scenario is either “probable” (*sannolikt*, MIG 2012:9, p. 1) or “not probable” (*inte sannolikt*, ibid.). Unlike, to use a very simple example, the weather forecast, this usage of probability does not specify how probable a certain future outcome is. In other words, MIG 2012:9 does not claim that there is a ‘25% probability’ that mother and children will be separated, in the same way as the weather report can speak of a ‘25% probability of rain’.

Such a critical view of legal discourses’ strong claim to rationality is supported by Klaus Eder’s investigation into the potential and limitations of procedural legitimacy (Eder, 1986; 1987). Habermas and Eder agree that the legitimacy of legal decisions cannot be based solely on the presupposed rationality of legal procedures (Habermas, 1987a; cf. Eder, 1988). In this context, therefore, I find Alexy’s terms hypothetical discourse and hypothetical consensus to be useful. Grounding a decision on the prediction of certain future developments being (im)probable cannot be an entirely certain enterprise. Instead, one could speak of probabilities. Notwithstanding the limitations of probability in the mathematical sense (for example, in meteorology), when something is deemed to be probable in the legal decisions that I analyse, this probability (or lack thereof) is not specified further. Alexy has theorized around this problem, while also recognising the limitations of natural scientific knowledge: “Even in the natural sciences, which are often held up in contrast with jurisprudence as the paradigm of genuine science, there can be no question of reaching conclusive certainty” (Alexy, 1989, p. 293). Precisely therefore, as I understand the term, Alexy’s concept of hypothetical consensus captures well the ways in which legal argumentation can use the term probable, i.e. something is not entirely certain, but (more or less) probable.

In MIG 2012:9, the first hypothesis is formulated as such: “It was not considered probable that the husband or the parents-in-law would take the children away from A [...]” (MIG 2012:9, p. 1). A hypothetical consensus is inherent to the assumption that a legal custody dispute constitutes the (most) probable threat to the unity of the family. Yet, from this hypothetical angle, the family was not seen as being in need of protection: “A custody or visitation dispute

was assessed to not constitute grounds for need of protection [...]” (ibid.). This being noted, these are still formulations of the MCA that paraphrase the initial expulsion decision of the MB.

Given these formulations, one general element of uncertainty in asylum cases in general becomes palpable. Legally assessing asylum seekers’ need for (international) protection is often strongly dependent on assessing the probability of future events (see Sweeney, 2009; cf. UNHCR, 1998). And while the legal party of the applicant(s) has the burden of proof to perform a credible ‘asylum narrative’ (see e.g. MIG 2014:1, p. 1; cf. Chapters Three and Eight), providing conclusive evidence that supports such a narrative is obviously limited to presenting evidence about past events and/or present states of affairs. Once again, Alexy’s legal theory can help to understand the centrality of this problem:

“[...] almost all legal – just as almost all general practical – argument forms include empirical statements. Statements of quite different kinds are under consideration here. Argument forms variously presuppose statements about particular facts, about individual actions, motives of agents, events, or states of affairs. [...] Furthermore, a distinction can be made between statements about past, present, and future [...]. Both in general practical and in legal discourse the problem arises that the necessary empirical knowledge is often not available with the desirable degree of certainty” (Alexy, 1989, pp. 232-233).

According to the MB’s standpoint as it is presented in MIG 2012:9, the threat of mother and children being separated did not constitute sufficient grounds for protection in Sweden. In the appeal to this assessment, the applicants’ legal party added information that was to be considered by the second-instance MC:

“A, B and C appealed the decision to the Migration Court, adding, among other things, the following. It had now been found (*Det hade nu visat sig*) that A’s husband was already married in Nigeria and that her [the mother’s] marriage was therefore invalid. She stated that they [mother & children] risked being sent back to Senegal by the Nigerian authorities. C risked genital mutilation in Nigeria. The Migration Board contested the appeal (*bestred bifall till överklagandet*) and argued, inter alia, the following. There is no support for [the claim] that the family will be sent back to Senegal from Nigeria. A has the opportunity to obtain citizenship in

Nigeria. National protection prevails over (*har företräde framför*) international protection.”⁸⁷

This exchange of arguments between the applicants and the MB, both of which were considered in the decision of the second-instance MC, applies both authorizing and rationalizing legitimation strategies. It had come up that the father was married to another woman. Therefore, his marriage to A was invalid. This new piece of information makes a rationalizing legitimacy claim “by reference to [... an] institutionalized action” (Fairclough, 2003, p. 98), i.e. marriage. The socio-cultural institution of marriage is, of course, invested with legitimacy “by reference to authority of tradition, custom, law, and of persons in whom some kind of institutional authority is vested” (ibid.) in Nigeria, as elsewhere. Seen from this angle, the appeal made by the applicants includes an intersection of rationalizing (institutionalized action) and authorizing (tradition, custom, law) legitimations. The same can be said about the reply of the MB. And yet there is a subtle difference in regard to the claims about facts that are put forward: “There is no support for [the claim] that the family will be sent back to Senegal from Nigeria”, as the MB’s response is summarized by the MCA. This is a direct factual claim. The formulation “there is no support” conveys meaning in the sense of ‘lack of evidence’. The final clause from the excerpt above then clearly applies the authorizing legitimation strategy by reference to law: “National protection prevails over (*har företräde framför*) international protection”, as the argument of the MB is presented by the MCA. The MC, however, decided as follows:

“The Administrative Court in Malmö, the Migration Court (2010-11-04, Chairman Westberg and three lay judges), supported the appeal and granted A, B and C permanent residence permits, refugee status and travel documents based on, inter alia, the following reasons. The new wording of Chapter 5. § 1 Aliens Act (2005: 716) has the result that a residence permit cannot be refused on the grounds that a safe third country exists in reference to the second paragraph. Any other

⁸⁷ From the precedents: “A, B och C överklagade beslutet till migrationsdomstolen och tillade bl.a. följande. Det hade nu visat sig att A:s make redan var gift i Nigeria och att hennes äktenskap därför var ogiltigt. Hon anförde att de riskerade att sändas tillbaka till Senegal av nigerianska myndigheter. C riskerade könsstympning i Nigeria. Migrationsverket bestred bifall till överklagandet och anförde bl.a. följande. Det finns inte stöd för att familjen kommer skickas tillbaka till Senegal från Nigeria. A har möjlighet att få medborgarskap i Nigeria. Nationellt skydd har företräde framför internationellt skydd” (MIG 2012:9, pp. 1-2).

regulation that allows for this does not exist either. As soon as an examination regarding (*prövning i sak*) the need of protection has taken place, and the alien is considered to be a refugee and therefore entitled to a residence permit under Chapter 5 § 1 first paragraph Aliens Act, the application cannot be rejected on the grounds that there is a safe third country. The [Migration] Board has not rejected the asylum applications [of A, B & C] under Chapter 5. § 1b Aliens Act with reference to Nigeria being a safe third country. The [Migration] Board has instead examined (*prövat*) their asylum applications and evaluated that they [A, B & C] are refugees in relation to Senegal. Expulsion to this country (*till nämnda land*) is therefore not possible. Legal preconditions for rejecting A's application for a residence permit with reference to Nigeria being a safe third country and her [A's] ties there [to this country] are lacking. She is therefore a refugee. With reference to the principle of the unity of the family (*principen om familjens enhet*) and to [the circumstance] that this [decision] concerns children, [the applications of] B and C should be evaluated in the same way (*att det rör barn ska⁸⁸ B och C bedömas på samma sätt*).⁸⁹

In view of this excerpt, one may highlight the procedural legitimacy implied within the detail that the judge – or ‘chairman’ – and the three lay judges came to a consensus decision. This decision was substantially different from the expulsion order that had been decided by the MB. Both the mother and her two children were granted “permanent residence permits, refugee status and travel documents” (MIG 2012:9, p. 2). In other words, they were fully recognized as refugees who could plan their lives in Sweden. This turn-around, second-instance decision was

⁸⁸ In this study, the Swedish auxiliary verb *ska* is, depending on the context, translated with ‘will’, ‘is/are’, ‘should’, ‘shall’, ‘is to be’ or ‘must’.

⁸⁹ From the precedents: “Förvaltningsrätten i Malmö, migrationsdomstolen (2010-11-04, ordförande Westberg samt tre nämndemän), biföll överklagandet och beviljade A, B och C permanent uppehållstillstånd, flyktingstatusförklaring och resedokument med bl.a. följande motivering. Den nya lydelsen av 5 kap. 1 § utlänningslagen (2005:716) får till följd att uppehållstillstånd inte kan vägras på grund av att ett säkert tredjeland finns med hänvisning till andra stycket. Någon annan bestämmelse som ger utrymme för detta finns heller inte. Så snart som en prövning i sak har ägt rum av skyddsbehovet och utlänningslagen ansetts vara flykting och därmed berättigad till uppehållstillstånd enligt 5 kap. 1 § första stycket utlänningslagen, kan ansökan inte avslås med hänvisning till att det finns ett säkert tredjeland. Verket har inte avvisat asylansökningarna med stöd av 5 kap. 1 b § utlänningslagen med hänvisning till att Nigeria är ett säkert tredjeland. Verket har i stället prövat deras asylansökningar och bedömt dem vara flyktingar i förhållande till Senegal. Utvisning till nämnda land är därför inte möjlig. Det saknas lagliga förutsättningar för att avslå ansökan om uppehållstillstånd för A med hänvisning till att Nigeria är ett säkert tredjeland och hennes anknytning dit. Hon är därför flykting. Med hänvisning till principen om familjens enhet och att det rör barn ska B och C bedömas på samma sätt” (MIG 2012:9, p. 2).

legitimized primarily “by reference to authority of [...] law” (Fairclough, 2003, p. 98). Its authorization is formulated as such: “The new wording of Chapter 5 § 1 Aliens Act (2005: 716) has the result that a residence permit cannot be refused on the grounds that a safe third country exists in reference to the second paragraph”. Moreover, “[...] any other regulation that allows for this does not exist either.” Meaning, in simple terms: Even if Nigeria were an entirely safe place to live, A, B and C could not be forced to travel there, because mother and children had filed their asylum applications, firstly, to become refugees ‘from Senegal’ (*gentemot Senegal*). Or, in the words of the precedent:

“As soon as a factual examination (*prövning i sak*) regarding the need of protection has taken place, and the alien is considered to be a refugee and therefore entitled to residence permit under Chapter 5 § 1 first paragraph of the Aliens Act, the application cannot be rejected on the grounds that there is a safe third country” (MIG 2012:9, p. 2).

This excerpt presents another example of rationalization as legitimation “by reference to the utility of institutionalized action, and to the knowledges society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98). When the examination of the factual claim that an applicant is in need of protection is confirmed, then “the alien is considered to be a refugee and therefore entitled to a residence permit” (MIG 2012:9, p. 2). By establishing a certain facticity that is officially recognized by the legal system and that is, in this sense, part of those “knowledges society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98), rationalization intersects with authorization. Thus, “the utility of [the] institutionalized action” (*ibid.*) to grant refugee status and a residence permit is presented as not only rationally but also as legalistically legitimate.

Finally, by publishing a precedent, the MCA generalizes the normative legal point that it makes with MIG 2012:9, while stressing two principles: “With reference to the principle of the unity of the family (*principen om familjens enhet*) and to [the circumstance] that this [decision] concerns children, [the applications of] B and C should be evaluated in the same way.” Thus, explicitly, “the principle of the unity of family” and, implicitly, the principle of ‘the child’s best’ (*barnets bästa*) are invoked. As legal principles, in terms of legitimation strategies, they exemplify how, firstly, legal discourse makes claims to correctness (Alexy, 1989) when using the word principle. In MIG 2012:9, the clear example of this being

“the principle of the unity of the family”. Yet, while called a “principle”, it is indeed one of those conceptions of human rights that need explicit legal norms within national jurisdictions (see Benhabib, 2016, p. 137; cf. Alexy, 2002a, pp. 47-48). Moreover, the unity of the family, as well as ‘the child’s best’, refer not only to legality but also to morality and, in these two ways, to legitimacy. The last passage of MIG 2012:9 presents the MCA’s decision as follows:

“Since it is nowadays not possible to reject a refugee’s asylum application on the grounds that there is a safe third country, the Migration Board could not, after having decided that A is a refugee from Senegal (*gentemot Senegal*), reject her asylum application. Therefore, the design of the current law does not provide scope in order to reject A’s application for asylum on the grounds that she can settle in Nigeria, while she has been assessed to have refugee status in relation to [from] Senegal (*gentemot Senegal*). The Migration Board’s appeal concerning A has, therefore, to be rejected. When hereinafter regarding B and C, it is in this [legal] case (*målet*) undisputed that A’s children, as minors, are to be regarded as refugees from Senegal under Chapter 4 § 1 Aliens Act. With regard to this and to the principles of the unity of the family and the child’s best, the Migration Court of Appeal finds, in the assessment which the court has done concerning A, no reasons to change the Migration Court’s judgment (*domslut*) that concerns B and C, notwithstanding that they are also citizens of Nigeria.”⁹⁰

This passage explicitly frames both “the right to the unity of the family” as well as “the child’s best” as “*principles*” (MIG 2012:9, p. 6, my emphasis in italics). They are once more highlighted and taken up at the very end of the precedent, and after referring to relevant legal sources from the Swedish Aliens Act. Therefore, I would argue that it is accurate to say that, with these two terms, the MCA legitimizes its decision both “by reference to [...] law” as well as “by reference to [non-legal] value systems” that are represented by these two terms as “conceptions of human

⁹⁰ From the precedents: “Eftersom det numera saknas möjlighet att avslå en flyktings asylansökan på grund av att det finns ett säkert tredjeland kunde Migrationsverket inte, efter att i sitt beslut ha konstaterat att A är flykting gentemot Senegal, avslå hennes asylansökan. Utformningen av den nuvarande lagstiftningen ger således inte utrymme för att avslå A:s asylansökan med hänvisning till att hon kan bosätta sig i Nigeria, när hon har bedömts ha flyktingskäl gentemot Senegal. Migrationsverkets överklagande beträffande A ska därför avslås. När det härefter gäller B och C är det i målet ostridigt att de är A:s minderåriga barn och att de är att anse som flyktingar enligt 4 kap. 1 § utlänningslagen gentemot Senegal. Med beaktande av detta och principerna om familjens enhet och barnets bästa finner Migrationsöverdomstolen vid den bedömning som domstolen har gjort avseende A inte skäl till ändring i migrationsdomstolens domslut avseende B och C oaktat att dessa är medborgare även i Nigeria” (MIG 2012:9, p. 6).

rights [that] require specific legal norms” (Benhabib, 2016, p. 137). In other words, the legal as well as the moral aspects of these two “principles” are referred to.

Conclusions

With the focus on the study’s first research question in this chapter, the following findings can be presented. My reading of two precedents that concern the asylum applications of protection-seeking families has shown that, in order to legitimize these last-instance decisions, different discursive strategies are applied. The most frequently used strategy of legitimation, in both decisions, has been authorization, i.e. making legitimacy claims “by reference to authority of tradition, custom, *law*” (Fairclough, 2003, p. 98, my emphasis in italics). Legitimation by reference to law is prominent in both of the analyzed precedents. One such legal norm, namely the best interest of the child, which clearly intersects with legitimation strategies based on moral evaluation “by reference to [non-legal] value systems” (ibid.), however, can be questioned regarding its content.

When reading the two last-instance legal decisions in contrast to one another, it becomes clear that in MIG 2007:25 the best interest of the child requires – despite being called called a “principle” (p. 2) – a specific legal norm at the national level. Meanwhile, in MIG 2007:25 the child’s best interest is subordinated to the national interests of territorial sovereignty and the preservation of social order by regulating immigration. The precedent paraphrases the MB in the sense that no principle will be established according to which seriously ill children – who are not Swedish citizens and who could receive better health care in Sweden than in their ‘home country’ (*hemland*) – may be granted residence permits in order to access the Swedish healthcare system. It is in this context that, in MIG 2007:25, the best interest of the child is de-legitimized as it does not become a principle – in reference to Alexy, Benhabib (2016) makes a conceptual distinction between ‘strong principles’ and ‘weak norms’ – that would entail nationally valid legal practice in the form of a precedent. The rejection of the respective applicants is legitimized by subordinating the best interest of the child to the authorizing as well as rationalizing legitimacy of the assessment “[t]hat the care which B could receive in Sweden is of higher quality cannot in itself entail that a residence permit is granted” (MIG 2007:25, p. 2).

On the other hand, MIG 2012:9 legitimizes the right of an asylum-seeking family to remain in Sweden. In this case too, the MCA starts by summarizing the MB's legitimation of its expulsion decision "by reference to [...] law" (Fairclough, 2003, p. 98). This is made clear with the following statement: "National protection prevails over international protection" (MIG 2007:25, p. 2). This statement had been made in the context of the MB's decision to expel the family not to Senegal, as the country from which they had initially received refugee status, but to Nigeria. Hence the authorizing legitimation by reference to the legal norm that "[n]ational protection prevails over international protection" was included in this first-instance decision to legitimize expulsion to Nigeria, instead of asylum in Sweden. In its final assessment, however, which turned around the decision of the MB and granted refugee status as well as permanent resident permits to the family, the MCA first of all de-legitimized the MB's argumentation with a direct reference to law, i.e. through the (in legal texts prominent) legitimation strategy of authorization: "[T]he design of the current law does not provide scope in order to reject A's application for asylum on the grounds that she can settle in Nigeria, while she has been assessed to have refugee status in relation to Senegal" (MIG 2012:9, p. 6).

In the very end of the storytelling of MIG 2012:9, the MCA legitimizes its corrective decision as such: "With regard to [...] the principles of the unity of the family and the child's best, the Migration Court of Appeal finds, in the assessment which the court has done concerning A, no reasons to change the Migration Court's judgment that concerns B and C, notwithstanding that they are also citizens of Nigeria". In terms of rationalization as one applied legitimation strategy, it was "by reference to the utility of institutionalized action, and to the knowledges society has constructed to endow them with cognitive validity" (Fairclough, 2003, p. 98) undisputed that the children were Nigerian citizens and that they could utilize this institutional status, if expelled to Nigeria. In MIG 2012:9, however, 'the unity of the family' and 'the child's best' transcend this rationalising legitimation of expulsion. Instead, they lead to a precedent that legitimizes the asylum-seeking family's right to stay in Sweden.

Obviously, either the acceptance or the rejection of families with children who seek asylum can be legitimized through legal precedence. Against the background of the principle of universalizability as the primary basis on which precedents are formulated (Alexy, 1989, p. 275), the child's best can be identified as a rather weak norm of human rights (see Benhabib, 2016, p. 137). MIG 2007:25 (p. 2) illustrates this in quite straightforward language: "This case cannot be seen as a

single [legal] case, since granting a residence permit in principle would entail that all children with the same problem have the right to a [residence] permit in Sweden.” The functional requirements of the legal system determine this evaluation (Habermas, 1992, pp. 565f). The case cannot be treated as single legal case, because granting a residence permit in Sweden “*in principle* would entail that all children with the same problem have the right to a [residence] permit in Sweden” (MIG 2007:25, p. 2, my emphasis in italics). Given the overarching policy of regulating immigration, often motivated by the need to safeguard national sovereignty, security and social order (see also Chapter Seven), MIG 2007:25 is an example of law becoming a “means for political ends” (Habermas, 1992, p. 567). In consequence, by subordinating the child’s best to the policy of regulating immigration, the lifeworld of the affected families risks being colonized by the system (ibid.).

On this point, my findings are in line with recently published research (Johannesson, 2017, pp. 173f), which challenges the view of special migration courts as institutions that necessarily protect asylum seekers against restrictive immigration policies. Moreover, my interpretation echoes the critique of another study of the precedents of Swedish asylum law, which highlights the subordination of asylum-seeking children’s interests to the Swedish state’s aim of controlling immigration (Josefsson, 2016, pp. 13f) Regarding the first legal instance, these research results are also similar to the conclusions that are drawn by researchers who analyse the rights of asylum-seeking children in cases processed by the MB. As Lundberg summarizes (2011, p. 49), “at the Migration Board, children’s rights are treated as secondary to the national interest of keeping overall migration numbers down”.

Given the interview material, from which I have presented excerpts in the first main section of this chapter, the judges’ concern with the difficulty of deciding cases that affect asylum-seeking children is mirrored in the two precedents on which I focused. It would be an oversimplification to say that the legitimacy of these decisions can be questioned because, in both cases (MIG 2007:25 & MIG 2012:9), the different legal instances came to different decisions. Rather, my reading of MIG 2007:25 and MIG 2012:9 urges me to think in relative terms. As mentioned above, one of the judges maintained that “we [the judges] are so [EU] directive-steered (direktivstyrda) in this area, with [family] reunification and the family’s – what is it called – the right to the unity of the family” (IT9). When reading MIG 2007:25, however, one must acknowledge that this “right to the unity of the family” (IT9) is only a relative right. If, as it is stated in MIG 2007:25,

the highest Swedish migration court can conclude that the “care which B could receive in Sweden is of higher quality”, at the same time as this “cannot in itself entail that a residence permit is granted”, what value does the “right to the unity of the family” indeed have? In other words, how can the unity of a family be safeguarded without safeguarding the practice that epileptic children should receive the best possible health care? Regarding ‘the child’s best’, it cannot be logically argued – in the form of a well-grounded consensus (see Habermas in Alexy, 1989, p. 111) – that it is in the child’s best interest to be expelled to a country with potentially lower quality health care.

Finally, in relation to the issue of temporality, one last remark regarding the future. As the reader may have noticed, I emphasized the word in bold font whenever it came up in the excerpts that I cited. This happened three times. In the first example, the MCA summarized its final decision with, among others, the following sentence: “It has not been shown that the child’s **future** development and the quality of life would be compromised in a decisive way if the child returned to the home country” (MIG 2007:25, p. 1, my emphasis). In the second example, the MCA paraphrases the second-instance decision as such: “It is clear that the treatment has importance for his **future** development and quality of life” (MIG 2007:25, p. 2, my emphasis in bold). Lastly, as the third example, the MCA legitimizes its own decision with the following sentence: “Care is available in Asmara, and it has not been shown in the case that B’s **future** development and quality of life would be endangered in a decisive way through him returning to the home country” (MIG 2007:25, p. 2, my emphasis).

Recognizing the discursive relation between ‘future’ and ‘development’, these passages lead me to the following considerations. First, in contrast to MIG 2012:9, in MIG 2007:25 one can find formulations that explicitly link legal decisions to possible (or ‘probable’) future events. Second, despite the claim of formulating decisions only in response to normative (legal) questions, in these passages of MIG 2007:25 the MCA does make statements that concern factual questions. At least in the first and third example of the three sentences from MIG 2007:25 that I cited above, the MCA states its own assessment of the likelihood of events as they might develop in the future. Regarding Johannesson’s (2017, p. 177) finding that, at the second-instance MCs, “judges still have to make an assessment of the future risk of harm”, I must add that this happens also at the third-instance MCA. Hence my conclusion that factual aspects are also taken into account in precedents of Swedish asylum law, despite the MCA’s official function to produce decisions solely in response to normative (legal) questions.

As previously highlighted, the problems of empirical reasoning and statements about past, present and future play a significant role in “numerous legal cases” (Alexy, 1989, p. 233). Among other issues, with my focus on the term ‘credibility/genuineness’ (*trovärdighet*), the problem of making claims about the future is an important part of the discussion in the following chapter.

Chapter Six

Reading into the (In)visibilities of Asylum Cases: Class, Ethnicity, Religion, Gender and Sexuality

In the preceding chapters, I introduced the research questions and discussed my methodological considerations. Following this, I presented my conceptual framework in order to conduct a critical discourse analysis of six precedents of Swedish asylum law. I then began to apply concepts from this framework in the first empirical chapter that revolved around the first research question. Accordingly, in the second empirical chapter, which unfolds in the pages below, the focus is on the second research question. This question was posed as follows: When considering precedents as legal narratives, which discursive representations correspond to gender, sexuality, ethnicity, religion and/or class?

Understanding a Data Set in Which Class is Absent

Traces of social class are largely absent from highly formalized legal texts such as the precedents analyzed in this study. The interview data, however, can provide some clues when it comes to the question of how the applicants' class positions can play a role when filing an asylum claim in Sweden. On the one hand, a second-instance Migration Court judge uttered the following:

“[...] if the one fleeing (*den flyende*) says this, ‘I have such a poor electricity supply in my home country, and in addition I have a huge maintenance burden (*jättestor försörjningsböorda*) and I cannot afford the life that we have there,’ yes, it is

regrettable, but it does not constitute grounds for seeking asylum (*det är inte flyktskäl*) [...]” (IT6).⁹¹

Hence the observation that grounding an asylum application on lacking the economic capital needed to “afford the life” (IT6) in the country of origin is dismissed by this judge. Neither a “huge maintenance burden” (IT6) nor the lack of economic capital to “afford” (ibid.) one’s life can be considered as legitimate grounds for protection. On the other hand, in the same interview the following reasoning was formulated:

“If I come to the conclusion: This is a well-educated human being, who is a young man who also is healthy and has a good network around him, some form of family, friends, relatives, whatever it may be, then I know that much more is needed (*det ska väldigt mycket till*) in order for me to be able to recognize a need-for-protection (*erkänna skyddsbehov*), in as much as it is not the case (*såvida det inte är så*) that bombs drop on his head all the time. If, however, it happens (*Är det däremot så*) that I arrive at the analysis that this person is disabled (*handikappad*), [and lives] in the countryside, belongs to a minority clan and so on, well, then it becomes the other way around (*då blir det åt andra hållet*), well.” (IT6)⁹²

If one understands a person’s class position in Bourdieusian terms (cf. Chapter Two), i.e. as also defined by cultural capital (e.g. “well-educated” [IT6]) and social capital (“a good network” [ibid.]), the judge’s statement can be read as follows: For applicants from a comparably favourable class position, “much more is needed”, so that this judge “can recognize a need for protection” (IT6). At the same time, this interview excerpt also includes an explicit mention of other aspects of a person’s social position. These are apparently important when the interviewed judge considers asylum applications. Being “young” (age), a “man” (gender) and “healthy” (health) is correlated negatively with the legal term “need for protection” (*skyddsbehov*, IT6). Being “disabled” ([dis-]ability), living “in the

⁹¹ From the interview data: “[...] om den flyende säger så här: Jag har så dålig elförsörjning i mitt hemland och dessutom så har jag jättestor försörjningsböroda och jag har inte råd med det liv som vi för där. Ja, det är beklagligt, men det är inte flyktskäl [...]”

⁹² From the interviews: “Har jag då kommit fram till då: Det här är en välutbildad människa, som är en ung man som dessutom är frisk och har ett gott nätverk omkring sig, nån form av familj, vänner, släkt, vad det kan vara, då vet jag att det ska väldigt mycket till för att jag ska kunna erkänna skyddsbehov, såvida det inte är så att det faller bomber i skallen på honom hela tiden, va. Är det däremot så att jag kommer fram till den här analysen att den här personen är handikappad, på landsbygden, tillhör en minoritetsklan osv. Ja då blir det åt andra hållet, va.”

countryside” (rural-urban) and belonging “to a minority clan” (ethnicity), means this “becomes the other way around”. Hence one observation is significant. The judge categorizes asylum applicants by mentioning certain aspects of their social positions (e.g. gender) that are clearly related to the refugee definition according to international and national legal norms (UNHCR, 2010; cf. UtL 2005:716, Chapter 4). Other aspects (e.g. education or social networks), however, are less clearly linked to legal definitions of ‘the refugee’ (see Chapter Two). In line with the UN Refugee Convention (see UNHCR, 2010), the EU’s refugee reception policy (e.g. EU Regulation 604/2013) and the Swedish Aliens Act from 2005 (UtL 2005:716), the MB summarizes – in English – the relevant regulations as follows:

“[...] a person is considered a refugee when they have well-founded reasons to fear persecution due to race, nationality, religious or political beliefs, gender, sexual orientation, or affiliation to a particular social group. [...] In exceptional cases asylum seekers may be granted a residence permit, even if they do not need protection from persecution. This requires extraordinary circumstances directly linked to their personal situation, (for example, people with very serious health issues or people subjected to human trafficking) implying that a decision to deny residence permit would conflict with Sweden’s international obligations” (Migration Board, 2017a).

The judge relates to ethnicity implicitly with the formulation “minority clan” (IT6). Nationality does, of course, always play a significant role in asylum cases as it is – in almost all cases (exceptions are stateless people) – relevant to determine the ‘home country’ (*hemland*) of the applicant. This is also mentioned in the interview excerpt. Not mentioned by the judge in this excerpt, however, are “religious or political beliefs”, or “sexual orientation”. Instead, it is at another point in the same interview that the judge explicitly addressed these terms: “Gender, sexuality, religion, politics of course, ethnicity [...] they are grounds of persecution (*förföljesegrunder*). Today one talks about religious and sexual identity” (IT6).⁹³

When it comes to what the Swedish Migration Board in the above citation calls “exceptional cases”, the longer excerpt from the interview, which is cited above, mentions health; in the judge’s words “a healthy young man” (IT6). Meanwhile,

⁹³ From the interviews: “Kön, sexualitet, religion, politik givetvis, [...] de är förföljesegrunder. Idag talar man ju om religiös och sexuell identitet.”

this formulation also includes categorizations that cannot easily be related to the refugee definition as the Migration Boards presents it: Age (“young”), disability (“*handikappad*”) and a cultural-geographical background in terms of either rural or urban ([living] “in the countryside”) are mentioned by the judge as categorizations to determine the applicant’s “need for protection” (IT6). One may argue that, from a legal perspective, these among the judge’s categorizations can fit into “affiliation to a particular social group” or “extraordinary circumstances directly linked to their personal situation”, as the Migration Board (2017a) summarizes these categories of the refugee definition cited above (cf. UNHCR, 2010; 2002).

Be that as it may, I find the following observation to be analytically noteworthy. Not only can complex aspects of a person’s social position, such as age (in the interview excerpt: “young”), (dis-)ability (“*handikappad*”), rural or urban (“in the countryside”), be taken into account when a legal decision is made, but also indicators of cultural capital (“well-educated”) and social capital (“a good network”); at least when it comes to asylum cases decided by judges at Sweden’s MCs. In other words, ‘law in the books’, as it is for instance presented in the MB’s refugee definition cited above, does not mirror precisely how and on what grounds the respective legal decisions are taken. To present this as a finding, however, would be not much more than stating the obvious in the sense of ‘re-inventing the wheel’ of empirically studying the law⁹⁴ (see e.g. Staaf, 2005; cf. Banakar, 2015, p. 12). Instead, the central argument that I intend to put forward with this introductory section is the following: Despite the absence of class in the precedents, the discussion above – together with Chapter Two’s focus on migration as a classed social process – helps to identify the conflict between:

1) sociological knowledge that has time and again shown that, de facto, class as much as ethnicity and gender – among other more or less contextually significant markers of a person’s social position – matter, as they intersect continuously and thereby mark (and are marked by) our positions as human beings who live within a complex web of power relations (Crenshaw, 1989); and

⁹⁴ For instance, with her focus on *rättsäkerhet* (in her translation ‘legal security’, see above), Staaf could show that, in the context of ‘compulsory treatment and care’ (*tvångsvård*) in Sweden, understandings of *rättsäkerhet* vary among the staff who shall do their work in accordance with this legal ideal. In her words, the “results show a relatively fractured picture with respect to the maintenance of legal security values” in Swedish ‘facilities for compulsory treatment and care’ (*LVM-bemmen*, see Staaf, 2005).

2) legal definitions of ‘the refugee’ as, de jure, an individual who must have “well-founded reasons to fear persecution due to race, nationality, religious or political beliefs, gender, sexual orientation, or affiliation to a particular social group” (Migration Board, 2017a).

This being noted, the way in which categorizations of race/ethnicity and religion, sex and gender as well as sexual orientation/sexuality⁹⁵ are represented in precedents of Swedish asylum law is exemplified in what follows below.

The Swedish Migration Bureaucracy’s Categories

“[...] we always begin with the actual grounds for becoming a refugee (*egentliga flyktingskäl*). What we say [is] that one claims that one is persecuted and harbours a well-founded fear (*hyser en välgrundad fruktan*) – as it is called – of persecution. And this of course includes, not explicitly but actually, ethnicity as grounds for persecution (*förföljelsegrund*). This is called race (*ras*) then. It’s a more old-fashioned term, in the 1951 Refugee Convention, and it states race in the Swedish Aliens Act as well, but obviously what it means is what we in more modern language call ethnicity (*det vi i mer modernt språkbruk kallar etnicitet*). So this is grounds for persecution which is recognized (*förföljelsegrund som erkänns*) – there are particular social groups, for example Kurds who are resident in Iraq, of which just being a member can make one extra vulnerable under certain conditions” (IT6).⁹⁶

This excerpt from an interview I conducted with a judge at an MC illustrates the following. The term ‘ethnicity’ (*eticitet*) frequently occurs in discussions about protection-seeking people. Examples of precedents in which ethnic belonging is a significant part of the narrative are MIG 2007:9, MIG 2007:16, MIG 2007:33,

⁹⁵ With ‘race’ (*ras*), ‘sex’ (*kön*) and ‘sexual orientation’ (*sexuell läggning*) I am taking up terms that are used in the data (both interviews and precedents). Analytically, I prefer the terms ethnicity, gender and sexuality.

⁹⁶ From the interviews: “[...] vi börjar ju alltid med egentliga flyktingskäl. Det vi säger att man gör gällande att man är förföljd och att man hyser en välgrundad fruktan, som det heter, för förföljelse. Och där ingår ju, inte uttryckligen men väl faktiskt, etnicitet som en förföljelsegrund. Det heter ‘ras’ då. Mera gammaldags begrepp, i 1951-års flyktingkonventionen, och det står ‘ras’ i svenska utlänningslagen också, men det som uppenbarligen avses är det vi ju det vi i mer modernt språkbruk kallar ‘eticitet’, så att det är en förföljelsegrund som erkänns, det är en sån särskild samhällsgruppering, till exempel vara kurd och bosatt i Irak, att man kan vara extra sårbar bara på grund av det under vissa förutsättningar.”

MIG 2011: 5 and MIG 2011:26. The third in this list, MIG 2007:33, is a precedent that relates to a case in which the applicant is categorized as being a ‘Kurd’ (*kurd*), understood as a distinct ethnic group, and ‘Yezidi’ (*yezid*), understood as a religious minority in Iraq. And while the judge cited above (IT6) mentioned the identity of being Kurdish, MIG 2007:33 (decided on 15 June 2007) identifies the applicant with the following, short, declarative clauses:

“He is Yezidi and a Kurd. He has never been politically active, and he has never had problems with the home country’s authorities (*hemlandets myndigheter*). He was in love with his cousin and wanted to marry her. The cousin’s father forbade the marriage” (MIG 2007:33, p. 1).⁹⁷

Focusing on the second clause from this excerpt exemplifies how important the categorization “politically active” can be. The notion of the political refugee is as old as the 1951 UN Refugee Convention, and still of central importance today for the international refugee regime (see Barnett, 2002; cf. Mayblin, 2014; McAdam, 2017). As the refugee definition of the MB, which I had already cited above, states:

“In accordance with the UN Convention Relating to the Status of Refugees, Swedish legislation and EU regulations, a person is considered a refugee when they have well-founded reasons to fear persecution due to race, nationality, religious or *political beliefs*, gender, sexual orientation, or affiliation to a particular social group” (Migration Board, 2017a, my emphasis in italics).

Rather than being “politically active” (*politiskt aktiv*), as it is put in MIG 2007:33, the MB here frames its identification of the political refugee as holding a belief. Such contrasts lead to the complex question of whether the ‘politicalness’ of being categorized as a political refugee can be seen as an aspect of an individual’s identity. This understanding of a ‘political identity’ would be more similar to conceptualizations such as “sexual identity” (IT6), as I have quoted the judge above. Regarding this conceptual complexity, I was told the following:

“[...] here one probably reaches the outskirts of science (*vetenskapens utkant*), when it comes to trying to draw a circle around (*försöka ringa in*) which kind of contact

⁹⁷ From the precedents: “Han är yezid och kurd. Han har aldrig varit politiskt aktiv och han har aldrig haft problem med hemlandets myndigheter. Han var kär i sin kusin och ville gifta sig med henne. Kusinens far förbjöd giftermålet.”

there is between politics and the self, so to speak. I would think that one can say this: religious and sexual identity have a character of permanence (*oavytterlighet*), so to speak, that it is something that cannot be helped, quite simply, it's just like it is. Perhaps to an even greater extent when it comes to sexual identity than religious identity, but they are related (*besläktade*) in that way. When it comes to political identity one might hesitate a little to describe it as an identity concept, that one has a political affiliation (*politisk hemvist*). There can certainly be examples of people who say: I am indissolubly (*ouplösligen*) social democrat from the cradle to the grave. But I almost think this is more unusual today than it has been” (IT6).⁹⁸

With this statement the judge addressed the complex notion of *identitet*. In the context of asylum applications, this word first of all refers to ‘the identity of a person’ in the sense of establishing the applicant’s full name, nationality, birthplace, and so forth. The judge also touches upon the question of whether the different ‘grounds for protection’ (*skyddsgrunder*) can be understood as a somewhat coherent collection of different yet interrelated “identity concept[s]” (IT6). As the judge stressed in an earlier part of the interview, “Gender, sexuality, religion, politics of course, ethnicity [...], they are grounds of persecution (*förföljesgrunder*)”, whereupon it was added that “[t]oday one talks about religious and sexual identity” (IT6). Thus, twice in the same interview, a judge singled out sexuality and religion as ‘identity concepts’ (*identitetsbegrepp*). Or, in the words of the judge: “I would think that one can say this: religious and sexual identity have a character of permanence (*oavytterlighet*), so to speak, that it is something that cannot be helped, quite simply, it's just like it is” (IT6).

Perhaps, the judge further elaborates, this is the case “to an even greater extent when it comes to sexual identity than religious identity, but they are related in that way.” What the judge is surer of is the conceptual difference between (sexual and religious) “identity” and “political affiliation” (*politisk hemvist*). According to the judge, “one might hesitate a little to describe [such political affiliation] as an

⁹⁸ From the interviews: “[...] här är man nog ute i vetenskapens utkant, när det gäller försöka ringa in vad politik har för kontakt med det egna jaget så att säga. Ähm, jag skulle tro att man kan säga såhär: Religiös och sexuell identitet har en karaktär av oavytterlighet så att säga, att det är nånting som, jag rår inte för detta, helt enkelt, det är som det är bara. Kanske ännu i högre grad när det gäller sexuell identitet än den religiösa identitet, men att de är besläktade på det sättet. När det gäller politisk identitet så skulle man väl kanske tveka lite grand för att beskriva det som ett identitetsbegrepp, att jag har en politisk hemvist, det kan säkert finnas exempel på personer som säger: Jag är ouplösligen socialdemokrat från vaggan till graven alltså. Men jag tror nästan det är det ovanliga idag än det har varit, alltså.”

identity concept” (IT6). Instead, as the judge continues to develop the thought, “there can certainly be examples of people who say: I am indissolubly (*ouplösligen*) social democrat from the cradle to the grave”, while the judge tends towards the opinion that “this is more unusual today than it has been” (IT6).

Hence the judge makes a distinction between the “grounds of persecution” (*förföljesegrunder*, IT6) of sexual and religious “identity” (IT6) on the one hand, and “political affiliation” (*politisk hemvist*, IT6) on the other. That the judge with the term “political affiliation” uses yet another term for the category of the political refugee, which the Swedish Migration Board (cited in English above) calls “political belief”, and which the Migration Court of Appeal in MIG 2007:33 refers to as being “politically active” (*politisk aktiv*), does indeed not diminish confusion. How should one understand the overarching categorization of ‘political refugee’? At this point of the discussion, it is useful to see how Åsa Wettergren and Hanna Wikström introduce their empirical study of Migration Court decisions that concern Somali asylum seekers in Sweden:

“The notion of refugee has been criticised internationally, because it rests upon a narrow Western understanding of what political persecution means, assuming wilful political participation in what is conventionally considered a political sphere (supranotes: cf. Bhaba, 1996; Calgagno, 2008; Spijkerboer, 2000; Tamboukou, 2005; Wikrén & Sandesjö, 2010). Persecution is thus presumed to be directed at the individual and carried out by state actors. According to critics, this understanding of political subjectivity has effects on the categorisation of asylum seekers, as it tends to exclude a number of groups and actions – not being viewed as properly political – from refugee status [...]. For instance, women, whose activities tend to be confined to what we conventionally term ‘the private sphere’, may be ignored as carriers of ‘conscious and wilful actions undertaken by agents to achieve a desired and successful end’ (supranotes: Bhaba, 1996; Calgagno, 2008, p. 1066). To meet this problem, receiving countries – following international legislation, as well as inventing solutions of their own – offer a number of subcategories to refugee status, commonly referred to as ‘subsidiary’ protection (supranotes: cf. Adamson, Triadafilopoulos & Zolberg, 2011; Morris, 2009). Subsidiary protection serves as a residual category to include asylum applicants that do not fit the refugee category, and thereby ‘entrenches a protection hierarchy’ (supranote: McAdam, 2005, p. 462)” (Wettergren & Wikström, 2014, p. 567).

Indeed, against the backdrop of this criticism of the restrictive granting of (full) refugee status, the relation between the category of the political refugee and the other legally recognized grounds for seeking protection does not become less

complicated. As Wettergren and Wikström summarize existing research on the issue, the fact that ‘the refugee’ initially – in 1951 – was conceptualized as the (implicitly male) political refugee who, in the aftermath of WWII and, thus, during the Cold War (cf. Barnett, 2002), would escape/flee/seek refuge from political persecution directed against ‘him’, implies “a narrow Western understanding of what political persecution means” (Wettergren & Wikström, 2014, p. 567). Indirectly, this critique is of further importance in understanding how protection-seeking “women, whose activities tend to be confined to what we conventionally term ‘the private sphere’” (ibid.) are still affected today by these historical roots of the international refugee regime. Asylum seekers from different cultural backgrounds are forced to deal with migration bureaucracies in the Global North that are largely rooted in a “narrow Western understanding” (ibid.). As one example of such limited Western understanding, I think it is fair to say that the judge was thinking rather of Western contexts – and probably of Swedish political culture – when half-jokingly telling me that “there can certainly be examples of people who say: I am indissolubly social democrat from the cradle to the grave” (IT6). Whether such a ‘half-joke’ has any value for understanding the diversity of ways in which politically motivated persecution is experienced around the globe is obviously another question.

Jokes aside, the judge formulated another distinction in another section of the interview. At this point, it was not the difference between the categories of political belief/activity/affiliation or the need for protection on the grounds of being persecuted due to one’s religious or sexual “identity” that were the focus. Instead, the judge touched upon an aspect of the category of ethnicity which a layperson would maybe not think of immediately:

“Yes, well, ethnicity one can say, it is [included] there because, often, one must get an idea about which region this person comes from, so that one becomes able to understand why this person should get asylum or why they (*den*)⁹⁹ should not get asylum [...]” (IT6).¹⁰⁰

⁹⁹ In line with translating *sin/sitt* as ‘their’ (see below), I translate *den* as ‘they’ (instead of ‘she or he’) in an attempt not to reproduce sex/gender binaries.

¹⁰⁰ From the interviews: “Ja, alltså etnicitet kan man väl säga, det är väl med därför att man måste, ofta, få en uppfattning om vilken region i vart fall den här personen kommer ifrån, så att man ska kunna förstå varför ska den här personen få asyl eller varför ska den inte få asyl. [...] Men däremot, religion eller kön, det har ju egentligen ingen betydelse annat om än det skulle råka vara så att

Indirectly related to the understanding of identity as those details that are written in a person's passport, this aspect of ethnicity is linked to the ways in which the word *hemvist* is frequently used in the precedents.¹⁰¹ Meant not in the "political affiliation" (*politisk hemvist*) sense that was mentioned in the interview (IT6), but in the more literal sense of *hemvist*, meaning of 'being at home'. In the words of the judge, one must establish the applicant's *hemvist* in order to know "which region this person comes from, so that one becomes able to understand is why this person should get asylum or why they (*den*) should not get asylum" (IT6).

Before I continue with analysing how the complex categorizations of ethnicity and religion, as well as gender and sexuality, are represented in the precedents, it should be stressed that this discussion illustrates the following. Based on the data I collected through interviewing migration court judges, I can highlight that 'identity' and 'ethnicity' tend to refer to different things in different contexts. Thinking of Derrida (1991 [1982]) and his neologism *différance*, the 'sign' of the Swedish word *identitet* can, in the context of an asylum application, indeed relate to a range of different signified meanings. For example, sexuality can be framed as 'sexual identity', religion as 'religious identity', at the same time as 'identity' can also simply mean what is written in the applicant's passport. Regarding the claim of being politically persecuted, the decision-making at Sweden's MCs can, in the words of a judge, take into consideration the political 'being-at-home' ("*politisk hemvist*", IT6) of an applicant. In a precedent, the respective question can be whether the applicant had "been politically active" (*varit politiskt aktiv*, MIG 2007:33, p. 1). To show that such different formulations – or different meanings of the same word in different contexts – complicate the task of analysing how important markers of a person's social position are represented in the precedents, is the purpose of what I have discussed up to this point.

Now, before delving into the analysis of the relevant excerpts from two precedents for this discussion, I want to return one last time to what I was told by a judge. As mentioned above, this judge claimed that "[...] here one probably reaches the outskirts of science, when it comes to trying to draw a circle around which kind of contact there is between politics and the self, so to speak" (IT6). As a researcher, I cannot but agree with this statement. And yet: The question of

målet, liksom den intressanta frågeställningen, det som vi vill uttala oss om, har - handlar om förföljesle på grund av kön eller religion t.ex."

¹⁰¹ For *hemvist* see e.g. MIG 2006:7; MIG 2007:40; MIG 2011:4; MIG 2012:9; MIG 2013:21; MIG 2016:7.

whether being a refugee is to be understood rather as the identity of forced migrants or as the agency of social actors – or if, maybe, an entirely different conceptualization that reaches beyond this dichotomy is needed¹⁰² – is of utter importance for policy, legislation and, thus, the affected people. Therefore, the greatest possible scrutiny should be applied in any research project that touches upon this issue.

Ethnicity and Religion as Grounds for Protection

That scholarly scrutiny is indeed needed becomes apparent with a look into MIG 2007:33, which summarizes the initial expulsion decision of the MB as follows:

“On 27 January 2006, the Migration Board rejected A’s application and expelled (*avisade*) him. The decision should be enforced through A returning to Iraq (*genom att A skulle återvända till Irak*). As reasons for the decision, the Board adduced, among others, the following. A has stated that he is at home (*hemmahörande*) in the municipality of Mosul, which is also confirmed by the language analysis that was undertaken (*företagen språkanalys*). His reasons must therefore be examined against the background of the situation in this part of Iraq. – A does not belong to any of the vulnerable groups (*utsatta grupperna*) in Iraq. He has, in addition to the general situation, invoked (*åberopat*) the fear that he, if he returns, would be killed by his uncle and cousins because he abducted (*rövat bort*) his female cousin to marry her. A has not invoked that he, if he returns to Iraq, would risk being harassed because of his race, nationality, membership of a particular social group, religion or political opinion. Therefore, he cannot be considered to be a refugee” (MIG 2007:33, p. 1)¹⁰³

¹⁰² Khosravi uses the term “forced-displaced people” to refer to those people who are “categorized and labelled as refugees, asylum seekers, internally displaced people, and stateless people” (Abram et al., 2017, p. 8).

¹⁰³ From the precedents: “Migrationsverket avslag den 27 januari 2006 A:s ansökan och avisade honom. Beslutet skulle verkställas genom att A skulle återvända till Irak. Som skäl för beslutet anförde verket bl.a. följande. A har uppgett att han är hemmahörande i kommunen Mosul, vilket även bekräftas av företagen språkanalys. Hans skäl skall därför prövas mot bakgrund av situationen i denna del av Irak. - A tillhör inte någon av de utsatta grupperna i Irak. Han har utöver den allmänna situationen åberopat fruktan för att han vid ett återvändande kommer att dödas av sin farbror och sina kusiner eftersom han rövat bort sin kvinnliga kusin för att gifta sig med henne. - A har inte åberopat att han vid ett återvändande till Irak riskerar att trakasseras på grund av sin

In view of this excerpt from MIG 2007:33, which explicitly uses the words “race, nationality, membership of a particular social group, religion or political opinion”, it is helpful to turn to Fairclough’s conceptualization of discursive meaning relations. He conceptualizes these in terms of six main types of semantic relations (Fairclough, 2003, p. 89): 1) causal; 2) conditional; 3) temporal; 4) additive; 5) elaboration; 6) contrastive/concessive. Regarding this enumeration, he clarifies that he “distinguished a relatively small number of main semantic relations” (ibid.). As causal semantic relations, he further lists three sub-categories: I) “Reason (We were late *because* the train was delayed)”; II) “Consequence (the train was delayed, *so* we were late)”; III) “Purpose (we left early *in order to* catch the first train)” (ibid, emphases in italics in original). The other five main categories of semantic relations are not further divided into sub-categories, and I do not discuss them here because they are not relevant for the analysis.

As becomes visible with a look at the excerpt cited above from MIG 2007:33, the third sentence introduces a causal semantic relation through what Fairclough conceptualizes as reason: “As reasons for the decision, the Board adduced, among others, the following. A has stated that he is at home in the municipality of Mosul, which is also confirmed by the language analysis that was undertaken.” In terms of Fairclough’s four legitimation strategies, the causal semantic relation of reason is in this excerpt combined with rationalization, namely legitimation “by reference to the utility of institutionalized action [...]” (Fairclough, 2003, p. 98). According to MIG 2007:33, one reason for the MB’s initial decision was the result of the language analysis, i.e. the institutionalized action to assess the applicant’s way of speaking. This focus on the applicant’s native language is, in turn, discursively related to the keyword *hemmahörande* in the sense of belonging to a certain place (here Mosul). To borrow from Alexy, the expert knowledge embedded in such a language analysis constitutes an external justification of a legal judgment based on “statements about particular facts” (Alexy, 1989, p. 232). In other words, it is an example of empirical reasoning for legal justification that is rooted in certain fields of knowledge, namely the academic discipline of linguistics (ibid.).

Furthermore, this part of the precedent can be read against the background of what the judge, whom I cited above, stated about ethnicity and belonging to a certain place: “Yes, well, ethnicity one can say, it is there because, often, one must get an idea about which region this person comes from, so that one becomes able

ras, nationalitet, tillhörighet till viss samhällsgrupp, religion eller politiska uppfattning. Han kan därför inte anses som flykting.”

to understand why this person should get asylum or why they (*den*) should not get asylum” (IT6). Thus, indirectly, MIG 2007:33 can illustrate how the often-complex question of where an applicant “comes from” is not necessarily always linked to any explicit discourse about ethnicity. However, given the information that the applicant “is Yezidi and a Kurd”, it is stressed further into the text that he “does not belong to any of the vulnerable groups in Iraq” (MIG 2007:33, p. 1). While this might sound counterintuitive to the reader – and it does not become less confounding given the judge’s remark about particular social groups (“for example Kurds who are resident in Iraq, of which just being a member can make one extra vulnerable under certain conditions” [IT6]) – the term language analysis provides a basis for further insights.

According to the narrative that the MCA puts forward with MIG 2007:33, the applicant had stated that he was a Yezidi Kurd from Mosul. This statement becomes legitimized rationally by referring to the language analysis as an institutionalized action that confirmed the applicant’s claim. Hence the facticity – established through a language analysis as a statement about “empirical knowledge” (Alexy, 1989, p. 232), which “society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98) – that the applicant belongs to an ethnic-religious minority in Iraq. This became a strong argument for the MB to reject the asylum claim. That said, the underlying reasoning can only be understood against the background of the information that Mosul, in 2006 when the MB took the first-instance decision, was part of a largely autonomous Iraqi Kurdistan (see e.g. Stansfield, 2014).¹⁰⁴ In this context, at a time when nobody had yet heard anything about the ‘Islamic State’, ‘ISIL’, ‘ISIS’ or ‘Daesh’, the assessment that the applicant was “at home (*hemmahörande*) in the municipality of Mosul” was a reason to discursively legitimize the following argument: “[The applicant] has not invoked that he, if he returns to Iraq, would risk being harassed because of his race, nationality, membership of a particular social group, religion or political opinion. Therefore, he cannot be considered to be a refugee” (MIG 2007:33, p. 1).

¹⁰⁴ In the journal article *The Islamic State, the Kurdistan Region and the future of Iraq: assessing UK policy options*, Gareth Stansfield (2014, p. 1329) summarizes the events of the last years as such: “The fall of Mosul in June of 2014 was followed in July by the establishment of a self-proclaimed Caliphate by the Islamic State of Abu Bakr al-Baghdadi. Since then, the Islamic State has continued to expand its operations, persistently pushing into Sunni-dominated parts of Iraq and Syria, nearly defeating the Kurds of Iraq, and moving against the Kurds of Syria, in Kobani, as well as army units of the Syrian state.”

At the time of writing, after the successful “battle for Mosul” (Al Jazeera, 2017)¹⁰⁵ against ISIS in 2017, this reasoning appears in a different historical context. Mosul’s recent history is defined by different regimes that have been in power in this geography (Saddam Hussein’s Iraq, Iraqi Kurdistan, ‘ISIS’, and currently again Kurdish control). Regarding the years of 2006-2007, MIG 2007:33 applied the following, rationalizing strategy of legitimation: The applicant is a) Yezidi, b) Kurdish and not in any way at risk, “if he returns to Iraq”, precisely because he is c) “at home in the municipality of Mosul” (MIG 2007:33, p. 1). By relating this excerpt from the precedents to the following excerpt from an interview with a judge, which I had cited at greater length above, the initially applied reasoning can become clearer.

“Yes, well, ethnicity one can say, it is there [included] because, often, one must get an idea about which region this person comes from, so that one becomes able to understand why this person should get asylum or why they should not get asylum. [...]” (IT6).¹⁰⁶

Applied to MIG 2007:33, this reasoning can be understood as follows. The crucial information about “A” is that he is “Kurd” (MIG 2007:33, p. 1); a piece of information that, from a legal perspective, can be factually validated through language analysis. His ethnicity of being Kurdish is, thus, constructed as rather a) belonging to a certain region (Mosul in Iraqi Kurdistan) and b) speaking the respective language, than c) understanding being Kurdish as a concept of race. Hence the section of the precedent which stresses that “A has not invoked that he, if he returns to Iraq, would risk being harassed because of his race, nationality, membership of a particular social group, religion or political opinion” (ibid.); an important detail which fits well with how the judge explains it in the interview excerpt above: “[...] religion or sex (*kön*) are not really of importance, other than, if it should be so that, that the [legal] case (*målet*) [...], is about persecution on

¹⁰⁵ In this journalistic piece published on 2 March 2017, Al Jazeera (author[s] unknown) summarize the situation in Mosul as follows: “Intense battles between Iraqi security forces and ISIL fighters in Mosul are causing increasing numbers of displaced people, with 4,000 civilians fleeing the city each day, according to the United Nations. More than 28,000 people have been forced from their homes since a coalition of US-backed Iraqi forces launched an offensive on February 19 to retake the western sector of Mosul, ISIL’s last major urban stronghold in Iraq, the UN said.”

¹⁰⁶ From the interviews: “Ja, alltså etnicitet kan man väl säga, det är väl med därför att man måste, ofta, få en uppfattning om vilken region i vart fall den här personen kommer ifrån, så att man ska kunna förstå varför ska den här personen få asyl eller varför ska den inte få asyl. [...]”.

the grounds of sex or religion for example” (IT6). The detail that “A” is also “Yezidi” (MIG 2007:33, p. 1) is not significant for the legitimization of the decision. After all, “A has *not* invoked [...] his race, nationality, membership of a particular social group, religion or political opinion as grounds for seeking asylum” (ibid., my emphasis in italics).

In summary, it can be noted that the rationalizing legitimization strategy of establishing the knowledge that the applicant was in a double-minority position in the context of the nation state of Iraq became – only seemingly paradoxically – an important legitimization of the decision to expel him. At the end of the precedent, it is stated that “[t]he appeal is thereby upheld and the decision of the Migration Board [is] confirmed” (MIG 2007:33, p. 9). When the precedent was published on 15 June 2007, the MCA confirmed the reasoning that, in the specific spatiotemporal context of Mosul in Iraq in 2007, as a Yezidi Kurd the applicant was not facing any persecution because of his identity. As indicated above, a rationalizing legitimacy claim is implicit to the statement that the applicant himself did not invoke “his race, nationality, membership of a particular social group, religion or political opinion as grounds for seeking asylum” (MIG 2007:33, p. 1).

At the time of writing, however, it is widely known what happened in the years after 2007, as the “fall of Mosul in June of 2014 was followed in July by the establishment of a self-proclaimed Caliphate by the Islamic State of Abu Bakr al-Baghdadi” (Stansfield, 2014, p. 1329). Of course, at the MCA in June 2007, these future developments were unknown (and indeed unknowable). For the rejected applicant of MIG 2007:33, who was identified as being “at home in the municipality of Mosul” (p. 1), meanwhile, it meant that the highest legal instance confirmed that he should be expelled to Iraq.

Gender and Sexuality as Grounds for Protection

As the only precedent that explicitly discusses gender and sexuality, MIG 2013:25 is an analytically significant case. The MB decided to expel the applicant of MIG 2013:25. This person is identified as male (through the pronoun he [*han*]) early on in the text along with the information that “[h]e was convicted, on the 21st of February 2012, by Attunda Court, to one year in prison and expulsion with a ban on returning to Sweden before the 21st of February 2017” (MIG 2013:25, p. 1).

Two months after this conviction, the applicant then filed an application for asylum in Sweden based on “his sexual orientation” (ibid.). The MCA summarizes this application as follows:

“A applied, on the 18th of April 2012, for a permanent residence permit, [refugee] status declaration and travel documents in Sweden, and stated as a reason for refugee status (*flyktingkap*) the subsidiary or other need for protection (*alternativt eller övrigt skyddsbehov*) on the grounds of his sexual orientation (*sexuella läggning*). The Migration Board handed over the questions of a residence permit and status declaration to the Migration Court in accordance with Chapter 4 § 6, and Chapter 5 § 20 Aliens Act (2005: 716). The Migration Board put forward the opinion (*anförde i yttrande*) that there were certain circumstances in A’s narrative (*omständigheter i A:s berättelse*) that gave reason to question its credibility (*trovärdigheten av densamma*), but assessed nevertheless it was probable (*gjort sannolikt*) that he had been living as a homosexual, that his sexual orientation was generally known (*sexuella läggning var allmänt känd*), that he risked abuse and that he could not be expected to avail himself of the authorities’ protection in the home country of Nigeria (*begagna sig av myndigheternas skydd i hemlandet Nigeria*). The [Migration] Board therefore assessed that he was considered to be a refugee (*betrakta som flykting*)” (MIG 2013:25, p. 1).¹⁰⁷

In terms of discursive meaning relations, causal semantic relations are identifiable (see Fairclough, 2003, pp. 26-27; ibid., pp. 87-97). The direct use of the word reason, which is found twice in this relatively short excerpt, supports the effect that emerges when reading the sentences, which are linked primarily through causal relations that Fairclough sums up with ‘reason’. For instance: “The Migration Board handed over the questions of residence permit and status declaration to the Migration Court *in accordance with* Chapter 4 § 6, and Chapter 5 § 20 Aliens Act” (my emphasis in italics). Presented as the reason for why the decision-making was handed over from the Board to the Court, it is “in

¹⁰⁷ From the precedents: “A ansökte den 18 april 2012 om permanent uppehållstillstånd, statusförklaring och resedokument i Sverige och angav som grund flyktingkap, alternativt eller övrigt skyddsbehov på grund av sin sexuella läggning. Migrationsverket överlämnade frågorna om uppehållstillstånd och statusförklaring till migrationsdomstolen i enlighet med 4 kap. 6 § och 5 kap. 20 § utlänningslagen (2005:716). Migrationsverket anförde i yttrande att det fanns vissa omständigheter i A:s berättelse som gav anledning att ifrågasätta trovärdigheten av densamma, men bedömde ändå att han hade gjort sannolikt att han hade levt som homosexuell, att hans sexuella läggning var allmänt känd, att han riskerade övergrepp och att han inte kunde förväntas begagna sig av myndigheternas skydd i hemlandet Nigeria. Verket bedömde därför att han var att betrakta som flykting.”

accordance with” that represents a causal semantic relation, which highlights precisely a certain reason. In turn, this should be read as a discursive meaning relation that, once more, supports the importance of what Fairclough (2003, p. 98) lists as his first main legitimation strategy, namely authorization as legitimation “by reference to authority of [...] law”. It is “in accordance with Chapter 4 § 6 [...]” – so in accordance with certain legal paragraphs – that the application in MIG 2013:25 had been transferred from the first-instance MB to a second-instance MC.

The last, short, declarative clause (“The MB therefore...”) of this excerpt presents an example of what Fairclough calls causal semantic relations of consequence. Introduced with “therefore” (*därför*, MIG 2013:25, p. 1), the MB’s standpoint is legitimized discursively through the semantic relation between this short declarative clause in the end of the excerpt and the longer sentences that preceded it. In terms of legitimation strategies, the longer, above cited, sentence “The Migration Board put forward the opinion [...]” (ibid.) is the beginning of a chain of arguments that rationally legitimize the MB’s decision as follows:

“[...] there were certain circumstances in A’s narrative that gave reason to question its credibility, but [the MB] assessed nevertheless that it was probable that he had lived as a homosexual, that his sexual orientation was generally known, that he risked abuse and that he could not be expected to avail himself of the authorities’ protection in the home country” (MIG 2013:25, p. 1).

It is clear that these arguments about the credibility of the applicant’s narrative and the related probability of “his homosexuality” (ibid.) are part of a facticity claim made by a state institution. In reference to Alexy and his concept of hypothetical consensus (see Chapter Five), “the credibility” (*trovärdigheten*) and “probable” (*sannolikt*, MIG 2013:25, p. 1) become the significant keywords here (see Alexy, 1989, p. 294). The MB, as it is summarized by the MCA in this precedent (MIG 2013:25, p. 1), was of the opinion that “there were certain circumstances in A’s narrative that gave reason to question its credibility” (ibid.). However, the MB had evaluated other parts of “his asylum narrative” as credible, because ...

“[...] it was *probable* that he had lived as a homosexual, that his sexual orientation was generally known, that he risked abuse and that he could not be expected to avail himself of the authorities’ protection in the home country of Nigeria” (MIG 2013:25, p. 1, my emphasis in italics).

Then the following hypothetical consensus is established: he is probably a gay man and, therefore, threatened in Nigeria. The assesment that it is more likely than not that he is gay provides the following clause with legitimacy: “The [Migration] Board therefore assessed [...]”. This is discursively achieved through a causal semantic relation of consequence (Fairclough, 2003, pp. 89-98). To put it in less abstract terms, as the first instance of the Swedish migration bureaucracy, the MB first had to formulate a certain knowledge claim about the applicant’s sexuality. Thereafter, the following could be presented as a logical and legitimate consequence: “he was considered to be a refugee” (MIG 2013:25, p. 1).

MIG 2013:25 is, in other words, a case that exemplifies how legal decisions can be influenced also by opinions (“*anförde i yttrande*”, MIG 2013:25, p. 1). Such opinions are often based on an assessment of the applicants’ credibility. Against the backdrop of Alexy’s (1989, p. 233) criticism, it is important to stress that “in legal discourse the problem arises that the necessary empirical knowledge is often not available with the desirable degree of certainty” (ibid.). In addition to the uncertainty that always emerges when estimating the probability of future events (cf. Chapter Five), at this point of the analysis it becomes visible that the establishment of empirical knowledge about the past and present can also be marked by uncertainty.

Given Banakar’s discussion on the importance of the certainty/uncertainty divide in social theory (Banakar, 2015, p. 13), it is in this context depending on the epistemological standpoint of the observer whether a legal decision that is based also on opinions – and on a binary understading of either ‘probable’ or ‘not probable’ – can live up to “the rule of law’ (*Rechtssicherheit*) [which includes] the promise of certainty” (ibid.). My reading of MIG 2013:25, meanwhile, contributes to the body of research which problematizes the fact that many asylum cases are decided based on assessing the credibility of asylum seekers’ narratives. In the Swedish context this regards research on the subject matter of *trovärdighetsbedömningar* (see e.g. Wikström & Stern, 2016; 2015; Wikström, 2015).

Related to Benhabib’s concept of porous borders, bureaucratic assessments of credibility/genuineness, as exemplified in MIG 2013:25, can be understood as a part of what I would like, from here on, to call the filter of porous borders. *Trovärdighetsbedömningar* should be conceptualized as a part of this filter because they are an empirical example of the “politico-juridical discourse and regulation” (Khosravi, 2010, p. 3) that contribute to the legitimacy of boundaries as well as to the ‘porousness’ of national borders (cf. Benhabib, 2004). In other words, my

argument is that these assessments function as a filter because they include, simultaneously, ‘the legitimate life’ of the legally recognized refugee while excluding ‘the illegitimate life’ of the unwanted migrant (cf. Khosravi, 2010). This being noted, I want to stress that, while the process of one *trovärdighetsbedömning* contributes to the establishment of the legal binary of either accepted or rejected in the single legal case, the existence of all *trovärdighetsbedömningar* combined contributes to the legitimacy of the Swedish asylum system as well as the international refugee regime at large (see Barnett, 2002; cf. Mayblin, 2014; McAdam, 2017).

In MIG 2013:25 the question about the applicant’s *trovärdighet* came to be the decisive aspect of the final decision as it was presented by the MCA. On the last pages of this relatively long precedent, the MCA justifies its decision as follows:

“In the Migration Court of Appeal’s opinion, he should, if he had had a real and genuine need for protection (*verkligt och genuint skyddsbehov*), reasonably have applied for a residence permit based on grounds for protection (*skyddsskäl*) immediately upon arrival in Italy and in any event no later than after [his] arrival in Sweden. The somewhat contradictory information that A has given about why he entered the Schengen area, the reason for why he travelled to Sweden and applied for a residence permit for extended stay in the country, the fact that he committed crimes as well as the stated reason for why he waited to apply for asylum, speak against him feeling a well-founded fear of returning to the home country. Another circumstance that gives reason to doubt A’s narrative is that he, on several occasions, including at the District Court (*tingsrätten*), during the Migration Board’s asylum investigation, and at the Migration Court’s oral hearing, has provided different information about his family situation, and when his children were born. Even at the Migration Court of Appeal’s oral hearing, the information about the family situation, and the dates when the children were born, have been vague and contradictory. This (*Även detta*) also leads the Migration Court of Appeal to question A’s general credibility (*allmänna trovärdighet*). In an overall assessment, the Migration Court of Appeal is of the opinion (*anser*) that A has not made it probable (*inte har gjort sannolikt*) that he is homosexual or that he was ascribed such a [sexual] orientation in the home country (*i hemlandet tillskrivits en sådan läggning*). Thus, there is no need for the Court to take a stand on whether the situation of homosexuals in Nigeria is such that there is a risk of persecution there. Since A is not risking persecution because of his sexual orientation, he cannot be considered a refugee. He has neither made it probable (*gjort det sannolikt*) that he is in need of subsidiary or other protection (*alternativt eller övrig*

skyddsbehövande), which is why there is not any basis to grant him a residence permit and [refugee] status declaration” (MIG 2013:25, pp. 11-12).¹⁰⁸

In view of this long excerpt from MIG 2013:25 it becomes possible to “reconstruct” (Habermas, 1992, p. 569) how the MCA legitimized the final decision to reject the applicant as not credible and, thus, ordered his expulsion from Sweden. The crucial aspect of this rejection is that “the MCA comes to the opinion” (*anser Migrationsöverdomstolen*, MIG 2013:25, p. 12) that “A has not made it probable that he is homosexual or that he was ascribed such a [sexual] orientation in the home country” (*ibid.*). With a look at this sentence it is understandable that the Court framed the applicant’s sexuality as a social identity concept (see Tajfel & Turner, 1986). In other words, the court approached the applicant’s sexuality as the ‘sexual orientation’ (*sexuell läggning*) of an individual social actor, while the possibility that such an identity would be ascribed to him by others was also explicitly considered.

In the following sentence, the MCA establishes a (negative) causal semantic relation of consequence as well as purpose: “Thereby, there is no need [...]”. In other words, first a hypothetical consensus is established based on the empirical reasoning (see Alexy, 1989, pp. 232-233) that “A has not made it probable that he is homosexual” (MIG 2013:25, p. 12). This leads to the result that he shall not be granted a residence permit. Consequentially, for the MCA, there is no purpose

¹⁰⁸ “Enligt Migrationsöverdomstolens mening borde han, om han hade haft ett verkligt och genuint skyddsbehov, rimligen ha ansökt om uppehållstillstånd på grund av skyddsskäl direkt efter ankomsten till Italien och i vart fall senast efter ankomsten till Sverige. De till viss del motstridiga uppgifterna som A har lämnat om skälet till varför han reste in i Schengenområdet, anledningen till att han reste vidare till Sverige och ansökte om uppehållstillstånd för förlängd vistelse i landet, det faktum att han begick brott samt den uppgivna anledningen till varför han väntade med att söka asyl talar mot att han skulle känna välgrundad fruktan för att återvända till hemlandet. Ytterligare en omständighet som ger anledning att tvivla på A:s berättelse är att han vid ett flertal tillfällen, bl.a. hos tingsrätten, vid Migrationsverkets asylutredning och vid migrationsdomstolens muntliga förhandling, har lämnat olika uppgifter om sin familjesituation och när hans barn är födda. Även vid Migrationsöverdomstolens muntliga förhandling har uppgifterna om familjesituationen och tidpunkterna för när barnen är födda varit vaga och motstridiga. Även detta föranleder Migrationsöverdomstolen att ifrågasätta A:s allmänna trovärdighet. Vid en samlad bedömning anser Migrationsöverdomstolen att A inte har gjort sannolikt att han är homosexuell eller att han i hemlandet tillskrivits en sådan läggning. Det saknas därmed anledning för domstolen att ta ställning till om situationen för homosexuella i Nigeria är sådan att det föreligger risk för förföljelse där. Eftersom A inte riskerar förföljelse på grund av sin sexuella läggning kan han inte anses vara flykting. Han har inte heller gjort sannolikt att han är alternativt eller övrig skyddsbehövande, varför det saknas förutsättningar att bevilja honom uppehållstillstånd och statusförklaring”.

in taking “a stand on whether the situation of homosexuals in Nigeria is such that there is a risk of persecution there” (ibid.).

Judges in the second legal instance might disagree on this point. As mentioned previously, during an interview with an MC judge (IT5), I was told that one re-occurring debate among Swedish migration court judges was whether the MCA should also establish precedence regarding the factual conditions that affect certain groups in their countries of origin.

With MIG 2013:25, among other details, the MCA indicated two things. Firstly, it is stressed that those people who are experiencing a ‘well-founded fear of persecution’ (see Chapter Two) because of their sexuality have the right to protection in Sweden. Protection based on the respect for sexual diversity, as one of those “conceptions of human rights [that] require specific legal norms” (Benhabib, 2016, p. 137), is, in this general sense, affirmed within MIG 2013:25. Secondly, however, while the applicant of MIG 2013:25 could not make “it probable that he is homosexual”, the MCA refrained from making a statement about the “situation of homosexuals in Nigeria”. Thus, while acknowledging the general conception of human rights that grants people who are persecuted because of their sexuality the right to protection, the MCA did not establish any specific legal norm on how this right should be considered in cases that concern people from Nigeria. This refraining is legitimized discursively through a causal semantic relation that combines consequence with (lack of) purpose. Because of the assessment that the applicant was not “homosexual”, there was no purpose in commenting any further on the “situation of homosexuals in Nigeria”. This reasoning can be further analysed with the help of Habermas’ insights regarding the construction of legitimacy in texts written by judges, and Alexy’s thoughts on legal justification.

One could argue that it is of general importance for refugee law to make statements concerning the situation of homosexuals in Nigeria. Following Habermas’ ideas on legitimacy through legality, legal decisions tend to “obscure” (*ausblenden*) non-legal normativity “in favor of the implied functional requirements [of the legal system]” (Habermas, 1992, p. 569, see also Chapter Four). This being noted, one could further argue that taking a stand on the situation of homosexuals in Nigeria constitutes not normative but purely empirical reasoning. Yet, if one shares my understanding of the formulation “to take a stand” (*att ta ställning*, MIG 2013:25, p. 12) as hinting at the difficulty to establish neutral and precise knowledge on something as complex as the situation of homosexuals in Nigeria, once again one arrives at the overarching question of

‘What is knowledge?’, i.e. the problem of epistemology. Alexy has addressed this significant problem:

“[Certain arguments] require statements concerning laws of the natural or social sciences. Furthermore, a distinction can be made between statements about past, present, and future actions, events, or state of affairs. These statements in their turn can be ordered into different fields of knowledge such as economics, sociology, psychology, medicine, linguistics, etc. This makes it clear that a thoroughgoing theory of empirical reasoning relevant to legal justification would have to deal with almost all the problems of empirical knowledge. Added to this are the problems of the incorporation of empirical knowledge into legal reasoning” (Alexy, 1989, pp. 232-233).

Reading this citation, it becomes apparent that asylum cases are strongly affected by the “problems of empirical knowledge”, as Alexy calls it (*ibid.*). As I discussed it at some length in Chapter Five, there is the general problem of assessing the applicants’ ‘need for protection’ (*skyddsbehov*) based on an estimation of the probability of future events. Now, in MIG 2013:25, when it comes to taking a stand on “the situation of homosexuals in Nigeria” (p. 12), does this ‘taking a stand’ include a consideration of how this situation has been in the past and/or how it will be in the future? Or is it merely a question of how it is at the moment?

Moreover, besides exemplifications of those “fields of knowledge” (Alexy, 1989, p. 232), which are of importance in asylum law and which I have already mentioned in the preceding chapters, i.e. age determination procedures (medicine, see Noll, 2014; 2016) and language analysis (linguistics, see Noll, 2010), MIG 2013:25 illustrates how sociological knowledge can be applicable in certain asylum cases. After all, the question of whether a non-heteronormative sexuality – in a certain spatiotemporal context – is experienced as deviant by the person in question, and/or if this person is perceived as deviant by others, should be approached sociologically.

In Sweden, as previously mentioned, such questions are, in the first place, addressed by the MB’s country information unit (*landinformatiönsenheten*). The fact that this unit is the main source of country of origin information (COI),¹⁰⁹ at

¹⁰⁹ As the European Asylum Support Office explains the term, “Country of Origin Information (COI) refers to information on countries from which asylum seekers originate relevant for decision-makers in the field of asylum. The quality and accuracy of COI can thus play a determining role in achieving the aim of the Common European Asylum System that similar

least for the first legal instance, has been criticized. An official government report concludes that there is a “lack of guidance for the lower instances [MB & MCs] in so-called country-questions” (SOU 2009:56, p. 23). Consistently, Johannesson (2017, p. 10) stresses that this lack “runs the risk of creating disparity in decision-making”. Moreover, she highlights that the “same conclusion is found in research that compared Sweden’s system of collecting COI with the UK country guidance system” (ibid.). In a footnote, she adds:

“COI reports are conducted by the Migration Agency’s expert unit on country information, although reports from other countries’ migration authorities and from NGOs are frequently used in asylum cases as well. According to my interviewees, COI reports particularly from Norwegian and British migration authorities are frequently used” (ibid.).

This finding is in line with what I have been told during three interviews (IT2; IT6; IT8) in which judges discussed the practice of reading COI in languages other than Swedish. The question of how this specific selection of sources of information in precisely these three languages can be critically approached is addressed in Chapter Seven. For now, it suffices to stress that, for the Swedish migration bureaucracy, the most important source of COI is a database called *Lifos*. This ‘Centre for Country Information and Country Analysis in the Area of Migration’ (*Center för landinformation och landanalys inom migrationsområdet*)¹¹⁰, was mentioned by two of the judges (IT2 and IT6). The MB provides the following information: “Lifos is the Migration Board’s own database for legal and country information. It includes information about the situation in the countries where the applicants come from.”¹¹¹ Or, as Johannesson (2017, p. 98) describes it, this database is open for public access and it ...

“[...] consists of country reports conducted by the Migration Agency [the MB] as well as reports from other countries’ migration agencies (in particular, the UK’s

cases should receive similar outcomes across the EU.”, see <https://www.easo.europa.eu/country-origin-information> (Accessed 29 July 2017).

¹¹⁰ See, in Swedish, <http://lifos.migrationsverket.se/> (Accessed 18 July 2017).

¹¹¹ In Swedish original, “*Lifos är Migrationsverkets egen databas för rätts- och landinformation. Den innehåller information om förhållandena i de länder som de sökande kommer ifrån.*”, see <https://www.migrationsverket.se/Om-Migrationsverket/Ratts-och-landinformation-Lifos.html> (Accessed 18 July 2017).

and Norway's reports were appreciated among the interviewees) and NGOs such as Amnesty, UNHCR and Human Rights Watch”.

A judge who works at a second-instance migration court told me the following about certain information from this database:

“I can be quite critical about what the Migration Board sometimes writes. One has, among other things, written (*gjort*) such a legal instruction regarding credibility and reliability assessments (*trovärdighets- och tillförlitlighetsbedömningar*) which is on Lifos. And I have to say that this is difficult to get through because it is messy and it is – it is not unobjectionable, regarding neither form nor content, really” (IT6).¹¹²

Given the MCA's decision not to believe in the “asylum narrative” of the applicant in MIG 2013:25 and, therefore, not to produce any statement about non-heteronormative sexualities in Nigeria, this criticism is illuminating. A judge can “sometimes” be “quite critical” (IT6) about information produced by the first legal instance, i.e. the MB. In the given example, it is “a legal instruction regarding credibility and reliability assessments” (IT6) that the judge is questioning. In addition to the discussion on the difficulty of estimating the probability of events in the future (see Chapter Five), this part of the data thereby indicates that there are also difficulties in evaluating the credibility of narratives about the past (see Alexy, 1989, pp. 232-233). In MIG 2013:25 this concerns the (lack) of credibility that is granted to the applicant's narrative about how he had lived his sexuality.

This unwillingness of the Court to believe in the applicant's self-identification as a gay man should be contextualised. Sara McKinnon has investigated the issue, i.e. the legal processing of asylum claims based on sexuality, in the US-context. She concludes:

“[G]ender and sexuality [...] interact for lesbian and gender-conforming gay male asylum seekers, shaping the possibility for refuge that these claimants have in accordance with what I theorized [...] as the one-sex, one-gender system. While gender-conforming gay men experience challenges to their claims through this

¹¹² From the interviews: “[...] jag kan vara ganska kritisk till det som Migrationsverket skriver ibland. Man har bl.a. gjort en sån här rättslig instruktion som gäller trovärdighets- och tillförlitlighetsbedömningar som finns på Lifos. Och jag måste säga att den är svår att ta sig igenom därför att den är rörig och den är – den är inte invändningsfri, varje sig det gäller form eller innehåll, egentligen.”

rhetoric and logic, gay women often fail at being legible [...] too frequently, gay women are either figured as not gay enough or as “too woman”, against the genre conventions of sexual orientation persecution claims, to be recognized as worthy of asylum relief because of their sexuality” (McKinnon, 2016, p. 121).

In response to this chapter’s research question, it is important to stress that not only sexuality but also gender must be ‘performed convincingly’ by asylum applicants. Related to the rather obvious observation that, as discussed above, it is not enough to self-identify as homosexual and/or an LGBTIQ¹¹³ person, it must be stressed that sexual minorities are still and “too frequently” (ibid.) imagined as people with a deviant gender identity. In other words, while ‘the gay man’ tends to be imagined as ‘feminine’, the opposite is the case for ‘the lesbian woman’. As McKinnon puts it in the excerpt cited above, women who do not conform to this imagination tend to be “figured as not gay enough or as ‘too woman’” (ibid.). Being perceived as a ‘feminine’ gay man or, respectively, as a ‘masculine’ lesbian, on the other hand, would conform to dominant, heteronormative discourse. As it regards the precedents of Swedish asylum law, it will be interesting to see what future research has to say about this phenomenon. I stated previously that, among the precedents published during the first ten years of the Swedish migration court system, MIG 2013:25 is the only case that discusses an applicant’s *homosexualitet*.

While the MCA deemed it to be not credible (enough) that the applicant in MIG 2013:25 was homosexual, the Court’s refusal to make any general statement about “the situation of homosexuals in Nigeria” (p. 12) indicates the following. Given the “lack of guidance for the lower instances [the MB & MCs] in so-called country-questions” (SOU2009:56, p. 23), there appear to be general difficulties in establishing empirical knowledge about the situation in countries of origin. Referring to Alexy’s thoughts on the importance of factual knowledge for (almost) all legal cases, I must therefore present the following observation. The Swedish migration bureaucracy, throughout its three legal instances, appears to have problems legitimizing empirical reasoning (Alexy, 1989, p. 233) when it comes to establishing as well as to incorporating knowledge about the past, present and/or future in decisions that affect asylum seekers. This “lack of guidance on factual questions”, which previous research (Johannesson, 2017, p. 10), as well as an official government report (SOU2009:56, p. 23), identify as a problem for the second-instance MCs, hints at a lack of legitimacy that affects the entire

¹¹³ LGBTIQ refers to lesbian, gay, bisexual, transgender, intersex, and queer.

administration of refugee migration in Sweden. Such uncertainty about countries of origin, in turn, undermines the Swedish migration bureaucracy's central legitimacy claim. This claim is grounded in the bureaucracy perceiving itself as legally certain and, thus, safeguarding *rättssäkerhet*, i.e. 'legal certainty' and "the rule of law' (*Rechtssicherheit*)" (Banakar, 2015, p. 13; cf. Chapter One).

Conclusions

The chapter has focused on the study's second research question, namely the interest in considering precedents as legal narratives that address gender, sexuality, ethnicity, religion and/or class. Methodologically speaking, I can conclude that Fairclough's conceptualization of discursive meaning relations is a useful tool for analysing representations of ethnicity and religion as well as gender and sexuality in legal decisions that concern refugee asylum. More specifically, the category that Fairclough calls casual semantic meaning relations, and the three respective sub-categories of reason, purpose and consequence, can be applied in an analysis of such representations. This being noted, I stressed that representations of social class are largely absent in the precedents of Swedish asylum law. It became possible to find traces of social class in Bourdieusian terms of economic, cultural and social capital in excerpts from the interviews that I conducted with Swedish migration court judges. In one interview with a MC judge (IT6), it was stated that a lack of economic capital was not to be seen as legitimate grounds for seeking protection status in Sweden. Meanwhile, this judge stressed that a (relatively) privileged class position in terms of social and cultural capital – at least when it concerned a "young man who also is healthy" (IT6) – would not be beneficial to the legitimacy of the respective asylum application. This description of how a judge reflects on the social process of 'law in action' in the courtroom is, thus, a confirmation of socio-legal research that has stressed the difference between empirically-based and normative representations of the law (see Banakar, 2015, pp. 12f).

Within the framework of the international refugee regime, it is significant that international (including Swedish) asylum law has been developing since 1951 (cf. Chapter Two). Refugee law departed from the initial understanding of the (implicitly male) refugee as a figure of the Cold War (see Barnett, 2002; cf. Mayblin, 2014; McAdam, 2017; cf. UtL 2005:716). Against this historical background of the refugee category, I have been able to show the following. Based

on my in-depth reading of two precedents of Swedish asylum law and informed by the interviews with judges that I conducted at Sweden's migration courts, it is noteworthy that abstract words such as 'identity' (*identitet*) or 'ethnicity/race' (*etnicitet/ras*) are used in different ways with differing discursive meanings attached to them. For instance, while an applicant's sexuality or religion can be addressed with the formulation of 'sexual orientation' (*sexuell läggning*, see e.g. MIG 2013:25) or, respectively, 'religious beliefs' (*religiös uppfattning*, see e.g. MIG 2007:33), a judge repeatedly used 'sexual identity' (*sexuell identitet*, IT6) and 'religious identity' (*religiös identitet*, IT6). Both of these terms, as the judge further reasoned, could be understood as 'identity concepts' (*identitetsbegrepp*, IT6). In contrast, in its summary (in English, see above) of who is considered to be refugee, the MB lists "religious or political beliefs" and "sexual orientation" as legitimate grounds for seeking protection.

It should further be noted that Wettergren and Wikström highlighted that the shortcomings of the international refugee regime have, at least partially, been addressed in the recent past. One example of this is the inclusion of sexual and gender minorities (LGBTIQ people) as individuals who are entitled to (apply for) international protection. Nevertheless, as the second main section in this chapter exemplifies with the analysis of MIG 2013:25, it is not enough to self-identify as an LGBTIQ person. Instead, to be accepted, the applicant's asylum claim needs to be legally legitimized based on a "hypothetical consensus" (Alexy, 1989, p. 294). Given the example of MIG 2013:25, such a consensus would require assessing it to be more 'probable' (*sannolikt*) than not that the applicant is *homosexuell*. In other words, making the (self-identified) LGBTIQ-asylum seeker into 'the legitimate refugee' requires that the applicant's 'asylum narrative' (*asylberättelse*) is recognized as 'genuine'/'credible' (*trovärdig*). In MIG 2013:25, for the applicant's claim of 'need for protection' (*skyddsbehov*) to be deemed credible, the applicant would have had to present it as probable that he would face persecution in the 'home country' (*hemland*). However, the MCA did not assess the applicant's claim that he was homosexual to be credible. Therefore, as the MCA concluded the precedent, there was also no need "to take a stand on [...] the situation of homosexuals in Nigeria" (MIG 2013:25, p. 12).

In the adversarial setting of the Swedish migration court system within the framework of administrative law, it is the legal party of the applicant(s) who has the burden of proof (see e.g. MIG 2014:1, p. 1; cf. UNHCR, 1998). Previous research results are (Johannesson, 2017), thus, in line with my findings that the process of establishing a certain facticity about the applicant's country of origin is

constrained by what I call the procedural power imbalance of the Swedish migration bureaucracy. Consequentially, I argue, there is an institutionalized power imbalance embedded in this bureaucracy throughout its three legal instances. This power imbalance is mainly based on the following arrangement: The MB, as the first legal instance, and as an institution where much of the legally applied knowledge about the applicants' countries of origin is produced and compiled (at the MB's unit called *landinformationsenheten*), becomes one of the legal parties as soon as one of its decisions has been successfully appealed.

In contrast to criminal law, where it is the prosecutor – and not the accused – who has the burden of proof, in asylum cases oftentimes the legal party of the applicant(s) becomes dependent not only on how convincing the applicant(s) can tell their stories but also how well-read in asylum law and country information the public counsels are. This understanding of the procedural setup is supported by information from interviews with two judges (IT1 and IT9) who highlighted the importance of public counsels. Moreover, if it comes to an oral hearing with an 'interpreter' (*tolk*) involved, the process depends on how well the employment of the interpreter enables the communication in the triangle of the two legal parties and the (lay) judges (see Johannesson, 2017, pp. 19f).

Furthermore – and again, this becomes apparent if the administrative law setting of an asylum case in Sweden is contrasted to criminal law – the threshold of how well a certain facticity must be established for it to become 'probable' (*sannolikt*) is framed differently in asylum cases. This threshold is lower in the sense that the benefit of the doubt,¹¹⁴ as it has been re-defined for refugee law by UNHCR (see Kagan, 2002; Sweeney, 2009; cf. UNHCR, 1998), does not apply in the same way to asylum seekers as it does to the accused in criminal cases. One might argue that migration law and criminal law are too different to make such comparisons, and this argument might be valid from a legalistic point of view. Regarding the social practices of migrant detention and deportation, however,

¹¹⁴ UNHCR points out that 'the benefit of the doubt' is strongly linked to I) criminal law and II) common law systems. However, since I am focusing on cases decided within the framework of 1) administrative law and 2) the Swedish civil law tradition, the following must be taken into account: "In common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved 'beyond reasonable doubt'. In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a 'balance of probabilities'. Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of applicant is credible" (UNHCR, 1998, p. 2).

there are good reasons to compare. The consequences for the affected human beings, and the social harm that is produced when criminalizing certain citizens, while detaining and deporting unwanted noncitizens (see Canning, 2017; 2019), ought to be contextualized also in contrast to one another.

Finally, since the establishment of a certain facticity in asylum cases is so heavily dependent on ‘credibility/genuineness assessments’ (*trövärdighets-bedömingar*), I proposed a concept that I call the filter of porous borders. Drawing on Benhabib’s ‘porous borders’ as a normative conceptualization for how she sees the contemporary world as it ought to be, I incorporated Khosravi’s (2010, p. 3) criticism of how “politico-juridical discourse and regulation” function as a filter that aims at including ‘the legitimate life’ of the refugee, while excluding ‘the illegitimate life’ of the unwanted migrant. As a part of what dominant politico-juridical discourse presents as legitimate procedures to determine who will be either included or excluded, I exemplified how a single *trövärdighetsbedöming* contributes to the legitimacy of rejecting the applicant in a single legal case (see MIG 2013:25). All *trövärdighetsbedömingar* combined, as I then elaborated the argument, contribute to the filter of porous borders in general. It is the very existence of these assessments that, thus, re-affirms the legitimacy claims of the politico-juridical discourse from which they have initially emerged. In other words, despite the epistemological limitations of such assessments (see Wikström, 2015; Wikström & Stern, 2015; 2016), they are part of a) a logic that legitimizes expulsions and, at the same time, b) the politico-legal discourse based on which these assessments have been developed in the first place. From a critical perspective, it is therefore important to stress that this circular legitimation process is built on the underlying claim that the applied procedures are rational (see Weber, [1909] 1972). Irrespective of how rational they actually can be, based on this implied rationality claim, they can provide asylum determination processes with procedural legitimacy (see Habermas, 1987a; cf. Eder, 1986; 1987; 1988).

Chapter Seven

The Political Goal of Regulated Immigration, and the Promise of Certainty

In response to the study's third research question, this last empirical chapter aims to answer how 'the legitimate refugee' is discursively constructed. To discuss this question, I sample two precedents based on the chapter's main theme. This theme is concerned with the following phenomenon: The term 'regulated immigration' (*reglerad invandring*) is stated in a handful of the precedents of Swedish asylum law. In the first main section below, I present and problematize the relevant discussions from interviews with Swedish migration court judges. These discussions are introduced through excerpts in which the judges relate to, firstly, Sweden as the receiving country where *reglerad invandring* is maintained and, secondly, those countries of origins about which the Swedish migration bureaucracy produces and compiles knowledge in the form of country of origin information (COI).

Politics at Home, Politics Abroad

"[...] there's indeed a lot of politics in the Aliens Act (*utlänningslagstiftningen*), one cannot get away from this. And that we want to have a regulated immigration, and so it is, well – all countries actually protect their external borders and want to regulate which people will settle [in the receiving country] and what will be required. And that's after all important, precisely this with creating precedent[s]

(*prejudikat*), so that it becomes a unitary application of the law (*enhetlig rättstillämpning*) [...]”¹¹⁵ (IT4).

In an earlier interview at the MCA, the judge reasoned on the issue as follows: “[...] one has to make general statements, because it is still so that our legislation builds on [the grounds] that we should regulate immigration, and that there should be certain laws which tell [you] about the cases in which one gets [a] permit to stay in Sweden [...]”¹¹⁶ (IT9). Further into the interview from which I cited the excerpt above (IT4), the judge explained that the “unitary application of law” (*enhetlig rättstillämpning*) was important because it should be unitary “between different courts” (*mellan olika domstolar*). I identify this aim of maintaining *enhetlig rättstillämpning* as being directly linked to the main legitimation of the Swedish migration bureaucracy, which claims to be an administration that safeguards ‘legal certainty’ (*rättsäkerhet*) and upholds ‘the rule of law’ (also *rättsäkerhet*). As I elaborated in the preceding chapters, the promise of certainty is central to what is called ‘the rule of law’ in common law or, respectively, *der Rechtsstaat* (in Swedish *rättsstaten*) in civil law systems (see Banakar, 2015). The promise of maintaining a legally certain distinction between ‘deserving’, ‘legitimate’ refugees and ‘underserving’, ‘illegitimate’ asylum seekers is, in this sense, situated at the heart of the Swedish asylum system.

When it comes to empirical research that critically examines the social reality of seeking asylum in Sweden, however, there are several studies that challenge precisely this claim of legally certain processes. For instance, Linna Martén (2015) presents the following results of her quantitative research: Asylum cases are decided differently at Sweden’s different Migration Courts. Her study indicates that different judges decide similar cases significantly differently, and that the respective decisions are also dependent on the involvement of lay judges recruited from political parties with anti-immigration stances. In this context, I may quote

¹¹⁵ From the interview data: “[...] det är ju mycket politik i utlänningslagstiftningen, det går ju inte komma ifrån. Och att vi vill ha en reglerad invandring, och så är det väl - alla länder skyddar egentligen sina yttre gränser och vill reglera vilka personer som ska bosätta sig och vad som ska krävas. Och det är väl viktigt, just det här med att skapa prejudikat, så att det blir en enhetlig rättstillämpning, mellan olika domstolar [...]”.

¹¹⁶ From the interview data: “[...] får man ju göra generella uttalanden, eftersom det ändå är så att vår lagstiftning bygger på att vi ska ha en reglerad invandring, och att det ska finnas vissa lagar som talar om i vilka fall man får tillstånd att vistas i Sverige [...]”.

the following from the first interview that I conducted with a judge at the MCA in September 2015:

“[...] if I have understood the distribution between the Migration Courts, it is like this, that certain [applications from applicants from certain] countries come more to certain courts, so [the countries] which have certain ethnic groups (*folkgrupper*). And then it is also like that, that the Administrative Court in Stockholm [of which Stockholm’s MC is a part] is divided [into different units], because it is so big that certain units decide on cases where the asylum seekers come from certain areas in the world, precisely because one needs so much in-depth knowledge about countries, about culture, about customs/manners (*seder*), which indeed facilitates [the process] when one evaluates, for example, the credibility/genuineness (*trovärdigheten*) of narratives. To know when they [applicants] shall be interrogated (*förhöras*) about their country-knowledge (*länderkunskaper*) that we talked about, and when one shall conduct language tests, which have been questioned, but this indeed means (*det gör ju*) that one tries to create a specialization in different areas of the world, precisely because it shall become easier, sort of, to compare and also to have better knowledge (*kännedom*). And there come [into the process] indeed very much these different documents which come from the Migration Board that makes its travels and writes reports (*gör sina resor och skriver rapporter*), and many international bodies who also write reports”¹¹⁷ (IT4).

Besides the aspects that I already addressed in the preceding chapters, i.e. language analyses (Chapter Five) and credibility assessments (Chapter Six), the interview excerpt provides the information that there is a distribution of cases according to geographical expertise. This was confirmed in another interview that I conducted with a second-instance judge: “[Y]es there are [specific units for geographical areas.... Some judges] are Africa-experts, one can say. But there are very many

¹¹⁷ From the interviews: “[...] om jag har förstått fördelningen mellan migrationsdomstolarna, så är det så att vissa länder kommer mer till vissa domstolar, alltså som har vissa folkgrupper. Och sen är det också så att Förvaltningsrätten i Stockholm i alla fall indelas, för det är så stort att vissa enheter dömer i mål där de asylsökande kommer från vissa områden i världen, just för att man behöver så mycket ingående kunskap om länder, om kultur, om seder, som ju underlättar när man bedömer t.ex. trovärdigheten i berättelser. Att veta när de ska förhöras om sina länderkunskaper som vi pratade om, när man gör språktester, som har ifrågasatts, men det gör ju att man försöka ju skapa en specialisering på olika områden i världen, just för att det ska bli lättare, liksom, att jämföra och också ha en bättre kännedom. Och sen kommer ju väldigt mycket de här olika dokumenten som kommer ifrån migrationsverket som gör sina resor och skriver rapporter, och många internationella organ som också skriver rapporter.”

countries in Africa also, so this has many niches (*det är jättenischad*), but I think this is good”¹¹⁸ (IT8).

Given the fact that asylum seekers can provide the courts with newspaper articles or other mass media output to support their applications (see Chapter Three), it is interesting that this judge also touched upon the complicated relation between the judiciary and the mass media:

“[...] almost all migration cases, or not almost all but a very large proportion, are indeed appealed, which shows that people are not pleased (*nöjd*) with the decision (*avgörandet*). But, after all, it can also be that they buy themselves time, to stay some more weeks even, in Sweden – this we don’t know really. But, as a judge, I am in fact very rarely contacted by individuals who are displeased (*missnöjda*) with their decisions (*med sina domar*). This may well partially depend on language difficulties, that it is not so easy for a person from Africa to call and talk with me and say: you cannot do this. But, well, sometimes I can also think (*tycka*) that the media have a responsibility – the media are not always impartial. Instead, the media sell news. No, well, one can read [for example that] the claimant (*den klagande*) brings in a newspaper article, to which he or she has contributed, and says this and that, and the journalist, or people in the home towns [where the applicant lives in Sweden], think that one cannot send [expel] him or her. Say Mohammed, just to have a name, he has been here so and so many years and has his whole life here. And so one makes a great sob story (*jättestor snyftberättelse*) about this, and one does not at all describe the legal (*det rättsliga*) [question of] why one has arrived at this decision, there is no interest in this, it does not sell. Well, and it is clear, this can of course affect trust (*påverka förtroende*) in the Court, but the courts are after all set to follow law and preparatory works and [legal] practice (*lag och förarbeten och praxis*), and this [setup] is entirely lost in the media’s reporting”¹¹⁹ (IT8).

¹¹⁸ From the interviews: “[...] ja det finns såna, [...Några domare] är ju Afrikaexperter så, kan man säga. Men det är väldigt många länder i Afrika också så att det är jättenischad så, men jag tycker att det är bra.”

¹¹⁹ From the interviews: “[...] nästan alla migrationsmål, eller inte nästan alla men en väldigt stor andel, överklagas ju, vilket ju visar att människor inte är nöjda med avgörandet. Men det kan ju också vara så att de köper sig tid för stanna ytterligare några veckor i Sverige, det vet vi ju inte riktigt. Men jag som domare blir ju ytterst sällan kontaktad av enskilda som liksom är missnöjda med sina domar. Det kan väl delvis bero på språksvårigheter också, att det inte är så lätt för en person från Afrika att ringa och prata med mig och säga att såhär kan du inte göra. Men, hm, ibland kan jag också tycka att medierna har ett ansvar att - media är inte alltid opartisk. Utan media säljer nyheter. Nämen man kan läsa, den klagande ger in en tidningsartikel, där han eller hon har medverkat, och säger si och så, och journalisten, eller folk då på hemorter, tycker att man inte kan skicka hem han eller hon. Säg Mohammed, bara för att ha ett namn, han har varit här i

In this excerpt, the judge connects several points that are significant for my analysis. Firstly, the judge describes a rather distorted form of communication that takes place between the courts and wider society. According to the judge, the communication between the affected asylum seekers and the responsible judges tends to be limited. This might “partially depend on language difficulties” (IT8), the judge reasons. Moreover, in a scenario where the applicant provides a newspaper article as evidentiary material in support of the application, the judge exemplifies the procedure of determining the applicants’ need for protection. The mass media are also mentioned in another context. The media, as the judge “sometimes” tends to think, are not impartial, mainly because they want to “sell news” (IT8). When Swedish journalists, together with engaged locals from places in Sweden where the applicants live, mobilize opinion in favour of the asylum seekers’ right to stay, the judge sees these cases as formulating a “great sob story” (*jättestor snyftberättelse*, IT8). Elaborating on this rather harsh wording, the judge seems to be particularly critical towards the media’s tendency to focus on the question of whether the applicants are allowed to stay or not. Therefore, as the judge further claims, the media would not write or speak about the legal aspect(s) of the respective cases.

In line with what I argued in Chapter Three, this excerpt confirms the observation that the media tends to be interested in the outcome for the affected asylum seeker rather than in the main (legalistic) point of the respective decision. In the interview excerpt above, this concerns second-instance decisions and not the precedents of the MCA. In Habermas’ (1985) terms, the judge gives an example of distorted communication by formulating it in a generalized form, i.e. of ‘how such cases tend to be’: The journalists tend to be interested in the legitimacy of the expulsion, while the judges tend to stress the reasons for the decision’s legal correctness (see Banakar, 2015, pp. 63-67; Alexy, 2002b; cf. Chapter Three). One aspect that I, therefore, must highlight once more is the tension between the judges’ ambition to make a legal point and the journalists’ possibility to question the legitimacy of an expulsion decision. In addition to the discussion about it in Chapter Three, I now need to present the idea that this is a

si och så många år och har hela sitt liv här. Och så gör man en jättestor snyftberättelse om detta, och man redogör inte alls för det rättsliga – varför man har kommit fram till det här avgörandet, det finns inget intresse för det, det säljer inte. Ähm och det är klart, det kan ju påverka förtroende för domstolen va, men domstolarna är ju faktiskt satta att följa lag och förarbeten och praxis, och det tappar man helt bort i nyhetsrapporteringen sen.”

tension that can emerge in response to second-instance as well as to third-instance migration court decisions.

Thus, it cannot be only due to the MCA's practice of "obscuring" (Habermas, 1992, p. 566) non-legal normativity, with the aim of "conducting precedents [solely] on legal questions" (Johannesson, 2017, p. 176), that this tension between legality and legitimacy emerges when asylum cases are communicated between the 'strong' public sphere of the migration courts and the 'weak' public sphere of the media (see Benhabib, 2004, p. 179). Instead, my interview data shows that the MCs – which do incorporate factual legal argumentation in their decision-making – are also questioned by the media when it comes to the legitimacy of their decisions on certain asylum cases. To reduce the democratic, investigative and critically questioning function of journalism to the financial motivation of wanting to "sell news" (IT8), while using formulations such as "sob story" (ibid.), is surely an oversimplification. If nothing else, such formulations indicate that the authority of 'law as power' (see Benhabib et al., 2006; cf. Cover, 1983) tends to be confronted with, and indeed sometimes challenged by, the question of how legitimate its decisions are and how it can give meaning to them; a meaning which larger swathes of society, and not only a highly educated bureaucratic elite, can understand.

The interview with the judge who confirmed that there was specific expertise in certain countries of origin (IT8) makes it necessary to focus in depth on COI. In the first place, the political situation in a certain place at a certain time is important when it comes to establish COI.¹²⁰ A country can be officially at war, suffering from civil war or other forms of 'inner armed conflict' (*inre väpnad konflikt*) – a formulation that is used in more than 30 of the 200 precedents (e.g. MIG 2007:9, MIG 2009:27 or MIG 2011:4), and which has been mentioned in six interviews (IT1, IT2, IT4, IT6, IT7 & IT8). Depending on the asylum application, the focus of the legal interest may also be information that has nothing to do with armed conflict. For example, it could be "the situation of homosexuals in Nigeria" (MIG 2013:25, p. 12) that becomes case-specifically relevant COI (see Chapter Six).

As a rule, COI is "provided" (IT1, see below) by the legal parties. Regarding other sources of COI, in an interview that I conducted with a judge at the MCA, I received the following information:

¹²⁰ See European Asylum Support Office (EASO), <https://www.easo.europa.eu/country-origin-information> (Accessed 29 July 2017).

“[...] it is [the UK’s] Home Office [...and] even the USA, there the State Department, and sometimes in fact the [Swedish] Foreign Office’s reports, these can be [taken into account], and there it is even like that, that, yes well, the thinking with the new Aliens Act is after all that the [legal] parties should contribute with country information which they think is needed, sort of. The Migration Board, for example, indeed provides the court with – and this, actually, only if we think that this country information, which they [the MB] have come with, is too old, or it does not give enough information, or whatever it [the problem] can be. Then we have ourselves taken in (*plockat in*) reports sort of and then one has probably looked in the first place at those. But from the parties, they can provide whatever they want (*föra in vad de vill*), so whichever information they want. And then one indeed has to evaluate in light of, if one says, other reports [too], and see what one thinks (*tycker*) is most likely [the correct information]”¹²¹ (IT1).

In this excerpt, a judge at the MCA describes the ways in which COI can become part of the decision-making process. The judge confirms that, besides reports from the US State Department and the UK Home Office, the Swedish Foreign Office produces reports that are used as COI in Swedish asylum cases. In four of the ten interviews (IT3, IT5, IT6 & IT8) it was stated that sources in Norwegian are used. Specifically, country reports written by the Norwegian Ministry of Foreign Affairs¹²² and the Norwegian Directorate of Immigration¹²³ were mentioned. This specific detail was explained by a second-instance judge as follows:

“[...] so, there is another aspect of this with country information, and this is that which are questions and answers that come from the [Swedish] MB’s country information unit (*Migrationsverkets landinformationsenhet*). But there, the operation [of the unit] has been quite undeveloped (*outvecklad*), but indeed, there

¹²¹ From the interviews: “[...] är det ju Home Office, som du nämnde, även USA, där State Departement, och ibland då faktiskt UD:s rapporter, kan vara, och då är det ju även så att, ja men, tanken med nya utlänningslagen är ju att parterna ska föra i den landinformation som de tycker behövs, liksom. Migrationsverket t.ex. ska ju förse domstolen – och de är ju egentligen bara om vi då tycker att den här landinformationen, som de har kommit med, den är för gammal eller den ger inte tillräckligt med information, eller va det nu kan vara, då har vi ju själva plockat in rapporter och då har man väl tittat framförallt på dem. Men från parterna, de kan ju föra in vad de vill, alltså vilken information de vill. Och den får man ju då värdera i ljuset av, om säger, andra rapporter liksom, och ser va man tycker är mest troligt”.

¹²² In Norwegian, the institution is called *Utenriksdepartementet*, see <https://www.regjeringen.no/no/dep/ud/id833/> (Accessed 27 July 2017).

¹²³ This one is called *Utlendingsdirektoratet*, see <https://www.udi.no/> (Accessed 27 July 2017).

one has made an investment and made it into an own unit, and the thought is that it will get a more important role, sort of that different case workers (*handläggare*) pose questions to the country information unit, search through all sources they know and then they compile an answer. And then one publishes that. And these type of questions and answers can be tremendously valuable, because compiling information in the way they have done is indeed tremendously time consuming. And it is, sort of, the Norwegian Directorate of Immigration has had such a function for a very, very long time, and this means indeed that it can become very [...] one can even have such luck that exactly the question that one has problems with in one's case, [for example the] possibility for women to have a divorce in Lebanon, that exactly this question is there. As a question-answer, from the Norwegian Directorate of Immigration or from the Swedish [MB] or so, well, and then one does provide sources. And there I think that, there, it is of course clear, it is still the [Swedish] Migration Board that has done that, but there it is not done in just, well there it is after all not about deciding how the Migration Board should look at a certain question, as it is with these legal positions (*rättsliga ställningstaganden*). Instead, there it is a civil servant (*en tjänsteman*), who has this as their (*sitt*) job and who happens to be (*råkar vara*) employed by the MB, who has sort of trawled over all sources that can be thought of (*trålat över alla källor som kan tänkas*) and who tries to obtain this [information]. And it is reported very thoroughly also where they have found the different things, so that one can evaluate this oneself. These, I am indeed more inclined (*benägen*) to view [it] as ordinary country information (*vanlig landinformation*), although it in fact comes from the [Swedish Migration] Board there as well"¹²⁴ (IT5).

¹²⁴ From the interviews: "[...] så finns det en annan aspekt av det här med landinformation, och det är det som är frågor och svar som kommer från Migrationsverkets landinformationsenhet. Men där, den verksamheten har varit rätt så outvecklad, men där har man ju gjort en satsning och har gjort den till en egen enhet, och tanken är att den ska få en mer betydande roll, liksom att olika handläggare ställer frågor till landinformationsenheten, letar i alla källor de kan och så sammanställer de ett svar. Och sen publicerar man det. Och den där typen av frågor och svar kan vara oerhört värdefulla, därför att sammanställa information på det sättet som de har gjort är ju oerhört tidskrävande. Och det är liksom, Norska utlänningsmyndigheten har haft en sån funktion väldigt, väldigt länge, och den där gör ju att det kan bli väldigt – man kan få – man kan tom har sån tur att exakt den frågan som man har problem med i sitt mål, möjlighet för kvinnor att få skilsmässa i Libanon, att exakt den frågan finns. Som en fråga-svar, från den norska utlänningsmyndigheten eller från den svenska eller så va, och då anger man ju källor och så. Och där tror jag att, där, det är ju klart, det är fortfarande Migrationsverket som har gjort det, men där är det ju inte gjort i just, alltså där handlar det ju inte om att bestämma hur Migrationsverket ska se på en särskild fråga, som det är med de här rättsliga ställningstaganden. Utan där handlar det om att det är en tjänsteman, som har det som sitt jobb och som råkar vara anställt av Migrationsverket, som har liksom trålat över alla källor som kan tänkas och som försöker få fram detta Och det redovisas väldigt noga också var de har hittat de olika grejerna, så att man kan

This excerpt from an interview with an MC judge illustrates the problem that is inherent to the fact that the MB is the first legal instance of the Swedish migration bureaucracy and, at the same time, the main compiler of COI. Notwithstanding the detail that *landinformationsenheten* is thought of as an independent unit within the MB, the here cited judge highlighted that, when COI is produced in practice, it is done so by “a civil servant, who has this as their (*sitt*)¹²⁵ job and who happens to be employed by the MB” (IT5).

Especially the formulation “happens to be” (IT5) hints at the criticism to which this organizational practice exposes itself. If the main source of COI in Swedish is to be independent, why is the respective expert organisation a unit of the MB? The obviousness of this question weakens the legitimacy of COI produced in Sweden; a weakness that is echoed in the government report SOU2009:56. In this report it is noted that the (today non-existent) possibility of factual aspects being reviewed by the MCA could support the overall “ambition to promote legal certainty/the rule of law and legal safety/security (*rättssäkerhet och rättstrygghet*) for individuals and, thus, strengthen the judicial system’s legitimacy” (SOU2009:56, p. 23).

In the excerpt above, the interviewed judge (IT5) stressed that incorporating factual knowledge produced by the MB’s country information unit was not the same as referring to the MB with regard to legal questions. As the judge put it, COI produced by *landinformationsenheten* “was after all not about deciding how the MB should look at a certain question, as it is with these legal positions (*rättsliga ställningstaganden*)” (IT5). In other words, the judge found it to be less problematic to incorporate empirical reasoning produced by a unit of the MB, compared to the idea of incorporating statements which concern legal normativity, and which are formulated by the MB. This is in line with what another judge (IT6) said, and which I have cited towards the end of Chapter Six. I am referring to the following excerpt:

“I can be quite critical about what the Migration Board sometimes writes. One has, among other things, written such a legal instruction regarding credibility and reliability assessments which is on Lifos. And I have to say that this is difficult to

värdera det själv. Dem är jag ju mer benägen att betrakta som vanlig landinformation, trots att det faktiskt kommer från Verket där också.”

¹²⁵ When translating the possessive pronouns *sin* and *sitt*, I use ‘their’ (instead of ‘her/his’) in order to avoid sex/gender binaries.

get through because it is messy and it is – it is not unobjectionable, regarding neither form nor content, really” (IT6).

Thus, as becomes noteworthy when these two statements (from IT5 and IT6) are read alongside each other, a more general distinction can be made, namely between the factual and the normative information that is produced and compiled by the MB. Incorporating COI that originates from the MB’s *landinformationsenhet* as factual knowledge is standard practice at Sweden’s migration courts. Meanwhile, two judges were critical towards incorporating a “legal instruction” (IT6) or a “legal position” (IT5) as pronouncements on legal normativity that concern the procedural and, respectively, substantive organisation of law. In another interview with a second-instance judge, the criticism of the MB’s “legal positions” (IT5), and their different nature as texts compared to COI, was echoed as follows:

“[...] I have in fact been in the situation that, sometimes, I thought that I don’t agree with this, which they [the MB] write in their legal position (*rättsliga ställningstagande*). But they include indeed a good review of, maybe, [legal] practice in an area, and from this practice the Migration Board draws its own conclusion, which of course is usually something that one can agree with, but it is still an input from a legal party (*en partsinlagan*) in some sense”¹²⁶ (IT5).

Regarding the distinction that the judge cited further above (IT6) implied, this criticism still concerned the content and not the form of information. In the same interview, the judge also made the following remark on the form, i.e. the language, in which relevant material was written:

“[...] this is indeed an inequality in that respect between different, what should we say, source-compilers (*källsammansställare*). So, [if] one can compile their sources in English, or for our part in Swedish, or in a Nordic language, [then] one indeed lies far ahead of those (*den*) who have done that in French, I would like to say. I know that there are [Swedish] jurists (*föredragande*) who are proficient in French and read decisions in French from the European Court and so on, I know that –

¹²⁶ From the interviews: “[...] jag har faktiskt varit med nån gång att jag tyckte att det här håller jag inte med om, som de skriver sitt rättsliga ställningstagande. Men de innehåller ju ofta en bra genomgång av kanske praxis på ett område och utifrån den praxis så drar Migrationsverket sin egen slutsats, vilket naturligtvis ju oftast är nåt som man kan hålla med om, men det är ju ändå en partsinlagan i någon mening.”

but well, one can still generally say that the country information that is prepared in English or Swedish has an advantage (*har försteget*) in this respect”¹²⁷ (IT6).

I posed the follow-up question of whether it could ever be of importance to consider, for example, the Japanese Foreign Office as a source of COI. The judge replied: “Myself, I have tried to read in Dutch at some point, because I know a bit of German, but one cannot manage this” (IT6). In another interview with a different second-instance judge (IT8), the issue of being expected to read, besides Swedish and English, also Norwegian, was criticized as follows:

“Yes, Swedish and English are indeed the most common, and then Norwegian. And I actually think that this is strange (*konstigt*), country information that is not translated. Because we sit, well, apply very important text and this not in our mother tongue (*modersmål*), and we are after all quite many judges who are not, sort of, entirely bilingual and it could indeed be worth to translate, I have in fact thought about this several times, and sometimes Norwegian can be more difficult than English I can say, it is not so easy – if one shall – one should not be forced to sit and feel insecure”¹²⁸ (IT8).

When I urged the judge to develop this thought, the interview continued as follows:

“Because this is so important! And if it is now so that we are so many who read this [COI], why cannot one, someone, do the job to translate this, so that we all

¹²⁷ From the interviews: “[...] det är ju en ojämlikhet i det avseendet mellan olika, vad ska vi säga, källsammanställare. Så, kan man sammanställa sina källor på engelska, eller för vår del då på svenska, eller på ett nordiskt språk, så ligger man ju långt före den som har gjort det på franska, skulle jag vilja säga. Jag vet att det finns föredragande här som behärskar franska väl och läser avgöranden på franska från Europadomstolen och så där, jag vet att det - men alltså, man kan nog generellt säga att den landinformation som är framställd på engelska och svenska då har försteget i det avseendet då.”

¹²⁸ From the interviews: ”Ja, svenska och engelska är ju de vanligaste, och norska sen då. Och jag tycker egentligen att det är konstigt, en landinformation som inte finns översatt. För vi sitter, alltså tillämpar väldigt viktig text och det är inte på vårt modersmål, och vi är ju ganska många domare runt om som inte är liksom helt tvåspråkiga och det kunde väl vara värt att översätta, det har jag faktiskt tänkt på flera gånger, och ibland kan norska vara svårare än engelska ska jag säga, det är inte så lätt, om man ska, man borde inte vara tvungen att sitta och känna sig osäker.”

can get a more secure and more easily applicable basis [for taking decisions] (*mer lät tillämpligt underlag*)?¹²⁹ (IT8).

Indeed, I replied, this was an interesting point. The judge continued:

“Yes, I think often about this, I can become really angry (*riktigt förbaskat*) about [the fact] that it has to be like this. It is a Swedish process, but we have to sit and read in English and decide about people’s, well not life and death, but sometimes actually, in another language than our mother tongue”¹³⁰(IT8).

Rather surprised about the emotional nature of these formulations, I posed another follow-up question by returning to the example that I had used earlier. I asked whether, if there was potentially relevant information, for instance about North Korea written in Japanese, such information could become accessible to Swedish judges. In reply, the judge agreed that such a scenario was possible. Yet, this immediate answer was followed by a “no”; one could not access such information. The judge concluded: “in fact I think that this is something that one could do something about.”

In summary, an MC judge (IT8) could not understand that there were not any translations of relevant COI. When it comes to reading – and taking decisions based on – COI written in English or Norwegian, the judge stressed that many judges were not equally proficient in English and that, at times, Norwegian was more difficult than English. Regarding the importance of decisions on asylum cases – in the words of the judge, decisions “about people’s, well not life and death, but sometimes actually” (IT8) – the judge expressed anger about the current situation, in which there were no translations provided. In response to my question about potentially significant information in, for example, Japanese, the judge confirmed that such information was entirely out of reach for Swedish migration court judges. In this context, the judge asked for change by stating that this lack of translation should be something that someone “could do something about” (IT8).

¹²⁹ From the interviews: ”Eftersom det är så viktigt! Och om det nu är så att vi är så många som läser det här, varför kan inte en, någon, lägga ner jobbet på att översätta det, så att vi alla kan få ett säkrare och mer lät tillämpligt underlag?”

¹³⁰ From the interviews: ”Ja, jag tänker ofta på det, jag kan bli riktigt förbaskat över att det ska vara så. Det är en svensk process, men vi ska sitta och läsa på engelska och avgöra folks, ja inte liv och död alltid, men ibland faktiskt, på ett annat än vårt modersmål.”

Further into the same interview (IT8), the judge returned to the content of COI, or more precisely the sources of country information. In social scientific terms, it was a methodological issue that the judge highlighted with the following sentences:

“[...] certain country information, after all, can be based on what two people out in the forest state (*vad två personen ute i skogen uppger*). Yes, a bit like that, not really. But in countries where it is difficult to get information, there the standpoint [of the COI in question] can at least partially be built on quite weak observations, but this is what is accessible, quite simply. One has maybe collected, sort of, what many [people] say, field workers in Africa who have come across people, sort of”¹³¹ (IT8).

Due to these methodological weaknesses, to paraphrase the judge, the following practice was described as a strategy to “compensate” (IT8) for poor data: “[...] in return, one does try to compensate this by cutting together several such fragments in such a case, maybe from different countries, so different country reports [...]”¹³² (IT8). To exemplify such cases, the judge then turned to the expertise about certain countries:

“[...] Somalia is a quite good example, where one has, at least previously, been doing such investigative trips (*utredningsresor*) which – sort of, there is not much more country information than [from when] the Migration Board had done this trip and came across people who said this and that. It is indeed difficult when there is not so much foreign representation (*utlandsrepresentation*) in a country, then one does not get to know that much”¹³³ (IT8).

¹³¹ From the interviews: “[...] viss landinformation kan ju baseras på vad två personen ute i skogen uppger. Ja, men lite så, inte riktigt. Men i länder där det är svårt att få information, så kan ju ställningstagandet delvis iaf bygga på ganska klena iakttagelser, men det är vad som finns att tillgå, helt enkelt. Men kanske har samlat in liksom vad rätt många säger, men, fältarbetare i Afrika som har stött på liksom folk, det liksom.”

¹³² From the interviews: “[...] i gengäld så försöker man ju kompensera det igenom att klippa ihop flera såna här fragment i så fall, kanske från olika länder, alltså olika landrapporter [...]”

¹³³ From the interviews: “[...] Somalia är ett ganska bra exempel på, när man har under en lång tid tidigare i vart fall gjort såna utredningsresor som – liksom det finns inte så mycket landinformation mer än att Migrationsverket har gjort den här resan och stött på folk som har sagt si och som har sagt så. Det är ju svårt när det inte finns så mycket utlandsrepresentation i ett land, då får man inte veta så mycket.”

The judge developed this exemplification of Somalia, as a place about which it was difficult to collect country information, with the help of a concrete example:

“[...] I thought of this investigative trip which the Migration Board did, that one has to do this type of trip to get information about a country. There was, after all, almost no one (*Det fanns ju nästa inga*) who had lived and worked in Somalia [at the time]. It is very difficult to evaluate (*bedöma*) a country where one is not inside to observe and see. Then it indeed becomes like that, easily, yes one has to take the information that is there, of course”¹³⁴ (IT8).

In addition to the problem of reading – and incorporating into the decision-making – information that is written in a language other than Swedish, the judge’s remarks (IT8) are linked to the lack of factual guidance for which COI in Swedish has been criticized (see SOU2009:56, pp. 23f). In certain cases, according to the judge, information about asylum seekers’ countries of origin had been compiled “based on what two people out in the forest” (IT8) collected as data. Even though the judge quickly relativized this formulation by adding “not really”, the judge’s criticism of the way in which certain COI had been collected was further illustrated in the context of countries where “there is not so much foreign representation”. In the example of Somalia, according to the judge, it had been the MB that had “at least previously, been doing such investigative trips”. Furthermore, according to the judge, in Somalia there was not much foreign representation and “not much more country information than [from when] the Migration Board has done this trip and came across people who have said this and that”. Thus, the judge reasoned, “one has to take the information that is there” (IT8). In other words, the judge criticized that there were countries, for instance Somalia, about which there was not enough accessible COI of sufficient quality.

At this point, it becomes analytically interesting to read these different excerpts, which include criticism of the factual as well as the normative information that judges receive from the MB, against the background of what an MCA judge expressed about ‘regulated immigration’ (*reglerad invandring*). When I asked how *reglerad invandring* could become part of a precedent of Swedish asylum law – as it does in MIG 2007:31, MIG 2011:23, MIG 2011:27, MIG 2014:3, MIG

¹³⁴ From the interviews: “[...] jag tänkte på den där utredningsresan som Migrationsverket gjorde, att man måste göra den typen av resor för att få information om ett land. Det fanns ju nästa inga som hade liksom bott och arbetat i Somalia då. Det är väldigt svårt att bedöma ett land där man inte är inne och iakttar och ser. Då blir det ju så, lätt, ja man får ta den information som finns, såklart.”

2014:16 and MIG 2015:21 – the judge answered the following: “one has to make general statements, because it is still so that our legislation builds on [the ground] that we should regulate immigration” (IT9). If one reads this explanation against the backdrop of the example of Somalia as the judge cited above presented it (IT8), one can start to wonder if – and if yes, how – it can become possible “to make general statements” (IT9) about the situation in a country, when significant aspects of a case concern information on this country about which “one does not get to know that much” (IT8). The ways in which ‘regulated immigration’ can become part of the process of legitimizing certain last-instance decisions that affect asylum seekers is, therefore, the focus of what follows below.

The Term Regulated Immigration in the Precedents

When looking through the 365 precedents of Swedish migration law that were published from 2006 until 2016, one can find precisely 14 precedents that state the formulation *reglerad invandring*. Thus, besides the six precedents that concern asylum seekers, there are eight precedents¹³⁵ that concern applications for a residence permit on grounds other than asylum and which mention *reglerad invandring*. Among the six precedents that I categorized as asylum law precedents that mention *reglerad invandring*, in four precedents the applicant also sought asylum (MIG 2007:31, MIG 2011:23, MIG 2011:27 & MIG 2014:3). In the remaining two decisions it is a family member of an asylum seeker who is the applicant for a residence permit in Sweden (MIG 2014:16 & MIG 2015:21). The application for a residence permit in these two cases is not directly linked to any asylum claim made by the respective applicant. This leaves me with four precedents of asylum law that state the term and in which the applicant for a residence permit sought asylum, and from here on, I limit myself to sampling from these four decisions.

It is important to stress that the applicants in MIG 2007:31, MIG 2011:23, MIG 2011:27 and MIG 2014:3 are all categorized as having ‘family ties’ (*familjanknytning*) to Sweden. Both the applicants of MIG 2011:23 and MIG 2011:27 are recognized as fathers of children born in Sweden. In MIG 2007:31

¹³⁵ Here, I refer to the following precedents of Swedish migration law: MIG 2006:8, MIG 2007:11, MIG 2009:2, MIG 2009:3, MIG 2009:11, MIG 2014:12, MIG 2015:4 & MIG 2016:6.

family ties are constituted by the applicant's "ties to the girlfriend" (*anknytning till flickvännen*, p. 2), while MIG 2014:3 is the only case that concerns an asylum-seeking mother. MIG 2014:3 further sticks out among the four because it is the only precedent that decides about a 'Dublin transfer' (*Dublinöverföring*), i.e. an expulsion to another member state of the Dublin system (see Chapter Two). All four precedents revolve around the question of whether it is possible to make an exception to the rule that applications for a residence permit based on 'ties' (*anknytning*) must be filed from outside Sweden. In this context, it is necessary to highlight that, even though all four cases include an asylum claim filed by the residence permit applicant, in none of these precedents is the asylum claim in the focus of legal interest. While this is a common feature of the four precedents, I decided to begin with the analysis of MIG 2014:3 – the only 'Dublin case' (*Dublinärende*) among them.

Regulated Immigration in a Dublin Case that Concerns a Mother

The heading of MIG 2014:3 presents the following summary:

"A court cannot assess (*pröva*) whether the Migration Board should have applied Chapter 12 § 18 of the Aliens Act to an application for residence permit based on family ties, when there is a legally valid (*lagakraftvunnet*) decision of transfer, according to the Dublin Convention, which will be enforced" (MIG 2014:3, p. 1).

MIG 2014:3 thereupon introduces the case with the following lines:

"A applied for asylum in Sweden on 11 June 2012, whereupon, on 27 July the same year, the Migration Board decided to reject her asylum application and to transfer her to Malta in accordance with the provisions of the Council's Regulation (EU) No. 343/2003 from the 18th of February 2003 about criteria and mechanisms to determine which member state has the responsibility to process an asylum application that a citizen of a third country has submitted in another member state (The Dublin Convention, *Dublinförordningen*). The transfer-decision became legally valid. On the 18 September 2012, A submitted an

application for a residence permit based on ties to her in-Sweden-residing husband”¹³⁶ (MIG 2014:3, p. 1).

At the level of content, this excerpt clarifies some of the intricacies of MIG 2014:3. The applicant had filed an asylum claim in Sweden. After the MB had decided that Sweden was going to expel her to Malta in accordance with ‘Dublin II’ (EU Regulation 343/2003, see Chapter Two), “A” filed another application for a residence permit. This application was not based on any need for protection, but on the family ties to her husband who was residing in Sweden. The formulation “in-Sweden-residing husband” (*i Sverige bosatte make*) stands in contrast to those formulations that are used in other precedents, in which the ‘partner’ (*sambo*) or ‘spouse’ (*makal make*) of a residence permit applicant is a Swedish citizen. Hence the impression that the “husband” in MIG 2014:3 is a denizen of Sweden, i.e. legally residing in Sweden without being a Swedish citizen.

About five months later, in February 2013, the MB rejected also this application. The appeal to this second rejection is summarized in MIG 2014:3 as follows:

“A appealed the Migration Board’s decision and pleaded (*yrkade*) that she should be granted a residence and work permit. She substantially adduced (*anförde i huvudsak*) the following: On the 27th of January 2013, she gave birth to a child in Sweden. She cannot return to Malta to apply for a residence and work permit based on ties to her husband in Sweden from there. The Maltese authorities are immediately going to send her back to Libya, which would be especially dangerous for her and the child”¹³⁷ (MIG 2014:3, p. 1).

¹³⁶ From the precedents: “A ansökte den 11 juni 2012 om asyl i Sverige, varpå Migrationsverket den 27 juli samma år beslutade att avvisa hennes asylansökan och överföra henne till Malta i enlighet med bestämmelserna i rådets förordning (EG) nr 343/2003 av den 18 februari 2003 om kriterier och mekanismer för att avgöra vilken medlemsstat som har ansvaret för att pröva en asylansökan som en medborgare i tredje land har gett in i någon medlemsstat (Dublinförordningen). Överföringsbeslutet vann laga kraft. A lämnade den 18 september 2012 in en ansökan om uppehållstillstånd grundad på anknytning till sin i Sverige bosatte make. Ansökan gavs in till Svenska ambassaden i Köpenhamn.”

¹³⁷ From the precedents: “A överklagade Migrationsverkets beslut och yrkade att hon skulle beviljas uppehålls- och arbetstillstånd. Hon anförde i huvudsak följande. Den 27 januari 2013 födde hon ett barn i Sverige. Hon kan inte återvända till Malta för att därifrån ansöka om uppehålls- och arbetstillstånd grundat på anknytning till sin make i Sverige. De maltesiska myndigheterna kommer omedelbart att skicka tillbaka henne till Libyen vilket skulle vara synnerligen farligt för henne och barnet.”

This pleading includes a new factual detail. About four months after the applicant had filed her second application, she became the mother of a child born in Sweden. The second-instance court took the following decision:

“[The MC] rejected the pleadings for a residence and work permit and annulled (*undanröjde*) the appealed decision and handed the case over to the Migration Board for re-assessment (*ny prövning*) in accordance with Chapter 12 § 18 Aliens Act. The Migration Court stated as reasons for its decision substantially the following. The Court does not agree with the Migration Board’s assessment that Chapter 12 § 18 Aliens Act should not be applicable in the case. This regulation is in its nature (*till sin karaktär*) different from Chapter 12 § 19 Aliens Act, which is only valid for not previously assessed grounds for protection (*inte tidigare prövade skyddsskäl*). Included in the Migration Board’s *ex officio*¹³⁸ assessment, in accordance with § 18, are situations which do not at all concern the earlier assessment, for example practical obstacles against enforcement (*praktiska verkställighetshinder*). In accordance with the paragraph’s third section, the consequences for a child of being separated from its parents shall be particularly taken into account, which appears to be an assessment that will be done in A’s case”¹³⁹ (MIG 2014:3, pp. 1-2).

Mainly because the applicant had become the mother of a child born in Sweden, the MC annulled the decision of the MB. As the MCA summarizes the MC’s decision, the case was sent back to the MB for ‘re-assessment’ (*ny prövning*). The MCA added the following information about the MC’s decision:

“[...] The [Migration] Board made a mistake when one evaluated that Chapter 12 § 18 Aliens Act cannot be applied. The Board should, thus, have made an

¹³⁸ As an adjective, according to *Wiktionary – The Free Dictionary*, in legal contexts *ex officio* refers to the following: “By virtue of the office that originated it, or of the title held.”, https://en.wiktionary.org/wiki/ex_officio (Accessed 31 July 2017).

¹³⁹ From the precedents: “[Migrationsdomstolen] avvisade yrkandena om uppehålls- och arbetstillstånd samt undanröjde det överklagade beslutet och överlämnade målet till Migrationsverket för prövning enligt 12 kap. 18 § utlänningslagen. Migrationsdomstolen anförde som skäl för sitt avgörande i huvudsak följande. Domstolen delar inte Migrationsverkets bedömning att 12 kap. 18 § utlänningslagen inte skulle vara tillämplig i målet. Denna bestämmelse är till sin karaktär annorlunda än 12 kap. 19 § utlänningslagen som endast gäller inte tidigare prövade skyddsskäl. Inom Migrationsverkets *ex officio*-prövning enligt 18 § ryms situationer som inte alls har med den tidigare prövningen att göra, exempelvis praktiska verkställighetshinder. Enligt paragrafens tredje stycke ska konsekvenserna för ett barn att skiljas från sina föräldrar särskilt beaktas, vilket förefaller vara en sådan bedömning som ska göras i A:s fall.”

assessment in accordance with the regulation instead of taking an expulsion decision (*fatta ett beslut om avvísning*). The Court therefore annuls the expulsion decision and hands the case over to the Board for a factual assessment (*materiell prövning*) regarding what has now been said”¹⁴⁰ (MIG 2014:3, p. 2).

The MB disagreed with the evaluation that it had “made a mistake”. When it appealed the MC’s second-instance decision, leave to appeal was granted and the MCA accepted taking a decision. The legal party of the main applicant, a mother who was faced with the possibility of being expelled to Malta, reacted as follows:

“A dismissed the appeal (*bestred bifall till överklagandet*) and adduced substantially the following. Her application should be re-assessed in accordance with Chapter 12 § 18 Aliens Act. The arguments that the Migration Board presented are not an obstacle to such an assessment. Even in a case that concerns transfer supported by the Dublin Convention it must be possible to take into account new circumstances, especially when small children are affected. Her son, who was born in Sweden, has been granted a residence permit. She is pregnant again and it is not realistic that her application for a residence permit based on ties is processed by the Maltese authorities. She does not see any possibility of taking her son with her to Malta and the conditions that prevail there for asylum seekers. Such an evaluation cannot be made from a child-perspective (*utifrån ett barnperspektiv*) and the consequences of a long-term separation would be devastating for both her and the son”¹⁴¹ (MIG 2014:3, p. 3).

In addition to incorporating the information that her child had been granted a residence permit in Sweden, the mother stated that she was pregnant again. Stressing the danger to which both mother and son would be exposed if she were

¹⁴⁰ From the precedents: “[...] har verket gjort fel när man bedömt att 12 kap. 18 § utlänningslagen inte kan tillämpas. Verket borde alltså ha gjort en prövning enligt den bestämmelsen istället för att fatta ett beslut om avvísning. Domstolen undanröjer därför beslutet om avvísning och överlämnar ärendet till verket för en materiell prövning enligt vad som nu har sagts.”

¹⁴¹ From the precedents: “A bestred bifall till överklagandet och anförde i huvudsak följande. Hennes ansökan bör omprövas enligt 12 kap. 18 § utlänningslagen. De argument som Migrationsverket fört fram hindrar inte en sådan prövning. Även i ett fall som rör överföring med stöd av Dublinförordningen måste det vara möjligt att ta hänsyn till nya omständigheter, särskilt när det är små barn som berörs. Hennes son som föddes i Sverige har beviljats permanent uppehållstillstånd. Hon är åter gravid och det är inte realistiskt att hennes ansökan om uppehållstillstånd på grund av anknytning prövas av de maltesiska myndigheterna. Hon ser ingen möjlighet att ta med sonen till Malta och de förhållanden som råder där för asylsökande. En sådan bedömning kan inte ske utifrån ett barnperspektiv och konsekvenserna av en långvarig separation skulle bli förödande både för henne och sonen.”

expelled to Malta, the legal party of the applicants put forward the following reasoning about the future. It was “not realistic that her application for a residence permit based on ties *is* processed by the Maltese authorities” (MIG 2014:3, p. 3, my emphasis). Despite using the present tense, this reasoning makes a claim about how the Maltese bureaucracy is likely to act in the future. From a perspective that seriously takes into account the child’s best – or, as it is worded by the MCA in MIG 2014:3 (p. 3), “from a ‘child-perspective’” (*utifrån ett barnperspektiv*) – it would not be sensible for mother and son to travel to Malta. Neither would it be acceptable to forcefully separate the mother and her baby boy by deporting her. In the response, which expresses the view of the MCA, the following is noted:

“1. Regarding the [legal] case (*målet*):

A has applied for a residence permit and claimed ties to spouse and child in Sweden. The application was submitted after a decision to transfer her to Malta, supported by the Dublin Convention, had become legally valid (*vunnit laga kraft*). The question in the case is how such an application shall be treated.

2. Regulations which can be actualized:

An alien/foreigner (*utlänning*) who wants to have residence permit in Sweden should (*ska*) have applied for and been granted such a permit before entering the country. This follows from Chapter 5 § 18 first section Aliens Act. This is also a consequence (*Det är också en följd*) of the fundamental principle of Swedish aliens law (*svensk utlänningsrätt*) that immigration in Sweden is to be regulated (supranote: see e.g. Wikrén Sandesjö, 2010, pp. 309f)¹⁴² (MIG 2014:3, p. 3).

With this clarification, the MCA summarized why the case was legally relevant to decide in the form of a precedent. The first point mentions the timing of the two applications that “A” submitted. As stressed in the second sentence of the excerpt above, the residence permit application based on ties was made only after the

¹⁴² From the precedents: “1. Vad målet gäller: A har ansökt om uppehållstillstånd och åberopat anknytning till make och barn i Sverige. Ansökan har getts in efter det att ett beslut att överföra henne till Malta med stöd av Dublinförordningen vunnit laga kraft. Frågan i målet är hur en sådan ansökan ska behandlas. 2. Vilka bestämmelser som kan aktualiseras: En utlänning som vill ha uppehållstillstånd i Sverige ska ha ansökt om och beviljats ett sådant tillstånd före inresan i landet. Detta följer av 5 kap. 18 § första stycket utlänningslagen. Det är också en följd av den grundläggande principen i svensk utlänningsrätt att invandringen i Sverige ska vara reglerad (se t.ex. Wikrén Sandesjö, Utlänningslagen med kommentarer, 9 uppl. s. 309 ff.)”

decision for a ‘Dublin transfer’ to Malta had become ‘legally valid’ (*vunnit laga kraft*). Regarding Fairclough’s legitimization strategies, it is important to read the whole of MIG 2014:3. In this way, one can see how the precedent legitimizes its arguments as a narrative (Fairclough, 2003, p. 98). Without the preceding pages, in which the MCA summarizes statements made by the lower instances and by the legal parties, the reader would, for instance, not know that “A” gave birth a few months after she filed her second application. In other words, without the storytelling of MIG 2014:3 as structured up to that point, it would be unclear that she became the mother of a child with a permanent residence permit in Sweden. This detail constitutes information that concerns factual claims regarding the past and present (see Alexy, 1989, p. 232). The second-instance MC decided to send the case back to the MB, so that a new ‘factual assessment’ (*materiell prövning*)¹⁴³ could be conducted.

In the next sentence, the MCA relates this second-instance decision to the more general legal question of the case. Since the decision to expel the mother to Malta for her asylum claim to be processed there had already become legally valid, the question emerged as to whether the Swedish migration bureaucracy should process any new (factual) details. Then the MCA specified which legal norms needed actualisation. Of analytical importance, besides the authorizing legitimation that is evoked through the re-occurring reference to “Chapter 5 § 18 first section Aliens Act”, is the rationalizing legitimation that is inherent to the following justification: “It is also a consequence of the fundamental principle of Swedish aliens law that immigration to Sweden shall be regulated” (MIG 2014:3, p. 3). To remind myself and the reader, as Fairclough conceptualized it, rationalization refers to legitimation “by reference to the utility of institutionalized action, and to the knowledges society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98). The way that I have interpreted and applied this conceptualization throughout the preceding chapters – the first part of this conceptualization especially, i.e. “by reference to the utility of institutionalized action” (ibid.) – should be read against the backdrop of Habermas’ insight that law can be used as means for political ends.

In MIG 2014:3 the political ends of regulating immigration shall be achieved through the legal means of ‘Swedish aliens law’ (*svensk utlänningsrätt*). In the

¹⁴³ In Swedish legal discourse, the term *materiell prövning* means that the factual aspects of a legal case shall be assessed. In Alexy’s (1989, pp. 232-233) terminology this relates to ‘empirical reasoning’.

precedent, these means and ends stand in a discursive meaning relation that is represented by the formulation ‘the fundamental principle’ (*den grundläggande principen*). As soon as the political goal of regulating immigration is called this, i.e. a fundamental principle of Swedish migration law, a meaning relation of embedding as been accomplished (see *ibid.*): the clearly political goal of regulating immigration is more firmly embedded in legal discourse. In MIG 2014:3 this reasoning is supported by the relatively uncommon usage of references to scholarly literature. The view that “immigration in Sweden is to be regulated” (MIG 2014:3, p. 3) is, thus, legitimized through intertextuality, which Fairclough defines as the presence “of elements of other texts (and therefore potentially other voices than the author’s own)” (Fairclough, 2003, p. 218). By referencing Wikrén and Sandesjö (2010), the authors of MIG 2014:3 invest their decision not only with their own authorizing legitimacy as judges at the last-instance MCA, but also with the scholarly authority represented by the Swedish immigration law experts Gerhard Wikrén and Håkan Sandesjö.

As stressed in the preceding chapters, Habermas warns that using legal decisions as means for political ends entails the danger of the system colonizing the lifeworld (Habermas, 1992, p. 569). In less abstract terms, and in the context of MIG 2014:3, deporting a pregnant mother of a baby boy is a sensitive issue to say the least. The circumstances in which this woman had sought asylum in Sweden – her asylum claim should be processed in Malta, from where she feared deportation to Libya – do not make the case less complicated. In Habermasian terms, it is a case where the law finds itself “between politics and morality” (*ibid.*, p. 567). In other words, the law must mediate between the ethics of incorporating a “child-perspective” (*barnperspektiv*, MIG 2014:3, p. 3) and the policy of regulating immigration. The legitimatizing rationality of expelling the mother according to the MB’s initial decisions is, thus, questioned not only from a legal but also from a moral point of view.

Surely, as I addressed already in Chapter Five, formulations such as ‘the child’s best’, ‘the best interest of the child’ or, as in MIG 2014:3, “from a ‘child-perspective’” (*utifrån ett barnperspektiv*, p. 3) can be called principles in legal texts (see also Josefsson, 2016). In the background of such formulations there are always implicit or explicit references to conceptions of human rights that can be called ‘child rights’ (see Benhabib, 2016; cf. Alexy, 2002a, pp. 47-48). Related to one of Habermas’ crucial insights, however, these formulations – which represent the claim of maintaining a morally responsible approach towards children – also confirm that, to be legitimate, juridical decision-making procedures must be

“permeable to moral discourses” (Habermas, 1992, p. 565). In the context of Habermas’ key-concepts of *System* and *Lebenswelt*, MIG 2014:3 is, therefore, yet another example of the following problem. Because there are children to be considered, the system’s aim of expelling a person based on the political rationale of regulating immigration runs the risk of colonizing the lifeworld of the affected people. Given the history that comes to mind upon hearing the word colonizing (see e.g. Darian-Smith, 2013), colonization has always been backed up by force. When deemed necessary by the colonizer, European colonization of other parts of the world was enforced through actions in line with the “monopoly character of the state’s rule through violence” (*Monopolcharakter der staatlichen Gewaltherrschaft*, Weber, [1909] 1972, §17).

To take the analysis one step further, in reference to the distinction between ‘law as power’ and ‘law as meaning’ that Benhabib (et al., 2006) notes when citing Cover (1983), one can argue that the Habermasian understanding of ‘law as medium’ (Habermas, 1987b, pp. 365-367), i.e. law being located between politics and morality (Habermas, 1992), opens up for the following interpretation. When used as means for political ends, the law that the state-system enforces is rather ‘law as power’ (see Cover, 1983; cf. Habermas, 1987b; 1992). In contrast, when permeable to moral discourses, ‘law as meaning’ (Cover, 1983) – or, to use Habermas’ (1987b, pp. 365-367) term, ‘law as institution’ – is evoked by rooting a decision’s legitimacy more firmly in the lifeworld of the affected people. As Cover pinpoints, the precepts of law must “have meaning, but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking” (Cover cited in Benhabib et al., 2006, p. 48). As soon as vital aspects of the lifeworld of people, e.g. the birth of a child, are considered in legal reasoning, meaning is borrowed from ‘materials’ that emerge within the infinitely complex processes that make up human life.

In my analysis of MIG 2014:3, therefore, I argue that it is precisely the birth of the child, who then received a Swedish residence permit, which exemplifies the importance of the lifeworld of the most directly affected people. Human life histories are contingent, and therefore impossible to regulate in advance through law-making. In MIG 2014:3 the second-instance MC decided that the factual circumstances had changed significantly after the MB had taken its decision to ‘transfer’ the applicant to Malta. Therefore, as the MC decided, the MB should conduct a new factual assessment. The MCA disagreed: “The Migration Court of Appeal revokes the Migration Court’s decision – except for the rejection of the

application for residence and work permit – and confirms the Migration Board's decision from 18 February 2013¹⁴⁴ (MIG 2014:3, p. 4). Regarding the procedural legitimacy of this assessment, the lack of consensus among the judges who formulated MIG 2014:3 is noteworthy:

“[Judge] Axelsson disagreed regarding the motivation and was of the opinion that the grounds for the decision under heading 3 [stated above on the same page of MIG 2014:3] should have the following wording. In a case concerning the enforcement of a removal order (*verkställighet av ett avlägsnandebeslut*) that has become legally valid, the regulation of Chapter 12 § 18 Aliens Act provides the possibility of taking into account, inter alia, [the question] if there is a particular reason why the decision should not be enforced. In this assessment, the consequences for a child of being separated from their (*sin*) parent should be taken into account [...]”¹⁴⁵ (ibid.).

Upon stressing several legalistic aspects, the dissenting judge stressed the (normative) importance of the possible (factual) “consequences for a child of being separated from their parent” (ibid.). Once more, it is the ties that the mother has to her baby – and not those that she has to her husband – that are decisive. Clearly, this is due to the courts’ ambition to consider cases, if relevant, “from a ‘child-perspective’” (*utifrån ett barnperspektiv*, MIG 2014:3, p. 3). And while such a consideration has taken place according to what is stated in MIG 2014:3, the precedent ends with the following sentences:

“The Migration Court of Appeal has pronounced earlier that, in case of a transfer according to the Dublin Convention, an application for a residence permit on the grounds of ties to a spouse and/or child should not be processed in accordance with the Aliens Act but, instead, be rejected (supranote: MIG 2007:32). In these cases, an application for residence permit on the grounds of ties shall, thus, not be assessed factually (*prövas i sak*) along ordinary procedures. If such an application is handed in after the decision about transfer has become legally valid, it should,

¹⁴⁴ From the precedents: “Migrationsöverdomstolens avgörande. Migrationsöverdomstolen upphäver migrationsdomstolens dom - utom såvitt avser avvisande av yrkande om uppehålls- och arbetstillstånd - och fastställer Migrationsverkets beslut den 18 februari 2013.”

¹⁴⁵ From the precedents: “Axelsson var skiljaktig i fråga om motiveringen och ansåg att skälen för avgörandet under rubrik 3 skulle ha följande lydelse. Bestämmelsen i 12 kap. 18 § utlänningslagen ger möjlighet att i ett ärende om verkställighet av ett avlägsnandebeslut som vunnit laga kraft beakta bl.a. om det finns särskild anledning att beslutet inte bör verkställas. Vid denna bedömning ska konsekvenserna för ett barn av att skiljas från sin förälder särskilt beaktas [...]”

therefore, neither be subject to the assessment of ties that can be made within the framework of the extraordinary assessment procedure (*prövningsförfarandet*) according to Chapter 12 § 18 Aliens Act. The Migration Board's decision and handing over the case to the [Migration] Board for assessment according to Chapter 12 § 18 Aliens Act, was therefore incorrect (*felaktigt*) and the decision is repealed in that part. As stated above, according to Chapter 5 § 18 fifth section Aliens Act, A's application cannot be processed based on other regulations. The Migration Board's decision to reject the application is, therefore, confirmed¹⁴⁶ (*ibid.*).

Firstly, it is significant to stress that the MCA judged the second-instance decision to be 'incorrect' (*felaktigt*). With its final decision confirming the MB's initial decision to reject the residence permit application, the MCA 'corrected' the MC's decision. In reference to Banakar and his reading of Alexy, the MCA made the (indirect) claim to take a legally (more) correct decision (see Banakar, 2015, p. 65; cf. Alexy, 2000, p. 146). This 'claim to correctness' is further linked to what Banakar has called the 'promise of certainty'. As previously mentioned (Chapter Six), this promise is central to "the rule of law" (*Rechtssicherheit*)" (Banakar, 2015, p. 13) and, thus, to what is called *rättssäkerhet* in Swedish. That the MCA calls the MC's decision 'incorrect' (*felaktigt*) and consequentially changes it, is noteworthy regarding the legitimacy of the Swedish migration bureaucracy as a whole. Since this system is composed of three legal instances, the procedural framework allowed the (third-instance) MCA to overrule the (second-instance) MC. In Alexy's terms, one can speak of the claim to correctness that the legal system pursues; a pursuit for which the mentioned promise of certainty is central (see *ibid.*, p. 65). In Habermas' terminology, the same pursuit can be understood in terms of trying to live up to the standards of the *Rechtsstaat*, its 'rule of law'

¹⁴⁶ From the precedents: "Migrationsöverdomstolen har tidigare uttalat att vid överföring enligt Dublinförordningen ska en ansökan om uppehållstillstånd på grund av anknytning till make/maka och/eller barn inte prövas enligt utlänningslagen utan i stället avvisas (MIG 2007:32). En ansökan om uppehållstillstånd på grund av anknytning ska alltså i dessa fall inte prövas i sak i det ordinarie förfarandet. Om en sådan ansökan lämnas in först efter det att beslutet om överföring vunnit laga kraft, bör den därmed inte heller kunna bli föremål för den prövning av anknytningen som kan ske inom ramen för det extraordinära prövningsförfarandet enligt 12 kap. 18 § utlänningslagen. Migrationsdomstolens beslut att undanröja Migrationsverkets beslut och överlämna målet till verket för prövning enligt 12 kap. 18 § utlänningslagen var därför felaktigt och domen i den delen ska upphävas. Som konstaterats ovan kan A:s ansökan inte prövas med stöd av övriga bestämmelser enligt 5 kap. 18 § femte stycket utlänningslagen. Migrationsverkets beslut att avvisa ansökan ska därför fastställas."

and, in this context, law's 'claim to legitimacy' (ibid.).¹⁴⁷ In the data, besides the aim of "increasing transparency" (*öka insyn*, IT4), in an interview I conducted with a judge at the MCA, it was confirmed that one important reason for the MCA to continue its work was the ambition to "uphold the demands of legal certainty and rule of law" (*upprätthålla rättssäkerhetskraven*, IT9). Yet, if decisions are taken on uncertain grounds, the promise of certainty – which is so central to 'the rule of law' – can become a serious problem for the legitimacy of the institutions that produce these decisions.

In MIG 2014:3 the claim to legal correctness that is implied in the MCA's evaluation of the respective MC's decision as incorrect is not directly linked to any claims about factual state of affairs (see Alexy, 1989, p. 232). Instead, it is the MC's normative assessment, i.e. the interpretation of relevant legal norms, that the MCA deems to be incorrect. By reference to the authorizing legitimacy of one of its own precedents, the MCA introduces its final decision as follows: "[...] in case of a transfer according to the Dublin Convention, an application for a residence permit on the grounds of ties to a spouse and/or child should not be processed in accordance with the Aliens Act but, instead, be rejected (supranote: MIG 2007:32)" (MIG 2014:3, p. 5). By referencing MIG 2007:32, the legitimacy of MIG 2014:3 is, once more, constructed intertextually, as the text is marked by the "presence within it of elements of other texts" (Fairclough, 2003, p. 218). In response to the research question of the chapter at hand, MIG 2014:3 presents a rather straightforward answer:

"If such an application [for a residence permit based on family ties in Sweden] is handed in after the decision about transfer has become legally valid, it should, therefore, neither be subject to the assessment of ties that can be made within the framework of the extraordinary assessment-procedure according to Chapter 12 § 18 Aliens Act" (MIG 2014:3, p. 5).

¹⁴⁷ On these links and similarities between Alexy's 'claim to correctness' and Habermas' 'claim to legitimacy', Banakar writes: "Both Habermas and Alexy share the conviction that 'law consists of more than pure facticity of power, orders backed by threats, habits or organized coercion' (supranote: Alexy, 2000, p. 138). Besides possessing a factual side, law also comprises 'a critical or ideal dimension,' which is defined by a 'claim to correctness' or, to borrow Habermas' terminology, a 'claim to legitimacy' (supranote: Cooke, 2007, p. 225), a claim which when made by law also entails making a claim to justice, operating as the defining property of a legal system" (Banakar, 2015, p. 65).

To put it bluntly, the procedure to determine whether an applicant is worthy of the Swedish state's protection is exported from Sweden to the respective Dublin-signatory state as soon as "the decision about transfer has become legally valid". In MIG 2014:3, after the decision to expel the applicant according to the Dublin system became legally valid, the Swedish migration bureaucracy was (now) uninterested in the question of whether the applicant should be granted protection status. Instead, it would be up to the Maltese migration bureaucracy to assess whether "A" could be recognized as a 'legitimate' refugee – or rejected as an 'illegitimate' asylum seeker. To use an (over)simplification, in a Dublin case such as MIG 2014:3, everything that is pleaded by the applicant's legal party "after the decision about [Dublin] transfer has become legally valid" becomes part of what three judges (IT2, IT7 & IT8) called 'permit cases' (*tillståndsmål*).

Regulated Immigration in an Asylum Case that Concerns a Father

In two of the four precedents (MIG 2011:23 & MIG 2011:27) that concern asylum seekers and which state *reglerad invandring*, the main applicant is a father. In both cases the MCA overturned the initial expulsion decision of the MB. Both decisions were taken because the MCA agreed on the statement that it "cannot be reasonably required" (*inte skäligen kan krävas*, MIG 2011:27, p. 1) that father and child will be separated because of the rule that applications based on ties must be filed from outside Sweden.

In MIG 2011:27 the applicant had already sought asylum in Sweden in 2003 when he was 16. The MB rejected this application a few months later in 2004. The second instance at the time, the AAB (*Utlänningsnämnden*, see Chapter Two), confirmed this decision to reject him on 9 May 2005. Four years later, after a "long illegal stay in Sweden" (*lång illegal vistelse i Sverige*), on 9 May 2009 the rejection decision was revoked (*preskriberades*). Two days later, another application was filed:

"In the current application, he maintains that he had earlier pleaded a need for protection (*skyddsbehov*) and adds, substantially, that he is now an adult and, when returning to his home country, risks a prison sentence under severe conditions because he has not been present to perform military service and to fulfil this service

for 18 months. He also pleads ties to Sweden because he is currently living [together] with a Swedish citizen and the couple has a common son, born in February 2009. In support of his application, he has submitted a paternity certificate (*faderskapsbekräftelse*), notification of joint custody, and a letter from the Social Office in Borås where it is stated, inter alia, that his partner has received support in her role as a parent in the form of a family therapist, and that this [therapist] believes that A has shown great commitment to the needs of the son and taken an active part in the care of the son. The partner is also reported to have a small network around her and A functions as a big support for her”¹⁴⁸ (MIG 2011:27, p. 1).

According to this excerpt from MIG 2011:27, “A” submitted the application in 2009 after his status in Sweden had been regularized. The (up to this point valid) rejection decision, which had been issued by the AAB in 2005, was revoked on 9 May 2009. “A” was aged 16 in 2003 and, thus, in 2009 he had ceased to be a teenager. As the excerpt from MIG 2011:27 informs, he was wanted for military service in his country of origin. A few paragraphs further into the precedent, this country is identified: Azerbaijan (MIG 2011:27, p. 2). In relation to the aforementioned distinction between ‘asylum cases’ (*asylmål*) and ‘permit cases’ (*tillståndsmål*), it is analytically significant to see how the MCA’s summary of his application from 2009 starts, i.e. with the “need for protection” (*skyddsbehov*), which he pleaded as someone from Azerbaijan who feared being imprisoned “under severe conditions because he has not been present to perform military service” (MIG 2011:27, p. 1). And yet this application for protection status in Sweden is only the first part of the residence permit application that “A” filed in 2009. Besides the threat of being imprisoned upon the completion of 18 months of compulsory military service, he claimed family ties in Sweden based on living together with his ‘partner’ (*sambo*) and their newborn son. As evidentiary material

¹⁴⁸ From the precedents: “I den nu aktuella ansökan vidhåller han tidigare åberopat skyddsbehov och tillägger i huvudsak att han numera är vuxen och vid ett återvändande till hemlandet riskerar ett fängelsestraff under svåra förhållanden på grund av att han inte inställt sig till militärtjänstgöring samt att få fullgöra denna tjänstgöring under 18 månader. Vidare åberopar han anknytning till Sverige genom att han numera är sambo med en svensk medborgare och att paret har en gemensam son född i februari 2009. Till stöd för sin ansökan har han ingivit faderskapsbekräftelse, anmälan om gemensam vårdnad samt en skrift från Socialkontoret i Borås vari bl.a. anges att hans sambo erhållit stöd i sin föräldraroll i form av en familjeterapeut och att denne anser att A visat stort engagemang för sonens behov och har tagit en aktiv del i omvårdnaden av sonen. Sambon uppges även ha ett litet nätverk omkring sig och A fungerar som ett stort stöd för henne.”

to support these ties, he submitted a paternity certificate and a notification of joint custody. Moreover, it is noted that a family therapist confirmed the importance of his role as a caregiver for his son and as support for his partner. The opposing arguments of the MB are presented as follows:

“On 30 December 2009, the Migration Board rejected A’s application for a residence permit and decided to expel him. The reason for the decision was substantially the following. A has stayed in Sweden for more than six years, four years of which were with a legally valid rejection decision (*lagakraftvunnet avvsningsbeslut*). It has not been found that he participated in the enforcement of that decision. There is, therefore, reason to waive the general rule of granting a residence permit due to the [fact] that the previous rejection decision has become invalid. He is not to be regarded as a refugee or in need of subsidiary protection (*skyddsbehövande i övrigt*). As it regards his ties to the partner and their son, they are considered to be strong, but a military service of not more than 18 months does not in itself mean that it would be unreasonable (*oskäligt*) for him to travel to his home country in order to apply for a residence permit from there. That he has resided in Sweden without permit for four years without taking measures to return to the home country (*hemlandet*) constitute circumstances which weigh heavily against granting an exception to the rule that residence permits must be arranged prior to entry. In view of the findings in the case and in accordance with the provisions of the preparatory works (*föarbetena*) of the Aliens Act (2005:716) and what has been stated in practice, the Migration Board finds that it can neither be regarded as unreasonable nor offensive to legal consciousness (*stötande mot rättsmedvetandet*), even considering the best interests of the child, to demand that he returns to Azerbaijan in order to apply for a residence permit from there”¹⁴⁹ (MIG 2011:27, pp. 1-2).

¹⁴⁹ From the precedents: ”Migrationsverket avslag den 30 december 2009 A:s ansökan om uppehållstillstånd och beslutade att utvisa honom. Som skäl för beslutet anförde verket i huvudsak följande. A har vistats i Sverige i drygt sex år varav fyra år med lagakraftvunnet avvsningsbeslut. Det har inte framkommit att han medverkat till verkställighet av det beslutet. Det finns därför skäl att frångå huvudregeln att bevilja uppehållstillstånd på grund av att det tidigare avvsningsbeslutet har upphört att gälla. Han är inte att betrakta som flykting eller skyddsbehövande i övrigt. Beträffande hans anknytning till sambon och deras son bedöms den som stark men en militärtjänstgöring som omfattar högst 18 månader medför i sig inte att det skulle vara oskäligt att han reser till hemlandet för att därifrån ansöka om uppehållstillstånd. Att han har vistats utan tillstånd i Sverige i fyra år utan att vidta åtgärder för att återvända till hemlandet är omständigheter som väger tungt mot att bevilja undantag från huvudregeln om att uppehållstillstånd ska vara ordnat före inresan. Med hänsyn till vad som framkommit i ärendet och med ledning i vad som anges i föarbetena till utlänningslagen (2005:716) och vad man uttalat i praxis, finner Migrationsverket att det varken kan anses oskäligt eller stötande mot

This excerpt from MIG 2011:27 explicitly mentions a number of legal terms that have also been central to the decisions that I analysed in the preceding chapters. Explicitly, the MCA paraphrases the purpose of the MB's rejection with the word *utvisa* ('expel'). In contrast to *avvisa* – which can mean either 'reject' or 'expel' – using the term *utvisa* always relates to the practice of expelling and, if deemed necessary, deporting ('*tvångsutvisa*', lit. 'coercively expelling') a non-citizen. In six of the interviews I conducted with Swedish migration court judges (IT1, IT4, IT5, IT6, IT7 & IT8), the two respective nouns, *avvisning* and *utvisning*, were mentioned. In IT5 the difference between them is explained as such: Up to 90 days after entering Sweden, a noncitizen could still be expelled in the sense of being 'rejected' (*avvisad*). If the expulsion had been ordered later than 90 days after entry, it would always be called *utvisning*.

Read intertextually, the importance of considering MIG 2011:27 in the form of a decision taken by the MCA is expressed through the same formulation as in the first precedent (MIG 2014:3) that I analysed in this chapter: "legally valid expulsion decision" (*lagakraftvunnet avvisningsbeslut*, MIG 2011:27, p. 1). The case (UM8625-10) that led to MIG 2011:27 became legally interesting because of the detail that the application for residence permit that "A" filed in 2009 was submitted after he had already received a legally valid expulsion decision. In MIG 2011:27 it is stressed that this application was submitted four years after the initial rejection of the applicant. As the MCA summarizes the MB's view on these circumstances, the detail that the applicant had stayed in Sweden for four years in spite of the expulsion decision was seen by the MB as one important "reason to waive the general rule of granting a residence permit due to the [fact] that the previous rejection decision has become invalid" (MIG 2011:27, p. 1).

With a formulation that stretches across Fairclough's (2003, p. 98) first two main strategies of legitimation, namely authorization and rationalization, the MB's rejection was justified as being neither "unreasonable nor offensive to legal consciousness". This explicit mentioning of an important concept from legal theory, i.e. 'legal consciousness' (*rättsmedvetande*), is a specific feature of MIG 2011:27. While this concept has not been mentioned at all in the interviews I conducted, only two of 365 precedents of Swedish migration law include the word *rättsmedvetande(t)*. Besides MIG 2011:27, the term is used in MIG 2008:44 . It

rättsmedvetandet, även med hänsyn till barnets bästa, att kräva att han återvänder till Azerbajdzjan för att därifrån inge ansökan om uppehållstillstånd."

should, therefore, be noted that authoritatively legitimizing a precedent of Swedish asylum law by referring to legal consciousness is a rare phenomenon.

In response to the legal parties' different claims as they are presented in MIG 2011:27, the second-instance MC decided, in short, the following: "According to the stated conditions, especially considering a small child's need for a safe and lasting relationship with both parents, it cannot be 'reasonably' (*skäligen*) required that A returns to the home country in order to apply for a residence permit from there" (MIG 2011:27, p. 2). The MB appealed this decision and stressed that the MC had "entirely disregarded" (*helt bortsett från*, p. 3) the fact that "A" had been living "illegally" in Sweden for four years. Finally, in the part of the precedent that mentions *reglearad invandring*, the MCA legitimizes the applicant's right to stay in Sweden as follows:

"The Government and the Parliament have repeatedly stressed that this requirement for residence permits prior to entry is an important element for the maintenance of regulated immigration and that this should also apply to those who have strong ties [to Sweden ...] The requirement, however, is not without exceptions. [...] One such [an exceptional] case may be at hand when it can be assumed that, after the [applicant's] homecoming (*hemkomsten*), the applicant can have difficulties in obtaining a passport or an exit permit (*utresetillstånd*), and this due to some form of harassment by the authorities of the home country (*hemland*). However, the mere fact that the applicant is likely to have difficulties in obtaining a passport or an exit permit should not automatically lead to the application being granted here in the country [Sweden]. For example, if the applicant is found guilty of crimes [in the country of origin], the application should not be granted [residence] after entering here in the country. Nor should the application be granted on a regular basis, if it regards the case of a man who is not allowed to travel again before completing his military service. However, due to the fact that there can be conditions of very long-term military service or service under unusually severe circumstances, it may be deemed not to be reasonable to require the applicant to return to his country of residence to file the application from there. For example, that the applicant would be imprisoned for a crime without political inscription (*utan politiska förtecken*) cannot on a regular basis constitute grounds for granting exceptions to the rule, unless it is a punishment for offenses not criminalized (*straffbelagda*) in Sweden or a long-term imprisonment for an offense for which there is only a minor penalty in Sweden"¹⁵⁰ (MIG 2011:27, pp. 4-5).

¹⁵⁰ From the precedents: "Regering och riksdag har vid flera tillfällen strukit under att detta krav på uppehållstillstånd före inresan är ett viktigt led i upprätthållandet av en reglerad invandring och

With this longer excerpt from MIG 2011:27 the MCA illustrates the intersections of the two main topics of this chapter's first main section, i.e. the aim of maintaining regulated immigration and the Swedish migration bureaucracy's practice of compiling COI. As highlighted in the beginning of the excerpt, it is a demand made by both the Swedish Government (the executive) and the Parliament (the legislative) that the migration bureaucracy – including the migration courts as institutions of the judicative – regulate immigration. In MIG 2011:27, as in the other five precedents of Swedish asylum law that mention the term *reglerad invandring*, this is to be achieved by applying the following rule restrictively. Residence permit applications that are not grounded in the need for (international) protection, and “this should also apply to those [applicants] who have strong ties [to Sweden]” (MIG 2011:27, p. 4), should be granted before an applicant enters Sweden. This “requirement, however, is not without exceptions” (ibid.). As stressed in MIG 2011:27, for example, the threat of not being allowed to leave the country again, after one has applied for a Swedish residence permit from there, can lead to an exception. Such exceptions should, however, not entail that the right to apply for a residence permit in Sweden is “automatically” (*automatiskt*, MIG 2011:27, p. 4) granted. For instance, the threat that the applicant will not be allowed to exit the country is described in MIG 2011:27 as a scenario that would not lead to an exception to the rule that the application must be filed from there. Another example that MIG 2011:27 brings forward is military service: “a man”, “who is not allowed to travel again before completing his military service” (MIG 2011:27, p. 5), is not exempted from the rule that residence permit application (other than asylum) must be filed from abroad.

att detta även bör gälla den som har stark anknytning hit [...] Kravet är dock inte undantagslöst. [...] Ett sådant fall kan vara då sökanden efter hemkomsten kan antas få svårigheter att få pass eller utresetillstånd och att detta beror på någon form av trakasserier från hemlandets myndigheter. Enbart den omständigheten att sökanden kan antas få svårigheter att få pass eller utresetillstånd bör dock inte automatiskt leda till att ansökan beviljas här i landet. Om orsaken exempelvis är att sökanden gjort sig skyldig till brott, bör ansökan inte beviljas efter inresan här i landet. Inte heller bör ansökan regelmässigt beviljas, om det rör sig om en man som inte får resa ut på nytt innan han gjort sin värnplikt. Förhållandena kan dock, på grund av att det är fråga om mycket lång värnpliktstjänstgöring eller tjänstgöring under osedvanligt stränga förhållanden, vara sådana att det inte kan anses skäligt att kräva att sökanden återvänder till hemlandet för att ge in ansökan där. Att sökanden exempelvis skulle tvingas avtjäna ett straff för ett brott utan politiska förtecken kan dock regelmässigt inte utgöra grund för att medge undantag från huvudregeln, såvida det inte handlar om straff för gärningar som inte är straffbelagda i Sverige eller om ett långvarigt fängelsestraff för en gärning som i Sverige har ett endast ringa straffvärde.”

But the MCA frames these examples in relative terms. If the country of origin enforces “very long-term military service or service under unusually severe circumstances” (ibid.), it may not be deemed ‘reasonable’ (*skäligt*) that the claimant must apply from there. Finally, of analytical importance is the following normative guidance that the MCA establishes with MIG 2011:27. Criminal punishment for ‘non-political’ offenses in the country of origin – if the offense does not exist in Sweden, or if it means “long-term imprisonment for an offense for which there is only a minor penalty in Sweden” (ibid.) – can lead to the exception that a residence permit based on ties can be granted after entering Sweden. This being noted, the formulation “without political inscription” (*utan politiska förtecken*, ibid.) needs consideration. In line with international refugee law, if someone has been – or fears being – convicted for a ‘political crime’, this person can file an asylum application after entering Sweden. With MIG 2011:27, meanwhile, it is stressed that ‘non-political’ offenses can also lead to the exception that protection-seeking people can apply for residence permit without having to file the respective application from outside Sweden.

Thus, MIG 2011:27 exemplifies the importance of COI for the Swedish migration bureaucracy. Regarding the criminalization and imprisonment for acts that are deemed to be offenses in a certain country of origin, it is essential to have knowledge not only about the ‘law in the books’ in this country but also about the ‘law in action’ as it is socially practiced there (see Banakar, 2015, pp. 47-48; cf. Pound, 1910). Moreover, as I argued in Chapter Five and Six, assessments about what will happen, if people are forced to travel back to their countries of origin, constitute empirical reasoning about “future actions, events, or state of affairs” (Alexy, 1989, p. 232). As Alexy highlights, while such reasoning faces “almost all the problems of empirical knowledge” (ibid., p. 233), making factual arguments about the past, present and/or future also entails “the problems of the incorporation of empirical knowledge into legal reasoning” (ibid.). That said, MIG 2011:27 illustrates that the production, collection and application of COI is important not only for asylum applications but for residence permit applications more generally.

Once more in reference to Fairclough’s types of discursive legitimation, rationalization here becomes central in the following sense. For certain cases, in which the main grounds of applying for residency in Sweden are ties (e.g. MIG 2011:27 & MIG 2014:3), the situation in the applicant’s country of origin can become significant – if it must be considered whether it is ‘reasonable’ (*skäligt*) that the applicant applies from that country. Due to the policy – or, as it is

described in MIG 2014:3, the “fundamental principle of Swedish aliens law” (p. 3) – that immigration to Sweden is regulated, such cases are rationalized in several ways. It is, first of all, legitimation “by reference to the utility of institutionalized action” (Fairclough, 2003, p. 98), which emerges when the utility of expelling the applicant according to the policy of regulated immigration is considered. In other words, the case is rationalized in relation to Swedish society, politics and law, grounded in the dominant view – explicitly held by legislative, executive and judicative (see e.g. MIG 2014:3) – that immigration must be regulated. On the other hand, if, as in MIG 2011:27, an expulsion affects applicants who, to apply, would have to travel to countries where there are potential threats to their safety, the case is rationalized in relation to the society, politics and law of the country in question. The information about this country becomes, in turn, part of legitimation through rationalization as Fairclough defines the process: knowledge claims “that society has constructed to endow them with cognitive validity” (Fairclough, 2003, p. 98). When considering COI that is used in Sweden, it is indeed knowledge claims that Swedish society “has constructed to endow them with cognitive validity” (ibid.) which become important to legitimize a certain decision.

In MIG 2011:27 as well as in MIG 2014:3 *reglerad invandring* is considered according to the functional requirements of the Swedish legal system (see Habermas, 1992, p. 566). At the same time, as MIG 2011:27 illustrates, factual arguments about what is likely going to happen if applicants are forced to leave Sweden must also be considered. This is done in the form of empirical reasoning about (the likelihood of) “future actions, events, or state of affairs” (Alexy, 1989, p. 232). And while the potential effects of future events, i.e. the separation of parent and child, are considered both in MIG 2011:27 and MIG 2014:3, the following, final decision is illustrative:

“It is undisputed that, upon returning to the home country, he may risk having to complete military service for 18 months and possibly a subsequent imprisonment because he has withheld himself from the service. This does not in itself mean that it would be unreasonable (*oskäligt*) to require him to travel to the home country or another country to apply for a residence permit (supranote: cf. MIG 2009: 2) from there, but the child is, thus, at risk of being separated from his father for at least 18 months, which is a relatively long time. In view of this as well as of the age of the child and the circumstances mentioned above, the consequences of such a separation are deemed to be such that, even with regard to A’s illegal stay in Sweden, it cannot reasonably (*skäligen*) be required that he returns to the home

country or another country to apply for a residence permit from there”¹⁵¹ (MIG 2011:27, p. 8).

Against the background of the theoretical input regarding the normative (Habermas) and factual (Alexy) aspects of legal discourse that I referred to throughout the study, it becomes clear that in MIG 2011:27 ‘the child’s best’ is considered both normatively as well as factually. Not only as a “conception of human rights that needs concretization within national jurisdictions” (Benhabib, 2016, p. 137), but also in the form of empirical reasoning about what is likely going to happen in the future, ‘the child’s best’ is in the focus. In the words of MIG 2011:27, “the child is at risk of being separated from his father for at least 18 months”. Consequently, in view of the discursive rationalization that the word ‘reasonably’ (*skäligen*) implies, the MCA takes a decision that permits the father to stay.

Finally, when reading MIG 2011:27 under the theme of the chapter at hand, the distinction between ‘law as power’ and ‘law as meaning’ can provide additional insights. The applicant in MIG 2011:27 is rejected as an asylum seeker. He does not receive any protection status and he is, thus, not granted any residence permit. In pursuit of the political goal of *reglerad invandring*, it was first argued in MIG 2011:27 (mainly by the MB) that he should return to his country of origin, or in any case not be allowed to apply for residence permit while staying in Sweden. This argumentation, together with the authorizing discursive legitimation strategy of repeatedly stressing that he had been staying “illegally” for years in Sweden, can be identified as legitimizing a decision through ‘law as power’ (see Benhabib et al., 2006, p. 48; cf. Cover, 1983). On the other hand, by indirectly referring to the moral values that society claims to have in order to protect children, and by repeatedly using the rationalizing terms of ‘reasonable’ (*skälig*), ‘unreasonable’ (*oskälig*) and ‘reasonably’ (*skäligen*), a final decision is legitimized that overrules this ‘law as power’ with a precedent that, arguably, represents ‘law as meaning’.

¹⁵¹ From the precedents: “Det är obesträtt att han vid återvändande till hemlandet riskerar att få genomföra militärtjänst i 18 månader och eventuellt ett påföljande fängelsestraff på grund av att han har undanhållit sig tjänstgöringen. Detta medför i sig inte att det skulle vara oskäligt att kräva att han reser till hemlandet eller annat land för att därifrån ansöka om uppehållstillstånd (supranote: cf. MIG 2009:2 II) men barnet riskerar därmed att skiljas från sin pappa under i vart fall 18 månader, vilket är en förhållandevis lång tid. Med hänsyn härtill samt till barnets ålder och de omständigheter i övrigt som redovisats ovan får konsekvenserna av en sådan separation anses vara sådana att, även med beaktande av A:s illegala vistelse i Sverige, det inte skäligen kan krävas att han ska återvända till hemlandet eller annat land för att därifrån ansöka om uppehållstillstånd.”

Conclusions

In this third and last empirical chapter, I focused on the topic of Sweden aiming to regulate immigration. Given this policy of *reglerad invandring*, which is explicitly mentioned in precisely six of the 200 precedents of Swedish asylum law published during the years 2006-2016, I discussed the third research question. This regards the question of how ‘the legitimate refugee’ is discursively constructed in precedents of Swedish asylum law. In a similar way as in the two preceding empirical chapters, I first presented and problematized relevant passages from my interviews with Swedish migration court judges. Upon reviewing these passages, I could exemplify how the political aim of *reglerad invandring* is legitimized also through precedents of Swedish asylum law. As I quoted a judge who works at the MCA, precedents are important also because “one has to make general statements, because it is still so that our legislation builds on [the grounds] that we should regulate immigration” (IT9).

Especially decisions that affect asylum seekers are, meanwhile, strongly influenced by the COI that is used in Sweden to establish factual knowledge about asylum seekers’ countries of origin. Based on criticism that emerged from my interview data, I could confirm the statement that – as it is put in an official government report from 2009 – there is a “lack of guidance for the lower instances [MB & MCs] in so-called country-questions” (SOU2009:56, p. 23). This report further states that the “absence of guidance concerning country-questions can, therefore, have consequences for the legal certainty/the rule of law (*rättssäkerheten*) in the migration process” (ibid.). Consequently, as the report argues in search for measures of reform, the possibility of factual aspects being reviewed by the MCA could support the overall “ambition to promote legal certainty/the rule of law and legal safety/security (*rättssäkerhet och rättstrygghet*) for individuals and, thus, strengthen the judicial system’s legitimacy” (*det judiciella systemets legitimitet*, ibid).

The main criticism, which the judges whom I quoted in this chapter formulated, is that the lack of applicable COI is due to both the form and the content of the available information. Two judges highlighted the following problem: Swedish MC judges are expected to be able to incorporate factual arguments in the form of COI written in, besides Swedish, English and Norwegian. While one of the judges concluded that this selection of languages could lead to “inequality in that respect between different [...] source-compilers

(*källsammanställare*)” (IT6), another judge could become “really angry’ (*riktigt förbaskat*, IT8) about the fact that Swedish migration court judges were expected to “read in English and decide about people’s, *well not life and death, but sometimes actually*, in another language than our mother tongue” (IT8, my emphasis). Moreover, the same judge stated that, at times, Norwegian could be more difficult to understand than English. For these reasons, this judge questioned why there were no Swedish translations. Explicitly, therefore, the judge asked for change.

Having noted, firstly, the importance of the policy of *reglerad invandring* and, secondly, the difficulties that Swedish MC judges apparently encounter when it comes to finding and applying COI that is understandable to them and of sufficient quality, I proceeded to the second main section of the chapter. Among the 365 precedents of Swedish migration law published between 2006 and 2016, there are precisely 14 that explicitly state *reglerad invandring*. Of those 14, there are six cases that concern asylum seekers. These six cases include a residence permit application based on ties (*anknytning*) to Sweden, while in two precedents the main applicant had not sought any protection status but applied based on family ties to someone who had been granted protection in Sweden. This left me with four precedents, which mention *reglerad invandring* and in which the main applicant also sought asylum. Among these four, as the only precedent that concerns an asylum-seeking mother who had been rejected in accordance with the Dublin system, I began with a thorough reading of MIG 2014:3.

Given the theme of the chapter, it can be noted that *reglerad invandring* occurs in MIG 2014:3 as soon as the task to determine whether the asylum seeker is a refugee is ‘transferred’ to Malta. In other words, as soon as the expulsion based on the Dublin Convention had become ‘legally valid’ (*vunnit laga kraft*), neither the asylum claim, nor the residence permit application based on family ties were of concern for the Swedish migration bureaucracy. In response to the third research question, I could present the finding that, in MIG 2014:3, the procedure to assess whether the applicant was a ‘legitimate refugee’ was exported from Sweden to Malta. The potential effects that this decision would have in the form of future events, i.e. the expectation that the expulsion of the mother, as the main applicant in MIG 2014:3, would result in a separation of her and her child, were not deemed to be sufficient grounds to make an exception to the rule that residence permit applications based on family ties had to be filed from outside Sweden. The authorizing as well as rationalizing legitimation of pursuing the policy of *reglerad invandring* weighed, in this sense, heavier than the risk of harming a child.

In contrast, in MIG 2011:27 the final decision was taken in support of making such an exception. As the MCA ruled in the final lines of the decision, “the consequences of such a separation are deemed to be such that, even with regard to A’s illegal stay in Sweden, it cannot be reasonably required that he returns to the home country or another country to apply for a residence permit from there” (MIG 2011:27, p. 8). Again (cf. Chapters Five and Six), it was the probability of an event in the future, represented by the possibility of the father being forced to complete 18 months of military service plus a possible imprisonment, that was considered. By incorporating the moral aspects of the normative standpoint that is called “a ‘child-perspective’” (*ett barnperspektiv*) in MIG 2014:3 (p. 3) and that, in other precedents, is addressed with the term ‘the child’s best’ (*barnets bästa*, cf. Chapter Five; see also Josefsson, 2016), the final decision was legitimized authoritatively, rationally and morally as well as through its narrative structure (see Fairclough, 2003, pp. 98-100).

Finally, I want to return to the discussion about the promise of certainty (see Banakar, 2015, p. 13). The central argument for the establishment of the migration courts in 2006 was the ambition to safeguard “legal certainty/the rule of law” (*rättssäkerheten*, IT4). Uncertainty, meanwhile – e.g. due to the lack of factual guidance on COI and the practice of taking decisions based also on the assessment of the likelihood of future events – de-legitimizes the ways in which ‘the legitimate refugee’ is discursively constructed (cf. SOU2009:56). As other research has shown, there is a considerable degree of uncertainty inherent to the processes that determine who is recognized as a ‘legitimate refugee’, and who is rejected as an ‘illegitimate asylum seeker’ (see e.g. Wikström & Stern, 2015; Wettergren & Wikström, 2014; Martén, 2015).

In consequence, the claim that Sweden rejects only ‘illegitimate asylum seekers’ is questionable. Against the background of the analysis in this chapter, however, this lack of certainty is an ambivalent phenomenon regarding the potential effects on the lives of the most directly affected people, i.e. the applicants. While in MIG 2014:3 a mother is expelled despite the assessment that the expulsion could lead to a long-term separation of her and her baby, in MIG 2011:27 the separation of a father and his small child is deemed to be “unreasonable” (*oskäligt*, MIG 2011:27, p. 1). In the words of the MCA, “the consequences of such a separation are deemed to be such that, even with regard to A’s illegal stay in Sweden, it cannot reasonably (*skäligen*) be required that he returns to the home country or another country to apply for a residence permit from there” (MIG 2011:27, p. 8).

Notwithstanding the significant differences between these two cases, I find one observation to be crucial. In both cases, the “consequences” (MIG 2014:3, p. 3; MIG 2011:27, p. 8) that the separation of the respective parent and child might have in the future are, of course, to some degree uncertain. In Alexy’s (1989, p. 233) terms, these two examples of empirical reasoning about factual states of affairs in the future – and their incorporation into legal argumentation – indeed face “the problems of empirical knowledge” (ibid.). For instance, it is not entirely certain that “the consequences of such a separation” (MIG 2011:27, p. 8) will definitely damage the child’s development. The degree of doubt that remains can, therefore, be seen as an aspect of uncertainty which can – for example in MIG 2011:27 – be interpreted to the benefit¹⁵² of the affected applicants. Hence my conclusion that a purely positive understanding of certainty, as for instance the Swedish word *rättsäkerhet* connotes, is indeed normative and not empirically supportable to the extent that absolute certainty would be something inherently positive for everyone who is affected by it.

¹⁵² This observation could lead thoughts to the term ‘benefit of the doubt’, or ‘reasonable doubt’ as it is used in Anglo-Saxon common law contexts that concern criminal cases (see e.g. Grechenig, Nicklisch & Thoeni, 2010). Yet, when it comes to asylum applications, as previously mentioned (Chapter Six), it is the applicant (see Kagan, 2002; Sweeney, 2009) who must present a ‘credible asylum narrative’ (see UNHCR, 1998; in Swedish legal discourse *trovärdig asylberättelse*). The benefit of the doubt in asylum cases works, in this sense, generally to the advantage of the state institution, i.e., in Sweden, the MB.

Regarding psychiatry, as another area of the Swedish legal system in which far-reaching decisions are often based on trying to predict future developments, Sjöström conceptualizes ‘doubt’ as follows: “Beyond reasonable doubt’ captures a basic component of what legal institutions see as true. Courts face the practical task of resolving conflicts. The truth is sorted out in a hearing where contesting parties struggle to persuade the Court that their particular version of reality is correct. Within the legal institution, the outcome of a court hearing, the ruling, is accomplished and made official in a ritual procedure” (Sjöström, 1997, p. 305).

Chapter Eight

Conclusion

In this final chapter, the conclusions of the preceding chapters are revisited, interlinked and developed. The discussion about the overarching problem of the study, i.e. the existence of powerful legal discourses that recognize certain people as ‘legitimate’ refugees and reject others as ‘illegitimate’ asylum seekers, are deepened. Drawing on Benhabib’s political theory, I had connected this problem to her discussion about the legitimacy of borders and boundaries. To summarize it very briefly, she puts forward the standpoint that all asylum seekers ought to benefit from a ‘porousness’ of borders by being granted first admittance (Benhabib, 2004; cf. Chapter Four). This, however, results in her view that a long-term inclusion of noncitizens is dependent on how a given polity, within the borders of the respective state, defines its boundaries in terms of who is excluded.

Those asylum seekers who somehow – despite the lack of ‘legal ways’ to enter Europe (see Chapter Two) – manage to reach Swedish territory, find a porous border in the sense that, once the Swedish border has been crossed, asylum claims can be filed and will be processed in Sweden. Many of these people face, after such first admittance with the registration of their asylum claim, the following reality. According to the MB’s statistics for the first half of 2017, 45% of all asylum applications were rejected (Migration Board, 2017b). Against this background, the current state of the Swedish asylum system can indeed be summed up with the word boundary. While the Swedish migration bureaucracy determines which applicants are categorized as in need of protection, the ones who fail this legal ‘test’ are to be expelled and, if deemed necessary, deported.

On a more abstract level, and illustrated by the example of ‘credibility assessments’ (*trovärdighetsbedömningar*) that I conceptualized as being part of the filter of porous borders in Chapter Six, every porous border necessarily needs to represent at least one boundary. In other words, a border would not be porous, but open if there were no boundaries that define which people are excluded. In addition to her claim that legitimate boundaries exist, Benhabib refers to a

‘paradox of democratic legitimacy’ (Benhabib, 2004). This concept comes down to the problem that arises when the ones who are already included decide who will be either included or excluded. Regarding the specific group of asylum seekers, this problem is particularly complex, contentious and, potentially, controversial: Who is, under which circumstances and on which grounds, granted what can kind of residence permit?

On a very basic level, this problem is rooted in the – explicit or implicit – self-identification of the already included population as ‘hosts’ who, consciously or unconsciously, understand themselves to be legitimately entitled to reside and participate politically within certain national boundaries (see Benhabib, 2004, pp. 25ff.). In such an understanding, asylum seekers are ‘strangers’ and only potentially ‘guests’ (Benhabib et al., 2006, pp. 155-158; cf. Simmel, [1908] 1992). Empirically, this understanding is exemplified if one considers the most recent changes to Swedish migration law, i.e. ‘the temporary law’. With the arguably small exception of ‘quota-refugees’ – during the first half of 2017, precisely 1,469 *kvotflyktingar*¹⁵³ were resettled in Swedish municipalities – the maximum length of a residence permit granted to legally recognized refugees is currently three years (see also Chapter Two; Joormann, 2017).

Regarding the discussion about the restrictive granting of (full) refugee status in Sweden in recent years (see Wettergren & Wikström, 2014), it should further be noted that during the first half of 2017 (Jan. – Sep.) precisely 27,706 people were granted a residence permit based on asylum (*asyl*), as the MB uses the category statistically (Migration Board, 2017c). Figures reveal that 3,354 of these legally recognized refugees were *kvotflyktingar* who received permanent residency. Thus, the number of resettled refugees accepted to Sweden shows an increase (compared to approx. 2,000 p/a in previous years, cf. above). Another 10,595 people received (full) refugee status according to the UN Refugee Convention. From the people granted a residence permit, the remaining 13,757 people received other forms of subsidiary protection statuses. Expressed in percent, during this period, 12.1% of accepted asylum seekers were granted permanent residence permits, while 87.9% received some form of temporary residence permit as they were granted the refugee status or other protection status. In consideration

¹⁵³ In its statistics for January-June 2017, the MB categorizes ‘quota-refugees’ as follows: “Resettled [refugees] (‘quota-refugees’) who have been extracted abroad by the Migration Board in collaboration with the UN’s refugee organisation UNHCR” (Migration Board, 2017b, my translation).

of ‘the temporary law’ (Chapter Two), thus, it can be inferred that the clear majority of accepted asylum seekers in Sweden today are currently treated as ‘guests’, i.e. they are merely granted temporary residence permits. In relation to her idea of porous borders, necessitating boundaries based on the already-included understanding themselves as hosts, while the still-excluded-yet-to-be-included are understood as (potential) guests, Benhabib poses the following questions:

“Will I be greeted with hospitality or rejected with hostility? Will you admit me beyond the threshold, or will you keep me waiting at the door and maybe even chase me away? Will you send me back to the land from which I am trying to escape?” (Benhabib et al., 2006, p. 155).

In response to these fictitious questions of a refugee, she reasons: “There is a moment of ominous *uncertainty*, of indecision, which lurks behind the ‘initial’ encounter with the other” (ibid., my emphasis in italics). Against the backdrop of the discussion on the promise of certainty (Banakar, 2015, p. 13), which emerged from the analysis of the empirical chapters, I wonder how these fictitious questions can lead to additional insights when applied to the conclusions presented in the study. In order to approach such a ‘conclusion of conclusions’, it is necessary to revisit the concluding sections of the preceding chapters.

Revisiting (Un)certainty

As elaborated in Chapter Two, when the Swedish migration bureaucracy was reformed in 2005-2006, two main legitimations for the substantive (new Aliens Act) and procedural (MCs and MCA replaced AAB) changes were communicated to the public. First and foremost, the process of asylum determination – and the granting of residence permits to migrants in general – should become (more) ‘legally certain in accordance with the rule of law’ (*rättssäker*). Attached to this argument was the claim that, through the establishment of the second and third instances as courts of law, the process would become ‘more transparent’ (*öka insyn*). During an interview I conducted with a judge at the MCA, it was stated that the migration courts came into being to “increase transparency, because, at the time, the Migration Board’s decisions were not public, the Aliens Appeals Board’s decisions were not public, because they were not a court” (IT4).

To consider the second main source of legitimacy of the current system, which is less easily identifiable when one explores the mechanisms underpinning the public legitimization of the reform, it is useful to quote, once again (Chapter Two), the Migration Minister at the time (2005): “As it looks today, the process effectively has no end because we have a system where the asylum seeker after a final decision can file new applications again and again”¹⁵⁴ (Sydsvenskan, 2005). In this context, the reform of 2006 was legitimized as a measure to limit asylum seekers’ possibilities to re-apply.

Given Benhabib’s (et al., 2006) argument about hosts and guests, the first main legitimization can be read as being rooted in hospitality, i.e. the announcement to make the system more transparent. On the other hand, to frame the possibility for asylum seekers to re-apply as something that should be limited – as implied in the quotation above – evokes a sense of hostility; especially if one considers the connotation of the Minister’s original formulation in Swedish: “*lämna in hur många nya ansökningar som helst*” (approx.: ‘submit endlessly many new applications’, Sydsvenskan, 2005).

Having said this, taken the two main legitimations of the 2006 reform together, when it comes to the direct effects on asylum seekers’ lives, the abstraction that hospitality always includes hostility appears to be accurate (see Benhabib et al., 2006, pp. 155f; cf. on ‘hostipitality’, Derrida, 2000). At least, this seems to be true when focusing on the question of how the Swedish migration bureaucracy is currently legitimized. Given the inherently positive-sounding term of *rättssäkerhet*, the ‘juridified’ (Habermas: *verrechtlicht*) state of the asylum system in present-day Sweden has the effect that both acceptance and rejection decisions are invested with a strongly legalistic understanding of legitimacy.

Or, to turn to Weber, the Swedish migration bureaucracy of today claims (legal) certainty, transparency and efficiency, while – at least from the perspective of the rejected – the system has moved even further towards the ‘iron cage’ of modernity. Manifest in the materiality of detentions and deportations (Keshavarz, 2016; cf. De Genova & Peutz, 2010), in detention centres and planes, at airports and the EU’s external border, this metaphorical ‘iron cage’ should be linked to

¹⁵⁴ My translation of the Swedish original: “Som det ser ut i dag har processen egentligen inget slut eftersom vi har ett system där den asylsökande efter ett slutligt beslut kan lämna in hur många nya ansökningar som helst”, see <http://www.sydsvenskan.se/2005-05-26/utlanningsnamnden-avvecklas-nasta-ar> (Accessed 26 Oct. 2016).

those very real cages that exist – e.g. in the EU-funded detention and deportation centre Moria on the island of Lesbos.¹⁵⁵

That said, it has not been an objective of this study to ‘judge’ the decisions of the MCA. Instead, the analysis made imbalanced power relations visible. As elaborated in the methodological discussion of Chapter Four, a CDA of the legitimation of decisions that directly affect people seeking asylum should pay attention to the differences between legal and other forms of discourse. Having summarized Habermas’ discussion on legitimacy through legality, it is crucial to acknowledge that legal discourse does not subscribe to the ‘all-affected principle’ of discourse ethics (see Habermas, 1992, pp. 566f; cf. Benhabib, 2004, p. 177; see also Fraser, 2008, p. 94). Instead, to come to definite, timely and binding decisions, in legal discourse morality is ‘complemented by coercive law’ (Habermas, 1992, pp. 565-566).

Given this analytical insight regarding the differences between legal and moral discourses, Fairclough’s (2003, p. 98) four ideal types of discursive legitimation can become sharpened methodological tools. When reaching Chapter Seven’s reasoning around *reglerad invandring*, it becomes clearer that Swedish migration law – in the books of black-letter law as well as in the action of the courtroom – entails the possibility of subordinating the rights of asylum seekers to those interests that are framed in terms of national security, social order and territorial sovereignty (see also Josefsson, 2016).

Chapter Five investigates this possibility with an in-depth focus on two precedents that affect the lives of asylum-seeking families with children. Drawing on Josefsson’s (2016, p. 13) argument that “the outcome of democratically enacted laws and the aim of controlling immigration, on the one hand, and public calls to protect the universal rights of asylum seeking children, on the other, have created a political challenge for Western democracies”, it was illustrated empirically how the acceptance as well as the rejection of asylum-seeking families

¹⁵⁵ In late August 2017, I had the chance to visit Lesbos for an academic conference. On the island I was invited to a self-organized refugee camp (Pikpa – Lesbos Solidarity, see <http://www.lesvosolidarity.org/index.php/en/>) and I spoke with some of the people living there. Moreover, I had discussions with lawyers and activists from different NGOs – or, as they preferred to call their workplaces, CBOs (community-based organisations). Among other details, these people talked about the severe conditions in the EU-financed detention and deportation center Moria (Joormann, 2018). In this detention and deportation center, within the framework of the ‘EU-Turkey Deal, certain groups of detainees were literally imprisoned in cages (for a video filmed from inside Moria [commentary in French], see <https://www.youtube.com/watch?v=TmaD6Ch2pjQ> (Accessed 7 October 2017).

with children can be legitimized in the MCA's precedents. Either acceptance or rejection can be legitimized within precedents that explicitly state 'the principle of the child's best' (see MIG 2007:25; MIG 2012:9). In reference to how Alexy's concepts are used by in her discussion about (weaker) norms and (stronger) principles of human rights, it was shown that the so-called principle of the child's best is not always a principle from a critical point of view (see Benhabib, 2016; cf. Alexy, 2002a).

Moreover, I began to highlight one observation that is theoretically as well as empirically grounded. As Alexy (1989, pp. 232-233) stresses, reasoning about the factual aspects of legal cases can include knowledge claims about events or states of affairs in the past, present and/or future. Based on her ethnography of asylum cases at the Migration Courts in Malmö, Gothenburg and Stockholm, Johannesson (2017, p. 177) presents the finding that "judges still have to make an assessment of the future risk of harm". In line with these theoretical and, respectively, empirical insights, I showed that the MCA also legitimizes decisions in relation to estimations of what is likely to happen in the future. For example, the MCA invests one decision with the rationalizing legitimation of the argument that "it has not been shown [that the child's] future development and quality of life would be endangered in a decisive way through him returning to the home country" (MIG 2007:25, p. 2).

Chapter Six drew on the critical feminist tradition to problematize social reality in view of – among other markers of intersecting power relations – class, gender and ethnicity (see Benhabib et al., 2006, pp. 34f; cf. Crenshaw, 1989; Haritaworn, 2008). Building on a discussion that I introduced in Chapter Two, I argued that considerations of social class are absent in the precedents of Swedish asylum law not only because of the general limitations of Western liberal law (see Priban, 2002; Norrie, 2005), but also because of a fundamental distinction in the dominant discourse (including international refugee law) about forced-displaced people. This distinction categorizes people fleeing from unemployment, poverty and/or hunger as 'economic migrants'; a term that tends to function as the binary opposite of 'the refugee'.

Having identified and problematized this binary, it is necessary to revisit an interview with a judge (IT6) who mentioned aspects that can be related to the Bourdieusian concepts of economic, social and cultural capital. To paraphrase the cited excerpts from this interview, the judge maintained that lacking economic capital could not be a reason for being granted protection in Sweden. Meanwhile, the judge contrasted a well-educated, young, healthy, man with a "good network

around him” (IT6) with a person who lives on the countryside, with a disability, and who belongs to “a minority clan”. Regarding the first person, the judge reasoned that “very much more is needed so that I can recognize need-for-protection”, while for the latter it would be “the other way around” (IT6). In addition to this reasoning about the question of how the granting of protection status can be practiced at a Swedish migration court by taking into account the social and cultural capital of the applicants, in view of excerpts from other interviews with judges, it is argued that economic capital matters in asylum cases; for instance when it comes to the need for ‘public counsels’ (*offentliga biträden*, see Chapter Two). Indirectly pointing at cultural capital, as one second-instance judge reasoned, an “elderly illiterate woman from Somalia, she, after all, cannot speak for herself in the [same] way as this well-educated guy from Iran” (IT8). In such cases, “hopefully, then, there is a public counsel who can help support this person who has a weaker school education.” (IT8).

Considering this information and related details that emerged from the interview data, I proposed the term procedural power imbalance in order to address the problem that, as one of the judges I interviewed at the MCA put it in regards to the appeals that reach this highest legal instance, the MB’s lawyers “get – what can one say – a little bit cream on top (*lite gräddfyl*)” (IT9), i.e. compared to the legal party of the applicant(s). This was explained as mainly due to the circumstances that a) the lawyers of the MB tended to write better applications for leave to appeal than the public counsels and that b) the MB appealed less frequently. To pinpoint it as a process that works throughout all three legal instances of the Swedish Migration bureaucracy, I then proposed the term institutionalized power imbalance for the following reasons.

The MB – of which the main compiler of COI in Sweden, ‘the country information unit’ (*landinformatiönsenheten*), is a part – is the state institution with which applicants must file their initial asylum claim. In the higher legal instances, subsequently, the MB becomes the opposing legal party that asylum seekers (and, potentially, their public counsels) face in court. Finally, to reach the MCA as the third and highest legal instance, applications for leave to appeal must be written in such a way that they become “of interest for precedence” (*preudikatintressant*, IT9). In this context, thus, my finding is that asylum seekers are in a potentially disadvantaged position of power vis-à-vis the MB when their cases reach the second or third legal instance, quite simply because one can only wish that, “hopefully” (IT8), the asylum seeker has “a public counsel who can help” (IT8).

Consequently, sufficient economic capital might enable applicants to balance this power relation by paying privately for a specialist lawyer. Moreover, social and cultural capital at the disposal of the asylum seeker – as illustrated for instance by the contacts in the mass media of the Iranian filmmaker discussed in Chapter Three – could contribute to balance.

Upon these considerations of how social class – here defined by cultural, social and economic capital – can play a role in asylum cases decided at Sweden’s migration courts, I proceeded to focus on how ethnicity, religion, gender and sexuality are represented in precedents of Swedish asylum law. In one interview (IT6), a judge singled out specifically religion and sexuality as “identity concepts” (*identitetsbegrepp*): “I would think that one can say this: religious and sexual identity have a character of permanence (*oavytterlighet*), so to speak, that it is something that cannot be helped, quite simply, it’s just like it is” (IT6). In this context, the judge further reasoned that “[w]hen it comes to political identity one might hesitate a little to describe it as an identity concept” (IT6). Instead, the judge spoke of “political affiliation”, which I contrasted to the formulations “politically active”, as stated in MIG 2007:33, and “political belief”, as the MB uses the term.¹⁵⁶

I connected this apparent difficulty of using one consistent formulation to represent ‘the political refugee’ to Wettergren’s and Wikström’s criticism that is essentially summarized in the following sentence: “The notion of refugee has been criticised internationally, because it *rests upon* a narrow Western understanding of what political persecution means, assuming wilful political participation in what is conventionally considered a political sphere” (Wettergren & Wikström, 2014, p. 567, my emphasis in italics). As important in the context of this criticism, I stress the emphasized formulation ‘rests upon’ which, as I read it, highlights the following. It is, in the first place, the historical roots of the international refugee regime in the 1951 Convention that represent “a narrow Western understanding of what political persecution means” (*ibid.*). Therefore, one must also acknowledge those legal changes that have been developed since then to address these shortcomings (see e.g. McAdam, 2017; cf. McKinnon, 2016).

After this consideration of the question of who can be categorized as ‘the political refugee’, I focused on ‘religious belief’ (*religiös uppfattning*) and ‘sexual orientation’ (*sexuell läggning*), as they are used in MIG 2007:33 and, respectively,

¹⁵⁶ See <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Asylum-regulations.html> (Accessed 12 July 2017).

MIG 2013:25. In line with other research on asylum determination procedures in Sweden (e.g. Wikström & Stern, 2016; 2015; Wikström, 2015), my analysis of MIG 2007:33 and MIG 2013:25 supports the view that the main source of legitimacy in order to answer the question of whether an applicant is granted any protection status is, in many asylum cases, the so-called ‘credibility assessment’ (*trovärdighetsbedömning*). Alternatively called ‘genuineness assessments’ in English, these evaluations often come down to the question of whether it is more ‘probable’ (*sannolikt*) than not that an applicant has been, is and/or will be, persecuted. To be believed and, thus, legally recognized, applicants must present a ‘credible asylum narrative’ (*trovärdig asylberättelse*). Keeping in mind the important detail that it is the applicants who must perform such a *trovärdig asylberättelse*, I problematized this framework by analysing the discursive representations of gender and sexuality in MIG 2013:25. With this precedent it is exemplified that, for asylum seekers, it is not enough to self-identify as a LGBTIQ person.

In this single precedent (of the 200 published 2006-2016) that focuses explicitly on sexuality, it is stated that the applicant “had made it probable that he had lived as a homosexual, that his sexual orientation was generally known, [and] that he risked abuse” (MIG 2013:25, p. 2). In the same introductory passage of the precedent, first a certain facticity about the past and present is established (“had lived as a homosexual”, “sexual orientation was generally known”), whereupon an assessment of risk (“risked abuse”) regarding the future is made. Given the epistemological limitations due to which such claims about factual states of affairs in the past, present and future should always be questioned (see Alexy, 1989, pp. 232-233), I put forward the idea of conceptualizing credibility assessments as part of the filter of porous borders. Drawing on Benhabib’s (2004, pp. 114-115) as well as Khosravi’s (2010, p. 3) work on migration, with ‘filter of porous borders’ I understand these assessments as an essential element of “the politico-juridical discourse and regulation” (ibid.) that enables the legal system to make a binary distinction between ‘legitimate’ and ‘illegitimate’, respectively ‘deserving’ and ‘underserving’, applicants.

In spite of the epistemological limitations of these assessments, every assessment in itself contributes to the legalistic legitimacy of the respective single decision of either permit or expulsion. The existence of these assessments in general, meanwhile, contributes to the legitimacy of the international refugee regime at large. Furthermore, I have stressed that age determination procedures and language analyses, given their attachment to the fields of scientific knowledge of medicine and linguistics, respectively, are other procedures that, despite their

epistemological limitations (cf. Noll, 2010; 2014; 2016), contribute to the filter of porous borders in the following sense. Irrespective of how rational these assessments can actually be, they help to discursively construct certain boundaries as legitimate. In conclusion, the (external as well as internal) borders of the nation state are already ‘porous’ – albeit in a very different way than Benhabib envisions this ‘porousness’ normatively (cf. Benhabib, 2004).

In Chapter Seven, the focus was placed on the discursive construction of ‘the legitimate refugee’ against the background of the government policy of ‘a regulated immigration’ (*en reglerad invandring*). While one of the judges at the MCA explained that “one has to make general statements, because it is still so that our legislation builds on [the grounds] that we shall regulate immigration” (IT9), in MIG 2014:3 it is called “the fundamental principle of Swedish aliens law that immigration in Sweden is to be regulated” (MIG 2014:3, p. 3). As this precedent exemplifies, country of origin information (COI) can be used not only to assess the different dangers which applicants might have faced in their countries of origin in the past, but also to evaluate those future risks by which a rejected applicant might be harmed after being expelled to the country in question. In other words, applying the policy of *reglerad invandring* in asylum cases is strongly dependent on the Swedish migration bureaucracy’s ways of seeing the world through the lens of COI. In order to problematize the pursuit of *reglerad invandring* by deporting rejected asylum seekers from Sweden to countries about which there is a certain amount of knowledge in the form of COI, I presented relevant excerpts from the interview data. For instance, a judge at the MCA stated the following:

“[It is important to] know when they [applicants] shall be interrogated (*förhöras*) about their country-knowledge (*länderkunskaper*) that we talked about, and when one conducts language tests, which have been questioned, but this indeed means (*det gör ju*) that one tries to create a specialization in different areas of the world, precisely because it becomes easier, sort of, to compare and also to have better knowledge (*känedom*)” (IT4).

Conceptualizing the credibility of the applicant’s ‘asylum narrative’ as dependent on its congruence with the applied COI, this excerpt informs that the applicants themselves are expected to have a certain “country-knowledge” (IT4). They must show that they possess this knowledge when they are “interrogated” (IT4) by the Swedish migration bureaucracy. To the potential disadvantage of the applicant, it

is knowledge that the Swedish migration bureaucracy deems to be valid – often¹⁵⁷ indeed represented by a “narrow Western understanding” (Wettergren & Wikström, 2014, p. 567) – which asylum seekers must (re)produce when they are questioned.

Meanwhile, two of the judges I interviewed criticized that certain information about the applicants’ countries of origin was not of sufficient quality with regard to its sources (IT8) and was inaccessible due to the language in which it was written (IT6 and IT8). One judge could become “really angry” (*riktigt förbaskat*, IT8) about the fact that relevant information in English or Norwegian was not translated into Swedish. This judge explicitly asked for reform in that matter. Currently, the judge maintained, Swedish migration court judges had to “read in English and *decide about people’s, well not life and death, but sometimes actually*, in another language than our mother tongue” (IT8, my emphasis in italics).

Upon presenting these insights that emerged from the interview data, I sampled two precedents. These two cases concern asylum seekers and they state the term *reglerad invandring*. First, I chose to focus on a precedent that concerned the asylum-seeking mother who was in danger of being deported to Malta/Libya and, second, a precedent that concerned an asylum-seeking father; a young father who had earlier not been accepted as an unaccompanied minor, and who had for several years lived as an undocumented person in Sweden. In addition to the focus on asylum-seeking families with children in Chapter Five, thus, Chapter Seven analysed two cases that concern asylum-seeking parents (MIG 2014:3 & MIG 2011:27). The fact that all six precedents (of the 200 published 2006-2016) that concern asylum seekers and mention *reglerad invandring* also include residence permit applications based on family ties to Sweden is mirrored in MIG 2011:27 and MIG 2014:3. Both cases revolve around the question of whether the respective applicants are to be expelled and then apply for a Swedish residence permit based on such ties from outside Sweden. If one wants to use the simplifying distinction, in MIG 2011:27 and MIG 2014:3 *reglerad invandring* is discussed in

¹⁵⁷ At a workshop on refugee support in Malmö in late September 2017, I spoke with NGO workers who engage for and lawyers who work as public counsels for LGBTIQ refugees. As a reoccurring problem, they mentioned the following question that was frequently asked to LGBTIQ refugees in Sweden: ‘So when did you tell your parents?’ The NGO worker, a representative of the Swedish LGBTIQ rights organisation *RFSL*, explained that this question often represented Eurocentric, and indeed also classed, thinking in the following sense. Not every person in the world who does not conform to heterosexist norms of gender and/or sexuality can simply ‘tell their parents’ about this. Instead, the cultural as well as the class background of the family in question played a decisive role in this context.

the context of treating the cases not as ‘asylum cases’ (*asylmål*) but as ‘permit cases’ (*tillståndsmål*). This discussion develops with reference to ‘the general rule’ (*huvudregeln*) that only asylum applications can be filed from inside Sweden. In MIG 2011:27 the question of whether the father should not be expelled is discussed in terms of an “exception to the rule that residence permits must be arranged prior to entry” (MIG 2011:27, pp. 1-2).

In MIG 2011:27 the applicant was allowed to stay. In MIG 2014:3 the decision about the question of whether the applicant is a refugee was de facto exported to Malta. In this case, the rationalizing legitimation of pursuing *reglerad invandring* weighed heavier than the risk of harming the life of a child. In contrast, in MIG 2011:27 it is argued that “the consequences of such a separation are deemed to be such that, even with regard to [the applicant’s] illegal stay in Sweden, it cannot reasonably be required that [the applicant] returns to the home country or another country to apply for a residence permit from there”. This rationalizing legitimation, which develops around the keywords ‘reasonable’ (*skälig*), ‘unreasonable’ (*oskälig*) and ‘reasonably’ (*skäligen*), shows that the mentioned *huvudregel*, i.e. ‘the general rule’ that residence permit applications based on other grounds than asylum must be filed from outside Sweden, can be interpreted in ways that argue either for or against the applicant leaving Sweden in order to apply from a third country. Such a third country would be neither Sweden nor the country of origin (cf. Chapter Two on ‘safe third countries’).

Furthermore, MIG 2014:3 highlights those specific rights of children that are rooted in a combination of authorizing legitimation and moral evaluation (see Fairclough, 2003, pp. 98f). In Swedish legal discourse, this tends to be discussed in terms of a ‘child-perspective’ (*barnperspektiv*, see e.g. MIG 2014:3) or ‘the child’s best’ (*barnets bästa*, see e.g. MIG 2007: 25; cf. Josefsson, 2016). At the same time, it was important to stress once more (cf. Chapter Five and Six) the rationalizing legitimation that is inherent to the practice of legitimizing such decisions by reference to an assessment of possible future developments. In focus in Chapter Five’s analysis were the ways in which both parents and children, if expelled from Sweden, might be harmed. In Chapter Seven, it was the harm from which, if a parent is expelled from Sweden, the respective child might suffer. In line with how I used one of Alexy’s concepts in chapters Five and Six, the legitimacy of the decisions in Chapter Seven was also based on agreeing on a “hypothetical consensus” (Alexy, 1989, p. 294). Such a consensus comes about when estimating which future scenarios are (most) likely to cause harm.

Moreover, in Chapter Seven, I deepened the discussion around the promise of certainty; a discussion that I began towards the end of Chapter Six. As Banakar (2015, p. 13) elaborates, this promise is essential to what in English is referred to as ‘the rule of law’. The study at hand has, meanwhile, stressed that the main source of legitimacy for the Swedish asylum system can be summed-up with the term *rättssäkerhet*, i.e. ‘the rule and of law’ that shall incorporate ‘legal certainty’. Yet, I highlighted that especially the asylum system’s central claim of being legally certain is challenged. Legal scholars and sociologists (Beard & Noll, 2009; Noll, 2014; 2016; Wikström & Stern, 2015; 2016; Wettergren & Wikström, 2014), an economist (Martén, 2015) and, most recently, a political scientist (Johannesson, 2017) have challenged the claim that asylum determination processes in Sweden are legally certain in the sense that people in need of international protection are granted residence permit in Sweden. This concerns in particular the claim that the procedures of ‘medical age examinations’ (Noll, 2014; 2016) and ‘credibility assessments’ (Wikström & Stern, 2015; 2016) contribute to ‘the rule of law’ including ‘legal certainty’, i.e. *rättssäkerhet*.

In other words, the claim that only ‘legitimate refugees’ are accepted in Sweden and, consequentially, only ‘illegitimate asylum seekers’ are expelled from Sweden is questionable. Primarily, my study has not been focused on contributing to the body of research that criticises this lack of certainty. Surely, some excerpts from my interviews (IT6 & IT8) suggest that the law that is socially practiced at the MCs does not contribute to certainty when it comes to the question of who is to be recognized as in need of protection. In any case, notwithstanding the significant differences between a legalistic understanding of certainty and the various ways in which (un)certainly has been problematized in social theory (see Banakar, 2015, pp. 23f), absolute certainty cannot be achieved – especially not when relying on assessments that partially depend on trying to predict the future. As I stressed from Chapter Five onwards, in the analysed precedents, such attempts to estimate the probability of future events do not present any mathematical or otherwise specified notion of probability. Instead, in the analysed decisions, developments in the future are deemed either ‘probable’ (*sannolik[t]*) or ‘not probable’ (*inte sannolik[t]*).

As one of the main contributions of my study I can highlight the empirical exemplification of Habermas’ (1992, pp. 541f) theoretical postulate that legal decisions must be ‘permeable’ (*durchlässig*) to moral discourse, among other sources of non-legal normativity – if they aim to be legitimate decisions. Applied to the precedents of the MCA, if one focuses on how the legitimacy and not the

legality of these decisions is discursively constructed, my research thereby challenges the claim that these precedents are statements solely about ‘legal practice’ (*rättspraxis*), i.e. authoritative statements which merely refine legal normativity. Asylum cases that are deemed to be ‘of precedent value’ (*av prejudikatvärde*), and therefore decided by judges at the MCA in the form of a precedent, also entail that the applicant(s) of the respective legal case will, in most cases, receive a definite answer to the question of whether or not they are allowed to stay in Sweden. In contrast to the legalistic points that the judges at the MCA may want to make with the respective decisions, this important aspect of most precedents that concern asylum seekers is mirrored in the mass media’s focus on the applicants’ rights, as I problematized the issue from Chapter Three onwards.

In reference to Benhabib’s (2004, p. 179) distinction between ‘weaker’ and ‘stronger’ public spheres, the view that precedents are strong discursive contributions to the democratic debate about refugee asylum, therefore, I deem to be accurate and insightful in the following sense. Compared to any pronouncement (news articles, blog or social media posts, etc.) made by non-state actors, published legal decisions are backed by the force of law. They have an impact beyond their contribution to debate in the public sphere. Once they become ‘legally valid’ (*lagakraftvunnet*) judgments, these decisions have concrete effects on the lives of the directly affected people, i.e. the applicants.

To elaborate on this argument: The legitimacy of contributions to legal discourse is strongly dependent on the promise of certainty. And while the legality of legal decisions is primarily grounded in their claim of being legally correct (see Banakar, 2015, pp. 63-67; cf. Alexy, 1989; 2002a; 2002b), the legitimacy that society at large attributes to legal decisions is intimately intertwined with the claim that these decisions are legally correct as well as certain and, thus, contribute to ‘the rule of law’. Hence the strongly positive connotation of the Swedish word *rättssäkerhet* (cf. Staaf, 2005).

From a critical point of view, however, the complexity of the social phenomenon of refugee migration in the contemporary world cannot be holistically represented in any certain terms. Chapter Two shows that, in the first place, there is no certainty that the ones who need protection will be able to file asylum applications in Sweden – or anywhere else in Europe. Due to policies and legal frameworks such as the ‘EU-Turkey Deal’ and the Dublin system, large groups of vulnerable people have no access to any fair, due process, asylum determination in Sweden – quite simply because they cannot reach Sweden. On the other hand, as I exemplify when examining the so-called Immigrant Investor

Programme (IIP) of Malta and residence permits for the ‘self-employed’ (*egen företagare*) in Sweden, individuals and families with sufficient economic capital can access privileged alternatives to filing asylum applications. This is not to say that the protection through EU citizenship or a residence permit that grants access to the inter-EU freedom of movement is the same as being granted refugee status in Sweden. Yet, due to these conditions heavily constrained by power relations and the spatiotemporal context in which the Swedish asylum system is embedded, I am sceptical to share an understanding of *rättssäkerhet* as something that is inherently and always positive.

In view of Sweden being part of the international refugee regime and, in this context, understanding ‘Europe’ as primarily defined by the Schengen Area and the Common European Asylum System, I find that a critical debate on the legitimacy of legally recognizing only certain people as refugees should start here: While certain travellers are called ‘bogus asylum seekers’, ‘economic migrants’ – or, as one judge (IT9) put it, “economic asylum seekers” (Chapter Two) – the following perspective ought to be taken into account. The social reality of refugee migration at the global level is a highly complex, uncertain, unfair and unjust result of global politics at all its different levels and in all its different places (Khosravi, 2010; 2018; De Genova, 2015).

Given this complexity, injustice and, in this sense, illegitimacy of the myriad of selection processes that lead to the social (and further legal) constructions of certain forcibly-displaced people becoming recognized as refugees, I see the main contribution of my study not in the few points that it can make regarding the legal certainty of asylum cases decided at Sweden’s migration courts. Instead, the study presents three empirical chapters that “reconstruct” (Habermas, 1992, p. 569) and, thus, critically analyse those legitimacy claims that have been made within the analysed precedents. Based on this analysis, for socio-legal research, the most significant point that this study has made is the finding that even the MCA – which officially produces precedents solely as guiding answers to questions of legal normativity – legitimizes its decisions discursively not by only referring to the authority of law. Rather, besides legal norms, precedents of Swedish asylum law also refer to factual claims about the past, present and future. Moreover, they display legitimacy claims that are as much rooted in moral and political discourses as they are based on legal sources. Furthermore, the MCA also legitimizes its decisions by structuring them as legal narratives. These narratives

almost¹⁵⁸ always begin by summarizing and paraphrasing the lower legal instance's decisions. Thus, they invest certain arguments, which were initially made by the MB or at a MC, with legitimacy. Only thereupon is the MCA's final decision presented.

In the light of the observation that legal decisions are formulated not only with the claim to correctness (see Banakar, 2015, p. 65; cf. Alexy, 2000, p. 146) but also with the promise of certainty (Banakar, 2015, p. 13), it seems to be accurate to argue that Swedish asylum law as a whole contributes to the legitimacy of a certain 'porousness' of the Swedish border; a porousness that presupposes boundaries (cf. Benhabib, 2004).

Processes of asylum determination in Sweden – as legal procedures which are influenced by the precedents formulated at the MCA – are generally deemed to be so (legally) certain that Sweden can have 'porous' borders and 'legitimate' boundaries at the same time. In such an understanding of porousness (cf. Benhabib, 2004), the Swedish border is 'porous' in the sense that entering Swedish territory without permission is 'illegal', at the same time as such "unauthorized" (Carling, 2007, p. 6) crossings of the Swedish border are 'legal' if the border-crosser applies for refugee asylum immediately upon entry (see also Allain, 2001). Thus, given the current practices of the Swedish immigration regime, Sweden's border can be characterized as being 'porous'.

Such a generalizing view of the Swedish asylum system should, however, not diminish the differences. As illustrated throughout the preceding chapters, different precedents legitimize in different ways and to different extents Sweden's 'porous' borders. Nor do I want to claim that Sweden's borders have always been, or always will be, porous. The discussion about the strengthened border controls in Chapter Two shows that, from January 2016 until May 2017, the Swedish border was indeed almost entirely closed to people seeking asylum (see e.g. Sager & Öberg, 2017; Barker, 2018).

Finally, to take the discussion one step further, it makes sense to return to the distinction between "the social organization of law as power and the organization of law as meaning", as Cover is cited by Benhabib (Benhabib et al., 2006, p. 48). Following Fairclough's research agenda of critical discourse analysis, it can be shown that precedents of Swedish asylum law are not only legitimized by reference to I) the authority of law, but also by reference to II) the rationalization of empirical reasoning, III) the utility of institutionalized actions that can use law as

¹⁵⁸ See the discussion on *säkerhetsärenden* in Chapter Two.

means for political ends, IV) those moral evaluations that permeate legal discourse and V) the storytelling that appears when legal texts are read as narratives (Fairclough, 2003, p. 98; Habermas, 1992, pp. 565f; Alexy, 1989, pp. 232-233). Hence the following argument that emerged from the preceding chapters. When precedents display legitimacy claims based on the authority of law, one can identify “the social organization of law as power” (Cover cited in Benhabib et al., 2006, p. 48). On the other hand, when legitimizing decisions are made by reference to rationalization, moral evaluation and/or through the structure of the decision’s narrative, it is rather “the organization of law as meaning” (ibid.) on which the respective text passages are discursively built.

In this context, it appears to be the complex, and indeed chaotic, social reality of seeking asylum that is represented when precedents of Swedish asylum law are legitimized by reference to rationalization, moral evaluation, and/or as narratives. By providing the respective decisions with some meaning, rather than merely making sure that they are legally correct, precedents are legitimized not only by reference to the authority of law. In this sense, it can be argued that a critical discourse analysis can illustrate how the MCA’s judges make (conscious or unconscious) attempts to pay notice to the complexity of understanding refugee migration in the world of today.

Challenging the Power Imbalance

As previously elaborated, the excerpts from my interviews with Swedish migration court judges that are incorporated throughout the study, the detailed overview of the precedents that is presented in Chapter Three, the in-depth analysis of six of these precedents in the empirical chapters, and my review of existing literature that critically examines asylum determination procedures, have led me to the argument that Sweden’s migration bureaucracy is marked by an institutionalized power imbalance. This imbalance operates to the potential disadvantage of asylum applicants. To start with, there is a procedural power imbalance between the applicants and the MB; an imbalance which continues to exist yet shifts throughout the three legal instances due to the “dual role” (Johannesson, 2017, p. 98) of the MB as, generally, an “expert agency on asylum” (ibid.) and, as soon as a case reaches the second instance, the legal party who opposes the applicants.

In addition to that, the production and/or compilation of COI is dominated by a unit of the MB, *landinformationsenheten* (see chapter Six and Seven).

The institutionalized power imbalance that operates to the potential disadvantage of the applicants is, however, not limited to these aspects that illustrate the advantaged position of the MB. The terms ‘language analysis’ (*språkanalys*), ‘credibility assessment’ (*trovärdighetsbedömning*), ‘age determination’ (*åldersbedömning*), as well as the notions of ‘credible asylum narrative’ (*trovärdig asylberättelse*) and ‘the burden of proof’ (*bevisbördan*), are all linked to the fact that asylum seekers are, per se, questioned and, potentially, “interrogated” (IT4). One precedent, MIG 2014:1, from which I quoted the following excerpt already in the detailed overview of Chapter Three, combines several of these key-terms:

“An asylum seeker who claims to be a minor has the burden of proof (*bevisbördan*) to make their stated age probable. He or she can be offered the possibility of using a medical examination as means of evidence (*bevismedel*) to fulfil their burden of proof. There is no obligation of the Migration Board to offer a medical examination, only an obligation to inform about the possibility of being examined. A medical age determination is, however, only one of several means of evidence that the individual [applicant] can use to fulfil her/ his burden of proof regarding the age [of the applicant]” (MIG 2014:1, p. 1).

In this excerpt, the MCA expresses how some of the rights and obligations of unaccompanied minors are defined. It becomes clear that applicants, if they claim to be minors, must “make their stated age probable” (MIG 2014:1, p. 1). Thus, as it regards age, the applicant “has the burden of proof” (*ibid.*). The MB, on the other hand, “has no obligation to offer an examination” (*ibid.*) that could become ‘means of evidence’. In terms of rights and obligations, in this specific context of age determination, unaccompanied minors have, thus, several obligations. In contrast, the MB is not obliged to prove any factual aspects regarding the applicants’ age. To illustrate the consequences that this institutional setup can have in extreme cases, I will now read the excerpt from MIG 2014:1 (above) against the backdrop of a newspaper article (below) about the application, detention and recent deportation of a young asylum seeker:

“[...] Hadi Barbari’s application for residence permit was submitted on 1 December 2015 and rejected in February 2017. The decision was appealed, the appeal was rejected and at the end of July [2017] the enforcement [of expulsion]

(*verkställighetsärendet*) was handed over to the Police. Shortly after, Hadi Barbari was transferred to the MB's closed detention centre (*låsta förvar*) in Märsta, Stockholm. There he stayed for five months." (Holmberg, 2018).

Above this passage of the newspaper article, the reader has already been informed that "Hadi Barbari was only 20 years old" (ibid.). Events unfolded such that on "10 January [2018] he was expelled to Afghanistan. The plane landed in Kabul at nine in the morning. Five hours later, he was dead" (ibid.). Irrespective of why Hadi Barbari died – friends of him who are quoted in the article suspect that he was poisoned – the following details of the case are known. More than two years before the deportation, he applied for asylum in Sweden. After his failed application and, later, the rejection of his appeal, he was locked up for five months in a "closed detention centre" (Holmberg, 2018). Five months later, and five hours after being deported from Stockholm to Kabul on 10 January 2018, he died. The detail that his age was 20 when he died suggests that he was around 18 when he applied for asylum in Sweden on 1 December 2015.

Hadi Barbari's tragically short life illustrates the gravity that certain decisions about "people's, well not life and death, but sometimes actually" (IT8) can have. While acknowledging the general possibility that he might have also died in Sweden had he not been deported to Afghanistan, the final point that I want to make ties into the comparison of migration law and criminal law, which I sketched towards the end of Chapter Six. Notwithstanding the significant differences between asylum cases and criminal cases, in terms of harm (Canning, 2017; 2019), the consequences of becoming a rejected asylum seeker can include imprisonment. Whether this is framed in terms of being 'detained' (*förvarstagen*), put into 'police arrest' (*häkte*), or otherwise being 'robbed of freedom' (*frihetsberövad*) might be very important from a legalistic perspective. For unwanted noncitizens, these different forms of de facto imprisonment can lead to the same consequence: 'coerced expulsion' (*tvångsutvisning*), i.e. deportation.

Not only imprisonment and deportation but also death can follow – as in Hadi Barbari's case – a rejected application. In such extreme cases, a rejected asylum applicant can, de facto, be more threatened than the accused in a criminal case. In Swedish criminal law, one can be convicted to lifetime in prison, but there is no death penalty. Swedish immigration law clearly states that a rejected applicant must not be expelled from Sweden if it is assessed that the expulsion is likely to lead to the applicant's death or other forms of serious (bodily) harm. As I pointed out in Chapter Two, when it comes to those cases where the applicant can receive

subsidiary protection in terms of being *alternativt skyddsbehövande*, a reason for granting this protection status can be the assessment that the applicant “runs the risk of being punished with death or being subjected to bodily punishment, torture or other inhuman or degrading treatment” (UtlL 2005:716, Chapter 4 § 2).

However, if the MB (in the first instance) and – if leave to appeal is granted – the MCs (in the higher instances) do not believe that the applicant will be (bodily) harmed, this legal paragraph is not of any help for those people who are in danger of being threatened and/or tortured and/or killed upon expulsion. After all, as I have previously cited the point, “deportation can remove people not only from national territory but also from any legal means of supporting themselves and finally from life itself” (Bibler Coutin, 2010, p. 368). Precisely therefore, given the institutionalized power imbalance that I highlighted throughout this study, the position of the asylum applicant should be strengthened (cf. UNHCR, 1998). Not to say that this would free the Swedish migration bureaucracy of unbalanced power relations. In addition to the observation that international migration is a classed social process (Chapters Two and Six), I agree with Dean Spade’s (2013, p. 1047) argument that systems such as immigration enforcement are “technologies of racialized-gendered population control that cannot operate otherwise – they are built to extinguish perceived threats and drains”,

And yet the study’s insights compel me to argue for changing the asylum system. When focusing on the Swedish context, one might highlight that the ‘country information unit’ (*landinformationsenheten*) ought to become entirely independent from the MB and that migration court judges should have access to professional translations of all the information that could be relevant. However, given the growing body of research that also criticizes other “evidentiary grounds” (Johannesson, 2017, p. 177) – such as medical age examinations and credibility assessments (e.g. Noll, 2014; 2016; Wettergren & Wikström, 2014; Wikström, 2014; 2015; Wikström & Stern, 2015; 2016) – based on which asylum claims are processed, much more thorough change is needed.

A precondition for such change is to, firstly, realize that there cannot be any absolute certainty in processes of asylum determination (see UNHCR, 1998; cf. Kagan, 2002). On a higher abstraction level, the judicial ideal of legal certainty – and thus “the rule of law’ (*Rechtssicherheit*) [which includes] the promise of certainty” (Banakar, 2015, p. 13) – must not be confused with certainty in the empirical sense of this word. Obviously, yet, the decision-maker strives to be as certain as possible that expelled applicants will not be harmed.

Secondly, any argument for changing the asylum system ought to acknowledge that uncertainty affects not only the Swedish but the international refugee regime at large. For example, as I want to argue in reference to McKinnon's study on the decision-making practices of immigration judges in the US (see Chapter Six), the fact that absolute certainty in the empirical sense cannot be established – for instance on the question of whether an applicant is a “gay woman” (McKinnon, 2016, p. 121) – has the consequence that the deportation of a rejected asylum seeker always entails the risk of taking a decision that will – psychologically and bodily – harm a human being who is in need of protection.

Thirdly and lastly, thus, anyone who argues for changes within the framework of the current refugee regime should face the reality that even the most legally certain asylum system runs the risk of deporting people who will be psychologically and bodily harmed (see De Genova & Peutz, 2010).

The Sociological Study of Legal Decisions

In addition to the insights summarized above, I want to argue that the study at hand provides socio-legal research with a methodological contribution. My argument is that the method-theory interface of the study can be applied to study any kind of legal decision. In addition to Fairclough's (2003) advice – which I support – to complement text analysis with other methods of empirical social research (see Chapter Three), his discourse theory of legitimacy can be successfully combined with other relevant concepts from social theory. In more concrete terms, as exemplified in the previous chapters, Fairclough's four ideal types of discursive legitimation can be developed by reference to Habermas' and Alexy's theories of legal discourse.

Firstly, Fairclough's conceptualization of legitimacy claims based on authorization is enhanced by connecting it to Alexy's theory of legal argumentation and what Alexy calls external justifications. Secondly, Fairclough's 'moral evaluation' is a conceptualisation that can be applied for studying non-legal normativity in legal decisions when turning to Habermas' focus on the question of how legitimacy is constructed 'through legality'. Thirdly, the different sub-types of Fairclough's 'legitimation through rationalization' can become sharpened methodological tools by reference to both Alexy and Habermas. Finally, the discursive legitimation of decisions based on legal authority as well as

legitimacy claims embedded in narratives are conceptualizations from Fairclough's discourse theory that can operate independently from any additional theoretical level.

Notwithstanding the possibility that other inputs from social theory can be used to refine this approach, I do think that my conceptual framework, which I applied in the empirical chapters, is food for thought for when future research decides to use discourse analysis to study legal decisions sociologically. That said, for my study of decisions that concern refugee asylum, I found that Benhabib's work provided useful concepts to contextualise my findings. Given the premise that the chosen theoretical-conceptual approach must be methodologically compatible with Fairclough, Alexy, Habermas and their common roots in critical social theory, I imagine that other theorists could take the place that Benhabib has in my study.

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Appendix

Interview Guide (for the pilot interview)

1st Theme: Work at the MCA

- Can you talk generally about your work for the Administrative Court of Appeal and the part of your work that you do for the Migration Court of Appeal? For how long have you been working there, how much of your work concerns migration cases?

(In Swedish original: *Kan du berätta allmänt om ditt arbete för Kammarrätten och den delen av ditt arbete du gör för Migrationsöverdomstolen? Hur länge har du arbetat där, hur mycket angår ditt arbete migrationsmål?*)

- In what way is the Migration Court of Appeal part of the Administrative Court of Appeal and how is the division of labour organized? How does the administration of the Court look in practice and which departments take decisions on which cases?

(In Swedish original: *På vilket sätt är Migrationsöverdomstolen en del av Kammarrätten och hur är arbetsfördelningen organiserad? Hur ser administrationen av domstolen ut i praktiken och vilka avdelningar tar beslut i vilka fall?*)

- Could you talk about the work concerning expulsion decisions in relation to other decisions that are taken at the Migration Court of Appeal?

(In Swedish original: *Hur kan du berätta om arbetet med av- och utvisningsbeslut i förhållande till andra beslut som tas på Migrationsöverdomstolen?*)

- If you have experience of it: How did legal practice look before 2006? Were there similar decisions as ‘indicative judgments’ and how was it, compared with today, regarding the highest instance?

(In Swedish original: *Om du har egen arbetslivserfaren av det: Hur såg rättspraxisen i migrationsmål ut före 2006? Fanns det då liknande beslut som "vägledande avgöranden" och hur var det då, jämfört med idag, ang. sista instansen?*)

- How is the work with cases that are not granted leave to appeal?

(In Swedish original: *Hur ser arbetet med ej meddelade prövningstillstånd ut?*)

2nd Theme: Clarifying Terminology

- What is the difference between 'indicative judgments' and precedents?

(In Swedish original: *Vad är skillnaden mellan vägledande avgöranden och prejudikat?*)

- What is the difference between taking decisions on *avvisning* and *utvisning*?

(In Swedish original: *Vad är skillnaden mellan att ta beslut om avvisning och utvisning?*)

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Legitimized Refugees

Legitimized Refugees investigates the question of how the Swedish migration bureaucracy's highest legal instance, the Migration Court of Appeal, legitimizes decisions that affect the lives of asylum seekers. Based on critical discourse analysis of precedents and informed by semi-structured interviews with migration court judges, the study illustrates the textual construction of last-instance decisions that concern families with children; class, ethnicity, religion, gender and sexuality; and the policy of 'regulated immigration'. Thus, it challenges the institutionalized power imbalance that is built into the asylum system.



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