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How Asylum Claims Are Adjudicated: The Institution as a Moral Agent*

ABSTRACT

Since the Second World War, asylum has become institutionalized within the framework of the 1951 Geneva Convention. In France, the National Court of Asylum (Cour Nationale du Droit d'Asile) examines appeals from applicants whose requests have been turned down by the French Office for the Protection of Refugees and Stateless Persons (Office Français de Protection des Réfugiés et Apatrides). It operates in a context where public discourse increasingly casts doubt on the validity of the majority of claims and where the Office's application acceptance rate has fallen from nine in ten to one in ten in the last thirty years. We examine how changes in the moral economy of asylum and a shift from trust to suspicion are reflected in local justice practices founded on the principles of independence and the fairness of the institution. Based on the results of an eighteen-month-long observation and interview study, we analyse rapporteurs' recommendations and magistrates' adjudications. We show that, despite sociological differences between rapporteurs, their recommendations differ little, while the pressure of institutional procedures attenuates differences in judgements. The tension that thus develops between ideals and norms of asylum protection on the one hand, and policy injunctions and routine practices on the other, is resolved by the conviction that the principle of asylum is better defended when access to it is restricted.

Asylum, in the sense of protection offered to a foreigner under threat, has been common to diverse cultures and different eras, since at least the *asylum* of ancient Rome (Fustel de Coulanges [1864] 1900: 182). Philological investigations reveal, however, an ambiguity stemming from these origins, since in Latin the increasingly pejorative connotation attributed to the term *hostis*, meaning stranger, led to the appearance of another word, *hospes*, in order to distinguish the enemy of a host. A trace of this etymology is retained in contemporary language in the tension between "hostility" and "hospitality"

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(Benveniste 1969: 87). Two major developments in this history have taken place in the contemporary period. On the one hand, asylum has been institutionalized by international treaties, beginning with the 1951 Geneva Convention, revised by the 1967 New York Protocol, which expanded the definition of refugee status to include non-Europeans, as well as by national bodies put into place in numerous countries to administer persons aspiring to this status, in the case of France these being the French Office for the Protection of Refugees and Stateless Persons (Office Français de Protection des Réfugiés et Apatrides–OFPRA) and the National Court of Asylum (Cour Nationale du Droit d’Asile–CNDA). A new form of governmentality of refugees was thus established. On the other hand, asylum has become differentiated in fact, if not in law; in the South, large populations are often subjected to mass displacements and assembled in refugee camps under the auspices of the United Nations High Commissioner for Refugees (UNHCR) and in the North, individual asylum seeker’s cases are subjected to meticulous individual examination following lengthy stipulated procedures, in the case of the French process by the decisions of the OFPRA and the rulings of the CNDA. Two distinct regimes of sovereignty have therefore developed, one of delegation to a supranational organization and the other within the framework of the nation-state.

Accordingly, the form of governmentality and regime of sovereignty define how asylum is managed. In France, this implies a treatment of individual cases that is comparable to an adjudication or, more precisely, when a rejected asylum seeker appeals an initial unfavourable decision—both initial rejection and recourse to appeal have become the rule—to two successive adjudications.⁽¹⁾ The first takes place in the OFPRA, on the basis of documents available to the officer in charge as well as an interview he carries out in the majority of cases. The second takes place at the CNDA where, following an investigation by a rapporteur, a public hearing is held in the presence of the applicant who faces three magistrates. While the decision-making process resembles a judicial investigation in both cases, it is above all at the CNDA that the procedure most explicitly resembles a tribunal. However, it is a distinctive tribunal since, rather than judging the culpability of the accused, the truthfulness of the alleged victim is being judged in order to discover whether their past experiences and future prospects match what really

(1) In fact, this two-stage analysis, which corresponds to the official description of the asylum procedure, should be qualified from the outset, since before these latter stages can be reached two obstacles have to be overcome which can sometimes be insurmountable for some asylum seekers: entering the country where the border police can intercept foreigners and take them to waiting zones, where their cases are examined in order to decide whether their requests are well-founded; and the submission of cases to the Prefecture, against which a range of factors can be opposed, such as coming from a country that is considered “safe” or having been evaluated by another state. In both cases, asylum requests are urgently assessed according to a “priority procedure” which does not provide a right to stay, and mainly results in rejection. This means that the figures we provide in the text below substantially underestimate the severity of the asylum seeking selection process.

happened (are they telling the truth?) on the one hand, and what defines asylum (do they meet the conventional definition of a refugee?) on the other: the person the president and his assessors face seeks recourse to the asylum laws on the basis of the persecution he or she claims to have endured victim of and the risks he or she would encounter if repatriated.

Examining the statistics, it can be observed that the evaluation of applicants has undergone a remarkable transformation over the recent period, since the proportion of those rejected by OFPRA in the first instance has risen from one in ten and even fewer in the mid-1970s, to nine in ten and even greater at the beginning of the 2000s, while the rate of rulings quashed by the CNDA, in other words favourable decisions that counter the initial ruling, has declined from one in two to one in ten during the same period. The low-water mark for admission rates was 2002, at which point the proportion of negative rulings by the CNDA began to exceed the percentage of positive rulings delivered by OFPRA and the total admission rate began to climb back up.⁽²⁾ In three decades, there has thus been a transformation from a situation where most applicants received refugee status to one where the vast majority of them are denied asylum, the ratio between admissions and rejections reversed in the mid-1980s. This change is also evident in the public sphere, where the issue of “bogus refugees” has grown in importance, notably in the discourse of the Interior and Immigration Ministries, so as to justify controls and restrictions on asylum rights.

To make a comparison with the judicial system, this means that while in a courtroom a defendant is presumed innocent, at the CNDA, the alleged victim is considered suspect. Suspicion can be directed towards the true identity of the person, the truthfulness of their account of the persecution they claim to be victims of, the authenticity of the documents they produce in support of their request, and the reality of the dangers they would face if repatriated. This is manifested at different stages, in the reports prepared by rapporteurs, during the hearings before magistrates, and ultimately through the reduction in admission rates. Therefore, the question arises: how is the selection between “real” and “false” refugees carried out, or, more precisely, how is it decided who has a legitimate right to asylum? Does the principle of “*intime conviction*” [personal conviction], to which the actors attach great importance in their evaluations, stem from objective elements in the case, or is it instead based in large part on subjective assessments of the applicants? Do all rapporteurs investigate in the same way and do all magistrates rule in the same fashion, or do they exhibit differences, for example as a function of their

(2) The figures on asylum are available on the OFPRA (<http://www.ofpra.gouv.fr/>) and CNDA (<http://www.cnda.fr/>) websites, particularly in the increasingly detailed annual reports. For 2010: http://www.ofpra.gouv.fr/documents/RA_2010_Ofpra.pdf. Taking into account the time allotted for processing cases, an update is made at $n + 4$ years, allowing a more accurate presentation of admission rates. For the most recent synthesis, see: http://www.ofpra.gouv.fr/documents/CAB-bilan_de_la_DA_enregistree_en_2007.pdf.

academic or professional social profiles?⁽³⁾ Basically, it is a question of understanding how the moral economy of asylum is expressed within the Court, and how agents charged with laying down the law dispense local justice.

The moral economy of a societal issue characterizes the production, circulation and appropriation of norms and values, sensibilities and emotions that account for how it is treated at a given moment, both in the public sphere and in private actions (Fassin 2009). This definition is appreciably different from that proposed by Edward P. Thompson (1971) to interpret the workers' movements and peasant revolts in eighteenth-century Britain, in that, while it assumes the idea of a moral system that is the basis of the ethos of a social world, it does not retain an economic dimension in the sense of an exchange of goods and services: the economy must be understood here more in its classical sense of the distribution of elements in a complex whole as defined by Lorraine Daston (1995). Considered in this way, the moral economy allows us to grasp the successive states of the moral order, on the basis of which we think about things and act on them. In the case of asylum, we will thus endeavour to understand the moral principles and moral sentiments that govern it at different times by analysing both changes in public discourse and official statistics as well as the transformation of measures and the way in which agents adopt them. It is through the everyday practices of the Court, through the investigative case work of rapporteurs and through the deliberations in hearings by magistrates that we can see how norms and values, sensibilities and emotions translate into what can be called local justice, to use the concept proposed by Jon Elster (1992) for analysing the allocation of scarce goods and essential responsibilities. For reasons that shall be explained, asylum has become just such a scarce resource, the attribution of which takes place within increasingly complex structures and which brings into play contradictory processes. This complexity and contradiction stems specifically from existing tensions within the moral economy of asylum between the principle of justice and the feeling of mistrust. This tension means that the emotional dimension adds to the rational approach to guide choices much more than in the classical theory of local justice.

We begin by discussing policy responses to the demographic evolution of the refugee issue and the resulting institutional changes, showing how these facts illuminate profound changes in the moral economy of asylum. We then undertake an analysis of the recommendations of rapporteurs and the decisions by presidents to make sense of how they both converge and diverge,

(3) To answer these questions, we carried out a study at the CNDA lasting eighteen months, from February 2009 to July 2010, which consisted of observing seventy-five public hearings, amounting to nearly five hundred asylum requests. This was supplemented by formal interviews with fifteen rapporteurs and twelve magistrates, and above all numerous informal conversations with these actors in the course of our fieldwork. Rapporteurs and magistrates are systematically referred to as masculine in the text for reasons of orthographic simplicity. However, it should be noted that a significant proportion of magistrates, and especially assessors, are women.

thus establishing how the Court can perpetuate relatively stable forms of local justice while at the same time being composed of different people. We therefore attempt to describe the two levels: macrosociological, of policies, and microsociological, of practices. Our thesis is that the institution is the product of both policies and practices, but also that it contributes in turn to fashioning the former and determining the latter. Studying the values that are embodied by it and the sentiments that cut through it denotes how it behaves like a moral agent.

A policy under strain

In view of the apparent goodwill that prevailed during the signing and implementation of the Geneva Convention on refugees, when the inability of the Western powers to protect Jewish exiles fleeing Nazi Germany had to be acknowledged and, more immediately, hundreds of thousands of displaced persons had to be reabsorbed at the end of the Second World War, the situation half a century later offers a stark contrast, insofar as suspicion seems to dominate contemporary practices and representations of asylum in wealthy countries when deciding on refugee status (Daniel and Knudsen 1995; Maillard and Tafelmacher 1999; Bohmer and Shuman 2008). In fact, studying negotiations and discussions during the preparation of the text shows that economic concerns and their implications for immigration control often prevailed in political circles over the desire to protect persecuted people at the time (Noiriel 1991). An analysis of the statistics and the discourse in the early years of the application of the new law reveals that welcoming refugees from the Cold War represented an ideological issue, inasmuch as, by definition, asylum seekers could be Europeans only (Marrus [1985] 2002). While we should be wary of idealizing the period following the implementation of the Geneva Convention as a result, it remains the case that changes on two levels—economic, with the crisis in the mid-1970s, and ideological, with the fall of communism at the end of the 1980s—have prompted an opposite movement that has resulted in a progressive closure of borders to all forms of immigration, including asylum seeking,⁽⁴⁾ supposedly enshrined in principles of international law (Crépeau 1995). How can these changes be explained for France?

According to a widely accepted notion, the closure of borders, firstly to economic immigration in 1974, then to familial reunification in 1984, led

(4) Extending the programme set out at the Tampere European Council of 15 and 16 October 1999, the European Pact on Immigration and Asylum, signed by European Union states during the French presidency in 2008, explicitly links the two questions. The text can be consulted at: http://www.diplomatie.gouv.fr/fr/IMG/pdf/Le_pacte_europeenn_sur_l_immigration_et_l_asile_-_version_francaise.pdf.

candidates for exile to turn towards other possible routes to acquiring rights to stay, notably towards asylum.⁽⁵⁾ This is the “relay” thesis, according to which immigrants attempt to pass themselves off as refugees (Legoux 1995). The coincidence of restrictions on migratory movements and the increase in asylum requests since the mid-1970s seems to support this thesis, since the number of new cases rose from 2,000 annually to 22,000 ten years later.⁽⁶⁾ It is, however, difficult to be satisfied with this interpretation, which considers asylum seekers to be “economic refugees” as was previously said of the Jews in the 1930s (Noiriel 2007). The historical reality is indeed more complex. Until the official interruption of inflows, it was easier to obtain a work contract than refugee status and many potential candidates contented themselves with this, especially since “employment offices” directed them to the labour market, where they were regarded as a workforce like any other (Spire 2004). Accordingly, while asylum demands increased following the closure of borders in the 1970s, it is not because immigrants in search of employment abusively turned to this route, which was the only one that remained open to them. Rather, the end of labour immigration made it necessary for there to be a right of asylum that had hitherto been neglected because it had been substituted by simple access to employment. Moreover, it is reasonable to believe that this period, marked as it was by the successive rise of dictatorships in Latin America, south Asia and central Africa, and by an increase in conflicts and even genocides, was likely to produce individuals in search of protection, only a small proportion of whom ventured to Europe. Basically, far from indicating an influx of “bogus refugees,” the increase in asylum demands in the 1980s only emphasized the necessity of the Geneva Convention. On the one hand, this had, up to then, been too easily adapted to economic requirements at the expense of the application of the international law; on the other hand, a real urgent need for true asylum protection to be put into place became apparent with the reception of Chilean and Argentinean political exiles and subsequently Vietnamese and Cambodian boat people during this time.

This is not, however, the interpretation that prevails in the public sphere. A perception that the majority of requests are unfounded and in fact correspond to migration for economic rather than political reasons gradually took hold, including within the reception centres that successive governments expanded (Kobelinsky 2012). This representation is often engendered by the authorities, who, through a form of circular reasoning, rely on acceptance statistics produced by OFPRA, whose practices depend closely on the guidance and

(5) See http://www.ofpra.gouv.fr/documents/Brochure_historique_Ofpra_BD.pdf.

“Following the oil crisis and the rise in unemployment, the French government has decided to close borders to economic immigration. Asylum requests will become the only access routes, all the more attractive since, at the same time, the social rights to which

asylum seekers are entitled have become more numerous.”

(6) The figures given here come from the OFPRA and CNDA annual reports. See: http://www.ofpra.gouv.fr/index.html?dtd_id=10&xmld_id=2679 and <http://www.cnda.fr/ta-caa/donnees-chiffrees-et-bilans/>.

directives of its ministerial supervision.⁽⁷⁾ Most recent studies, though, show that influxes of asylum seekers stem principally from countries where they are exposed to problems with political oppression, domestic insecurity and violations of human rights, on the one hand, and difficulties of an economic kind, including forms of inequality and discrimination, on the other (Neumayer 2005). This is what we discover examining the accounts of asylum seekers: while they are required to highlight persecution and risks of persecution to meet the most explicit criteria of the Geneva Convention, they also reveal the precariousness of their social conditions and the material consequences of the violence they suffer (houses destroyed, shops torched, goods seized, etc.).

Yet it would be wrong to believe that asylum policies in France, as in the rest of Europe, follow a single demographic dynamic, aimed simply at managing influxes and assimilating refugees with immigrants. Three rationales unfurl in parallel and at times in competition. Firstly, there is the endeavour to restrict access to the right of asylum by instituting a series of measures, such as the assessment of cases at borders, the establishment of a list of safe countries, the subjection to a so-called priority procedure with no provisional right to stay, which considerably reduce opportunities to bring a case before the OFPRA, but equally by influencing the latter through instructions passed on to officers charged with examining cases, such as refusing to examine the applications of claimants whose fingerprints had been altered, which earned the Office condemnation from the administrative tribunal in December 2011.⁽⁸⁾ Secondly, there is the obligation to respect the principle of the right of asylum given that it is established by international conventions signed by France and that it is harmonized within the European Union by treaties and pacts; ignoring this principle can, moreover, lead to legal action, and the French government has been condemned by the European Court of Human Rights on several occasions; thus, in February 2012, for not allowing appeals before the CNDA to be held following rejection by the OFPRA for foreigners placed in detention centres, resulting in deportations before appeals could be

(7) The statement of the interior minister, Claude Guéant, on 25 November 2011, calling for a reform of the asylum laws, which were “hijacked for economic ends” and would lead to the threat of “more and more numerous unfounded requests,” is part of a long series of similar officer positions. In announcing a desire to extend the list of “safe countries” on this occasion to include Bangladesh, which contributes the largest group of asylum seekers in France, he tried to put pressure on OFPRA, which had made public the report of a joint mission with the CNDA in the country, the conclusion of which highlighted the persistence of serious shortcomings in human rights and significant threats to civil society (*Le Monde*, 25 November 2011).

(8) See <http://combatsdroitshomme.blog.lemonde.fr/2011/12/29/empreintes-inexploitables-de-demandeurs-dasile-le-juge-des-referes-du-conseil-dEtat-renvoie-la-balle-a-la-cnda/>. In a note dated 3 November 2011, the director of OFPRA asked his officials not to examine in depth the asylum requests of those whose fingerprints were considered to be unusable by the Préfecture. The Tribunal Administratif de Melun judged this practice to be contrary to the Geneva Convention, but the *juge des référés* of the Conseil d’État designated the CNDA to be the sole competent jurisdiction to determine this, leading to a legal imbroglio.

heard, in contradiction to convention requirements.⁽⁹⁾ Thirdly, there is an imperative of administrative efficiency, taking into account the number of cases, the complexity of procedures, the requirements to respect legal forms, the frequency of rejections in the first instance and the generalization of appeals in the second, all elements that generated an extension of the duration of the examination of cases. The effects of these are not just an increase in work for the institutions in charge of asylum, but also an overflow of the reception centres and the rendering of applicants awaiting decisions more vulnerable. In recent years reducing waiting times has been a major issue, and the CNDA made the reduction in the proportion of cases postponed for a later hearing as a result of applicants' illnesses or absences an absolute priority.⁽¹⁰⁾ These three rationales—political, legal and managerial—have led to an increasingly more sophisticated mechanism being put into place to separate requests considered justified from others. France is thus endowed with institutions that benefit from increasing budgets and staff to cope with the rise in initial applications and appeals, but is also burdened by the need to justify rejections in light of international law and European requirements. The more selective the institution is supposed to be, the more means it requires.

The metamorphosis of the institutions

As an illustration of this phenomenon, the number of staff at the OFPRA, which remained under one hundred from its creation in 1952 until the mid-1980s, during which time the number of applications was rising rapidly, reached 890 permanent or contract employees in 2005, even though the volume of requests was barely greater than two decades earlier. These considerable additional resources of course permitted old cases, which had sometimes been significantly delayed, to be dealt with and a reduction in investigation times of new requests. But it also allowed more frequent interviews with applicants, with the rates of summonses nearly doubling in the 2000s, and a closer examination of individual circumstances, as evidenced by

(9) See <http://combatsdroitshomme.blog.lemonde.fr/2012/02/03/droit-francais-de-l'asile-et-procedure-prioritaire-de-l'art-francaisd'ouvrir-les-yeux-a-strasbourg-cedh-anc-5sect-2-fevrier-2011-i-m-c-france>. The affair was considered sufficiently important to give rise to a public hearing in the Palais des Droits de l'Homme and was the subject of an intervention from the United Nations High Commissioner, which led to the condemnation of France for a violation of both Article 13 granting the right to an effective appeal and Article 3 prohibiting torture.

(10) For OFPRA see: http://www.ofpra.gouv.fr/documents/Rapport_Ofpra_2008_complet_BD.pdf and for the CNDA <http://www.cnda.fr/media/document/cndarapportannuel2008.pdf>. According to the 2008 OFPRA report, the waiting times for hearing cases rose from 167 days in 1996 to 324 days in 2002, before plummeting to 100 days in 2008. According to the 2008 CNDA report, 29.4% of cases were postponed. The report of the Commission des Finances du Sénat, which analyses the reasons explaining the length of procedures can also be examined: http://www.senat.fr/rap/r10-009/r10-009_mono.html.

the increased spending on interpreting. In order to justify these resources and the new practices that accompanied them, the institution suggested the existence of a “new order,” as indicated in its brochure: “Many people want to settle in Europe for economic reasons and seek refugee status, which remains the principal point of entry. The fight against illegal immigration is becoming a priority issue, not just for economic but also for security reasons.”⁽¹¹⁾ In reality, as has been seen, the same observation was made by the Office in the mid-1970s, making this order a little less new than stated.

It was only in 1973 that the rate of acceptances began to be measured and recorded by OFPRA (see the Appendix): until then the relatively low number of requests and the practically systematic admission made this evaluation irrelevant. The acceptance rate thus reached 90% in 1974, the year that borders were closed to labour immigration, and even 95% two years later. Asylum seekers at this time came principally from the Latin American dictatorships and the communist regimes of southeast Asia, eliciting ideological solidarity with the former and compassion for the latter, generally faced with tragic circumstances. During the following decade, the origins of applicants diversified, with a growing proportion coming from sub-Saharan Africa, notably Zaire, and south Asia, essentially Sri Lanka, and above all the number of requests rose, reaching a record level in 1989 of 61,000, causing a work overload for the Office. Asylum reform was thus instigated aimed at speeding up the treatment of cases and making their examination more rigorous, fraud becoming a common theme for debate following the discovery of cases of identity theft.

The effects of this reform and the changing attitudes towards refugees that accompanied it were immediate. While in 1980 the acceptance rate was still greater than 85% of the 19,000 requests, it fell to 43% of 29,000 cases in 1985, reaching 15% of the 55,000 cases in 1990. Fifteen years later it reached its lowest level, being 8% of 42,000 candidates for refugee status.⁽¹²⁾ The nine-fold reduction of the rate of favourable rulings by OFPRA in three decades is, from the point of view of the institution, simply the result of better work by officers in selecting between “real” and “bogus” refugees, in a context where the increase in the flow of demands is presented as an element of proof of the “misuse” of asylum. Without empirically being able to prove or disprove this assessment, it can at least be noted that for comparable levels of requests (20,000) the situation has changed from one where eight in ten cases resulted in agreement in 1980 to fewer than two in ten in 1995, during a period that was marked by, among other things, the violent break up of the former Yugoslavia, civil war in Sri Lanka and the Tutsi genocide in Rwanda.

(11) See http://www.ofpra.gouv.fr/documents/Brochure_historique_Ofpra_BD.pdf.

(12) The figures come from the OFPRA activity reports from 1995 (for statistics concerning the evolution of requests) and 1996 (for data on admission rates). For the older

period, a synthesized table can be found in the *Documentation française* table (Legoux 1995: 138). For the most recent period, the latest update entitled “Bilan et taux d’admission des demandes d’asile et d’apatridie” (22 August 2011) was used.

Neither the demography of the influx, nor the international context thus seems to explain this change, which appears to be linked less to objective data concerning applicants than to modifications to the subjective evaluation of circumstances.

At the same time, appeals of OFPRA decisions also underwent a transformation, the significance of which is more mixed, particularly in the recent period. For a long time, few cases came before what was, until 2007, the Refugee Appeals Commission (Commission des Recours pour les Réfugiés–CRR): fewer than one dozen in the 1950s, one hundred during the 1960s, except in 1961-62, and under three hundred in the 1970s, with the exception of 1979. It was from the 1980s on that the number of appeals rose sharply, a consequence of both the influx of first requests and the increase in rejections in the first instance: at the end of this decade this number passed 10,000, with a peak of more than 50,000 in 1990 and 1991; a reduction then took place, before a further increase at the beginning of the 2000s, reaching a second peak above 50,000 in 2004; since then a certain stability has come about with between 20,000 and 30,000 cases per year; which amounts to a rate of appeal of between eight and nine of ten cases rejected by OFPRA.⁽¹³⁾ In other words, in a half-century, from an institution that was rarely consulted in the years following the signature of the Geneva Convention, the Commission has been transformed into a Court that is practically systematically appealed to by ever-increasing numbers of the rejected.

Initially, junior officials at the Conseil d'État, which is the highest administrative court, handled the appeals. As their number increased, the process was split up, and from 1983 onwards two stages developed: the investigation, carried out by rapporteurs; who were recruited in successive waves as a function of the fluctuation of demand, reaching approximately one hundred today; and the decision, following a public hearing conducted by a panel of magistrates under the authority of a president, the number of whom rose to one hundred and seventy by the mid-2000s. This consolidation of the process has been accompanied by a statistical change that is comparable to the one observed for the OFPRA, namely a rapid fall in the number of recognitions: while approximately half of the cases resulted in granting refugee status in the 1970s, in the 1980s less than one request in ten ended in a favourable decision; this proportion further diminished to 5% in the mid-1990s. In other words, as the OFPRA has become more severe, the CRR has also become stricter, nearly always confirming on appeal the decisions from the initial proceedings of an institution on which it depended both functionally and financially.

This court, however, presented a dual problem of independence and equity. Independence, since the CRR was under the control of an administration (OFPRA) whose decisions it could be required to contest: we have seen how

(13) The older data come from unpublished documents that were kindly made available to us by the general secretariat of the CNDA, and the more recent data from OFPRA and CNDA reports, available from their respective websites.

the rejection figures for both proceedings have come into line. Equity, since the number of panels and the weak coordination that existed between them led to significant differences in decisions: quashing rates could vary between one in twenty and one in two depending on president, according to data that circulated informally within the institution. The creation of the CNDA in 2007, which was the culmination of a process of reform enshrined in law,⁽¹⁴⁾ brought solutions to these two problems: the new institution now depended on the Conseil d'État and the heterogeneity of panels was in part corrected by halving the number of part-time magistrates and recruiting ten permanent presidents. In addition to these two elements that contributed to a more independent and equitable treatment of asylum, there are two others that work in the same direction: access to legal aid, since 1 December 2008, allowing claimants to be defended by a lawyer when they did not have one and leading, in our observations, to practically all applicants appearing before the Court assisted by a counsel; and the increase in the number of places for asylum seekers in reception centres permitting claimants to obtain social and legal support which we know markedly improves the chances of their cases being successful.

Following these changes, a significant development occurred, which was, a doubling of the rate of quashed decisions, rising from 10% in 2002 to 22.1% in 2010. This development was partly a result of the reform, but it should be put into perspective on two levels. On the one hand, the published figures do not take into account the preliminary triage carried out by the presidency of the CNDA under the "*ordonnances nouvelles*" ("new edicts") which provide the administration with the ability to decide whether an appeal is "without serious basis:" thus one in five or six appeals does not reach a hearing and is therefore absent from the statistics presented here. On the other hand, the development is also closely linked to circumstantial factors, and notably the decision of the CNDA presidency, in certain conditions, practically automatically to grant subsidiary protection to Sri Lankans when the civil war in that country was at its most intense: this specific internal rule accounts for nearly a third of the increase in quashed decisions during our study.

In a general sense, the changes in recent decades invite two reflections. Firstly, the autonomization of the appeal process and its compliance with international law leads to a slightly more favourable treatment of applications with, at the same time, an increase in the number of decisions quashed on appeal than successful applications in the first instance. This fact, which is novel for a judicial appeal process, is often interpreted as an indication of a procedural flaw. Secondly, doubts concerning the merits of applications nevertheless remain, since four out of five of all the appeals presented before the Court are ultimately rejected, a proportion that is even higher if we take

(14) See chapter VII, article 29, of the law of 20 November 2007 relating to the control of immigration, to integration and to asylum, which replaced the CRR with the CNDA.
[http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000524004&dateTexte=.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000524004&dateTexte=)

into account the new edicts: the recent rise in recognition rates should not obscure what remains a strong trend.

In a little more than half a century, we have moved from a regime of trust, in which the account of an applicant was sufficient for the OFPRA in more cases than not, while infrequent appeals to the CRR often resulted in initial decisions being quashed, to a regime of distrust, in which an accumulation of evidence is increasingly necessary but rarely sufficient, since nearly nine out of ten applications to the OFPRA end in rejection, and only one in five appeals to the CNDA of the former's decisions are overturned. The moral economy of asylum has been dominated, following the Second World War, by a sense of guilt concerning Jewish refugees and of responsibility for the displaced, which did not preclude the exploitation of refugees as a labour force needed for European reconstruction and as an ideological weapon against the Communist bloc. At the end of the 1970s, as frontiers were being closed to immigration and as applications increased rapidly, the values of solidarity, notably towards Chilean asylum seekers, and feelings of compassion towards the distress of Asian refugees temporarily sustained high levels of admissions for protection, winning President Valéry Giscard d'Estaing the 1979 Nansen Refugee Award.

From the beginning of the 1980s, the control of what was increasingly seen as a wave of migration became a major preoccupation, legitimized by the idea that the majority of claims were, in fact, unfounded, either because they were economically motivated, or because they were based on fraudulent practices. The director of OFPRA at the time even saw this abuse as being the consequence of the ratification of the 1967 New York Protocol, which extended the right of asylum, limited to Europeans under the Geneva Convention, to all the countries in the world, "redrawing the profile of refugees applying to the Office."⁽¹⁵⁾ This remark was aimed at African applicants, but the suspicion that developed over this period would not abate when claims from Europeans were again the largest. Constantly reiterated by the government in the 1990s and 2000s, the public expression of doubt regarding the validity of applications became the principal trait of the moral economy of asylum. The whole remarkable and expensive process developed by France is the result of this fear, which has imposed an inquisitorial system to ascertain the validity of applications, but it is also the product of formal compliance with legal requirements, notably under the influence of the European Union. In these conditions, the work of officers in the OFPRA and even more so in the CNDA, which is an autonomous jurisdiction, consists of permanently arbitrating between a logic of suspicion and a concern for justice. This was what was revealed by our study of rapporteurs and magistrates in the Court.

(15) During this period, the discovery of "major" frauds, according to OFPRA, led to the practice of requiring fingerprinting following the 1989 reform, and the discovery that 3% of applications were repeat applications http://www.ofpra.gouv.fr/documents/Brochure_historique_Ofpra_BD.pdf. Despite the isolated and modest character of these falsifications, the theme of deception became widespread.

The difference in the details

One hundred or so *rapporteurs* are charged with investigating the contentious appeals brought by applicants or their lawyers. They gather all the evidence in the case, including generally the initial account, the interview with the officer, the OFPRA decision and the paperwork justifying the appeal, as well as various other documents concerning the identity of the applicant and evidence of alleged persecution. The latter can include political party, trade union or association membership cards, newspaper cuttings recounting significant events, judicial decisions against the claimant, death certificates of murdered relatives, and medical certificates that attest to physical scars or psychic trauma. The *rapporteurs* complete their investigations by conducting a computer search on the situation in the country of origin and sometimes with a request to the geopolitical unit to best match the alleged and established facts. There is a certain amount of specialism among them, some have better knowledge of Sri Lanka or are more interested in Africa or have travelled in central Asia. Their reports are thus the fruit of real investigations and are evidence of a concern for rigour when granting asylum.

During the public hearing, the *rapporteurs* read a summary before the court of what they have written up, concluding their presentations by making a recommendation that can take one of three forms: in favour of overturning the initial decision, which signifies a positive decision for the applicant, either within the framework of conventional asylum or the less protective subsidiary protection; in favour of rejecting the appeal, which in principle has the value of a definitive judgement; or finally, they can reserve their opinions based on the possibility that unclear evidence in the case might be clarified by explanations given at the hearing. The *rapporteur* is present for the deliberations even if he does not formally participate in the decision and he can be called upon to intervene to recall evidence or jurisprudence that could have a bearing on the decision. Once this is made, whether or not it follows his recommendation, it is he who writes the justification and submits it for signature by the president of the tribunal.

The composition of this increasingly professionalized group⁽¹⁶⁾ is the result of recruitment policies that have undergone qualitative (profiles sought) and quantitative (successive waves) changes over the last three decades. Half of the *rapporteurs* are permanent, generally coming from other administrations and notably from the OFPRA, the other half consists of part-time staff. Most are young, aged between 25 and 40, with a high proportion of women. On the basis of the interviews we carried out, we have distinguished three categories

(16) The strike in October 2010, the first in the history of asylum in France, following the announcement of an increase in workload, showed that a certain collective conscience effectively existed among the *rapporteurs* with whom the recorders associated themselves during this social action. See: <http://www.rue89.com/2010/10/22/la-cour-nationale-du-droit-dasile-en-greve-pour-nepas-craquer-172673>.

that relate to trajectories before recruitment and approaches to cases. Obviously, the portraits that we paint depict ideal-types.

The first group, the “geopoliticians,” is made up of rapporteurs who have been educated in political science or international relations, sometimes in law, and is characterized by the central importance they accord to knowledge of the historical context of countries. They strive, above all, to confirm how well accounts match what is known about geopolitical situations. “I have a very global vision of the case,” comments one of them, “I try to see in what ways the account relates to the geopolitical context of the country or region the applicant comes from. It is this consistency that seems the most important to me” (rapporteur, education in political science, 27 November 2009). The second group, the “legalists,” is made up of rapporteurs who have studied law and who pay particular attention to technical aspects of cases, namely the correspondence between the facts and legal texts and texts of conventions. As one of them explains: “I have a very legal approach. Firstly I study the nature of the case, that is, whether it is a matter of conventional or subsidiary protection, and then I try to see whether the elements fit within this legal set-up. It is what is called delimiting the field” (rapporteur, education in public law, 9 October 2009). The third group, the “humanists,” is defined by the prominence they accord to human rights and the defence of refugees, usually in conjunction with a background in the voluntary sector, either as volunteers or employees, some of whom express disappointment with this previous experience. Even though some have legal training, they seem to differ from the other rapporteurs if the remarks by one of them are to be believed: “I learned that us young people who arrived at roughly the same time and who wanted to work here were called the human rightists in a negative way.” (rapporteur, education in public law, experience working in a non-governmental organization helping migrants). How do these relatively distinct profiles translate into practice, and especially into the rapporteurs’ recommendations?

To find out, we examined 121 cases⁽¹⁷⁾ involving nine rapporteurs, three from each category. Of the thirty-nine cases on which the “geopoliticians” reported, three were judged inadmissible, for thirty-five they recommended rejections and in one case they reserved judgement. Of the thirty-nine applicants whose reports were carried out by the “legalists,” one conclusion was for inadmissibility, twenty-five were recommendations for rejection, six suggested granting subsidiary protection and seven were reservations of

(17) The only selection criterion was the exclusion of a few hearings dealing with cases that were considered to be “unique” or “problematic.” Thus, we took into account all hearings that were considered “ordinary,” for which we had all the information at our disposal and where we attended the deliberations. The 121 cases corresponded to 17 hearings that took place between 10 July 2009 and 10 July 2010. The sample consisted of 17 Turks, 15 Congolese, 14 Sri Lankans, 13 Bangladeshis, 11 Kosovars, 8 Armenians, 6 Russians, 5 Guineans, 4 Egyptians, 4 Malians, 4 Sudanese, 3 Iranians, 2 Algerians, 2 Cameroonians, 2 Ivorians, 2 Mauritanians, 1 Albanian, 1 Belarusian, 1 Burkina, 1 Colombian, 1 Korean, 1 Iraqi, 1 Nigerian, 1 Senegalese and 1 Togolese. The country composition is fairly representative of the usual activity of the Court.

judgement. Finally, of the forty-three requests investigated by the “humanists,” three were declared to be inadmissible, twenty-eight inclined towards rejection, recognition was proposed for two cases and judgement was reserved in ten. It can be noted that reservations of judgement were focused on four main areas of doubt: concerning the deadline for filing initial requests, the authenticity of documents presented, the validity of fears of repatriation, and finally, occasionally a point of law needing to be checked; the “geopoliticians,” however, cited only the last reason, whereas the “legalists” and “humanists” refer to all four.

Several conclusions can be drawn from these results. Firstly, the rapporteurs’ opinions concerning claims are generally negative since, if we exclude inadmissible cases,⁽¹⁸⁾ rejections represent 77% of recommendations, reservations of judgement 16% and recognitions only 7%. Additionally, it should be pointed out that of the latter, five of eight concerned subsidiary protection for parents of girls for whom repatriation could be followed by genital cutting, jurisprudence in this area leaving little room for interpretation and leading magistrates to grant this status to parents. Under these conditions, the recommendations that are not strictly constrained by this jurisprudence represent only 3%, well below the number of favourable decisions by the CNDA during the same period. Secondly, the differences relating to the profiles of rapporteurs are marginal, since, if we take into account the risk of female circumcision for the reasons given above, recognition recommendations account for only 0, 0 and 2 cases for the “geopoliticians,” “legalists” and “humanists” respectively. The variations between categories essentially concern reservations of judgement, which were made in 1, 7 and 10 requests respectively. It is as if the leeway granted to rapporteurs to express less unfavourable evaluations of asylum claims represents more an expression of doubt that could benefit an applicant rather than an overtly positive opinion.

When we started this investigation, we thought, on the basis of our personal knowledge of the rapporteurs, including informal conversations we had with them that, on the one hand, their belief in the cause of asylum would bear witness to a relative benevolence in their conclusions to their testimonies, and on the other, that the significant disparities in their approaches and trajectories would result in marked differences in the assessment of cases and, therefore, the conclusions that they would put forward. On both counts we were wrong.

Firstly, the severity of their judgements produces few challenges to OFPRA’s decisions. The very low levels of recognition recommendations are, moreover, confirmed by a larger sample of 395 cases, corresponding to sixty-six hearings, for which we have less detailed data: only eight recommendations for asylum were expressed in them, that is 2%, of which half concerned Sri Lankans for whom an internal note from the presidency of the

(18) A case is generally declared inadmissible when it is considered that no new evidence has been provided that would justify a request to reopen it.

CNDA demanded that they benefit from this protection at this time subject to certain criteria. Therefore, again setting aside these cases of imposed generosity, in only one instance in a hundred chosen at random would a rapporteur call for a ruling to be quashed under the Geneva Convention. Contrary to the beliefs that many may have held when joining the institution, in the end they all recommend granting asylum only to a very small number of applicants, which seems to confirm that the vast majority of asylum seekers do not qualify for this status. In light of the conversations we had with some of them, it is likely that they themselves would be surprised, even embarrassed, by this statistic, which does not correspond to the image they have of their work.

Secondly, the variations between the categories of rapporteur, according to their trajectories and conceptions of their roles, have little influence on the recommendations they are inclined to generate. While it might be expected that the rapporteurs who have worked in voluntary organizations favouring of the right to asylum would be clearly distinguishable from their colleagues with less activist pasts, in showing a greater propensity to make positive evaluations, it is not the case, at least not when considering their recognition recommendations. However, there is a key, albeit modest, difference that warrants attention. It does not concern rejections or recognitions but reservations of judgement. Indeed, these recommendations, which might seem trivial, leave open the possibility for panels to decide in favour of claimants. This could be regarded as a sort of tactical calculation, combining cleverness and caution, because it avoids appearing to suggest a decision too strongly, something that could work against a claimant, or exposing themselves to public rebuke, of which rapporteurs said they had unpleasant past experiences of with certain presidents. In fact, of the eighteen reservations of judgement that we observed, two-thirds finally led to quashing, often to the granting of conventional asylum, confirming the validity of the tactic and the positive connotation that could be given to these reservations. Thus, reading between the lines, it is less in the recommendations to grant asylum, which remain exceptional, than in the motivations to reserve judgement, that the engagement of the actors can be understood. Benevolence is in the details.

Variations in rulings

The panels of magistrates, which now number eighty, sit in public. Several sessions take place concurrently daily, each in the presence of a president and two assessors, a rapporteur, a secretary, an interpreter, the applicant and a lawyer. Presidents are nominated by the vice-president of the Conseil d'État from members of that institution or from within the administrative tribunals, or by the president of the Cour des Comptes or finally, by the Minister of Justice from among active or retired sitting judges: this means that there is a great deal of heterogeneity of skills and experience between these administrative, financial and judicial magistrates. Until 2009, all the presidents were

part-time, each sitting a few times per month. Since then, ten have been granted a permanent office, while seventy have remained part-time. The officially stated objectives have been to remove the least active magistrates and to encourage greater consistency in decisions.

Each president is flanked by two assessors, one nominated by the United Nations High Commissioner for Refugees, the other by the vice-president of the Conseil d'État on the recommendation of the Administration Board of OFPRA. The former are often academics, some of whom have worked with the HCR in other countries. The latter are commonly agents who work in or are retired from public administration.⁽¹⁹⁾ The typology that we have sought to construct, however, relates only to the presidents and not their assessors. This is not to underestimate the importance of the latter in decisions, but witnessing deliberations leads us to make the observation that there is a substantial convergence of positions between them, almost always resulting in unanimous opinions. This should not be so surprising since not only does the configuration of these triumvirates promote working towards a consensus—no one wants to be marginalized—but, in addition, the way the panels are constituted directs assessors who represent the administration to choose presidents with whom they get along well, either on a personal level or in terms of ideological beliefs.

The distinctions we made between the eleven presidents we analysed are not dependent on their original jurisdictions, which we found influenced the way they behaved in hearings—the magistrates from the judiciary appeared to be more inquisitive, conforming to their professional habitus—but seemed to play little role in their decisions. We elected to construct our categories on the basis of the presidents' behaviour in sessions and during deliberations: the proposed classification corresponds to our observations, to the comments made by rapporteurs and to the justifications given by the presidents themselves. It is not a typology based on career paths, institutional positions or social characteristics, but simply on the image they have when in the Court. The quantitative analysis we put forward thus has no objective other than to confirm the correspondence between representations and practice and to provide a statistical measure of the disparities in decisions.

The “benevolent” believe that doubt should favour the claimant. Their leniency stems either from sympathy for the misfortunes they surmise, or from a personal position opposed to contemporary asylum policies. “I take my time, above all I try to understand them since it is the applicant's life that is at stake,” explains one (president, administrative judge, 23 November 2009). The “circumspect” explore the facts with a great deal of attention to

(19) Before the recent reform, these assessors were nominated by the director of OFPRA and thus were referred to as OFPRA assessors and HCR assessors. It could be presumed that the former would be more strict as a result of loyalty towards the institution that nominated them, and the latter more generous as a result of the idea that they make it their mission to defend asylum. This division of roles persisted in how other CNDA agents saw them, but, as we will see, it had little validity in terms of the practices of either.

detail, looking for potential contradictions in accounts or with respect to known facts. While they believe that they should not make the wrong decision, according to them it is as much a question of avoiding granting refugee status to an applicant who does not deserve it as it is of mistakenly refusing it to another who would truly be in danger. "I read the files, I make notes, and before the hearing I compare my notes with the report, but the hearing is the most important to me," confirms a magistrate (president, judicial judge, 23 June 2010). Finally, the "inflexible" are inquisitorial, willingly putting claimants under pressure publicly with questions that unsettle them. Persuaded that protection is granted too generously, they take the slightest breach in a case to be a reason to decide in favour of rejection, something they justify by the high esteem in which they hold asylum. "Today we have four Bangladeshi cases, they all say the same thing. You see, it's depressing. You don't see those who are truly persecuted every day," observed one (president, administrative judge, 15 February 2010) at the end of a hearing.

Given these varied approaches to hearings and to how applicants are viewed, one could, of course, expect there to be substantial differences in the determinations. Of the same previous sample of 114 cases, after eliminating the seven that were finally judged inadmissible, the results were as follows: seventy-nine were rejected, twenty-six decisions were overturned within the conventional framework and nine were granted subsidiary protection, which corresponds to 69%, 23% and 8% respectively. These figures are a little higher than those for all the asylum requests examined for the corresponding period, since in 2009 and 2010 the recognition rates, all types included, were 26.6% and 22.1% respectively (against 31% in our sample). This difference is, however, in part due to decisions that were in some way predetermined by jurisprudence on excisions and by the ruling concerning Sri Lankans, two situations for which the margins for interpretation for the tribunals are much reduced and which account for seven of the twenty-five recognitions that were observed and six of the nine subsidiary protections granted.

If the seven, practically predetermined, decisions are set to one side, it can be observed that the three presidents who are considered "benevolent" rendered thirteen of the twenty-eight favourable decisions, all granting conventional asylum; that the five magistrates we have called "circumspect" quashed twelve previous decisions, two of which were in favour of subsidiary protection; and that finally their three colleagues described as "inflexible" granted asylum in three cases, two under the Geneva Convention. Thus, the differences in the three categories are clearly marked. The proportion of recognitions by the "benevolent" is 36% (thirteen of thirty-six cases); while the average number of decisions in favour of protection is 1.6 per hearing for the whole sample, it is 2.6 for this group, which, even though it accounts for only three of the eleven tribunals, grants nearly half of the overturned decisions. The "circumspect" grant asylum to 25% of claimants (twelve of forty-eight), which is 2 per hearing; the "inflexible" give protection to 8% of applicants (three of thirty-six), being 0.6 per hearing. In contrast to what was seen for

the rapporteurs, the differences in approaches to asylum by the presidents are associated with differences in the decisions of the tribunals.

However, this result in itself is hardly surprising. Sociological and legal studies carried out within the context of the *Law and Society* movement half a century ago established, contrary to a certain idealized vision of justice, that, like citizens, magistrates themselves were aware that rulings differed according to judges (Abel 2010). Everyone at the CNDA knows that there are “strict” presidents and others who are “generous” and, consequently, given the affinity that leads assessors to choose presidents with whom they feel compatible, that there are considerable variations in recognition rates. The ratio between the two extreme groups is nearly one to five in our study, which means that an asylum seeker has a nearly five-times greater chance of receiving refugee status by appearing before a “benevolent” president than an “inflexible” colleague. Again, here we are talking about averages for each category, since the disparities would be even greater if we examined statistics for individual magistrates.

Since there is an overall awareness of these differences, both claimants and agents adapt to them. On the one hand, some applicants take them into account, and when they learn they must appear before a reputedly strict president, they ask their lawyer to request a postponement, often citing a medical reason. However, in an effort to reduce delays in processing cases, the presidency of the CNDA keeps a close eye on postponement rates, leading magistrates to frequently refuse adjournment requests and then to consider that applicants have not made an appearance, which is generally prejudicial to the final decision. On the other hand, division heads, whose task, among others, is to schedule cases for hearings, often do so taking into account their knowledge of the presidents, readily assigning to the most inflexible those cases that are considered lost in advance (because applicants are nationals whose rate of overturned cases, is very low or because there is little convincing evidence in their applications) or conversely those who practically automatically benefit from protection (because it falls within jurisprudence), while reserving the most difficult cases whose examination requires a certain amount of goodwill, for the more accommodating presidents. The paradoxical consequence of this tactic is that, in our sample, one of the two magistrates whose figures seem most lenient because he overturned OFPRA decisions in half of the cases, actually belonged to the “inflexible” group: this is because six of the fourteen cases he was assigned concerned Africans who argued that their daughters were at risk of female circumcision or Sri Lankans who met predefined protection criteria, all cases where the panels could only grant asylum. Once these are set aside, his recognition rate amounted to only one of the eight cases adjudicated, conforming more closely to what might be expected.

Generally, the Court endeavours to iron out disparities in assessments between panels, while at the same time restricting the abilities of applicants to take advantage of this. Not only has it reduced the number of presidents by half, of whom ten have been made permanent, but through a subtle control of

the information it shares, it has tended to make decisions converge: while postponement rates, the specific control of which is presented simply as a principle of good administrative management, are accessible to all panels, the presidents, in contrast, only receive the data on their own decisions as well as the average recognition rates for the institution as a whole, in order, it is thought, to allow them to take stock of their divergence from the norm and eventually correct their practices.

The value of asylum

At this stage in our inquiry, we should return to the question of the articulation of policies and practices. On the one hand, we have analysed the public discourse and regulatory framework, which we have shown have undergone remarkable transformations: the more consolidated and sophisticated institutions have become, endowed with ever-increasing human, technical and regulatory resources in the name of greater efficiency and fairness, the more the recognition of refugee status has become difficult and uncommon. During the last decade, however, a certain dissociation has occurred between the OFPRA, which maintains very high proportions of rejections, and the CNDA, which tends to produce more favourable decisions. On the other hand, we have shown that agents are characterized by a certain duality: rapporteurs who, independent of their trajectories and approaches to cases, seem universally restrictive in their recommendations but are marginally distinguishable through their reservations of judgement; and magistrates who, in contrast, differ significantly in terms of recognition of refugee status, inciting, in turn, efforts towards homogenization on the part of the administration. How do these two levels interact?

Two interpretations could broadly be imagined. According to the first, which could be called diffusionist, representations in public and political measures are transmitted, percolated even, through the institutions, descending to social agents whose conduct they influence or even determine. According to the second, which we could describe as aggregative, the actions of agents within the institutions construct what ultimately materializes as a more or less coherent sum of decisions, justifying public discourse and legitimizing policy choices. In our case, the question that could be asked with respect to the trends in the statistics over the recent decades is: are the rapporteurs and judges in the CNDA influenced by discourse that discredits asylum, likening it to disguised immigration, and measures that restrict their decisions, or are they independent and autonomous agents the sum of whose actions ultimately constitutes a restrictive asylum policy justifying doubts expressed by the authorities? By posing this question in such a clear-cut way we lose sight of the tension between the norms defined by the government and the values upheld by the agents, the relationship between rulings given and justifications

provided. The dualism of structure and agency eludes the dialectic of the institutionalization of policies.

To account for the latter, we need to return to the moral heart of the institution (Heyman 1998). In the informal interviews we conducted with rapporteurs after hearings, we often asked them what they thought of the decisions that were made in the tribunals. Almost, they replied that they held the decisions to be just: the applicants who merited refugee status received it. This response seemed unexpected. Indeed, it was uniform while the actual decisions varied considerably among presidents. An explanation of this difference could be linked to the fact that rapporteurs have a certain amount of latitude to choose “their” presidents: consequently, elective affinities account for the fact that the strictest rapporteurs tended to work with “inflexible” presidents and the most charitable rapporteurs with “benevolent” presidents. This interpretation is, however, inadequate, inasmuch as the affinitive process does not apply to the permanent presidents and only affects some of the part-time ones: in fact, rapporteurs often have to collaborate with presidents whose approaches they do not share.

Actually, adherence to the decisions taken is primarily due to two adjustments that occur *a priori* and *a posteriori*. Before the hearing, rapporteurs anticipate how infrequently refugee status will be granted: a recommendation to quash a decision is exceptional, especially if we set aside the cases that are clearly defined by jurisprudence. Reserving judgement, therefore, makes it possible to challenge an OFPRA decision without exposing oneself to criticism; two out of three times it leads to recognition, which in some way confirms the doubt expressed. In certain cases, a rapporteur can even risk proposing a ruling be quashed that they would not have risked with another panel, knowing that they are in the presence of a notoriously lenient judge. After a hearing, rapporteurs justify decisions provided they can make legal arguments for what they learned during deliberations: with this proviso they accept a verdict as the most appropriate taking into account the evidence presented at the hearing; this was notably true in the third of cases where their reserved opinions were transformed into rejections. The only time we saw them upset or indignant was not the result of decisions that shocked them, but because of the aggressive attitude of a president towards them. These accommodations thus make the tension between commitment to asylum and low rates of recognition tolerable, allowing them nearly always to regard the decisions as good ones.

The most remarkable aspect in this regard is that, for rapporteurs as for judges, the high proportion of rejections, far from making them question the protection offered by the Geneva Convention, reinforces its virtues. By an apparent paradox, the lower the esteem in which asylum seekers are held, the more asylum seems to gain in value. The less frequently it is granted, the more precious refugee status becomes. This justification mechanism is particularly effective since it both establishes the worthiness of asylum and the merits of their selection work. Moreover, sometimes it is the assessor representing the UNHCR who is the most inquisitorial in a hearing and proves to

be the most inflexible during deliberations. This institution, charged with guaranteeing the rights of refugees, can also be the one that makes the status the most inaccessible.

The problem is, therefore, to comprehend how it was possible, not so long ago, to justify decisions when nearly all requests resulted in a favourable response, and equally how easily it can be understood today now that most requests result in rejection. In view of our interviews with rapporteurs and above all the magistrates with lengthy experience in the Court, the only morally acceptable means to solve this problem is to make a separation between valuing asylum while devaluing those who claim it. The refugee selection process has rendered asylum a scarce good. In creating this scarcity, the institution must consequently undertake to distribute it according to principles that are similar to a “tragic choice,” that is to say the allocation of a good, the possession or deprivation of which puts the lives of the individuals concerned at risk (Calabresi and Bobbit 1978). In this case, refugee status is truly vital for the claimants, both since possessing it provides access to social rights whereas being deprived of it can threaten their very existence. Rapporteurs and magistrates do not disregard this and they also defend asylum as an abstract principle, of which refugees are the concrete reality, striving to protect the purity of the former and genuineness of the latter from what they see as fraud and abuse. It is conceivable that rapporteurs and magistrates who are unresponsive to organizations that denounce the decline in asylum not only believe that they do good work, in which they sincerely believe, but are also convinced that they do it even better when they are more scrupulous in their examination of claims and parsimonious in granting refugee status.

The reform of the institution is supportive of this conviction, as we have shown. On the one hand, the CNDA is now independent of the OFPRA, which was not true of the CRR it replaced. Conflicts between the administration under the authority of the Ministry of the Interior and the courts under the control of the Conseil d'État have thus become more common in recent years. On the other hand, the CNDA has sought to reduce the variation in recognition rates between magistrates and consequently the disparities between judges, by reducing the number of presidents and consolidating a core of ten. A corollary of this approach is, however, a certain toughening of decisions. In our sample of eleven presidents, four of whom were permanent and seven part-time, two of the three “inflexible” ones and two of the five “circumspect” ones were permanent; none was among the “benevolent” ones. On average, they overturned decisions less frequently than the other presidents. This distribution is probably based on the initial selection of the permanent magistrates, but is also the result of a tendency observed in other contexts of allocation of scarce resources to individuals seeking them (Fassin 2003), namely an emotional desensitization when faced with repeated stories of misfortunes and growing impermeability to moral sentiments: in the case of asylum, this sort of “compassion fatigue” is expressed in the oft-heard remark that all the accounts end up resembling each other. From the institution's perspective, though, the increased severity only attests to higher quality

expertise: the permanent presidents know how to detect lies and outsmart tactics better, so they quash fewer OFPRA rulings. Thus, while rightly claiming to be more equitable in its treatment of requests, the institution favours greater severity. All that is left for those who are sympathetic to the cause of refugees is the possibility of making adjustments at the margin, such as the assignment of the least defensible or the most undisputable cases to the most inflexible presidents by division managers, and the transfer of the more complex and less confident to their more lenient colleagues in the hope of correcting the injustices of chance.

The truth of sentiments

It is true, in their defence, that the work of the rapporteurs and magistrates in establishing the well-foundedness of appeals is not easy. Indeed, fundamentally, the casuistry of asylum is based on a relationship in which the person conducting the investigation or, above all, making the decision relies on their inner conviction as to whether the applicant is telling the truth or otherwise concerning the persecution they have suffered and if the risks they would encounter if repatriated conform to what they assert (Fassin 2013). Admittedly, they can invoke the coherence in the accounts given before different proceedings, the degree of correspondence between the reported facts and known aspects of local situations, the existence of documents that tie in with reported persecutions, and the production of medical certificates attesting to the existence of injuries that are consistent with the alleged violence suffered, but these elements rarely establish the legitimacy of an application in an absolutely irrefutable way: observation of the work of the CNDA illustrates that practically all evidence can be contested.

Ultimately, in the vast majority of cases, the question can be expressed simply: do we believe or not? In other words, can we put faith in what the applicant says? Trust is thus at the heart of this relationship that is fleetingly created through the examination of evidence in a case for a rapporteur and during the hearing for a panel. Yet, trust always makes one vulnerable to others (Baier 1994) since, if we were sure that they say what they did and did what they say, we would have no need to trust, but simply have certainty. For agents who investigate and adjudicate on asylum, the decisions they recommend or that they take stem from an examination of this vulnerability: in which cases and on what bases will they give more credit to one applicant than another? If an account can be called into question on the basis of a contradiction or a factual error, which we know to be trivial when psychic trauma is experienced, if the documents can be disputed when they are not simply missing, if even medical certificates only provide presumptions of compatibility in revealing physical or psychiatric signs, what is there left for the applicants to establish the truth of their stories and for the tribunals to decide?

Here the hearing can become decisive. When a rapporteur's conclusions take the form of a reservation of judgement they often refer to details that an applicant could supply in the proceedings to clarify a contradiction in their case or reply to an objection that led to an initial rejection. In their deliberations, magistrates frequently mention a moment, phrase or bearing of an applicant who, during questioning, convinced them, or on the contrary made them doubt, especially since some of them only become aware of cases on the day of, or, even during their presentation of a case. This means that the hearing is a performance of which much is expected by the tribunal. Asylum seekers are not unaware of this. Their lawyers, a support organization, close relatives who have endured this ordeal sometimes also prepare them to avoid the pitfalls that certain presidents and assessors are keen to place in their path. Of course, the hearing can allow equivocal facts to be clarified and new evidence to be presented, to support an account. But something else is at play here; it is the sincerity of the applicant. It will support the veracity of an account or can even entirely substitute for it when there is a lack of evidence (Sweeney 2009). The emphasis on truthfulness is so significant that it counterbalances suspicions regarding the narrative and documents. In this trial of veridiction, a shift occurs from the object (the facts) to the subject (the applicant). The more distrust that is shown towards the facts as presented, the more critical becomes the trust that one is willing to confer on an applicant in an evaluation.

Sincerity is, however, difficult for magistrates to establish, just as it is difficult for observers to analyse the assessment of it. It can be based on a mode of behaving, dressing, looking or speaking. These assessments were expressed in the interviews we conducted with rapporteurs, or more indirectly through the comments made during deliberations. An attitude considered overly relaxed, or clothing regarded as too revealing did not fit well with the image of an asylum seeker for whom a modest, dignified demeanor and sober, even austere appearance were better suited. In certain cases, downcast eyes prompted contradictory interpretations, signifying a lack of candour for one, the applicant not looking at the magistrate when replying, and for another a cultural trait corresponding to an attitude that can be expected in the presence of a man. The quality of oral expression can also become, if it does not seem affected, a favourable factor. For example, a Cameroonian student, the son of a dissident killed in unexplained circumstances, who claimed to have been arrested and mistreated, immediately elicited a positive reaction. He showed linguistic and social skills that won over the magistrates, the president later commenting that "this young man is very nice." Few questions were asked, and at the conclusion of the hearing, the decision to grant him asylum was quickly reached, even though there was little available evidence of the nature of his own political involvement and therefore the reality of the risks he faced, which are normally detrimental factors, but which were set aside by the president we classified as "benevolent." During other deliberations, these impressions of the authenticity of an applicant are often brought up and discussed, directing decisions towards recognition or rejection, because if

someone seems sincere, the veracity of his account increases, while in the opposite case, his whole story is called into question.

One factor can prove important: the feelings experienced by the magistrates during the hearing when faced by an applicant. On the positive side, they range from sympathy to compassion, sometimes to admiration. The case of a Sudanese man from Darfour who claimed that several members of his family, including his sister and father, had been murdered and that he himself had been imprisoned and subjected to degrading treatment, occasioned unusual emotion. While the report concluded, as did the OFPRA officer, in favour of rejection for lack of evidence, the tears the man could not hold back while talking about his detention, during which he was treated “like a slave,” provoked a sustained silence in the courtroom and convinced the magistrates, who had been sensitized to the tragedy in this troubled region in the preceding years by non-governmental organizations, international institutions and the media. He was granted asylum with no discussion by a panel whose president was considered to be among the “circumspect.” These dramatic situations are certainly not common, but they demonstrate how moral sentiments can override the usual reservations about the veracity of a story, in this instance caused by the absence of documents, which is generally seen as damning. More than others, asylum bureaucracies are permeated with emotions, given that the accounts related reveal the tragedy of the sufferings of the world (Graham 2002). Even if infrequent, these moments bestow meaning to the work of rapporteurs and magistrates who often complain of the repetitive, routine nature of cases and the routineness of their activity and, as they confide, serve to remind them of the reason they are engaged in this activity.

Calling on the moral sentiments in these distressing cases is not, though, unambiguous. Firstly, it gratifies the rapporteurs and magistrates by showing that they know how to be lenient when necessary, their compassion reinforcing the humaneness of their approach to asylum. When we speak with the strictest among them, the recollection of these rare cases seems to attest to the correctness of their decisions. Secondly, it reinforces the evidence of a distinction between true refugees and others: the expression of emotions becomes an indicator of sincerity and consequently one of veracity. The problem of rape allegations offers a striking illustration because the frequency with which they are brought up by applicants, notably from central Africa, and the difficulty of finding evidence for them, frequently leads magistrates to rely on their impression of the authenticity of suffering, something that body language is supposed to reveal. This premium placed on emotion during hearings, often held in camera, penalizes less demonstrative applicants whose stories are commented on as unconvincing during deliberations. It remains, however, a relatively uncommon fact that, without upsetting the general logic of suspicion, invigorates the ordinary work of the Court.

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In the past sixty years, asylum has become a political matter that governments have managed through the introduction of rules and laws and the institution of administrations and courts. All these measures ought to guarantee a right that, in the wake of Second World War, has been set out as an ethical foundation of international order. Political and ethical issues are thus found at the heart of public debate on asylum, which oscillates between a preoccupation with the management of migratory flows and the principle of protection of victims of persecution, like the act of judging requests, which pits the feelings of suspicion towards asylum seekers against a concern to produce just decisions. The importance of the deployment of resources and skills, the proliferation of reforms and the intensity of discussions they arouse, the refinement of the law and the disputes it is the object of, bear witness to the extraordinary place that asylum occupies in contemporary societies, far beyond what the estimated 135,000 people granted it in France asylum under the Geneva Convention in France represent quantitatively. It is this tension between contradictory processes that we have analysed.

The rapporteurs and judges of the CNDA find themselves caught up in this tension on a daily basis. On the one hand, however independent they would like to be, they are subject to policies and public discourse. Half a century ago, their predecessors worked in a climate of confidence facilitated by the infrequency of appeals. Thirty years ago, the growth in requests having taken place in a context where the issues of asylum and immigration were still clearly distinguished and where Latin American and Asian refugees enjoyed considerable legitimacy, they only had to deal with a few nonsuits. Today, with European treaties having integrated the issue of asylum with policies regulating immigration, and with the merits of claims often being questioned in the public sphere, the institution finds itself driven to generate decisions on tens of thousands of cases each year in an environment dominated by suspicion. On the other hand, the rapporteurs and judges remain determined to implement the principles of the Convention. They are aware that they do so in more difficult conditions, taking into account the number of appeals to be dealt with and the importance, under the circumstances, of making a selection among the applicants, with the twin concerns of not rejecting an application from someone whose repatriation would entail a threat to their life and of not overturning decisions in favour of individuals whose situations would not justify refugee status. They must, however, make this selection constrained by a sort of veil of ignorance, since they rarely possess irrefutable proof that would allow them to rule objectively and definitively on a case, which leads to evermore detailed enquiries, generally ending in rejections. Over time, this tension between a moral economy that places greater emphasis on suspicion, and local justice that strives to maintain the principles of independence and fairness has, therefore, increased.

In effect, the institution is confronted by three aporia from the point of view of the good, of justice and of sentiments, three dimensions that are at the foundation of morality. Firstly, the greater good that the institution refers to is asylum protection. But, to take its place in the political system, it needs

simultaneously to enhance the standing of asylum while challenging asylum applications. The more the latter are subjected to a selective evaluation, the more the former is thereby enhanced. Secondly, the core value defended by rapporteurs and magistrates is that of the just decision. The adjective should be understood here both in terms of correctness—the decision must be appropriate to the situation being judged—and of fairness—the differences between tribunals should be as negligible as possible. However, the assessment of correctness is based on a subjective dimension—the practically constant impression of having not committed an error—rather than objective—the validation of a decision in relation to an applicant's experience, which is by definition ignored. As for the improvement in the fairness of the system, this has as a consequence increased the severity of the institution on average—through the selection of presidents and the effects of time on the practices of the permanent ones. Thirdly, the humanity of the institution is expressed through the moral sentiment that it sanctions, and notably the sympathy, and even compassion, felt towards some applicants during hearings. Yet, this rationale falls back on considering the sincerity of individuals to be an indirect proof of the veracity of their stories. Such a move tends to make emotions, uncommon though they may be, play the role of the ultimate assessor of veracity, for want of better criteria. However, this triple aporia is not generally formulated as such by the rapporteurs and magistrates who, faced with the ethical impasses that it implies, substitute their deontological concerns, that is to say a sort of awareness of a duty accomplished. Thus the moral economy of asylum finds itself validated by the local justice of the Court.

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APPENDIX

Year	Initial requests	Recognition by OFPRA	Quashing by the CRR (then the CNDA)•
1973	1,620*	85.8%*	50.0%
1974	2,188*	90.1%*	36.8%
1975	8,150*	93.6%*	43.9%
1976	18,478*	95.4%*	14.7%
1977	17,007*	93.8%*	37.5%
1978	16,052*	93.6%*	51.3%
1979	17,034*	85.0%*	53.4%
1980	18,790*	85.4%*	52.0%
1981	19,863 [□]	77.7% [□]	21.8%
1982	22,505 [□]	73.9% [□]	18.6%
1983	32,359 [□]	70.0% [□]	7.1%
1984	21,714 [□]	65.3% [□]	7.6%
1985	28,925 [□]	43.3% [□]	4.6%
1986	26,290 [□]	39.0% [□]	6.7%
1987	27,672 [□]	32.7% [□]	7.6%
1988	34,354 [□]	34.6% [□]	8.0%
1989	61,422 [□]	28.1% [□]	7.8%
1990	54,813 [□]	15.4% [□]	4.7%
1991	47,380 [□]	19.7% [□]	6.0%
1992	28,872 [□]	28.0% [□]	8.1%
1993	27,564 [□]	27.9% [□]	9.1%
1994	25,964 [□]	23.6% [□]	6.5%
1995	20,415 [□]	16.3% [□]	4.9%
1996	17,405 [□]	19.6% [□]	5.4%
1997	21,416 [□]	17.0% [□]	6.3%
1998	22,347 [□]	19.4% [□]	8.9%
1999	30,907 [□]	19.3% [□]	9.1%
2000	38,747 [□]	17.1% [□]	10.0%
2001	47,291 [#]	12.4% [#]	10.6%
2002	51,087 [#]	12.6% [#]	9.4%
2003	52,204 [#]	9.8% [#]	11.5%
2004	50,547 [#]	9.3% [#]	12.7%
2005	42,578 [#]	8.2% [#]	15.4%
2006	26,269 [#]	7.8% [#]	15.5%
2007	23,804 [#]	11.6% [#]	19.9%
2008	27,063 [#]	16.2% [#]	25.3%
2009	33,235 [#]	14.3% [#]	26.6%
2010	36,931 [#]	13.5% [#]	22.1%
2011	40,464 [#]	11.0% [#]	nr

Sources: The data come from the OFPRA and the CNDA.

• Figures provided by the CNDA during the study (typewritten table).

* Figures taken from Legoux (1995: 138), from the OFPRA.

Figures from OFPRA activity reports, viewable on the Office's website.

□ Figures from the OFPRA activity report for the year 2000, viewable at:

<http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/014000762/0000.pdf>.

Interpretation: Initial requests correspond to petitions submitted for the first time (and thus do not include appeals). The OFPRA recognition rate is the ratio between admissions and decisions (which do not precisely overlap with requests submitted). The quashing rate by the CRR or CNDA is the ratio of favourable opinions to appeals heard (as it is only based on appeals, the two rates, which do not have the same denominator, cannot be added together).

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