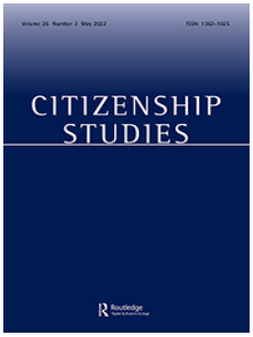

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Just another benefit? Administrative judges' constructions of sameness and difference in asylum adjudications

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ABSTRACT

This ethnographic study examines how Swedish administrative judges apply the principle of treating like cases the same and unlike cases differently when adjudicating asylum claims. The findings suggest that judges construct asylum claims like citizens' claims for welfare benefits and unlike protection claims made by citizens. Drawing on Hannah Arendt's critique of the state-centric foundation of contemporary human rights framework, I demonstrate that the Swedish asylum procedure is structured according to a similar state-centric foundation. Therefore, it reinforces injustices that exist between those who belong to a political community and those who stand outside that community asking to be let in. This study contributes to previous research on asylum adjudication by shedding light on structural injustices embedded *within* legal practices rather than searching for explanations in extra-legal factors. The implication of this approach is that it makes visible a paradox: that judges' commitment to procedural justice principles can perpetuate structural injustices.

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Introduction

> The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or the equality before the law and freedom of opinion–formulas which were designed to solve problems within given communities–but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. (Arendt [1951] 2017, 386–87)

Refugee status determinations are complex administrative decisions often criticized for failing to live up to rule of law requirements such as fairness, accuracy, and predictability (e.g. Rousseau et al. 2002; Gill and Good 2019; Smith-Khan 2020; Johannesson 2022). The lack of justice in these legal-administrative procedures have been so frequent and so apparent that refugee status determinations are depicted as 'asylum lotteries' (Rehaag 2012) and 'refugee roulettes' (Jaya, Schenholtz, and Schrag 2007).

One popular solution to injustices in legal-administrative decision-making is to call for more formalized procedures and a closer adherence to justice principles, such as due process, the right to be heard, or effective legal remedies. In this study, the procedural

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justice principle of equal treatment, which stipulates that decision-makers should 'treat equal (like) cases equally (alike), and unequal (different) cases unequally (differently)' (Carr 1981, 211) will be examined. By mobilizing this principle, decision-makers can contest accusations of arbitrariness, inconsistency, and unpredictability as well as assure litigants that they are treated fairly (Marmor 2005).

However, the seemingly straightforward principle of treating like cases alike needs to be substantiated to become meaningful in practice. In order to substantiate this principle, crucial questions need to be answered: Which cases are similar? Which cases are different? How should this be decided? Legal philosophers have criticized the emptiness of this principle as 'any two items can be deemed alike in some respects and unalike in others, thus making the mere idea of likeness or unlikeness singularly unhelpful' (Schauer 2018, 438). To treat like cases alike requires classification of unique entities into abstract categories based on resemblance, and each act of classification, Science and Technology Studies scholars Bowker and Leigh Star (2000, 5) remind us, 'valorizes some point of view and silences another'. Ethnographic research on judicial decision-making has further demonstrated that in legal practice sameness and difference are constructed according to other categorization principles than in ordinary life and sociological analysis, where gender, ethnicity, and class are the usual markers of difference (van Oorschot 2021).

This study explores which understandings of claiming asylum become silenced when judges construct asylum claims as similar to some, and different from other, administrative court cases. I achieve this objective by an ethnographic study of judges adjudicating practices of asylum appeals in Swedish administrative courts. In Sweden, administrative courts are responsible for legal disputes between the state and the individual, such as tax disputes or disputes between individuals and the Swedish Social Insurance Agency, the municipality, or the Social Welfare Committee. The administrative courts also make decisions regarding compulsory care of minors, drug abusers, and people with severe mental disorders. This broad variety of case types makes the Swedish administrative courts a fruitful setting to explore how judges construct differences and similarities between asylum claims and administrative court claims made by citizens.

Drawing on political theorist Hannah Arendt's ([1951] 2017) critical inquiries of human rights and her concept *the right to have rights*, I argue that Swedish judges classify asylum claims like welfare benefit claims lodged by citizens but unlike citizens' claims for protection from the state's infringements on their civil liberties. This construction of similarity and difference is based on a state-centric notion of justice and thereby silences the fact that asylum seekers do not ask for rights stemming from their membership in a nation state but ask to be recognized as right bearing subjects only based on their humanity. By constructing asylum seekers as if they do not have the right to have rights and simultaneously treating them *as if* they were citizens, their unique vulnerability as being outside any community of rights is disregarded. The practical implication of this argument appears to be paradoxical: judges' commitment to the equal treatment principle generates severe injustices for asylum applicants compared with citizens.

This argument contributes to a new perspective on injustices in asylum adjudications. Most studies have searched for explanations for why injustices emerge in extra-legal aspects of judicial decision-making, such as subjective judgements, political agendas, and unconscious biases among decision-makers. In these endeavors, they have omitted to

analyze injustices stemming from legal classifications as such. By incorperating Arendt's critical reflections on the state-centered foundation of human rights, this study opens new avenues of inquiry into the legalistic ways of doing asylum adjudications and their broader effects on justice for noncitizens, who are situated beyond and in the fissures of the global system of nation states. Thereby, this study also contributes to discussions within the literature on noncitizenship about the contingencies and precariousness of claiming human rights as *human beings* outside of the nation state (Krause 2008; Blitz and Otero-Iglesias 2011; Tonkiss and Bloom 2015; Ataç, Rygiel, and Stierl 2016; Kubal 2020; Andreetta, Vetters, and Yanasmayan 2022 in this issue).

Previous research on injustices in asylum adjudication

To determine whether a person is eligible for asylum is not a simple task. Determinations of asylum claims require interpretations of both international law and domestic legislation and assessments of both past and future events in cultural, political, and social settings, which are distant to the daily lives of decision-makers. To assist the decision-makers, they have a variety of so-called 'country of origin information'. However, the methods by which this information is produced (van der Kist, Dijstelbloem, and de Goede 2019) and its strategic use in decision-making (Johannesson 2012; Gibb and Good 2013; Rosset and Liodden 2015; van der Kist and Rosset 2020; Liodden 2021) demonstrate that this information hardly resolve the uncertainties in this adjudication.

In addition, the oral testimony from the asylum seeker is often crucial as evidence in asylum claims. This testimony needs to be translated by interpreters, which complicates the communication and risks altering the intended meanings (Gibb and Good 2014; Nikolaidou, Rehnberg, and Wadensjö 2022; Wadensjö, Rehnberg, and Nikolaidou 2022). Moreover, the testimony of an asylum seeker is judged on how well it conforms with what decision-makers consider to be indicators of credibility (e.g. Hedlund 2017; Johannesson 2018; Gill and Good 2019; Smith-Khan 2020; Affolter 2021; Johannesson 2022). For these reasons, legal scholars have argued that asylum adjudications constitute the most complex decision-making in contemporary societies (Rousseau et al. 2002; Crépeau and Nakache 2008).

These complexities have resulted in both procedural inconsistencies and inaccurate outcomes. One of the most salient injustices found in previous research is that asylum recognition rates differ to an unacceptable degree both between countries that apply similar international criteria for assessing protection (Neumayer 2005; Toshkov and de Haan 2013; Hamlin 2014) and between different courts and decision-makers within the same jurisdiction (Anker 1990; Jaya, Schenholtz, and Schrag 2007; Rehaag 2012; Gill et al. 2015).

Other scholars have paid attention to how work practices, professional norms, and institutional habits steer refugee status determinations and have offered ample evidence that there is a persistent 'culture of disbelief' (Jubany 2011; see also Pratt 2010; Fassin and Kobelinsky 2012; Johannesson 2018; Bohmer and Shuman 2018; Affolter 2021) saturating decision-making at all levels of the asylum system (mistrust towards migrants is also found in other parts of the migration control system, see for example Borrelli and Wyss 2022 in this issue).

A closely related finding is that the initial suspicion towards asylum seekers at border controls is intertwined with 'racialized/nationality-based stereotypes', which become transformed into objective indicators of suspicion in court proceedings (Pratt 2010, 472). Interpretation activities during bilingual asylum hearings further contribute to constructions of claimants as 'others' both in relation to the monolingual norm of judicial proceedings and the majority culture in society (Elsrud 2014).

Thus, there seems to be a risk of judges constructing differences between asylum claimants and other 'ordinary' claimants out of implicit assumptions about culture and language. In this regard, Smith-Khan's (2017) sociolinguistic analysis of diversity guidelines and their application in Australian asylum adjudications offers valuable insights. She demonstrates that an emphasis on diversity and differences generate essentializing perceptions of cultural difference that render atypical asylum narratives unintelligible in the eyes of the judges. Smith-Khan concludes that diversity discourses risk reinforcing stereotypical images of individuals seeking asylum rather than being an effective tool to combat these images, which 'may mean that while giving the impression of accommodating diversity, the institution's procedures and agents may actually create or reinforce barriers to fair outcomes, and thus ultimately undermine access to refugee protection for those who need it' (2017, 416).

In conclusion, previous research has pointed to several injustices in asylum adjudication, such as the problem of disparities and the problem of institutionalized suspicion. Most important for this study, research has also pointed to the dangers of accentuating difference, as it can reinforce exclusionary mechanisms and structural inequalities in asylum adjudications. In the next section of the paper, I describe Hannah Arendt's concept of *the right to have rights* and demonstrate how her critical inquiry of human rights offers a productive normative vantage point to explore the silencing effects of legal classifications of sameness and difference.

The foundation of all human rights: the right to have rights

Hannah Arendt's philosophical exploration of statelessness, territory, and human rights in *The Origin of Totalitarianism* ([1951] 2017) has over the decades sparked scholarly debates in democratic theory (e.g. Ingram 2008; Näsström 2014) as well as in citizenship studies (e.g. Benhabib 2004; Krause 2008; Blitz and Otero-Iglesias 2011; Gündogdu 2014). Arendt's exploration of statelessness stems for the following paradox: human rights promise equal personhood regardless of citizenship status, yet the only institution with capacity to provide these rights are nation states. However, and herein lies the predicament for the stateless, to these institutions the stateless have only very weak and contingent entitlements. Arendt describes the idea that underpins the human rights framework as it was developed in the aftermath of the Second World War as a state-centric idea, which took the system of nation states for granted:

> All human beings were citizens of some kind of political community; if the laws of their country did not live up to the demands of the Rights of Man, they were expected to change them, by legislation in democratic countries or through revolutionary action in despotisms. (Arendt [1951] 2017, 383)

Despite the ambition of anchoring human rights in the virtue of being born as a human being (i.e. as a universal right derived from a shared human nature), Arendt makes clear

that without membership in a state with the capacity and ambition to ensure human rights for its population, people are not only deprived of those rights but also of the very ground for making claims to such rights. Arendt coined the phrase *the right to have rights* to describe this foundational right, which precedes all other right claims.

Arendt's original discussion on the right to have rights revolved around people in *de jure* statelessness during the Second World War, but later work has broadened the notion of the right to have rights to describe the predicaments of undocumented migrants and minorities in different forms of illegal and semi-legal statuses (Krause 2008; Blitz and Otero-Iglesias 2011; Gündogdu 2014). Within this diverse group, one finds 'rejected asylum-seekers, visa overstayers and immigrants whose residence permit has not been renewed for a variety of reasons' (Krause 2008, 331) as well as people 'whose nationality is not in question but who cannot return to their country of origin and remain on temporary admission' (Blitz and Otero-Iglesias 2011, 661). What connects these illegal and semi-legal categories is that they share a rightless position–i.e. their rights to have rights are constantly under negotiation.

The position of the rightless coincides with positions described by concepts such as 'noncitizenship' (Coutin 2011; Tonkiss and Bloom 2015; Kubal 2020, Andreetta, Vetters, and Yanasmayan 2022 in this issue) and the 'autonomy of migrants' (Dimitris and Tsianos 2013; Ataç, Rygiel, and Stierl 2016) in that they all speak to the precarious position of being outside, or at the margins of, a political community of rights and claiming to be included. However, I argue that Arendt's reading of the predicaments for stateless people during and after the Second World War provides the most productive starting point for analyzing the limitations of procedural justice principles in contemporary asylum adjudications. By taking seriously the uniqueness of claiming the right to asylum compared to other right claims, it becomes possible to see other heretofore unexplored injustices within these procedures. To put this argument in the terminology of political theory, this means to shift focus from questions of rule-making (according to *which procedural principles* asylum adjudications will be fair) to people-making (*who* can exercise the right to have rights and *who* is authorized to grant this right to others?).

Methodology

The methodology of this study is grounded in an ethnographic approach to official law as outlined by Bens and Vetters (2018). Ethnographic approaches to law and legal processes start from micro-practices within the legal sphere and observe 'the intricate processes of boundary-making that uphold the appearance of a separation of formal and informal spheres and the particular ways in which formality and informality are negotiated' (Bens and Vetters 2018, 243). This bottom-up approach enables an analysis of the role of legal professionals, particularly judges, in norm-making processes traditionally associated with legislative bodies and intergovernmental treaties (Bens and Vetters 2018, 247).

In line with the legal ethnographic approach, I view courts as guided by both formal and informal rules of conduct manifested in a 'relatively coherent set of ideas shared by members of the institution regarding the institution's social function or role' (Hilbink 2007, 5). This perspective emphasizes that professional norms are individually communicated among the members of an organization; nevertheless, the content of the norms are understood in similar ways by the members of the

organization. Therefore, institutional language, which judges are famous for using, constitutes an informative source of knowledge about these collective professional norms. The task for the researcher is not to move beyond this institutional language in hope of finding so-called authentic attitudes, ideologies, or behaviors but to analyze the institutional language that judges use during their professional activities.

The analysis relies on twenty-seven interviews with judges in Swedish administrative courts who adjudicate both asylum and other types of court cases. In addition, I have participated in court hearings and in educational seminars for administrative judges, law students, and for lay judges, which gave me valuable insights into the informal norms that structure the professional ethos of judges. As additional background material for the analysis, I relied on interviews with other judicially trained professionals participating in asylum appeals in administrative courts, such as public counsels, law clerks, litigators, and various judicial experts. For confidentiality reasons, I will not reveal which administrative courts I have conducted research in nor the name, background, or gender of individual interviewees or claimants. When referring to quotations from interviews, I provide a pseudonym.

The analytical strategy I used could be described as moving between 'familiarity' and 'strangeness' when listening to and interacting with judges (Ybema et al. 2009). I tried to understand the judges by considering the context that they worked and acted in to make sense of their perceptions as parts of a larger institutional norm. Interview accounts were coded inductively to find the most dominant lines of reasoning among the judges, and especially, how the judges constructed similarities and differences between asylum cases and other case types adjudicated in the administrative courts. Strangeness, the opposite analytical move, was achieved by reading Arendt's work on the right to have rights. With the help of that reading, I tried to distance myself from the judges' constructions of similarity and difference and instead analyze the consequences of these classifications for the asylum claimants' possibilities to acquire the right to have rights. In the remainder of this paper, I will present the results of this analytical strategy.

Judges' constructions of similarities and differences in asylum adjudication

Administrative courts in Sweden are organized so that judges are assigned many case types during a regular week. This organization prioritizes general legal knowledge over specialization in different areas of law and was one of the reasons why Swedish asylum adjudications were relocated to the administrative courts in 2006. Before 2006, asylum decisions from the Swedish Migration Agency (the public authority responsible for determining asylum claims in first instance) were reviewed by an administrative tribunal specialized in refugee law (Johannesson 2018).

Many of the interviewees told me that the variety of cases was one of the main benefits of their work, as they never had to adjudicate only one type of administrative law cases. They found satisfaction in being confronted with a mix of routine cases and more demanding cases. For these judges, demanding cases were exciting because they required them to 'crack a case'. The importance of 'cracking cases' was something judges taught younger colleagues:

> This is what you start with day one with a new law clerk: 'find the [legal] question, the question, what is the case [about]'? If you don't get that, you will never *crack the case*. (Judge Daniel)

In the following sections, I elucidate how this judicial method of decision-making generated an understanding of asylum claims as similar to benefit claims and different from protection claims, and I will demonstrate the consequences this classification had for asylum seekers' possibilities to be understood as right bearing subjects–i.e. individuals with the right to have rights.

Asylum claims as similar to benefit claims

In Swedish administrative law, a distinction is made between burdensome decisions (*betungande beslut*) and favorable decisions (*gynnande beslut*). This distinction is not enshrined in formal law but has a long tradition as a rule of thumb in Swedish administrative legal practice and is taught in law schools and in law textbooks (Diesen 2012, 160). Burdensome decisions denote situations where the state interferes in people's lives by restricting their rights and freedoms. Compulsory psychiatric care cases and cases pertaining to compulsory treatment of children or of drug addicts are examples of cases that fall under the burdensome category. In these cases, it is the state's representative who has the burden of proof, that is, the state must justify the restrictions the authorities want to impose on an individual.

Favorable decisions, on the other hand, denote situations where the individual asks for a 'benefit' (*förmån*) from the state; in these cases, the burden of proof weighs heavier on the individual.[1] Examples of this type of cases is when individuals appeal to the court to review the Swedish Social Insurance Agency's decisions on reductions of sickness benefits or when an individual wants to appeal the social services' decision to deny or reduce economic support.

When asylum appeals were introduced in the administrative courts in 2006, the judges had to decide where to place these claims in this established classification scheme of burdensome and favorable decisions. For most judges, this led them to the conclusion that asylum appeals were most like benefit claims according to the rationale that the Swedish state is a recipient of a claim for a benefit (which in this case is protection from harmful treatment or persecution) and that the Swedish state does not make any claims to impose restrictions on the claimant's life or freedom. Because of this classification, the burden of proof on the asylum claimants is much heavier than on protection claimants. This finds support in international law; according to both international and European standards, the burden of proof initially rests with the asylum claimant in appeal instances even when this burden can be mitigated by the principle of 'the benefit of the doubt' at later stages in the determination process (Staffans 2012, 74).

References to international refugee law, however, not only brings legitimacy to this classification of asylum claims as benefit claims but also undermines it. In international law, the right to asylum is clearly formulated as a protection legislation subsumed under a global expansion and codification of the human rights framework (Gündogdu 2014). This internationally codified construction of asylum rights as a protection legislation at the same time as the asylum claimants are deemed to have the burden of proof opens up

for ambiguous interpretations of these claims at the national level. I will elaborate the implications of this ambiguity in the discussion section of this paper.

How deeply rooted the categorization of burdensome and favorable decisions is in Swedish administrative law becomes evident from the interviews with the judges. Emilia, a judge with extensive experience with administrative law, explained how important the placement of the burden of proof was for the processing of a case. It was the first thing she determined when faced with a new case, and, according to her, it was also 'very easy to place' as it belonged to 'basic law':

> I usually start by placing the burden of proof, who has the burden of proof for this? And if there are ambiguities [in the case], then it [the decision] falls out, then it goes against the one who has the burden of proof [. . .] so the burden of proof is very easy to place, who is it that should prove what here? If it's not proven, it is just a statement and then you get rid of it. But that is like basic law.

Consequently, it became clear that the judges' constructions of asylum claims as benefit claims did not stem from a lack of adherence to basic principles of law or judicial methods. To the contrary, it was a logical consequence of the judges' ethical commitment to uphold equality before the law in administrative law procedures. In meeting this justice principle, the judges at Swedish administrative courts relied on the same methods and procedures that they always relied on and had been trained to use over their long professional life–i.e. to start a legal investigation by applying the classification of burdensome and favorable decisions. However, a consequence of this practice was that the judges perpetuated a distinction which made it impossible to treat asylum claims as protection claims. This distinction is not only debatable from a international refugee law perspective but also prevents, from an Arendtian point of view, asylum seekers' chances to be granted the right to have rights.

When considering the Arendtian notion of the right to have rights, the comparison between, for example, sickness benefits and asylum claims becomes less intuitive than what the judges assume. Although the individuals who are denied sickness benefits may suffer tremendously (e.g. without enough money to buy food or pay the rent), they cannot be deprived of their right to have rights by a negative decision. That is, they still belong to a community where they are entitled to basic human rights, and the very grounds for them being understood as rights bearing subjects are not under threat by the rejection of sickness benefits. They can still ask for other benefits from the state and they are still entitled to protection from the courts if public authorities try to impose arbitrary restrictions. Moreover, in a democratic system like in Sweden, they can also execute their political rights to change the legislation that denied them this benefit. In brief, the relationship between them and the state is not fundamentally broken by a negative decision on sickness benefits. It might have sparked distrust and pain, but the relationship *as such* is not at risk.

A denied asylum claim, on the other hand, breaks the weak and contingent relationship established between the asylum seeker and the host state during the asylum process. Once the asylum applicant is denied this 'benefit', she is also, by extension, denied all other (future) benefits stemming from this first benefit. Moreover, the denial not only deprives the applicant of future benefits but also deprives her of protection against future restrictions imposed on her from states or other actors. As Arendt argues, the problem

for the rightless is no longer that they are deprived of particular rights but that 'no laws exist for them' (Arendt [1951] 2017, 387). As all noncitizens, asylum seekers are under constant threat of being denied not only a particular human right, but all other human rights that stems from this first one, that is, the right to have rights.

Asylum claims as different from protection claims

As stated above, the classification of asylum claims as benefit claims effectively silences any sensemaking of asylum as a protection legislation, despite this being clearly stated in international refugee law. Once asylum claims are placed in the favorable decision category, they are simultaneously excluded from being perceived as protection claims. This exclusion effect became evident when Judge Daniel corrected me when I searched for the legally accurate words to describe asylum appeals:

> Me: They [asylum claimants] ask for a right, so to speak, or do you say right?
>
> Daniel: They want to have a benefit.

In a similar line of reasoning, Judge Sara struggled to exclude asylum claims from the category of protection legislation by mobilizing the distinction between Swedish citizens and 'people who come from outside':

> Well, it [the Swedish Aliens Act] isn't really a protection legislation in that sense–if you think of [compare it to] compulsory care cases–instead it is people who come from outside and seek protection in Sweden.

This statement illustrates the state-centric foundation of asylum adjudications, which is the essential critique in Arendt's discussions on the perplexities of human rights. If the realization of human rights depends on membership in a political community, human rights will in practice not be granted to people *as human beings*, but only as citizens. Therefore, Judge Sara's reluctance to categorize noncitizens' rights claims as protection claims can be interpreted as an implicit denial of noncitizens' right to have rights.

Other interviewees expressed similar views as Judge Sara, but formulated it a bit differently:

> Compulsory care cases are under a protection legislation–it exists for the benefit of these people. And that is not [the purpose of] the Aliens Act–it exists for the benefit of the state and nothing else. (Judge Daniel)

However, this seemingly matter-of-fact statement about the purpose of the Swedish Aliens Act is not an innocent statement, as the authority of judges to interpret laws also means that they are co-constructing the intent and purpose of a law. By appealing to this assumed difference in protectability between citizens and noncitizens, they also contributed to reproducing a distinction between these groups in terms of entitlements to fundamental human rights.

Viewing asylum seekers unlike citizens in terms of the protection they were entitled also had consequences for how judges constructed their own roles in balancing different interests in court disputes. For example, Judge Thomas reasoned about how to balance asylum seekers' interest of staying in Sweden against the state's interest of keeping immigration numbers low:

> There are different types of cases, where you can sort of look at interests, which you have to weigh against each other. There are some [cases] where the public interest may not be very strong, while the individual's interest is very strong. [. . .] But when it comes to asylum, I think there is a very strong opposing interest [to the individual's interest] in that you want, not everyone who seeks asylum has eligible grounds for protection so you need to try to find those who have and, yes, there is an opposing interest, namely that it should work, that we cannot accept everyone just because they want to come.

This statement illustrates a state-centric perception among the Swedish judges: protecting the state's interests to control immigration rather than protecting an asylum seeker's interest to be granted the right to have rights (compare this to German judges' reasonings in Vetters 2022 in this issue). Judge Thomas further explained that he used 'different parts of the brain' when adjudicating asylum claims compared to compulsory care cases, which to him, was a 'pure protection legislation':

> The role changes, yes, you are more, you have to think very critically [in asylum adjudication] like: 'what has he said and how does he express himself', while in these social cases [compulsory care cases], the question is not to find out whether they are lying or to try to find out if they are lying, it is not like that [. . .] In those cases, you are trying to understand how they [the claimants] reason, what their insights are about themselves. Yes, it is completely different. Yes, so, it is different parts of the brain that is working.

Judge Thomas's assumption that asylum claims were unlike protection claims informed his judicial method of reasoning as he adopted a more skeptical approach to asylum seekers than to citizens whose civil liberties risked being infringed by the state.

This categorization was legitimized by the distinction between burdensome and favorable decisions, and therefore, it can be said to adhere to the equal treatment principle; all claims classified as benefit claims was treated the same way. However, as the analysis in the next section demonstrates, when discussing the practical conditions that determine how welfare benefit cases can be investigated and which procedural safeguards can be applied, some differences become evident between welfare benefit seekers and asylum seekers.

Similar to benefit seekers, but without history and future in Sweden

As discussed above, classifying asylum appeals like welfare benefit cases but unlike protection claims was straightforward for the judges as long as they anchored the classification in the distinction between burdensome and favorable decisions. The classification, however, became more complicated for them when discussing practical circumstances pertaining to asylum claimants' temporary presence in Sweden.

For example, the judges found the scarcity of reliable documents to be a unique aspect of asylum adjudications. Judge Fredrik described the difference in documents produced by the state about citizens and asylum claimants:

> The social services know who your relatives are and what you did when you were two years old, where you went to school, which doctor you have been to, and everything is like documented, so you [as a judge] have a pretty solid material, that is, so to say, impartial or produced by professionals that you can rely on [. . .] because this person was born in a hospital in Sweden and you can like follow him from the cradle, in principle. But if you

> have an asylum case, it's just; that is, what you have to decide on most of the time, not always, but it is a person sitting in front of you and saying, 'I am this person and this has happened to me.' And that is very, very difficult.

This quotation illustrates that administrative judges are used to relying on informative and detailed documents from Swedish public authorities on the doings and whereabouts of claimants. Just as the distinction between burdensome and favorable decisions is an ordering principle for an administrative judge's ability to make sense of the equal treatment principle, they assume a pre-existing relationship between the state and its subjects to gather reliable evidence in a casefile. Considering this, asylum claimants became 'new acquaintances' to the courts, as one judge explained to me in a coffee break between two court hearings I observed (fieldnote 4/21/21). Their lack of a pre-existing relationship with the Swedish state made it more difficult for both the claimants and the litigators from the Swedish Migration Agency to bring undisputed facts to the case, increasing the level of uncertainty in decision-making in these cases.

Asylum adjudication also stood out as different from welfare benefit claims in that the decisions from the administrative courts on asylum appeals were irrevocable to a larger extent than in other benefit cases. In cases pertaining to citizens, the claimants can ask either for a review of the decision at the next appeal instance–the Administrative Court of Appeal–or lodge a new application in the future. This provided the judges with a 'safety net', as judge Anna said, when making decisions in complex or uncertain cases. Judge Lars explained how this 'safety net' functioned as a reassurance for him in such cases:

> You can then say 'sorry, this investigation is too bad, I dismiss [the case]', because the social services can of course come back and do a better investigation and apply again.

In asylum cases, the 'safety net' is a lot weaker as asylum seekers whose claims are dismissed by the administrative courts have less than a one percent chance of being granted the right to appeal to the Migration Court of Appeal (Martén 2015), which is the final instance of appeal in asylum cases. Moreover, rejected asylum seekers must wait four years before they can reapply for asylum in any EU country. Consequently, the 'safety net' of reapplications in the future that Judge Lars was referring to in the quote above cannot apply to asylum claims.

When considering these differences between asylum claims and citizens' benefit claims, it becomes clear that the Swedish administrative law system assumes continuation in the relationship between the state and its members. For asylum seekers, as neither their past nor their future are within the purview of Swedish authorities, important 'safety nets' that apply to citizens are not applicable. This assumption also reveals a state-centric view in which political membership is constructed as stable over time and rooted in a particular territory controlled and safeguarded by a nation state. According to this view, asylum seekers become a rare exception in an otherwise well-functioning and complete system of nation states.

Equality before the law and state-centric justice

In this paper, I explored how the principle of treating like cases alike and unlike cases different became substantiated at the Swedish administrative courts. I found that judges constructed asylum claims like citizens' welfare benefits claims, which is based on an

established doctrinal classification of favorable and burdensome decisions in Swedish administrative law. This classification had several consequences for asylum claimants' possibilities to be recognized as right bearing subjects. First, it rendered a classification of asylum claims as protection claims impossible as the legal classification of favorable and burdensome decisions constructs benefit and protection claims as mutually exclusive categories. This construction of similarity and difference contributes to silencing asylum claims as protection claims, but it also shed light on the prioritization of doctrinal rule of thumb traditions over international human rights law within Swedish administrative courts.

Second, the classification of asylum claims as benefit claims places the burden of proof on the individual claimant. Although welfare benefit seekers and asylum seekers were constructed as similar and therefore had equal responsibilities for making their claims credible before the courts, the judges noted that several procedural safeguards that applied to citizens did not apply to asylum seekers. For example, asylum claimants' temporary relationship with the Swedish state made it difficult to cross-check information provided by claimants with reliable documents from Swedish authorities, and it also deprived them of future legal review possibilities.

An Arendtian reading of these empirical findings uncovers the state-centric notion of justice in the Swedish administrative courts' construction of sameness and difference. This state-centric justice delineated the judges' perceptions of which rights they should protect. The Swedish judges' construction of sameness and difference removed asylum seekers from the realm of protection legislation and therefore denied them their rights as human beings. By drawing attention to this state-centric foundation structuring Swedish asylum procedures, it becomes possible to analyze these procedures as social constructs that reinforce injustices between those who belong to a political community of rights and those who stand outside, asking to be let in.

However, the empirical study of Swedish judges' construction of sameness and difference also shed light on a construction in international refugee law, which reveals a similar state-centric notion of justice as in Swedish legal practice. To the Swedish judges, it was obvious that individuals whose claims were classified under a protection legislation should be relieved of the burden of proof. In such cases, it was the state representative who needed to prove the Swedish state's legal right to infringe on the individual's civil liberties. This idea about placing the burden of proof on the party in the dispute who wish to restrict someone's basic rights is not observable in the international doctrines on refugees. Despite that asylum is prescribed to be a protection legislation, the burden of proof rests with the individual asylum seeker. This generates ambiguity around asylum seekers' status as protection seekers and offers legitimacy to a perception of asylum seekers as individually responsible for persuading states to protect their right to have rights. That is, they become individually responsible for their own exclusion from the most foundational of all human rights.

The results of this study speak to two different but related debates in the research on refugee status determinations. First, its conclusions make visible the state-centric foundation of justice in asylum adjudications, a type of justice ignored by the literature. Most previous research on disparities in granting rate among asylum judges has concluded that these injustices stem from factors outside of law, such as the attitudes among and characteristics of the decision-makers (Jaya, Schenholtz, and Schrag 2007; Rehaag

2012). Research on skepticism and disbeliefs among decision-makers in asylum adjudications has also pointed to extra-legal factors, such as decision-makers' psychological reactions to trauma (Rousseau et al. 2002), to 'ambiguous stereotypes nurtured by officers' experiences and social prejudices' (Jubany 2011, 74), or to political discourses in society (Johannesson 2018) to explain injustices.

In contrast, this study places the injustice problem *within* legal principles and practice, not outside it. This means that not only sociological, psychological, and political factors but also the very heart of legalistic ideals (e.g. the commitment to equal treatment) can result in injustices for asylum applicants. Just as 'racism does not have to be present in the heads of individual actors for a system to work out in racist ways' (van Oorschot 2021, 80), injustices in asylum adjudications do not need to be nurtured by political agendas or unconscious stereotypes among individual judges. It can also survive through taken-for-granted classification schemes appearing as neutral structuring tools for legal practice, such as the burdensome and favorable classification employed in Swedish courts. Importantly, this injustice is not intentional but perpetuated by a genuine commitment among judges to abide by procedural justice principles and to treat like cases alike and unlike cases differently.

Second, the results of this study speak to research on the consequences of diversity discourses in asylum adjudications. As Smith-Khan (2017) reminds us, there is a danger of essentializing difference using diversity discourses in court proceedings, especially when claimants speak a foreign language and their narratives revolve around distant geographical regions and cultural practices. An implication of this claim can thus be that emphasis on sameness would be a successful way to solve injustices. However, his study demonstrates that constructions of sameness and emphasis on similarities can be as detrimental as diversity discourses.

A more nuanced implication, which considers both this study's and Smith-Khan's (2017) conclusions, would be to conclude that both constructions of sameness and of differences risk perpetuating injustices between citizens and noncitizens as long as they are grounded on a state-centric notion of justice. Smith-Khan's (2017) study demonstrated that problematic categorizations arise when difference is based on essentialized assumptions about culture and identities and measured according to an implicit yardstick that stipulates that those that are most like 'us' are also most rational and reasonable. In this study, I have shed light on another problematic ground for categorizations–i.e. the assumption that asylum claims are similar to citizens' benefit claims and, therefore, cannot be treated as protection claims.

It is possible to imagine other ways to make categorizations that do not perpetuate state-centric views of human rights. One alternative would be to categorize asylum claims as burdensome decisions under a protection legislation with the implication that it would be the responsibility of the migration agencies, representing the state, to prove their right to deprive asylum seekers of their fundamental right to have rights. However, this categorization would breach the internationally accepted principle of placing the burden of proof on the asylum claimants and it would result in much higher acceptance rates. This together, make I doubt this alternative as a realistic solution under any current national jurisdiction on asylum (see Andreetta, Vetters, and Yanasmayan 2022 in this issue).

Concluding remarks

Arendt is one of the most distinguished thinkers on exile, refugees, and human rights and many have been inspired by her suggestions on how to improve the human rights framework and its underlying tensions between the citizen and the noncitizen, the universal and the particular, and nature and history (Gündogdu 2014, 4). She rejected the idea that human rights could be defended by strong institutions (such as UN) or strong leaders (such as liberal leaders of the West). Instead, she claimed that rights could best be acquired through struggles for rights by those who lack them–i.e. the rightless themselves (Ingram 2008). This action-oriented view of human rights politics has been taken up by citizenship literature, including scholars working with the notions of non-citizenship (Tonkiss and Bloom 2015; Kubal 2020; Andreetta, Vetters, and Yanasmayan 2022 in this issue). This literature brings forth the potential empowering and liberating force that can be mobilized through migrants claiming citizenship rights in public arenas.

This study concurs with the idea that the rights claims of migrants can have empowering and liberating potential, and I agree with Tonkiss and Bloom (2015, 849) conclusion that the heterogenous category of noncitizens 'presents a useful starting point for theorising rights and justice'. However, the conclusions presented here have a more pessimistic outlook, pointing to the limits of right claims when they are articulated within a framework of state-centered justice. Nevertheless, it is my conviction that it is against the marginalized and precarious position of the noncitizen that the legalistic promises of equal treatment, universal human rights, and 'blind' justice will find their toughest test.

Note

1. The judge, however, cannot leave all investigation burden to the individual as the principle of ex officio proceedings (*officialprincipen*) has a long tradition in Swedish administrative law. It puts an extensive investigative burden on the courts although it is not stated clearly just what the burden consists of and when it is fulfilled (Cegrell Karlander 2021).

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