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Journal of Comparative Policy Analysis: Research and Practice

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/fcpa20

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To cite this article: Jonathan Miaz (2024) Asylum Adjudication and Street-Level Discretion: Negotiating Practice Rules, Journal of Comparative Policy Analysis: Research and Practice, 26:1, 25-41, DOI: 10.1080/13876988.2024.2304832

To link to this article: https://doi.org/10.1080/13876988.2024.2304832

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Published online: 09 Feb 2024.

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Journal of Comparative Policy Analysis, 2024
Vol. 26, No. 1, 25–41, https://doi.org/10.1080/13876988.2024.2304832

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Asylum Adjudication and Street-Level Discretion: Negotiating Practice Rules

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(Received 3 August 2022; accepted 4 January 2024)

ABSTRACT *Studying asylum adjudication in Switzerland, this article investigates how front-line practitioners in street-level organizations (SLOs) effectively exercise collective rulemaking power when they engage in construction of procedural rules, known as "asylum practice" rules. Asylum practice rules aim at standardizing decision-making by defining which profiles can be protected or not, according to each country of origin. These rules potentially influence individual discretion and refugee status determination by shaping which decisions street-level adjudicators perceive as possible according to asylum seekers' motives, situation and country of origin. The article argues that, in the context of a judicialized asylum policy, the development of asylum practice rules is part of a strategic and adversarial game with the legal defense of refugees and the court reviewing asylum appeals to interpret asylum law and determine its specific applications.*

Keywords: street-level organizations; street-level bureaucracy; law and policy; comparative asylum policy; implementation; discretionary power; practice rules; ethnography

Introduction

International conventions and national laws provide the basis for granting asylum and subsidiary protection to individuals fleeing conflict and persecution. However, the implementation of this protection depends, among other things, on the processes through which claims for asylum are adjudicated. For those migrants who make it across the borders into Europe, this process determines who will be allowed to stay or required to leave. These determinations are often complex, even contentious, placing the state administrative agencies that process these claims in a critical position. In effect, they function as proto-typical street-level organizations (SLOs) to the extent that they mediate between formal law and individual cases in a context in which the law involves multiple, competing and ambiguous elements that must be fitted to individual cases, imbuing their work with considerable discretion.[1]

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As research on SLOs in this and other contexts has amply demonstrated, the discretionary nature of street-level work presents difficult challenges for management, challenges which have produced a variety of strategies to assert control, influence, and accountability over organizational practices that depend on the discretionary activities of front-line practitioners (Brodkin 2011, 2013; Van Berkel et al. 2017; Evans and Hupe 2020; Visser and Kruyen 2021). While asylum decision-making deservedly received considerable attention (Bohmer and Shuman 2017; Jubany 2017; Dahlvik 2018; Liodden 2020; Affolter 2021; Miaz 2021; Pörtner 2021), this article examines a less well-examined dimension of the refugee status determination process, namely, the development of so-called rules of practice developed to guide claims adjudication at the street-level. As observed, for example, in Norway (Liodden 2020), Germany (Schittenhelm and Schneider 2017), Switzerland (Miaz 2017; Pörtner 2021), and France (Probst 2011; Akoka 2020), practice rules are commonly used in asylum adjudication to specify which elements of a case matter, interpret factual claims, and assess how criteria will be applied to specific cases. In Switzerland, these practice rules are gathered in documents known as *Asylum Practices* (or APPA). Despite their significance in asylum adjudication, only few studies have analyzed these documents (Liodden 2020; Pörtner 2021), and none analyzed directly and together their content, and how they are developed and used in asylum adjudication. This article does so: it studies the processes through which asylum practice rules and guidelines are informally negotiated, notably in adversarial interactions with the Court, and how they orient asylum adjudication, shaping front-line discretion.

On the face of it, these rules would appear to be simply another layer of Weberian-like specifications designed to control and standardize asylum decision-making. However, as street-level theory and research make abundantly clear, rules themselves, however well specified they may be, do not fully determine front-line practices. While they may function to narrow the scope of formally-delegated discretion, under certain conditions, informal discretion is ineradicable in street-level practices (Lipsky 2010; Hupe 2013; Brodkin 2020). Yet, practice rules are important to the extent that they shape the conditions under which discretion is exercised, making some types of decisions more likely than others (Miaz 2017, 2021). While the relevance of practice rules is well-recognized, little is known about how these rules come to be.

This article examines the unusual case of rulemaking involving the development of practice rules and how they orient asylum adjudication. While the formulation and application of these rules are generally associated with top-down strategies of hierarchical control, the Swiss case is notable because it confounds this hierarchical formulation, incorporating street-level adjudicators into a largely unseen process through which the rules are negotiated. It raises questions about how street-level adjudicators function, not only as the subjects of practice rules, but as their creators. This raises questions about how managerial strategies to influence practice develop when street-level practitioners are included (Andersen et al. 2017). This line of research raises questions about how including front-line workers in organizational governance might shape the parameters and substance of decision-making, ultimately changing law-as-produced and potentially altering agency efficiency and effectiveness (Visser and Kruyen 2021; Larsen and Caswell 2022).

This case study of the development of the APPA (*Asylpraxis-Pratique d'asile)*, which documents practice rules for adjudication of asylum claims in Switzerland, provides an opportunity to gain insights into how front-line experience may inform rulemaking, the processes through which street-level adjudicators negotiate the terms under which their practices are governed, and how their involvement may re-shape the structure of decision-making and, potentially, asylum decisions themselves.

This analysis recognizes that rulemaking takes place in a highly judicialized refugee status determination (RSD) regime (Hamlin 2014), in which asylum decisions are often contested before the Federal Administrative Court (FAC) (Kawar and Miaz 2021).[2] The article explores how the making of practice rules interacts with judicial decision-making and how court's jurisprudence sometimes leads to changes in practice rules. In this sense, one may regard the development of practice rules is a tri-partite negotiation between the State Secretariat for Migrations' (SEM) management, street-level asylum adjudicators, and the courts. In this context, it is appropriate to consider the negotiation of practice rules as an adversarial and strategic game which may result in new interpretations of the law or applications of the law to specific situations.

Street-Level Bureaucrats and Asylum Adjudication

During the last decade, a growing body of literature has studied aspects of asylum adjudication, often using ethnographic methods (e.g., Dahlvik 2018; Tomkinson 2018; Gill and Good 2019; Affolter 2021; Pörtner 2021). This literature has highlighted the discretionary power that asylum adjudicators have throughout RSD (Dahlvik 2018; Liodden 2020; Affolter 2021; Miaz 2021) and points toward increasingly restrictive tendencies in street-level practice (Tomkinson 2018).

The literature on asylum adjudication in European countries also points to the relevance of practice rules, variously referenced as "internal guidelines" in Germany (Schittenhelm and Schneider 2017), "practice" in Norway (Liodden 2020), institutional "doctrine" in France (Akoka 2020), and "asylum practices" in Switzerland (Miaz 2017; Affolter 2021; Pörtner 2021). The manifest purpose of these rules is to interpret country-of-origin information (COI) and the legal framework used to assess asylum claims (Liodden 2020). More broadly, however, one may regard them as managerial tools that function to shape street-level discretion by drawing attention to some criteria rather than others, by weighting factors in different ways, and by indicating what "counts" as credible evidence for an asylum claim. Thus, like other types of managerial tools used to influence street-level discretion and well-studied in other policy areas (e.g., Brodkin 2011; Van Berkel et al. 2017), asylum practice rules can be understood as tools that function to shape the terms on which street-level adjudication takes place, even if manifestly appearing only to streamline or standardize decision-making. Thus, understanding how these rules are made and negotiated has importance for understanding how asylum adjudication works on the ground.

This article examines the making of asylum practice rules, first analyzing how asylum adjudicators and their senior officials negotiate to construct the rules, second, how agency rulemaking processes interact with judicial decision-making and, third, how they orient asylum adjudication. The inside look at rulemaking within the SEM, an SLO which has

critical responsibility for assessing asylum claims, provides insights into a critical element of the asylum adjudication process. It also illuminates that asylum adjudicators' discretionary power not only rests on individual decision-making, but also on their involvement in the production of the rules ostensibly used to govern their decision-making, providing an opportunity to probe "attempts of immigration bureaucrats to standardize and codify their own practical norms" (Vetters 2019, p. 86).

Methods and Approach

This article is based on organizational ethnographic research conducted between 2010 and 2014 in the Swiss Asylum agency (SEM), including interviews and observations in a reception center and in the central administration. The research started with an archival work based on official sources to reconstruct the evolution of the Swiss asylum policy. The observations included asylum hearing, training sessions, and participant observation during six months in a legal aid service for asylum seekers in 2011. I conducted 59 semi-structured interviews with asylum adjudicators and their senior officials at the SEM as well as 35 semi-structured interviews with lawyers and volunteers of legal aid services in. Additionally, I conducted six interviews with judges and law clerks of the FAC.

This study adopted the techniques of organizational ethnography in order to "open to inquiry areas of political activity that are not necessarily recognized as political, because they occur outside of 'normal' political channels and on terms that are not explicitly or even intentionally political" (Brodkin 2017, pp. 131–132). It was supplemented by collection and analysis of archival and case documents, including archival work conducted to reconstruct the evolution of the Swiss asylum policy and a review of confidential documents used in the rulemaking process.

Because case documents and observation of internal discussions were confidential, I protected confidentiality by masking names and specific evidence while presenting observations that remained sociologically relevant and close to the data. The examples that I have reconstructed from the data take up and combine several salient characteristics found in these documents to render their logic without referring to a specific country.

Background: Swiss Asylum Policy

In Switzerland, the first Asylum Act (AsylA) came into force in 1981. Since then, asylum rapidly became one of the most debated issues on the Swiss political agenda. Multiple legislative reforms were adopted by the Swiss Parliament, and seven of them were accepted by Swiss citizens in an optional referendum. These reforms introduced hardening of the law and federal authorities affirmed the need for a rigorous interpretation of the notion of refugee and a strict application of the law in connection with the goal of a restrictive immigration policy.

Over the last 40 years, the field of asylum adjudication has been characterized by the increase and evolution of the legal framework (legislative reforms, legal dispositions, ordinances, directives, international agreements and federal jurisprudence). Swiss asylum policy is highly judicialized to at least two respects: first quantitatively, in connection with the large volume of appeals filed with the Federal Administrative Court (FAC)[3]; secondly, qualitatively, due to the impact of FAC jurisprudence on the practices of street-

level actors. With the asylum decisions being widely contested through appeals, this judicialization has a significant impact on bureaucratic decision-making and on asylum practice rules, notably since all asylum decisions rendered by the SEM must respect the legal forms and comply with the FAC jurisprudence.

Within the administration, the importance of FAC jurisprudence is a real issue, not only because it can generate costs (procedural, or time-related), but also because the Swiss government and the administration no longer have total control over the practice. To the contrary, lawmaking takes place "on the ground" in asylum decision-making and SEM "asylum practices," but also in the (conflictual) relation between the administration, the legal defense of asylum seekers appealing bureaucratic individual decisions and the FAC. Hence, compared with other RSD regimes (see: Hamlin 2014), the Swiss one is characterized by the central role played by the SEM. The SEM adjudicates all asylum applications, and its decisions can be individually appealed to the FAC. There are adversarial and competing relationships with the FAC in the interpretation of asylum law, of COI, and in the implementation of asylum law to specific cases. SEM's practice rules (even if they are not publicly communicated) and federal jurisprudence are the subject of parliamentary interventions often pushing for hardening them.

During the period in which I conducted my fieldwork (2010–2014), the asylum procedure required asylum seekers to file their application in a reception center.[4] There were two hearings, "on personal data" and "on asylum motives." The SEM asylum adjudicators' task is to investigate asylum demands, which mainly involves conducting hearings of asylum seekers and writing legally argued asylum decisions. To this extent, the SEM is considered as an SLO where asylum seekers encounter the state.

Practice Rules

This section analyzes the development of the formal rules that constitute APPA. It illuminates the street-level negotiations through which these rules are developed.

Standardizing Asylum Adjudication

As a former SEM senior official explains in a publication on practice rules, in the 1980s, following the enactment of AsylA, asylum adjudicators started to develop country-specific practice rules. It is considered that, since they themselves conduct hearings of asylum seekers and also make asylum decisions, they acquire sound and up-to-date knowledge about the countries of origin in their field of competence and a certain part of their working time is to be devoted to active research, analysis and processing of COI (Parak 2020, p. 31).

During an interview, another senior official recalled that, during a "pioneer phase" in the 1980s, "you could participate in the development of the practice." Practical juridical questions were to be solved: "Do we grant asylum to Tamils who had difficulties during 1983 riots in Colombo?" "When is a return reasonable or unreasonable? What does Article 3, ECHR cover? What does it mean? What is unbearable psychological pressure?" While there were already legal comments and doctrinal elements, "nevertheless, the question was: but how do we apply this to concrete cases? (. . .) You know, there was almost nothing!"[5] Since this pioneer phase, SEM asylum practice rules changed and were

specified according to the evolution of asylum migrations to Switzerland, of the conflicts, of the persecutions and of the violation of human rights in the world.

SEM's asylum practice rules cover two dimensions, including, first, rules regarding specific topics related to the legal interpretation of law, for example, the development of a practice on "gender-related persecutions," and second, country-specific rules that determine how asylum law and procedures must be applied according to each country of origin (Parak 2020). Asylum practice rules provide guidelines for investigating asylum demands and for decision-making. On the face of it, the asylum practice rules are manifestly intended to ensure a "unity of practice" between asylum adjudicators working in different locations, to avoid that "[asylum adjudicator] X grants asylum in a case, and [asylum adjudicator] Y does not grant asylum for the same thing."[6] According to Parak, who worked for the SEM for more than 30 years, in accordance with the principle of "equality before the law," asylum authorities – i.e. the SEM through its middle-managers and asylum adjudicators – are "obliged" to develop uniform practice rules and to guarantee consistent implementation in different locations (federal asylum centers) (also see: Parak 2020, p. 30).

By providing asylum adjudicators with clear guidelines, the APPAs aim for greater efficiency in decision-making. But beyond its manifest functions, the APPAs, like other managerial tools used to influence discretion, also shape what matters in asylum adjudication. As it has been observed in another context (Liodden 2020), parts of practice rules are sometimes crystallized in "*Autotexts*" and compositional elements (*Textbausteine*), *i.e.* standardized pre-written texts containing legal arguments, which are sometimes specific to a country, and which can be used in an asylum decision (also see: Affolter 2021; Pörtner 2021).

The Content of Practice Rules

Asylum practice rules provides asylum adjudicators with guidelines for investigation and decision-making by typifying situations and motives according to the specific context of each country of origin. These documents offer a pre-analysis of the applications by making it possible to categorize them *a priori* according to different characteristics. They thus synthesize the law (legal principles), the FAC jurisprudence, the doctrine, and an institutional analysis of the country situation based on COI. Each one of the 20 main countries of origin have a specific formalized APPA that can be consulted in the SEM intranet.

These documents are organized in sections providing guidelines for processing and triage, investigation and hearings, linguistic expertise, and presenting the "Asylum and Removal Practice." Asylum motives and situations are associated with a "guiding principle" (is asylum or temporary admission granted or not), with an "explanatory note" arguing why an asylum motive is recognized or not, and with guidelines for the investigation of asylum demands, as well as hyperlinks to various documentation such as internal and external reports, websites, and legal jurisprudence. This point is important, as practice rules must comply with FAC jurisprudence. Hence, the APPAs offer a complex network of information, expertise and documentation that asylum adjudicators can mobilize.[7]

Thus, APPAs establish categories to which a protection (asylum or temporary admission) can be granted, or whose demand must be rejected (Appendix 2b). An asylum motive is only considered as relevant once it is related to a particular situation of a specific country of origin, i.e., according to its contextualization. The

analysis of APPAs shows that work on categories is first and foremost work on countries of origin information insofar as these categories can only make sense in relation to the assessment of the specific context of that country. Thus, recognition of an asylum motive is often restricted to particular situations, for instance by distinguishing profiles:

> Guiding Principle: High-ranking activists of the Democratic Opposition Alliance (DOA) or the Party for Revolution and Progress (PRP) are persecuted by the State. They are granted asylum. Simple supporters of these opposition parties, however, are not persecuted (Appendix 2b).[8]

Or by differentiating conditions:

> If a homosexual person is exposed to decisive persecutions by third parties or the authorities, he should be granted asylum. Mere homosexual orientation does not give rise to a well-founded fear of persecution.[9]

Besides, FAC jurisprudence can also justify the recognition of certain asylum motives, as the following fictional example illustrates:

> Guiding principle: According to the federal jurisprudence of April 22, 2015, members of ethnic group W have a well-founded fear of being exposed to state persecution solely on the basis of their ethnic and religious affiliation.[10]

The granting of asylum and temporary admission is thus highly related to a context and limited to specific situations according to the assessment of the context of the country of origin, or even of particular regions and cities. Thus, the APPAs take into account the geography of persecutions, of conflicts, and of the state potential protection (in the case of non-state persecutions).

Finally, some motives are simply not recognized as persecutions, or profiles are considered as not being persecuted. If the asylum motive is based on the general situation prevailing in the country (insecurity, war situation, bad overall situation), it is usually rejected. The APPAs then determine in which situations it is possible to grant a temporary admission because the removal is considered unlawful, unreasonable or unfeasible. For example, specific groups can be identified as being "vulnerable," for example "single women with children," "unaccompanied minor asylum seekers," or "people with complex health problems leading, in a case of lack of treatment, to a life-threatening situation" (see Appendix 2c).[11] In these cases, the person's gender, age, education, financial means, professional experience, health situation, as well as social and family network are taken into account to construct profiles of "vulnerable persons."

Changing Rules and Challenging Legal Jurisprudence

This section first analyzes how practice rules can evolve according to new knowledge regarding COI, to changes of legal jurisprudence or of interpretation of law and COI. Second, it shows how rulemaking is embedded in an adversarial game with the FAC.

Changing the Practice Rules: The Role of COI and Intertwined Logics

These are small groups of asylum adjudicators, senior officials, and a "country specialist" – i.e., an officer of a COI unit of the SEM whose tasks are to search for and assess country expertise (Rosset 2015) – that are responsible for developing the main APPAs. These groups analyze the available documentation, such as official reports, reports of the Swiss embassy in the country, NGOs' and IOs' reports, the press,[12] the practices of other European countries, and the recommendations of the UN High Commissioner for Refugees (UNHCR) (Parak 2020). Sometimes, they organize fact-finding missions and travels in the related country "to see what happens"[13] and to assess the situation in the country of origin. This shows the key importance of the internal and external expertise, the COI (Rosset 2015), in determining practice rules.

Then, they try to assess the risks for specific categories of populations to be persecuted. To do so, they identify from the cases they adjudicate what are the types of asylum motives and situations? They contextualize and elaborate a practice – what are the groups of persons that are recognized as being persecuted or "at risk?" – based on their assessment of this context. An asylum adjudicator explains to me that they "schematize a little bit" according to the asylum demands that they have adjudicated or are adjudicating. They identify typologies – i.e., what are the types of cases and "constellations of facts" they encounter? – and they decide in which circumstances they grant protection according to their assessment of the country situation. They differentiate a given part of the country – e.g., which would be controlled by "quasi-state entities" (not by the central government) – and they "mention precisely what the possibilities are," i.e., which types of persecutions are recognized as being relevant to grant asylum – for instance, non-state persecutions in the Northern part of the country –, which categories of persons are considered as being "at risk," and guidelines for the treatment of these kinds of asylum demands (Appendix 2a).[14]

The group that is responsible for an APPA must follow the developments in the country to "keep th[e] information up to date."[15] To do so, as it has been observed in other countries (Liodden 2020), they mobilize COI reports, but also other public reports from governments, international organizations, NGOs, media or embassies (Rosset 2015). Major changes can lead to modifying the rules, for example, when there is a *coup d'État*, as I observed during my fieldwork. In this case, the SEM had to temporarily stop the treatment of asylum demands from this country's nationals and to change the rules according to a new assessment of the situation.

During an interview, an experienced asylum adjudicator also explained how they had to change the APPA after the Kosovo war. Before the 1998–1999 war, people of "Albanian ethnicity" who were politically engaged and who had been judged as being "against the Serbian Yugoslav system" could (fear to) be persecuted. The situation changed following the conflict. The SEM changed its rules based on an analysis of variety of information considered as "reliable:" media reports, reports of the Swiss embassy, fact-finding missions in Kosovo, and other COI contacts. They also consulted other national delegations (German, Austrian), and the UNHCR. Based on these multiple sources, they assess the situation of the different groups of people in the different regions of Kosovo, even in the different cities and villages of the country. For instance, "are the Roma threatened in a given municipality?"

Once the information has been gathered, the group responsible for this rule examines the information and determines changes of practice rules according to different ethnic groups: Serbs, Roma, Albanians, depending on where they reside or may reside (for instance, if they live in an enclave or in the Northern part of Kosovo). The decision is formulated in an internal report and communicated to the head of the division, the deputy director of the office, the director, and even the member of the Swiss government who is in charge of the federal Department of Justice and Police to which the SEM is attached.[16] As Pörtner (2021) underlines, important changes in practice rules must be negotiated in higher-level meetings with mid-level and high-level bureaucrats. In certain cases, "country situation assessment" meetings can involve other federal departments and the UNHCR or civil society organizations, such as the Swiss Refugee Council.

This process is revealed in observations I conducted with a colleague in 2013 regarding a "doctrine report" to change the rules on gender-related persecutions, specifically on motives related to sexual orientation and gender identity (SOGI).[17] The meeting gathered senior officials of the two divisions responsible for the asylum procedure. The two officials who were responsible for gender-related persecutions took the lead. Their presentation started with the current rules related to SOGI, the guidelines to adjudicate these motives, the FAC jurisprudence, the jurisprudence of the European Court of Justice, and the examples from other European states (Germany, Norway, Belgium, and UK). Then, they considered seven asylum cases as the basis for elaborating new rules, illustrating how the concrete meaning and application of legal categories can be discussed and contested. For example, the group considered how to determine what is an "intolerable psychological pressure" or a "well-founded fear of persecution." At the same time, other arguments related, for example, to the risk of a "pull effect" and to have to "grant every gay Iraqi asylum, no matter whether *he lives it* [a well-founded fear or an intolerable psychological pressure] *or not*" (quoted in: Pörtner 2021, p. 317) were mobilized by senior officials to support a restrictive version of the practice rules. In effect, these asylum adjudicators and senior officials continued the law-making process, based on a casuistic approach combined with a systematic typification of the "constellations of facts" that aim at elaborating categories of treatment that will be generalized to standardize and rationalize future decision-making on "similar" cases.

When they elaborate or change the rules, asylum adjudicators and senior officials rely not only on their front-line experience (asylum hearings and decision-making) and on a juridical analysis of cases, but also on different kinds of expertise. They mobilize COI, legal expertise and recommendations of international organizations (especially the UNHCR), as well as rules and jurisprudence of other European countries. In this process, legal logics confront bureaucratic, managerial and political ones, for example when they mention the risk of a pull effect, a possible effect on the number of asylum applications, or on the processing of asylum demands, or when they anticipate the position of the federal councilor (member of the government) or political pressures from the Parliament. In this sense, the making of practice rules is a good example of SLOs as mediators of both policy and politics continuing lawmaking and political conflict by administrative and juridical means (Brodkin 2013).

Rulemaking in a Judicialized Policy: An Adversarial Game with the Court

When they elaborate or change practice rules, asylum adjudicators and senior officials must also take into account the FAC jurisprudence and its developments, at the risk of decisions being systematically overturned. Indeed, the adjudication of asylum demands is highly judicialized: lawyers and legal aid services for asylum seekers persistently and massively challenge administrative decisions on asylum demands before the FAC. Because appeals can only concern individual decisions, they focus on contesting for each case how the SEM apply legal principles to individual motives and situations in specific countries of origin, and how they interpret these situations and COI. Hence, FAC jurisprudence specifies legal concepts and procedures, as well as particular application of legal principles to specific situations according to each country of origin (Kawar and Miaz 2021).

In this context, changing practice rules sometimes involves a form of "adversarial game" with the legal defense of asylum seekers and the court. Indeed, the FAC jurisprudence can differ from the SEM's APPA, leading judges to overturn SEM decisions. FAC rulings may also bring an assessment of the situation that competes with that of the SEM, leading the administration to change its rules to comply with the FAC jurisprudence.

When senior officials and asylum adjudicators want to change SEM practice rules, which would differ from FAC jurisprudence, a SEM adjudicator makes an individual asylum decision that challenges the FAC jurisprudence – by not complying with it – to "test" if the FAC follows the change of SEM rules and, hence, if judges change their jurisprudence. A senior official explains that, in doing so, SEM tries to "test the FAC."[18]

> [. . .] It happens, at times, that we feel that the practice should be reoriented for this country. And we try to make decisions that deviate a little bit from the [FAC] jurisprudence, in order to bring the Federal Administrative Court to review its jurisprudence a little bit. (Appendix 3b)[19]

This strategy of "testing the court" may concern "adaptations linked to the evolution of the situation" or the "willingness to change the jurisprudence after a certain time." A SEM asylum adjudicator explains that it can also result from a discordant interpretation of the SEM, which wishes to maintain its rules despite the FAC jurisprudence, even if the latter finally prevails. She recalls a case in which they tried to "test" the FAC to change the jurisprudence on a specific country:

> Because we had a completely different practice between the SEM and the FAC with regard to the provinces considered safe in [country Z], in which a removal is considered reasonable. We had provinces that we considered safe and the court did not. The SEM maintained its practice, and then, there was a decision of principle by the FAC which obliged the SEM, in general, not only for [country Z], to comply with the [jurisprudence] of the FAC, which is a higher authority, for reasons of equal treatment for all nationals. Afterwards, our practice has indeed changed. (Appendix 3b)[20]

In these two last quotes, the SEM aims to pass a more restrictive asylum practice rule than the FAC jurisprudence. Through this adversarial "game" between the SEM and the FAC to pass new interpretations of the law or of the situation prevailing in certain countries, asylum law is

co-produced in interaction between the SEM and the FAC, since the SEM integrates, reacts to, anticipates and tries to influence the jurisprudence of the FAC.

The rules contained in the APPA (which is not publicly available) and FAC jurisprudence strongly impact RSD outcomes: when the rules for a specific country provides that most asylum motives are not relevant, like Nigeria for example,[21] or that the country is "safe from persecutions," like Balkan countries, the asylum recognition rate will be very low. To the contrary, when the rules and the jurisprudence provide that certain motives can be granted asylum, and that removals are not lawful or reasonable, the protection rates are higher, as was the case for Eritrea since an FAC jurisprudence in 2006.[22] Because of this role, they are sometimes politicized by members of the federal parliament pushing (most often) for hardening the asylum practice rules and the FAC jurisprudence (see Appendix 4).

Asylum Practice Rules in Action: How they Orient Asylum Adjudication

This section analyzes how practice rules affect asylum adjudication by shaping how asylum adjudicators perceive what they *can and must decide* (Miaz 2017, 2021).

Asylum Practice Rules as a Tool in Asylum Adjudication

When they adjudicate asylum demands, SEM asylum adjudicators are asked to determine the credibility of the asylum motives and narratives, and the eligibility of the asylum demand, i.e., whether the asylum seekers meet the criteria for refugee according to the Asylum Act. In the case of asylum denial, asylum adjudicators must decide if the removal is lawful, reasonable, and feasible.[23] If not, the asylum seekers can receive a temporary admission. Yet, if these articles are crucial, the implementation of asylum law doesn't consist in a "pure application" of positive law. Rather, when they are asked about how they make their decisions, asylum adjudicators explain that they "have to stick to the [asylum] practice [rules]. It's always that: the Asylum Act and the [asylum] practice, we have to follow them."[24]

As an asylum adjudicator explains it, practice rules provide them with elements of understanding and analysis of each case to guide asylum adjudication:

> In my opinion, asylum practices are really the main tool, because they contain all the information needed to help making the decision, i.e. information on the identity documents or means of proof that applicants from each country can bring with them. Then there is a series of questions which are given and which must already be asked during the hearing.[25]

Thus, the APPAs strongly orient asylum adjudicators' investigation and decision-making by shaping the decisions that they perceive as being possible according to the country of origin and to the motives and situations of the asylum seekers (Miaz 2017, 2021). Schematically, in the case of restrictive rules, possibilities for asylum are limited and conditioned to strong argumentation to convince senior officials and persons responsible for the APPA. In certain cases, asylum adjudicators have discretion when they look for elements in the file and arguments to justify a temporary admission, for example, for "vulnerable persons." To the contrary, negative decisions are not controlled in the same manner:

> When you make negative decisions, you're never controlled. Never. The negative decisions are always welcome at the office in a sense. That's . . . unfortunate, but it's really like the mentality of the office. On the contrary, when you make a temporary admission decision, and even more for an asylum decision, you have to make a proposition of decision. This proposition is then accepted or not by your superior.[26]

Discretion especially remains in tasks such as investigation – how to conduct hearings, how to dig into the stories of asylum seekers, for example – and the assessment of credibility, which is a central part of asylum adjudication, and a particularly determining argument to reject an asylum demand.

During my interviews with SEM asylum adjudicators and my observations, I could witness that, when they don't have the specific asylum practice rules "in mind,"[27] they consult the APPAs to prepare their hearings or to make their decision.[28] When they have doubts, they often contact their colleagues who are responsible for the concerned rules or their superiors, to be sure of their decision. In this sense, practice rules do more than simply standardize decision-making, informally they provide guidance that shapes discretionary decision-making (Miaz 2017, 2021; Affolter et al. 2019), in part, by reducing adjudicator uncertainty related to the decision they are expected to make (Liodden 2020).

Organizational Conditions

Oversight of compliance with practice rules reinforces their constraining dimension. First, each asylum decision is signed by the adjudicator and by a senior official who controls it ("double-signature"). Each negative decision must be legally argued and can be appealed. To the contrary, "to avoid the learn effect," positive ones (asylum and temporary admission) are not legally argued but must be justified in an internal note that will be read by the senior official. Asylum adjudicators usually anticipate this "double-signature" and discuss with their superiors to find a decision that they will both accept to sign. If the decision is contrary to the rules, it can happen that the person who is responsible for the APPA also controls the decision or calls to order the asylum adjudicator who wrote it.

An asylum adjudicator explains that his decisions would be controlled more carefully if he granted asylum or temporary admission to a national of a country about which the APPA is very restrictive, with a very low protection rate. "They will really want to deeply control the file then. I don't see myself giving asylum, even if I find that there is credibility . . . " He also recalls the example of a colleague who granted asylum to a national from a country with a very low protection rate and who was called to order by their superiors.[29] This example indicates how this adjudicator perceives that granting protection for a specific country is not possible, because of the very restrictive rules. In effect, it can be "costly" to adjudicators to make decisions that might lead to additional oversight and management challenge. The change in the balance of street-level costs is a common, if largely hidden, element in managerial strategies used to influence front-line discretion (Brodkin 2011; Van Berkel et al. 2017).

Moreover, asylum adjudicators are recruited according to decisional and relational skills. Middle-managers explain that, when they hire someone, they pay particular

attention to their "ability to decide," because a key aspect of their role is a productivity one: "we need people who are able to decide. Because we cannot investigate a file for one year."[30] With this skill, it is also important that an asylum adjudicator can decide in compliance with practice rules, or without having strong political and moral dilemmas to do so.

Following their recruitment, during training, coaching with peers and superiors, as well as learning by adjudicating asylum demands (institutional socialization), asylum adjudicators learn specific knowledge, institutional logics, know-how, routines and expectations; and eventually schemes of thinking and acting. As discussed in another article, asylum adjudicators develop an institutional and legalist *ethos* (Miaz 2017), or what Affolter calls an institutional habitus (Affolter 2021), characterized by the idea that they only "apply the law" in conformity with the practice rules, and by a suspicious and skeptical attitude. This latter dimension is related to the issue of credibility and is similar to what is observed in other European countries (Probst 2011; Bohmer and Shuman 2017; Jubany 2017; Schittenhelm and Schneider 2017; Tomkinson 2018; Akoka 2020; Liodden 2020): it leads to "digging deep" (Affolter 2021), i.e., to insistently look for inconsistencies and contradictions in stories of asylum seekers that would prove it incredible and, eventually, to reject the demand.

This latter point is important, because if practice rules strongly orient asylum adjudication, asylum adjudicators still have different kinds of discretion. (For a more extensive discussion of this point, see: Miaz 2021). They have discretion in the way they investigate the files, especially how they conduct hearings and to which extent they look for inconsistencies and contradictions. They also have discretion in decision-making when they choose a decision over another for the cases that are, as they say, in the "gray zone." As well, they have discretion in choosing to argue with their superiors or colleagues over cases that they want to defend. As an asylum adjudicator explains it, they have to "choose their fights."[31] Finally, deciding to reject an asylum demand for a country with a restrictive asylum practice rules – i.e., complying with practice rules without digging deeper if there are reasons to argue a positive decision – is also a kind of discretion.

Hence, practice rules don't eliminate discretion, nor do they directly determine what asylum adjudicators do. Rather, together with other organizational conditions (controls, institutional socialization), they orient adjudicators' perceptions of what is possible to decide for a country of origin.

Discussion and Conclusion

This article shows how the SEM, as an SLO, builds asylum practice rules. The latter shape individual discretion by providing a bounded horizon of which decisions are possible and "just" for the institution (Affolter et al. 2019). In other words, they shape how adjudicators perceive what is possible according to different elements of the case (country of origin, motives, and situations of asylum seekers) and the costs and benefits of making alternative judgements. Nevertheless, it is important to underline that practice rules don't eliminate discretion: they shape discretionary practices, but asylum

adjudicators still have room for maneuver according to their tasks, to the situations they are faced with, or to their own characteristics (Miaz 2021).

The existence of such practice rules is a common feature of several RSD regimes, as it has also been observed in other European countries. In Switzerland, APPA constitutes a very formalized and systematic form of practice rules. They are constructed by adjudicators and middle-managers themselves, based on their street-level experience of adjudicating asylum demands and their interpretation of law and of the COI. To do so, they adopt a kind of "casuistic reasoning" based on concrete asylum cases, and on a typification of situations. Asylum practice rules may be understood as managing strategies and organizational devices (Brodkin 2011) that respond to persistent issues of uncertainty in asylum adjudication (Liodden 2020), as well as issues of regularity and consistency within the administration, to limit street-level divergence (Gofen 2014) between asylum adjudicators working in the different federal centers by bridging the gap between abstract law and individual complex situations of asylum seekers. Asylum practice rules manifestly aim to standardize and rationalize asylum adjudication by providing asylum adjudicators with rules for the action, but, as discussed, informally shape discretion at the front-lines.

More precisely, asylum practice rules function to, first, advance institutional and legal *security* and *stability* of decision-making. Indeed, on the one hand, by standardizing, rationalizing and unifying RSD, these practice rules aim to ensure a certain conformity of asylum decisions and a "unity of practice" in space – asylum adjudicators work in different sites – and time. On the other hand, the rules present principles and instructions for action that can reduce uncertainty about what is a "just" and "correct" decision (Affolter et al. 2019). Regarding legal security and stability, practice rules also inform adjudicators about FAC jurisprudence and its changes.

Second, the APPA is manifestly aimed to improve *bureaucratic efficiency* by "accelerating the asylum procedures." Providing practical rules, principles, instructions and guidelines for action aims at helping asylum adjudicators to make faster decisions. APPAs centralize research and assessment of COI, the evaluation of the situation and the identification of "persecuted" categories and "at risk" groups in each country, while analyzing law and jurisprudence in relation to the country-specific situation. This centralization aims at avoiding any duplication of this work. Third, less explicitly, APPAs may be understood as instruments for advancing internal and external *legitimacy*. The internal legitimacy refers to the fact that street-level jurisprudences are shared by the colleagues within the institution ("unity of practice"). The external legitimacy is related to the legal conformity especially with the jurisprudence, but also to the regularity of the decisions made by the SEM.

This article argues that beyond individual discretionary power, one must consider this collective, institutional discretionary rulemaking power jointly held by asylum adjudicators and their senior officials. Practice rules considerably orient asylum adjudication, and, it appears, strongly shape RSD outcomes. They notably make it difficult to justify a positive decision when the rules are restrictive, indirectly limiting the possibilities to grant protection (asylum or temporary admission) by raising the street-level "cost" of less restrictive decisions.

However, this rulemaking activity is not isolated, but takes place in a broader RSD regime involving the court reviewing asylum appeals (FAC), whose jurisprudence can be

conflicting with SEM asylum practice rules. This article highlights the strategic and adversarial game to which the administration lends itself in the context of a highly judicialized asylum policy, by "testing" the appeal authority and seeking to evoke change within its jurisprudence to ensure it follows the administration's practice. As Hamlin argued, RSD outcomes depend on the institutional players involved in the RSD process, the level of contention among them, and the degree of centralization within the decision-making process (Hamlin 2014). The analysis of practice rules in Switzerland and of the strategic and adversarial game which they are part of shows how Swiss asylum law and policy is produced and negotiated at the street-level, not only within the administration – through the institutional making of practice rules and individual discretion –, but also in the conflictual relationships between the administration, the legal defense of refugees and the court.

Acknowledgements

The author would like to thank all the interviewees for their time and the information shared with him. The author is also grateful to Evelyn Brodkin, Karen Breidahl, and the anonymous reviewers for their comments on a previous version of the article. This article was written during an Early Postdoc Mobility fellowship funded by the Swiss National Science Foundation (P2LAP1_178067).

Notes

1. See the introduction to this special issue for discussion of the street-level approach to comparative analysis of migration and asylum (Breidahl et al. 2024, this issue).
2. In this context, SEM asylum adjudicators' tasks – investigating asylum demands and writing legally argued asylum decisions – have an important juridical dimension, closely linked to the significant court's jurisprudence, as well as to the legal standards of decision writing. Between 2015 and 2022, the recourse rate (based on decisions of rejections and dismissals) varied between 27.1 per cent and 38.8 per cent (SEM, "Suivi du système d'asile. Rapport 2022", https://www.sem.admin.ch/dam/sem/fr/data/publiservice/berichte/monitoring-asyl/monitoring-asylsystem-2022.pdf.download.pdf/monitoring-asylsystem-2022-f.pdf, 14 September 2023).
3. Appeals before the FAC are only written (there are no hearings).
4. The procedure I observed between 2010–2014 was changed in 2019. Reception centers are now called Federal Asylum Centers.
5. Interview with Markus, senior official, SEM, March 2012. *All the quotes are translated either from French or German. All the names of interviewees have been changed for confidentiality issues.*
6. Interview with, Paul, asylum adjudicator, SEM, December 2011.
7. For an extensive fictional typical example, see Appendix 2a.
8. Fictional example inspired by the analysis of ethnographic notes on APPAs, SEM, 2010–2012.
9. Ibid.
10. Ibid.
11. Ibid.
12. Interview with Paul, asylum adjudicator, SEM, December 2011.
13. Interview with Carole, asylum adjudicator, SEM, March 2012.
14. Interview with Jean-Pierre, asylum adjudicator, SEM, October 2011.
15. Ibid.
16. Interview with Simon, asylum adjudicator, SEM, January 2012.
17. Observation notes, SEM, 2013.
18. Interview with, Virginie, senior official, SEM, April 2012.
19. Interview with Sylvain, asylum adjudicator, SEM, November 2011.
20. Interview with Brigitte, asylum adjudicator, SEM, July 2012.

21. The global protection rates (asylum grants and temporary admissions) for Nigeria between 1993 and 2019 is of 1.1 per cent, and the global asylum recognition rate is of 0.1 per cent (Parak 2020, p. 101).
22. The global protection rates for Eritrea between 1993 and 2019 is 77.3 per cent, and the global asylum recognition rate is 53.6 per cent (Parak 2020, p. 65).
23. For these legal bases, see: Appendix 1.
24. Interview with Marta, asylum adjudicator, SEM, January 2012.
25. Interview with Christophe, asylum adjudicator, SEM, February 2011.
26. Interview with Sylvie, asylum adjudicator, SEM, January 2011.
27. Interview with Geraldine, asylum adjudicator, SEM, January 2011.
28. Observation notes, SEM, 2010–2012.
29. Interview with Christophe, asylum adjudicator, SEM, February 2011.
30. Interview with Virginie, senior official, SEM, April 2012.
31. Interview with Corinna, asylum adjudicator, SEM, December 2011.

Disclosure Statement

No potential conflict of interest was reported by the author.

Supplementary Material

Supplementary data for this article can be accessed at https://doi.org/10.1080/13876988.2024.2304832

Funding

This work was supported by the Swiss National Science Foundation [P2LAP1_178067].

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