ANAMORPHOSIS – Revista Internacional de Direito e Literatura
v. 5, n. 2, julho-dezembro 2019
 – doi: 10.21119/anamps.52.587-611

THE REFUGEE STATUS IN BRAZILIAN LAW, BASED ON KAFKA'S DYSTOPIA

FLAVIA RODRIGUES DE CASTRO[1]
NATALIA CINTRA DE OLIVEIRA TAVARES[2]

TRANSLATED BY FELIPE ZOBARAN

ABSTRACT: This article aims at critically analyzing the concept of eligibility for refugee status in Brazilian law, by approaching administrative processes of refugee status pleas, as well as the legal defense given to applicants for refugee status in the legal system. Based on the central aim of this article, we scrutinize how the decision-making mechanisms work, especially considering the collective decision-making spaces and the confidential aspect of these lawsuits under the allegation of protecting the interested parts. This critical analysis is thought of as a reflection on the possible existence of connections between present practices and policies regarding the eligibility for refugee status in Brazil and the dystopia of absurdity presented in the narrative by Kafka about bureaucracy in lawsuits and the legal defense system.

KEYWORDS: refugee status; eligibility; Brazil; Kafka.

[1] Professor at the PET TEPP Brasil Global extension and teaching project (PUC-Rio). Doctoral Student of International Relations at the Institute of International Relations (IRI) of Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio). FAPERJ research fellow. Master's degree in Strategic Studies in National Defense and International Security at Universidade Federal Fluminense (UFF). Bachelor's degree in International Relations at Universidade Federal Fluminense (UFF). Rio de Janeiro (RJ), Brazil. ORCID: https://orcid.org/0000-0001-9951-5271. CV Lattes: http://lattes.cnpq.br/5090373525534762. E-mail: flaviacastro.uff@gmail.com.

[2] Doctoral Student of State Theory and Constitutional Law at Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio). Researcher, Lawyer and Sub-coordinator at the Center for Refugee and Immigrant Protection of Fundação Casa de Rui Barbosa (Scholarship holder P3). Master's degree in Contemporary Legal Theories at Universidade Federal do Rio de Janeiro (UFRJ). Bachelor's degree in Law at Universidade Federal de Goiás (UFG). Rio de Janeiro (RJ), Brazil. ORCID: https://orcid.org/0000-0003-3783-4300 .CV Lattes: http://lattes.cnpq.br/0778082878929786. E-mail: cintratavares@gmail.com.

1 INTRODUCTION

> Where was the judge he'd never seen? Where was the high court he had never reached? (Kafka, 2007, p. 271)

The practice of governing peoples and things is based on producing specific truths about them and elevating a different discourse about the other. As Campbell (1992) states, the social-political life encompasses practices that inspire the construction of things in the process of dealing with such practices, which generates a conquered space where some statements gain more importance than others. Such space includes not only the construction of frontiers, the limitation of spaces, the attempt to privilege specific interpretations of history while marginalizing alternatives (Campbell, 1992), but also the (re)production of identity and the agglutination of categories, such as the refugee status. The government of peoples includes, necessarily, specific representations and production of knowledge and expertise regarding the governed ones (Larner; Walters, 2004). Thus, a refugee can me though of from the perspective of the production of a regime of knowledge, representations and hierarchic categories in order to keep and manage the modern international establishment.

Having a broad, complex, international regime that encompasses governments, international humanitarian organizations, nonogovernamental organizations and academic groups, it is possible to build a network of knowledge to manage populations and migration flows. Thus, the international establishment and the international regime of refugee protection constitute an intense framework of regulation not only by the sovereign states, but also by a network of diverse organizations. In this international setup, refugees are subject to regulations and disciplinary decisions in an institutional outline that legitimates certain types of interaction and political solutions that are key elements for these populations' governments.

Thus, considering this worldwide context, this article aims at constituting the refugee's image focusing on the perspective of the frontier as a legal and bureaucratic practice that includes central processes regarding the refugee status in Brazil (and the world): the establishment of

a regime of truth and proof, the analysis of credibility and status granting. All such processes gathered represent the eligibility for refugee status, with its own fragmented, dispersed and contingent practices, which, in the end, produce the sentences and verdicts. Our analysis object is the Brazilian situation, and in that country one can see a series of practitioners and places that are put together in the eligibility for refugee status lawsuits: civil society organizations, government institutions and international organisms that are sometimes together, sometimes split, sometimes overlapped in several stages of the processes that end up granting or not the status of refugee for the applicants. However, harder than that is the task of finding the role of the applicant him/herself throughout the processes, which seemed to have been ever more independent and detached of the pleading subject, who had been gradually disappearing. There is, hence, a kind of real dystopia taking place in the Kafkaesque style, as bureaucracy and administrative decisions develop in spite of the applicant (and his/her attorney) and gain independent life, despite the involved subjects and their histories.

As a matter of fact, there are no specific instructions, neither in the Refugee Law nor in any other regulation, about the express defense possibility and/or legal representation for refugee applicants. Such absence is not mere coincidence: as Javier de Lucas (2018) clarifies, refuge has been emptied of its legal character and has been given the status of a humanitarian concern, exclusively. Then, international protection is a result of solidarity and charity rather than something that could be demanded from the State as international duty. If the refugee status is no longer in the field of law, also its recipient, that is, the refugee, is no longer given international protection, and becomes a mere beneficiary. At best, the refugee becomes a sort of minor subject, since, together with Migration Law, Refugee Law constitutes a state of permanent exception, in which basic rights such as security, international politics, national economy, amongst others, rule over the Rule of Law.

What we want to emphasize more specifically is the proximity between the plot of *The Trial*, a novel by Kafka, and the legal situation of the refugee status in Brazil. Referred to as K., the main character of the

novel pleads refuge and goes over the complex bureaucracy, almost always with no lawyer protection and ignorant of the many organs, names and people involved in the system. If, in the case of K., what is unknown is the accusation and the court that judges the case, in the case of the applicant for refugee status, the unknown is a multiplicity of factors, that are highlighted throughout this article. Not knowing the pieces of the game, the unknown is the process as a whole. The applicant for refugee status, as K., fights with covered eyes, not knowing what weapons to use nor against whom.

With an essentially qualitative methodology[3], this article searches for, first of all, analyzing the concession of the refugee status and how it is granted via almost judicial processes, which can be called eligibility. Secondly, it is necessary to understand what defense rights are and, finally, how it is possible to read eligibility and defense rights based on the dystopian plot by Kafka.

2 ELIGIBILITY FOR REFUGEE STATUS IN BRAZIL

> And now my advice for you [...] go into your room, stay calm, and wait and see what's to be done with you (Kafka, 2007, p. 9)

Eligibility for refugee status is ruled by an international normative system that was written in 1951, with the approval of the Geneva Conventions. The practice of eligibility for refugee status, led in many countries by their government authorities, can be understood as practices of granting the status of refugee, that is, legal concessions of such status to subjects who are seen as authentic applicants. However, the same Convention of 1951 did not prescribe the mechanisms for determining who is and who is not a refugee, thus giving full decision power to country governments when deciding it, as well as their own eligibility processes' organization (Alexander, 1999; Gorlick, 2002; Kagan, 2006). Such processes are considered, yet, key elements for protecting the pleading subject (Kagan, 2006), since it is the means through which those in need of

[3] For this article, the main method is bibliographic research regarding the area, together with information from our daily practice as researchers and professionals in and from the area.

protection can be identified (Alexander, 1999) or produced (Facundo, 2014). In this context, the eligibility process is crucial for researchers on the topic due to the fact that it reflects the transformation of law into policies and practices (Alexander, 1999; Kagan, 2003; Rousseau *et al.*, 2002; Saltsman, 2014).

The process of eligibility demands from the seeker of refugee status a cohesive report, a detailed confession of persecution fears, the exposition of the suffered trauma, the creation of a discourse that may have been silenced so far as a personal strategy of memory and erasure of pain. Whether a refugee applicant is or is not an "authentic" refugee, with all rights limited and all obligations fulfilled in statues, it is intimately related to his or her capacity of navigating through the complexities of the eligibility process and understanding the meaning of the questions they need to answer continuously according to a series of principles and criteria to which, usually, migrating subjects have no access. The success of the applicant also depends on how governments interpret and confront his or her narrative and the credibility of the plea, by producing counter-narratives and objections to the pleading process, possibly inside of spaces the applicants do not have access, to begin with, or in which they are present only when subjected to inquisitions.

Hence, the refugee can be seen as an artificial category created through uneven relations that are responsible for establishing, among other things, which countries can be seen as "makers" of refugees, which elements favor truth and credibility of narratives and which body language is more adequate for narrating specific alleged persecutions (Jubany, 2011; 2017). Based on the daily practice in this universe it is possible to observe what Fassin (2007, p. 501) calls as "defense of cause", which "demands not only setting aside other causes, but also producing public representations of human beings who should be defended". It is in this sense that we believe adequate to agree with the proposition by Rojas (2016, p. 378), that "*what exists* is always the effect of practices or performances".

As defended by Saltsman (2014), there is emerging consensus nowadays on the importance of analyzing the process of determining the refugee's status, since it includes transforming law and politics into actions.

The perspective used hereby points, thus, to a potential connection with international politics sociology and the practical turn that attempts to study not the entities, but the practices through which they are created, redefined, changed and established with their connections (Huysmans; Nogueira, 2016). The small, daily practices allow a different glance over the process of eligibility for refugee status as well as the frontier practices that are present in current Brazil, aiming at differentiating who is welcome in the country and who is not through the analysis of the plea's merits.

In Brazil, eligibility for refugee status starts when the subject enters the country and reveals the refuge plea to a Federal Police officer, who is then responsible for providing a Declaration Form with the reasons why the subject pleads refuge as well as basic personal data (Jubilut, 2007). Besides that, one of the most important steps for the recently arrived applicant is to fill in the form of refuge plea of the National Committee for Refugees (Comitê Nacional para os Refugiados – CONARE)[4] which, when filled in, must be delivered at any Federal Police unit. The form is made of more than twenty pages with questions that are considered fundamental for evaluating the refugee's plea, such as the reasons that led the subject to leave their country and search protection in Brazil, what would happen if the applicant should return to the original country and the existence or not of some kind of fear of threat to their physical or mental integrity or their freedom. Thus, with this formed filled in, together with the Federal Police one, the narrative of the subject begins to be constructed, evaluated and countered throughout the process.

Amongst the practices of eligibility for refugee status in Brazil, after filling in the entry form, together with the other personal documents,

[4] Created by Law 9,474 / 97, in order to recognize and make decisions about refugee status in Brazil, CONARE is a multi-ministerial body. CONARE is composed by: the Ministry of Justice, which presides over it; the Ministry of Foreign Affairs, Vice Presidency; the Ministry of Labor and Employment; the Ministry of Health; the Ministry of Education; the Federal Police Department; Cáritas / RJ and Cáritas / SP as representatives of the civil society, holder and alternate, respectively; and the United Nations High Commissioner for Refugees (UNHCR / UNHCR), which has the right to speak, without vote. The Federal Public Defender's Office has advisory member status in the CONARE. The Institute of Migration and Human Rights (IMDH) participates as an observer member.

another important part for conducting the process with the applicant is the official refuge application interview[5]. In this interview the credibility of the plea is analyzed, constantly contrasted with the supposed objective situation of the country of origin or residence. The interview's ritual includes, usually, the introduction of the eligibility process by the officer of protection to the interviewer, who reinforces the aspect of confidentiality and sigil regarding all information narrated by the applicant in that space and moment of exchange. After the introduction, the interviewer officer conducts inquiries on the applicant's profile, regarding personal general information and then starts more directed questionings regarding the applicant's motivations for leaving the country of origin or residence and pleading refuge – that is, the persecution or fear personal narrative.

It is important to highlight the possibility of unofficial and non-obligatory interviews taking place with the applicant and different practitioners in this universe, mainly in places like Rio de Janeiro and São Paulo, where the civil society presence via Cáritas institution is more widespread. From such interviews, representatives of the civil society at CONARE can formulate their own opinions on the current processes and articulate their views regarding specific cases, so that they can be discussed in collective, public spaces, in further parts of the process[6]. However, it is important to state that such interviews do not have the same importance or weight as those with official character, as described in the previous paragraph – from which, necessarily, decisions are written down regarding the fundaments for granting or overruling the pleas.

The official eligibility report of CONARE is written down by the presidency of the committee, that is, by the Ministry of Justice, and is the

5 Going on to the interview stage with a CONARE Eligibility Officer is not fast, due to the small number of available professionals to conduct the interviews.

6 In producing such opinion reports, this institutions that represent civil society attempt to separate what they perceive as "Strong cases" from "weak cases" – that is, there is an attempt to differentiate the economic migrant from the refugee, operating under the logic of vowing for cases that have more chances of being acknowledged by the Brazilian government.

moment of the process in which eligibility officers clarify the recommendations on refugee status pleas to the Brazilian government. Such document is based on a plethora of norms that constitute the essential legal-bureaucratic grammar of eligibility processes in the country. From this lexicon, representative institutions of civil society adapt and organize their daily practice, members of CONARE debate and justify positions of the Previous Studies Group (Grupos de Estudos Prévios – GEP) [7], appeals against rejected pleas are analyzed[8], meetings and training sessions of institutional refugee status practitioners are held and all decisions are legitimized. Thus, after the interviews with representatives of the civil society at CONARE and with the eligibility officials of this committee, the decisions regarding refugee status pleas are discussed by GEP. Following to that, the positioning of the group, recommending granting or overruling the refugee status pleas in analysis, is sent to CONARE's plenary, so that the final decision is made.

The group of norms that constitute the eligibility document is a collection of laws, normative resolutions, procedures and guidelines that orient different perceptions on what is called credibility. Such analysis is seen as one of the most challenging key aspects in the process of granting refugee status, since a great part of refusals when granting such status is based on the justification that the competent authority does not believe what the applicant refugee says (HHC, 2013). Credibility is seen, thus, in relation to the applicant's statements for the evaluation of the plea, so that it is possible to determine whether it is "genuine" and "protection worthy" (HHC, 2013, p. 28). In this sense, credibility is established when the applicant presents a plausible and consistent claim, which does not

[7] The Group of Previous Studies (GEP) is a collective, non-obligatory envionment that is held regularly before the Plenary meetings which are responsible for the final decisions. GEP is constituted by all CONARE members who will to be presente, but generally it counts with the presence of representatives from the Ministry of Justice, the Ministry of International Relations, the Federal Police, the organized Civil Society, besides members who observe and are consulted, such as Instituto Migrações e Direitos Humanos, ACNUR and DPU.

[8] Although this is a topic to be discussed in the next session of the article, it should be emphasized that not all appeals against decisions for refusal of the condition of refuge are based on the report, given that it is not delivered to the applicant at the moment of the decision notification.

contradict the generally known facts (such as information on the original country) and, with that, is seen as believable (HHC, 2013). In this analysis, thus, it is necessary to assess *external consistency*, that is, whether the applicant's information agrees with other objective evidence and sources of information, especially regarding the original country; *internal consistency*, that is, whether the narrative by the applicant is detailed and non-contradictory; and *plausibility* or the possibility of what is being narrated to have really happened or come to happen (ACNUR, 2013; HHC, 2013).

The main criteria and elements that orient credibility analyses end up depending on a series of memory and emotion tests conducted in a non-reasonable way, since the aim is to "prove" the authenticity of the claims. Regarding memory, for instance, it is expected that the "authentic" refugee applicant should present detailed memories of places, dates, event chronologies, people and daily facts that would hardly be memorized by any subject, even in non-traumatic situations, even with no linguistic and cultural barriers (Cameron, 2010). As for emotions and narratives, the refugee applicants who do not fit the expectations of the eligibility officers are usually seen as impostors. According to Graham (2002), the real refugee status is in danger if the asylum seeker shows emotions that disagree with the stereotype of proper behavior, which includes lack of acting and initiative, depression or sadness, relationship with authorities marked by few demands and a deep gratitude behavior. Being detached from such expectations and stereotypes may generate the refusal of the plea based on the supposed lack of authenticity, which makes the asylum seeker face a "wall of bureaucratic indifference" (Graham, 2002, p. 211).

Via credibility analysis, the process of eligibility ends up working to protect the statute of political asylum from the "contamination" of other migrant subjects. In other words, which are easily heard in the institutional universe of political asylum in Brazil, it is necessary to hinder the "abusive" and "undue" use of the statute of asylum and refugee status. Hence, credibility analysis is crucial in protecting the very statute. Though such analysis is not mentioned in the Convention of 1951, regarding the Statute of Refugees, nor in the Brazilian law that rules over the matter, and in spite of being presented as an alternate mechanism to proof, which should be

used only to compensate possible difficulties in finding and exposing evidence regarding refugee claims (Sweeney, 2009), there is a search for truth (Bohmer and Shuman, 2007) in a "disbelief culture" (Alexander, 1999; Jubany, 2011, 2017; Souter, 2011; Weston, 1998) that makes use of credibility as the only possible basis in order to legitimate negative decisions (Magalhães, 2014, 2016). The objective of such inquiry process may be seen as a search for the protection of the very refugee statute from what can be considered abusive and undue use by other subjects and migrants. This makes the refugee status no longer a basic right as stated in the 1951 Convention, but a kind of prize to be won by highly privileged persons, since few deserve it and many demand it illegally (Zetter, 2007).

After this type of credibility analysis is made and written down in the official report of eligibility overlooked by the GEP, the case is finally debated and decided in Plenary meeting. If the recognition of the claim is granted or not, the applicant receives a notification next time he/she goes to the responsible Federal Police station. After that, in case of denial, the applicant has only 15 (fifteen) days to present administrative appeal, destined to the Minister of Justice, so that the plea is re-evaluated. Similarly to the excerpt in the epigraph of this chapter, in which K. waits for other people to make decisions about his life, unable to do anything and unknowing what is happening. So is the situation of the refugee applicant, who does not participate of his/her own refuge plea. When giver the sentence, the applicant never gets to know why the plea was or was not recognized. If the decision granted the refugee status, the recently-recognized refugee does not know the reasons that led to such acknowledgement, nor can he/she suppose his/her narrative was responsible for that. He/She is now a refugee, and he/she will never know why. He/she just is a refugee. As for the denied applicant, the situation is the same; administrative bureaucracy simply determines he/she is not a refugee, and he/she cannot counter-argument, if willing to, based on the arguments of the Committee. He/She will have to defend him/herself not knowing against what.

3 RIGHT TO DEFENSE IN THE REFUGEE STATUS PROCESS: THE CONVENIENT SILENCE

> This is because proceedings are generally kept secret not only from the public but also from the accused. (Kafka, 2007, p. 138).

In Brazil, the full access to defense and counter-argument is constitutionally guaranteed as a fundamental right in article 5, paragraph LV, in the Federal Constitution of 1988 (FC), in administrative and judicial proceedings, for national and non-national persons. Refugee status granting proceedings, however, are special administrative proceedings, that is, they are developed mainly in the scope of Federal Public Administration. Specifically regarding administrative proceedings, besides the constitutional law previously referred to, the main norm to be followed is the Law of Administrative Proceedings nº 9.784/1999.

That being, some aspects need to be emphasized: 1) the refugee status granting proceedings, as previously stated, are administrative proceedings; 2) the main norm that rules over it is Law nº 9.474/1997; 3) in case of legal gaps, the regulation that must be brought to light is the Law of Administrative Proceedings, besides the FC itself; 4) Refugee Law has no articles about defense rights; 5) Law nº 9.784/1999, however, guarantees, in its 3rd article, that the applicant should have access to the proceeding reports, could formulate allegations before the sentence and may have attorney support, if willing to.

In sight of a purely legalistic analysis of the norms mentioned above, the refugee status applicant has the right to defense, as any other person, in any other administrative proceeding. Practice, however, shows otherwise. Firstly, it is necessary to state how strong the legal gap is regarding administrative proceedings. When the Law of Refugee is silent regarding judicial representation, access to proceeding reports and the decision adjacent organ, it is necessary to analyze which consequences this may have to the attendant, considering the access (or lack thereof) to rights, hence the direct link of Public Administration to the law.

For more than 20 (twenty) years, Law nº 9.474/97 has been practiced, showing that: 1) only a small minority of applicants have the legal support and representation of lawyers in the process; 2) Asylum seekers do not usually see their processes and reports[9]; 3) At no time will the interested party have direct access to the collegiate body, that is, to CONARE[10]; and, finally, 4) no refugee applicant has access to the reasoned decision of their process. As for the latter point, it is important to highlight that Law nº 9.474/1997 created distinction as for the sentence of grant or rejection. When the case is judged by recognition of the refugee status, the law only states, in Article 27, that CONARE will notify the applicant. On the other hand, when the sentence denies the status, Article 29 provides that there should be a notification to the applicant. Practice, however, shows that neither in the case of a positive sentence, nor in the case of denial of refugee status, does the applicant receive any official notifications. When visiting the Federal Police Department in the dwelling area, the refugee applicant only receives a simple notification, in few lines, stating whether the claim was granted or not, with the information of which law was used to sustain the decision. The motivation as to why the decision was made in a certain way and no other, however, is kept secret.

Only applicants dealing with CONARE-based organizations, such as CARJ, CASP and IMDH, and seeking guidance, may see, if provided by these institutions, the official opinion of the Ministry of Justice concerning their case, but at no time will this applicant know the content of the Plenary meeting discussions that motivated the decision. It is key to highlight these institutions exist in very few cities, which are Rio de Janeiro, São Paulo and Brasília, and not even in these places do all refugee applicants know about such organizations and reach them for guidance in their cases. This means

[9] Refugees can, if desired, email CONARE requesting information such as the status of their case. They usually get answers without much detail. Applicants living in cities where there are representatives of civil society organizations in CONARE usually approach them for more detailed information on their process.

[10] The official eligibility interview, described in the previous topic, is carried out by an eligibility officer, an official linked to CONARE, who is responsible for conducting the interview and the official opinion, who, in turn, has the Ministry of Justice's approval. In this sense, the only opportunity in which the applicant has to say something is to the eligibility officer, who, although linked to CONARE, produces the opinion / vote of the Ministry of Justice. Thus, the refugee applicant never addresses the collegiate body as a whole directly.

that there is no standardization in the treatment of refuge applicants who have institutional access and those who do not.

It is also important to highlight that, unlike administrative proceedings in general, refugee cases are, mandatorily, confidential[11], which is justified by the fact that secrecy is essential to protecting the interested part. In fact, people persecuted in their countries of origin, often by state agents, fear that for some reason the authorities of their countries will know where they are. Practice, however, demonstrates that total and absolute secrecy does not only have the effect of protecting the applicant from being discovered by his/her country of origin, but also undermines his/her own right to full defense and contradiction, as refugees, main stakeholders in the development of their claim, have no access to the progress of the process, and as a consequence the right for refuge in itself becomes weakened.

Although lawyers representing refugee applicants, upon request, have access to official eligibility opinions, they are not even notified of interviews or when their clients' requests are in the agenda of the Plenary Meeting. Again, it should be highlighted that only a minority of refugee applicants is officially represented by lawyers. How is it possible to think about the access to legal representation, if most of the millions of refugees in the world do not have the least? The concept of "emergency", for international organizations and NGOs, generally relates to other situations. Even in regions where the refugee status is also developed by eligibility, such as the European Union, there always are urgencies conceived as more serious to engage with.

In fact, the right to representation by a lawyer, or even access to defense, in general, has never been the main agenda, or even subsidiary of organizations belonging to the institutional universe of the refugee, a term coined by Angela Facundo (2014). Refugee status itself has not even been

[11] As provided for in Article 20 of Law No. 9,474 / 97.

treated by the code of rights, but by the code of solidarity, of kindness, by most of the institutions involved (De Lucas, 2018, p. 173)[12].

In Brazil, this is not very different either. As mentioned, although there are rules that, when taken together, in theory allow a wide range of procedural rights to claimants, the main institution involved in the topic[13] never raised as their agenda the right to broad defense, even in periods with low numbers of applicants[14]. The silence of the Refugee Law, in this point, may be seen as convenient in order to make the applicant something below a subject of rights, extremely weakened in his / her own case. This relevant gap, hence, corroborates the development of the refugee world in Brazil, ever further distant from the scope of rights and closer to the humanitarian ambit.

Thus, the applicant becomes more dependent on the institutions involved, which, in turn, maintain their power status as holders of information and political influence. As a result, the applicant ends up having little to say about his/her own claim. The very interview for eligibility, one of the main moments when the interested part is hear[15], similarly to an instruction audience, since, generally, the narrative is the only proof element gathered. There are cases in which a more thoroughly detailed analysis is done regarding the reasons for the refugee application by the interested part. Even more rare cases include the possibility for the

[12] De Lucas (2018) even mentions how, in the Italian Mediterranean region, many "non-docile" NGOs, that is, that do not address the issue of refuge under the code of kindness, were considered accomplices of immigrant smuggler networks, even leading to that the Italian government sign a code of conduct for NGOs operating in the Mediterranean to be signed by them. Among those who have not signed is Doctors Without Borders, for example.

[13] All CONARE members, whether voting or observing members.

[14] The Federal Public Defender's Office (DPU) itself was only admitted, as an advisory member of CONARE, in 2012 and has since participated in Prior Study Group (GEP) meetings and Plenary meetings, commenting on all cases, regardless of whether they accompany them individually or not. On the other hand, there are memories of the presence of very few advocates of refuge applicants at such meetings, and only one refugee (i.e. no longer applying) spoke at a plenary meeting, Charly Kongo, Congolese, in 2014. It should be noted that even the presence of the DPU was guaranteed only after the result of a Public Civil Action (n. 00111220420124036100 6 SP) brought against CONARE that same year, to guarantee, among other things, access to the Plenary meetings and the GEP (DPU, 2018).

[15] Note that when filling out the form, the applicant should also write what is being asked.

applicant to speak toward the committee members in a Plenary meeting, for example. And, as Fassin (2012, p. 111) states, "[...] the asylum seekers' word no longer constitutes sufficient evidence [...]". Furthermore, also as shown by the anthropologist, the humanitarian ambit disputes the value of testimony. In other words, an important part of humanitarian action is the testimony of certain organizations which consider themselves spokespersons for refugees and refugee applicants. Thus,

> In the contemporary era, the prolixity of humanitarian workers thus stands against the silence of survivors. The voice of the former is substituted for the voice of the latter. Or to be more precise, wherever victims of violence and injustice are seen as deprived of the power of expressing themselves, humanitarian organizations speak in their place: they have established themselves as spokespeople for the voiceless (Fassin, 2012, p. 206-207, highlighted for the purpose of this article).

Perhaps this is the reason why the main humanitarian organizations do not dispute the issue of access to broad defense, after all, they have been posing as the voice of refugee applicants in CONARE, which gives them political power and interference, either toward the government or international organizations, or the very refugee community[16]. As subjects (or something inferior to that) who are constantly mediated, whose speech is never really of their own, not even in the context of being officially interviewed, as analyzes Fassin (2012, p. 147), "rather than true stories, refugees need effective narratives". These, however, are built through dynamics which involve several persons but the refugee applicant him / herself.

Defending oneself, therefore, is very difficult for the refugee applicant. In contrast to the legal norms, which together can be considered world examples of regulation of the matter, the Refugee Law itself silences in very relevant points in a convenient and effective way in order to make the applicant invisible. Kafka's dystopia thus materializes in the norms of eligibility for refugee status. A process without defense or defender, where the content of the decision is unknown and the interested party speaks, sees and hears almost none of it.

[16] We include both refuge applicants and recognized refugees here.

4 THE DYSTOPIAN UNIVERSE OF ELIGIBILITY

> The verdict does not come suddenly, proceedings continue until a verdict is reached gradually (Kafka, 2007, p. 252).

The novel *The Trial* starts when Josef K., or just K., as he is usually referred to, sees himself sentenced in his own house, for a supposed complaint made against him – even if he does not know who made it, nor what he was accused of. As the plots moves further, the reader accompanies the many attempts of K. to get to know the reasons for having been accused, to see the complaint, to understand the bureaucracy of proceedings, of his case specifically, his court, and try to defend himself, unsuccessfully. In this context, there is a "dynamics of *objectification* of humanity" (Acosta; Castanha, 2017, p. 449), which reveals a "a dispassionate bias of the law, as it promotes itself as a mere automated instrument of social control, self-referenced and totally devoid of any concern for the individual who has had the misfortune to be prosecuted" (Acosta; Castanha, 2017, p. 449).

We argue that this dystopian world, written by Kafka, especially his fictional judiciary, can be used as a reference point for drawing relevant parallels with the process of determining refugee status or, as we call it, the process of eligibility – especially regarding the Brazilian case.

First of all, the fact is that K. does not know the content of his accusation and does not even know the nature of the process, that is, whether it is criminal or civil and, in the face of ignorance, needs to defend himself from everyone and everything in every possible manner. As for the eligibility process, in turn, there is no actual prosecution given the sui generis nature of the procedure. Nevertheless, there is an instructional moment, that is, the evidence-gathering step in order to demonstrate the truth, which, as we seek to find out, is the result of many previous variables, during and after the eligibility process, which almost never involve the life story of the person concerned. Thus, the applicant for refugee status, even though not actually charged, has, in practice, the very questioning of truth against him. In other words, in eligibility cases, the truth becomes a relevant issue when the stakeholders become suspects (Fassin, 2013), that

is, the accusation against which applicants for refugee status must defend themselves is that they are not telling the truth and that they are impostors.

However, how to know the expected truth if the refugee applicant does not have access to the decisions of peer's cases? How to be part of the construction of truth, if the narrative of the interested person is not part of the construction of truth or has little value? How to dimension the possible decision if it is not possible to see the judges? And without knowing the true narrative(s), how does the interested person defend his own account? How would it be possible to build an effective narrative?

The narrator of *The Trial* introduces K. in a similar situation, when he decides to defend his case by himself:

> Needless to say, the documents would mean an almost endless amount of work. It was easy to come to the belief, not only for those of an anxious disposition, that it was impossible ever to finish it. This was not because of laziness or deceit, [...] but because he did not know what the charge was or even what consequences it might bring, so that he had to remember every tiny action and event from the whole of his life, looking at them from all sides and checking and reconsidering them (Kafka, 2007, p. 152).

Not knowing what the expected truth is, the refugee applicant is in uncharted waters. In order to elaborate the narrative and attempt to overcome the whole disbelief directed to him / her, the applicant must recall every single details of his / her life, ignorant of which should be emphasized and which should be avoided – expecting it will be enough to reach the positive result at the end of the process. As with K., when the applicant is finally interviewed and thus finally gets to face a real person who is responsible for the case, there is the feeling that his / her destiny is already decided and scrutinized. Making considerations about it, the narrator of the novel says that, even if it was K.'s first time having a direct conversation to the responsible people for his case, these people seemed to know him already and, about that, thinks: "it had been so nice first to introduce yourself and only then for people to know who you were" (Kafka, 2007, p. 251). As for the eligibility process, when the applicant first sees the responsible personnel for his her case, he/she is already known and his/her narrative had already been analyzed from the forms and, possibly,

contrasted to what is known regarding the political situation of the country of origin – and yet, however, the applicant still does not know what is considered as truth and proof, to which he/she is submitted and known for, unconsciously.

Secondly, it should be noted that, in the fictional judgment of the case in *The trial*, the case file is secret, as is the case of the eligibility process and, consequently,

> [...] the accused and his defence don't have access even to the court records, and especially not to the indictment, and that means we generally don't know or at least not precisely what the first documents need to be about, which means that if they do contain anything of relevance to the case it's only by a lucky coincidence. [...] Conditions like this, of course, place the defence in a very unfavourable and difficult position. But that is what they intend. In fact, defence is not really allowed under the law, it's only tolerated. [...]But even treating the lawyers in this way has its reasons. They want, as far as possible, to prevent any kind of defence, everything should be made the responsibility of the accused. (Kafka, 2007, p. 135-137)

As thoroughly analyzed in the previous chapter, Refugee Law is conveniently silent regarding several aspects which, by coincidence, make the applicant's defense, if not impossible, severely difficult. Can the applicant have a lawyer? If so, dos the attorney have permission to access the court documents regarding the process? How? Are there limitations? Indeed, as in K.'s situation, the defense of the refugee applicant, if any, is in a very disadvantageous and difficult situation. Like the interested person, the defender does not usually have access to the Plenary Meetings, to even to argue, nor to be aware of the terms of the sentence. Could we consider this the moment of Kafka's trial when " [...] the trial [...] entered a stage where no more help can be given, where it's being processed in courts to which no-one has any access [...]" (Kafka, 2007, p. 146)?

Moreover, without knowing how other similar cases had been tried, it is hardly known what to argue in a petition. The fact is that, in the process of eligibility, although defense is mandatorily allowed, its terms are not precisely stated in the special law, so the difficulties are so great to have access to information, to the making of "petitions", to interviews, to reports of relevant meetings, etc., that practice leads us to conclude that defense is

only tolerated within the framework of refugee law, and ultimately they intend to exclude the possibility of its existence – as with K.

As seen, eligibility in Brazil is a quasi-judicial act that is part of a legal and also humanitarian order and has an institutional universe already established since its origin. In this sense, these advocacy organizations, especially attorneys, must respond to a spectrum of the process that was never materially present — neither in law nor in practice, but always and only as a distant possibility. As non-existent, these institutions used to react among themselves and acquired their own definitions due to space, position and power dispute. When facing the pressure of defense, there is a new territory, to which limits were not yet traced – regarding these institutions involved.

How to react to the unknown? The narrator of the novel concludes that, given the trial, K. must conform to the existing conditions, since,

> [...]Even if it were possible to improve any detail [...] the best that they could achieve, although doing themselves incalculable harm in the process, is that they will have attracted the special attention of the officials for any case that comes up in the future, and the officials are always ready to seek revenge. Never attract attention to yourself! Stay calm, however much it goes against your character! Try to gain some insight t into the size of the court organism and how, to some extent, it remains in a state of suspension, and that even if you alter something in one place you'll draw the ground out from under your feet and might fall, whereas if an enormous organism like the court is disrupted in any one place it finds it easy to provide a substitute for itself somewhere else. Everything is connected with everything else and will continue without any change or else, which is quite probable, even more closed, more attentive, more strict, more malevolent (Kafka, 2007, p. 143-144).

Faced with the very feasible possibility that, in the face of tensioning, the established system will counteract to contain the disturbance to the anti-status quo and may become even more closed, attentive and severe, many organisms prefer to avoid this, they prefer not to resort to the right of defense or even seek to suppress it. In other words, to prevent the disappearance of the right of refugees, the right of defense is made inviable. In the end, the refugee applicant is only a lesser subject of rights, given the

inability to access the full range of rights established in the FC and in ordinary laws to Brazilians and residents.

The paths taken by the asylum seeker, as well as K.'s, are full of doubts about the functioning of the strange and unknown institutional bureaucracy – where are the organs, who they are, who they judge, what the meaning of every step he has access to is — and the mysteries about what he / she is entitled to: A lawyer? Making a petition? Accessing decision instances? Unaware of the content of his accusation, K. is unable to defend himself, as well as the applicant for refugee status, who is not even aware of the content of the decision, against which he / she blindly appeals. The dystopian / Kafkaesque content of the eligibility process is present in the absence of the law and in the shortcomings of the practice, which contribute to this supposedly simple administrative process to be complex, mysterious, hierarchical, authoritarian and of the order of exception. As with K., everything becomes doubt and blame in a process in which unanswered questioning, widespread confusion, and disbelief prevail over the possibility of misuse of the refugee status.

How can the supposed defense accomplish to argue against the scenario posed by such eligibility process? When K. discovers that a painter with knowledge about the court could help him, he asks about the possibility of his assistance in the trial:

> "How do you intend to do that?" asked K. "You did say yourself not long ago that it's quite impossible to go to the court with reasons and proofs." "Only impossible for reasons and proofs you take to the court yourself" [...] "It goes differently if you try to do something behind the public court, that's to say in the consultation rooms, in the corridors or here, for instance, in my studio" (Kafka, 2007, p. 180).

The possibility of defending the refugee applicant is, as in K.'s story, largely restricted to the presence of a lawyer in interview rooms, the availability of dialog with the officers in corridors or other informal spaces of interaction, but prevented from acting in the official places where the case is being tried and therefore unable not only to offer evidence before the multi-ministerial decision-making committee, but also to understand the debate and the support of the arguments. Given this, the possibilities of counterargument in the official decision-making spaces by the applicant's

defense are restricted, as well as the chances of making a well-founded appeal, in the face of case rejection. The narrator of *The Trial* seems to reveal that – even close to the tragic but absurd ending – doubts persisted in K. about his trial and judgment:

> Were there objections that had been forgotten? There must have been some. The logic cannot be refuted, but someone who wants to live will not resist it (Kafka, 2007, p. 271).

5 CONCLUSIONS

By making an extremely symbolic question, Josef K. inquires whether he could "constitute the entire congregation?" (Kafka, 2016, p. 248). It is thus, with such questioning in mind, that we move to the conclusion of this article. Could the refugee applicant, who navigates the complexities of the Brazilian eligibility system, represent a wider community of people subject to regulation by a complex network of bureaucracies and institutional persons? Although refugee status determination processes were not foreseen by international refugee frameworks, such as the 1951 Convention and the 1967 Protocol, and each country is bounded by it, we began writing with reference to a broader system of population regulation. As we seek to demonstrate through the explicitness of the credibility analysis, there are ongoing inquisitive truth-seeking and proof practices that consider the asylum seeker with a police-like perspective of eternal suspicion. If Europe emerges, in this context, as an exemplary case of the hardening of migratory measures that also fall on the refugees, Brazil does not appear as a model of justice when faced with the dystopias of its eligibility processes.

The comparative proposal between the refugee status by eligibility in Brazil and the dystopia portrayed by Franz Kafka's novel was not developed in order to formulate alternatives for legalizing the eligibility for applicant cases. It is not our intention here to propose mechanisms that make the request for refuge a purely legal matter, without regard to its allocation in the humanitarian field. What we intend to demonstrate in these pages is more closely related to an attempt to critically analyzing the operation of

the Brazilian refugee system and what we consider to be obstacles to the applicant's defense and their own performance as agents, rather than mere spectators, of their own cases. We are concerned, as the readers of Kafka's novel might, about the excesses of a bureaucracy that never allows the subjects on whom it falls to confront the absurdities of a reality deeply marked by the regulation of things and populations. While it seems an exaggeration for some to approach the process of refugee status for eligibility in the comparative light of an accusatory process that is never formally filed and about which the accused can never obtain information, it seems to us significant that we find so many parallels between them.

The argument that the eligibility process is merely an administrative procedure – and therefore not a trial with defendants and judges – seems to be far from a keen understanding of the violent character of constant inquisition to which the applicant is subjected. The key practice in this process, which is credibility analysis, necessarily involves a subjective assessment of the truth concerning what is told by refugee applicants. The aim seems to be uncovering contradictions and inconsistencies, to gather evidence, to demand linear and cohesive reports from the memory of the trauma, to separate the "authentic" refugee from the "impostor" immigrant. Until proven refugee, every applicant is considered a suspect. Like police investigation proceedings, every applicant is treated from the perspective of suspicion of attempted misuse or abuse of the sacred status of the refugee. The origins of their fear, the truth of their personal information, the plausibility of their report, and the expression of their emotions are scrutinized – as, in short, their whole life.

6 REFERENCES

ACOSTA, Daniel; CASTANHA, Ruth. Direito, justiça e mito: uma leitura a partir de "O processo", de F. Kakfa. *Anamorphosis - Revista Internacional de Direito e Literatura,* Porto Alegre, v. 3, n. 2, p. 437-464, 2017.doi: http://dx.doi.org/10.21119/anamps.32.437-464.

ALEXANDER, Michael. Refugee Status Determination Conducted by UNCHR. *International Journal of Refugee Law*, Oxford, v.11, n.2, p. 251-289, 1999.

UNHCR – United Nations High Commission for Beyond Proof. Credibility Assessment in EU Asylum Systems. Genebra: ACNUR, 2013. Available at: http://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html. Access: 14 June 2017.

BOHMER, Carol; SHUMAN, Amy. Producing epistemologies of ignorance in the political asylum application process. *Identities*, Londres, v. 14, n.5, p. 603-629, 2007.

BRASIL. Constituição Federal de 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Access: 21 Oct. 2018.

BRASIL. Lei nº 9.474 de 22 de julho de 1997. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9474.htm. Access: 21 Oct. 2018.

BRASIL. Lei nº 9.784 de 29 de janeiro de 1999. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9784.htm. Access: 21 Oct. 2018.

CAMERON, Hilary Evans. Refugee Status Determination and the Limits of Memory. *International Journal of Refugee Law*, Oxford, v. 22, n. 4, p. 469-511, 2010.

CAMPBELL, D. *Writing Security*: United States Foreign Policy and the Politics of Identity. Minneapolis: University of Minnesota Press, 1992.

COMISSÃO EUROPEIA. EU-Turkey Statement: Questions and Answers. Available at: http://europa.eu/rapid/press-release_MEMO-16-963_en.htm. Access: 21 Oct. 2018.

DE LUCAS, Javier. Refugiados: um test de lanecropolitica. *In*: CONTARINI, Eugenia C. (org.). *Protección Internacional de Personas Refugiadas*. Buenos Aires: Departamento de Publicaciones UBA, 2018.p. 163-180.

DPU. Notícias: Brasília, 19/12/2012. Available at: http://www.dpu.def.br/legislacao/leis?id=10134:dpu-participa-pela-primeira-vez-de-reuniao-plenaria-do-conare&catid=79. Access: 21 Oct. 2018.

FACUNDO, Angela. *Êxodos e refúgios*: *colombianos refugiados no sul e sudeste do Brasil*. Tese (Doutorado em Antropologia) - Universidade Federal do Rio de Janeiro, Museu Nacional, Rio de Janeiro, 2014. 388f.

FASSIN, Didier. Humanitarianism as a Politics of Life. *Public Culture*, Durham, v. 19, n. 3, p. 499-520, 2007.

FASSIN, Didier. The Precarious Truth of Asylum. *Public Culture,* Durham, v. 25, n. 1, p. 39-63, 2013.

FASSIN, Didier. *Humanitarian Reason:* a moral history of the present. Los Angeles: University of California Press, 2012.

GORLICK, Brian. Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status. *New Issues in Refugee Research*, Working Paper, n. 68, p. 1-17, 2002.

GRAHAM, Mark. Emotional Bureaucracies: Emotions, Civil Servants, and Immigrants in the Swedish Welfare State. *American Anthropological Association*, Arlington, v. 30, n. 3, p. 199-226, 2002.

HHC - Hungarian Helsinki Committee *Credibility Assessment in Asylum Procedures*. Budapeste: Hulgarian Helsinki Committee, 2013. Available at: http://www.helsinki.hu/en/credibility-assessment-in-asylum-procedures-a-multidisciplinary-training-manual/. Access: 18 June 2017.

HUYSMANS, J.; NOGUEIRA, J. P. Ten Years of IPS: Fracturing IR. *International Political Sociology*, Oxford, v. 10, n. 4, p. 299-319, 2016.

JUBANY, O. Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within. *International Sociology*, Londres, v. 26, n. 1, p. 74-94, 2011.

JUBANY, O. *Screening Asylum in a Culture of Disbelief*. Truths, Denials and Skeptical Borders. Switzerland: Palgrave Macmillan, 2017.

JUBILUT, Liliana Lyra. *Direito internacional dos refugiados e sua aplicação no ordenamento jurídico brasileiro*. São Paulo: Método, 2007.

KAFKA, Franz. *The Trial*. Translated by David Wyllie. United States: Echo Library, 2007.

KAGAN, Michael. Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination. *Scholarly Works*. Paper 633, 2003. Available at: http://scholars.law.unlv.edu/facpub/633/. Access: 25 June 2017.

KAGAN, Michael. The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination. *Scholarly Works*. Paper 636, 2006. Available at: http://scholars.law.unlv.edu/facpub/636/. Access: 25 June 2017.

LARNER, W.; WALTERS, W. *Global Governmentality*: governing international spaces. Londres: Routledge, 2004.

MAGALHÃES, Bruno. *Enacting Refugees: An Ethnography of Asylum Decisions*. Tese (Doutorado em Relações Internacionais) -The Open University, Londres, 2014. 220f.

MAGALHÃES, Bruno. The Politics of Credibility: Assembling Decisions on Asylum Applications in Brazil. *International Political Sociology*, Oxford, v. 10, p. 133-149, 2016.

ROJAS, Cristina. Contesting the Colonial Logics of the International: Toward a Relational Politics of the Pluriverse. *International Political Sociology*, Oxford, v. 10, n. 4, p. 369-382, 2016.

ROUSSEAU, C. *et.al.* The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board. *Journal of Refugee Studies*, Oxford, v. 15, n.1, p. 43-70, 2002.

SALTSMAN, Adam. Beyond the Law: Power, Discretion and Bureaucracy in the Management of Asylum Space in Thailand. *Journal of Refugee Studies*, Oxford, v. 27, n. 3, p. 457-476, 2014.

SOUTER, James. A Culture of Disbelief or Denial? *Oxford Monitor of Forced Migration*, Oxford, v. 1, n. 1, p. 48-59, 2011.

SWEENEY, James A. Credibility, Proof and Refugee Law. *International Journal of Refugee Law*, v. 21, n. 4, p. 700-726, 2009.

WESTON, Amanda. A Witness of Truth: Credibility Findings in Asylum Appeals. *Immigration& Nationality Law & Practice*, v. 12, n. 3, p. 87-89, 1998.

ZETTER, Roger. More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization. *Journal of Refugee Studies*, Oxford, v. 20, n. 2, p. 172-192, 2007.

Original language: Portuguese
Received: 04 Nov. 2018
Accepted: 28 Mar. 2019