

Leder

Introduction

Justice of Others: Arbitrary Law-making in Contemporary Migration Policy

Patricia Mindus

Does the regulation of migration constitute a blatant case of arbitrary law-making? What is arbitrary law-making? And how does it manifest itself in contemporary migration policy? These are pressing issues that the scholars who come together in this special issue seek to engage with, by exploring international migration from the point of view of arbitrary power. When does legitimate state discretion slide into an exercise of arbitrary power? Since we cannot address what we do not understand, the urgency of the matter addressed in this special issue speaks for itself.

Deciding who may enjoy the right of abode, the right to remain, the right to asylum and to citizenship is a key power of the state: it is a regal prerogative, an act of sovereignty, limited only by deliberately accepted commitments, such as the respect for human rights. This makes migration policy an exceptionally interesting ground to test the limits of discretion and the forms of arbitrariness. Power can be understood to be of a discretionary nature if it acts freely within the boundaries defined by law, whereas arbitrariness qualifies discretionary power exceeding the limits of law.

The special issue is conversant both with the details of the legal frameworks and the theories involved, in contrast to much of the literature on migration in the social and economic sciences of a more general character. As of today, little or no conversation has arisen across the domain of practical philosophy – ethics, political theory, social philosophy or philosophy of law – on arbitrary law-making generally. We believe migration law is a policy area that would be interesting to focus on because of the recurrent use of discretionary practices in migration law and because of the ethical issues raised by practices conceived to be arbitrary. Arbitrary law-making has yet to garner the attention it deserves as a key concern in relation to migration law. Arbitrariness is thus not only under-theorised but also lacks sufficient empirical analysis.

The special issue covers both fronts by presenting a conceptual analysis of arbitrary law-making that sets out to typify its various meanings, along an empirical account of its actual functioning in legal and political practice. As arbitrariness becomes a pressing concern for lawyers, politicians and scholars attempting to grasp the discretionary powers of judicial and administrative authorities vis-a-vis legal subjects, its social impact as well as its political consequences must be taken into consideration in order to fully comprehend how central arbitrariness has become for a philosophical and a sociological account of law-making. Migration policy is precisely where arbitrariness vividly shows its face, and where its various

forms unleash their most revealing implications. It is in this field that we must dig further if we want to know how this hitherto peripheral and surrogated dimension of legal decision-making stretches the leeway of legal officials to the very margin of legality, disclosing the social tension and the power struggle between their agency and the structures that condition and enable it.

The special issue – entitled “Justice of Others: Arbitrary Law-making in Contemporary Migration Policy” – therefore brings scholars, both junior and senior, from a broad range of disciplines into conversation over migration policy and migration law. This interdisciplinary approach is called for: on this topic narrow research agendas, often blind to what is going on in methodologically diverse yet substantially contiguous fields of inquiry, still dominate. This is an attempt to overcome this limitation of the state of the art. The first steps towards this special issue were taken at a U4 conference at the University of Uppsala a few years ago and the issue been brought to completion largely thanks to funding generously offered by the Knut & Alice Wallenberg Foundation (grant KAW 2014.0133).

In general, the internal organisation of this special issue follows the format of an increased granularity: as your reading moves along, the articles go from the theoretically focused more general aspects to investigating the more specific and concrete manifestations of arbitrary law-making in contemporary migration policy.

Patricia Mindus (professor in practical philosophy, Uppsala University, Sweden) starts off with an article that purports to establish a move ‘Towards a Theory of Arbitrary Law-making in Migration Policy’ and which serves as a thematic introduction to the topic of arbitrary law-making. The article considers what arbitrary law-making is and what may count as arbitrary law-making in the field of migration policy. It contributes to the discussion of arbitrary law-making in relation to migration policy in two ways. First, it offers an analysis of arbitrariness, points out that rhetorical definitions of the term abound – perhaps unsurprisingly given that migration is a highly-contested policy area – and argues for why transposing a conception developed in ethical theory to the law has high theoretical costs; an alternative conception is described and found to be better equipped to deal with arbitrary law-making in migration policy. It is argued that if we want to understand how arbitrariness plays out in the field of migration law – which is necessary to find ways to hinder its spread by the adoption of specific law-making practices – we first need to distinguish arbitrariness from legitimate choices of legislators. Secondly, a typology of forms of arbitrariness is fleshed out in relation to contemporary migration policy. The policy area is here broadly construed to include not only naturalisation processes, but also migration, asylum and refugee policies and more generally border control. The examples are taken from a broad selection of countries. They have been chosen for illustrative purposes only. A key point of the article is to explore the meaning of arbitrariness as applied to an authority, illustrating embodiments of the different meanings of the term to be found in contemporary citizenship and migration policies. The conceptual unpacking of arbitrariness that it undertakes clears the ground for a proper conceptual understanding of arbitrary law-making, but also for a comprehensive knowledge of how it functions in legal practice and political reality. The paper thus enables a differentiation among types of arbitrariness that can either constitute forms of illegal practices, irrational policies or discriminatory statuses.

Differentiation is paramount to developing ways of reducing the arbitrary rule of public officials in migration and citizenship policies, which makes this article an essential preliminary conceptualisation of the key problematic of this special issue.

We then go *in medias res*. A longstanding critical voice in migration ethics, Phil Cole (Senior Lecturer in Politics and International Relations at UWE Bristol, UK) contributes with the article entitled 'Framing the Refugee' and looks at the power of representation of liberal political theory with regard to refugees. In his view, legal and political arbitrariness lie in representing refugees as lacking agency. His key point is that liberalism fails to conceive of refugees as politically capable actors and is hence complicit in the arbitrary neutralisation of their emancipatory potential and participatory powers. This paper emphasises the moral justifiability of that state of affairs by seeking some answers to the question as to why liberal political theory construes a concept of the refugee that does not contain any element of political agency. Most obviously, Cole acknowledges that refugees do perform a significant social role in contemporary societies and are hence active members in them. Nonetheless, they remain neglected in their *political* role by most political theory. What does it mean to have political agency for Phil Cole? It means to have the power of self-representation, that is, of being allowed and even enabled by a given legal system to bring about change in the political order, or at least to participate in that change.

But Cole also addresses the role of 'theory' in calling attention to this downside of the contemporary liberal democratic order. Theory becomes even more crucial at times of urgency, that is, times where theorists are called upon their moral responsibility to deepen their philosophical imagination as Hannah Arendt so forcefully underlined. The theoretical task of 're-framing' the Refugee entails reconfiguring political philosophy and its traditional categories of sovereignty, citizenship and nationality. The liberal inability to accommodate political agency of many members of the political community – especially of non-nationals – is a sign of the historical contingency of the current rules of political membership and makes evident the imperative of rethinking politics in ways that avoid the arbitrariness of treatment and aim instead at equality and justice. If political leaders can re-write the rules of membership to suit their own ideological agendas, the same requirement should be addressed by – indeed demanded of – political and legal theorists.

This is not, however, as easy as it seems, according to Phil Cole. In his view, political theory is confronted with fundamental challenges, the most obvious of them being that 'theory' is usually unequipped to defeat its own 'topology'. Note that in saying this Cole is raising a more pressing concern about arbitrary law-making: it may be that arbitrariness – especially the arbitrary treatment of aliens by the sovereign state and by liberal democracies in particular – is inscribed in the very DNA of liberalism. No matter how odd this may seem, Cole advances the view that ideas, however creative of a new order, or transformative of a given *status quo*, never appear in 'free form', and are instead deeply rooted in a structure that constrains our imagination. The challenge is thus to develop a meta-theory in which the very way in which marginalised sectors of society – such as the 'poor' – are framed by liberal political theory, can be re-conceptualised as a product of an international economic order that robs those sectors of their agency as the very condition of its internal functioning. We must therefore question how the very idea

of the refugee is produced, for it symbolises the construction of an inside and an outside that is complicit with the arbitrary play of legal status involved in migration policy. Cole's main point regarding this is that certain groups get sidelined by economic, political and social systems because they are already excluded from theoretical systems to start with.

The next article moves into the area of political theory and migration law. The well-known scholar on territoriality and immigrants' rights, Linda Bosniak (Distinguished Professor of Law at Rutgers, USA) contributes with an article entitled *Territorial Presence as a Ground For Claims: Some Reflections* where she returns to political theory to assess the moral and legal position of those individuals who are inside the territory of liberal democratic states, but whose very presence has not been authorised by the state. She poses the question as to what their physical presence means and does from a political perspective. The article is part of a broader political phenomenology of territoriality in liberal national thought and emphasises the idea that migrants' physical presence within the state's territory lies at the analytical heart of the conversation about irregular immigrants. What is paradoxical about the territorial presence of unauthorized migrants is that such presence is simultaneously (1) the source of the offence that states invoke as a justification for making them 'illegal'; (2) the basis for basic fair treatment protections the migrants may claim from the state while present; and (3) the ground for claims they make (or that are made on their behalf) to remain – i.e., to stay in the territory. Territorial presence is thus fertile ground for analysing arbitrary law-making in migration. Bosniak sets out to analyse some recent legal developments pertaining to the governance of irregular noncitizen immigrants in the United States. These developments bear on the project of theorising "immigrant justice" as resistance to the growing illiberalisation of migration policy. In Bosniak's view, the very existence of a class of people designated as irregular migrants within state polities presupposes that such polities maintain formal exclusionary border regimes and that in such regimes, some persons are predesignated as ineligible for entry. And even though those exclusion rules do not function to fully preclude entry and presence of such persons, states do not treat their arrival as an automatic basis for full membership either. Hence, irregular immigrants are territorially present in a state that purports to eschew that presence. She then explores how the idea of "sanctuary" relates to the kinds of claims that both liberal humanitarians and immigrant justice advocates have been making over the last few years. These are claims which ground protection in what exponents cite as the overriding ethical significance of immigrants' territorial presence – their *already-hereness* – as the basis for recognition and rights. In particular, Bosniak makes the convincing case that even though "sanctuary" provides a logic of safe harbour, it fails to end the predicament of constitutive exclusionism based on borders, and thus it fails to end the predicament of inequality of treatment that these immigrants have actually inherited. For her, the political, social, but also philosophical, struggle for the idea of border abolitionism, she maintains, requires a figurative sword that must go beyond sanctuary so that borders are not just mitigated, but radically deconstructed and even destroyed. She takes this to be the vital imperative that confronts all legal and political theorists who must engage the normative challenge of rethinking arbitrary law-making in view of the new inequalities that a global political order grounded on sovereign borders produces.

The critical tonality is pursued also in the next article, albeit with a focus on legal theory and some aspects of it that are connected to the institutionalist theory of law, an important continental 20th century legacy, that is seldom highlighted in relation to contemporary dividing issues such as migration. Conversant with both philosophy of law and migration law, Enrica Rigo (associate professor in legal and social theory at the Department of Law, University of Roma Tre, Italy) contributes with an article on *Arbitrary Law Making and Unorderable Subjectivities in Legal Theoretical Approaches to Migration*. She considers the changes that have affected European border regimes of migration control as a test case for discussing arbitrariness. Her argument highlights the limited capacity of notions of arbitrariness – defined as a departure from the rule of law – to capture the ongoing conflict at the borders of Europe and instead brings the ambivalent meaning of arbitrariness to the fore. By comparing Santi Romano's classical theory of legal pluralism with recent analyses of legal globalisation processes, she is able to show how arbitrariness emerges either as an authoritative attempt to impose a different order on society or as a means to contrast acts of resistance to border regimes. In both cases, arbitrariness forcefully blurs the limits between the ordered and unordered. By her analysis, this indicates the paradoxical impossibility of excluding what is outside the law from the legal order. On this basis, Rigo advocates for the importance of reframing the demand for open borders as an appeal to liberty by those who challenge the pragmatic order of migration regimes. Indeed, as Rigo points out, arbitrariness is necessarily limited when the legal order recognises, at least to some extent, the agency and the claims of subjectivities that resist the dichotomy between inclusion and exclusion.

The steady focus on how legal constraints are being played out in certain social settings takes us to the next article, authored by Alexis Spire (Director of research at the CNRS, France). A sociologist with a longstanding interest in inequalities, Spire refers to a very interesting ethnographic study of the visa service at the French consulate in Tunis and reflects on arbitrariness, using this first-hand experience as his starting point. He develops the thesis, grounded in sociology, that discretionary power works, as suggested by the title of his article, as a political weapon against foreigners. Spire shows how the administrative practices of officials who process the admission of immigrants show significant variability in how migration policy is enforced on the ground. For him, inequality of treatment lies in the very hierarchy of tasks and services of what he dubs, following Pierre Bourdieu, the immigration "field". This social field is profoundly unequal in that it empowers legal officials by not providing foreigners with the necessary means to resist or syndicate the arbitrariness of administrative procedures. According to Spire, this is because the governments' security priorities favour suspicion towards foreigners that the media then reinforces, thus authorising so-called street-level bureaucrats to act with great leeway toward immigrants. Under pressure, governments implement what the author calls a "trompe-l'oeil policy" that explores the ambivalence between international and domestic law: while the state enforces repressive laws that apparently comply with fundamental human rights, it leaves to low-ranking civil servants enough discretion to make those rights ineffective. This point is Spire's central contention. The arbitrariness of these officials is neither contingent nor accidental: it actually constitutes a deliberate "frontline policy" to increase the discretionary power of street-level bureaucrats in charge of regulating admissions.

Unequal treatment comes in three flavours in this context. First, officials are asked to ensure that each right granted to a foreigner will not threaten the national order, meaning the economic, social and political order. They are therefore in a position to judge the suitability of each application in view of their own arbitrary interpretation of what such a "threat" consists of. The question of discretionary power is in this way intimately linked to the problem of equality in front of the law. Second, the scarcity of material and human resources allocated to services in charge of welcoming migrants starkly contrasts with the expenditure incurred to deport foreigners. Inequality also arises from how agents perceive users and the leeway they have to implement the law. Third, inequality is related to the abilities and means foreigners have to challenge discretionary power, especially through their use of legal tools or legal intermediaries. Spire thus concludes that such "frontline policy" has increasingly been used as a weapon against migrants, especially since the early 2000s, when immigration and detention policies were generalised in France. More broadly, in Europe as well as in United States, immigration reforms have made greater use of detention and focused on enforcement rather than on hosting programmes and services for asylum seekers. But they have also strengthened the role of legal intermediaries. Hence the need to investigate how discretionary power is challenged as it sheds light on the power relationship between states and migrants.

The contribution that closes this special issue is authored by Francesca Asta (PhD, University of Roma Tre, Italy). It is entitled *Arbitrary Decision-making and the Rule of Law: The Role of the Jurisdiction in Migrants' Detention Proceedings – Between Discretion and Arbitrariness*. The starting point is that while many studies have highlighted substantial "bureaucracy domination" in procedures relating to migrants' access to territory, little attention has been devoted to the arbitrariness of judicial decisions or to the judicial role in general in the numerous proceedings that increasingly affect migrants. Asta's study focuses on the Italian case law in expulsion and detention proceedings of irregular third country national citizens and asylum seekers. In here article, she presents the results from her qualitative empirical study on decisions issued by the competent national authorities. The data was analysed based on a selection of theoretical tools, all referable to the general concept of the rule of law. The judicial decisions on pre-removal detention proceedings are examined in two case studies: the jurisprudence on detention of irregular migrants, in different offices of the Justice of the Peace in Italy; and the case law on detention of asylum seekers in the Ordinary Tribunal of Rome. The assumption underlying the research is that various conceptions of the rule of law may have different explanatory power when it comes to making sense of what is going on in the everyday practice of legal officials. Through a historical-conceptual analysis, Asta lists six theoretical models of the rule of law in the Western tradition of political and legal thought, and assesses their explanatory power against the backdrop of the data collected. Highlighting the benefits and drawbacks of each explanatory framework, she concludes that, first, the results of the two cases studies cannot be fully explained by any single model available in the literature. This fact alone casts doubts on the explanatory power that these theories may be said to have and calls for further research on judicial decision-making more generally. Secondly, concerning discretion and arbitrariness, she finds that the judicial approach which assures the highest protection of rights is also the one that is most easily influenced

by arbitrariness. She argues that this apparent paradox may be resolved with reference to the plural dimensions of arbitrariness. If we consider arbitrariness from a legal point of view, as an illegal decision, it is unsurprising that the authority that uses its discretionary power the most is also the one most likely to abuse its power. But if we consider arbitrariness from the philosophical-political point of view, as a form of domination characterised by the absence of sufficient justification, it becomes clear that self-image matters a lot in explaining the risk of falling into arbitrary choices. The authority most likely to stretch its discretionary power into the realm of arbitrariness is thus the one that also assures the highest protection of rights: this authority views its own role as the guardian of fundamental rights and of the constitutional democratic legal order. The risk of exercising its power in criticisable ways increases with the stakes of the choices the authority makes. This contrasts with an authority that views itself merely as a rubberstamp in line with the requirements of the law enforcement agencies, where the risks of arbitrariness, but also the authority's ability to protect migrant rights, are more circumscribed.

This special issue set out to achieve two objectives. First, it shows the importance of meeting across areas of expertise in discussing ethically and politically sensitive issues like migration and arbitrary power exercises. By bringing together scholars with an interest in the problematic aspects of law-making in the area of migration policy, the hope is to shed light on an area of inquiry – arbitrary law-making in migration policy – that has hitherto not received the attention it deserves and is often not addressed with the full toolkit and due methodological wealth. The special issue, in this sense, represents an interdisciplinary meeting ground. Second, we aim to contribute to the understanding of how and why arbitrary and discretionary practices in the field of migration law come into being. Some of these practices are illustrated in the following articles. Hopefully this special issue will contribute to opening up fertile research venues for applied ethics at the crossroads of social, political and legal theory.



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