

## DISCRETION AT WORK - QUALITY OF LAW-MAKING & MIGRATION POLICY

*Work on better law-making and quality of legislation has boomed over the last decade. It is often cast as a gateway to law that better lives up to its very nature of rule-making in a normatively valuable sense, where societal challenges can be meaningfully tackled and goals achieved. There is a growing literature on the quality of legislative practices in relation to an ever-expanding array of policy fields – from cybersecurity to linguistic policies – yet citizenship and migration policy has not yet been scrutinized. Our aim is to explore how arbitrariness and discretionary practices in the field of migration law are hindered, or fostered, by the adoption of specific law-making practices. We investigate what we can learn about how law-making puts discretion at work in the field of migration and citizenship policy, by bringing together those with an interest in the quality of law-making with scholars working on migration.*

## DISCRETION AT WORK - QUALITY OF LAW-MAKING & MIGRATION POLICY I: THEORIES

### PANEL ORGANISATION

PANEL #113

TUESDAY JUNE 26 2018 4.30 PM - 6.00 PM

4:30-4:50 - Introduction by **Patricia Mindus** (Uppsala), *Arbitrary Law-making: Analysis of a Contested Concept*  
Q & A

4:50-5:05 - **João Tiago Silveira and Diana Ettner** (Lisbon), *Legal Drafting Tools to Prevent Arbitrariness in Discretion*  
Q & A

5:05-5:20 - **Guilherme Marques Pedro** (Uppsala), *Preventive Entry Policies as a Violation of the Right to Leave*  
Q & A

5:20-5:35 - **Tommaso Braidà** (Uppsala), *Shadow Legislative Processes: Is Detention of Stateless Persons an Arbitrary Law-making Practice?*  
Q & A

5:35-5:50 - **Giuseppe Campesi** (Bari), *For a Social Theory of Migration Law*  
Q & A

## DISCRETION AT WORK - QUALITY OF LAW-MAKING & MIGRATION POLICY II: CASE-STUDIES

## PANEL ORGANISATION

PANEL #139

TUESDAY JUNE 26 2018 4.30 PM - 6.00 PM

4:30-4:50 – Introduction by **Mauro Zamboni** (Stockholm), *Law-making in the face of the Migration Crisis: to find the best Legislative Policy (the Swedish Case)*

Q & A

4:50-5:05 – **Rebeca Stern** (Uppsala), *'This is Very Urgent Indeed': How the 2015 'Refugee Crisis' Justified Departing from Established Processes of Law-making*

Q & A

5:05-5:20 – **Enrica Rigo** (Rome 3), *The Design of Jurisdiction in Asylum Proceedings. Reflections on the Italian Case*

Q & A

5:20-5:35 – **Tesseltje de Lange & Pedro de Sena** (Amsterdam), *Your income is too high, your income is too low: Discretion at work in labour migration law and policy in Macau and the Netherlands*

Q & A

5:35-5:50 - **Elena Prats** (Uppsala), *Does Discretion in Citizenship by Investment Programs Affect the Quality of Legislation?*

Q & A

## ABSTRACTS FOR PANEL #113

*Arbitrary Law-making: Analysis of a Contested Concept*

Patricia Mindus

Associate Professor in Legal Theory, Department of Philosophy, Uppsala University, Sweden

Arbitrariness is detrimental to the legitimacy of any rule in a deep and decisive way. Yet, it is poorly understood and underexplored. This is regrettable because we need a better and more articulate understanding of it in order to use this key notion, in particular with regard to the so-called constitutional quality of legislation. In this paper, the concept of arbitrary power is analysed on the backdrop of contemporary theories of law and politics in view of establishing a conceptual framework of greater value for the scholar interested in investigating discretion and arbitrary measures in the law today than the ones currently on offer. The point is that, by viewing citizenship and migration policies from the perspective of the rule of law, new areas and dimensions of the problem of arbitrary law-making emerge. In this paper, a typology of forms of arbitrariness is sketched out and applied specifically to the analysis of citizenship policies and border control techniques.

### ***Legal Drafting Tools to Prevent Arbitrariness in Discretion***

*João Tiago Silveira*

*Professor of Administrative Law, University of Lisbon, Portugal*

*Diana Ettner*

*Researcher at Lisbon Centre for Research in Public Law, University of Lisbon, Portugal*

Discretion comes with the possibility to choose between different legitimate solutions, involving a significant amount of power for administrative authorities. The paper discusses discretionary powers, identifying situations in which it is acceptable to grant such powers and the existing legislative drafting tools to impede discretion to turn into arbitrariness. The paper addresses three issues. First, the clarification of what shall be understood as discretion in the legal system and how to identify the existence of discretionary powers. Second, the identification of the advantages and disadvantages of discretion, in order to define possible criteria for using discretionary powers in drafting. Third, which legislative drafting tools may be used by lawmakers to grant discretionary powers: e.g. the use of “may” or “must” when referring to the powers of a deciding authority or the provision of non-exhaustive lists of situations that may determine the application of a legal provision.

### ***Shadow Legislative Processes: Is Detention of Stateless Persons an Arbitrary Law-making Practice?***

*Tommaso Braidà*

*PhD candidate in Philosophy of Law, Department of Philosophy, Uppsala University, Sweden*

ECtHR case law clarified that Article 5(1)(f) authorises lawful detention, contingent on the possibility of effectively removing the alien within a reasonable amount of time. Stateless migrants are not considered as nationals by any state: there is no prospect of removing them. They often have no way of officially being recognised as such, and are not granted the right to stay thus exposing released detainees to re-detention. Where there is no a stateless determination procedure or it is not coordinated with the removal system, EU Member States can be imputable. Administrative authorities may be responsible for applying detention to stateless persons. How well does the implementation of such legislation accomplish the aims set by the policymakers? Given that asylum and removal

procedures often do not account for statelessness, is the practice of detaining stateless persons an arbitrary law-making practice?

### ***Preventive Entry Policies as a Violation of the Right to Leave***

*Guilherme Marques Pedro*

*PhD candidate in Philosophy of Law, Department of Philosophy, Uppsala University, Sweden*

Current practices of "interception-at-sea" preempt many travellers, from irregular migrants to would-be refugees, from claiming a legal right to enter the EU. This policy often hinges upon the consent of the sending country to agree to have its waters policed by foreign maritime authorities and to accept the return of migrants provided that countries of destination are willing to fund the camps and detention centres where migrants end up after their frustrated attempt to leave. This paper asks the following questions: how does extraterritorial migration control accommodate for the EU's legal requirement to abide by quality of legislation? Are key elements of the better law making agenda neglected or hindered by such practices? In particular, do policymakers take into account the right to leave of those who are sent back? Can externalities of these 'push-back' policies be monitored? Do we face the new safe haven of arbitrary law-making and state discretion?

### ***For a social theory of migration law***

*Giuseppe Campesi*

*Associate Professor in Sociology of law, Law Department, University of Bari, Italy*

The social theory of migration has attached a marginal role to the State and the law, focusing on demographic, economic and social factors instead. Much of the literature argues that attempts to regulate or limit migratory flows fail in all major industrialised democracies (Hollifield, Martin, Orrenius 2004; Castles 2004). Others have explicitly criticised this idea: the share of international migrants is still quite low and the ability of migratory movements to escape state control is largely overestimated (Freeman 1994; Teitelbaum 2002; Zolberg 2000). There is a need to bring the state and the law back in the social theory of migration. The paper illustrates how migration law is driven by overlapping legal regimes in constant tension between themselves, following a paradox within the migratory policies of contemporary post-industrial democracies: the desire to limit migration (sovereignty) is at odds with dynamics that increase the degree of porosity of borders (market, rights).

## **ABSTRACTS FOR PANEL #139**

### ***Law-making in the Face of the Migration Crisis: To Find the Best Legislative Policy***

*Mauro Zamboni*

*Professor in Jurisprudence, Stockholm Centre for Commercial Law, Faculty of Law, Stockholm University, Sweden*

The recent Syrian crisis and the following increase in migratory fluxes have put many European welfare states under pressure. At least initially Sweden has been one of the most generous European recipient of migrants, confirming its world-image as a safe harbor for "people in need" around the globe. However, due to factors of internal and international politics, the Swedish law-makers have soon turned towards a more restrictive approach to

migration in order "to preserve the Swedish welfare state." Particularly this turn has been achieved by producing several legislative provisions enlarging the discretionary power of the public agencies. This paper will address the issue of which legislative policy model is best in order to face such crisis. By looking at the Swedish example, this paper suggests that the right model of legislative policy is the one that moves the legislative law-making process closer to the judicial system.

***'This is Very Urgent Indeed': How the 2015 'Refugee Crisis' Justified Departing From Established Processes of Law-making***

*Rebecca Thorburn Stern*

*Associate Professor of International Law, Faculty of Law, Uppsala University, Sweden*

During the 2015 'refugee crisis' Sweden adopted one of the strictest asylum policies in the EU, incl. (re)introduction of border controls and identity checks, through temporary legislation. A feeling of urgency marked the drafting process. Key elements of the law-making process were disregarded: e.g. rapidly drafted proposals with no analysis of the consequences and the proportionality of the measures suggested, extremely short deadlines for formal consultation, disregard of the comments by the Legal Council and the consultation bodies. The government argued on grounds of urgency and the temporary nature of the legislation. The policy effectively reached its goal (reduction of numbers of asylum seekers). However, there is no indication that the policy is being reversed. Are such derogations from the procedure established for the legislative process are justifiable? This paper argues that this legislation was pushed through with deliberate disregard for key qualitative elements of the legislative process, and discusses whether this development is particular to migration and asylum policy or if it can be seen as part of a more general trend.

***The Design of Jurisdiction in Asylum Proceedings. Reflections on the Italian Case***

*Enrica Rigo*

*Associate Professor in Philosophy of Law, Law Department, Roma Tre University, Italy*

Since the 1951 Convention on refugees, the right not to be returned to a country where one is at risk of prosecution is recognised as one of the few principles that international law imposes on States' discretionary power. An extensive international literature has focused on the ways in which states have tried to circumvent this obligation, through e.g. off-shore interdiction or confinement (Goodwin-Gill & McAdam), while recent socio-legal studies have underlined how practices such as the limitation to welfare access discourages asylum seekers (Morris 2014). These analyses have focused on the substantial dimension of the right to seek asylum. Less attention has been paid to the jurisdictional phase. By drawing on the analysis of a wide number of minutes of proceedings and referring to recent legislative reform in Italy, the paper compares the quality of different legislation designs on the jurisdictional control of the rights of asylum seekers and argues that judicial procedural rules are key to evaluate the quality of legislation on migration and asylum.

***Your income is too high, your income is too low: Discretion at work in labour migration law and policy in Macau and the Netherlands***

*Tesseltje de Lange*

*Senior Researcher & Assistant Professor in Administrative and Migration Law, Amsterdam Research Institute for Legal Studies (ARILS), University of Amsterdam*

*Pedro de Sena*

*Ph.D. candidate University of Amsterdam*

*Chief Legal Adviser, Macao SAR Legislative Assembly*

The tension between EU harmonisation of economic migration law and Member States' concern over their sovereignty has downplayed or neglected EU legal obligations by Member State legislators. The law-makers' design of a system granting either no or very wide discretion to the street-level bureaucrats, as is the case in the Netherlands, creates an atmosphere of fear, uncertainty and frustration amongst migrants and their sponsors alike. Interestingly, we see a similar pattern in East Asia, more specifically in Macao SAR of the People's Republic of China. Both use discretionary power to randomly set income requirements for migrant workers, claiming a salary offered might be too low or high, based on vaguely defined local labour market rates. With the Netherlands as an example of an EU Member State and liberal democracy and Macao as a very specific example falling under Chinese sovereignty but with the authority to design its own migration policy this contribution provides unique comparative data on law-making practices and discretion at work in the field of labour migration policy.

***Does Discretion in Citizenship by Investment Programs Affect the Quality of Legislation?***

*Elena Prats*

*PhD candidate in Philosophy of Law, Department of Philosophy, Uppsala University, Sweden*

Citizenship by investment programs (CIPs) – granting citizenship on grounds of economic transactions – have been catching the attention of scholars during the last decade. Most agree that CIPs represent a form of selling citizenship. The introduction of the Maltese program, which grants not only national but also European citizenship, represented a turning point. Although the Maltese program has been the most controversial, it is neither the first nor the only one in Europe. The rise of CIPs around the world has aroused serious concerns among scholars: CIPs are said to corrupt democracy, increase inequality and undermine the concept of citizenship. Yet, no attempts have been made to investigate if the discretion in such programs affects the quality of legislation. This paper presents the current CIPs in the EU; charts discretion in the legislation establishing the programs; and explores how it affects the quality of the legislation.