

The Ethics of Migration Policy Dilemmas

Why Justice Provides Better Reasons for Legalisation Than the Rule of Law: A Response to Song and Bloemraad (2022)

Andrea Sangiovanni

Andrea Sangiovanni is Professor of Philosophy at King's College London. His forthcoming book, Solidarity: Nature, Grounds, and Value (Manchester University Press) is due out in 2023.

In their persuasive and closely reasoned article, Song and Bloemraad (2022) argue that rule of law considerations enhance, rather than detract from, the case for legalising the status of unauthorised migrants who have lived for a substantial period of time in the host country. While they focus on the US, their arguments have much wider applicability. I agree with Song and Bloemraad's conclusions, and I find the argument compelling (though with some reservations that I will register below). In this short response, I query the rule of law rationale for legalisation. Rule of law considerations, I will argue, cut both ways: while they may (in a narrower range of cases) be used to defend legalisation, they can also be used more effectively against it. My conclusion will be that the rule of law is an unstable basis for defending the rights of unauthorised migrants to permanent residence. Justice considerations are more compelling.

I.

Song and Bloemraad begin with the assumption that states have a presumptive (but qualified) right to exclude would-be immigrants and also a concomitant (presumptive) right to remove those who enter without authorisation. I will also assume the same. Song and Bloemraad also assume that there are often strong justice-based considerations that outweigh these rights, especially when unauthorised immigrants have resided for a substantial period of time in the host state. As unauthorised migrants' contributions to the host state grow (through, for example work, care, and participation), as the strength of their social ties deepens, and as their vulnerability to exploitation and domination expands, their presumptive (moral) rights to legal residence and protection grow more stringent and weighty. These justice-based considerations are more than enough, it strikes me, both to justify legalisations in general and to sustain Song and Bloemraad's persuasive defence of a 'statute of limitations' for immigration rights violations (see, in particular, Song and Bloemraad 2022, 26-27; 35).

But, for the purposes of their article, Song and Bloemraad want to go further. They claim that a key argument often used against legalisations, namely that they undermine the rule of law, can actually be used in their support. Their argument has two parts. The first is defensive: rule of law arguments against legalisation don't work on their own terms. The second is offensive: rule of law considerations can be used to support legalisations. I will address each in turn.

II.

Perhaps the most prominent rule of law argument against legalisations is that they create a powerful incentive for growing numbers of would-be migrants to enter illegally in the future. The criticism depends entirely on empirical premises, which Song and Bloemraad rebut. I leave this argument aside.

The second rule of law argument is that legalisations enable 'queue-jumping'. Through legalisation, rule-breakers immediately acquire a right to remain that those who have been following the rules may have to wait years to acquire (if they ever do). Song and Bloemraad's first response is that, in fact, "amnesty programs are usually enacted as special provisions outside the caps or numerical quotas of regular immigration law. Thus, those waiting in other lines (e.g. admitted based on family ties or chosen for humanitarian considerations) experience no measurable harm" (Song and Bloemraad 2022, 19). Second, the rule-breakers are most often less skilled workers with no family—a category that is not normally granted access in any case; therefore, rule-breakers and rule-followers do not, so to speak, belong to the same queue.

The argument doesn't strike me as a convincing rebuttal to the claim that legalisations enact a form of queue-jumping. Imagine you are standing in a long queue to enter a concert. You have been waiting a long time. You learn of others who have snuck in over a fence, and who have not been turned away by ushers and staff. The unfairness remains whether or not (a) you have been harmed by the queue-jumping (let us suppose that your entry will not take any longer as a result of the 'legalised' rule-breaking entry of the others, or otherwise diminish your likelihood of getting in), or (b) the rule-breakers had a ticket in the first place (i.e., whether they could have gotten in by standing in the same queue with you). As a normative objection, queue-jumping is a form of unfairness (and so a violation of the rule of law's impartiality condition). And, as a form of unfairness, it does not require harm or displacement to be objectionable (on fair play and harm, see e.g., [Simmons 2001, 30](#)).

The third rule of law argument is that legalisation rewards law-breaking. Song and Bloemraad respond by citing survey data showing that publics are generally supportive of legal paths to citizenship for unauthorised migrants. Second, they argue that unauthorised migrants themselves distinguish noncompliance with immigration law from "noncompliance with laws prohibiting behavior that is self-evidently harmful or criminal, such as murder and theft" (Song and Bloemraad 2022, 22).

I am not sure I follow how these facts (assuming they are facts) constitute a response to the rule of law objector. What the rule of law objector doesn't like about legalisations is that they are an inappropriate response to law-breaking (see e.g., [Kobach 2008](#)). If one cares about respect and compliance for the law, they argue, then one shouldn't let rule-

breakers ‘get away with it.’ One should, rather, increase the effectiveness of enforcement and deterrence measures (even, one might add, if such enforcement or deterrence isn’t very effective—symbolically, the rule of law at least requires that we try). This is why the lawyer and Kansas Republican Kris Kobach advocates funding the exchange of information between immigration enforcement and police; restricting the access of unauthorised migrants to social services, public education, and healthcare; and aiding Trump to build a ‘wall’ between Mexico and the US ([Kobach 2008](#); [Wikipedia 2022](#)). It isn’t clear to me how citing survey data addresses this essentially normative argument.¹ Justice-based considerations seem sufficient to rebut such draconian, discriminatory, and extreme measures.

III.

Song and Bloemraad adduce five positive rule-of-law arguments for legalisations.

The first is that legalisation “counteract[s] the unpredictable and inconsistent patterns of discretionary enforcement” of the current US system by removing discretion in toto ([Song and Bloemraad 2022, 24-25](#)). Those who receive amnesty acquire a legal right to reside (barring special circumstances) no matter what their social connections to members of the host state are, independently of their possession of particular skills, and without considering whether they suffer ‘undue hardship.’ Without legalisation, the current US system, on the other hand, requires particular proof that one or more of these conditions applies before granting a right to reside. The trouble is that the US applies these criteria inconsistently and unpredictably. By removing discretion, legalisation therefore promotes the rule of law.

This strikes me as a convincing response given the unpredictability and inconsistency of the present system’s application of the rules. But note that the rule-of-law critic could just as well hold that the appropriate response is not legalisation, but simply more predictable and consistent application of the rules. Put another way, the rule-of-law argument only works to support legalisation if it is infeasible, impossible, or otherwise excessively costly to make the system as it stands more predictable and consistent. This might in fact be true, but more argument would be needed to sustain the (hidden) premise. If it isn’t true, then the rule-of-law argument doesn’t support legalisation but greater funding and oversight of the current system. If the objection is to the rules themselves (i.e., making regularisation conditional on meeting one or more of the conditions listed above), then the objection is a justice- rather than rule-of-law-based one.

The second rule-of-law argument for legalisation derives from the same reasoning behind statutes of limitation. I thought this argument was the most convincing of all the ones offered. “The underlying moral claim”, Song and Bloemraad ([2022, 25](#)) write, “is that it is wrong to make people live indefinitely with a looming threat of serious legal consequences for a long-past infraction, except for the most serious offenses.” Statutes of limitations, that is, allow people to plan their lives with clarity and predictability (hence the rule of law). They need not wait indefinitely for a sword of Damocles that may, or may not, fall; they can just carry on with their lives. Thinking of regularisation of unauthorised status after a period

¹ A potential response suggested to me by Rainer Bauböck: perhaps the claim is that, given the lesser gravity of an immigration violation when compared with theft and murder, the enforcement measures proposed by rule-of-law advocates are not proportional to the offence. I agree, but this is (a) a justice-based argument and (b) survey data is irrelevant to its defence.

of time as equivalent to a statute of limitations also preserves the sense that unauthorised migration is a form of rule-breaking, and so preserves the idea of respect for the law at the core of the rule of law. Indeed, so powerful is the argument that it also supports a move away from intermittent and unpredictable legalisations and toward a system where any unauthorised migrant is granted access to permanent residence (and eventually citizenship) after a determinate period of time. Song and Bloemraad discuss this further reform in the conclusion to their paper.

The third rule-of-law argument follows, Song and Bloemraad claim, from considerations of publicity. Publicity requires laws to be accessible to those subject to them. More specifically, it requires that laws be available and easily understandable; that officials explain, on demand, the reasoning for particular bits of legislation, implementation, and adjudication; and that subjects be able to contest and monitor the application of the laws. Legalisation, for Song and Bloemraad, promotes publicity by bringing unauthorised migrants ‘out of the shadows’ just like the legalisation of prostitution or drugs. But how does this promote publicity? Of course, legalisation reduces criminality—in part by definition and in part because, once open to legal regulation, unauthorised migrants (like sex workers and drug dealers/users) will be less likely to engage in or be subject to other, related forms of criminality (violence, exploitation, and so on). So, there is a sense in which it promotes the rule of law simply by reducing criminality. But I don’t follow why it leads to an enhancement in publicity. When taken to apply to the rule of law, publicity refers to aspects of the law as a system. But how does legalisation make the law more accessible, more easily understandable, more intelligible, more transparent, or more contestable?² If it doesn’t, then this leaves the following response open to rule-of-law objectors: legalisation may be one way to reduce criminality, but, insofar as the rule of law is concerned, another way is greater enforcement and deterrence without legalisation (e.g., clamping down on unscrupulous employers, drug gangs, and so on). Once again, justice arguments seem more compelling to offer in response, like the argument that legalisation would reduce the exploitation, violence, and vulnerability to which unauthorised migrants are subject (partly in virtue of being deterred from exercising their legal rights for fear of deportation, as well as being prevented from accessing other social, ‘safety net’ benefits).

The fourth and fifth rule-of-law arguments for legalisation can be discussed together. According to these arguments, legalisation serves as a remedy for administrative failure. Because of the sheer scale of unauthorised migration, the US immigration runs a massive backlog. Largely as a result, the system grants limited access to basic due process rights

² Lukas Schmid suggests the following response: “Song and Bloemraad could argue that legalisation promotes publicity by giving unauthorised migrants better agential conditions from which to understand and contest the law. Presumably, living within the material and psychological constraints of irregularity will often render unauthorised migrants less capable of properly engaging with and understanding the legal system and its norms. By alleviating very fundamental anxieties, legalisation enlarges the set of people who are in a position to meaningfully comprehend and appreciate the law and the legal system.” I agree, but, once again, I think this response is better motivated by justice- rather than rule-of-law considerations. Legalisation improves justice by including a group under its protection that was not included before, thus reducing that group’s exposure to vulnerability, domination, and exploitation. But legalisation does not change the procedural properties of the law in any way. It does not, for example, make possible new forms of legal contestation, due process, accountability, or monitoring that were not available before. Legalisation merely extends the range of subjects to whom the existing procedures apply (and, in so doing, promises to shield them from forms of vulnerability, domination, and exploitation to which they would otherwise be subject).

(e.g., migrants have no right to appeal deportation decisions). It also enacts forms of racial profiling that disadvantage not only unauthorised migrants but also permanent residents and citizens who share the targeted ethnic and/or racial background (Reed-Sandoval 2019). Legalisation, Song and Bloemraad claim, would promote the rule of law by reducing the backlog of cases, by mitigating the discriminatory impact of enforcement, and by providing migrants with basic rights to due process. Legalisation hence enhances the rule of law by enhancing the generality (i.e., 'treat like cases alike') and regularity (i.e., impartiality) of law. Here again, I wonder whether the argument sufficiently addresses the rule-of-law objector who claims that respect for the law doesn't require admission of defeat, as Song and Bloemraad propose, but more tenacity and regularity in enforcement. I also wonder, as before, whether the justice-based rationales—reducing discrimination, mitigating inequality, decreasing domination—are really doing the normative work, rather than the procedural concern with the generality, impartiality, or regularity of the law.

The conclusion I think we should draw is that, precisely because of their procedural character, rule-of-law arguments are, with few exceptions, a shifty and unstable basis upon which to defend legalisation. Justice arguments do better.

References

- Kobach, Kris. 2008. "Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration." *Georgetown Immigration Law Journal*, Vol. 22, No. 3, pp. 459-83.
- Reed-Sandoval, Amy. 2019. *Socially Undocumented: Identity and Immigration Justice*. Oxford: Oxford University Press.
- Simmons, A. John. 2001. *Justification and Legitimacy: Essays on Rights and Obligations*. Cambridge: Cambridge University Press.
- Song, Sarah and Irene Bloemraad. 2022. "Immigrant legalization: A dilemma between justice and the rule of law", *Migration Studies*, mnac014, pp. 1-26. Citations here refer to the PrePrint version available at: <https://escholarship.org/uc/item/9b71f02r>.
- Wikipedia. 2022. Kris Kobach.

About the “Dilemmas” project

This commentary contributes to the [‘Dilemmas’ project](#) at the EUI’s Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

Suggested citation

Sangiovanni, A. (2022) ‘Why Justice Provides Better Reasons for Legalisation Than the Rule of Law: A Response to Song and Bloemraad (2022)’, Commentary for ‘The Ethics of Migration Policy Dilemmas’ project, Migration Policy Centre (MPC), European University Institute (EUI).

Migration Policy Centre

The Migration Policy Centre (MPC) at the European University Institute (EUI) conducts advanced research on the transnational governance of international migration, asylum and mobility. It provides new ideas, rigorous evidence and critical thinking to inform major European and global policy debates.

Contacts

Website: <https://www.migrationpolicycentre.eu/>

Twitter: @MPC_EUI

Facebook: Migration Policy Centre

E-mail: migration@eui.eu

Address: Convento di San Domenico
Via delle Fontanelle 19

I-50014 San Domenico di Fiesole (FI)