Citizenship and Arbitrary Law-Making: On the Quaintness of Non-national Disenfranchisement

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The paper explores forms of arbitrariness in relation to citizenship and migration policies. Non-national disenfranchisement follows from certain migration policies, and these may be cast as an arbitrary form of domination, that may undermine political legitimacy. Political exclusion is the vertex of a chain of other forms of exclusion: the denizenship of the politically powerless is particularly bothersome because liberal-democratic systems lack incentives to promote their rights. We have singled out the specificity and quaintness of the argumentative strategy employed to sustain non-national disenfranchisement. It differs from other argumentations in favour of disenfranchisement because it is not framed in derogatory terms and shifts the burden of proof from the state over to the individual.

Introduction

Arbitrary law is the hallmark of domination, illegitimate power, despotism. Avoiding arbitrariness is key to avoid domination, as a long-standing Republican tradition of political thought has made clear[1]. In a world of great migrations (transnational or otherwise) the authority to determine the 'people' in terms of citizenship and migration policy, i.e. to define the *demos*, is essentially about the «sovereign power to exclude»[2], and exclusion without (sufficient) reason-giving is the hallmark of arbitrary power that reduces and limits our ability to conduct non-dominated lives. Moreover, the use of this power to exclude defines the constitutional identity of a political regime.

[1] The use of the term here is the one that occurs in the contemporary republican debate on domination. According to Frank Lovett and Philip Pettit (2009: 9), a free person is «one who does not live under the arbitrary will or domination of others». See also Frank Lovett (2012), for a critical perspective see Patchen Markell (2008). The expression 'arbitrary power' usually refers to an authority that is free to act following nothing but his own will, without considering any limits and constraints. To use Montesquieu's classical phrasing in *Esprit des lois*: «It has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits» (1989: 155 [1748]).

[2] The expression comes from the Supreme Court in *Trop vs. Dulles*, 356 U.S. 86, 101 (1958): 355.

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Yet, arbitrariness is poorly understood and underexplored in relation to citizenship and migration policy. This is regrettable because, as we shall see, disenfranchisement can be seen as the outcome of certain migration and citizenship policies. By viewing citizenship and migration policies from the perspective of disenfranchisement, new areas and dimensions of the problem of arbitrary law-making emerge.

We can view legal positions that single individuals may come to occupy as located along a spectrum stretching from full (legal) inclusion to full (legal) exclusion. The right to access national territory is here considered in a *continuum* on the other end of which we find full civic inclusion entailing franchise (*civis optimo iure*): this is the way the road to living under democratic rule frequently looks for those making the journey[3].

My basic claim is the following: the level of illegitimate use of power increases by making the route to enfranchisement longer for non-nationals having some stake in a given community. In other words, state power becomes all the more arbitrary as the chain of obstacles to living under a rule to which one has given one's consent becomes longer. The obstacles on the way to citizenship, in other words, may be cast as an arbitrary form of domination, which in turn undermines political legitimacy. If we view border control policies in line with naturalisation and enfranchisement practices, consistently with the perspective of many migrants, then it becomes clear that by making the route to enfranchisement longer, the level of illegitimate use of power increases and the plight of domination worsens.

Disenfranchisement of non-nationals, hindering access to full civic inclusion, is problematic for different reasons. This paper focuses of the legal form of non-national disenfranchisement and the quaintness of the argumentative strategies employed to uphold it[4].

Enfranchisement, Affectedness and Legitimacy

Enfranchisement sets the level of autonomy that the legal order recognizes for fully capacitated adult agents in most liberal-democratic constitutional orders

[3] This paper develops a key idea of the project I run as Wallenberg Academy Fellow 2015-2020. For more information please see the website: www.civissum.eu. The paper presents results from the project *Arbitrary Law-making in Today's Citizenship and Border Control Policies* funded by the Swedish Research Council (2012-2015).

[4] A previous version of this paper was presented at the Higher Seminar Series in Philosophy of Law at the Philosophy Department, Uppsala University, November 2015. I would like to thank Anthoula Malkopoulou, Guilherme Marques Pedro and Sebastian Reyes Molina for comments on the earlier draft.

and it is often seen as a source of legitimate power, i.e. that through which consent is given, and that therefore makes state coercion not merely an exercise of the monopoly of the use of force. In other words, enfranchisement is seen as a benchmark of legitimacy: a necessary albeit insufficient condition for establishing a political order to which people give their consent. Enfranchisement does more than that: It says something about the constitutional identity of a political regime. Since Aristotle, the number of rulers counts as criteria for defining the nature of a polity. Here I take franchise to be essential to substantiate legitimacy in constitutional democracies. It is, first, a normative threshold and, second, a descriptive criteria of identification of political regimes.

Disenfranchisement constitutes a thorn in the side of liberal democratic legitimacy (Benton 2008). Because, generally speaking, disenfranchisement challenges liberal-democratic regimes since it breaks the (ideal) symmetry between the rulers and the ruled that is often considered a foundation of (democratic) legitimacy. This ideal refers to a fundamental principle of democratic government, i.e. the principle of affectedness, meaning that all those affected by a political decision should have a say in its making and those who are not affected should have no say.

Even though the principle seems fairly straightforward, it gives rise to many concerns, both in practice and in theory[5]. Although an in-depth analysis of the scope, range and application of the principle of affectedness is beyond the purpose of this paper and would require a paper in its own right, it is safe to say that this principle functions as a regulatory ideal in the Kantian sense. Here, it is used as an indicator of potential problems of legitimacy. We thus adopt a minimal definition of affectedness as pursuant to a condition of steady presence on state territory for natural or physical persons who *de facto* live under a given national jurisdiction. This is of course a minimal account of affectedness that uses presence on the territory as a proxy, which some will surely consider to be a way of conflating the principle of subjection with that of affectedness. But this need not worry us for the present purposes. In fact, neither a principle referring to affected interest (subjectively or objectively determined), nor a principle referring to subjection to coercive laws can be confined to inclusion of residents within state territory. Both hinge on the undetermined character of the principles at hand, as well as the unclear category of 'residence', halfway between a factual claim and a legal institute. Bearing this in mind, the proxy can be used and our minimal definition employed.

[5] On the 'principle of affectedness' see Frederick G. Whelan (1983), while Robert Dahl (1989) refers to this principle when discussing the 'problem of unity' in *Democracy and Its Critics*.

What needs to be stressed however is that the affectedness ideal is here not applied as a method to determine borders of appropriate constituencies but as a regulative ideal (Arrhenius 2005 and 2011). A method to determine how to make decisions is justified by reference to a normative ideal, while the normative ideal (the principle of affectedness) is justified by reflective equilibrium, weighing our normative judgments and a set of methodological and epistemological criteria, such as consistency etc. For example, utilitarianism is often accused of not providing a criterion or rule-of-thumb for deciding what action ought to be taken because, in any situation in which we are called to act, we cannot calculate in advance all the effects of a decision, and then choose the one that maximizes well-being as the ideal of utilitarianism prescribes. However, this is not an argument against the normative ideal. If we were utilitarian, we should not stop trying to get closer to the ideal of maximizing wellbeing only because it is difficult to do so. It would be analogous to concluding that the value-freedom of science is not a scientific value to be pursued only because there is a lot of research the impartiality of which may be doubted, or that health is not an ideal to which we should strive given the existence of diseases. In a similar way, the principle of affectedness might be inappropriate as a method for defining constituencies, without being an ideal to be rejected[6]. This is why we can continue without entering the debate on affectedness and keeping our minimal definition.

So, the affectedness principle instantiated by the classic formula *quod omnibus tangit, ab omnibus tractari et approbari debet* is a key principle in democratic theory of legitimacy, notwithstanding the fact that it does not include criteria on how to determine who has a stake in an issue; a determination that can be done both subjectively and objectively. Both ways presents problems that, however, need not be addressed here. The only aspect that is important for the continuation of the argument is that the principle of affectedness, cast as a regulative ideal, has a high level of indeterminacy. One of the problematic features then is that the principle of affectedness, construed in this minima-

[6] In fact, some believe that the principle of affectedness is simply impracticable, like David Held. For instance, if one wanted to apply the principle to any policy decision, we would be forced to conclude that, strictly speaking, we can know the extent of the effects only after the decision has been taken, so ignoring what the decision is we cannot know who should participate in its taking. There are also those who complain about the situation of legal uncertainty that would reign in a world of fluid borders and variables. Celebrated by some advocates of deliberative democracy, such as John Dryzek (1996), the volatility of boundaries redrawn at every (kind of) decision to be taken by diverse communities, is for the critics, like Dahl, for example, a serious risk to the state law. For a discussion see R.E. Goodin (2007), for a reconstruction of this debate see Johan Karlsson Schaffer (2011) and Patricia Mindus (2014 – especially chapter 5).

listic way, does not allow to account for exactly for *how* many and *which* non-nationals are disenfranchised. This might be a question of grades.

By suggesting that there is a spectrum stretching from full inclusion to full exclusion, we may still highlight how contemporary liberal democracies fail to live up to the ideal by excluding legally resident non-nationals from franchise and by excluding a range of other non-nationals within the jurisdiction from granting to prospect of one day naturalizing.

The distinction that is central to this paper is between nationals and non-nationals. Yet the category of non-nationals is quite broad and includes non-resident non-nationals having no relationship with a given jurisdiction. We can call them absolute foreigners. Different non-national categories may be relevant to the argument given here, such as non-national residents, third country nationals in the European Union, non-nationals granted temporary permits of stay, illegal migrants present on the territory, asylum seekers and more. What all these categories share, and what distinguishes them from absolute foreigners, is that they may be said to have a stake in the community.

Of course to define a 'stake' is *per se* a daunting challenge: subjective determination of 'stakes' is problematic (there are people who feel worried without being affected, and affected people who do not worry), and there still is no scientific method to determine whether a person has a 'stake' in any objective sense (we lack a criterion for the rationality of preferences). So by 'stake' here I mean who *de facto* stands in a relationship with a given jurisdiction, as opposed to the great majority of human beings who do not.

This explains why a critical assessment of the lack of voting rights for all non-citizens or non-nationals would go beyond the purposes of this paper, since the latter category would include absolute foreigners. Defining 'stake' as having a *de facto* relationship to a given jurisdiction excludes from this inquiry the question of whether or not absolute foreigners should be given voting right(s). There is of course a debate going on about whether voting rights should be granted also to non-resident non-nationals on the basis of their having some form of stake in the community. But in this debate the stake is, first of all, conceived as an a-territorial claim (or better: a claim regardless of the territorial boundaries of a jurisdiction), and this is so regardless of whether the stake ought to be understood in a subjective or objective sense. Second, this debate over cosmopolitan democracy, i.e. if it is (il)legitimate to give voting rights to non-nationals, hinges on the idea that the principle of affectedness would be a method for determining policies, and not a regulative ideal. Here, this principle figures only as a regulative ideal. We can thus leave this debate aside.

The focus thus falls on today's arguably most critical form of disenfranchisement, as a blunt violation of the regulative ideal of affectedness: that of non-nationals and the exercise of arbitrary power that it embodies.

Border control and naturalisation policies generate a critical form of disenfranchisement. The denizenship of the politically powerless is particularly bothersome because liberal-democratic systems lack incentives to promote their rights. This turns their disenfranchisement into a particular form of arbitrary rule exercised by the enfranchised majority. With the words of Michael Walzer (1983: 62), «the rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history». This is the reason why it offers an interesting testing ground for assessing the level, type and nature of the arbitrary power exercised by the state.

In searching for a good testing ground for examining arbitrary power practices in today's law and policy-making, a specific form of disenfranchisement practice can be singled out as particularly interesting: the disenfranchisement of non-nationals; and as we will show below, primarily of categories of non-nationals that are barred from naturalisation, such as illegal migrants.

This, however, does not depend on any claim about border control being *per se* an instance of arbitrary exercise of political power, as many democratic globalists and cosmopolitan advocates of open borders would claim. Rather, it depends on the kind of argumentative strategy that is used to sustain the exclusion of non-nationals from franchise, which determines the rule of citizens over non-citizens within a single jurisdiction. Strategies employed to justify legal provisions of disenfranchisement in the case of non-nationals differs radically from that of nationals. One may thus stay agnostic about the (il) legitimacy of border control and still uphold the thesis defended in this paper.

Ordinary and Extraordinary Disenfranchisement

Clearly, disenfranchisement, i.e. being legally barred from exercising political rights, has be given many faces in the course of history – ranging from Third Country Nationals in the EU to Brazilian illiterates, from mentally disabled people in Eastern Europe to inmates in Asia, from French *domestiques* to Athenian women, and so forth (Rosanvallon 1992, Beckman and Erman 2012). No wonder then that the strategies of argumentation or reason-giving in favour of disenfranchisement practices have varied.

Among reasons adduced in our modern world to sustain disenfranchisement, we find claims of self-government by autonomous ethnic communities, used to exclude indigenous people in Canada from exercising political rights until the federal elections in 1960, and blacks in South Africa until the 1994 general election (Bartlett 1980, Kirkby 2010). The disenfranchisement of citizens affected by mental disabilities in several countries has been supported because of the need to defend the integrity and dignity of elections (Bartlett

et al. 2007, Vyhnánek 2010). The so-called «felony disenfranchise» (Ispahani 2009: 12) has been sustained on the basis of both *punitive* and *regulatory* arguments. Liberal and contract-theory tools have also been applied to the claim that criminal disenfranchisement is the logical outcome of the breaking of the social pact perpetuated by offenders who violate the law[7].

Notwithstanding great variation in the strategies employed to justify legal provisions of disenfranchisement[8], an important threshold can be determined: the difference lies in whether the disenfranchisement is conceived as a principle of the system or as an exception to the rule. The dialectics between rule and exception that emerge from the argumentative strategies used to exclude people from franchise provide relevant criteria for distinguishing so-called ordinary from extraordinary forms of disenfranchisement.

Ordinary forms of disenfranchisement are those that the system presupposes or takes for granted, those for which therefore there is no requirement of reason-giving or justificatory practice. Extraordinary forms of disenfranchisement are those that the system do not presuppose or take for granted, those for which therefore there is a requirement of reason-giving: the system engages in justificatory practices in order to uphold these forms of disenfranchisement.

To exclude non-nationals appears to be an 'ordinary' form of exclusion, needing no justification. In most legal systems, enfranchisement is reserved to *nationals* having full legal capacity. There are of course exceptions, both of non-national franchise (Shaw 2007) and of external voting (Bauböck 2007), as well as a few cases of illegal migrants voting (Sadiq 2008). Admitting non-nationals to political representation seems to be a strengthening trend in many liberal-democratic countries but it is still far from constituting a serious contender to the standard exclusion of non-nationals.

Indeed, as a default position before the legal order, non-nationals in most commonly recognized liberal-democratic regimes are disenfranchised notwithstanding their presence on state territory. This implies that, even if they happen to hold the legal citizenship or nationality of another state, they still fit into the category of 'subjects'[9] with reference to the state they are located in. This means they are *passive members* of the political community.

The standard form of such subjecthood is embodied by fully capacitated persons who are non-nationals deprived of franchise.

[7] This was notoriously stated in *Green vs. Board of Elections* where the US Supreme Court affirmed this position by quoting John Locke, see Jesse Furman (1997).

[8] For the argumentative strategies behind disenfranchisement, see Ludvig Beckman (2009).

[9] Subjects are those to whom directives and norms are addressed yet that are not entitled to take part in shaping these norms, in whatsoever form. The subject is under the political obligation to obey the laws to which he or she has not given direct or indirect consent.

The fact that some non-nationals may choose to remain outside the political sphere of their state of residency for numerous reasons need not worry us here: it is secondary to establishing whether one is deprived of the very possibility to choose such a voluntary form of subjecthood.

Do note that here we do not deal with self-imposed or socially imposed disenfranchisement. Rather, we only look at disenfranchisement *de iure*. Because being entitled to the right to vote constitutes a threshold. This threshold defines those who are entitled to a privileged relationship with the state (most typically, nationals) and those who are not (most typically, non-nationals). Whether nationals are able to enforce this privileged relationship and/or whether non-nationals are even interested in having a political relationship in the form of participation and enfranchisement is secondary to the issue addressed here. So the fact that non-nationals are a varied group from the sociological perspective is not an argument that can be used against the thesis of this paper. Social composition of non-national groups is irrelevant in order to establish entitlement to franchise. Indeed, the rules that determine who counts as national and who does not, and the rules that determine who is entitled to vote and who is not, are clear and well-known in each jurisdiction.

Disfranchisement of non-nationals embodies arbitrariness in contemporary constitutional democracies where the principle of legitimacy is grounded on the ideal of all-affectedness. Most typically, non-nationals are excluded from full political citizenship, which (especially in the case of long-term residents) bluntly mocks the ideal of affectedness. But unlike other disenfranchised categories such as minors, inmates, and convicts, the disenfranchisement of non-nationals is not presented as an exception to the rule. In the case of disfranchisement of nationals, the provision works like the institution called *capitis deminutio media* in Roman law: the situation in which a Roman citizen passed from the status of full Roman citizenship, *civitas optimo iure*, to what was called *civitas sine iura suffragii et honorum*, i.e. a situation in which the person loses the entitlement to political rights of participation (Sherwin-White 1939, Gaudemet 1984, Thomas 1996, Lovisi 2003).

Disfranchisement of non-nationals embodies arbitrariness because it creates political subjects in a system the legitimacy of which depends on such subjecthood being connected to enfranchisement.

Yet another aspect of non-nationals disenfranchisement should interest us here: how it frames who is accountable for proving what. The disenfranchisement of non-nationals is different from other types of disenfranchisement because it is not conceived as an exception, but as the rule. This has important implications for the attribution of the burden of proof in the event of litigation. Institutions of disenfranchisement are prevailingly justified as an exception to the rule. Archetypically, minors are disenfranchised because they are unable

to conscientiously perform the politically salient activities involved in voting and standing in elections due to *special circumstances* (young age). The legal form of minor disenfranchisement is derogation on the basis of circumstance.

Archetypically, mentally disabled persons are disenfranchised because they are unable to conscientiously perform the politically salient activities involved in voting and standing in elections due to *special personal characteristics* (incapacity). The legal form of disenfranchisement is derogation on the basis of personal attributes.

More generally, standardized classes of people have their rights restricted and these limitations are justified as exceptions to the general rule, granting these rights to those of ordinary capacity[10]. Hence, freedom of movement may be restricted; the right to vote may be withdrawn but this can legitimately be done only *under special circumstances and/or due to special personal characteristics* for which the state needs to account. This means that burden of proof thus falls automatically on the state intending to restrict the exercise of such rights.

The legal form of non-national disenfranchisement is however not of a derogatory type: it is the rule, not the exception. Moreover, it is a rule that constitutes the very system.

By construing the exclusion of non-nationals as the rule there is a rarely noticed shift in the allocation of the burden of proof from the state to individuals, from the governors to the governed. In this lies another aspect of the arbitrariness that non-national disenfranchisement embodies. In other words, while it is the state that needs to prove why inmates are to be disenfranchised, it is the individual who is required to provide evidence for his/her lawful presence on the territory that is in practice the first step in order to acquire the status that provides access to franchise.

Models of Citizenship and Forms of Disenfranchisement

The argumentative strategy that grounds the disenfranchisement of non-nationals is very different from that used for other disenfranchised groups. This is due to the fact that the conception of citizenship that underpins the disenfranchisement of non-nationals is not the conception of citizenship that lies behind other categories' exclusion from franchise.

[10] Capacity is an aspect of a person's status and defined by a person's *personal law*, i.e. for natural persons, the law of nationality or *lex patriae*, or of habitual residence in civil law states and residence in many common law jurisdictions.

Here we should distinguish between the political and the legal conceptions of citizenship (Mindus 2014). The political model that grounds democracy and addresses the question of legitimacy, opposes the 'citizen' to the 'subject', i.e. the disenfranchised and thus passive member of a political community; while the legal conception stresses national sovereignty and protects the rule of law, it opposes 'citizen' to 'alien', i.e. the non-national. Alien here includes both the foreigner (person lacking the nationality of the state of reference yet having the nationality of another state) and the stateless (person deprived of any nationality). To a great extent, modern law has identified nationality and citizenship (there are various constellations thereof and this identification was made possible under the principle of sovereignty)[11]. Citizenship, within this conception, is thus merely the positive reflection of the status of alien. In other words, for legal science, citizenship is the status of those who are entitled to claim a series of legally recognized positions before the state. The paradigmatic word for this is *Staatsangehörigkeit*, which literally means 'belonging to the State'.

Whereas in the political conception of citizenship, legitimacy in principle stems from the participation of 'the people', i.e. the sum of the citizens, in shaping the common rules under which they live and thus exclusion from such co-participation must be motivated, the legal model of citizenship – that is the background theory of citizenship employed in defending disenfranchisement of non-nationals – does not say much about justifying disenfranchisement: voting or standing in elections are usually described as a form of bonus right ascribed to some nationals (natural persons with full legal capacity, in some cases of passive electoral rights, they also need to be over a certain age threshold). The state does not offer motivations and is not held to do so, mainly on the basis of the principle of sovereignty, out of which self-determination of whom to include in the system derives. As a growing stream of research is highlighting, it is problematic to assume that sovereignty as a concept is even compatible with rule of law (Eleftheriadis 2009) so that sovereignty cannot per se constitute sufficient reason to exclude non-citizens without reason-giving and pushing the burden of proof onto the individual.

Not only does the State offer no reasons, the legal system does not even rule out the possibility of prohibiting some natural persons with full capacity of accessing the said legal system, a precondition for acquiring the status of

[11] The two paradigmatic models are often conceived as the French *ius soli*-centred model and the German *ius sanguinis*-focused model, see Roger Brubaker (1992) and Pietro Costa (1999). More specifically see Markus Krajewski and Helmut Rittstieg (1996), Paul Lagarde (1996), Andreas K. Fahrmeier (1997), Benoit Guiguet (1999), Alfred Schumacher (2001), Patrick Weil (2002), Ulrich K. Preuss (2003) and Edwige L. Lefebvre (2003).

citizenship that provides access to enfranchisement. A number of border control techniques, asylum and migration policy provisions have this function.

This possibility engenders what can be described as an indirect form of disenfranchisement practice that is, however, not understood as such by contemporary political and legal theory. Indeed, mainstream literature on disenfranchisement[12] only considers provisions relative to either nationals or those non-nationals that are legally resident within the state, thus failing to see how, in the broader context, disenfranchisement is effectively implemented through keeping fully capable adults from being granted access to legal positions (such as residency, permits of stay, asylum, etc.) that would enable them to apply for naturalisation at a later stage. Some live large parts of their lives in this disenfranchised limbo, yet within the territorial sphere of states that are generally held to be constitutional democracies.

Do note that, as to this argument's soundness, the difference between non-nationals legally present on state territory and so-called illegal migrants who lack entitlement to dwell on the very same territory (on which we focus later on), is not relevant because the legal/illegal migration status is not derivative so much of the subjects themselves as dependant on the temporal dimension they are located in. In other words, many migrants fall in and out of legal stay and residency and this may happen on multiple occasions in the course of their migrational career. The distinction between legally and illegally present on territory, itself quite fluid, does not impact disenfranchisement since both categories are barred from access to political rights. Yet the distinction between legally and illegally present is relevant in differentiating between steps along the way to enfranchisement, as we will see in the next section.

The rule of excluding non-nationals from franchise in the legal model of citizenship was historically explained by the extraneousness or exteriority of foreigners, usually located in physically distant places without relations or with few contacts with the autochthon population. Clearly, any such an *a priori* assumption in a globally interconnected world of mass-migration is unwarranted. On the whole, some 2.9% of the world population live outside their country of origin.

Furthermore, let us suppose that the legal order would cease to uphold non-national disenfranchisement as a rule. Apart from being a political non-starter in many constitutional settlements, this would not eliminate the problem of arbitrariness, even though it might modify its concrete manifestations. Because even if we assume that non-national disenfranchisement has to be

[12] See, among others, Zig Layton-Henry (1990), Jamin B. Raskin (1993), Virginia Harper-Ho (2000) and Richard S. Katz (2000).

justified, just like other forms of disenfranchisement, in terms of derogation from a rule, the size and nature of the issue would still leave lots of room for claiming that non-national disenfranchisement amounts to arbitrary law-making. Non-nationals have to the same extent as nationals full legal capacity and thus share the historically speaking key criterion used in practices disenfranchising nationals. Moreover, the number of people involved is rising. Since derogation in no way modifies the rule as such, as long as it remains an exception, this implies that, if the sheer number of those (dis)enfranchised is sufficient (there is of course debate over what that threshold is, but we shall leave the details of that discussion aside), it cannot be claimed that it is a 'mere exception', for the same reason that a 'state of exception' that lasts *sine die* amounts to the instauration of a new regime and is not an exception to the previous regime.

Making the Route to Citizenship Longer

Today the most critical form of disenfranchisement is that of non-nationals. This is so because of the exercise of arbitrary power that lies behind it. Within this category, exclusion from political rights of illegal migrants is particularly problematic. Saskia Sassen wrote some years ago that, in this realm, the most important distinction is between those with legal migration status and those without it (Sassen 1996). This holds true today. «More then any other phenomenon, illegal migration points up to the immense and arbitrary privilege of birth in a prosperous state» (Dauvergne 2009: 8).

Although it is hard to measure the number of illegal migrants (because they are illegal), some speak of around 12 million in the US, 14 million in Russia among whom some 700,000 illegal Chinese in the Far East, some 10 million in Eastern Europe including Central Asia, up to a million in the UK, some 150,000 in Italy, some 3 million around the EU, and India with its estimated 16 million illegal immigrants, another 2 million in Thailand, and up to 8 million in South Africa (source BBC). In 2005 the UN estimate was some 50 million illegal migrants out of the overall 190 million migrants around the world.

Within the category of non-national disenfranchisement one specific group can be singled out as the most vulnerable to arbitrary law-making: that of illegal migrants. This category is not only disenfranchised but prohibited from recognition as disenfranchised. Illegal migrants are thus excluded from franchise in a drastically more severe fashion than legal migrants. Because legal migrants might be barred from political rights but they are not barred from naturalization (even if it might turn out to be extremely cumbersome, e.g. in Switzerland). Illegal migrants are, most typically, barred from naturalizing.

Some defenders of disenfranchisement of non-nationals might insist that non-national residents who reject a fair naturalisation offer cannot claim to be arbitrarily disenfranchised, yet it is specifically the fair naturalisation offer that no illegal is offered *qua* illegal. Illegal migrants are barred from being recognized as being governed by the legal system in that they are natural persons with full capacity living under the laws of the country they are in and contributing to its social fabric.

This means that today we face a form of indirect disenfranchisement that is not properly addressed: it does not amount merely to exclusion from voting rights but from the status entailing such rights (i.e. nationality) and (in the worst cases) overall exclusion from rights (rightlessness which often follows *de facto* from being incapable of availing oneself of the protection of one's country of origin; most recurrently the case of illegal migrants and trafficked people). Such forms of exclusion are challenging legitimacy, because they prevent *a priori* any future political representation: while minors will grow up, illiterates can learn how to read, convicts may re-acquire their franchise etc., being barred from access to any legal system in the sense of not being able to avail oneself of the protection of a state entails a form of truly apolitical condition.

What the legal system fails to recognize, in other words, is the factual circumstance that – according to the tenets of legitimacy of the system as such, i.e. according to the political conception of citizenship that grounds the legitimacy of the exercise of coercion by state actors in liberal-democratic settings – activates the legal entitlement to being included in the system. So, by referring to one and the same factual condition (presence on state territory) one group of people gain access and recognition while another is prohibited from accessing the said legal system. Or to rephrase it, the legal system is blind when it comes to that specific group. Pertinence to state territory, to put it elegantly, makes some more equal than others.

There is an interesting corollary to this thesis. Suppose we have a system, the legitimacy of which is based on the assumption that those who can be coerced by the State have a stake in the jurisdiction and – if no special circumstances or personal incapacity are at hand – this stake offers sufficient reason for being entitled to voting rights. Then, when chunks of the population live in conditions of political disempowerment, with no clear prospect of gaining franchise, the legitimacy of the exercise of coercion by state actors is challenged. This is what seems to be happening today, in a world with millions of refugees and millions of internally displaced people, not to mention other forms of migration. The crucial role of defining the *demos* in terms of citizenship and migration policy can therefore no longer be downplayed. Acquisition and loss of citizenship does not belong to the legal backwaters of administrative law: it is a question of high constitutional weight since such

policies determine, in a mediated way, who are those entitled to participate in collective decision-making. Simply put, the appearance of disenfranchised masses in contemporary democracies – modern metics – questions the state's sovereign right to define its people (Abizadeh 2008, Mindus and Goldoni 2012). But this corollary merits a paper in its own right.

This paper explored arbitrariness in relation to citizenship and migration policies. Non-national disenfranchisement follows from certain migration policies, and these may be cast as an arbitrary form of domination, that may undermine political legitimacy. Political exclusion is the vertex of a chain of other forms of exclusion: the denizenship of the politically powerless is particularly bothersome because liberal-democratic systems lack incentives to promote their rights. We have singled out the specificity and quaintness of the argumentative strategy employed to sustain non-national disenfranchisement. It differs from other argumentations in favour of disenfranchisement because it is not framed in derogatory terms and shifts the burden of proof from the state over to the individual.

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