



Fighting Human Smuggling or Criminalizing Refugees? Regimes of Justification in and around *R v Appulonappa*

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Abstract

Following the arrival of the MV *Ocean Lady* in 2009, four men were charged with human smuggling under s. 117 of the *Immigration and Refugee Protection Act* for having helped Sri Lankan asylum seekers reach Canada. Section 117 made it a criminal offence to aid and abet the unauthorized entry of asylum seekers, including when this was done for humanitarian reasons, to help family members, or as a matter of mutual aid. The case made its way to the Supreme Court and, in 2015, the court ruled in *R v Appulonappa* that s. 117 was too broad, potentially criminalizing humanitarian workers and family members who help transport asylum seekers, and should be interpreted in a strict manner. This article draws from pragmatic sociology to study the regimes of justification mobilized by various actors involved in, and around, *R v Appulonappa* between 2009 and 2015. It focuses on two sites of contestation that crystalized around divergent conceptions of fairness and safety, discussing how competing regimes of justification were used to advance stakeholder's positions.

Keywords: Appulonappa, Bill C-31, Canada, criminalization, refugees, regimes of justification

Résumé

À la suite de l'arrivée, en 2009, du navire MV *Ocean Lady*, quatre hommes furent accusés de trafic de personnes, en vertu de l'article 117 de la *Loi sur l'immigration et la protection des réfugiés*, pour avoir aidé des demandeurs d'asile sri-lankais à entrer illégalement au Canada. Selon l'article 117, le fait d'inciter, d'aider ou d'encourager l'entrée non autorisée de demandeurs d'asile constituait un acte criminel, même lorsque celui-ci était réalisé à des fins humanitaires dans le but d'aider des membres de la famille ou de fournir une aide mutuelle. En 2015, la présente affaire s'est rendue en Cour suprême du Canada où cette dernière a statué, dans l'arrêt *R. c. Appulonappa*, que la portée de l'article 117 était excessive dans la mesure où son libellé était susceptible de criminaliser des travailleurs humanitaires et les

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proches parents d'un demandeur d'asile, et que, par conséquent, il devait être interprété de façon plus étroite. Ancrée dans la sociologie pragmatique, l'article se penche sur les stratégies de justification mobilisées par les divers acteurs de l'affaire *R. c. Appulonappa* entre 2009 et 2015. Il porte notamment sur deux espaces de contestation qui se sont formés autour de conceptions divergentes de l'équité et de la sécurité. L'article illustre les façons dont ces stratégies opposées furent utilisées pour faire valoir les intérêts des parties intéressées.

Mots clés : Appulonappa, projet de loi C-31, criminalisation, réfugiés, stratégies de justification, Canada

Each time a boat carrying migrants arrives off Canadian shores without authorization, debates erupt about national sovereignty, refugee protection, and Canadian identity. Each time, the government and public response is harsh. During the twentieth century, the first of such incidents occurred in 1914, when the 376 passengers aboard the *Komagata Maru* challenged a racist Canadian policy attempting to prevent the immigration of British subjects from the Indian subcontinent. After much political and media attention, they were refused entry and deported back to Kolkata (then colonial Calcutta), where twenty of them were killed in riots and others were detained and tortured (Mongia 1999; Ward 2002; Johnston 2014; Silverman 2014; Mawani 2015; Roy 2016). In 1939, when the *MS St-Louis* arrived off the shore of Nova Scotia requesting that authorities let the more than 900 Jewish refugees from Nazi Germany land and claim asylum, they were received with bold anti-Semitic statements and sent back to Europe. Upon their return, many of them were arrested and transported to concentration camps, where they were later tortured and murdered (Abella and Troper 2012; Silverman 2014). These cases are now historically infamous, as they played a central role in the development of harsh and racist responses to subsequent irregular arrivals to Canada of racialized migrants, including asylum seekers (Ibrahim 2005; Oxman-Martinez, Hanley, and Gomez 2005; Neve and Russell 2011; Silverman 2014; Moffette and Vadasaria 2016). There is thus something significant and troubling about Canada's response to migrants and refugees who arrive by sea without authorization. And recent debates and interventions related to irregular arrivals need to be interpreted in relation to the heritage of the *Komagata Maru*, and understood as profoundly imbricated in the project of Canadian colonial state-building (Macklin 2011; Gera Roy 2016; Moffette and Vadasaria 2016).

While there is extensive literature providing analyses of the media representation of the irregular arrivals that occurred in 1986, 1999, 2009, and 2010 (Greenberg 2000; Mann 2009; Bradimore and Bauder 2011; Krishnamurti 2013; Mannik 2014; Sriskandarajah 2014), little attention has been paid to the discourses, arguments, and types of justification that have been made during the legislative reforms and the trials that have accompanied these recent incidents. We attempt to fill this gap by paying attention to the debates surrounding *R v Appulonappa*, a precedent-setting case that made its way to the Supreme Court in 2015. The events start in October 2009, when the *MV Ocean Lady* arrived off the coast of British Columbia

with 76 Tamil asylum seekers on board, followed in August 2010 by the MV *Sun Sea*, carrying 492 more individuals. Political discourses, media representations and border official practices in anticipation of and in response to these two incidents contributed to rhetorically and effectively criminalizing and securitizing these arrivals (Neve and Russell 2011; Krishnamurti 2013; Silverman 2014; Moffette and Vadasaria 2016). Four asylum seekers onboard the MV *Ocean Lady* who were thought to have organized the voyage or helped in its realization were criminally charged under s. 117 of the *Immigration and Refugee Protection Act (IRPA)* and, if convicted, could have been deemed inadmissible to Canada for reason of criminality (IRPA, s 37(1)(b)). Throughout *R v Appulonappa*, the Crown lawyers, the counsels for the four accused, the judges, and the intervening parties all made legal arguments about whether or not s. 117 of the *IRPA* violated s. 7 of the *Charter*, which guarantees the right to liberty, and whether it is overly broad as it criminalizes those who aid and abet the unauthorized entry of asylum seekers even if this is done for humanitarian reasons, mutual aid, or for family members. But beyond the *legal* arguments, actors involved in the case also all made *normative* claims about the meaning of safety and fairness.

In this article, we draw from French pragmatic moral sociology to map out the arguments made by the various parties involved in and around *R v Appulonappa*. As will be explained in the next section, this framework allows us to consider the social “as a space shot through by a multiplicity of disputes, critiques, disagreements” (Boltanski 2011, 27), to identify particular sites of contestation, and to describe the regimes of justification that are mobilized by the actors involved (Boltanski and Thévenot 2006). The article is based on the thematic content analysis of parliamentary debates and court documents (2009-15) to examine the regimes of justification that informed the arguments of lawyers, judges, defendants, and interveners during *Appulonappa*, as well as those of political actors involved in debates that led to the adoption of Bill C-31, *An Act to amend the Immigration and Refugee Protection Act*, in 2012, which was also concerned with the arrival of the MV *Ocean Lady*. The article is divided into four sections. First, we introduce the theoretical framework and methodological strategy that inform this study. Second, we provide more contextual information about the chronology of the legislative changes and the various appeals that brought the case to the Supreme Court. Third, we present the two main sites of contestation that we have identified, namely the struggles over the meaning of fairness and safety. Finally, we provide a typology of two regimes of justification at play in these sites and provide a discussion of the implications of our approach for further research on contested meanings of justice in Canada.

A Pragmatic Sociology of Justification

Pragmatic sociology is concerned with the practices of actors, their know-how, and the ways they address problems encountered in various situations (Kaufmann 2012). Through the influence of Boltanski and Thévenot, a trend developed to document “the modes of *equivalency*, of *qualification*, of *adjustment* and of *justification* through which actors produce *agreements* and *coordinate* their actions, that is, the way by which they create *orders of justice* and refer to them to denounce

injustice” (Nachi 2006, 21; italics in the original). Their project was to develop, in contradistinction with Bourdieu’s critical sociology, a sociology of critique. They thus asked: on what basis do actors critique the treatment accorded to people and things, how do actors justify their actions to others, how do they move from the critique and justification of everyday actions and reach a higher level of generalizability that allows for their critique to become morally convincing to a broader audience?

In *On Justification: Economies of Worth*, Boltanski and Thévenot (2006) argue that critiques and justifications operate within an economy of worth organized around, among other things: a principle of commonality and common humanity that allows for people’s worth (*grandeur*) to be judged according to the same criteria, higher common principles that provide the basis for this assessment, and a ranking of things and people based on their differential status or state of worthiness. Boltanski (2013) gives the simple example of the distribution of food among people gathered at a table (who to serve first, how much to give to each), which can easily “give rise to disputes when several different principles of ranking order are in opposition” (23). He adds that “If the sequence is to run smoothly, the guests must therefore be in agreement about the comparative status of people as disclosed by the order they are served in,” (23) an agreement informed by shared higher common principles. In *On Justification*, Boltanski and Thévenot mobilized what they call a grammatical approach and, not unlike linguists and grammarians, studied a corpus of classic political texts to inductively develop a typology of ‘polities’—also called at times ‘legitimate orders,’ ‘orders of worth,’ or ‘regimes of justification’—organized around different grammars or sets of higher common principles that provide the basis for the assessment of worth, the ranking of things and people, and the justification for action (2006, 66).

Beyond the actual list of polities, what is most interesting in this approach is how it looks at situations where a disagreement exists over what constitutes the legitimate course of action, and how it attempts to map out the contesting regimes of justification at play therein (Boltanski and Thévenot 1999). Indeed, humans act in everyday life without thinking too much about the principles that guide their actions until there is a disagreement over how to classify and treat things, people, and events. In these moments, the unquestioned logics and methods that govern actors’ regimes of action in everyday life are put to trial, and they must rely on moral grammatical resources belonging to different orders of worth to orient and justify their action. These “tests of justification” (*épreuves de justification*) always require that parties move beyond the practical reasons of everyday decisions and refer to broader and higher principles that should guide action. Therefore, as Boltanski explains, any “denunciation of injustice [or for that matter any contestation over the just and the unjust] is accompanied by rhetorical means geared to a *rise towards generality*, in such a way that the accuser can base her act, including in her own eyes, on defence of the common good” (2011, 97). This makes this framework particularly useful for studying political mobilizations and moral disputes (Pereira 2010; Boltanski 2011). Arguments and justifications deployed in court follow specific rules and are at times more technical than general (Thévenot 1992), but some cases—especially constitutional challenges—are nonetheless filled with

moral arguments about worth, and mobilize references to higher common principles that can also be found in the political public debates that usually accompany them.

We look at the regimes of justification at play in *R v Appulonappa* and in parliamentary debates surrounding Bill C-31 as sites of political and moral disagreement where the logics informing action are forced to appear more clearly. This is coherent with a socio-legal orientation that is sensitive to the role of law in social, cultural, political and economic life and—in turn—to the role of the social, the cultural and the political in law. Arguably, none of these fields can be easily distinguished from the others, but it is fair to say that by focusing on the legal case and on parliamentary debates, our study is limited to only a fraction of the social factors that intersect with law. The rationale for broadening the analysis beyond the legal case to include parliamentary debate was two-fold. On the one hand, before starting the project, we noticed how the mutually constitutive dynamics of law and politics transpired in the use in each sphere of terms that emerged in the other realm. Indeed, terms such as “rights” and “proportionality”—which are primarily legal categories—were regularly mobilized in parliamentary debates, while the notions of “deservingness” and, more prominently, “sovereignty”—which emerged in political theory and discourse—were used in court. We thus considered that the court case could not be analyzed as a bounded object. On the other hand, our conceptual orientation led us to want to capture broader *normative* arguments—and not exclusively the rhetoric and technicalities that are specific to the adversarial legal form—and we decided that it was methodologically important to look at the case in its social context. We chose to analyze parliamentary debates and court documents because they provide rich insight into the various political and legal arguments and their normative justification, as well as a detailed chronology of how the arguments progressed.

We did not limit the collection of parliamentary debates to the passing of Bill C-31 but also included those that occurred around the time of the passing of the bill and referred to the two boat arrivals. We collected interventions from a total of thirty-two members of parliament (MPs) using a publication search on *Hansard*. All debates that included the expressions “*MV Ocean Lady*” and “*MV Sun Sea*” were included in this study. These interventions took place between October 28, 2010, and May 20, 2016. The sample included interventions by eighteen Conservative MPs, six New Democratic (NDP) MPs, five Liberal MPs, one Green MP, one independent MP, and one Bloc Québécois (BQ) MP. Conservative MPs are more largely represented simply because they spoke on the matter more frequently as a result both of their politicization of the issue and of the fact that they were in government for most of that time.

A total of twelve court documents from *R v Appulonappa* were also examined, and we followed the decisions as the case proceeded from the trial at the Supreme Court of British Columbia, to the Court of Appeal for British Columbia, and the Supreme Court of Canada. The reasons for judgement at voir dire from the Supreme Court of British Columbia were analyzed, as well as the oral reasons and reasons for judgement from the Court of Appeal for British Columbia. From the Supreme Court of Canada, the reasons for judgement were examined along with

the transcripts of the hearings, two factums from the Crown, and the factums from five different involved parties (Amnesty International, the Attorney General of Ontario, the Canadian Association of Refugee Lawyers, the Canadian Civil Liberties Association, and the Canadian Council for Refugees). While these factums present legal arguments that differ from those that these organizations presented online and in the media, they also provide a glimpse into their normative positions. Finally, two exclusions should be mentioned. First, when *Appulonappa* reached the Supreme Court, the court was hearing four other similar cases consolidated in *B010 v Canada*. We consulted this decision but while from a legal perspective *Appulonappa* and *B010* are closely linked, we chose not to include this case, as we would have had to examine the various decisions of the four companion cases of *B010* to give them the same treatment we granted *Appulonappa*. Second, we had finished the data analysis when, after the Supreme Court decision, Mr. Appulonappa and his colleagues were sent back to a criminal court to face trial and were acquitted. While we consulted the decision and mention it in the article, we did not include it in our corpus.

We mobilized a three-stage coding strategy to conduct our thematic content analysis using the NVivo 10 software (Hsieh and Shannon 2005; Bailey 2007). The initial coding stage allowed for the examination, comparison, and search for similarities and differences throughout the data. During this stage, the data was examined openly, allowing us to inductively identify nodes—or basic units that file text under a specific topic. The second stage of analysis relied on pattern coding, whereby the data was scanned for patterns in order to gather nodes into broader codes. As an example, it became clear at this point that the node “international commitment to fighting smuggling”—a key legal argument—had gathered diverse normative arguments that could be divided into refugee protection and the protection of Canadian sovereignty and image, or that the node “criminality” was linked to broader questions of safety. In the final stage of the coding process, the existing codes were reviewed, compared, and grouped together to form two major themes that were particularly contentious, as a strategy to help streamline the presentation of the results. The two main sites of contestation discussed in this paper revolve around 1) fairness and equity (What is fair? What is owed to whom?) and 2) safety and protection (What and who deserve protection? From what and whom? What is the right balance between refugees’ safety and national security?).

***Appulonappa* Goes to the Supreme Court**

In order to understand the arguments made by various actors in these two crucial events relating to the treatment of irregular arrivals as well as the criminalization of individuals who assist asylum seekers in coming to Canada, we begin by contextualizing the chronology of Bill C-31 and *R v Appulonappa*. While irregular arrivals accounted for only 0.2 per cent of total refugee arrivals in Canada over the past thirty years (Silverman 2014), the Conservative government at the time made the fight against unauthorized entry a cornerstone of its immigration reform. Bill C-31—officially named *An Act to amend the Immigration and Refugee Protection Act, the Balance Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, but generally referred to by its

short title *Protecting Canada's Immigration System Act*—was introduced in February 2012 and received royal assent in June 2012. It included new provisions that were intended to expedite the processing of refugee protection claims by reducing protection, and expand the scope of the offence of human smuggling in the name of public safety and security (Hari 2014; Silverman 2014; Huot *et al.* 2016). In fact, the bill was a reformulation of abandoned Bill C-4 and Bill C-49 whose blunt sensationalist short title was *Preventing Human Smugglers from Abusing Canada's Immigration System Act*.

At the time, those opposed to the bill feared that it would create a two-tier system of refugee protection, lead to irreversible psychological harm caused by mandatory detention, and create heavy restrictions on applicants. Among other things, Bill C-31 introduced into law the new category of “designated foreign national,” a category that applies to persons who arrive in Canada as part of a group designated by the Minister of Public Safety as an “irregular arrival” (IRPA s 20.1). New provisions stipulate that a migrant who is sixteen or older and is declared by the Minister as a “designated foreign national” shall be automatically detained (IRPA s 55(3.1)) until a final determination of refugee status is made or the person is released by the Minister or the Immigration Division (IRPA s 56(1)). Originally, clause 25 of the bill even provided that no detention review could happen within the first twelve months of detention. This provision was softened substantially, but the treatment meted out to them is still worse than that of other foreign nationals. Indeed, whereas for most immigration detainees reviews occur “within 48 hours,” “at least once during the seven days following [the first] review,” and “at least once during each 30-day period following each previous review” (IRPA ss 57(1); 57(2)), the Immigration Division is required to review the detention of designated foreign nationals only “within 14 days after the day on which a person is taken into detention, or without delay afterward” and then again “on the expiry of six months following the conclusion of the previous review and may not do so before the expiry of that period” (IRPA ss 57.1(1); 57.1(2)).

In addition to mandatory arrest and detention, designated foreign nationals face significant restrictions on applications. While designated foreign nationals can obtain refugee status or the status of a person in need of protection, they cannot access the Appeal Division if they are refused protection and are not eligible to an automatic stay of removal if they ask for a judiciary review (IRPA s 110(2)(a); SOR/2002-227 s 231(2)). Designated foreign nationals must also wait five years before being able to apply for permanent residence, temporary residence, or for protection based on humanitarian and compassionate (H&C) grounds (IRPA ss 11(1.1); 24(5); 25(1.01)). In addition, and irrespective of a designation of irregular arrival, Bill C-31 also granted the Minister new powers to deem some “designated countries of origin” as safe, resulting in asylum seekers arriving from these countries being forced through an expedited process and receiving less procedural protection (IRPA s 109.1).¹ While those in support of

¹ We would like to thank Jamie Liew for helping us with the interpretation of some of the sections. For detailed summaries and analyses of the legal changes introduced by Bill C-31, see Béchard and Elgersma 2012; Galloway 2014; Liew and Galloway 2015, especially p. 257–61, 510–12, 560–61.

the bill claimed that the new provisions would make Canada's immigration system faster and fairer, those who opposed the bill feared that it amounted to a profound shift away from Canada's reputation as a country that accommodates refugees and asylum seekers.

The saga that led to a Supreme Court decision in *Appulonappa* in November 2015 started before and ran parallel to this legislative reform, but the two processes were in fact politically intertwined. In October 2009, Canadian authorities intercepted the MV *Ocean Lady* off the coast of Vancouver Island with seventy-six Tamil asylum seekers from Sri Lanka onboard. Authorities discovered that most migrants did not have the required documentation and had agreed to pay the organizers of the voyage a sum of between \$30,000 and \$40,000 to enter Canada. According to the Crown, the voyage was a planned operation designed to smuggle undocumented migrants into Canada with the intent of acquiring monetary gain (2013 BCSC 31). This is illegal according to the *IRPA*. As it existed at the time, s. 117(1) of the act stated that "No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act" and set a penalty of a fine up to \$500,000 and/or up to ten years' imprisonment for a first indictable offense. Four of the passengers—Francis Anthonimuthu Appulonappa, Hamalraj Handasamy, Jeyachandran Kanagarajah, and Vignarajah Thevarajah—were criminally charged under this section. In an application brought forward at the *voir dire*, the counsels for the accused contended that s. 117 of the *IRPA* is unconstitutionally overbroad as it may lead to the conviction of humanitarian workers or family members assisting asylum seekers for altruistic reasons. According to them, this failed to comply with the legislative intent of s. 117 and violated s. 7 of the *Charter* which guarantees the right to liberty.

The Crown agreed that the purpose of s. 117 was not to convict people who fall into these categories but argued that it needed to be broadly phrased to allow Canada to fulfill its international obligations in the global fight against smuggling and to protect refugees from abuse. The Crown added that this broad phrasing did not render s. 117 legally overbroad because s. 117(4) legislated procedures to screen out people in these categories by making it mandatory that the Attorney General authorize prosecution, thus excluding in practice humanitarian activists or workers and family members from being criminalized. Silverman J. disagreed with the Crown and argued that these measures do little to prevent the criminalization of people who fall into these categories. He also rejected the Crown's argument that the breadth was justified in the name of refugee protection and Canada's international obligations to combat transnational crime. For these reasons, Silverman J. concluded that s. 117 of the *IRPA* was in violation of s. 7 of the *Charter* in a way that was constitutionally overbroad, and was therefore of no force and effect.

Before the British Columbia Court of Appeal (2014 BCCA 163), the Crown changed its submission on the purpose of s. 117 and agreed that s. 117 was indeed enacted to prevent *all* efforts to organize or assist the unlawful entry of others into Canada, including those by humanitarian workers and family members. It is this unusual decision by the Crown to radically change its argument that brought our attention to the case in the first place. After failing to convince the judge that the

broad reach of s. 117 was a response to Canada's international obligations to fight smuggling and therefore protect refugees from abuse, the Crown argued at the BC Court of Appeal that, in fact, s. 117 was never meant to protect refugees. The breadth was instead justified by the objective of protecting the Canadian state. Indeed, as summarized in the Supreme Court's decision, the argument then became about the state's need in matters of "(1) controlling who enters its territory; (2) protecting the health, safety, and security of Canadians; (3) preserving the integrity and efficacy of Canada's lawful immigration and refugee claims regimes; and (4) promoting international justice and cooperation with other states on matters of security" (2015 SCC 59, para 13). On appeal, Neilson J.A. had revealed her surprise, stating:

On appeal, the Crown's ... position is somewhat unusual as it has significantly recast its argument, and now maintains that the trial judge erred in accepting its submissions on the objective of s. 117 at the *voir dire*. In its reformulated argument, the Crown contends the judge should instead have found that the overarching aim of s. 117 is to prevent individuals from arranging the unlawful entry of others into Canada, thereby securing the secondary goals of enforcing Canadian sovereignty; maintaining the integrity of Canada's immigration and refugee regime; protecting the health, safety, and security of Canadians; and promoting international justice and security (2014 BCCA 163, para 5).

This sudden change of heart responds to a shift in legal strategy, but we suggest that it also captures a lot of what is at play in the case in terms of contested regimes of justification. The BC Court of Appeal accepted the Crown's revised submission about the legislative intent of s. 117 and concluded that Canadian laws criminalizing those who assist the entry of undocumented migrants have not historically distinguished between a person's motive and characteristics. On this basis, the court declared s. 117 constitutional and overturned the declaration of no force and effect.

The case then made its way to the Supreme Court, which ruled that the purpose of s. 117 is to criminalize human smuggling in the context of organized crime and does not extend to the prosecution of humanitarian workers, family members, or refugees helping each other. The Court found that the overbreadth could not be justified as an exception under s. 1 of the *Charter* and ruled that s. 117 ought to be read, "as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*" (2015 SCC 59, para 86). The case of Mr. Appulonappa and his co-accused was sent back for a criminal trial and, in July 2017, Silverman J. found that they had acted in a manner consistent with the principle of mutual aid between refugees, and were therefore not guilty of human smuggling under s. 117 of the *IRPA* (2017 BCSC 1316).

Fighting Over the Meaning of Fairness and Safety

Applying our conceptual framework to the data we collected, we mapped out the arguments made in court and parliament and regrouped them within "common

discursive funds,”² which Lahire (2005, 18) describes as “thematic, metaphoric, rhetorical, and argumentative common grounds,” or culturally and historically situated discursive resources from which actors can draw to make sense of the issue at hand and justify their reading of it and the treatment they believe it should receive.

Fairness and Equity

The first site of contestation identified is over fairness. The question “What is a fair or just treatment of these ‘asylum seekers’ or ‘queue-jumpers’?”—asked in various forms in parliament and in court—depends in part on how they are seen and framed. These framings, in turn, rest on different moral grammars, that is, on normative resources belonging to distinct regimes of justification organized around divergent higher common principles (Boltanski and Thévenot 2006; Kaufman 2012). What is particularly interesting in these debates is that opposing views all relied on a notion of equal treatment. But while both sides leveraged the concept of fairness to advance their position, it appeared to mean very different things to the actors involved. Conservative MPs argued that without the implementation of Bill C-31, Canada’s immigration system would be unmistakably less fair for “legitimate” migrants who follow legal protocols to enter the country. In parliamentary debates, they made a clear distinction between those they deemed to be “legitimate” refugees and those they labelled as “non-legitimate” refugees or “irregular arrivals.” One MP went beyond the question of legitimacy and reframed the dichotomy as opposing “the honest applicant” who files an application from abroad, and “the impatient rich” who pays to be smuggled in.³

Interestingly, the position of the Crown throughout *Appulonappa* bears a striking resemblance to the arguments highlighted by the Conservative party. The Crown lawyers argued that in declaring s. 117 to be vague and overbroad, the courts would directly undermine the legal process of coming to Canada. Similar to the Conservative MPs, the Crown stated that “legitimate” and “legal” immigration channels must be upheld in order to prevent Canada’s immigration and refugee system from allowing a “free for all where anyone can decide who they want to bring into the country.”⁴ The Crown further argued that, if the court was to declare the section to be vague and overbroad, individuals would take advantage of the refugee determination procedures and this would in turn significantly hamper protection for genuine refugees. The Crown in *Appulonappa* and the Conservative MPs in parliament thus claimed that, to ensure that the immigration and refugee system treats *all* people equally, it needed to prevent people from “jumping the queue.” Legally, this argument relies on a problematic opposition between legitimate and illegitimate asylum seekers based on their means of entry—which is contrary to international and Canadian refugee law (IRPA s 133)—but it is nonetheless

² Our translation of Lahire’s “fonds discursif commun.”

³ *House of Commons Debates*, 40th Parl, 3rd Sess, No 89 (28 October 2010) at 5513 (Hon Steven Blaney citing M. Deakin-Macey).

⁴ *R v Appulonappa*, 2015 SCC 59 (Oral argument, Respondent at p. 122).

articulated as grounded in a principle of equality. In this view, reducing the breadth of s. 117 would send a message that there is a loophole that allows rules that are supposed to apply to all to be by-passed

The political opposition to Bill C-31 in its various versions, as well as the defendants' counsels and most concerned parties in court also mobilized this notion of equality but in a radically different way. The parliamentary opposition to Bill C-31 argued that the creation of a new category of asylum seekers under the labels "designated arrivals," "irregular arrivals," or "designated country of origin" is discriminatory and prejudicial. Consequently, the implementation of the bill would render the immigration and refugee system incompetent and incapable of delivering a just and fair process to all refugees. They further contended that refugees who arrive in Canada through irregular means would be treated differently and would thus have unequal access to protection. The lawyers for the accused deployed an argument also used by an NDP MP in claiming that s. 117 treats people unfairly by criminalizing family members who might help their kin enter the country without authorization to claim asylum. For instance, the counsel for Mr. Kanagarajah made the point during the Supreme Court hearings that an asylum seeker coming to Canada alone and without proper documentation would be able to count on the exemption written in the law (IRPA, s. 133), except that,

if they are the head of the family unit ... organizing their husband or wife or their children, then they are going to be subject to prosecution. How can it be that an individual ... conduct that is lawful, or at least exempt for the individual, is not exempt when it relates to a husband helping a wife or a parent helping a child? In my respectful submission that is unequal treatment. That is discriminatory treatment in the most categorical impossible ways.⁵

By not exempting parents from prosecution, s. 117 was presented as unfair and unjust by these actors. This point was echoed by some of the stakeholders in the case at the Supreme Court; in particular the Canadian Association of Refugee Lawyers (CARL) and the Canadian Civil Liberties Association (CCLA) whose lawyers claimed that treating parents who flee persecution with their children differently under the guise of the fight against smuggling is disproportional and fosters psychological harm and inequality.⁶

The discrepancy we encountered is not that surprising, since fairness is clearly an essentially contested concept (Gallie 1956). But what is interesting to note is that what is at play here are competing notions of fairness based on distinct moral grammars that are similar to those informing the historically conflicting notions of citizenship, generally dubbed "liberal" and "republican" (Leydet 2017), that have also resurfaced in recent debates about citizenship revocation in Canada (Park 2013; Forcese 2014; Macklin 2014; Winter 2014). Indeed, here we have a liberal grammar of equality based on access to equal rights clashing with a republican and conservative grammar of equality that

⁵ *R v Appulonappa*, 2015 SCC 59 (Oral argument, Appellant, Kanagarajah at 31).

⁶ *R v Appulonappa*, 2015 SCC 59 (Factum of the Intervener, Canadian Association of Refugee Lawyers at para 29; Factum of the Intervener, Canadian Civil Liberties Associations at para 19).

makes it something to be won by the deserving who fulfill their duties. We will come back to this distinction in the discussion section when we provide a typology of the regimes of justification mobilized by the actors.

Safety and Protection

The second site of contestation is about protection, safety and security. Here again, while the actors involved agreed that the question of protection required consideration, they did not agree on what and who should be protected. In arguing for increased security measures, the MPs who supported Bill C-31 predominantly grounded their arguments in the need to respond to the presumed threats posed by human smuggling. This is significant because, in portraying asylum seekers arriving by boat as “illegitimate” and “fraudulent,” it attached an even more negative notion to their status. In this iteration, all asylum seekers arriving irregularly by boat are tied to the international crime of human smuggling.

By shifting the focus to the threats posed by human smuggling, Conservative MPs argued that not only does Canada have the right and responsibility to decide who enters the country, but it also has an international obligation to condemn human smuggling. Indeed, MPs suggested that Canada has a moral and legal duty to safeguard the integrity of its immigration and refugee system from the abuse of human smuggling. Conservative MPs argued that Bill C-31 would uphold legal immigration channels, remove the incentives for people seeking to come to Canada through human smuggling, and allow the government to “crack down” on human smugglers. This expression was repeated so often by MPs that it made their speeches sound as though they were mere rewordings of speaking notes given to them by their communication team. For instance, they repeatedly claimed to support the various iterations of the bill because their constituents “told [them] they wanted [their] government to act decisively to crack down on those who would endanger the lives of men, women and children by selling them false dreams and transporting them in unsafe vessels or shipping crates.”⁷ Similarly, they contended that the measures their government was putting forward “substantially enhance [the government’s] ability to crack down on those who engage in human smuggling” and “strengthen our ability to protect the safety and security of Canadians from criminal or terrorist threats, and they respect our international obligations and commitments to provide assistance and sanctuary for genuine refugees.”⁸

Similar to the Conservative MPs, the Crown in *Appulonappa* viewed the protection of public safety and security as a moral and legal responsibility of the Canadian government. The Crown’s change of argument on appeal about the rationale for the wide breadth of s. 117 from refugee protection to national security

⁷ *House of Commons Debates*, 41st Parl, 1st Sess, No 132 (1 June 2012) at 8705 (Hon Steven Fletcher). These are almost exactly the same words as those used in March by Ed Komarnicki. See: *House of Commons Debates*, 41st Parl, 1st Sess, No 97 (15 March 2012) at 6390 (Hon Ed Komarnicki).

⁸ *House of Commons Debates*, 40th Parl, 3rd Sess, No 89 (28 October 2010) at 5461 (Hon Dave Mackenzie). Here again, these are almost exactly the same words as those used by fellow MPs, including by Steven Blaney in his speech some hours later. See: *Ibid.* at 5513.

was primarily the result of a legal strategy, but it also marked a change in the moral grammar mobilized to advance its position. Throughout the appeal process, the Crown argued that anyone who takes it upon themselves to by-pass Canada's immigration system by aiding the entry into Canada of undocumented individuals drastically undermines the integrity of Canada's immigration and refugee system, and that undocumented arrivals pose a severe threat to Canadian safety and security due to illness, or membership in a criminal or terrorist organization (2013 BCCA 163). Here, the moral argument is that the health and safety of Canadians, and the integrity of the filtering capacities of the immigration system, trump all other legal, but also moral, arguments and should be understood as the intent of the legislator in creating a legal regime that has a broad scope. And this position appears to be, in fact, consistent with the historical treatment of irregular arrivals in Canada. Indeed, the BC appeal judges who sided with the Crown, found guidance in the fact that, "Canada has had laws criminalizing those who assist undocumented migrants in entering the country since 1902 [and] early versions of the offence focused on offenders involved in organizing illegal arrival by ship or railway, and showed little concern for the rights of the migrants, who were generally expelled" (2013 BCCA 163, para 73).

On questions of security, the arguments by the counsels for the accused, the stakeholders in the case, and the opposition to the bill in parliament, had generally little to say and most often simply rejected any evidence of security risk. For instance, the parliamentary opposition to the bill challenged the Conservatives' position as relying on unsubstantiated claims made in the interests of the party's political agenda. Members of parliament claimed that by fabricating a spurious correlation between refugees and rising crime rates or terrorist activities, the Conservative party was creating public fear over an issue that may not have existed. For instance, a BQ MP claimed that the government's "barrage of public statements positioning the arrival of boats as a threat to the security of Quebeckers and Canadians ... were unfounded," adding that "there is no reason to believe that the arrival of the *MV Sun Sea* posed a threat to [our] security."⁹

However, the fact that they rarely spoke of national security does not mean that few of their claims touched upon questions of safety, security, and protection. Indeed, it is under this theme that we filed many of the statements that revealed most clearly the moral grammar they mobilized. The arguments of the opposition focused on the protection of fundamental rights, of children, and, by extension, of the family. The mandatory detention of those who reach Canada during an event deemed by the Minister as an "irregular arrival," as well as the limit imposed on their ability to access family reunification after being granted refugee status, was seen as violating their fundamental rights, and as an attack on the right to family. But it is specifically the possibility of detaining children (minors sixteen and older in the latest version of C-31 that became law, and all children in previous iterations) that was raised most often not only as a violation of fundamental rights, but also of the moral obligation to protect

⁹ Ibid. at 5470 (Hon Mario Laframboise).

children (Kronick and Rousseau 2005). One of the most passionate interventions came from an NDP MP who asked:

Do members know the psychological effects detention and imprisonment have on children? Some British researchers have shown that even in a few months of detention the psychological effects on children are tragic. They wet their beds. Some become mute. Others stop learning. They become withdrawn. They are not able to go to school because they cannot focus. Some lose weight. Some do not eat. These psychological and physiological effects have been seen in children who have been jailed for just a few weeks or months. Think of the psychological scars that we would be inflicting on these children who come to our country and are placed in detention centres. Some may call them jails but we call them detention centres. That is where children would be put for at least a year. It is totally unjustifiable.¹⁰

Here, it is the safety and protection of the rights, dignity and mental health of asylum seekers—and especially children—that is the topic of concern.

The defence and most parties opposed the Crown's claim about the threat to national security not by claiming that they are unfounded—as the parliamentary opposition had done—but by arguing that the safety of refugees and that of Canadians are equally important, are not at odds, and that in this context the threat posed to the safety of asylum seekers was much more acute. They contended that the breadth of s. 117 increased the vulnerability of refugees by criminalizing what is often the only viable route available to asylum seekers, and forced them to enter Canada without any assistance which could “endanger small children and vulnerable persons.”¹¹ This was brought as a ground on which to argue that s. 117 was overbroad. The counsel for Mr. Kanagarajah made this position clear at the Supreme Court when he posited that “when looking at whether this law is overbroad, arbitrary or grossly disproportionate, the fact that it has the effect it does on families and children is relevant of consideration.”¹² On this and other more technical grounds, the lawyers for the defendants and those who supported them argued that s. 117 infringed upon the liberty of those who help refugees in their arrival to Canada, including lawyers and NGO workers, and that it goes far beyond the threshold of proportionality. At the end, the Supreme Court sided with them (2015 SCC 59).

Competing Regimes of Justification

Distinctions exist between “ordinary” and “legal” forms in terms of the types of arguments deemed admissible and the criteria of validity they must fulfill (Thévenot 1992). And yet, all legal, political, and everyday claims about the reality of a problem (what is at stake), a disagreement over an injustice (who has been wronged), and

¹⁰ *House of Commons Debates*, 41st Parl, 1st Sess, No 15 (19 September 2011) at 1196 (Hon Rathika Sitsabaiesan).

¹¹ Depiction of the Appellants' lawyers' position by the counsel for the Attorney General of Ontario, acting as intervener. See: *R v Appulonappa*, 2015 SCC 59 (Factum of the Intervener, Attorney General of Ontario at para 21).

¹² *R v Appulonappa*, 2015 SCC 59 (Oral argument, Appellant, Kanagarajah at 33).

ways to solve this conflict (what ought to be), rely on regimes of justification to try to generalize their position. Indeed, what is at play in both *R v Appulonappa* and the debates about the various iterations of Bill C-31 are competing notions of fairness and safety that are based on distinct moral grammars. We suggest that it is possible to induce from the claims made two general types of moral grammars or legitimate orders (Boltanski and Thévenot 2006). On the one hand, a humanist-liberal order organized *ethically* on universal obligations to protect those in need, *politically* on the equal access to and protection of fundamental rights, and *legally* on the notion of proportionality. On the other hand, a kinship-republican order, organized *ethically* on the primacy of national obligations, *politically* on duty as a means to prove that one is deserving of membership and rights, and *legally* on a law-and-order reading of the rule of law. We concede that this echoes the conservative-liberal dichotomy, one that is anything but novel and could have been deductively predicted. Our approach allowed us to map out the various types of arguments, present some of the nuances between them, and show how they played out, but despite our attempts at establishing multiple connections between nodes and broader themes across political lines, we found that the claims appear to draw from these two moral grammars. Perhaps the nature of the legal adversarial model and of oppositional parliamentary politics had the effect of exaggerating this dichotomy and concealing similarities and multiple disagreements that may have appeared in other settings. The results are nonetheless rich and allow us to paint a picture that does more than confirm what is generally accepted.

First, despite the agonistic dimension of the debates, it was clear that these regimes of justification are not radically antithetical or incommensurable. They both strive to achieve a level of generalizability sufficient to convince others of what is at stake, who has been wronged, and what ought to be done, in relation to questions of belonging, duties and rights, and legal protection. They do so in a language that is common to them all, and while they may disagree on what principle should take precedence, they mobilize legal, political, and moral categories that are broadly recognizable. This is consistent with the theory: for a critique or a disagreement to be audible, intelligible, it needs to rely on categories that are shared across “polities,” or regimes of justification. While it was beyond the scope of this study to analyze the broader grids of intelligibility in which these moral grammars are imbedded (discussed in Moffette and Vadasaria 2016), it appears that our two regimes of justification are similarly informed by a shared history of colonial state building (in its more violent and more benevolent forms) in which racialized asylum seekers are framed either as threatening and cunning fraudsters, or as powerless victims without agency (Nyers 2006). Indeed, as Kronick and Rousseau (2015, 545) explained in their analysis of the representation of children in the debates surrounding C-31, these two perspectives fuel each other and lead to a process whereby “children are rendered so vulnerable as to be voiceless, enforcing the corollary image of the threatening adult refugee, thereby [at times inadvertently] legitimizing detention of children as a protective measure.” Or as Hage (2000) explains, the distinction between tolerant and intolerant nationalists may lie more in where they place the threshold of tolerance than in drastically different ways of considering the nation.

Second, while we should be careful to note what the regimes of justification have in common, it is also useful to highlight their particularities, and our study has allowed us to identify three axes along which these moral grammars differ. The key distinctions centre on 1) the *ethics of belonging* (and whether obligations are limited to fellow nationals); 2) the *politics of citizenship* taken in a broad sense (and whether we should insist on rights or on duties); and 3) related *notions of legality* (and whether the rule-of-law is understood primarily as a means to prevent state abuse and guarantee proportionality, or as a way to exert legal control over unauthorized entries in a law-and-order fashion). In this sense, the comparison we make between these two legitimate orders echoes the scholarship in citizenship studies on the traditional distinction between Roman/liberal and Greek/republican models of citizenship, the former providing a thin sense of belonging to the political entity and insisting on rights, and the latter centred around an integrated and more homogenous political community and insisting on duties (Leydet 2017). While modern nation-states integrate both conceptions to varying degrees, a tension always exists between them that regularly plays out in the political sphere, with politicians trying to promote competing notions of citizenship. The three axes that we identified could thus be productively used to analyze the regimes of justification at play in debates surrounding citizenship revocation in Canada for instance (Park 2013; Forcese 2014; Macklin 2014; Winter 2014).

The two orders that we identified also resonate with the distinction that legal scholar Delmas-Marty (2010, 84) makes between an “anthropologie guerrière” and an “anthropologie humaniste” in relation to social control. Studying the tendency towards incapacitation and pre-emptive security measures in the control of individuals deemed dangerous in France and elsewhere, she uses the term “anthropology” to highlight that independently of the more political aspects regarding the rule of law and its mutation [...], social control and its transformation express the vision that societies have of the human¹³ (84). She thus maps out a shift from a more (at least theoretically) humanist reading of criminal law that is based on the guilt-punishment dyad and that has at times insisted on equality, dignity, and the complex realities of the human, towards a more war-like conception of social control organized around a dangerousness-security measures dyad. She makes sense of political and legal changes by locating them within broader philosophical conceptions of humanity and community. The similarities between our readings suggest that the three axes that we developed could also be heuristically deployed to study sites of contestation related to the deployment of security measures.

While there are important differences between the objects, contexts, and theoretical frameworks informing these fields, enough similarities exist to sustain a fruitful dialogue and we consider our study as a contribution to this scholarship. And yet, because our focus is not on the actual treatment of people or on the laws themselves, but on the regimes of moral justification mobilized by actors, we believe that our approach can help us better capture the orders of worth that inform the everyday practices and logics of actors involved in these legal reforms.

¹³ Our translation.

Beyond its contribution to understanding the debates surrounding *R v Appulonappa* and Bill C-31, we hope that our article—through the conceptual strategy we deployed and the distinction we established between regimes of justification—can provide readers with tools to study other disputes around questions of immigration and citizenship in Canada and beyond.

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