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Editorial

Introduction: The Criminalization of Migration and European (Dis)Integration

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1 Crimmigration and Human Rights

The term 'crimmigration' connotes the interconnections between crime and migration in the context of public authorities' responses to irregular migration. The phenomenon—which originated in the US but is now well established in Europe and Australia as well—refers to criminal law mechanisms and imagery being heavily resorted to as part of a general political strategy for managing migration flows.[1]

1 D. Kanstroom, 'Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"', 29 *North Carolina Journal of International Law and Commercial Regulation* (2004) 639–670; T.A. Miller, 'Blurring the Boundaries Between Immigration and Crime Control After September 11', 25 *Boston College Third World Law Journal* (2005) 81–123; J. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', 56 *American University Law Review* (2006) 367–419; J. Stumpf, 'Fitting Punishment', 66 *Washington and Lee Law Review* (2009) 1683–1741; S.H. Legomsky, 'The New Path of Immigration Law: Asymmetric

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This can be seen, for instance, in the massive use of detention (typically a criminal-law instrument) in the (administrative) process of checking immigrants' entitlement to enter, or to stay in, the receiving territory, as well as in the (administrative) process of removing them when they are found to be 'in an irregular position'. In EU law, as is well known, immigration detention is explicitly allowed by both the Return Directive and the Reception Conditions Directive, respectively in the forms of pre-removal detention and of detention pending an asylum application. To be sure, the use of detention in migration management is not *per se* a recent innovation. Suffice it to mention Article 5.1(f) of the European Convention on Human Rights of 1950 (hereafter: ECHR), which allows 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. What is new, however, is the fact that the huge increase, during the last fifteen to twenty years, in the rates of migration towards Europe has changed the practical impact of this measure, which has shifted from being an instrument to facilitate dealing with individual cases of uncertain migrant status to being an avenue to mass incarceration of migrants. As a consequence, the meaning of migration detention has changed accordingly: indeed, the more indiscriminate it is, the less effective migration detention unavoidably becomes as a means for migration management. Notwithstanding this, governments continue to systematically resort to it, seemingly more interested in some collateral effects attributable to it than in its (very limited) capacity to contribute to migrants' identification and expulsion: effects that should be proper to criminal sanctions alone, such as deterrence, incapacitation, and expression of moral resentment.[2]

Crimmigration also reveals itself in the growing use of criminal law to sanction migration law violations, with irregular migration increasingly framed as a criminal problem instead of an administrative one.[3] Criminalization of

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Incorporation of Criminal Justice Norms', 64 *Washington and Lee Law Review* (2007) 469–528; J.M. Chacón, 'Managing Migration Through Crime', 109 *Columbia Law Review Sidebar* (2009) 138–148; J.M. Chacón, 'Overcriminalizing Immigration', 102 *The Journal of Criminal Law and Criminology* (2012) 613–652; C.C. García Hernández, 'Creating Crimmigration', *Brigham Young University Law Review* (2013) 1457–1515; A. Aliverti (2013) *Crimes of Mobility: Criminal Law and the Regulation of Immigration*, Abingdon: Routledge.

2 A. Leerkes and D. Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', 50 *British Journal of Criminology* (2010) 830–850.

3 See, among others, J. Stumpf (2015) 'Crimmigration: Encountering the Leviathan', in S. Pickering and J. Ham (eds), *The Routledge Handbook on Crime and International Migration*, Abingdon: Routledge, p. 241; V. Mitsilegas (2015) *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, Cham: Springer, Chapter 3.

irregular entry/stay can now be found in the legislation of many EU Member States [MSs].[4] But, even at EU level, one can easily detect how the Member States are urged to 'fight against illegal immigration', and how this frequently entails their being required to make use of criminal law measures (e.g. Facilitation Directive (FD),[5] Employers Sanctions Directive (ESD)).[6] This has led many EU MSs to enact various norms criminalizing conduct ancillary to irregular migration, such as use, or even mere possession, of forged immigration documents, facilitation of migrants' irregular entry/stay (thus implementing the FD), or the fact of employing 'illegally staying third-country nationals' (as is required by Article 3 ESD).

In the opposite direction, crimmigration can also be seen in migration law measures (most notably, residence permit revocation, citizenship deprivation, expulsion) being increasingly applied as either substitutive or additional sanctions against migrants who are found guilty of a crime. This means that immigration law is being used as an instrument of crime control. But it also means that criminal convictions more and more result in regular migrants being deprived of their legal status, and in their subsequent removability. In both cases, we are faced with another side of crimmigration: criminal law used as a criterion to determine migrants' entitlement to be part of the receiving community.

As a consequence of crimmigration, being an irregular immigrant is increasingly associated—both in public opinion and in legal documents—with being a criminal, and the distinction between irregular and regular migration tends

4 Fundamental Rights Agency (FRA) (2014) *Criminalisation of migrants in an irregular situations and of persons engaging with them*, Vienna: FRA, available online at http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-0_en_0.pdf (last accessed 18 February 2016). See also J. Parkin (2013) *The Criminalization of Migration in Europe. A State-of-the-Art of the Academic Literature and Research*, CEPS Paper in Liberty and Security 61, Brussels: CEPS, available online at https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf (last accessed 25 February 2016); A. Spena, '*Iniuria migrandi*. Criminalization of Immigrants and the Basic Principles of the Criminal Law', 8 *Criminal Law and Philosophy* (2014) 635–657; M. Provera (2015) *The Criminalization of Irregular Migration in European Union*, CEPS Paper in Liberty and Security 80, Brussels: CEPS, available online at https://www.ceps.eu/system/files/Criminalisation%20of%20Irregular%20Migration.pdf.

5 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

6 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

to overlap the distinction between criminality and non-criminality.[7] This raises a number of serious concerns regarding, first, the conformity of crimmigration norms and practices with the standards of principled criminal law, and, second, the impact that these same norms and practices can have on immigrants' basic rights. Clearly, these two concerns are closely linked: since the fundamental constraints on criminal law are founded on the need to protect basic human rights (so-called 'penal guarantees'), derogating from these fundamental principles may lead to a corresponding violation of these rights.

The crucial point is that, while under contemporary constitutional frameworks criminal law's legitimacy largely depends on its being inclusive (with criminal punishment emerging as a means of rehabilitation/re-socialization of the criminal,[8] and the criminal process as a dialogue between the accused and the community to which he/she belongs),[9] crimmigration instead is utterly exclusionary. Its function is precisely that of excluding unwanted migrants: first, excluding them from the territorial space over which states claim their sovereignty (expulsion, indeed, is the ultimate aim of crimmigration);[10] second, excluding them from the polity, by depriving regular immigrants of their entitlement to consider themselves as being part of it (citizenship deprivation, residence permit revocation); and third, excluding their (administrative) detention from the body of guarantees typical of Western criminal justice systems,[11] and in particular from the coverage of the *ultima ratio* principle

7 A. Dal Lago (1999) *Non Persone*, Milan: Feltrinelli; A. Spena, '*Iniuria migrandi*. Criminalization of Immigrants and the Basic Principles of the Criminal Law', 8 *Criminal Law and Philosophy* (2014) 635–657, at 647–649.

8 See, e.g., Article 27.3 of the Italian Constitution, according to which 'punishments (...) must aim at re-educating the convicted'.

9 On the dialogical nature of criminal trial, see, e.g., R.A. Duff (2001) *Punishment, Communication and Community*, Oxford: Oxford University Press; R.A. Duff, L. Farmer, S. Marshall and V. Tadros (2007) *The Trial on Trial*, vol. III: *Towards a Normative Theory of the Criminal Trial*, Portland: Hart Publishing.

10 See, e.g., J. Stumpf, 'Fitting Punishment', 66 *Washington and Lee Law Review* (2009) 1683–1741, pointing out some problems this raises in terms of proportionality: 'Proportionality is conspicuously absent from the legal framework for immigration sanctions. One sanction—deportation—is the ubiquitous penalty for any immigration violation. Neither the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect' (at p. 1684).

11 See, e.g., J. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', 56 *American University Law Review* (2006) 367–419, at 390; S.H. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', 64 *Washington and Lee Law Review* (2007) 469–528, at 515–516.

(according to which detention—especially in those cases in which it is not grounded on a previous lawful conviction—must be limited by strict necessity and proportionality),[12] as is shown by their being massively detained in the process of their expulsion and/or of verification of their entitlement to stay.[13]

Interestingly, this conflict between crimmigration, which is exclusionary, and the immigrants' claim to join new political communities and spaces, and hence to be included in the enjoyment of certain fundamental rights, corrodes the European project at the very core, which is, to a great extent, a project of integration through law and rights.[14] The protection of basic human rights (where 'human' is not synonymous to 'citizenship-related'), indeed, lies at the heart of the European effort after World War II, as can be easily illustrated by referring to both the ECHR and the epiphany of fundamental rights within the EU system, now codified in the Charter of Fundamental Rights of the EU (hereinafter EUCFR). On the other hand, however, it is also clear that the 'fight against illegal migration' has been among the most prominent worries of both the EU and its Member States for the last 15 years at least, as is shown by plenty of EU programmes and secondary legislation. Crimmigration is the most powerful manifestation of this conflict, and more generally of the insufficient mainstreaming of human rights into the governance of migration.

Hence, reflecting on crimmigration appears all the more urgent and necessary today in the perspective of the European integration process, of which the current migration 'crisis' is a symptom of malaise. Until the last few decades, in a context marked by economic wealth and growth, the process of integration was a success story, moving gradually—though in a convoluted way—in the direction of 'an ever closer union', where the lack of a precise idea of the *telos* of that 'union' was not a big issue after all, but rather an expression of the European *Sonderweg*.[15] The European 'journey' has been a story of

12 See, e.g., *Saadi v. the United Kingdom*, App. no. 13229/03 (ECtHR, 29.1.2008) paras 69–72, carving out immigration detention under Article 5.1(f) ECHR as an exception to this *ultima ratio* principle.

13 In Legomsky's words: 'Immigration law has been absorbing the theories, methods, perceptions and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.' See S.H. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', 64 *Washington and Lee Law Review* (2007) 469–528, at 469.

14 M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds) (1986), *Integration through Law. Europe and the American Federal Experience*, New York, NY: de Gruyter.

15 J.H.H. Weiler (2001) 'Federalism and Constitutionalism: Europe's Sonderweg', in: K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, Oxford: Oxford University Press.

supranational integration where 'economic battles' have been tackled with such 'weapons' as law, rights and integration. In the last few years, however, observers have noticed that integration is stagnating, colliding with the lack of solidarity, both within the EU and in the relations with external subjects. Migration management is a blatant example thereof, with border management increasingly approached by the MSs under the banner of securitization and in the perspective of maximizing their domestic interests, even at the expense of legal and political obligations towards other MSs as well as of their legal and moral obligations towards migrants.

With the terrorist attacks in Paris (January and November 2015) and in Brussels (March 2016), this trend finally reached its (provisional) apex, to the point that the very idea of a European space of free circulation of persons (so-called Schengen area) is now at tremendous risk of collapsing; at the same time, the traditional assumptions are being reinforced: that states have the sovereign prerogative to establish the conditions under which foreigners may gain regular access to their territories, that they have a legitimate interest in controlling migration flows, and that, in order to prevent violations of this interest, they can non-arbitrarily make use of their coercive powers, including criminal law instruments.[16]

Crimmigration, we argue, is one way by which states try to re-establish their sovereignty in a world in which globalization and increased mobility have deeply challenged that traditional political dogma. This attempt, however, as was previously said, comes at the expense of some basic rights: the exclusionary nature of crimmigration deprives immigrants of enjoyment of fundamental rights to which, as human beings, they are entitled.

And it is precisely on the basis of fundamental rights that we should find a way to approach a solution in order to reconcile the governance of migration, the fight against crime and the rule of law. In other words, the strength of the law cannot be ignored: the action of higher courts—European Court of Human Rights and Court of the Justice of the EU *in primis*—will contribute to making sense of those rights in a composite constitutional framework where the 'right to have rights' cannot get lost in the fragmentation of legal orders. The milestones represented by the achievement of the EUCFR and its *de facto* constitutionalization in the Treaty of Lisbon, alongside the steady, though non-linear, convergence between the EU and ECHR systems, are also there to function as a counterweight to the latest nervous manifestations of sovereignty, which increasingly resort to 'emergency' and 'exception' to tackle contemporary societal challenges. The Court of Justice, for example, is setting boundaries to some

16 See, e.g., Italian Constitutional Court, decision no. 250/2010.

developments of European integration not strongly embedded in respect for fundamental rights: for example, the recent case law on data protection (*Google Spain*, but especially *Digital Rights Ireland* and *Schrems*)[17] shows that storage and exchange of personal data for law enforcement purposes cannot happen without protection of fundamental rights (in those cases of data protection and privacy). It therefore rejected a European idea of the 'state of emergency', thus reaffirming, alongside *Kadi*,[18] that even most serious societal threats have to be tackled within the realm of 'principled law'.[19] At the same time, the Court of Justice has worked on the interaction between domestic 'crimmigration' law and the EU Return Directive, in a number of cases that, to some extent, have placed some boundaries to MSs' powers to criminalize irregular migration (even if in name of the effectiveness of EU law).[20] In other cases, the Court of Justice has strengthened the guarantees of the Return Directive, even recognizing that in some cases return should be not enforced.[21]

On its side, the European Court of Human Rights is also scrutinizing States' actions in the domain of crimmigration, including the interplay between national and European laws.[22] Its case-law is consolidating principled law, in

17 Court of Justice of the EU (Grand Chamber) 13 May 2014, case C-131/12, *Google Spain v. AEPD*, nyr; Court of Justice of the EU (Grand Chamber) 8 April 2014, joint cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Ireland*, nyr; Court of Justice of the EU, Grand Chamber, 6 October 2015, Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, nyr.

18 Court of Justice (Grand Chamber) judgment of 3 September 2008, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*.

19 See L. Marin (2016) 'The fate of the Data Retention Directive: about mass surveillance and fundamental rights in the EU legal order', in: V. Mitsilegas, M. Bergstrom and T. Konstatinides (eds.), *Research Handbook on European Criminal Law*, Cheltenham: Edward Elgar Publishing (forthcoming).

20 See cases *El Dridi* (C-61/11 (2011) in ECR I-03015), *Achughbabian* (C-329/11 (2011) in ECR I-12695), and *Sagor* (C-430/11 (2012) nyr). For further references, see N. Vavoula, 'The interplay between EU immigration law and national criminal law: the case of the Return Directive', in: V. Mitsilegas, M. Bergstrom and T. Konstatinides (eds), *Research Handbook on European Criminal Law*, Cheltenham: Edward Elgar Publishing, forthcoming. Recently however, in *Celaj* (Case C-290/14, *Celaj*, Judgment of 1 October 2015, nyr) the Court limited the scope of the previous case law.

21 In case *Abdida* (C-562/13, Judgment of the Court (Grand Chamber) of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, nyr). See S. Peers, 'Irregular Migrants: Can Humane Treatment be Balanced against Efficient Removal?', 17 *European Journal of Migration and Law* (2015) 289–304.

22 See ECHR, *M.S.S. v. Belgium and Greece* (Application no. 30696/09, Grand Chamber judgment of 21 January 2011) and *Tarakhel v. Switzerland* (Application no. 29217/12, Grand

checking that States' actions do not overstep the boundaries of fundamental rights, including when they act outside the territory.[23]

2 A Brief Overview of the Special Issue

This Special Issue of *European Journal of Migration and Law* is devoted to analysing some relevant facets of the abovementioned conflict, which we see at the heart of the current European approach to migration, between criminalization of migrants and migrants' rights. But it is also devoted to outlining some strategies and practices through which the conflict might be avoided, or at least overridden. The papers focus on different facets of this overarching subject by adopting a European (EU and ECHR) perspective, as well as the perspective of specific MSs. Three domestic systems, in particular, are taken into consideration—the UK, France and Italy—and compared with the relevant European standards concerning migrants' rights.

The first article, by Mary Bosworth and Marion Vannier, metaphorically takes us inside immigration detention,[24] by providing a comparative analysis of the ways in which this practice is regulated and carried out in France and in the UK. The authors explore the human rights implications of immigration detention in these two countries by focusing specifically on duration. They argue that practices in both systems fail to meet basic human rights protections, raising urgent questions about the legitimacy and justification of these sites of confinement. In particular, whereas in the UK problems arise from the absence of a statutory upper time limit to detention (which heavily impinges, for instance, on the lives of both those detained and their families), in France—paradoxical as it may seem—it is the short time for which foreign nationals may be held before deportation that raises humanitarian concerns, such as the difficulty for them of accessing due process and legal protections in time, or maintaining decent relationships with their families.

Annalisa Mangiaracina's article takes us, instead, outside immigration detention, by exploring to what extent alternatives to it are in fact accessible to immigrants. The viability of these alternatives has to do with various binding obligations coming both from the EU level and the human rights framework

Chamber judgment of 4 November 2014. See also *Khlaifia and others v. Italy* (Application no. 16483/12, judgment of 1 September 2015).

23 See ECHR, *Medvedyev v France* (Application no. 3394/03, Grand Chamber) and *Hirsi Jamaa and others v. Italy* (Application No. 27765/09, Grand Chamber).

24 See M. Bosworth (2014) *Inside Immigration Detention*, Oxford: Oxford University Press.

of the Council of Europe. Mangiaracina's exploration shows us some critical aspects of the practice of alternatives to immigration detention, focusing on recent European reports, but also focussing on the practice of the Italian case. The author underlines, in particular, that, detention being a measure of last resort, states should always evaluate whether their aims can be achieved through instruments that are both less coercive than detention and more attuned to the fundamental rights of individuals. The analysis carried out by Mangiaracina, however, reveals an unsatisfactory application of this approach, for example in Italy. The author concludes her article by urging a change of culture among the competent authorities, as well as by suggesting that the recast Receptions Conditions Directive might provide a good opportunity for this.

Alessandro Spena's article, in its turn, puts us, so to speak, against immigration detention, by providing a normative analysis and evaluation of the ways in which immigrants resist it. The author first outlines some general features of immigration detention, arguing, in particular, that it is the sole hypothesis in which European states are nowadays permitted, under the ECHR, to deprive individuals of their liberty independently of both their responsibility and their dangerousness. He then suggests distinguishing three main forms of resistance to this kind of detention: institutionalized, non-institutionalized, and anti-institutional. After spelling out the characteristics of each of these forms of resistance, the author maintains that they represent a form of 'constituent power', being ways through which irregular immigrants try to assert their existence and to negotiate some space within our largely hostile societies.

This constituent power preludes a—merely aspirational—pathway to citizenship. On the other hand, crimmigration itself can consist in sending people down the reverse path, depriving them of their citizenship. Lucia Zedner's article is specifically concerned with this, by focusing on the power, provided by the Immigration Act 2014, of the UK government to deprive naturalized British citizens of their citizenship, in cases in which this is deemed to be a necessary means to counter terrorism. As Zedner points out, citizenship deprivation impinges on various fundamental rights: first of all, the right to respect for private and family life (Article 8 ECHR), but also other rights (not least those established in Articles 2 and 3 ECHR) where the consequence of deprivation is that individuals suffer loss of life, torture, inhuman or degrading treatment or punishment. Zedner's article offers a strong critique of citizenship deprivation on grounds of both its efficacy as a security measure and of its legality and respectfulness of rights.

The last article, by Anna Magdalena Kosińska, elaborates on the limits put by the EU Return Directive on the power by MSs to criminalize the illegal entry and stay of third-country nationals (TCNs), which is a crucial aspect

of crimmigration. The article focusses, in particular, on the Court of Justice's judgment in the *Celaj* case, released on October 2015, which partly revised the restrictive approach previously maintained by the Court itself (e.g., in *El Dridi*, *Achughbabian* and *Sagor*). While it had put the principle of the effectiveness of EU law as the foundation of its previous case law on the issue, in *Celaj* the Court introduced a distinction between first entry, for which return is the dominant aim to achieve (even at the expenses of criminal punishment, insofar as executing this last impinges on the TCN's expulsion), and illegal entry in breach of an entry ban, for which MSs can legitimately decide to use more dissuasive sanctions—such as, for instance, criminal detention—even though this can impede a prompt execution of the TCN's return.