editorial

The Use of Criminal Law for Migration Purposes

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Punishment presupposes an offence, and an offence is a form of conduct that society has good reason to prohibit. However, this elementary logic becomes blurred when criminal law is used to address irregular entry to or stay in a territory. The person in question may have crossed the border without authorisation or obtained a residence permit and then overstayed. In each of these situations, the offence does not necessarily consist of harming the life, property or liberty of another, but rather of being present on the territory without the required legal authorisation.

Where the irregularity stems from remaining in the territory despite an obligation to leave, the conduct complained of takes the form of an omission: failing to leave the country despite the legal obligation to do so. Yet this omission merges with the mere presence of the person concerned, and compliance with the obligation does not always depend on their will alone.

In every case, criminal law punishes not so much an injury to others as a presence deemed contrary to migration rules. This observation is the starting point of this second volume, which is devoted to the use of criminal law for migration purposes. Before addressing the issues it raises, it is important to understand the scale of the phenomenon.

The criminalisation of irregular stay, expulsion ordered by the criminal courts, detention pending removal and the punishment for assisting entry do not form part of a single legal framework. Although immigration and asylum law form part of administrative law, they contain criminal provisions that punish breaches of their rules. The criminal code adds measures of its own, such as judicial expulsion. Administrative policing and criminal punishment thus operate according to different principles. Nevertheless, all these mechanisms converge on the same outcome: **determining who has the right to remain on the territory, and arranging the departure of those who are not authorised to stay.**

English-language scholarship (J. STUMPF, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, in: American University Law Review 56/2, 2006, pp. 367-419) has given this convergence a name: **the term 'crimmigration' which denotes the growing entanglement of criminal law and migration law.**

Stephen H. LEGOMSKY described the phenomenon as the 'asymmetric incorporation' of criminal justice norms into immigration law. The latter borrows the severity of criminal law without taking over all of its safeguards (S. H. LEGOMSKY, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, in: Washington and Lee Law Review 64/2, 2007, pp. 469-528). **The State thus retains, as its needs dictate, the coercive force of the one and the procedural flexibility of the other.**

By what routes does criminal law enter migration control? The analysis developed in this volume is organised around four configurations. The first concerns the direct penalisation of migration-related conduct: irregular crossing of the border, unauthorised stay, re-entry after expulsion, or working without a permit. The second configuration comprises peripheral offences that do not target migrants directly, but rather the conduct of third parties who facilitate their irregular entry or stay: forgery of documents, assistance with entry or stay, transport, accommodation or employment. The third configuration addresses the consequences that a criminal conviction may have in migration matters and which, by their very nature, affect foreign nationals alone. The fourth configuration brings together coercive administrative measures, detention in particular, which, although not formally classified as penalties, produce some of the effects peculiar to them.

The first issue raises a fundamental question: what legal interest is actually protected by the criminalisation of irregular stay? The answers usually advanced are familiar: the effectiveness of migration policy, control of the borders, enforcement of the State's decisions. It remains to be determined whether those interests suffice to ground a criminal offence, or whether they come down to the authority of the administrative decision itself. The principle of *ultima ratio* takes on particular importance here (cf. M. A. NIGGLI, *Ultima Ratio?*, in: RPS 111, 1993, pp. 236-263).

The migration consequences of a conviction raise the question of belonging in two ways: expulsion, which deprives a person of their right to remain in the country, and refusal of naturalisation, which prevents them from becoming a citizen. These two decisions may at times rest on the same criminal record. Coercive administrative measures, for their part, raise the question of the applicable safeguards: **which procedure should apply, which judicial authority should intervene, and which rights must be guaranteed where a sanction produces the effects peculiar to a penalty?** There is also the question of effectiveness: does the sanction achieve its aim, and at what cost?

Finally, migration-related criminal law must be examined in the light of the principle of proportionality, for these measures do not affect everyone alike and it is the most vulnerable who feel their effects most acutely. That principle requires, first, that criminal law be resorted to only where administrative instruments prove insufficient. Secondly, proportionality governs the application of coercive measures, and of detention above all: a deprivation of liberty that is not based on the commission of an offence calls for scrutiny both of its duration and of the existence of a genuine prospect of removal. Lastly, proportionality requires that the severity of the penalty remain in an appropriate relationship to culpability. Detention for irregular stay alone, or a long-term expulsion added to the sentence, put that requirement to the test — a question taken up by the various contributions gathered in this volume.

Where do the effects of these measures stop? They reach well beyond the person directly targeted. Little by little, 'illegality' ceases to describe a situation and becomes the description of a person: one is no longer in an irregular situation, one becomes 'illegal', and every interaction with an institution may reactivate the border and recall the precariousness of migration status (N. P. DE GENOVA, *Migrant "illegality" and deportability in everyday life*, in: Annual Review of Anthropology 31/1, 2002, pp. 419-447).

The consequences extend to those close to the person as well. Removal affects children, spouses, families who have committed no offence. Menjívar and Abrego speak of **'legal violence'** to describe these indirect but very real effects of immigration law on families (C. MENJÍVAR & L. J. ABREGO, *Legal violence: Immigration law and the lives of Central American immigrants*, in: American Journal of Sociology 117/5, 2012, pp. 1380-1421).

Another effect is more subtle. Where a person fears that the slightest contact with the police will reveal their status, they may give up reporting the violence or abuse they suffer, and that vulnerability benefits those who exploit them. Migration control thus produces consequences that go well beyond its immediate objective. Those effects multiply as the measures accumulate: conviction, imprisonment, administrative detention, expulsion, ban on re-entry.

The strengthening of migration-related criminal law increasingly reaches people whose presence is in no way clandestine. Some have lived in the country lawfully for decades, as the British scandal known as ‘Windrush’, revealed in 2018, has shown: people who had arrived lawfully from the Caribbean between 1948 and 1973 were detained, and even removed, for want of documentary proof of a status that no one had ever contested. Others are treated as irregular by the sole effect of a State decision, be it the revocation of a protection status, the non-renewal of a permit or a delay on the part of the administration itself. Their presence may then be perfectly explicable, and may even have been regarded as lawful until that point, while nonetheless becoming legally irregular; and the criminal law applied to it no longer punishes conduct, but a change of category decided elsewhere.

This raises the question **of the conditions under which criminal law can be used to control migration without distorting its own foundations**: conduct amounting to an offence, an identifiable legal interest, intervention as a last resort, and a sanction proportionate to the wrong. **How do legal systems answer it?**

In Europe, the Schengen Agreement of 14 June 1985 and its Implementing Convention of 1990 rest on an explicit trade-off: freedom of movement within, and reinforced controls at the external borders. The border therefore does not disappear; it shifts and differentiates between persons. Passport, visa or residence permit determine whether a movement will be characterised as travel, immigration, an application for protection or irregular entry (cf. K. F. AAS, *The ordered and the bordered society*, in: The borders of punishment, Oxford 2013, pp. 21-39; V. BARKER, *Penal power at the border*, in: Theoretical Criminology 21/4, 2017, pp. 441-457).

The shared repressive dimension of this policy took shape in 2002. Directive 2002/90/EC defines the facilitation of unauthorised entry, transit and residence, while Framework Decision 2002/946/JHA organises its punishment. Financial gain is required only in cases of facilitation of unauthorised residence, while States retain the option of exempting humanitarian assistance from liability. It is in this context that the ‘crime of solidarity’ appears, showing how control of the border extends to the social relationships that make the migrant's presence on the territory possible.

The ‘Return’ Directive 2008/115/EC of 16 December 2008 subsequently laid down common standards and procedures applicable to return, including detention. On that basis, the Court of Justice of the European Union set an unexpected limit to the penalisation of irregular stay in 2011: the imposition of a prison sentence provided for by national law may not jeopardise the effectiveness of the return procedure (CJEU, 28.4.2011, *El Dridi*, C-61/11 PPU; CJEU, 6.12.2011, *Achughbabian*, C-329/11). What limits recourse to criminal law here, then, is not the safeguards afforded to the individual, but the requirement for the removal to be effective.

Recent events nonetheless recall the reality to which these texts seek to respond. States face sudden, large-scale arrivals that are difficult to absorb, as shown at the end of July 2026 by the entry, within a few days, of some 60,000 people into the Spanish enclave of Ceuta, which has 83,000 inhabitants. Dozens of people died during the crossing, the army was deployed and almost all of those who arrived were returned to Morocco virtually at once. Greece, faced with rising arrivals from Libya towards Crete, suspended for three months, in July 2025, the registration of asylum applications from people arriving by sea, and then, in September 2025, made irregular entry and stay an offence punishable by at least two years' imprisonment. These situations show the scale of the management problem that migration flows represent, but also the speed with which the response slides from administration towards punishment and administrative detention.

Swiss law illustrates this entanglement particularly well. The criminal provisions of immigration legislation, that is, ancillary criminal law, go back to the Federal Act of 26 March 1931 on the Residence and Establishment of Foreign Nationals (cf. Valentin ROSCHACHER, *Die Strafbestimmungen des ANAG*, thesis, Zurich 1991). This act was replaced by the Act of 16 December 2005 (Federal Council dispatch of 8 March 2002, BBl 2002 3709), which has become the Federal Act on Foreign Nationals and Integration: its Article 115 punishes unlawful entry, departure, stay and gainful employment, and its Articles 116 and 117 punish assistance with unlawful entry or stay and the employment of foreign nationals without authorisation (L. VETTERLI & G. D'ADDARIO DI PAOLO, *Vorb. Art. 115-120e AIG*, in: Caroni & Thurnherr [eds.], AIG, 2nd ed., Bern 2024).

The situation of a person prosecuted for irregular stay may then become paradoxical. They are punished because they remain, even though they are materially unable to leave, for want of documents, of consular cooperation or of a practicable route of return. Punishment thus risks producing what it claims to combat. Where lawful residence becomes impossible without departure becoming any less so, the legislature itself contributes to creating lasting situations of irregular stay (A. BÜCHLER, *Der Gesetzgeber schafft Sans-Papiers*, in: Jusletter of 20.3.2017).

Criminal expulsion constitutes the second pillar of the Swiss model. Its introduction follows a precise chronology: the acceptance, on 28 November 2010, of the popular initiative 'for the deportation of criminal foreigners' (Art. 121 paras. 3-6 of the Federal Constitution), the dispatch of 26 June 2013 (BBl 2013 5975), and then the entry into force of Articles 66a to 66d of the Criminal Code on 1 October 2016 (C. PERRIER DEPEURSINGE, *L'expulsion selon les art. 66a à 66d du Code pénal suisse*, in: RPS 135, 2017, pp. 389-415).

The commission of one and the same offence may thus entail radically different consequences depending on the person's migration situation. The citizen remains in their country, whereas a foreign national may be expelled for several years, even if born in Switzerland and having built their whole life there. That difference does rest on an indisputable premise, namely the national's unconditional right to remain in their own State. It remains the case that nationality becomes decisive for the consequences attached to a conviction.

This is precisely the role of the hardship clause of Article 66a para. 2 of the Criminal Code, which is meant to prevent the automatic character of expulsion from doing away with any examination of the individual situation (M. BUSSLINGER & P. UEBERSAX, *Härtefallklausel und migrationsrechtliche Auswirkungen der Landesverweisung*, in: plädoyer 2016, pp. 96-109). Reconciling the will expressed by the constitutional legislator with the requirement of proportionality is therefore not a peripheral question: it lies at the very heart of the regime.

Spain has taken another path, which counsels caution when transposing legal categories from one legal order to another. Irregular stay does not constitute an offence there: Organic Law 4/2000 of 11 January 2000 classifies it as a serious administrative infringement (Art. 53), expulsion being capable of replacing the fine subject to a review of proportionality (Art. 57). The reforms of 2000 and 2009 tightened the framework, detention being capable of reaching sixty days, without altering that classification, while the Criminal Code occupies the periphery, with the facilitation of entry and transit (Art. 318 bis) and the substitution of expulsion for imprisonment (Art. 89, recast in 2015).

The absence of a criminal offence of irregular stay therefore does not mean the absence of a punitive logic. Detention, expulsion and related offences form a whole whose effects may match those of systems that penalise irregularity directly. The distinction between administrative sanction and penalty, already difficult to draw in general terms, becomes more blurred still in immigration law (cf. L. ALARCÓN SOTOMAYOR, *Los confines de las sanciones*, in: Revista de Administración Pública 195, 2014).

In the **United States**, this entanglement has taken a particularly institutionalised form. The statutes of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, broadened the categories of offences liable to carry migration consequences, narrowed the discretion of judges and reinforced recourse to detention. Irregular entry and re-entry are, moreover, the subject of specific federal offences (American Immigration Council, *Prosecuting People for Coming to the US*, 2026; C. C. GARCÍA HERNÁNDEZ, *Creating Crimmigration*, in: Brigham Young University Law Review 2013/6, 2014, pp. 1457-1516).

For the convicted foreign national, serving the sentence does not therefore necessarily bring the State's response to an end. It may be followed by immigration detention and then by expulsion. The sanction is split in two, and its second component, the loss of the right to remain in the country, may weigh more heavily still than the penalty itself.

Recent developments have reinforced this trend further. The Laken Riley Act, signed on 29 January 2025, requires the detention of foreign nationals as soon as they are charged with certain offences, before any trial. In March 2025, the administration invoked the Alien Enemies Act of 1798 to transfer Venezuelan nationals to a high-security prison in El Salvador without any prior procedure, before federal courts held those removals contrary to the guarantees of due process. At the same time, the revocation of temporary protected status and of humanitarian admission programmes tipped hundreds of thousands of people who had entered and been employed lawfully into irregularity overnight. This example confirms what has already been noted: a situation of irregularity is not always the consequence of the migrant's own conduct.

Latin America nonetheless offers a counterpoint to this development. Several States in the region have chosen to think about mobility rather in terms of rights, regional integration and regularisation, in particular through the residence mechanisms of Mercosur. One idea emerges from this: the border does not necessarily entail punishment.

The law on the books is not enough, however, to account for reality. Policing practices may sustain a punitive logic at the margins of the texts. In Brazil, scholars have thus noted the retreat of the humanist paradigm that had accompanied the reform of migration law (T. OLIVEIRA MOREIRA, *El regreso de la crimigración y el desvanecimiento del carácter humanista de la Ley de Migración Brasileña*, in: Latin American Law Review 1, 5, 2020, pp. 97-120).

Africa calls for another caveat, for their history precedes contemporary legal categories: many commercial, family and pastoral mobilities existed long before the borders inherited from colonisation, and the construction of the bordered State turned those long-standing movements into legally irregular entries and exits.

South Africa offers the most closely studied example. After apartheid, migration policing carried forward certain logics of control developed under the previous regime (J. KLAAREN & J. RAMJI, *Inside illegality: Migration policing in South Africa after apartheid*, in: Africa Today 48/3, 2001, pp. 35-47).

To this history is added today the externalisation of European migration policies. Europe's border extends beyond its territory where certain control functions are entrusted to foreign authorities. A question then becomes difficult to avoid: how far may a State delegate migration control in practice while escaping the protection obligations that ought to accompany it? The answer remains open.

Who will be checked, detained, prosecuted or removed? These normative transformations have very concrete consequences. More than the legal classifications chosen, it is the way coercion is distributed that must be observed. That is precisely what **the contributions gathered in this issue** do.

José Ángel Brandariz (Spain) opens the volume with a study translated from the Spanish by Ana Carla Farrèr Gonçalves. Fifteen years after its beginnings, crimmigration has become an indispensable framework for analysing the processes of criminalisation of irregular mobility. The author sets out its main lines of debate, then dwells on an aspect neglected by the international literature: the conflict between the objectives of migration control and those of criminal control. Perceptible at the normative level and still more in the application of the law, that conflict has given rise, depending on the country, to different punitive models, which generally tend to give precedence to the interests of migration control over those of criminal law and criminal justice. What then remains of criminal-law safeguards when the operation of the system is subordinated to the objectives of migration control?

Fabian Brand (Switzerland) examines the parallels between the mandatory expulsion of Article 66a of the Swiss Criminal Code and the refusal of naturalisation on account of a previous criminal conviction. Through the political-philosophical models of Hobbes and Rousseau, he shows that expulsion rests on a logic of excluding persons insufficiently integrated into the legal community, which is triggered, however, only where the fundamental values underlying the catalogue of Article 66a para. 1 of the Criminal Code are violated. Although its deterrent effects lend it a quasi-criminal character, the measure serves above all a preventive purpose of neutralising danger. It is within this framework that the distinction between the substantive foreigner and the merely formal foreigner takes on meaning, the hardship clause making it possible to determine into which of these categories the person concerned falls. These reflections are then extended to naturalisation, where the article proposes that the assessment of criminal antecedents follow the catalogue laid down in Article 66a of the Criminal Code, which offers an objective and foreseeable basis consistent with the requirements of legal certainty. In both configurations, the foreign national acquires political visibility before the Sovereign for the first time. Who belongs to the legal community, and who decides? Can the same antecedents ground both expulsion and the refusal of naturalisation?

Raphaël Bagi (Switzerland) questions the compatibility of the Swiss framework with fundamental rights where LGBTIQ people in a migration situation are concerned. Administrative detention pending removal and the penalisation of irregular stay form part of one and the same apparatus of migration control, whose effects may render the specific needs of those concerned invisible and expose them to heightened risks of violence, isolation, discrimination and treatment contrary to fundamental rights. His conclusion is nuanced: while the Swiss legal framework appears formally compatible with constitutional and Convention requirements, its concrete application displays, in the absence of explicit mechanisms for taking into account vulnerabilities linked to sexual orientation and gender identity, structural deficiencies liable to compromise its conformity with fundamental rights. By setting Swiss law against European and international standards and against certain foreign practices, the author brings out the limits of an apparent neutrality and identifies avenues for development. Is a framework that complies on paper enough to protect those most exposed?

Karin Georges Trabert (Switzerland) and **Jean Carlo Astorga Cordero** (Costa Rica) analyse the ‘criminalisation of the status of foreigner’, understood as the creation of specific sanctions directly attached to an irregularised migration status. Their comparative study examines the sanctioning response of two States: Article 115 of the Federal Act on Foreign Nationals and Integration, whose effective criminal application in Switzerland is illustrated by statistical data, and Article 33 para. 3 of the *Ley General de Migración y Extranjería* of Costa Rica, which provides for an administrative sanction that, as an interview reveals, is hardly applied in practice. The article closes by setting the similarities and differences side by side, and with a critical appraisal of the necessity and effectiveness of the sanctioning instruments of the two models. Should we punish what could simply be administered? And what does a country that barely applies the sanction it has itself enacted teach us?

Mansah Dondo Amoah and **Molya Vundamina** (South Africa) examine the criminalisation of migration in South Africa. Penal governance of migration there does not constitute a sudden break with a neutral administrative system; it reproduces, albeit reconfigured within the contemporary constitutional order, the punitive logics inherited from the control of mobility under apartheid. The study's principal contribution is to show that administrative failure is a driver of that governance: documentary obstacles, inaccessible refugee reception offices, backlogs, expired permits, corruption and defective routes to regularisation produce or prolong irregular status, which categories such as that of ‘illegal foreigner’ then render legally operative for the purposes of arrest, detention and expulsion. The closing comparison with the United States measures both the global convergence of the phenomenon and the singularity of the South African case. What, then, is the reproach of irregularity worth when the State has itself manufactured it?

Mateo González Figueroa (Colombia) closes the volume from Colombia, which has become the world's leading host country for Venezuelan migrants. The first part of the article traces the historical lack of interest of Colombian legal scholarship in migration to a long-standing relationship between administrative law and the foreign population, marked by the logic of the science of police and by the civilisation/barbarism paradigm that ran through the colonial period, the *Regeneración* and much of the twentieth century. The second part examines the sanctioning regime in force and the process of constitutionalisation led by the Constitutional Court. Its conclusion converges with that of the South African study: the broad discretion with which *Migración Colombia* operates today is in large part the legacy of that historical logic, and, despite advances in the case law, a structural gap persists between the constitutional mandate and institutional practice, to the point that the *acción de tutela* has become the ordinary remedy for protecting rights that ought to be guaranteed from the opening of the administrative procedure. What use are constitutional guarantees if the exceptional remedy becomes the ordinary route to obtaining them?

Six fields, four continents, but one and the same question. When punishment serves to administer the presence of people on a territory, it changes function. It no longer responds solely to an act committed; it helps to decide who may stay and who must leave. It is this shift that must be faced squarely if we are to discuss its justifications, measure its effects and, where they demand it, think about reform.