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Valsamis Mitsilegas

The Criminalisation of Migration in Europe

Challenges for Human Rights and the Rule of Law



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Challenges for Human Rights
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This book develops further ideas and arguments expressed in a number of recent publications. Chapter 3 is an updated and extended version of V. Mitsilegas, ‘The Changing Landscape of the Criminalisation of Migration in Europe. The Protective Function of European Union Law’ published in M. Guia, M. Van der Woude and J. Van der Leun (eds.), *Social Control and Justice. Crimmigration in an Age of Fear*, Eleven International Publishing, 2012, pp. 87–114. Parts of Chap. 4 develop further ideas and arguments presented in V. Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’ published in *Comparative Migration Studies*, vol. 2, 2014, pp. 231–253 and V. Mitsilegas, ‘Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive’ to be published in M. Guia, V. Mitsilegas and R. Koulish (eds.), *Immigration Detention, Risk and Human Rights*, Springer, forthcoming.

This book is dedicated to my EU Justice and Home Affairs LLM students and to the group of brilliant Queen Mary Ph.D. candidates currently researching their theses on migration and criminal law under my supervision. You are inspirational.

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Chapter 1

Conceptualising the Criminalisation of Migration

Recent years have witnessed a growth in scholarly interest in the phenomenon of the criminalisation of migration. Academic interest in the field has followed the proliferation of state enforcement practices in immigration control on both sides of the Atlantic, with a number of leading scholars offering different conceptualisations of and approaches to the criminalisation of migration and its legal implications. In the United States, Stephen Legomsky has highlighted the use of criminal law to punish immigration violations, combined in parallel with the attachment of immigration law consequences to criminal convictions.¹ This twofold link, underpinned by what Legomsky has called importing criminal law enforcement strategies in the field of immigration control, has also been highlighted by Juliet Stumpf under her analysis of the now widely used term of ‘crimmigration’, which also encompasses an analysis of the impact of the criminalisation of migration on inclusion and exclusion.² In the United Kingdom, a recent study by Ana Aliverti has focused on the criminal prosecution and punishment of migrants in domestic law,³ while Lucia Zedner has highlighted the potential consequences of the criminalisation of migration for fundamental principles of criminal law.⁴ From a European perspective, Elspeth Guild, writing for the Council of Europe Commissioner for Human Rights, has adopted a more general approach including within the criminalisation of migration the adverse consequences for migrants in terms of residence and social rights, including employment rights,⁵ while I have explored the criminalisation of migration at EU level in a narrower sense by focusing on the relationship between the use of substantive criminal law and European Union law in this context.⁶ Issues related to the criminalisation of immigration have also been addressed by a number

¹ Legomsky (2007).

² Stumpf (2006).

³ Aliverti (2013).

⁴ Zedner (2013).

⁵ Issue paper prepared by Guild (2009).

⁶ Mitsilegas (2012a).

of scholars in the United States and Europe within wider analyses of the link between migration and illegality,⁷ as well as of the process of the securitisation of migration and its legal implications.⁸ Research on the criminalisation of migration has not been confined only to academic lawyers, with important insights being provided by scholars in international relations, political sociology⁹ and, more recently, criminology.¹⁰

Informed by these contributions and the diversity of approaches contained therein, the analysis in this book will be based on a conceptualisation of the criminalisation of migration based primarily on the use of the law in this process and the legal consequences of such criminalisation. Criminalisation will thus be understood in a narrow sense as including the use of substantive criminal law to regulate migration (in particular via the creation of immigration-related criminal offences and the imposition of criminal sanctions for these offences), but will also encompass more generally the use of criminal law tools including surveillance¹¹ and detention¹² to deal with migrants. The definition of the criminalisation of migration will also include the recent shift observed in both crime and immigration control towards prevention, leading to what has been characterised as a model of preventive justice.¹³ **The criminalisation of migration for the purposes of this book will be understood as the threefold process whereby migration management takes place via the adoption of substantive criminal law, via recourse to traditional criminal law enforcement mechanisms including surveillance and detention, as well as via the development of mechanisms of prevention and pre-emption.**

The book will analyse the main elements of such criminalisation in the law of the European Union, by focusing on the position of migrants who do not have a link otherwise with EU law (by being, for instance, family members of EU nationals). The book will address the consequences of the criminalisation of migration for human rights and the rule of law. The analysis of the rule of law will include implications for legal certainty, arbitrariness, gaps in the law and legality (which, in the case of European Union law, also includes competence). Affected human rights are in particular the rights to liberty, to seek asylum, to private life and data protection and to non-discrimination. The structure of the book aims to reflect the migrant trajectory and align instances of criminalisation with the different stages of

⁷ Dauvergne (2008).

⁸ See inter alia Chacón (2007), Mitsilegas (2007), and for a comparative analysis, Mitsilegas (2012b).

⁹ On the international relations/political sociology nexus see the work of Bigo (1996) on the securitisation of migration.

¹⁰ See a number of contributions in Aas and Bosworth, *call out*.

¹¹ See Mitsilegas, *call out*. (references in note 8).

¹² See Joao Guia (2015).

¹³ See Ashworth and Zedner (2014).

migrant experience. The book will thus be structured on the basis of three stages of the migrant experience: before entry (and before migrants reach the border); during stay (looking at how substantive criminal law is used to regulate migration in the territory); and after entry and towards removal (examining efforts to exclude and remove migrants from the territory and jurisdiction of EU Member States). The book will thus aim to provide a holistic typology of the criminalisation of migration in the law of the European Union.

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