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The Hostile Environment and Crimmigration: Blurring the lines between Civil and Criminal Law

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Crimmigration is a way of describing the insidious advance of laws that criminalise immigration.

Rarely a week goes past in the UK media without some furore about immigration. It was the tabloid media's mean-spirited backdrop to the Brexit referendum, and, if anything, has both soured and intensified in the intervening years. In August 2020 Home Secretary Priti Patel referred in a tweet to the removal of 'illegal' immigrants arriving in Britain by means of small boat, and decried the actions of 'activist lawyers' who continued to frustrate these removals.[1] The online response from lawyers was swift and loud: this so-called 'activism' constitutes nothing more than the application of the law, and taking steps to ensure that its protections extend to everyone, especially the most vulnerable.

Those legal protections are the foundational focus of this article. Known as due process protections, these are legal requirements that the state respect several important rights and freedoms owed to a person. Law requires the state to observe due process, which in turn requires procedural laws of a certain kind - that operate as a bulwark between the individual and the power of the state. For the state not to behave in a manner observant of due process would offend the rule of law, which in turn can be thought of as a constitutional commitment to minimum standards of both substantive and procedural fairness. There is differentiation within the law, of course - there are variations in procedural standards between criminal law and civil law, on the grounds that their purposes are also different: that of criminal law being to punish, and of civil law to compensate. Indeed, civil and criminal processes have traditionally been distinguishable in several ways: they differ, for example, in how they conceptualise harm; in the kind of investigatory powers available to the state; in the role taken by a prosecution authority; and in the standards of evidence to be met. Due to the elevated penalties attached to the criminal law, the associated standards and protections are necessarily higher.

In the fevered context of immigration to the UK, 'activist lawyers' have been attempting to safeguard the rights and freedoms of refugees and people seeking asylum, whether in terms of their reception into, or their treatment while in, the country. While the reception may be one of

[1] https://twitter.com/pritipatel/status/1301590225936953346?s=20. Patel has further angered legal professions by alleging, in her speech to the Conservative Party Conference on Sunday 4 October, that 'the lefty lawyers' in fact 'profit from the broken [immigration] system' and are 'defending the indefensible'. https://www.independent.co.uk/news/uk/politics/priti-patel-immigration-lawyers-migrants-law-society-bar-council-b832856.html , accessed 14 October 2020.

antagonism and - if the Home Office has its way - immediate removal, it is arguably the ongoing treatment of immigrants and non-documented migrants to the UK that contains the most hostility.

This article will proceed in three parts. First, it will introduce and contextualise the hostile environment policies pertaining to immigration. Second, it will discuss the hostile environment as emblematic of the increased interaction of criminal law and immigration law, and the extent to which the distinctions between the two are being eroded through the phenomenon of 'crimmigration' - the criminalisation of immigration; it will argue that the hostile environment represents an arena in which this civil/criminal procedural line-blurring is increasingly and problematically normalised, without adequate justification. Third, it will make the case that such hybridised or blended procedures are being employed deliberately and instrumentally to circumvent due process.

The Hostile Environment

Over the past decade lawyers and legal academics have become increasingly, depressingly, familiar with the term 'hostile environment'. First mentioned in 2012 by then-Home Secretary Theresa May, and effected through the Immigration Acts 2014 and 2016, the hostile environment is a range of interconnected policies geared specifically towards impacting negatively on the lives of those unlawfully resident in the UK. The intention behind this 'sprawling web of immigration controls embedded in the heart of our public services and communities' is to prevent non-documented migrants from accessing public services and other necessities - employment, housing, healthcare, education, banking, even driving - by requiring, in all of these settings, documented proof of residential status.[2] As the long title of the 2014 Act states, its purpose *inter alia* is 'to limit, or otherwise make provision about, access to services, facilities and employment by reference to immigration status'.

The term 'hostile environment' actually pre-dates its contemporary use as meaning those UK-internal border controls targeted at undocumented migrants, however. 'Hostile environment' was initially used in the context of the post 9/11 fight against terrorism, and encompassed the steps taken to impact *indirectly* upon terrorist activity, for example through the limiting of avenues and opportunities for adherents to provide financial and other support. The term 'hostile' environment distinguished this newly antagonistic terrain from what was seen as the formerly 'safe' environment: though it was difficult to go after terrorists using only those tools afforded by the criminal law, alternative indirect regulatory or administrative measures could also have an impact on their operations and undermine their activity. Such thinking was later extended to apply to serious and organised crime - for example, the Proceeds of Crime Act (POCA) 2002 Part 5 provided the seizure of assets not only in the absence of criminal conviction but also under the civil standard of proof. Subsequently, in 2014, this approach was extended to the now-familiar context of immigration.[3]

Two central features of a hostile environment approach should be noted here: (i) the use of alternative legal procedures to implement and enforce its policies, and (ii) the use of indirect or situational means to affect undesirable activity.

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[2] The 'sprawling web' quote is from Liberty, 'A Guide to the Hostile Environment', 2018: 5: https://tinyurl.com/yyynuo4t

[3] J. Hendry & C. King, 'How far is too far? Theorising non-conviction-based asset forfeiture', *International Journal of Law in Context* 2015 11(4) 398-411, 399.

The first of these approaches - the use of alternative legal procedures - was intended to combat allegedly criminal behaviour - terrorism, organised crime, or illegal immigration; but it does not rely on solely criminal law mechanisms to achieve its stated policy aims. The reason for this is a straightforward one: using criminal law mechanisms would necessitate operating according to criminal law procedures and rules - that is, criminal law's due process requirements. As mentioned earlier, these include stricter evidentiary and procedural requirements, such as the presumption of innocence, the burden of proof resting with the prosecution, and the heightened standard of proof beyond reasonable doubt. By contrast, reliance on *non*-criminal law mechanisms has the prosecutorial benefit of bypassing these enhanced procedural safeguards.

The second of these hostile environment approaches, instead of pursuing its objectives directly, uses alternative situational and ancillary means to disincentive individuals from risky or undesirable behaviour. POCA 2002 Part 5, for example, constitutes such an alternative approach to the problem of organised crime: in response to the seeming limitations of criminal law in this arena, it uses civil law mechanisms to disrupt organised crime's profit incentive. In the context of immigration, hostile environment policies are geared towards making it harder for undocumented migrants to live in the UK, the idea being that this will encourage them to leave. Notably, this is not a comprehensive system of enforcement action - such a system would, of course, require resources, oversight, and a reliable body of existing documentation. Instead, by passing legislation that requires teachers, landlords, employers, doctors, hospital staff and council workers to ascertain an individual's residential status and to report on their right to be in the UK, the government has essentially *outsourced* immigration checks onto civil society. On threat of sanction, it has mobilised citizens as de facto immigration officials, and thus cast a wide net of citizen collaboration. This has, in effect, made many of us directly complicit in how our government treats those suspected of illegal immigration.

It is also worthy of note that, when it comes to applying the hostile environment to immigrants and non-documented migrants, the legislation does not actually address undesirable behaviour but instead targets undesirable *status*. It is this status - illegal, undocumented - that these provisions serve to criminalise; and the 'environment' aspect of the hostile environment concept in this particular context bears closer attention. While indirect civil law or regulatory measures aimed at addressing terrorism and organised crime usually concern finances, recognised as the lifeblood of such operations, the measures taken to address irregular migration status are much more holistic, and thus both pervasive and invasive. Indeed, in instituting the demand for documentary proof of status - passport checks - in everyday situations, hostile environment policies have the effect of generating multiple and diverse border sites *within* the UK. It is perhaps this aspect that is so saddening, as these sites - which include workplaces, doctor's surgeries, and schools - would normally be places of welcome, and of community.[4] Today, instead, ordinary citizens have become border patrol officials, while these places have been turned into frontlines.

Enemy Criminal Law and 'Crimmigration'

If you heard the term 'enemy criminal law', you would be forgiven for presuming that this was something employed in times of conflict, perhaps in the fight against terror or even the war on drugs. It might come as a surprise, then, considering the strength of the term, that 'enemy criminal law' is being employed in Britain against immigrants and non-documented migrants.

[4] For a comprehensive account of these provisions, see chapter 2 of Colin Yeo's excellent recent book, *Welcome to Britain: Fixing Our Broken Immigration System*, Biteback Publishing 2020.

Conceptualised by the German scholar Gunther Jakobs, the three core features of 'enemy criminal law' are as follows: punishment occurs in advance of any harm; sanctions are disproportionate; and procedural rights are restricted or circumvented. The best example of this is immigration detention, which is the Home Office practice of detaining non-citizens for the purposes of immigration control. In the 2018 Windrush scandal, individuals faced detention because 'their lack of documentation led the Home Office to believe that they were not here legally and that they should be returned to their country of origin'.[5] Hostile environment provisions exhibit all of these features in their operation, cleaving strongly to an anticipatory logic of securitisation in the way that potential harms are precluded through heavy-handed preventive measures.[6] Such 'harms' in the context of immigration remain amorphous, however. Far from being defined in legal terms, they are the preserve of tabloid headlines raging against 'floods' of immigrants, 'tides' of asylum seekers, undocumented migrants 'swarming across the border' intent on claiming benefits and free houses, changing your communities and undermining your NHS. 'Enemy criminal law' measures in fact maintain this idea of the potentiality of harm - what we sought to stop did not occur because we prevented it from happening - with the result that everything turns on the *risk* and thus the public's *fear* of harm occurring. In this sense, general moral panic is flavoured by populist prejudice and stereotyping, separate from any genuine statistics, and certainly none concerning actual crime.

Let us consider, in the context of immigration, those three specific features of 'enemy criminal law': pre-emptive punishment, disproportionate sanctions and limited procedural rights. Detention, administrative removal and deportation are all measures to pre-empt any harm.[7] And in fact they also constitute *collectively* disproportionate sanctions, not least when we remember that these stack on top of months, even years, of situational micro-aggressions about providing documentary evidence of citizenship. In terms of procedural rights, detention comprises the greatest violation - individuals are effectively incarcerated, often without any notice of a release date, without that individual having been convicted, and without any judicial authorisation of their imprisonment: the absence of any such processes is a source of serious concern. Indeed, this is where those 'activist lawyers' come in - the civil liberties NGO Liberty has campaigned against indefinite detention, while the law reform and human rights organisation JUSTICE recently published a report making 48 practical recommendations for change, several of which pertained to detention, most notably the importance of maintaining the right to appeal as a fundamental safeguard.[8]

The difficulty these lawyers and organisations face, however, is that 'enemy criminal law' seeks to undermine the legal foundation of their challenges: the third feature of 'enemy criminal law'- the erosion and circumvention of procedural rights - is further compounded in the case of individuals

[5] Joint Select Committee on Human Rights (2019). Windrush generation detention: Government Response to the Committee's Sixth Report of Session 2017–19. London, UK: House of Commons. https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1633/1633.pdf

[6] On securitisation see L. Zedner, *Security,* OUP 2009

[7] Administrative removal is different from deportation, being an immigration decision applicable against foreigners who have been refused entry or entered illegally, overstayed their visa, or breached the conditions of their existing leave to remain. There are minimal rights of appeal against such removal, but no official restrictions on return - although in practice, securing subsequent visas can be difficult. In contrast to administrative removal, deportation cancels leave to remain and prohibits return, although this is subject to appeal. A deportation order can be made in three situations: in the public interest; on conviction of a crime punishable by imprisonment; and on conviction in the UK of a serious crime or one carrying a sentence of twelve months or longer.

[8] https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf.

with irregular migration status by the insidious process of questioning whether such an individual in fact *holds* those rights. The term 'enemy criminal law' deliberately *others* immigrants and non-citizens, presuming their deviance, their risk, and their threat, on the basis of their *status* and not their behaviour. Whether an individual's behaviour is desirable or undesirable is not the trigger for their detention or deportation; rather it is their *status* - illegal, undocumented - that such measures are geared towards criminalising.

It was the US scholar Juliet Stumpf who first described the use of criminal justice responses to migration 'offences' as crimmigration, or the criminalisation of immigration. Stumpf also argued that the term includes practices such as the representation of refugees and migrants as deviant or criminal *by virtue* of being non-citizens, which further signified a growing together of the regimes of criminal law and immigration law. This term - and, indeed, that of 'enemy criminal law' - draws attention to the ways in which, in Britain too, the enforcement of immigration law has steadily but unmistakeably followed a securitised approach, with the practices and powers of the criminal justice system being increasingly levelled against immigrants. Conspicuously, this move towards the criminal justice system is occurring in this one arena only; like 'enemy criminal law', 'crimmigration' has the propensity to fortify criminal law's intrusions while at the same time denying its protections. (this is also an effect of 'enemy criminal law'). The result of this securitised approach has been an increasing hybridity within the system of immigration enforcement, and 'an overlapping of immigration law and criminal law, both in terms of substance (the type of wrongs sanctioned, and the measures imposed), and in terms of the *procedure* followed to enforce those norms'.[9] As discussed earlier, criminal law normally has elevated procedural protections for individuals, to mitigate against potential abuses of state power. In the context of UK 'crimmigration' measures what is taking place is the circumvention, on the part of the state, of those individual protections.

What are the grounds for this? One reason could be basic, pragmatic, administrative efficiency: in the event of low-level criminality - petty offences or speeding, for example - it is more straightforward for the police to divert the case of an undocumented person to the UK Border Agency (UKBA). Why waste time and resources on prosecuting an undocumented foreigner for a low-level offence when that individual is likely to be subject to removal proceedings? That the police have such an option is a result of the situation of parallel and overlapping regimes, as well as a lack of clarity about who has ultimate responsibility. Indeed, the intra-regime guidance is less than clear: while the Crown Prosecution Service (CPS) guidance concerning immigration offences states explicitly that administrative removal does not in itself justify the discontinuance of a prosecution, direction provided to enforcement officers by the UKBA says that, unless the criminal prosecution is for a serious offence, removal in fact *does* take precedence over it.[10]

Straightforward practicality is a fairly benign interpretation, of course. A more critical reading is to consider this fobbing off of cases involving foreigners onto immigration enforcement officers as involving more than coalface labour-saving on the part of the police: to regard it, instead, as a concerted effort on the part of the Home Office to shift petty offenders onto the parallel regime. In this manner, not only does the treatment of foreigners become asymmetric to the treatment of citizens; they are also subject to disproportionate sanctions, as well as a more limited system of appeals within the administrative regime.

[9] A. Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration*, Routledge 2013, my emphasis

[10] For CPS guidance see: https://www.cps.gov.uk/legal-guidance/immigration.

Part of the administrative regime, it is important to remember, are the hostile environment provisions, such as the legal duty for landlords, employers and banks to check documents and to notify the Home Office in the event that an individual is an unauthorised migrant. 'Crimmigration' hybridity is also evident here, not only in terms of the severe and immediate situational penalties and restrictions faced by the undocumented person - losing their job or benefits, for example, or being unable to get a driving license or to rent a room - but also in the form of civil penalties for *citizen* non-compliance. Immigration crimes are not solely the preserve of non-citizens: by virtue of their connection to a person's immigration *status*, they can be committed by citizens and non-citizens alike.

Although being quite tonally quite jarring for lawyers, who are accustomed to *punishment* being the preserve of the *criminal* law, civil penalties are becoming more commonplace. Robin White has written on the proliferation of civil penalties as departures from the criminal procedural norm, and his wholesale conceptual rejection of these is worth quoting here in full. For White, the very idea of 'civil penalties' depends on 'lack of analysis, confusion of thought and discounting of moral considerations in imposing punitive and deterrent penalties for what are essentially criminal offences (indeed, are sometimes already, and remain, criminal offences)':

> They seek to avoid the safeguards of criminal procedure by manipulation of the domestic classification and the pretence that they are civil debts: thus, they are stealth sanctions. The means of achieving this prejudice to the integrity of criminal procedure is the grafting together of incompatible constituents … they are not fruitful hybrids: they are harmful chimeras. And the constituents are incompatible because 'civil penalty' is a contradiction in terms: it is an oxymoron.[11]

White's conclusion that these are criminal charges in everything but name chimes with my own, which is that it takes more than a rhetorical relabelling to mask their punitive character. Civil penalties feature yet further in the immigration law system in the form of carrier's liability penalties for transporting clandestine entrants, under the Immigration and Asylum Act 1999 - like the hostile environment policies, these act as a disincentive to provide assistance to anyone with irregular migration status. And just as the hostile environment provisions undermine communities by obliging citizen collusion, so do civil penalties employ a deterrent effect upon altruism.

Hybrid Proceduralism

As we have seen, the hostile environment concept is not unique to immigration law, and the same is true for hybrid procedural forms, which are also to be found regulating other areas of law: for example, Knife Crime Prevention Orders (KCPOs), Public Space Protection Orders (PSPOs), and non-conviction-based civil asset forfeiture, to name but a handful. There is a worrying legislative trend towards blurring the lines between the criminal law and civil law by consciously including in one branch of the law mechanisms and standards associated with the other type,- whether on grounds of expediency, efficiency, or practicality. This is most evident where existing criminal law provisions have proven to be slow, of limited scope, or otherwise inadequate. The notion of inadequacy in this context is very broad: included here are instances where the law's 'inadequacy' is because the behaviour in question is not actually criminal but merely undesirable (itself a generous and inconstant category); or where the behaviour's undesirability arises only from it occurring repeatedly or on an ongoing basis; or where evidentiary or other procedural obstacles

[11] R. White, 'Civil penalties: oxymoron, chimera and stealth sanction', *Law Quarterly Review* (2010) 126(Oct) 593-616, 616

stymie the intent of the existing criminal law. Hybrid procedures between the civil (or administrative) law and criminal law thus provide means by which alternatives to traditional criminal proceedings can be instituted and elevated safeguards can be circumvented: this means that both *undesirable conduct* and *status* - whatever these may comprise - can be regulated.

While these hybrid practices are increasingly widespread, the hybridity of immigration law is the most systemic and the most wholesale. This is most likely because non-citizens have long been vilified as deviants and demonised as security risks. But, rumbling underneath, there is also an unpleasantly racialised dimension.

This racialised underpinning is sadly borne out in the unequal experiences of the hostile environment by people of colour, as well as in the population demographics of detention centres. Once more, and contrary to everything one would hope and expect of the criminal law, the regulation is often not of an individual's behaviour but of their membership of a 'risky' community or population. What's more, hostile environment provisions are parasitic upon other forms of racialised criminalisation, such as, for example, the controversial application of joint enterprise laws to 'gangs', whereby young Black men are literally held guilty by association and then deported due to their alleged criminality.[12]

Were these the only problems with the system they would be sufficient for criticism and censure, but this is unfortunately not the case. Indeed, if we contextualise these 'crimmigration' measures in terms of recent mainstream media headlines, it is difficult to read them as anything other than instrumental and policy-oriented. This can be seen in statements from the hostile environment's architect, Theresa May, who outlined its express intention of making 'staying in the United Kingdom as difficult as possible for people without leave to remain, in the hope that they may voluntarily leave'.

This reliance on hybrid proceduralism - a distinct regulatory technique, and one leveraged disproportionately against the deviant other, be they an immigrant, an asylum seeker, a homeless person or an 'anti-social' youth - is intentional, and it is an erosion of the individual legal protections that ought to be the right of everyone in the UK. Cloaking such short-sighted, meanspirited and prejudicial measures in the guises of pragmatism and prevention is misleading, and, more importantly, it seeks to lend this fearful, discriminatory, racist and shameful narrative an untoward quality of necessity. The increasingly common resort to hybrid proceduralism should instead be exposed for what it is: a deliberate effort to circumvent due process, and thus the rule of law. Someone should contact the activist lawyers.

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[12] For more on this see https://www.historyworkshop.org.uk/gangs-policing-deportation-and-the-criminalisation-of-friendship/