

'Administrative' immigration detention as a 'punitive' measure: is it time for a new standpoint?

Lorenzo Bernardini

Postdoctoral Researcher in Criminal Law

University of Luxembourg



UNIVERSITÀ DEGLI STUDI DI SALERNO



International Migrations, State,
Sovereignty and Human Rights:
Open Legal Issues

PRIN 2017
(2020-2024)



Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

(1) – Setting the scene

- The ‘**deprivation of liberty** of non-citizens for reasons related to their **immigration status**’ (Flynn, 2011)
- It is ‘the deprivation of an individual’s liberty, usually of an **administrative character**, for an alleged **breach of the conditions of entry, stay or residence** in the receiving country’ (UNHCR, 2014)
- It depicts ‘a *tool* for the **exercise of state prerogatives** of immigration control’ (Palladino, 2019)
- It represents ‘a **large-scale instrument**—almost *punitive in character*—that explicitly **targets categories of persons**, aiming to **protect borders** from “undesirable” immigration’ (Cornelisse, 2010).

(1) – Setting the scene

- **Wide-ranging physical control** over the migrant
- A clash between the “**particularism**” Member States and “**universalism**” of human rights
- **Personal liberty** is safeguarded by:
 - **Article 5 ECHR**
 - **Article 6 of the CFREU**
 - **Article 7 ACHR**
 - **Article ICCPR**

(1) – Setting the scene

- *Ratione personae*

1. Irregular third-country nationals (TCNs)



2. Applicants for international protections



3. “Dublin applicants”



(2) – Approaching the research question

- **Detention** is *the* traditional mean through which justice systems typically implement **criminal law**
 - Pre-trial detention
 - Penalty (after a conviction)
- Criminal law applied against migrants = **‘crimmigration’**
- Key concept:

criminal law = highest level of guarantees compared to other areas of law

(2) – Approaching the research question

- Yet, through administrative detention, TCNs are detained *outside criminal proceedings*
 - No *notitia criminis* – they did not commit any criminal offence
 - They are provided with **administrative law safeguards**
- Key concept:

Administrative law = lower level of guarantees compared to criminal law

(2) – Approaching the research question

- Formal level – administrative detention is *non-criminal in nature*
- But the “demarcation line” between ‘administrative’ and ‘criminal’ measures is **blurred** when administrative deprivation of liberty is at stake (Palladino, 2018)
- Research question:

Does administrative detention hold a **(material) punitive nature**, despite its formal label?

(3) – The *material* characterisation

- Perception:
 - (a) **punishment without a crime**
 - (b) **punishment ‘in disguise’**
 - (c) it follows the **punitive rationale** of criminal measures

- A **multifaceted** and **complex** nature

- Several **punitive elements** are entrenched in its normative structure

- Reference to the ***Engel* criteria**
 - Formal definition of the measure under investigation
 - Nature of the **offence**
 - Degree of severity of the **penalty**

(3) – The *material* characterisation

FIRST GROUND – Defending criminal-tailored legal interests

- Common ground for detention – **risk of absconding**
 - a) The need to **protect borders** from the arrival *en masse* of TCNs
 - b) The need to **manage migration flows**
 - c) The need to **avoid** the lodging of **deceptive asylum applications**
- Typically, they are safeguarded by **criminal law** (‘**crimmigration**’)

***Identical* legal interests behind administrative detention**

(3) – The *material* characterisation

SECOND GROUND – Is *detention* a (harsh) *reaction*?

- Grounds for detaining irregular TCNs
 - Risk of absconding + hindering conduct
 - Retribution – *punish* TCNs for an **undesirable behaviour**
 - Forcing the migrant to ***cooperate*** – otherwise he/she *shall be* detained
 - Deterrence – general grounds *prevent* TCNs from emigrating from their countries of origin
- Applicants can be detained on **public order/security grounds**

Link between an unsought behaviour and deprivation of liberty

(3) – The *material* characterisation

THIRD GROUND – The *substance* of detention

- Administrative detention implies a **deprivation** (and not a mere restriction) of personal liberty
- The same holds true for **criminal detention**
- Member States **challenge** this circumstance (but without merit)

The *substantive* nature of both measures is the same

(3) – The *material* characterisation

FOURTH GROUND – Where do we place migrants?

- According to EU law TCNs may be detained, in exceptional circumstances, in **prison facilities**
- In the same circumstances, they may also be detained **together with suspects/accused persons/convicted individuals.**
- Methods and functions of criminal law have been progressively embodied in the legal structure of administrative detention

TCNs can be detained in criminal justice systems facilities

(3) – The *material* characterisation

FIFTH GROUND – ‘A never-ending detention’

- Irregular TCNs – 6 months + prolonged up to **18 months**
- Applicants – **no time-limit is laid down in EU law**
- Duration plays a **key role** in depicting the degree of **severity** of a legal tool which involves the **deprivation of personal liberty**
- Time-limits are oftentimes *longer* than those foreseen in criminal law (!)

The long duration of administrative detention depicts its severity

(4) – Consequences

- A set of **additional guarantees** shall be provided to detained TCNs
 - E.g., **fair trial rights** (Article 6 ECHR)
 - Relevant consequences may have the acknowledgement of the **right to silence / right not to cooperate with the authority** *vis-à-vis* TCNs → improper coercion from the authorities is **forbidden** – heart of the notion of ‘fair trial’
 - A non-cooperative behaviour of the TCNs could no longer be a ground for detention

Thank you for the attention!

Lorenzo Bernardini

Postdoctoral Researcher in Criminal Law

University of Luxembourg

lorenzo.bernardini@uni.lu