State reluctance to use alternatives to detention

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States continue to show a marked reluctance to implement alternatives to immigration detention. The reason for this may well be because such alternatives ignore the disciplinary function of detention by which states coerce people into cooperation.

There has been a proliferation of reports in recent years emphasising the need to only use immigration detention as a last resort and highlighting the advantages that alternatives to detention represent for states, in terms of respecting people's fundamental rights but also in terms of the cost of dealing with removals. Why then do states show so little interest in using alternatives to detention, in spite of the unquestionable advantages they appear to offer? The answer to this question may lie in the fact that the alternatives proposed ignore the disciplinary function of immigration detention.

Immigration detention is usually thought of as a way to facilitate the removal of irregularly staying foreign nationals.[1] I would argue, however, that it is necessary to distinguish between two different ways in which states try to fullfil this objective. The first – and the most generally recognised – is what I term the 'administrative function' of immigration detention: a means purely to guarantee that individuals are present when it comes to removing them. But states are more and more relying on a second way to use immigration detention where it is thought of as an instrument of coercion designed to force people to cooperate for the purpose of their own removal: what I term the 'disciplinary function' of detention.

This evolution from the administrative to a disciplinary function is particularly obvious in the case of Switzerland. Switzerland's 1986 law on aliens allowed for pre-removal detention for a maximum period of 30 days, once a decision on removal had been made and was about to be implemented and there was a clear presumption that the individual would seek to avoid removal. However, in 1995, the law on aliens was changed to provide grounds for detention based on a lack of cooperation (refusal to confirm one's identity, obey a summons without valid reasons, etc). From then on, it became possible to order detention not only after an enforceable decision on removal had come into effect but after a decision at first instance and despite the fact that the asylum procedure was still underway. The maximum period of detention was increased to a year. This clearly suggests that detention is no longer solely intended to prevent individuals from absconding when their removal was imminent but also to force foreign nationals, whose removal is not directly enforceable, to cooperate by the threat of a long period of detention.

This disciplinary function of detention was explicitly expressed in the new Aliens Act (Loi sur les étrangers) of 2005 which included a new article entitled 'coercive detention', aimed specifically at any failure to cooperate. Detention could then be ordered on the grounds that removal could not be enforced because of the individual's behaviour – and the maximum period of detention was again extended, to 24 months[2]. The increased maximum period of detention was explicitly justified in parliament by its supposed effectiveness in forcing even the most recalcitrant individuals to submit to the rulings of the authorities.

A Swiss phenomenon or a European trend?

Several factors suggest that the disciplinary function of immigration detention is not just a phenomenon restricted to the case of Switzerland but is well established at a European level. The first is that as a signatory of the European Convention on Human Rights (ECHR) and a member of the Schengen Area, Switzerland could not express in such explicit terms an objective that was incompatible with the European legal framework. Several judgements by the Swiss Federal Court stating the compatibility of 'coercive detention' with the ECHR appear to demonstrate the Court's belief

that the disciplinary function of immigration detention does not contradict European law.

The second factor is the broad interpretation of ECHR Article 5.1(f) by the European Court of Human Rights (ECtHR) itself. Sub-paragraph f) of paragraph 1 stipulates that no-one may be deprived of their liberty, except in the case of detention of a person "against whom action is being taken with a view to deportation or extradition". Several legal commentators concluded from this that the use of immigration detention had to be restricted to its 'administrative function'.[3] In 1996, however, in the case of Chahal vs GB, the ECtHR ruled that: "This provision [Article 5.1(f)] does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing...."[4] By explicitly stating that immigration detention need not be restricted to preventing individuals from absconding, and without delimiting how else it could be used, the Court opened up the possibility of its use for disciplinary purposes.

Thirdly, it is in the 2008 EU Return Directive[5] that we find the most explicit confirmation of the use of a disciplinary approach to detention. Article 15.1(b), combined with Article 15.5, states that detention may be ordered in the case where the individual concerned obstructs the removal process for a period of six months. Article 15.6(a), moreover, states that in the event of a lack of cooperation by the person concerned, detention may be extended by a further 12 months. In other words, both the grounds for detention and the maximum period of detention provided for in the Return Directive corroborate the use of detention for disciplinary purposes, as in the case of Swiss legislation.

Dialogue, not coercion

If we recognise the disciplinary dimension of immigration detention, we might question the legitimacy of an administrative practice which has taken on a rationale usually restricted to the criminal justice system. However, the disciplinary function of detention does help us to understand one of the fundamental reasons for governments' lack of interest in implementing alternatives to detention. All the alternatives to pre-removal detention aim only to guarantee – by various means – that the person concerned is present when the decision to remove them is enforced. These measures range from release on bail to the use of electronic tags, house arrest or an obligation to report to the authorities at regular intervals. These are less restrictive and also less expensive ways of guaranteeing the individual's presence when due for removal. But proponents of the disciplinary approach believe that it is the disciplinary nature of detention which is most significant in bringing about a successful removal. In their view, the less restrictive, more liberal measures are less effective in bringing about the desired final result. The prevalence of the disciplinary approach in the use of detention therefore helps to explain states' reluctance to opt for alternatives.

The aim of this article is not, however, to reject alternatives to detention but, on the contrary, to highlight and question the disciplinary approach on which states' return policy now seems to rest. This approach should be questioned not only from the point of view of its compliance with international law but also for its supposed effect on the enforcement of removal decisions. Numerous studies have questioned the effectiveness of the use of constraint as means of encouraging people to comply with the orders of the authorities. Contrary to governments' current assumptions, which focus increasingly on repression and constraint, the evidence suggests that implementing a transparent policy that meets individuals' need for dignity would seem most likely to ensure that people comply with the decisions made about them.

Starting an open debate on administrative detention would help enable governments to base their policies not on unfounded and morally questionable assumptions but rather on the results of empirical research. From this point of view, the role of human rights

organisations would be to lobby for a return policy based on dialogue and support for people forced to leave the territory, rather than on simple repression. This would be in the interests not only of the individuals concerned but also of those states that wish to find a solution to the difficulties associated with enforcing removal.

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1. I am confining myself here to the question of pre-removal detention and have ignored the question of pre-arrival detention, which aims to prevent aliens from arriving illegally.

2. This would be reduced two years later to 18 months following the transposition of the Return Directive (Directive 2008/115/EC) into national law.

3. For example, see Noll, G 'Rejected Asylum Seekers: The Problems of Return', *International Migration*, 37(1): 281. 1999. http://onlinelibrary.wiley.com/doi/10.1111/1468-2435.00073/pdf

4. Case of Chahal vs United Kingdom of 15 November 1996, Application no. 70/1995/576/662, paragraph 112.

5. http://tinyurl.com/Return-Directive-2008