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A legal disgrace? The retention of deported migrants in contemporary France*

Abstract. *This article analyses contemporary trends in the deportation of undocumented immigrants, focusing on the past and present situation of the* centres de rétention administrative*, French confinement facilities where deportees await their removal. Studying the differential enforcement of legal protections for this particular population, we argue that the 'rule of law', though integrated with the everyday practice of deportation, has been turned into a way to more easily 'govern' the deported population.*

Key words. *Deportation – Immigration – Immigration detention – Rule of law*

Résumé. *Cette contribution analyse la pratique contemporaine de l'éloignement forcé des étrangers en situation irrégulière, et plus spécifiquement l'histoire et la situation actuelle des centres de rétention administrative où ces derniers sont enfermés pour le temps nécessaire à la préparation de leur départ. La mise en œuvre différentielle des normes juridiques instituées pour la protection des étrangers constitue alors moins une limite à la gestion des populations migrantes, qu'une autre manière d'assurer leur 'gouvernement'.*

Mots-clés. *Eloignement – Etat de droit – Immigration – Rétention administrative*

As in most European democracies, the French judicial system today includes the possibility of deporting undocumented or convicted aliens and locking them up in various non-penal places of confinement. These places include *zones d'attente pour personnes en instance* (ZAPI), located in ports and airports, and designed to 'maintain' foreigners whose claim for access

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to the French territory is refused (see Makaremi, 2005), and *centres de rétention administrative* (CRA, referred to hereafter as simply c*entres de rétention*), used for the confinement of deportees awaiting their forced removal to their country of origin.

Analysing deportation and confinement practices in France would require replacing them in the wider class of devices – not all of them openly repressive – used to set foreign immigrants aside (namely, penal detention, special homes for legal immigrants' housing, or for asylum seekers on the national level and, more broadly, the network of camps which has developed in Morocco, Libya and the external border of 'Schengenland' as a result of tighter EU border controls). This article focuses on French *centres de rétention* only, which are interesting for two main reasons. First, they can be described as the 'last phase' of the deportation process, therefore making it possible to embrace and evaluate the way removals are being decided and enforced, as well as the effects of this enforcement on the immigrant 'targets'. Second, deportation and retention practices take place as *legal* processes, in the general context of a democracy that refers to the principles of the 'rule of law'. As a result, the possibility to deport an individual – and furthermore to deprive him of his personal freedom at the sole convenience of the administration – has become a controversial issue in France over the past decades.

In the following, we emphasize this tension between the reference to the 'rule of law' and 'Republican legality' and the deportation and retention process, and underline its paradoxical outcomes. *Centres de rétention* have actually been 'legalized' – that is, brought into the French legal system and provided with various judicial guarantees partly designed to avoid criticism of the practice of confinement. The impact of these added guarantees – including a legal status for the centres or the possibility of legal counselling for 'retainees' – make it difficult to describe the centre as a place of simple 'exception' (Agamben, 1995). On the other hand, it appears that the very adding of an ever-more precise legal framework to the practice of deportation and detention has contributed to its development. Through legalization, detention centres were progressively turned into permanent, specialized and increasingly rationalized institutions. The same rationalization was applied to the legal framework of the deportation process as a whole, which civil servants must now learn to 'make the best' of. As a result, the 'rule of law' may not be seen as an actual limit to the repression of illegal immigration but as another way to organize it – one that is compliant with the requisites of a 'neo-liberal governmentality' (Foucault, 2004) – with legal provisions that both protect and oppress the deportees. In order to clarify this point, we first

review the history of the progressive legalization of *centres de rétention* since the mid-1970s. This preliminary outline of the influence of the 'rule of law' on the creation of the centres enables us to analyse the present situation and the use French officials are currently making of 'deportation law'.

What is a 'retainee'? The progressive 'legalization' of French *centres de rétention* from the 1970s to the present day

French *centres de rétention* were officially created in France by the 'Questiaux Act' of 29 October 1981. Though this bill was the first since the Second World War to publicly authorize the confinement of foreigners awaiting their deportation, the practice is rooted in a deeper tradition – that of the 'administrative internment' of foreigners or other 'undesirable' populations, which has been largely used by the French Ministry of Internal Affairs throughout the 20th century. In recent years this 'internment tradition' in France has increasingly become an object of study and debate among French historians, anthropologists and political scientists (see Bernardot, 2008; *Cultures & Conflits*, 2005; Fischer, 2007). Without reviewing this literature in extenso, the present article first tries to reposition *centres de rétention* in that tradition, which has obviously influenced the way centres were born and are still being run today, but from which their evolution and their current 'government' differ in notable ways also.

The notion of a 'tradition of internment' refers to the existence of enduring institutional characteristics for those places being used for internment (for a general presentation, see Bernardot, 2008). A 'camp' may first be defined as an 'exceptional' institution, created to control a given population by preventing its 'dissemination'. The camp is therefore an extra-legal and extra-penal confinement device, distinct from jails and used as a means to keep 'suspect' or 'burdensome' groups out of the polity, while denying them all protection (Agamben, 1995). It is often an *emergency* device, built in quickly to cope with the material requirement of an unexpected situation – such as the sudden influx of foreign refugees fleeing war or persecution – and characterized by *precarious* housing and sanitary facilities, and a general scarcity of food or pharmaceutical supplies.[1] This 'emergency' dimension of camps is a recurrent feature of the history of internment in France during the 20th century. Camps were first used for the confinement of foreign suspects during the First World War, while the development of French colonial rule in Asia, and more particularly in Africa, included widespread recourse to internment as a means of controlling 'indigenous' populations (Le Cour Grandmaison, 2005). Another 'camp' era

began in the late 1930s, as the growing repression of foreign immigration and the increasing number of refugees seeking the protection of the French government led to the creation of numerous places of internment, which were later used by the Vichy government to confine politically and racially persecuted populations.[2] The Algerian war then saw the establishment of other internment camps, in both France and Algeria.

Internment camps, as institutions, were officially closed in France in 1963, but it can be argued that non-penal detention as an informal police practice has actually never disappeared, and that it has somehow always been one of the State's techniques for controlling suspect or undesirable populations (Bernardot, 2008). In the more specific case of deportees, the temporary and officious 'detention' or 'retention' of those who cannot be immediately removed – owing to lack of means of transportation – or who have no travel documents, is actually as old a practice as the policing of foreigners itself.[3]

We argue, however, that contemporary *centres de rétention* are distinct from that specific tradition. Despite the fact that they include various legacies from the French 'pattern' of camps, contemporary *centres de rétention administrative* have undergone a series of changes which have an impact on the institution of contemporary forms of neo-liberal 'governmentality' characteristic of what Nikolas Rose calls 'post-social states' (Foucault, 2004; Rose, 2007). These changes may be summarized as a sequence with three phases. First, *centres de rétention* went through a process of officialization, which drove them from their original informal practice of the 1970s to become the legal, widespread and commonplace institutions they now are. Second, *centres de rétention* have evolved from provisional and precarious devices to a permanent facility as a direct result of their becoming legal. Third, they are now specialized institutions, involving a wide range of highly professional actors.

This triple process reflects the increasing repression of undocumented immigration in recent decades – one which could not be achieved, however, without changing the form of the confinement itself. In parallel with their 'legalization', *centres de rétention* have adapted to the norms of the 'rule of law' and of public control and 'accountability'. Far from stopping the development of *centres de rétention*, this trend has actually reinforced their development. The following section seeks to clarify these three dimensions of contemporary retention in France.

A state institution born of its critique

In the preceding section, we evoked the concept of 'governmentality', drawing on Foucault's later work (Foucault, 2004). Broadly defined, the term

refers to an apprehension of power as the general mode of 'affecting conducts', a mode which takes different shapes and inflexions in a given society at a given time in history. Such 'shapes' may be captured by studying the evolution of state regulation over time, and more specifically the way a given logic of government 'selects' specific techniques of state regulation. Furthermore, they involve various forms of intervention on the part of non-state actors, who may contain, reinforce and redirect public control (Rose, 2007). In tracing a genealogy of the progressive 'legalization' of administrative retention of foreigners in France, the concept of 'governmentality' thus enables us to highlight the *mobility* of power relations and the originality of contemporary patterns of illegal immigration control – the creation and recent transformations of *centres de rétention* being one incentive, among others, for this evolution. As Jonathan Inda points out, the concept indicates two main focuses for addressing the genesis of administrative retention: first, the way this new institution was progressively 'problematized' in the 1970s and the 1980s – namely, how it acquired public visibility on the political agenda and therefore became an object of legitimate debate; second, the material results of this problematization – in other words, the concrete government techniques that were actually enforced as a result of this general discussion, whether laws or specifically designed devices or architectures (Inda, 2006).

The specific history of the institution introduces us to two main characteristics of neo-liberal governmentality: first, the definition of immigrants as 'risk populations' which therefore should be set apart through deportation and confinement; and, second, the necessity for the places of confinement themselves to comply with the requirements of the 'rule of law', through the insurance of public, independent control of their day-to-day enforcement.

The history of French *centres de rétention* cannot, of course, be separated from the recent history of immigration control in France. Let us therefore begin with a short overview of immigration policies in the early 1970s – that is, the moment when the question of confinement of deportees was first publicly evoked. From the end of the Second World War to the early 1970s, the need for manual labour in France spoke in favour of weak immigration control – immigrants entering the country illegally were legalized with relative ease and employed in the national economy (Weil, 2005). Starting in 1972, the first signs of economic recession – and a growing fear among government officials of ethnic diversity due to immigration – sparked the first restrictive measures against illegal immigrants. The new importance given to deportation orders was responsible for the visibility of the confinement of expelled foreigners, which actually went public when it was first denounced by advocates of Human Rights. The history of retention indeed begins with

the 'discovery' in 1974 of an 'informal' retention centre set up by the police in a deserted warehouse on Arenc, one of the docks of the southern port of Marseille. First denounced by left-wing newspapers, the existence of this 'centre' was then strongly opposed by a local coalition of human-rights advocates and lawyers, which quickly acquired national importance. At the time the campaign started, the 'centre' of Arenc thoroughly resembled the image of a 'camp' as we defined it earlier: a precarious, informal place where immigrants awaiting their removal could be locked up indefinitely in very poor sanitary conditions, and without any rights or protection as the practice of confinement in itself was not authorized by any lawful text and was therefore undoubtedly illegal. These were precisely the dimensions emphasized in the campaign to close the centre, which lasted from 1974 to 1979. Commonly referred to as a 'clandestine jail' or a 'secret concentration camp', Arenc was publicly denounced as an outrage to the principles of the 'rule of law'. Although the movement did not have the expected outcome, it did have an important impact on the debate over the confinement of deportees that was to follow. Above all, it marked the entry of two new up-and-coming collective actors in the policy sector of deportation, which had been traditionally run by the Ministry of Internal Affairs administration alone. The first of those 'new' actors were human-rights advocates, whose importance has been constantly increasing since the 1970s. The second group comprised legal practitioners, ranging from judges to lawyers, who, at the same time, were becoming increasingly involved in the oversight of the executive 'policing' of foreigners (Joppke, 1998; Guiraudon, 2000).

The outcome of the 'Arenc case' illustrates this new trend. As controversy over the centre grew, human-rights activists introduced legal claims against the practice of confinement, and eventually obtained a legal conviction of the French Government for illegal detention. But this 'victory' also underscored the limits of their legal strategy: while judging the confinement of deportees unconstitutional, the French Council of State added that it was so only as long as it remained without proper oversight by a judge – thus implying that retention *could be made* legal if it were provided with such judicial supervision.

The paradoxical result of this decision was a strong incentive for government officials to create 'lawful' *centres de rétention*, while adding to their institutional canvas a series of guarantees that enabled their creators to avoid the accusation of simply 'legalizing Arenc'. After two unsuccessful attempts by the conservative majority administration of President Valéry Giscard d'Estaing in 1980 and 1981, the final ratification of the possibility to confine deported foreign immigrants who could not immediately be removed to their country of origin was eventually voted for in October 1981 by a newly

elected left-wing majority, only a few months after Socialist Party leader François Mitterrand had won the presidential election. Feeling uncomfortable about the measure, socialist speakers then emphasized how the *centres* to be created, unlike that of Arenc, were to be respectful of 'civil liberties' and would thus represent progress for deportees' rights.[4]

That the Left should be promoting the official creation of a non-judicial deprivation of liberty unknown to the French legal system since 1945 may seem quite disturbing. However, the theme of the 'rule of law' that was being widely referred to in the debate should not be dismissed as a purely rhetorical façade. If it could indeed be used to legitimize the creation of *centres de rétention*, it also made it compulsory for government officials to include concrete guarantees in the institution they created – guarantees that lastingly influenced the way deportees' confinement was then to be enforced.

The 1981 bill created the possibility for local French *préfets*[5] to lock up deportees awaiting their 'effective removal' for a maximum of 6 days in 'non penitentiary facilities'. The bill made it compulsory, after 24 hours of confinement, for the deportee to attend a judicial hearing, where the judge could either prolong his retention or place him under house arrest. The bill also included the possibility for confined foreigners to communicate with their lawyer and relatives, and to meet with a consulate officer from their country of origin. Although fairly important, these guarantees were not the major evolution for contemporary *centres de rétention*. They did not resolve what was to be the main problem of the following years: how to give a positive definition of those places negatively known as 'non penitentiary facilities'? What was '*rétention*', and what were the exact judicial status and rights of 'retainees'? The debate of the 1980s and 1990s was crucial in answering these questions

Inventing retention: the birth of a specialized institution

While they were created by the 1981 bill, *centres de rétention* were not actually built before 1983. That year indeed saw the end of the overall 'liberal' socialist policy regarding immigration, and the first shift of the majority towards a more repressive approach. Along with this shift came a general discourse, which was to become the received wisdom on immigration control, shared by both moderate left- and right-wing officials, that the 'successful integration' of legal immigrants required the repression and deportation of the undocumented ones. As a result, the ensuing debate did not address the legitimacy of border control – which was taken for granted

– but focused exclusively on the *means* that might be needed to enforce it, while remaining acceptable in a liberal state (Lochak, 1998). This evolution not only determined the actual building of *centres de rétention*, but also influenced the way it was implemented. Whereas administrative retention was no longer being publicly discussed, the enforcement debate took place mainly behind closed doors inside state agencies; though it also involved external actors, namely NGO representatives, who played an important part in the final problematization of retention centres.[6]

Indeed, the most striking specificity of the ongoing debate of the years 1983–8 is that it was no longer limited to elected officials and high civil servants. Presumably, discussion about the effective building of centres involved representatives of the Ministry of Internal Affairs, the Ministry of Justice, and the Ministry of Social Affairs (in charge of the welfare program for immigrants). But as early as December 1983, this cross-ministerial debate was opened to the intervention of representatives from the human-rights organization 'Cimade', a protestant organization whose members were contacted to participate in the conception of *centres de rétention* but also to be part of their enforcement.[7] Activists from the organization were offered government funds to be continuously present inside the centres, with a dual goal: to provide social relief for deported migrants, and to ensure a general monitoring of the conditions of confinement. Although Cimade had been part of the campaign against Arenc, its officials had accepted the principle of border control – and, as a result, of the deportation of illegal migrants – in 1982. They finally accepted the mission and emphasized that, while confinement could be seen as a necessary consequence of removal, the provision for official retention created in 1981 offered guarantees which clearly distinguished it from the former practices in Arenc, and gave it a democratic legitimacy that could only be reinforced by the presence of human-rights advocates inside the centres.

Since it is not possible here to recount in detail the circumstances of this departitioning of the arena of debate, we focus on the effects it had on enforcing confinement. On the side of the government, the presence of non-state actors inside *centres de rétention* gave their action crucial 'democratic legitimacy', while it quickly became evident that a showdown with local and national migrants' rights advocates could hardly be avoided. On the side of the organization, Cimade officials were plainly aware of the symbolic use the government could make of their cooperation – for which they were strongly criticized by other human-rights organizations – but also learned to use it, asking in return for tangible changes in the way the new centres were to be run. Thus a 'policy network' gradually appeared which linked officials from various state administrations and Cimade representatives. It became

sufficiently autonomous to survive political changes and policy shifts to this day (Marin & Mayntz, 1991).

While the general organization of *centres de rétention* did not change notably in the 1980s and 1990s (except for the maximum legal time of confinement, which was extended from 6 to 7, and then to 12 days in 1998), the constitution of this network enabled Cimade activists to gradually gain local advantages – and, notably, to officiously add to their initial attributions the informal but useful job of providing 'legal counselling' for the deportees. But its impact became even more obvious in 2000, when the status of administrative retention was officially defined for the first time. Whereas 13 centres had been in use since 1988, the socialist government once again, led this time by Lionel Jospin, prepared a draft project for a decree. This, while finally clarifying the status of retention, did not include the presence of a human-rights organization, which it tried to replace by a state-run welfare agency. When this information became public, various NGO representatives collectively demanded that the presence of Cimade lawyers inside the centres be confirmed by the new decree – which it eventually obtained. The new retention status defined by the decree (finally released on 19 March 2001) gave the official name 'centres de rétention administrative' to the former 'non penitential facilities' and called their inmates 'retained foreigners', while codifying a wider list of the specific rights they were entitled to. Among these were the rights to obtain medical care through a permanent infirmary in each centre, and to meet with social workers from the Agence Nationale d'Accueil des Etrangers et des Migrations (Anaem), the state agency that was initially to replace Cimade. As for activists from human-rights organizations, their right to permanent access to the centres was confirmed by the decree, and thanks to the 2000 movement they were officially charged with providing legal counsel for confined immigrants along with the general monitoring of retention conditions.[8] In the early years of the new millennium, the French *rétention administrative* had become an official, specialized institution. The spectacular development of the recourse to confinement after 2002 was to confirm this trend, while turning centres into large-scale, industrial deportation devices.

2004–8: the making of a deportation and confinement industry

The political success of the far-right National Front in the 2002 presidential election and the final election of a conservative majority favoured a new shift towards 'law-and-order' policies from then Minister of Interior Nicolas Sarkozy, which included increased repression of illegal immigration. As

early as 2003, a legal reform of the status of *centres de rétention* extended the maximum time of confinement to 32 days. In 2005, a new decree confirmed the 2001 text by making a more detailed list of the minimal facilities required of all *centres de rétention*, but combined this with a more openly repressive trend by authorizing the *rétention* of families, and making it harder for confined asylum seekers to formulate their claims from a centre. In those same years, the number of *centres de rétention* exploded (see the next section for a statistical overview).

This unprecedented development of administrative *rétention* should be related to the large-scale deportation policy implemented by the same Nicolas Sarkozy, relying on renewed visibility of illegal immigration through the widespread recourse to statistical reviews (Inda, 2006). This use of numbers was followed by the imposition in 2003 of 'deportation quotas' on *préfets*, law-enforcement officers in each department, forcing them to increase the number of illegal immigrants arrested, charged with deportation and actually removed from the territory – a policy which, as we see in the next section, soon resulted in a dramatic increase in the number of confined foreigners. As deportation was reaching 'industrial' dimensions, confinement itself was slowly becoming a private business: the 2003 'Sarkozy' bill authorized the delegation of the 'accommodation' side of retention (that is, laundry, meals, cleaning and the general management of everyday life) to private companies, while the police remained in charge of all security and the enforcement of deportations.

The findings of this first part of our study point to the contemporary shift of state action towards a decentralized, repressive and monitored regulation of immigration (Inda, 2006). As we have stressed, *centres de rétention* have gone from informal and precarious places to official, specialized and permanent institutions, involving specifically qualified workers. To end this brief history of *rétention*, we would like to make two observations. First, we should take into account the way 'liberal governmentality' deals with its critics by actually integrating them into the very enforcement of state policies – a trend Foucault had pointed out in the late 1970s (Foucault, 2004). As we have seen, representatives of the Cimade have been involved since 1984 in the ongoing 'problematization' of retention, as well as in the daily implementation of state deportation policies. Second, it should be noted that the critical reference to the 'rule of law', far from preventing the development of the institution, contributed to its problematization. This statement implies, in turn, that the 'rule of law' theme should not be regarded as a purely rhetorical device, but, on the contrary, should be seen as a specific inflexion by the contemporary government of migrant populations through deportation. The necessity to guarantee the 'rights of confined people' and

of independent monitoring and transparency indeed determined changes in the way *centres de rétention* are now being run; but by rationalizing and specializing enforcement, it made it possible for the whole deportation process to become massive and thoroughly repressive.

The perspective of an immigration lawyer from Cimade

We now turn to the practical implications of immigration detention in France by looking at some of the experiences of Cimade lawyers who defend immigration detainees in the suburbs of Paris. After a short presentation of the general context in which Cimade immigration lawyers work, we set out a few elements of the legal immigration process that leads to the detention of undocumented immigrants. Next, we focus on two immigration detention centres – in the Parisian suburbs of Bobigny and Mesnil-Amelot – before going on to analyse factors that have led to increasingly high numbers of undocumented immigrants being arrested and to profound changes in the profiles of immigration detainees. Finally, we show how judicial control of immigration detention is becoming less efficient. Indeed, in a system where the rule of law seems to have been strengthened, it has in fact become increasingly difficult to ensure that the rights of detainees are respected and that their right to due process is not violated.

Cimade and immigration detention today

Cimade has been supporting deportees in immigration detention centres since 1985. In the beginning, this support amounted essentially to social work, but through the 1990s Cimade increasingly provided legal assistance. Today, Cimade immigration lawyers defend the rights of detainees by preparing and filing motions and appeals, by applying for asylum, and by writing requests and letters to the administration. In addition, they explain the legal procedures to detainees and to their families and friends. As the only representatives of civil society within these spaces of confinement, Cimade immigration lawyers also play an important role in providing public monitoring by gathering information and analysing immigration detention and deportation, and publishing articles and a yearly report.[9]

Today, Cimade has 100 volunteers and 60 immigration lawyers who provide immigration detainees with legal support in all 26 French immigration detention centres. These centres vary in size and have between 10 and 280 beds – the latter in Vincennes, France's biggest immigration detention

centre, located in a Parisian suburb. There are a total of 1700 permanent beds in immigration detention centres, compared to 700 beds in 2003. The French Ministry of Internal Affairs has plans to construct immigration detention centres on an unprecedented scale, and it is expected that the number of beds will rise to as many as 2000 by the end of 2008.

As well as the 26 immigration *centres de rétention administratives*, there are numerous immigration holding cells (*locaux de rétention*) scattered throughout France. These holding cells are also places of administrative confinement where foreigners who have been released from custody can be confined for a maximum of 48 hours before being transferred to a detention centre. Their status departs from the legal status of immigration detention centres in several ways. Some one hundred of these immigration holding cells are 'permanent', and are well identified by immigration lawyers who support the deportees detained there. Many of the holding cells, however, are 'temporary' – such as hotel rooms, hospital rooms or gymnasiums. Created by a simple prefectorial decree for a restricted number of hours, days or weeks, there is no official list of these places, which makes it difficult, even impossible, for a deportee's family, friends or legal council to assist him. Some of these places are located within police custody. In many cases, the detainee has no access to a phone, nor access to Cimade immigration lawyers or medical help as is mandatory by law. The very existence of these immigration holding cells as well as the practices that take place in them has been criticized by the *Cour des Comptes*[10] in their report published in February 2007. In many ways, this can only remind one of the 'centre' of Arenc, to which we referred at the beginning of this article.

Several thousand foreigners are detained in these immigration detention centres and immigration holding cells each year (nearly 40,000 in 2007). However, about half of them are not deported, but are released without being legalized. Without any papers, they can be arrested and subjected to deportation proceedings again, or be jailed after being convicted as illegal aliens.

Legal immigration procedure

Until the mid-1990s, house arrest of deportees was the rule, and confinement an exception. Today, however, confinement is the rule, and the period of detention for deportees has been increased to a maximum of 32 days, divided into three phases, each overseen by a judicial judge. An administrative judge may decide whether a deportation order is legal or not, after a detainee or his council files a motion.[11]

After arrest, an undocumented immigrant is put into custody. The administration issues a deportation order, unless he already has one, and files a detainer in order to transfer him to an immigration detention centre or holding cell. The deportation order is most commonly an administrative decision based on the fact that the immigrant is living in France illegally. At first, the immigrant is detained for a maximum period of 48 hours, during which the administration organizes his deportation by trying to obtain travel documents from the consulate. The detainee can file a motion to challenge the administration's decision. The administrative judge rules on whether the detainee should be released for personal reasons such as his family life, the number of years he has been living in France, his state of health, or whether the administration respected his rights when they issued the deportation order.

After 48 hours, if the detainee has not yet been deported – which is most commonly the case – the administration must send him to a judicial judge, who decides whether or not the administration can file a new detainer of 15 days. The judge has the jurisdiction to ensure that the detainees' rights have been respected, from his arrest to his detention. If this is not the case, the judge releases the detainee, who, although freed, is still not legalized and can be arrested and detained again. If the judge rules that the detainee's rights have been respected, he may decide to issue an exceptional compulsory residence order, if the detainee abides by certain conditions such as giving his passport to the police. In this case, too, although the deportee is no longer detained, neither is he legalized. In most cases, however, the judge rules that the detainees' rights have been respected and that his detention should be maintained for another 15 days. After these 15 days of detention have expired, if the detainee has not yet been deported – either because he has applied for asylum or because the administration has not yet been able to organize his deportation for other reasons, for instance if the consulate has not yet issued a travel document – the administration may again send the detainee to a judge in order to ask for a new detainer of 5–15 days to be filed.

This is the legal context in which Cimade immigration lawyers work. We now look at two immigration detention centres, located in the Parisian suburbs of Mesnil-Amelot and Bobigny, which differ both in size and organization, and where six Cimade immigration lawyers take turns providing immigration detainees with legal assistance. At Mesnil-Amelot, lawyers work two at a time, and in Bobigny, one at a time. They also take turns going to court in order to observe the hearings where the judicial judge decides whether the administration has respected detainees' rights and whether a new detainer can be filed. In cases where a detainee has filed a motion against his deportation order, Cimade immigration lawyers may go to the administrative court as well, in order to observe those hearings. In some

cases, however, a detainee may have been transferred from another region, which makes it difficult for his or her immigration lawyer to follow the case.

The immigration detention centre of Mesnil-Amelot is located at the Paris suburb's biggest airport, Roissy-Charles de Gaulle, right next to the runways where flights take off and land, which puts further stress on the detainees. A local branch of the gendarmerie[12] ensures the administrative management of the detention centre and follows up on the execution of deportation orders, while 'mobile' *gendarmes* maintain order within the compound by patrolling the centre and by surveilling it from the watch-towers located in the no-man's land between the centre itself and the two barbed-wire fences that surround the compound.

Mesnil-Amelot is one of France's biggest immigration detention centres, with 140 beds. It has six housing buildings, while Cimade, Anaem (Agence d'Accueil pour les Etrangers et les Migrations), the medical service, and the staff that take care of catering, laundry, etc., use another building in the middle of the compound. Detainees are free to come and go in this building, and have free access to a TV room. The question of what detainees should do with their 'free' time has only recently become an issue, as a result of the extension of the period of detention from 12 days to 32 days, and creates another similarity between prisons and immigration detention.

Bobigny is a smaller detention centre, which can hold as many as 52 detainees in 26 bedrooms. Each detention building includes a TV room. The house rules are stricter than they are in Mesnil-Amelot though, for instance, access to its small outdoor yard depends on the policemen's good will. Similarly, detainees have to shout and bang on the doors of their detention building in order to draw the attention of the policemen and get access to Cimade lawyers and other 'services', all of which are located in remote offices.

Who are the detainees? The effects of 'deportation quotas'

We have seen a change in the population of detainees. First, there used to be fewer immigration detainees, and their situations were more similar: most of them used to correspond to the widespread image of the undocumented migrant – a single male, immigrating for economic reasons. A few immigration detainees were convicts who had been released from prison into immigration detention. Today, the deportation quotas that have been imposed on all *préfectures* and on the police lead to the arrest and detention of any undocumented person, regardless of personal situation. Never mind who is arrested, as long as the *préfectures* and police meet their quotas.

In 2004, then Minister of Internal Affairs Nicolas Sarkozy decided that each *préfecture* should respect certain quotas and deport a minimum number of immigrants each year. These quotas have increased every year since then. In 2007, for instance, French *préfectures* were ordered to deport 25,000 immigrants, and the number is set to rise to 26,000 deportations for the year 2008. The police have been assigned quotas as well. This has led to police checks on people in the street, in train stations, and even in post offices, cafés and barber shops in neighbourhoods that are known for their immigrant population, in the hope that they may arrest undocumented immigrants.

Not only have raids and racial profiling become commonplace in many low-income neighbourhoods in France's bigger cities, but the quotas have caused the police to turn to home arrests, to raids on workplaces, and even on hospitals. The *préfectures* have also started to summon undocumented immigrants a couple of days before their marriage to a French citizen, for instance, in order to arrest and deport them.

Finally, it has become commonplace for children to be picked up from school by policemen, who then bring them to the immigration detention centre where their parents have been detained. In 2007, 250 children, one of whom was a 3-week-old baby, have been detained in French immigration detention centres. Under-age children cannot be deported without their parents, and there have been numerous cases of isolated minors who were attending school in France having been arrested and given a deportation order promptly after they turned 18.

Thus today people who would not have been detained a few years ago can now be found in immigration detention – elderly people, people suffering from severe illness or major psychological problems, families with children, sometimes even babies, brides- or grooms-to-be, pregnant women, men who cannot be at their wife's side while she gives birth, asylum seekers, former inmates who have been released into immigration detention because they have a deportation order, but who have been living in France for many years and whose entire family is in this country.

Even though these facts are shocking, all these detainees have been placed in immigration detention and in deportation proceedings in respect of the law and of legal procedure. These practices are reinforced in a process that tends to reduce immigration detainees' rights, while hollowing out the rights they still have, in accordance with a managerial and industrialized state logic.

How about legal protection?

Two agencies provide legal protection – a judicial one that focuses on respect for individual liberties, and an administrative one addressing the

legality of the deportation order. However, it is extremely difficult for anyone to have those practices sanctioned, for a variety of reasons.

The judiciary procedure. Judiciary judges are often reluctant to release a detainee on grounds of a procedural error if that decision might prevent the deportation order from being carried out. Although these judges are constitutionally entitled to protect civil liberties – which in this context means the rights of children, asylum seekers, and the general right to respect for private and family life – they will usually limit themselves to merely verifying that police officers have followed procedural rules when arresting the deportee. In parallel, policemen and prefectorial civil servants are becoming evermore specialized experts in 'legal arrest' techniques. The circular of 21 February 2006 sent to prefects and prosecutors illustrates this contemporary trend: its 17-page text describes in detail the best way to carry out arrests 'in public spaces, within the buildings of the *préfecture*, at home, or in shelters for immigrants and asylum seekers' while avoiding any risk of judicial discharge (quoted from the relevant case law). The whole range of possible arrests is addressed: those performed in public spaces are presented as the 'less problematic' ones. The circular then reviews the cases of identity checks legally accepted by the *Cour de Cassation*.[13]

Home arrests, however, are seen as trickier, and thus there follows a list of what should legally be considered a 'home'. The attention to detail goes so far as to describe the way the police should 'enter homes': Does the foreigner refuse to open his door? Police officers should under no circumstances slide the prefectorial decision into his mailbox. Does someone open up? If he or she is 'likely to be the person concerned', then he or she may be checked. Arresting immigrants and asylum seekers in their shelters requires the same preparation, as policemen should consider whether the foreigner is inside the shelter or in its close vicinity. Regarding arrests performed within the *préfecture* itself, there is no particular difficulty if the foreigner presents himself at the desk of his own free will – that is, the police can arrest him without risk of later discharge. But litigation problems may arise when the foreigner is summoned to appear by the *préfecture*. This is why two 'models' for 'legal arrests' are included at the end of the circular for civil servants, so that they may avoid making mistakes that may lead to invalidation of the detention of the arrested foreigner.

New circulars have been released to develop these practices. The circular from the prefecture of the *Département des Hauts de Seine* of 28 February 2008 gives civil service personnel indications on the way to 'proceed with the systematic arrest [of deportable foreigners] when they voluntarily present themselves to the desk of the *préfecture*'s immigration office, in spite of

the fact that, when an undocumented immigrant arrives at the *préfecture*, something in his personal situation has changed that may enable him to be "legalized".' The circular concludes by reminding local civil servants that 'the removal of undocumented foreigners is a primary mission of our service: in this matter we have an obligation to achieve a significant result. You are therefore asked to be particularly zealous in enforcing the instructions enclosed in the present note…'. Similarly, the circular of 21 February 2006 reminded its readers of the 'necessity to increase the number of arrests of undocumented foreigners' and required prosecutors to account for the task that had already been completed (i.e. the police actions that had already been undertaken), thus disempowering the judicial courts that have been created to oversee police actions.

These circulars are representative of what we may call a 'clean' deportation industry: the law is not absent, but on the contrary overwhelmingly precise and complex, and can therefore be used to legitimize extremely questionable practices. As the circular of 21 February 2006 states: 'it is a matter of the credibility of the state's repression of illegal immigration.'

The administrative procedure. French immigration law sets out a very precise definition of the categories of foreigners who may legally apply for a residence permit and who are protected against deportation. The protected categories comprise: immigrants who suffer from serious illness for which there is no treatment in their country of origin, persons who arrived in France before the age of 13, foreigners who have a French spouse or who are parents of French children under certain conditions, and finally to the more general category of foreigners who have their private and family life in France – a rather broad notion which leaves judges with a great discretional power.

In immigration detention, however, the legal deadline for preparing and filing a motion against the deportation order is only 48 hours, followed by a hearing 2 or 3 days later. The deportee must then meet with a lawyer – either his or her personal lawyer or one from Cimade – within this very short time. This may be very difficult, however. Cimade lawyers are present in every detention centre, but, as we mentioned previously, this is not the case in the immigration detention holding cells, which are used during the first 48 hours of immigration detention. There are no pro bono lawyers available, and most lawyers will only meet the deportee in court on the day of the hearing, which leaves them a very short time to study their situation.[14]

Even if they meet with a lawyer in due course, deportees will still have to gather evidence proving their extended stay in France, the family life they lead in the country or the disease they suffer from – all in a few days and while being deprived of any freedom of movement. Without such evidence,

the administrative judge will not consider their claim. It should be added that the decisions of the administrative court, though they may address fundamental liberties, are taken by a single judge, while the rule in French administrative law is to let a full bench division decide on such important matters. Lawyers therefore have to be strongly reactive, but these means of appeal remain largely formal.[15]

Lawyers and detainees used to be allowed to negotiate with the administration in order to prevent the deportation of some immigrants, even if they didn't quite fit into the legal categories that protect against deportation. Today, because of the pressure on the administration to deport a growing number of foreigners, it has become almost impossible to discuss such cases with the *préfectures*. The narrow definition of the conditions of appeal against deportation orders enables civil servants to hide behind the law, using arguments such as 'the foreigner should have taken legal action in due time if he wanted to contest the order' or, if they are really being challenged, their final answer: 'We are only enforcing the order – we are not the ones who take the decision.'

Deportation seen from immigration detention: enforcing order through 'humanitarian control'

In the daily enforcement of immigration detention, security issues come before respect for legal provisions or attention to individual situations. Public order, though, is ever more difficult to ensure as the number of detainees has recently skyrocketed. In recent years, the number of overtly violent acts, and especially of self-injury and collective protests or even riots, has multiplied. Police forces can only refer these cases to their hierarchy and try to find a quick solution: either release the troublesome detainees, or charge them with trying to avoid deportation, or send them to another immigration detention facility… The issue at stake here is, once more, the credibility of the deportation machine: everything should be done to avoid incidences of self-mutilation, hunger strikes, suicide or any kind of violent death that might be made public. No such incident showing the consequences of state violence must be made known to the voters and thus show the true face of an existing *illegalizing* machine, which is also increasingly industrializing and de-humanizing the deportation of undocumented immigrants.

Since 2007, this violence has nevertheless been brought to public attention in highly mediatized, dramatic events (Cimade, 2008). The crackdown on illegal immigration has resulted in a growing fear of arrest among undocumented immigrants as well as cases of violent death. In the summer of

2007, a small child named Ivan fell several stories while trying to escape a police home arrest with his father; the same year a Chinese woman jumped out of a window in the Parisian neighbourhood of Belleville and finally died on 21 September; a Kenyan man aged 20 hanged himself after learning that his claim for asylum had been rejected; on 4 April 2008, a 29-year-old Malian man drowned after jumping into the Seine in an attempt to escape from the police. In immigration detention, two foreigners committed suicide in Bordeaux and Marseille, while two other detainees set themselves on fire in the Lyons and the Mesnil-Amelot immigration detention centres.

The only response to these desperate actions from the state was an increase in the repression inside immigration detention centres. The new centres built in 2007 have a prison-like aspect: surveillance cameras, fences, barbed wire, mechanical doors. The means of repression available to the police are ever growing, as seen in the Vincennes immigration detention centre – one of the largest and most 'industrialized' in France, with a total of 280 beds. Since December 2007, tensions and violence in the form of hunger strikes, self-mutilations, arson, fights, violent repression from the police and solitary confinement, have become commonplace. On the night of 11 February 2007, the Paris *préfecture* confirmed that 'Täser' guns had been used against detained rioters when 60 policemen intervened inside the centre to restore order. This action sent two people to hospital and is now under public investigation. The following night, a dozen police coaches were stationed outside the centre to prevent more violence breaking out. More than 20 legal actions have been taken out against police brutality by Vincennes' detainees since December 2007.

The 'outrageous directive': towards a European detention archipelago?

In spite of the dramatic consequences of this repressive system, a project is now being studied at EU level which may confirm detention as the main means of managing 'undesirable' immigrant populations. A draft for a so-called 'removal directive' is under discussion in Brussels with the aim to homogenize immigration detention systems among all European member states, drawing on the most repressive dispositions now being enforced in the EU. The project proposes a maximum detention time of 18 months, thus reinforcing the contemporary trend towards generalizing the recourse to detention for foreigners who are merely guilty of being undocumented, and more broadly towards the criminalization of immigrants. Our experience of French immigration detention and the statistics published by the Cimade

show that, in most cases, the actual enforcement of deportation orders is carried out in the first 17 days of detention. The goal of this European extension of the detention time may therefore not be a more efficient enforcement of deportation; it is more probably designed to punish undocumented foreigners and control them through administrative confinement.

Conclusion

In conclusion, two important points should be made. First, the account we have tried to give of the role of 'the rule of law' and of legal procedures in both the genesis and the current enforcement of immigrants' retention in France tends to confirm the view of the legal system as a set of instruments for governing the immigrant population (Foucault, 2004). As we have seen, officials from the Ministry of Internal Affairs officially acknowledge this 'governmental' use of deportation law by providing local civil servants with legal guidelines on the best way to deal and 'play' with legality. This struggle over law and the right way to enforce it (or not) is part of the everyday policing of migration.

Second, a broader statement should be made, regarding the general evolution of European immigration policies. As in North America, a global shift towards the criminalization of undocumented immigrants can be detected, the key institutions of which are the various confinement devices now in use in most 'Schengenland' countries (*Cultures & Conflits*, 2005). As we have emphasized, the logic of such a general recourse to detention is not to actually deport illegal foreigners, or to prevent them from entering Europe – two constant goals of most Western governments that actually never were attained, and probably never will be. In a foucauldian 'governmentality' perspective, this development of confinement, coupled with the differential enforcement of deportation laws, tends more to enable European officials to manage undocumented foreigners as a population. While most of them are actually staying in the country they have entered, they are nonetheless durably set apart and kept in a precarious form of existence – and thus made vulnerable to all kinds of exploitation.

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Notes

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1. Most French camps throughout the 20th century were indeed set in 'recycled' buildings, such as deserted factories or jails, or make-do facilities, including barracks or tents.

2. The government decree of 12 November 1938 was the first to set up *centres spéciaux de rassemblement* for deportees who could not actually be removed to any foreign country. In spring 1939, other camps were then improvised for the relocation of Spanish civilian and military refugees fleeing the repression of the Franco government after the end of the civil war. More camps were finally created after the declaration of war in autumn 1939, for 'suspect' nationals from countries known to be part of the Axis – to which the Vichy regime added new internment structures, while taking control of those already created. For a more detailed account, see Peschanski (2002).

3. A good indication of the early existence of this practice may be found in a 1910 government instruction, which seeks precisely to prevent it. At the time, most deportees awaited deportation in local jails, a practice that was later to receive implicit recognition in 1933 by article 120 of the French Penal code.

4. Throughout the debates in Parliament, MPs concentrated on those guarantees and the way they should be codified, without discussing the legitimacy of locking up deported immigrants in the first place. For a more detailed analysis, see Fischer (2007).

5. In the French administrative system, the *préfet* is the local representative of the state at the department level.

6. The following analysis is based on the examination of public and private archives (Ministry of Internal Affairs series, CAC 19990137 art. 5; personal archives of Mr Patrick Weil, consulted at the Paris Fondation Nationale des Sciences Politiques in Paris, WE 21 & 24; and finally archives of the human rights organization Cimade, service Défense des Etrangers Reconduits).

7. The acronym Cimade stands for Comité Inter-Mouvements d'Aide aux Réfugiés et aux Evacués, a denomination the human rights organization inherited from its beginnings as a group providing assistance to displaced refugees fleeing the war zones in Eastern France at the outbreak of the Second World War. The organization was already delivering social relief in the internment camps built on metropolitan French territory during the Algerian war, and then became specialized in the defence of foreign immigrants.

8. As a result of the public showdown of 2000, the position of Cimade representatives with respect to the state was actually reinforced. Acknowledging this new situation, its officials accentuated their public appraisals and criticisms of government immigration policies, and, starting in 2001, published an annual report on the general situation in *centres de rétention*.

9. See Cimade (2008). The report can also be downloaded: http://www.cimade.org/publications/16.

10. An institution that audits the French state's expenses each year.

11. A specificity of the French legal system is the existence of two kinds of judges: a judicial judge, who examines confinement questions, and an administrative judge, who examines the decisions of the administration.

12. In France, the *Gendarmerie* is a military body charged with police duties. Some *gendarmes* work within a specific geographical setting, others are 'mobile' and can work anywhere in France.

13. The *Cour de Cassation* is the Supreme Court of the French judicial order.

14. It should be added here that French immigration law includes a wide range of deportation orders, each one limiting in various ways the possibility for deportees to take action against their own removal. The *interdiction du territoire français*, a deportation order taken by a judge against foreign convicts released from prison to immigration detention, leaves almost no possibility for the detained deportee to file a motion against his removal. More recently, a new measure called *obligation à quitter le territoire français* has reduced in the same way the possibilities for legal action to prevent undocumented immigrants being deported.

15. These constant attacks on legal guarantees for deported foreigners could lead to the unification of judiciary and administrative judicial oversight of immigration detention, thus providing less protection to the detainees while making the procedure faster and easier to carry out for civil servants. In the same way, some *préfectures* now organize judiciary hearings *inside* immigration detention centres (in Toulouse, Marseille and Coquelles near Calais) – a measure designed to avoid spending public money on the transfer of detainees from the centre to a remote courtroom, but which makes it even more difficult for the deportee's lawyer or relatives to attend the hearing, as they have to actually go *into* the immigration detention facility. As the 2007 report from Cimade states:

> What we are facing here is not justice that is rendered in exceptional conditions, but simply an exceptional justice. A specific, less-protective procedure has been set up for foreigners, not to enforce their rights, but to minimize the cost and the trouble of formally maintaining those rights in a process whose only goal is to deport. (Cimade, 2008: 14)

References

Agamben, G. (1995) *Homo sacer*: *sovereign power and bare life*. Stanford, CA: Stanford University Press.

Bernardot, M. (2008) *Camps d'étrangers*. Paris: Editions du Croquant.

Cimade (2008) *Centres et locaux de rétention administrative, Rapport 2007*. Paris: Cimade.

Cultures & conflits (2005) Special issue on 'L'Europe des camps', 57 (printemps).

Fischer, N. (2007) *Rétention administrative in a state of rule of law*: *genesis and practice of the control of retention centres for deportees in contemporary France*. Phd dissertation (Political Science), Institut d'études politiques de Paris.

Foucault, M. (2004) *Naissance de la biopolitique.* Cours au Collège de France, 1978–9. Paris: Gallimard & Seuil.

Guiraudon, V. (2000) *Les politiques d'immigration en Europe: Allemagne, France, Pays-Bas*. Paris: L'Harmattan.

Inda, J. X. (2006) *Targeting immigrants: government, technology, and ethics*. Oxford: Blackwell.

Joppke, C. (1998) 'Why liberal states accept unwanted immigration', *World politics* 50: 266–93.

Le Cour Grandmaison, O. (2005) *Coloniser, exterminer: sur la guerre et l'Etat colonial*. Paris: Fayard.

Lochak, D. (1998) 'L'immigration, une question trop sensible', in Centre Universitaire de Recherches Administratives et Politiques de Picardie (ed.), *Questions sensibles*, pp. 246–61. Paris: PUF.

Makaremi, C. (2005) *Prisonniers du passage. Conditions de vie des étrangers qui attendent aux frontières des démocraties européennes: le cas de la 'Zone d'Attente pour Personnes en Instance' de Roissy-Charles de Gaulle en France.* Master de recherche en Sociologie Politique, Institut d'études politiques de Paris.

Marin, B. & Mayntz, R. (1991) *Policy networks*: *empirical evidence and theoretical considerations*. Frankfurt am Main: Campus Verlag.

Peschanski, D. (2002) *La France des camps: l'internement 1938–1946*. Paris: Gallimard.

Rose, N. (2007) *The politics of life itself: biomedicine, power, and subjectivity in the twenty-first century*. Princeton, NJ: Princeton University Press.

Weil, P. (2005) *La France et ses étrangers: l'aventure d'une politique d'immigration de 1938 à nos jours*. Paris: Gallimard.