DISCIPLINING THE VIOLATORS OF SOVEREIGNTY

RATIONALIZATION OF IMMIGRATION DETENTION IN THE DUTCH POLITICS 1984-2010

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The right of the Netherlands to guard the national border and only permit individuals who comply with the by the Netherlands set conditions to transgress the border and to stay on the national territory, is the essence and basic assumption of the national aliens law. This right is obvious. The right to the integrity of the national territory is recognized in the international law. An argumentation that would perceive also the refusal of admission of specific aliens as a deprivation of liberty, should take as basic assumption that the Netherlands detains in principle everyone who does not possess the Dutch nationality; in short an argumentation who declares the rest of the world to prison and the Netherlands to her warder.

Minister of Justice and State Secretary for Justice, explaining the amendment of the Aliens Act 1965 in order to make border detention lawful.

Quote previous page:

explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 5

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1 INTRODUCTION

1.1 Immigration detention: condemned but popular

"Politically popular and widely condemned", that is how Wilsher[1] describes immigration detention[2]. Politically popular, indeed. Detention of unauthorized migrants and asylum-seekers is a worldwide used instrument for the benefit of immigration control, both in Western liberal democracies as in newly industrializing countries and developing countries. Also in The Netherlands there exists broad political consensus about immigration detention as a necessary tool for the regulation of immigration. The capacity for immigration detention in 2009, which with 2185 places made up sixteen percent of the total prison capacity[3], reflects its popularity. Widely condemned, yes. Criticism on detention practices all over the globe comes from European institutions, the United Nations, national supervisory boards, non-governmental organizations and scholars[4]. Their criticisms are often related to routine use of this measure, to circumstances in and duration of detention, to judicial guarantees, and to detention of particular groups like asylum-seekers, children, elderly and sick persons. Also the Dutch government is reprimanded several times for the way its policy concerning immigration detention is shaped and implemented[5].

How can it be explained that immigration detention remains popular despite its criticisms? In essence this question asks to the legitimation of immigration control. That there exists a necessity to restrict entry is a basic assumption of the Western states. The sovereign states determine who may enter and who is excluded, whereby the interests of the citizens, and not those of outsiders, are decisive[6]. This is a consequence of the way the nation-states have developed into what they are now. A fixed territory and a people within that territory became inseparable linked. A sovereign authority rules over the territory and the people, and as a result of the democratisation process this authority represents the wishes and needs of the

1 Wilsher 2008.: 223

2 Detention based on immigration law and not on criminal law.

3 National budget, Kamerstukken II 2009–2010, 32 123 hoofdstuk VI, nr. 2: 129; 134

4 e.g. Amnesty International 2009; Commissioner for Human Rights 2009; Council of Europe 2010; Field & Edwards 2006; Global Detention Project 2010; Human Rights and Equal Opportunity Commission 1998; 2004; Khosravi 2009; Rajaram & Grundy-Warr 2004; Wilsher 2004

5 Amnesty International 2008; Commissioner for human rights 2009; European Parliament Committee on Civil Liberties, Justice and Home Affairs 2007; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ; Raad voor Strafrechtstoepassing en Jeugdbescherming 2008;Vluchtelingenwerk Nederland 2007; 2008; Raad voor Strafrechtstoepassing en Jeugdbescherming 2008;

6 Gibney 2004: 23-84; Wilsher 2008: 224-243

population. The authority has the obligation to provide in the physical, economic and cultural security of the population against internal and external threats. She has a monopoly over the legitimate use of sovereign power, which she may use to resist threats and is most visible in the penal law and the prison[7]. The developments in the nation-state led to the construction of an inside and an outside concerning both territory and population, what led to the distinction between 'us' and 'them'[8], or between non-citizens and citizens. In general the population prefers closed borders because it is assumed that closure is the best way to protect their security[9]. Therefore ever more "draconian measures" surrounding the surveillance and expulsion of immigrants are implemented, justified by the perception of foreigners as key sources of insecurity[10]. More and more states resort to detention, "the sharpest technique to achieve the related goals of imaginary unity, maintenance of the territorial order, and sedentarization"[11]. The question can be posed why it is specifically detention that is used as a instrument and not other techniques.

1.2 Immigration detention: its practical and symbolic purposes

The prison has been for centuries a precious instrument for states to maintain order. Although its effectivity is disputed, it has remained popular. Insights from the penology can help explain the increasing use of immigration detention, as also imprisonment of other categories of people increases. The penal law has developed in the course of centuries into a law that balances the sovereign power of the state and the rights of its citizens. The rights of citizens became always more important what is reflected in the guarantees the law offers for the protection of suspects. However, this development is partly reversed the last decades. The *new penology* concept emphasises that the penal law has changed from one to protect the suspect against the powerful state in which punishment was aimed at individual transformation, to one that seeks to regulate crime by managerial processes. The purpose of the prison has become the containment of dangerous people to protect the society against them and lost its transformative function[12]. Immigration detention is explained by applying this concept. The unauthorized immigrants are 'contained' in immigration detention centers to

7 Gibney 2004
8 Cornelisse 2010: 106-7
9 Gibney 2004; 2005
10 Guild 2009: 110
11 Cornelisse 2010: 118
12 Feeley & Simon 1992

protect the society and the state against the assumed threats they pose[13]. Garland's concept of c*ulture of control* describes similar processes that are adaptations to the ever-growing crime rates. In fact crime appears to be outside the power of the government. As a response the state adopts a tough 'law and order' stance to show she is still in control, what is reflected by more and longer prison sentences[14]. Immigration detention is used to show that the state is still in control of immigration while she in fact is not, according to Bosworth[15]. Several other purposes are ascribed to immigration detention, from which are some directly related to the physical deprivation of liberty, like the 'containment' which was mentioned above, or to prevent absconding in order to realize expulsion. Other purposes are symbolic ones, like showing that the state still is in power, to emphasise and reproduce the inside-outside distinction[16], and as deterrence[17]. Furthermore, the fear resulting from the always present threat of being detained and deported, is employed to create a form of discipline on unauthorized immigrants[18]. All these theoretical insights and prior research results provided a framework, which helped in interpreting the research data.

1.3 Research questions

What is it that makes detention a necessary considered instrument in the management of certain kinds of migration? This question formed the inspiration for conducting the research and is the red thread throughout this thesis. Insights regarding this question are provided by the analysis of parliamentary documents of especially the past 26 years. Focused is on arguments of the different political parties concerning this subject and the final outcomes as written down in law and policy. Also interviews with (ex-)politicians were conducted to get even better insights by avoiding the formal regulation of what is being said and written in parliamentary documents[19]. Literature was consulted extensively to get an answer on the question why immigration detention is assumed to be necessary.

The main question of the research at hand is why immigration detention is a necessary considered instrument by the Dutch politicians in the management of certain kinds of migration.

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13 Broeders 2010; Khosravi 2009; Richard & Fischer 2008; Simon 1998; Welch 2002; Welch & Schuster 2005: 331

14 Garland 1996

15 Bosworth 2008

16 Cornelisse 2010: 115

17 See for example Broeders 2010; Gibney 2004; Welch & Schuster 2005; Wilsher 2004; Cornelisse 2010; Dow 2007

18 Calavita 2003: 406; Coutin 2005: 13 ; De Genova 2010 : 39

19 Van Dijk 1993: 266

The sub questions by which the main question is answered are the following:

1. What are the purposes of immigration detention according to the distinct political parties?
2. What are the different views on the preferable design of immigration detention according to the distinct political parties with regard to judicial protection, duration of detention and detention regime?
3. What are the views on alternatives for immigration detention by the distinct political parties?
4. Which underlying assumptions can explain the possible differences between the political parties?

1.4 Reading guide

The methodology used to answer the main question, is the subject of chapter 2. First the choice for the data is explained and then is described in which way a sufficient reliability and validity of the research is strived for. In chapter 3 the Dutch history and actual state of affairs with regard to immigration policy in general and immigration detention in particular is discussed. Also the European policy on immigration is dealt with briefly as this is increasingly important for the Dutch policy. Furthermore the positioning of the Dutch political parties is presented. Chapter 4 provides a literature review on immigration detention and related issues. Issues as the development of the state, sovereignty and the justification for the right of states to restrict immigration are discussed. Developments in the penal law and the institution of the prison are dealt with as well, because immigration detention is often related to developments in the penal law. Chapter 5 presents and discusses the research data obtained form parliamentary documents and interviews. The views of the distinct political parties on purposes of immigration detention, legal protection of people in immigration detention, duration of detention and the detention regime are expounded. Furthermore the different views on alternatives for immigration detention are discusses as well as the underlying assumptions about the constitutional state and rights of citizens and non-citizens. Conclusions of the research can be found in chapter 6.

2 METHODOLOGY

2.1 Introduction

The main purpose of this research is to get an understanding in the reasons why deprivation of liberty is used in restrictive immigration policies, by answering the question why immigration detention is a necessary considered instrument by the Dutch politicians in the management of certain kinds of migration. The methods used to answer this question, form the subject of this chapter. First the choice for the data is explained and then is described how the reliability and validity of this research is obtained.

2.2 Units of analysis

For answering the research question, pronunciations of politicians concerning immigration detention (written or spoken) are necessary. Parliamentary documents could provide for this. Another possibility was to conduct interviews, but this had as disadvantages that no research pronunciations could be done about a longer period of time and that policy action (see below) probably should not be revealed. Utterances in the media proved to be scarce, so analyzing parliamentary documents appeared to be the best method of collecting data. Only documents of the Lower Chamber[20] are used, partly because the subject of immigration detention mainly was discussed in the Lower Chamber, and partly to restrict the amount of data. In search engines (Officiële bekendmakingen, Parlando and Staten-Generaal Digitaal) for government documents was searched on the term “immigration detention”, but this resulted in so many hits that finally was focused on documents concerning particular events. These events were mainly determined by the law history of immigration detention as written by Baudoin et al.[21].

Dutch parliamentary documents from the last 45 years were analysed. The last 26 years, formed the heart because in 1984 the first Memorandum on Immigration Detention was presented to the Lower Chamber, but because the current law concerning immigration detention has its roots in the Aliens Law of 1965, also attention is being paid to documents of

[20] For an overview of the Dutch political system see Ministry of Foreign Affairs n.d.

21 Baudoin et al. 2008

that period. The focus was on the arguments that were given to legitimate immigration detention.

To enlarge the validity (see below) of the research strategy, it was taken into account that there can exist a difference between policy debate and policy action[22]. Policy action includes both for instance the formulation of laws and regulation, and the behavior of practitioners who implement such policies[23]. This possible discrepancy can be explained by the fact that debates are heavily monitored because everything what is being said is put down in the parliamentary record[24]. Therefore not just the debates were of subject of analysis in this research, but also the way in which law texts and policy documents were formulated. This possible discrepancy was also the main reason that I conducted interviews in addition to the analysis of documents. They provided insight in rationalizations behind the importance that was attached to instrument of immigration detention, arguments that could not always be found in the parliamentary documents.

Other indicators for the quality of research, validity and reliability, are subject of the next paragraph.

2.3 Reliability and Validity

Qualitative research is often considered to be vague. One of the reasons for this is that, compared to quantitative research, there exist less clear methodological rules and guidelines. This could decrease the reliability. Reliability means that the influence of accidental or unsystematic errors is minimal, what results in getting the same outcomes when the research is done repeatedly. One of the instruments in increasing the reliability is doing a sufficient amount of observations[25]. As a consequence of this a considerable amount of parliamentary documents was analysed.

Another main indicator for the quality of research is the validity, what means that is measured or explained what the researcher really wanted to measure or explain by avoiding systematic errors[26]. A way to enhance the validity of the research strategy is written above, namely the choice for additional interviews. A way to enhance the general validity is to describe the analytical moves that are made. The main reason for the assumed ‘vagueness’

22 Schön & Rein 1994: 32

23 Rein & Schön 1996: 7

24 Van Dijk 1993: 266

25 Boije 2005: 145

26 Boeije 2005: 145

of qualitative research is that it remains often unclear how the analysis of obtained data took place, what justifies doubt about the conclusions. As Boeije writes: “What exactly happens between data and conclusions is a *black box*” (italics in original)[27]. To make qualitative research less vague, it is important to be clear about the procedure of the analysis.

For coding and analyzing the computer program MAXQDA an instrument for text analysis, was used. A coding scheme developed by Roggeband & Vliegenthart[28] for qualitative analysis on policy documents in the field of migration and integration proved to be useful (see appendix 1). Because the data consisted of a large amount of text, it was necessary to code in a systematic way. The coding scheme was simplified and reduced to three categories (due to the large amount of texts). These are *standing* (who speaks), *diagnosis* (what is represented as a problem, why is it seen as a problem and what are the perceived causes), and *prognosis* (what is represented as the solution).

Everything was coded what was related to immigration detention, views on immigration and immigration policy, and views on (policy on) illegal residing immigrants. The text was coded narrowly in order not to loose any information what could be of relevance in the further analysis, what resulted in an extended list of codes. Therefore the issues of immigration and immigration policy in general, and views on (policy on) illegal residing immigrants were omitted and taken for granted because it would be too much for one research. In order to determine the most important issues in the politics concerning immigration detention, codes from the second and third category were selected which had five or more codings. By the further analysis they were of main importance, although often remaining codings were consulted to further explain, found or refute findings.

It is very difficult or researchers to indicate how insights and interpretations are being developed, as Boeije writes, and an analysis can leap forward by a link one understands suddenly[29]. This applies also for this research. For instance far in the process of analyzing the data which were considered relevant for answering the research questions, the concept of the constitutional state suddenly proved to be very important.

The fifth chapter presents the results of the research. The layout follows the sub questions of the research. Quotes are extensively used to increase the validity of the research. Obviously this is no ‘proof’ of validity because a quotation can be taken out of its context. If doubts arise about this, readers can search for the parliamentary documents and read the

27 Boeije 2005: 12

28 Roggeband & Vliegenthart 2007: 545

29 Boeije 2005: 12

context their selves. All quotes are translated from Dutch into English, what can result in minor differences. The same applies to quotes coming from Dutch literature.

Before turning to the empirical data, first the historical and actual political context of immigration detention in The Netherlands is presented in the next chapter and then a literature review of theoretical issues follows.

3 IMMIGRATION DETENTION IN THE NETHERLANDS: HISTORICAL AND ACTUAL CONTEXT

3.1 Introduction

As the subject of this thesis is the rationalization of immigration detention in the Dutch politics, it is not redundant to discuss the history of immigration policy in The Netherlands what is done in paragraph 3.2. After all, political choices made by earlier generations determine partly the policies and ideas for later generations[1]. Because the European Union becomes always more important for the national policies of its member states, attention is being paid to the European policy with regard to immigration in paragraph 3.3. In paragraph 3.4 is an overview provided of the policy on immigration detention. In the last paragraph the political landscape is discussed in order to contribute to the interpretation of the data revealed in chapter 5.

3.2 Historical overview Dutch immigration policy

3.2.1 Immigration policy until WW I

Since well over two centuries immigration has been a matter of concern for national governments in Western Europe. Before that time national governments lacked power and interest to regulate immigration. The admittance of immigrants was organized locally. In general immigrants could settle where they wanted, as long as they were not considered undesired from an economic or religious point of view. Cities were afraid for large numbers of poor immigrants, with as a result that immigrants who were allowed to stay were not granted the same rights as citizens soon and easily. For instance in the city of Harlem it took four years before admitted immigrants received citizenship. Before that time they could lay no claim on poor relief. Poor immigrants who where not admitted officially, had to be expelled from the city. Anyway, immigrants from other cities were considered to be as much ‘alien’ as

1 Meyers 2000: 1261

immigrants from other parts of the world. This changed after the French Revolution when the nation-states developed into what they are now. Only immigrants from other countries were now considered as 'aliens' and national governments became interested in regulating migration, what is reflected in the passport legislation that became effective in the beginning of the 19th century. Especially in times of revolutions the passport legislation was strictly applied, because of fear for revolutionary immigrants. Despite this development, until WW I migration was mainly determined by the demand for labour. Therefore the first Aliens Act, dated 1849, was a liberal act; all aliens were welcome if they had sufficient financial means, were respectable and caused nobody inconvenience[2].

3.2.2 Immigration policy from WW I till 1985

The liberal attitude towards aliens changed on the outbreak of World War I. From then the immigration policy became much more restrictive. In 1918 the Act on the Supervision of Aliens (*Wet Toezicht Vreemdelingen*) and in 1920 the Act on the Guarding of the Border (*Wet op de Grensbewaking*) came into force. From then the possibilities for aliens to settle and work in The Netherlands decreased and this restrictive policy laid the basis for the Aliens Acts of 1965 and 2000[3]. This increased attention for the admission of aliens can be explained from reasons of state security (fear of spies, deserters, large numbers of refugees and bolshevist revolutionaries), but even more important was a structural change: the development of the welfare state. In 1916 new legislation obliged the Dutch state to pay for unemployment benefits of its citizens. Since then regulation of the labour market and of labour migration were linked in national policy, what is shown in the first act aimed at regulating the labour of aliens (Act on Aliens Labour, *Vreemdelingenarbeidswet*, 1934)[4].

In the 1950s and 60s the welfare state developed further. Before WW II aliens could maybe lay a claim on (limited) unemployment benefits, but since the 1950s immigrants could use extensive welfare benefits independent of their labour market position. In the 1950s a new split in the migration policy developed, what is shown in the active interference of the government with the recruitment of guest labourers[5] in the 1960s and the restrictive

2 Baudoin et al. 2008: 19-20; Lucassen 2001: 11-15; Swart 1976

3 Kuijer & Steenbergen 2005: 25

4 Lucassen 2001: 15-17

5 Gastarbeiders are labourers from mainly the Mediterranean area who were recruited to fill the gaps in the labour market. The intention of the government was to offer them temporary residence, but many of them stayed permanently.

immigration policy since the 1970s during the economic crisis[6]. In 1965 the Aliens Act 1849 was replaced by the Aliens Act 1965.

The Aliens Act 1965 can be characterized as an adaptation of the law to a gradually developed practice. Contrary to the law of 1849, the alien in general is not granted the right on admission to and residence in The Netherlands. This act was brought into line with international and European treaties, but the most important according to the explanatory memorandum accompanying the bill for the new Aliens Act was to "give the alien as much legal protection as possible"[7]. Swart mentioned however that this act not always resulted in the improvement of the legal position of aliens[8]. The explanatory memorandum stated that as a result of the demographic situation in the small and densely populated Dutch country it remained important that also in the new Aliens Act aliens could be refused entrance even if they had sufficient means of livelihood. Therefore measures with regard to supervision, admission and expulsion were necessary, although it was emphasised that refugees could count on protection in The Netherlands[9].

At the end of the 1970s and in the 1980s the call for more restrictive aliens legislation became louder. The official argument was that to have the possibility to invest in the solution of economic, social and cultural problems of already present legal immigrants, the arrival of new immigrants had to be restricted[10]. The demographic situation concerning immigrants in The Netherlands had changed. In 1965 150.000 aliens resided in The Netherlands, from which the biggest groups consisted of Germans and Belgians. Yearly around 90 asylum-seekers came to The Netherlands. In 1984 550.000 aliens lived in The Netherlands, with Moroccans and Turkish as biggest groups, and the number of asylum-seekers increased[11]. Besides the increased numbers, another development became visible, namely that the majority of the immigrants had socio-economic problems, as a report on ethnic minorities from 1979 showed[12].

6 Lucassen 2001: 15-18

7 Explanatory memorandum, Kamerstukken II 1962-1963, 7163, nr. 3: 12

8 Swart: 1978: 17

9 Explanatory memorandum, Kamerstukken II 1962-1963, 7163, nr. 3

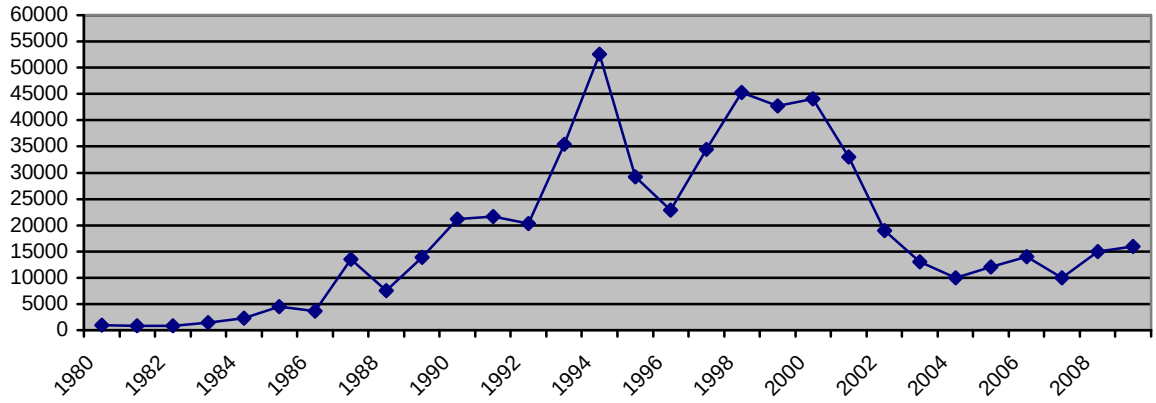
10 Memorandum, Kamerstukken II 1982-1983, 16 102, nr. 21

11 Memorandum, Kamerstukken II 1985-1986, 19 532, nr. 2: 7-8

12 WRR 1979

3.2.3 Immigration policy from 1985

Although the immigration policy remained restrictive, the period since 1985 can be regarded as distinctive from the former periods. Firstly because of a substantial increase in the number of asylum-seekers (see graph 1). Secondly because migration policy became more important in European Union policy[13]. As a result of the steeply rising number of asylum-seekers, restriction of asylum became a priority in government policy. Measures like carrier sanctions, visa requirements, criminalization of human smuggling, an accelerated asylum procedure and increased possibilities for and use of immigration detention all were aimed at asylum-seekers and unauthorized migrants[14]. In 1994 the Aliens Act 1965 was revised to restrict the amount and length of procedures concerning admission and expulsion of aliens[15] against the background of "an almost yearly increasing flow of aliens who want to settle here" and the expectation of massive requests for admission in the future. However, this act did not have the intended results. In 1999 a law came into force aimed at combating the problem of undocumented asylum-seekers. This law makes it possible to reject an application for asylum when asylum-seekers do not have proper documentation[16].



Graph 1: Number of asylum-seekers in The Netherlands 1980-2008[17]

In 2001 the new Aliens Act 2000 came into force, aimed at regulating immigration and keeping the consequences of immigration for the Dutch society manageable. The Aliens Act

13 WRR 2001: 58

14 Doomernik 2008: 129-146

15 Scheltema 2006: 33

16 Explanatory memorandum, Kamerstukken II 1997–1998, 26 088, nr. 3

17 WRR 2001: 59; CBS StatLine databank

2000 is mainly aimed at regulating asylum and its formal aims are the shortening of asylum proceedings and improvement of the quality of asylum decisions. Besides the regulation of asylum, the act contains rules concerning the supervision of aliens (to stop persons to determine their identity, nationality and residence position), both at the border and within The Netherlands and has implications for the policy regarding the return of unauthorized immigrants[18]. The law offers the possibility for the government to reject many applications for asylum on a first instance (within 48 working hours). Although asylum-seekers have the possibility to appeal, they are not allowed to await the outcome of the appeal in The Netherlands. According to Doomernik the law leads to little opportunity for asylum-seekers to appeal the decision[19]. The first of July 2010 a new law with regard to the asylum procedure came into force, which aims at "a more thorough and faster asylum procedure with as a result the encouragement of return" of asylum-seekers with a rejected claim[20].

Combating unauthorized stay of immigrants has become another policy priority for the government since especially the 1990's. On the basis of the Coalition Agreement of 1989 the Dutch government established the foundation of a Committee for the Domestic Supervision on Aliens, (the '*Commissie Zeevalking'),* for advice concerning policy on unauthorized migrants. In the final report, published in 1991, the Commission recommended among others to introduce a restricted obligation to carry ID papers, to increase the penalty for employers on illegal labour and to exclude illegal migrants from social services. As from then, a series of legislation is introduced to combat illegal residence more effectively. The linking of the social fiscal number to a residence permit (1991) and the Compulsory Identification Act (1994) make it difficult for unauthorized migrants to have legal labour. The Marriage of Convenience Act (1994) makes it more difficult to marry with the purpose of getting a residence permit and the Linking Act (1998) regulates that only aliens whose stay is legitimate can use social services[21]. Other forms of unsolicited migration were also the subject of restrictive measures, like high fees for visas and residence permits, costly integration tests which became compulsory for migrants who applied for family reunification or formation and other strict conditions for family migration[22]. Even more restrictive measures are taken in order to restrict immigration of low-skilled migrants. For example, in October 2009 again the government proposed stricter rules for family migration[23].

18 Scheltema 2006: 33-34

19 Doomernik 2008: 138

20 Explanatory memorandum, Kamerstukken II 2008–2009, 31 994, nr. 3: 2

21 Engbersen et al. 1999: 18

22 Doomernik 2008: 129-146

23 Letter of the ministers and State Secretary, Kamerstukken II 2009–2010, 32 175, nr. 1

The legislation resulted in high barriers for low-skilled and family-related migrants to enter The Netherlands legally, in high financial risks for employers to hire unauthorized migrants, in exclusion of unauthorized migrants from most social services and legal labour, difficulties for undocumented migrants to apply for asylum, higher risks for unauthorized migrants to get 'discovered' by the police due to the obligation for everyone over age thirteen to carry identification at all times, and criminalization of human trafficking and smuggling[24].

Another development in this era has been the increasing emphasis on possibilities for identification of immigrants. In the Aliens Act 2000 the possibilities to stop and arrest immigrants who are suspected of unlawful residence were already extended. It includes possibilities to stop vehicles, confiscate travel and identity documents and enter a home without the owner's permission. In 2010 a bill was introduced to further extend the power of the Aliens Police to determine the identity of the immigrant with the possibility to search the home and adjacent workplaces of unauthorized immigrants without their permission and research actions like the reading out of mobile phones of detained immigrants[25]. Also on European level the identification of immigrants led to several measures as is shown in paragraph 3.4.

3.3 Legislation and policy concerning immigration detention

3.3.1 Detention of unauthorized immigrants

Immigration detention in the current sense has its origins in the Aliens Act 1965, although the 1918 Act on the Supervision of Aliens knew already measures for the restriction and deprivation of the liberty of aliens[26]. The Aliens Law of 1849 didn't have such an article, maybe because the expulsion of aliens could be realized immediately and easily in that time[27]. The Aliens Act 1965 provided two measures for deprivation of liberty of aliens. The first one concerned the (short lasting) keeping of aliens and the second one, article 26, detention[28]. In the 1970s and 80s the measure of detention of irregular migrants was

24 Doomernik 2008: 129-146

25 Explanatory memorandum, Kamerstukken II 2010–2011, 32 528, nr. 3: 1

26 Baudoin et al. 2008

27 Swart 1978 : 315

28 Baudoin et al. 2008

probably scantly applied, although exact numbers are difficult to trace[29]. Immigration detention based on article 26 was mainly (but not only) used for aliens who after they served their sentence for criminal offences had legal proceedings concerning residence permits[30]. In the 1980's alien detention got more and more attention in the politics. As a result of questions in the Lower Chamber concerning the detention of a minor[31], the first memorandum on immigration detention was published. The legal provisions and the actual practice concerning immigration detention were expounded. Also supplementary instructions concerning the detention of minor aliens were introduced. In 1984 cells and in 1987 a prison were especially allocated for immigration detention for the first time[32]. Between 1988 and 1993 the number of cases of immigration detention rose from 2000 to 9600[33]. It was also in this period that the *Commissie Zeevalking* emphasized that removal of aliens without right to stay had to be effective, and the government subsequently stated that removal "was a priority within the overall migration policy to optimise the effect of the other parts"[34]. It was considered necessary that the complete process from tracing of illegal staying migrants till their departure or removal was well organized, including sufficient prison cell capacity for immigration detention. Also capacity by the police and the Royal Military Police should increase[35].

The revised Aliens Act 1994 did not result in great changes in measures for immigration detention, but the law concerning legal proceedings changed. Also article 19 about arresting undocumented aliens changed. Under the law of 1965 it was possible to arrest an alien when there existed a 'reasonable presumption' that someone was an alien, but under the amended article it was only possible to arrest someone when there existed concrete indications about illegal residence. During the preparations for the amendment of an article of the Aliens Law concerning border detention (see below), a second memorandum on immigration detention was promised and eventually published in November 1998, because the State-Secretary of Justice thought that the subject of immigration detention should receive more political attention and a more central role in the aliens and asylum policy[36]. The memorandum discussed mainly the detention based on article 26. Furthermore the necessity of immigration detention was emphasised and the juridical framework, the actual detention regime, and

29 Autonoom Centrum 1998: 11

30 Proceedings, Handelingen II 1984-1985, nr. 102: 48

31 Proceedings, Handelingen II, 1983/1984, nr. 58: 3628-3631

32 Proceedings, Handelingen II, 1984/1985, nr. 24, 1544

33 Proceedings, Handelingen II 1997-1998, nr. 11: 2650-2660

34 Letter of the minister and secretay of state, Kamerstukken II 1990-1991, 22146, nr. 1: 24

35 Letter of the minister and secretay of state, Kamerstukken II 1990-1991, 22146, nr. 1

36 Handelingen II 1997-1998, nr. 39: 3111

(theoretical) possibilities for different regimens, the length of stay and activities to support the return of the alien to the country of origin were discussed. Also it was proposed to advance the judicial test of the detention from four weeks to ten days[37].

In the new Aliens Act 2000 some important changes were made in measures concerning detention. Article 7 was renumbered and rewritten (see below). The restriction that people only could be arrested when there existed 'concrete indications' about illegal residence was changed again; yet there has to be a 'reasonable presumption measured against objective criteria'. Also people from whom the identity and residence status is known can now be arrested (article 50). Any refused asylum-seeker can be arrested (article 58). Article 59 (about detention other than under article 6 or 58) has been amended the most. Although detention is still related to expulsion, "with a view to expulsion", the former necessary charge to expulsion is lapsed. Furthermore, when the category for detention changes it is not any longer obliged that the judge hears the alien. Also there exists a new possibility to detain aliens for four weeks who are documented or are expected to have documents soon (section 59 subsection 2). The legal protections for aliens improved by a number of measures, but some of these measures were reversed in 2004. The government considered this necessary because they consumed too much time of the administration of the aliens justice[38].

The EU Return Directive[39] (see also sub paragraph 3.4.3) has implications for immigration detention. Articles 15 to 18 are dedicated to detention. The use of immigration detention as an *ultimum remedium* is emphasised, and it contains the obligation that the order to detention must be given by administrative or judicial authorities and must be reviewed regularly. In the case of ordering by administrative detention, a speedy judicial review of the lawfulness of detention should take place as speedily as possible from the beginning of detention. Furthermore a time-limit of 18 months is introduced, although in general a detention may not exceed the six months. Detention should take place preferably in specialized detention facilities, and otherwise in prisons where immigration detention takes place in separate quarters. The Aliens Act will be amended in order to implement the Return Directive. The bill proposes an amendment of article 59 with regard to the required maximum length of detention and an amendment of article 94 to obligate a judicial review when the detention period of 6 months is extended[40]. According to the explanatory memorandum, the Dutch system for the expulsion of unauthorized immigrants, detention and detention regimes

37 Memorandum, Kamerstukken II 1998-1999, 26338, nr.1

38 Baudoin et al. 2008: 24-26

39 Return Directive 2008

40 Bill, Kamerstukken II, 2009–2010, 32 420, nr. 2

are largely in accordance with the directive with as a consequence that only limited adaptation of the rules is necessary[41].

3.3.2 Border detention

Since the beginnings of the 1980s asylum-seekers were detained in police and military facilities in de surrounding area of Schiphol Airport, referring to article 7 of the Aliens Act 1965. The Supreme Court however decided that this detention lacked a legal basis. Then asylum-seekers were detained at a reception centre at Schiphol-Oost or in the Transit zone of Schiphol, but in December of 1988 the Supreme Court again judged that this practice was unlawful[42]. The Minister of Justice presented at once a proposal for an amendment of article 7 which should make detention of asylum-seekers lawful[43]. It was treated very quickly in the parliament, what encountered resistance in both the Lower and the Upper Chamber[44] and came into force with an almost "supersonic speed" in January 1989[45]. Aliens, including asylum-seekers, who entered by aeroplane could from then on be obliged to stay in a (locked) space, when they are not (yet) admitted to The Netherlands and are not able to return at once. As a result of the increase of the number of asylum-seekers, the government established the Committee for Analysis of the Asylum Procedure and Reception of Asylum-seekers (*Commissie Mulder)*. Concerning detention on the basis of article 7a of asylum-seekers who are refused at the border, she advised the government to stop with this policy and to receive them in open centres. However, the government disagreed with this advice because "the application of article 7a of the Aliens Act had to be considered as one of the instruments for the control of an unlimited inflow of aliens at the Airport of Schiphol"[46]. Instead, it was announced that the capacity of Schiphol-Oost in the same year would be enlarged with 120 places. In 1991 article 7 was amended again, to provide in the possibility to apply the measure also at aliens who entered by ship, and not only at the reception centre at Schiphol-Oost but also at other places. In the Aliens Act 1994 the article was rewritten. It remained essentially the same, but the legal position of the aliens improved. A parliamentary proposal to limit the length of the detention with a maximum of one month was not adopted,

41 Explanatory memorandum, Kamerstukken II, vergaderjaar 2009–2010, 32 420, nr. 3: 6

42 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3

43 Baudoin et al. 2008: 61-62

44 i.e. Handelingen II 1988-1989, nr.37: 2193-2303; Handelingen I 1988-1989, nr. 15: 605-634

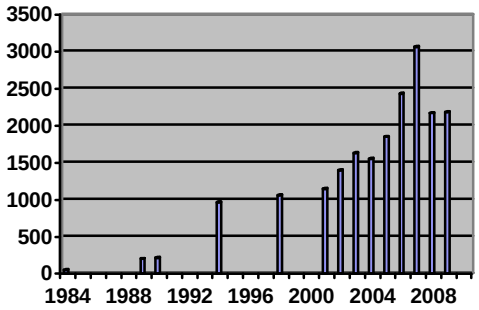
45 Baudoin et al. 2008: 62

46 Letter of the minister and secretay of state, Kamerstukken II 1990-1991, 22146, nr. 1: 37

although jurisprudence limited the application and length of the measure. This resulted in 1998 in again an amendment of the article to recover the situation before 1994, considered necessary by the government to control the borders of and combat unauthorized immigration in the Schengen-area as large numbers of undocumented asylum-seekers arrived in The Netherlands. In the new Aliens Act 2000 article 7 was rewritten again and renumbered in article 6. Any alien who is not admitted to the Netherlands and who not meets the obligation to depart can be detained and the distinction between those who applied for a residence permit and those who do not is not made any longer[47].

3.3.3 Volume of immigration detention

As is shown in graph 2, the capacity for immigration detention rose sharply in the 1990's. Two prisons (Tilburg and Ter Apel) provided together 770 new places[48]. From the beginning of the 1990's the removal of unauthorized immigrants became a policy issue what can explain the increasing capacity. In policy documents on migrants without right to stay and return of this group[49], expansion of the capacity and/or use of immigration detention and capacity (and often powers) of the police formed always part of the policy. In the first decade of the 21st century the capacity continued to increase as a result of the intensification of the combating of unauthorized stay.



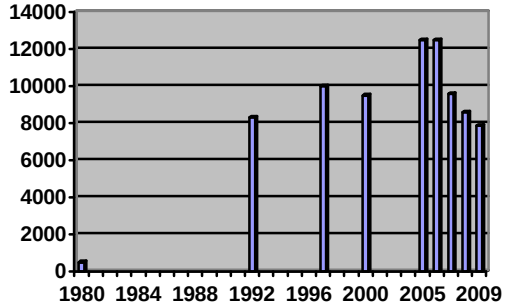
Graph 2*:* detention capacity immigration detention 1984-2008[50]

47 Baudoin et al. 2008: 24, 63-67

48 Questions of parliament, Kamerstukken II 1993-1994, 449; Handelingen II 1997-1998, nr. 11: 2650-2660

49 Memorandum, Kamerstukken II 1989-1990, 19 637, nr. 68; Memorandum Kamerstukken II 1996-1997, 25 386, nr. 1); Memorandum, Kamerstukken II 2003-2004, 29344, nr.1; Memorandum, Kamerstukken II 2003-2004, 29 537, nr.2),; letter State Secretary, Kamerstukken II 2007-2008, 19 637, nr. 1202

50 Baudoin et al. 2008; proceedings, Handelingen II 1984-1985, nr. 24: 1544; letter of the minister Kamerstukken II 1998-1999, 24587, nr. 34; Memorandum, TK 1989-1990, 19637, nr. 68; DJI 2010; national budgets, Kamerstukken II 2002–2003, 28 600 hoofdstuk VI, nr. 2: 166; 2003–2004, 29 200 hoofdstuk VI, nr. 2: 177; 2004–2005, 29 800 hoofdstuk VI, nr. 2:103; 2005–2006,



Graph 3: Number of people detained[51]

The number of people detained (see graph 3) shows a peak in 2005 and 2006 and decreased after that time, what is explained by the decrease of the number of refusals at the border as a result of the implementation of a requirement to obtain a visa for more countries. Furthermore illegal stay decreased as a consequence of the amnesty for a number of unauthorized immigrants in 2008. It is also influenced by the high numbers of granting of asylum applications for asylum-seekers from Iraq and Somalia. Finally former unauthorized immigrants from Eastern European countries are no longer illegal residing as a result of the new membership of the EU of several of these countires[52].

3.3.4 Features of immigration detention

In the law no time limit is laid down for immigration detention, although as a result of jurisprudence the current policy for aliens detention under section 59 subsection 1 is that "after six months of detention the interest of the alien in being released in general outweighs the general interest in keeping the alien detained in order to further expulsion", as is laid down in the Aliens Circular. Criteria for shortening or prolonging the duration of six months have also been added[53]. For border detention the Aliens Circular writes that "a duration of

30 300 hoofdstuk VI, nr. 2: 110; 2006–2007, 30 800 hoofdstuk VI, nr. 2: 104; 2007–2008, 31 200 hoofdstuk VI, nr. 2: 94; 2008–2009, 31 700 hoofdstuk VI, nr. 2: 86; 2009–2010, 32 123 hoofdstuk VI, nr. 2: 134; 2010–2011, 32 500 VI, nr. 2: 120

51 Handelingen II 1992-1993, nr. 91: 6790; Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 1; brief staatssecretaris Kamerstukken II, 2001-2002, 26 338, nr.6; Report Kamerstukken II 2009-2010, 19637, nr. 1302; Ministerie van Justitie 2010: 68

52 Report, Kamerstukken II 2009-2010, 19637, nr. 1302

53 Vc2000 A6/5.3.5 ; also see Memorandum Kamerstukken II 1998-1999, 26 338, no. 1

more than six months should be subject to strict reviews"[54]. Criteria on the basis of which this review should be conducted are lacking. In table 1 the duration of immigration detention is shown for 2008. However, also durations exceeding the 18 months are known[55].

Months	Section 59 Aliens Act	Section 6	Total
< 3	70%	86%	72%
3-6	13%	5%	12%
6 -9	10%	2%	9%
9 –12	5%	5%	5%
12-18	2%	2%	2%

Table 1: Length of immigration detention 2008[56]

The regime of immigration detention should not restrict the fundamental rights of the alien more than is necessary for the aim of the measure and the maintenance of order and safety in the detention center, as is written in the Aliens Decree[57], the Aliens Circular[58] and the Penitentiary Principles Act (PPA, *Penitentiaire Beginselenwet*[59]). This right of detainees is laid down in the constitution as well[60]. For immigration detention this resulted in two different regimes as is explained below.

The detention regime for aliens detention is in general governed by the PPA, a regime what is also applied to criminal detainees. People in immigration detention can therefore be subjected to extensive security measures (as the application of violence, placement in isolation, disciplinary punishment, and forcing to undergo medical treatment)[61]. They have a

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The minister is, according to the Aliens Act, authorized to "give special instructions"to officials charged with guarding the border and supervising aliens. The Vc (Vreemdelingencirculaire, Aliens Circular) contains these instructions amongst which policy rules, such as instructions for conduct and the division of authority. These policy regulations can be changed without consulting either the Raad van State or the chambers of parliament. Kuijer en Steenbergen (2005: 34) note that this allows for far-going changes in the Aliens act to be made and implied easily.

54 Vc2000 A6/2.7

55 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 5; Kalmthout 2007: 93

56 Report, Kamerstukken II 2009–2010, 19 637, nr. 1302: 35

57 Vb 5.4, section 1

The Aliens Decree (Vreemdelingenbesluit, Vb) contains Orders in Council resulting from the Aliens Act. It regards formal-procedural issues and material regulations like criterions for admission of certain categories of aliens (Kuijer & Steenbergen 2005: 33)

58 Vc A6/5.3.6.1

59 Staatsblad (further Stb.)1998, nr. 430

60 Stb. 1815, nr. 45, amended as Stb. 2008, nr. 348: Section 15 subsection 4

61 Letter State Secretary, Kamerstukken II 2001-2002, 26 338, nr. 6: 4

right to a minimum of 18 hours of recreational activities a week. There exist differences as well between the regime for immigration detention and criminal detention. The obligation for the state resulting from the PPA to provide for labor and education is not met[62]. Also people in immigration detention cannot lay claim to the right on leave, even not in exceptional cases as the delivery of an own child or saying farewell to a dying family member[63].

For border detention under section 6 a different regime applies since 1993, governed by the Regulation on Border Accommodation (RBA, *Reglement Grenslogies*)[64]. It allows more freedom of movement within a center and does not allow for extensive security measures. It provides for more possibilities for communication via telephone and visitors. This regime applies also in the removal centers and parts of some detention centers[65]. Obligations for the authorities to provide for labor or recreational and educational activities for the detainees are lacking.

Since 2004 the entire prison system was subjected to substantial budget cuts[66], which led to more sober programs and accommodation for immigration detention. As a result of these budget cuts and other developments, the Dutch prison system is not any longer characterized by its “mildness and suppleness”, as it was before. After all, each budget cut has direct and tangible consequences for the detainee[67].

With regard to the *habeas corpus* principle, the court must determine if someone is detained lawfully what is laid down in the Constitution[68]. While for criminal detention a period of three days and 15 hours applies in which a court has to judge about the lawfulness of detention, for immigration detention applies a period of 42 days. The first automatic notification to a judge has to take place within 28 days after detention and within two weeks the hearing has to take place. Individuals in immigration detention can appeal immediately and repeatedly before a district court as they are detained. This provides for sufficient legal protection, according to the government[69]. In cases of detention under section 59 Aliens Act 2000, the alien has the right of legal aid. This is not the case for border detention, although in practice legal aid is offered often to people in border detention[70].

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62 Letter minister, Kamerstukken II 2009-2010, 19 637, nr. 1353: 3

63 Van Kalmthout 2007: 89

64 Stb. 1993, nr. 45 as amended on 7 September 2000, Staatsblad 2000, nr. 364

65 Baudoin et a. 2007 : 254

66 17% of the budget (Kelk 2008: 50)

67 Kelk 2008: 3-4

68 Stb. 1815, nr. 45, amended as Stb. 2008, nr. 348: section 15 subsection 2.

69 Explanatory memorandum, Kamerstukken 2002–2003, 28 749, no. 3: 3

70 Baudoin et al. 2008 : 89-90

3.3.5 Criticism on immigration detention

Legislation, policy and actual practice concerning immigration detention has been criticised both by international and national agencies. They are critical about the detention of vulnerable individuals, such as unaccompanied minors and torture victims, the routinely detention of asylum-seekers who arrive by plane, the conditions in detention which are the same as or worse than in criminal detention, under qualified staff, the lack of a maximum term of detention, the use of isolation cells in case of behavioural problems, the way judicial review of detention decisions is organized, allegations of ill-treatment without prompt and full independent investigations, and the fact that detention is used frequently and not exceptionally, as a measure of last resort[71].

Also scholars are increasingly critical about immigration detention in The Netherlands. Their critics concern detention conditions, insufficient legal protection in detention, unlawfulness in many of the cases of detention and unjust detention conditions and concerns about the self-evidentness of the use of immigration detention[72].

As national policy is increasingly influenced by European regulations, the next paragraph expounds on European policy on immigration.

3.4 European policy on immigration

Since the 1950's the West European countries made efforts to create a common market. The intentions behind this mission were

> an ever closer union among the peoples of Europe, … affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples… by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts...[73].

71 Amnesty International 2008; Commissioner for human rights 2009; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2008; European Parliament Committee on Civil Liberties, Justice and Home Affairs 2007; Raad voor Strafrechtstoepassing en Jeugdbescherming 2008; Vluchtelingenwerk Nederland 2007;

72 Boone 2003; Cornelisse 2008; Den Hollander 2004; Kox 2007; Van Kalmthout 2007a;b;

73 Treaty of Rome 1957: Pre-amble

The free movement of persons, services, goods and capital were the foundations of this common market[74]. The first area in which the internal borders were abolished[75], was the area of France, Germany and the Benelux-countries. This was laid down in the Schengen Agreement of1985. The number of countries that are part of the Schengen area still increases and involves at the moment almost 30 countries. The abolition of the internal border controls has had great impact on the management of immigration. Therefore internal security checks and stricter measures to control the external borders of the Schengen-area have become very important[76]. Although the distinct member states have for a long time resisted a common migration policy, especially in the fields of asylum and unauthorized immigration there is yet established EU-law.

3.4.1 European regulation of asylum

The first and still important law regarding immigration is the Dublin Convention. It was signed in 1990, and was ratified by all member states and came into force in 1997[77]. In 2003 Dublin II succeeded it[78]. It regulates that only one member state is responsible for examining the asylum application. Which state is responsible must be determined by detailed criteria. It also offers the possibility of sending the asylum-seeker to a third country when this is consistent with national and international law.

A common migration and asylum policy ascended on the EU agenda since the Maastricht Treaty of 1992[79]. The subsequent Amsterdam Treaty of 1997 obliged The Council to adopt measures and minimum standards in the fields of asylum, legal and illegal migration within a period of five years[80]. At the summit meeting of the European Council in Tampere in 1999 a common EU migration policy was proposed which included a partnership with countries of origin, a Common European Asylum System, fair treatment of third country nationals and management of migration flows[81].

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74 Treaty of Rome 1957

75 Yet the Schengen Agreement offers the possibility to internal border controls when this is considered necessary concerning the public order and national security (Kuijer & Steenbergen 2005: 47).

76 Geddes 2001: 23-25

77 Guild 2006: 636

78 Dublin II Regulation 2003

79 Geddes 2001: 26

80 Treaty Of Amsterdam 1997

81 Tampere European Council 1999

3.4.2 Externalisation of immigration policy

Tampere emphasized also the importance of externalisation of policy concerning migration. Migration policy was linked to combating poverty and conflicts in countries of origin and transit[82]. The Hague Programme of 2004 was a five-years programme for Justice and Home Affairs. It reaffirmed the Amsterdam Treaty goal of establishing a common European asylum system before 2010. Other objectives were, among others, to regulate migration flows and to control the external borders of the Union[83]. Compared to Tampere, more attention was paid to the externalisation of migration policy in the sense of management of migration outside the borders of the EU:

> EU policy should purpose at assisting third countries, in full partnership, using existing community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal migration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return[84].

This resulted in amongst others the creation of Frontex, the European Agency for the Management of Operational Cooperation at the External Borders. The objective of Frontex is to carry out the EU strategy to secure external borders. Its activities include research, technical and operational assistance to Member States and coordination of operational cooperation between Member Sates in the field of management of external borders and providing Member States with the necessary support in organising joint return operations[85].
The assistance that European institutions offer in regulating migration to the EU extends to non-member states. The European Commission for instance adopted measures to assist Mauritania in controlling the flow of irregular migrants to the Canary Islands. Resources were allocated for amongst others detention and capacity building for detection and

82 Guild 2006: 644

83 Garlick 2006

84 The Hague Programme 2004

85 Frontex n.y.

apprehension[86]. The European Commission also co financed the implementation of removal policy for unauthoriz3ed migrants in Libya[87].

3.4.3 Legislation with regard to unauthorized migrants

With regard to irregular migration, the Commission of the European Communities carried out The Hague Programme and adopted a 'Communication on Policy priorities in the fight against illegal immigration of third-country nationals'. New policy priorities and proposals of a number of practical and action-oriented measures were set out concerning "this crucial topic, in the light of mounting migratory pressure at the EU´s external borders"[88]. In December 2008 the European Parliament and the Council adopted the Return Directive. December 2010 is the deadline for implementation by the Member States[89]. This directive obligates the member states to enforce the removal of unauthorized immigrants, the possibility to ban the entry in the entire Schengen area for a maximum of five years, the obligation to provide in possibilities to appeal against or seek review of return decisions and in legal assistance free of charge, and describes when immigration detention may be applied, where and for how long.

3.4.4 European registration of the identity of immigrants

Since the Schengen Convention of 1995 the filing of data with regard to the identity of immigrants has been very important in EU policy on immigration. Several databases are introduced since the Schengen Information System (SIS), set up as a data system aiming at signalling persons and objects for reasons related to public security, criminal justice and aliens law. With regard to the registration of persons, it is in practice mainly used as a system that registers unwanted aliens who are not allowed to (re-)entry the Schengen area. Detected unauthorized migrants form the majority of these persons[90]. The *Supplément d'Information Requis a l'Entrée Nationale* (SIRENE) is a supplementary data system linked to the SIS and extending its possibilities. The regulation of the successor of SIS, SIS II, entered

86 Cornelisse 2010: 120

87 Andrijasevic 2010: 161

88 Commission of the European Communities 2006:.2

89 Return Directive 2008

90 Guild 2009: 122; Broeders 2009: 159

into force in 2007 and provides for the registration of biometric data, the widening of organisations that have access to the database and extended possibilities for searching the system[91]. Eurodac (European Dactylographic System)[92] is a data system for the comparison of fingerprints of asylum-seekers that makes it possible to apply the Dublin Regulation quickly and effectively[93]. However, the storage of fingerprints of every unauthorized migrant about whose identity exists doubt is included as well in this database, in order to compensate for the fact that SIS could not register fingerprints[94]. The Visa Information System (VIS) is under construction and will store data on the application of visas, both on the person who applied for a visa and the course of the application procedure (whether the application is issued, refused, extended etcetera). It will include biometric data. It also includes details of the persons or company that can be held responsible when the visa is overstayed[95].

Chapter 5 describes the political rationalizations of immigration detention by the different political parties. Preceding that chapter some background information about the Dutch political landscape is provided in the next paragraph.

3.5 Dutch political parties

3.5.1 Political landscape in the last decades of the 20th century

At the end of World War I the Dutch political system was dominated by the Christian, liberal and socialist parties and this situation remained for a long time despite major social changes concerning the economy, culture and religion[96]. For an overview of the distribution of seats see graph 4.

Different typologies in the political sciences are used for classifying the distinct parties, but one that is common is that of a left-right division in which the ‘left’ means supporting social change in an egalitarian direction, and ‘right’ means opposing this[97]. Another classification is based on ideological views on freedoms and rights, in which the ‘left’ represents expanded

91 Broeders 2009: 162

92 Eurodac Council Regulation

93Kuijer & Steenbergen 2005: 316

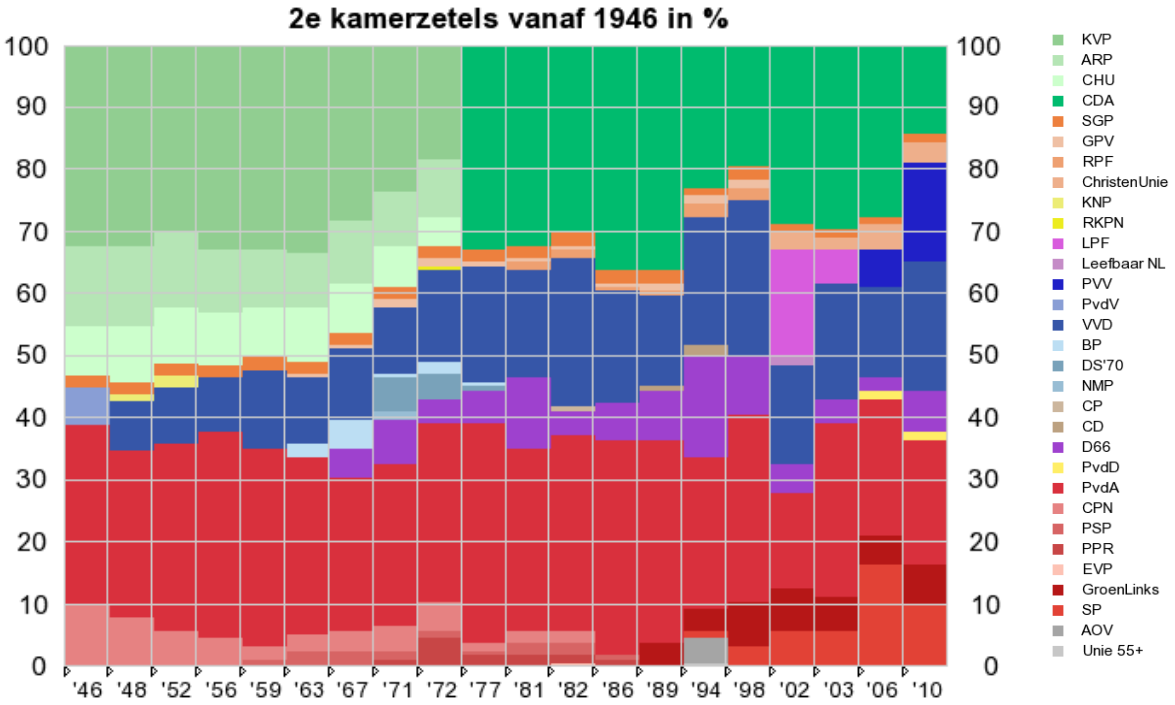
94 Broeders 2009: 164

95 Broeders 2009: 169

96 Deschouwer & Hooghe 2005: 59

97 Hakhverdian 2008

personal freedoms and rights, and 'right' represents a preference for order, stability and the government as a firm moral authority[98]. The political parties with a more or less continuous existence since the 1970's till the end of the 20th century can be divided in five groups on the left-right according to De Graaf et al. in the old left, the green left, the new left, the religious right, and the free market right.



Graph 4: Distribution of seats in the Lower Chamber since 1946 in percents[99]

The old left was a major political force in that period and is dominated by the PvdA (Party of Labor, social-democrats) and includes the SP (Socialist Party, socialists) and the CPN (Communist Party of the Netherlands, working-class party until 1986).

The new left contains only D'66 (Demcrats 1966, a left liberal party which emphasises constitutional issues). Green Left is included in the green left and came into being when four radical parties merged in 1989, namely the CPN (Communist Party), the PSP (Pacifist

98 Marks et al. 2006: 172

99 Parlement & Politiek n.d.

Socialist Party), the PPR (Radical Party) and the EVP (Evangelical People Party)[100]. The ideology of Green Left cannot be summarized in terms of the traditional political ideologies, but its party manifesto defined democracy, respect for nature and the environment, social justice and international solidarity as the main ideals of the party[101].

The religious right consisted of the KVP (Catholic People Party, catholic democrats), the ARP (Anti Revolutionary Party, calvinists) and the CHU (Christian Historical Union, liberal protestants). In 1980 they merged into the CDA (Christian Democratic Appeal, christian democrats). One of these parties has always been part of the government until 1994. Other confessional rightwing parties include the SGP (Reformed Political Party, conservative christians), GPV (Reformed Political Alliance, orthodox christians) and RPF (Reformed Political Federation, orthodox christians), which are more conservative than the christian democrats[102]. In 2000 the GPV and the RPF merged into the CU (Christian Union). The CU aims at a christian social policy[103].

The free-market right includes the VVD (People Party for Freedom and Democracy, conservative liberals), after the PvdA and the CDA the main force in Dutch politics[104].

3.5.2 Political landscape in the first decade of the 21st century

The political landscape changed profoundly in 2002 as a result of the electoral success of the List Pim Fortuyn in 2002, a right-populist party that became the second largest party in the elections. The LPF held tough anti-immigrant positions and criticized the Dutch mainstream politics fiercely. Although the LPF disappeared soon as a result of inner party conflicts after the murder of Pim Fortuyn, other right-populist parties appeared from which the PVV (Party for the Freedom) is the main one. The PVV has both conservative, liberal, right and left standpoints and especially opposes against the 'islamization' of the society[105]. During the elections of 2010 it became the third party in the Lower Chamber. The success of these populist parties accelerated the gradually development of a tougher stance towards immigration since the 1990's. Was the political competition traditionally centred around (left-right) economic issues like economic redistribution, the welfare state and government

100 De Graaf et al. 2001

101 Groen Links 1992: 5

102 De Graaf et al. 2001

103 www.christenunie.nl, visited 2 September 2010

104 De Graaf et al. 2001

105 http://www.parlement.com/9291000/modulesf/g18dztac, visited 24th October 2010.

intervention in the economy, currently non-material issues are dominating, like immigration, asylum and law and order. According to van Kersbergen & Krouwel especially the centre-right parties like the VVD and CDA will benefit from a tougher stance on immigration issues, as this fits their ideological position more than the previous preference for Europeanism and multiculturalism.

> Historically, issues such as immigration, asylum and European integration should be electorally advantageous to centre-right parties, since voters on the right often favour tougher law and order policies and more nationalistic and Euro-skeptical policies. Particularly when issues of immigration can be connected to right-wing core issues of law and order, centre-right parties have a strategic advantage over the left[106].

Not only the parties on the right side were affected by the rise of the populist right, but the other parties as well. Bonjour studied the response of the left parties on a law proposal on the obligation of civic integration abroad as requirement for entry rights for family migration. It was supported by the entire parliament except Green Left on principal grounds and the Socialist Party as a result of practical doubts. The broad support for such measures is partly explained by the 'unstable' situation in The Netherlands surrounding populist parties. As Bonjour writes:

> After what has come to be referred to as the 'Fortuynrevolt', the legitimacy and representativeness of the Dutch political system as a whole were at stake in the debates about migration and integration policies. All political parties sought to distance themselves clearly from positions and policies adopted in the past, so as to let their electorate know that their discontent had been heard and understood[107].

Yet, this "contagion of the right thesis" should not be too easily assumed, as Norris warns[108]. The contribution of the populist right to policy change has to be contextualized and although the influence of the populist right on other parties can be profound, intra-party politics can be

106 Van Kersbergen & Krouwel 2008: 399
107 Bonjour 2010: 311
108 Norris 2005: 268

equally important for policy change[109] as we saw above. The next chapter provides a literature review on immigration detention and related issues.

109 Bale 2008

4 IMMIGRATION DETENTION, SOVEREIGNTY AND THE PENAL LAW

4.1 Introduction

Migration within states poses governments, societies and individuals of a considerable part of the world for a variety of serious problems; let us only think of rapid mass urbanization in the developing world[1] and the volume of internally displaced refugees[2]. However, the focus of migration studies is migration across international borders[3], and indeed this forms the subject of this thesis. At the core of immigration policy is the assumption that a sovereign state is legitimated to decide on who is allowed to enter and reside in a country and under what conditions, and who is not. The sovereign power of the state is thereby taken for granted. But what means sovereignty? What is a state actually? And what justifies the right of states to restrict immigration? These issues will be discussed in paragraph one.

To actively exercise its power in performing its main tasks of protection against internal and external threats, the state has several instruments at its disposal. Deprivation of liberty is one of these instruments and reflects the legitimate use of force by the state. With the development of the constitutional state the use of deprivation of liberty became regulated under the penal law. The use of immigration detention can not be explained without analyzing the use of the penal law in general and the institution of the prison in particular, although formally immigration detention doesn't fall anymore under the penal law. The similarities of the practice of detention under both laws[4] and the current amalgamation of the penal and administrative law[5] lead to the necessity to reflect on developments in the penal law. This will be the subject of paragraph two. Indeed immigration detention is often related to developments in the penal law as we will see in paragraph three. In that paragraph also the main importance of the concept of sovereignty in relation to immigration detention will be discussed.

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1 Davis 2006

2 In 2009 there were an estimated 26 million IDPs around the world (UNHCR 2010)

3 Guild 2009: 10

4 Dow 2007: 536

5 Hartmann & Van Russen Groen 1998

4.2 The State

4.2.1 Development of the state

'The state' is characterized by three elements, namely a territory, a people and a bureaucracy (or authority). The state is a territory of sovereignty that by borders is separated from other territories. In that sense the border of sovereignty surrounds a space of order. The border "holds in place the people, identified as citizens, and the bureaucracy whose actions are defined by those borders"[6]. In current notions of the state it is often assumed that its natural being is one of a close linkage between the people, territory and authority[7]. Yet, it took centuries and much struggle before states were territorialized and other centuries to homogenize its population and develop a bureaucracy[8].

States developed some 8000 years ago to handle regulatory problems, as a response to growing populations and the development of more complex economies[9]. In the second millennium states transformed in what they are now. In the beginning, states concentrated on war and the only connection with the population was that the state extracted resources from this population to fund war making. The state's sphere however expanded from the military to welfare, culture, economy and daily routines of its citizens, especially after 1850. This led to homogeneity within and heterogeneity between states, especially because the states made efforts to turn the segmented and heterogeneous population in a homogeneous, connected one by enforcing among others education, a common language and religion. Advantages of homogeneity, from a state point of view, were that communication was more efficient, that the population could identify with rulers and that they were willing to unify against extern threats. Externally, the state began to control frontiers, both in relation to the movement of people as to that of capital and goods. Foreigners were treated as distinctive people who deserved limited rights and close control.

Together with mass national politics, direct rule in the form of national legislature grew[10]. All well-organized groups, whose interests the state did or could serve, put their claims on national legislation. Public law was very important in state-making for negotiating the community needs and individual rights, and for determining where legitimate power begins

6 Guild 2007: 176-177

7 Cornelisse 2010: 107

8 Sheehan 2006; Tilly 1990

9 Kottak 2002: 240

10 Tilly 1990

and ends[11]. One important development regarding individual rights was that of citizenship, what is the subject of the next paragraph.

4.2.2 The state and citizenship

The French Revolution can be regarded as a mile-stone in the development of citizenship[12]. During the revolution equality for the whole population was promoted, in which the concept of citizen meant that all individuals in a state had access to political rights and to the right to receive social state benefits if necessary. Yet at the same time the process began to exclude categories of people, starting with the exclusion of foreigners and extended to worker classes, women and people of other 'races'. The nineteenth and twentieth century were characterized by struggles between the privileged groups who tried to define citizenship narrowly, and groups who wanted a broader definition[13]. As Wallerstein mentions:

> [t]he more equality was proclaimed as a moral principle, the more obstacles - juridical, political, economic, and cultural - were instituted to prevent its realization. … The republic of virtuous equals turned out to require the rejection of the non-virtuous[14].

It has remained a site of struggle. Despite the international human rights regime and discourses about universal citizenship the access to rights is determined by the access to national territory. Citizenship is "both a marker of membership and a scarce good to which access is sought and restricted"[15], and this access is still regulated by legal structures within the nation-state. In West European democracies mass-immigration led to the necessity to rethink the concept of citizenship, what resulted in a hierarchal system for the access of immigrants to rights[16]. Both international conventions and legal systems like that of the European Union allow national distinctions and discrimination between nationals and non-nationals. For instance, the European Convention on Human Rights, which is very important

11 Sheehan 2006

12 'Citizenship' has two meanings. The first is a rather subjective concept related to social cohesion within a nation-state, belonging and the place someone has in society (see Ong 1996). The second one is a legal-political one, which is about granting of civil, social and political rights to and requesting duties from citizens. This last interpretation will be used here.

13 Wallerstein 2003: 651-3

14 Wallerstein 2003: 652

15 Morris 2000: 225

16 Morris 2000

for national law in member states, “contains a hierarchy of absolute, limited and qualified rights, with flexible interpretation of even absolute rights and with qualified rights explicitly defined with reference to national interests”[17].

The guaranteeing of rights to citizens is part of the general tasks of the state to maintain the individual and collective security of the population and to maintain its internal order. In order to be capable to perform these tasks, the state has a monopoly on authority and on the legitimate use of coercive force[18]. Precisely because the state has the capacity and the legitimacy to use coercive force, what can have a profound impact on its own and other state’s populations, the question is in place what legitimates the existence of the institution of the state. There exist different views on this question, which is discussed below.

4.2.3 The state as agent to pursue its own and its citizens interests

In the Hobbesian view, the existence of a state is justified by the human interest in self-preservation. It departs from the view that the natural state of human kind is one of war “of every man, against every man” and that without a “common power to keep them all in awe”[19] the people are in a continuous condition of insecurity. Therefore humans are willing to

> submit their right to judge and their ability to act to ensure their own preservation - to a common and independent political authority charged with the task of defending them ‘from the invasion of Forraigners, and the injuries of one another’[20].

In this view the state is not an altruistic agent that (only) serves the interests of its citizens, but has interests of its own, namely its own preservation. The state has a monopoly on collective political agency, to prevent that the population endangers the state or its interests[21]. Maintaining of order here is prioritised above the individual freedom of the population[22].

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17 Morris 2001: 388

18 Gibney 2004: 199

19 Hobbes 1968: 184, cited in Deschouwer & Hooghe 2005: 51

20 Hobbes 1968: 227, cited in Gibney 2004: 199

21 Gibney 2004: 201

22 Deschouwer & Hooghe 2005: 52

In the view of Locke on the other hand, the contract between the citizens and the state is characterized by the obligation of the state to act in the interests of the citizens alone, without striving for interests of its own. The democratic variant of this view is that the agency of the state depends on the collective agency of its citizens. The citizens exercise sovereignty by means of a representative democracy, what is now an important legitimation for the existence of the state[23]. This view reflects the developments of the state that are described below and have served as adaptations through which the state can remain the particularistic agent it is since its formation 300 years ago[24].

While the original legitimation of the state was providing the population physical security against violence, in the course of history its legitimation is strengthened by three developments. These developments led to a closer linkage between the state and its citizens. The first one is that nation-building became an important task of states, to create a common identity among its population. This has led to the view that the state has a task in protecting the way of life, or culture, of its citizens. The second development is its increased role in ensuring the economic welfare of the population, for which it is now held responsible. The third is the democratization of the states, with as a consequence that the authority of the state is legitimized by the claim that political action reflects the needs and the wishes of the citizens by a representative political system[25]. This relationship between the state and its citizens provides in strength and stability of the states and in security and freedom for its citizens[26].

4.2.4 The state as agent to take into account the interests of humankind

From the formation of the modern state system on, the view on the state as a particularistic agent acting in its own or own citizens interests alone has been criticised. The criticisms center around the tension between the state's particularism and the obligation to apply universal moral norms, what emanated also from Judaeo-Christian ethics[27]. Those who prioritise universal moral norms above particularism are the cosmopolitans, who take individuals and not states as the fundamental units of moral concern. Although the state as unit in which a specific part of the world is governed as such is not rejected, what is rejected

23 Gibney 2004: 206; Wilsher 2007: 227

24 Gibney 2004: 203

25 Gibney 2004: 194-212

26 Fletcher 2008: 4

27 Gibney 2004: 202

indeed is that it functions as an institutional resource only for its own people. The existence of the state can only be legitimated when it should consider the claims of citizens and foreigners equally, and the human rights of both categories are not violated by state actions[28].

While the contractarian views both depart from a portrayal of mankind as being self-interested, the cosmopolitan view adheres to the portrayal of humankind as moral beings that have all equal basic rights[29]. The cosmopolitan view however can be perceived as an ideal, contrary to the current state practices[30]. At the same time, it is often viewed as the "traditional moral point of view"[31].

We will now turn back to the main tasks of the contractarian state, namely maintaining the individual and collective security of the population and maintaining its internal order. The concept of sovereignty is considered to be indispensable for performing these tasks, as is discussed below.

4.3 Sovereignty and the state

Sovereignty and the state are indivisible concepts, because "sovereignty is what defines the state as a state" and is "a principle that claims the ultimate right of self-government"[32]. Sovereignty can be defined as the capacity and legitimacy of the state to determine and enforce its order[33]. So without sovereignty the state can not secure its own preservation and that of its population. Sovereignty is a contested concept with which different scholars mean different things. However, Messina describes four distinct meanings of sovereignty which cover the most common views on this concept. From these four meanings, two are relevant concerning immigration detention as we will see later. The first is *domestic sovereignty*, addressing the organization of and the level of control exercised by public authority. The second is *interdependence sovereignty*, which refers to the ability of a state to control international migration. Below is dealt with the sometimes conflicting issues of sovereignty and immigration.

28 Wilsher 2007: 230; Gibney 2004: 59

29 Wilsher 2007: 230

30 Gibney 2004: 202-3

31 Gibney 2004: 59

32 Buzan et al. 1998: 150

33 Guild 2007: 176-177

4.3.1 Immigration and the sovereign state

The international territorial system is build of sovereign nation-states from which the governments have authority over demarcated territory and responsibility for the distinct populations defined by that territory. Following from this there are two issues at stake in the case of immigration. The first one is territorial, the second one concerns citizenship. The sovereignty of the state concerning the territorial determinant is reflected by "the state's claim to a monopoly on the legitimacy of movement across borders"[34]. However, the crossing of a border is not just a physical affair as is explained below.

The common assumption is that the territory, the state sovereignty and the citizens of a nation-state form a "seamless union"[35]. The history of the nation-state shows that state sovereignty has constructed an inside and an outside concerning both territory and population, what led to the distinction between 'us' and 'them', or between non-citizens and citizens. The sovereign right to define who may enter and reside and who may not, therefore determines who belongs and who does not[36].

This relation between sovereignty and immigration does not mean automatically that sovereignty is undermined by immigration. Immigration control just confirms the authority of the state. Only when a state is out of control regarding migration, the sovereignty is affected. Whether and to what extent states are capable to really control immigration is under scholarly discussion. Views vary from the belief of Cornelius, Martin & Hollifield in a "crisis in immigration control"[37] whereby the sovereignty of advanced democracies is harmed irreversibly as a consequence of economic factors and the emergence of rights-based politics, to the view of both Freeman and Lahav that the capacity of states to control immigration has actually increased[38]. However, some renowned migration scholars refute that immigration control is in crisis. Despite the fact that irregular migration persists on significant levels worldwide, Castles & Miller believe that "what governments do matters a great deal"[39]. They expect that immigration policies will be even more credible and coherent in the future so that irregular migration will decrease[40]. Also Messina concludes (for the case of the West European countries) that immigration is still under control and does not reflect a

34 Guild 2007: 14

35 Peutz & De Genova 2010: 10

36 Cornelisse 2010: 106-7

37 Cornelius, Martin & Hollifield 2004 :7

38 Messina 2007: 9

39 Castles & Miller 2003: 94

40 Ibid.

possibly declined sovereignty. Significant immigration had characterized the reality in West Europe and still continues to do so, but

> despite its obvious social costs and the political convulsions with which it has been so often closely associated, post-WWII immigration …has been driven and dominated by a political logic, a logic that has superseded and trumped economic and humanitarian imperatives whenever these imperatives conflict with the goals and interests of politics[41].

Despite these conclusions, it is widely believed that especially irregular migration and asylum migration threaten the sovereignty of the state. This is discussed below.

Irregular migration

Especially irregular and asylum immigration are perceived to pose a threat to state sovereignty, what is reflected in the fact that these forms of migration have become the main issue in immigration politics and debates worldwide[42]. This can be simply explained by the following reasoning: states have a sovereign right to control who crosses their borders and irregular migrants threaten sovereignty by undermining this control[43]. But there must be something that makes it so important for states to have this control. After all, most things in a state that happen without obeying the rules do not cast doubt on the legitimacy of the state. Furthermore, immigrants who cross borders of and stay in a state without its permission do not present a state with a serious crisis or pose a dire threat[44]. Also, in general only a small proportion of total immigration is irregular so the argument that states are overwhelmed by masses of irregular migrants does not hold[45]. Several authors[46] therefore point to the meaning of the border. It is not just a territorial one, but separates also the distinct peoples. This can be regarded as a symbolic border. Thus, especially if migrants cross borders irregularly it is suggested that this barrier is only a fiction and it cannot protect the insiders,

41 Messina 2007: 10

42 Peutz & De Genova 2010: 1

43 Koser 2010: 189; Guild 2007: 52

44 Koser 2010; Peutz & De Genova 2010: 1

45 Koser 2010: 190

46 E.g. Bosworth 2007; Cornelisse 2010; De Genova 2010; Khosravi 2009; Rajaram & Grundy-Warr 2004; Walters 2010;

and also not differentiate the insiders from the outsiders[47]. This upsets the existing world order of sovereign states that link people, territory and authority[48] and therefore interdependent state sovereignty is seriously harmed. While legal immigration can also lead to the blurring of insiders and outsiders, they are at least under the control of the state. However, an irregular migrant is an "anti-citizen", "an individual who is outside the ordinary regulatory system, who violates the established norms and who may constitute a risk to the safety and quality of life of 'normal' citizens"[49]. But also the domestic sovereignty is at stake, as irregular migrants are unidentified and therefore unmanageable[50].

Irregular migration and asylum-seeking are often equated with regard to the threat they should pose to the sovereignty of the state. What needs further explanation is why asylum-seekers should pose such a threat since they submit themselves to the power of the state by the simple act of applying for asylum, contrary to irregular migrants. The most logical explanation is that asylum-seekers also violate the territorial sovereignty. After all, they are already present on that territory without preceding permission as they submit their asylum request, while Western liberal states cannot simply return them immediately as a result of international refugee law.

We saw that irregular and asylum migration can threaten state sovereignty by violating the physical and therefore also the symbolic border of the state. There exists yet another relation between immigration and sovereignty as is expounded in the next paragraph. As immigration is regarded as posing a threat to the economic stability, to the idea of national identity and to the integrity of its territory, this in itself does not mean that the sovereignty of the state is at issue. That is only the case when the state is not capable to manage this threat. What is at stake however is the legitimacy of the existence of the state, as a considerable part of the population has the conviction that the state has lost its sovereign power. This subject is dealt with below.

Immigration and the declining legitimacy of the state

It should be inherent to the democratic nation-state system that governments prioritize the interests and views of their own citizens, otherwise they risk not being re-elected"[51].

47 Bosworth 2007: 211

48 Cornelisse 2010: 107

49 Khosravi 2007: 49

50 Khosravi 2007: 49

51 Fletcher 2008: 4

Theoretically this can result in a lenient immigration policy, as long as the citizenry wants that. There are instances that the moral expectations of citizens pressured governments into more humanitarian action. However, over the long term the citizens have used their influence to encourage the state to act in a particularistic way[52]. This is reflected in increasing support for right-populist parties as we see below.

Currently a considerable part of the citizens of Western democratic states are hostile to refugees and other immigrants what led, according to Gibney, to restrictive entrance policies[53]. As we saw earlier, the state has the obligation to take care of the physical, cultural and economic security of its citizens. Immigration has become perceived as a threat to these three forms of security. The mass-immigration of the last decades has had a cultural and economic impact in West European countries, although the views vary on the extent of it[54]. However, immigration becomes only problematic when it is viewed as not just having an impact on but also as a threat to the culture and welfare of the population. Larger parts of the populations of the Western democracies started to perceive the immigrant,

> the proverbial "other" and "stranger" as a source of threat to "our" jobs, housing and borders, but also more far-reaching ontological threats to the borders of sovereign states, bodily security, moral values, collective identities and cultural homogeneity[55]

and as a threat to welfare provisions[56] since the late 1980's. Many voters didn't feel that the governments represented their interests. This led to sometimes violent encounters between 'natives' and 'foreigners'[57], and increasing sympathy for radical right movements as right-populists exploited these feelings. They combine anti-immigrant rhetoric with an anti-establishment rhetoric, in which they reproach the mainstream politics with not daring to make radical choices to solve '*law and order'* problems, including immigration[58]. For example in the case of the Netherlands, the success of the right-populist Pim Fortuyn "was interpreted

52 Wilsher 2007: 227; Gibney 2004: 207

53 Gibney 2004: 35. Yet farther onwards he put that in fact it doesn't matter whether a state is democratic or not, it acts particularistic anyway (pp. 206-209).

54 See e.g. Gibney 2004 and Messina 2007 for views on the cultural impact; see Banting 2005; Dustmann et al. 2010; Freeman 1986; Gibney 2004; Hanson 2009; Jean et al. 2007: 28; Messina 2007 for the economic impact.

55 Faist 2005: 167

56 Huysmans 2000: 756

57 Gibney 2004

58 Deschouwer & Hooghe 2005: 81; Bonjour 2010: 311

as a vote of no-confidence against the entire political establishment"[59]. Although a more anti-immigration stance within centre-right parties has developed since the 1990s, this process was accelerated by the elective success of the party of Fortuyn[60]. It follows from these developments that immigration should be restricted by the state, otherwise the legitimation for its existence is at stake and its authority undermined[61]. Drawing from the concept of *securitization*[62] it is easy to understand that these restrictions as a response to the endangered legitimacy of the state can be harsh (or "illiberal" in the words of Gibney & Hansen[63]). After all, anything that shows doubts on the recognition, legitimacy or governing authority of the state can existentially threaten the sovereignty of the state what can result in *securitization*[64].

Securitization is the process in which a security issue is presented as a threat to the survival of for instance the state or national identity, in which case it "is not defensible to leave this issue to normal politics. The securitising actor therefore claims the "right to use extraordinary means or break normal rules, for reasons of security"[65]. *Securitization* is one of the extremes on a scale of action on public issues that ranges from nonpoliticised, which means that the state does not act at all on an issue, through politicized, meaning that the issue is part of public policy which involves government decisions and resource allocations, to securitizised[66].

What is important to realize in the above mentioned reasoning, is that not immigration itself leads to such problems that the security of the population and the order of society is violated. It is the perception of parts of the population that the state doesn't take seriously the perceived threats posed by immigrants and is not capable to enforce its order. This casts doubt on the legitimacy of the state because the interests of its citizens are considered to be neglected. However, the supposed threat from immigrants is a complex phenomenon as is discussed in the next paragraph.

59 Bonjour 2010: 311

60 Messian 2007; Norris 2005

61 Gibney 2004

62 Buzan et al. 1998

63 Gibney & Hansen 2005: 14

64 Buzan et al. 1998: 150

65 Buzan & Weaver 2003: 71

66 Buzan et al. 1998: 23

Immigrants as threat

The already present sociological changes as individualization and secularization[67] were in the 1990's accompanied by other profound transformations in the economy and society. The internationalization of the economy and decreasing job-security, the deterioration of public services and decreasing safety of the public domain, continuing immigration, the collapse of the social infrastructure and the loss of solidarity networks in working-class neighborhoods led to feelings of insecurity by a part of the population. The presence of foreigners led to the perception that immigrants were the sources of this insecurity[68]. Although the economic transformations are mainly unrelated to and social transformations are only partly related to immigration, these have led to enhanced fears of immigrants[69]. As we saw above, what matters is not the question whether immigrants are actually a threat to the state itself or its population, but whether they are perceived to be a threat. These fears are exploited and enlarged for gaining electoral support and other political interests. For instance it is noticed that the threat-construction of immigrants served the self-interests of governments as distraction from and justification for the replacement of the welfare state by neo-liberalist policies[70]. For the matter of space I leave aside the construction of threat, but what remains is the question, why *immigrants are* seen as a threat. What is that makes them such appropriate subjects for scapegoating and *securitization*[71]? Although the societal context in West European states contributed to negative feelings towards immigrants, there must be more. Often it is seen as the outcome of the process of nation-state formation in which it became of main importance to distinguish between insiders and outsiders[72]. Yet this argument is not sufficiently satisfying. After all, at its best reluctance towards immigrants and at its worst xenophobia are not reserved for these nation-states in this era, but seems a general characteristic of human history. More strongly put: "[s]ectional self-interest and xenophobia are anthropological constants which predate every rationalization. Their universal distribution suggests that they are older than all known societies"[73]. This 'anthropological constant' to prioritize the own group is reflected in the view that the state is

67 De Graaf et al. 2001: 1

68 Van Kersbergen &. Krouwel 2010: 407

69 Faist 2005; Huysmans 2000; Messina 2007

70 Huysmans 2000; Kersbergen & Krouwel 2008; Messina 2007

71 Buzan et al. 1998; Faist 2005; Huysmans 2000; Messina 2007; Stolcke 1995: 8

72 De Genova 2010; Khosravi 2007; ; Rajaram & Grundy-Warr 2004

73 Enzensberger 1994: 106

only responsible for its own citizens and has no obligation to act in the interests of outsiders[74].

While many authors which are passed in review above explain harsh immigration measures as being inherent to the current nation-state system, they remain silent about the existence of xenophobia as inherent to human nature. They seem to suggest that the nation-state invented the inside-outside distinction, what can be questioned. A more complete view would be that this distinction in this particular system of nation-states is the way in which the boundaries between inside and outside in this particular era are shaped. In other era's other ways were and will be more appropriate.

As was shown, immigration can become a subject of conflict within the nation-state. As the state has among its tasks to remain order and protection against external and against internal threats, the next question is how this is be done. In maintaining the internal order, legislation and its enforcement by the penal law plays a vital role. But the penal law and its institutions are also of main importance against the 'external threat' of migration. Below I will go into characteristics and developments of the penal law, although in The Netherlands, like in many other countries, immigration detention is part of the administrative law. But because of the similarities of the practice of detention under both laws[75], the amalgamation of both laws[76] because other institutions assist the criminal law institutions, like the administrative law and the increase of private security branch[77], and the fact that immigration detention in the literature is often related to developments in the penal law, it is useful to elaborate on the penal law.

4.4 The penal Law

Since the beginning of the development of the nation-state the guaranteeing of law and order was of key importance[78], in which the legitimate use of power (or violence) by the state played a vital role. The state alone had a claim to the use of violence. The penal law reflects the legitimated use of power by the state, one of the most important characteristics of the state. That the use, or threat of use, of punishment is circumscribed by law and is not an arbitrary affair, is characteristic for a constitutional state[79]. This development led to the

74 Gibney 2004; Fletcher 2008: 4; Wilsher 2008: 224-25.

75 Dow 2007: 536

76 Hartmann & Van Russen Groen 1998

77 Boutellier 2002: 121

78 Bouttelier 2002: 179

79 Hawkins 1976

situation that in the penal law there exist two conflicting interests. At the one side are the interests of the state. The state is expected to maintain order, what requests that it takes decisive measures to counter disruptions of law and order. At the other side are the interests of individuals, which are threatened because the instruments that are considered necessary for maintaining the order make deep inroads on the private life of citizens, like tapping telephone lines and deprivation of liberty. This results in the fact that, "in the penal law, more than in other fields of law, sovereign power becomes really visible"[80]. Criminal law therefore has historically developed into an *ultimum remedium* to restrict the power of the state, what becomes visible in for instance the many guarantees to protect the suspect[81]. The concept of *ultimum remedium* (measure of last resort) refers to the principle of subsidiarity, what emphasizes that punishment is an imposed harm with serious, negative consequences. It has a general and an individual meaning. The first one refers to the requirement that everything is being done what seems reasonably possible to prevent the use of the power to punish. This can be realized by making as few undesired behaviors punishable as possible and by prevention of such behavior by social policy that combats its causes. The second one requires applying as few methods of coercion and punishment as possible in each individual criminal case[82].

The use of the criminal law is fluctuating. For instance, theories on the penal law show different tasks of the penal law, namely retaliation, reconciliation, compensation, general prevention (by means of deterrence), particular prevention (because the society is protected against this particular perpetrator as long as he is detained), and rehabilitation[83]. Several scholars observe that the penal law underwent a development the last two decades what is referred to as the *new penology*, what is discussed in paragraph 4.4.1. Related to this also changes in the use of detention can be observed, what is dealt with in paragraph 4.4.2.

4.4.1 Developments in views on the penal law: new penology and the culture of control

The characteristics of the *new penology* are the new emphasis in discourses about criminal law on probability and risk, the primacy given to the efficient control of internal system processes what replaces traditional objectives of rehabilitation and crime control, and the

80 Mevis 2009: 37 (My translation)

81 Bouttelier 2002: 123-124; Feeley & Simon 1992: 451

82 Blad 2005: 15

83 Van Der Wijngaert 2006: 21

emphasis on identifying and managing groups that form a risk for the society. The goal of this new penology is to make crime tolerable by rationalizing managerial processes. The purpose is to regulate levels of crime, instead of intervening in or responding to individual deviance or social problems[84]. The aspiration is not any longer "to affect individual lives through rehabilitative and transformative efforts" but "toward the more "realistic" task of monitoring and managing intractable groups"[85]. It seeks to *regulate* levels of deviance, not intervene or respond to individual deviants or social malformations. These groups are, not surprisingly, marginal groups without any economic or other utility. They are considered hopelessly without any prospect to transformation, but with a high risk to collective misbehavior against which the society must be protected .The new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups.

Garland describes much of the same processes in the development of the penal system as a response to high crime rates and the limitations of the criminal justice, which are part of a broader '*culture of control'.* Where Feely & Simon[86] focus on the characteristics of the new penology, Garland describes different government responses, like defining deviance down by decriminalization of certain behaviors or lowering the degree to which these are penalized. Another one is the punitive sovereign response. While there is evidence that crime rates are not influenced significantly by severe sentences or a greater use of imprisonment, governments adopt a punitive 'law and order' stance. This punitive response is very attractive, because

> it can be represented as an authoritative intervention to deal with a serious, anxiety-ridden problem. Such action gives the appearance that 'something is being done' here, now, swiftly and decisively. Like the decision to wage war, the decision to inflict harsh punishment exemplifies the sovereign mode of state action. No need for co-operation, no negotiation, no question of whether or not it might 'work'. Punishment is an act of sovereign might, a performative action which exemplifies what absolute power is all about. Moreover, it is a sovereign act which tends to command widespread popular support[87].

One of the consequences of these developments in the penal law is the increasing use of detention and lengthier sentences for those who pose the highest risks, while alternatives

84 Feely & Simon 1992: 450-452

85 Ibid.: 469

86 1992

87 Garland 1996: 460

like probation and other supervisory and surveillance techniques are increasingly used for low-risk offenders because of its cost-effectiveness[88].

In fact this seems a return to the situation before the civil rights became an important characteristic of the nation-state. After all, then the penal law was exclusively used for maintaining order. As Kelk writes:

> The concept of the constitutional state is currently too often identified – in the parliament as well – with a state in which the maintenance of the law, thus the power of the instrument of the law, is the first matter of importance. With this it is fairly often forgotten that in the first place the level of an adequate legal protection for the citizen is characteristic for a constitutional state[89].

Changing views on the penal law has also led to changing views on detention. In the penal law detention always played an important role, and can be considered as the most durable form of punishment although the reasons why and the extent in which and the way it is used vary in the course of history[90]. Considering the subject of this thesis, it seems not redundant to reflect on the purposes of detention and the prison.

4.4.2 Development of the prison from punishment into a disciplining institute and back again

Detention in itself is a (judicial) decision on the deprivation of liberty of a person, whether as sentence or with another purpose as is the case in detention on remand (to be available to the judiciary) or detention under a hospital order (to be treated compulsory). Answers to the question why imprisonment is used in societies vary and reflect multiple goals. Most frequently are mentioned correction, coercion, prevention, deterrence, reform, containment, control, punishment, retribution, rehabilitation, therapy, training and reintegration[91]. The purposes of the prison change over time as we see below.

The institution of the prison as we know it came up in the 16th century. The seventeenth century was the era of the 'great confinement', because its use rose sharply[92]. Groups that

88 Feely & Simon 1992: 459

89 Kelk 2005: 588

90 Hawkins 1976

91 Ibid.: 35

92 Foucault 1989

were perceived to threaten the existing order of the nation-state, like the unemployed, criminals, mentally ill, disabled people and tramps were confined together. The elimination in an institution had the purpose to release the society from the problems caused by these groups as a result of their behavior, way of living or psychic condition, but went together with the wish to re-educate the individuals by labor[93]. In the subsequent centuries the prison increasingly focused on the individual in its efforts to eliminate crime as an institution to transform the individual detainees and to bring crime rates down by its deterrent character[94]. In this sense the prison became an institution to discipline[95].

In Foucault's view, detention distinguishes itself from other forms of punishment by the aspect of supervision and discipline it involves with the ultimate goal to correct the individual. The prison is a link in a chain of disciplining institutions like educational, psychiatric and welfare institutions which purpose it is to normalize the abnormal, the anomaly, to create obedient and economically useful people to perpetuate the power and the property of the ruling class and to combat the disorder, crime and madness which threat this power[96]. This view is shared by Simon, who states that (until recently) imprisonment was used to reform people into participants in an open market economy and a democratic society[97].

One of the above mentioned developments in the penal law is that the prison is not any longer considered as an institution to transform the individual detainees, but as one to warehouse offenders who are classified to be too dangerous to remain in the society[98]. The "offenders are treated as a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help. The only practical and rational response to such types is to have them 'taken out of circulation' for the protection of the public"[99]. Imprisonment becomes more a means of incapacitation and punishment instead of deterrence and transformation[100].

Whatever its intended purposes, the prison has always been criticized because it is not considered to be effective, what is the subject of the next paragraph.

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93 Cornelisse 2008: 73; Kelk 2008: 27

94 Garland 1996: 458

95 Foucault 1989

96 Foucault 1989

97 Simon 1998

98 Feeley & Simon 1992

99 Garland 1996: 461

100 Garland 1996: 458-9

4.4.3 Durability of the prison

The perceived ineffectiveness of the prison, as is reflected by high recidivism rates and always increasing crime rates[101] led some to plea for the abolition of the prison, some to make the regiment more repressive and punitive, others to improve rehabilitative programs, and again others to drastically reduce such programs[102]. In spite of this the prison proves to be a very durable institution, resistant to change[103]. This can partly be explained by considering the different purposes that are ascribed to the prison. In the notion of the *new penology* with its emphasis on managing dangerous groups, recidivism is not perceived as a failure of the prison but as an indication of effective control[104]. Garland argues that it is not relevant whether harsh punishments are effective. What is relevant indeed is that they serve a symbolic purpose, that of the signal that the state is combating serious problems by exercising its absolute power[105] (see the citation under note 15). Another explanation of its durability is the lethargy, irresponsibility, ignorance and perceived costs related to change from the side of politics. At the one hand this can be understood in a democracy, given the facts that prisoners in general lack political leverage and that prisons are seen by the majority of citizens as necessary, reflecting factors like fear, resentment, vengefulness and even idealism and compassion[106]. At the other hand, when realizing what deprivation of liberty actually means as is dealt with below, it can also arouse astonishment that it remains a form of punishment in the liberal democracies.

4.4.4 Deprivation of liberty

[T]he modern way of punishing is shaped in a way that the violence that its practices remains to comprise can be neglected. However, this is not completely successful. We understand

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101 Feeley & Simon 1992; Garland 1996; Hawkins 1976; Foucault 1989. It is taken for granted that high recidivism and crime rates mean that the prison is ineffective. However, no one knows what would happen without prison. Like deportation is an "(unquantifiable) disincentive" (Gibney & Hansen 2003: 15) for potential migrants, so can the prison be an unquantifiable disincentive for potential criminal behaviour.

102 Hawkins 1976: 1-29

103 Ibid.; Kelk 2004: 30; Foucault 1989

104 Feeley & Simon 1992: 455

105 Garland 1996: 460

106 Hawkins 1976: 40-45

the atrocity of punishing, but think at the same time that it is necessary. This punitive sentiment is conflicting with the Western civilization[107].

To grasp the meaning of deprivation of liberty it is essential to understand its counterpart, freedom of movement in an unlimited form. According to De Genova this should not be considered as a 'right', but as 'an ontological condition'. In this sense human life is "inseparable from the uninhibited capacity for movement"[108]. Freedom of movement is the freedom to truly live and the "precondition for human self-determination"[109]. However, this view neglects the fact that freedom for one can mean a reduction in freedom for another. Freedom of movement seems only relevant in an unpopulated world. This is reflected by the fact that as soon as societies developed a sedimentary lifestyle, migration became problematic and an era of conquest and enslavement of other peoples began[110]. Even in a nomadic lifestyle, the regulation of movement is important to prevent that the freedom of movement of one group interferes with the freedom of movement (and means of subsistence) of another group[111]. Territorially therefore is also a feature of human life, be it not in the static form which is characteristic for the current era. We now turn back to one of the most extreme restraints on freedom of movement, deprivation of liberty in the form of detention (another one is deportation or banishment).

Cornelissen views the protection of individual liberty to be the main legitimation for the existence of the state[112]. Yet also this view can be contested, as we saw earlier that the main task of the state is to guarantee the security of its population and confinement of some was used to protect the way of life of others. Collective security implies that individual freedom must be restrained because some people always will use this right in a way that harms others. This is a principle that is also as old as the existence of human societies itself. Each society has always had its norms and rules to restrain individual behavior. Violations of these norms have always been sanctioned with a form of punishment[113]. Earlier we saw that punishment is an imposed harm with serious, negative consequences, whereby imprisonment is the most severe punishment in The Netherlands. In modern notions of detention it is the physical deprivation of liberty that is the purpose of the measure and each element that aggravates this measure as a punishment should be dismissed[114]. Even if this

107 Bouttelier: 163 (my translation)
108 De Genova 2010: 39
109 De Genova 2010: 58
110 Koslowski 2002: 382
111 Kottak 2002
112 Cornelisse 2010: 118
113 Kottak 2002
114 Kelk 2008: 20

viewpoint is realized, detention is still viewed as a very thorough measure what is reflected in the regulation of detention in national and international law to prevent arbitrary detention[115]. Deprivation of liberty, "the sharpest technology" of sovereign power[116] is characterized by "extreme powerlessness, lawlessness and dependency, with many oppressive elements, which by those who are subjected to it usually arouses a high level of psychic frustration and embitterment"[117]. Considering the seriousness of deprivation of liberty, Kelk argues that the state always should legitimize itself concerning restriction of liberty, both for the extent of such measures and for the way she restricts the liberty of individuals[118].

Below theoretical insights on immigration detention are discussed, in which all the aspects of the state, sovereignty, the penal law and detention are brought together.

4.5 Immigration detention

Immigration detention is an instrument to administer the entry and deportation of immigrants. To an increasing degree it is considered to be indispensable in the management of immigration, what is reflected in its always growing application world-wide. Yet, especially as people say that detention is "an absolute necessity, it is relevant to ask what the thing is needed for"[119], wrote Hawkins thirty years ago. This question can be distinguished in two separate questions. The first one is about legitimation and is actually the question what justifies the application of the law. The answer can be short. In essence detention, as an instrument to realize deportation or refusal of entry, can be viewed "as the proper and natural response of the sovereign state to those who violated its territorial sovereignty". This legitimation can be found in official political discourse[120]. Deportation and refusal of entry is a logically consequence of the nation-state system, because it is a concrete way to govern populations and allocate people to states to which they belong. In this sense it is a means to protect the territorial system of sovereign states[121].

115 See for example section 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1950)
116 Cornelisse 2010: 118
117 Kelk 2008: 15
118 Kelk 2008: 15
119 Hawkins 1976: 39
120 Cornelisse 2010: 101
121 Cornelissn 2010: 115

The second question regards the question why detention is the proper instrument to reach the intended purpose of realizing deportation or refusal of entry. To answer this question I go first into the main characteristics of immigration detention. It is an administrative measure, what is rather unique because detention is not a regular sanction under administrative law.

4.5.1 Immigration detention and rights

The ambiguity of administrative detention

Immigration detention is an administrative measure, which involves that the guarantees that the penal law offers against arbitrary and indefinite detention do not apply for immigration detention[122]. Indefinite detention is possible in for example The Netherlands, and mandatory detention (what inclines to arbitrary detention) is possible for all immigrants entering without a visa in the USA and Australia. Remarkable is that in countries where illegal residence is criminalized such as Germany, the penal law is hardly used to detain (non-'criminal') irregular staying immigrants. Immigration detention as an administrative measure is preferred[123].
The administrative detention involves an ambiguity. At the one hand the institutions of the penal system are used to apply this measure what gives it a punitive character. At the other hand, it is formally not a punitive measure. This involves that the guarantees in the penal law offered to suspects and convicts to protect them against the power of the state, are denied to people in immigration detention. For Dow this is the rationale behind this measure. It is not called 'punishment' because then the detainees should have the right to the guarantees the penal law offers. Because they lack these guarantees, they are vulnerable to mistreatment and lengthy, in principle indefinite, detention with few or no possibilities to judicial control"[124]. The punitive character suggests that it is used as a deterrent[125]. Wilsher argues that the use of detention as a deterrent is only legitimized when it is an aspect of the penal law. In that case it should be imposed by a judge and not by the executive branch. Only detention that is reasonably necessary in order to effectuate immigration control can be considered as non-punitive. The crux here is the concept of 'reasonableness' in law which refers to the principle of *ultimum remedium*. Although arbitrary and indefinite detention is very effective in immigration control, this comes at a "disproportionate (and unreasonable) cost to the liberty

122 Wilsher 2004
123 Broeders 2010
124 Dow 2007: 536
125 Wilsher 2004; Dow 2007

of non-nationals"[126]. But the fact that immigration detention is an administrative measure is not the only explanation for the specific character of immigration detention, as we see below.

The vague legal status of irregular immigrants and asylum-seekers

Paragraph 4.2.2 showed that access to rights is determined by access to national territory. Although international human rights conventions contain rules against arbitrary and indefinite detention, in practice often that does not lead to protection of individuals against such detention. Common-law judges, legislatures and even human rights courts differ in their views on the legal status of illegal residing aliens and aliens refused at the border. They also differ in their view on whether and in which degree they enjoy the same rights concerning detention as lawful residents[127]. As a consequence, according to Cornelisse, a situation can exist "that is outside the usual legal framework of the *Rechtsstaat*"[128]. The traditional safeguards that protect citizens against the sovereign power of the state, are absent with regard to immigration detention. Thousands of people are incarcerated in immigration detention within or at the borders of liberal Westerns democracies, in many cases without a maximum duration of the detention, subjected to far-reaching administrative powers in centers that are not easily accessed or controlled. These people

> are in essence outside the pale of the law; even in the case that they are actually within the territory of a national state, the absence of initial state authorization for their presence on national territory leads to the usual safeguards embodied in international legal norms not applying to them[129].

Yet this does not mean that in the European countries in general people in immigration detention are lawless. After all, they are detained in a legal way under the administrative law. However, it remains unclear how international human rights and refugee law is integrated, and these laws "are often insufficient (leaving too much discretion to immigration officials), detention policies non-transparent (leaving individuals open to abuse or arbitrariness), detainees' access to lawyers limited and empirical data concerning detention lacking"[130]. This

126 Wilsher 2004

127 Wilsher 2004: 898

128 Cornelisse 2010: 119

129 Cornelisse 2010: 120

130 Council of Europe 2010: 1

can be viewed as ‘counter law’, a concept derived from Ericson and what Broeders defines as “law in which ‘traditional principles, standards and procedures of criminal law’ are undermined”[131]. As one of the consequences, the general trend is that detention is not used as an *ultimum remedium*. Also clear and accessible law that regulates the operation of centers and their conditions and the possibility to judicial review on this lacks often. In general conditions and safeguards for people in immigration detention are worse than for detainees incarcerated under criminal law. Often the centers are overcrowded, the conditions appalling and the regime inappropriate or absent[132].

Interestingly, Gibney & Hansen explain the use of immigration detention in the UK just because of the fact that irregular migrants have certain rights. Especially if they reside for a longer time, they may lay claim on social and economic rights[133]. For instance in The Netherlands irregular migrants have rights with regarding to necessary healthcare, legal aid and education for minors[134]. Detention of failed asylum-seekers is thus a means to prevent them from absconding and prolonging their stay. The perceived necessity of detention thus results from the inclusionary policy regarding rights for irregular migrants. The same argumentation can be applied to detention of asylum-seekers during the proceeding of their claim. It is often perceived to be used as a deterrent for future asylum-seekers. But states need such measures because when asylum-seekers arrive, states are obliged to process their application what has huge financial consequences[135]. The dilemma is that, although measures aimed at prevention and domestic control are often illiberal, they are necessary in order to realize an expansion of the responsibility towards refugees. From this it follows that

> states must at some point distinguish between their responsibilities to asylum-seekers and their responsibilities to members. For if states refuse to deport unsuccessful applicants, then asylum determination procedures are wastes of time. And if determination procedures are wastes of time, there is no difference between an asylum policy and an open admissions policy[136].

131 Ericson 2007: 24, cited in Broeders 2010

132 Jesuit Refugee Service (2005); Council of Europe (2010): 1; Cornelisse 2010; Van Kalmthout & Hofstee-van der Meulen 2007

133 This is also confirmed by Wilsher 2004: 933

134 Ministerie van Justitie 2008

135 Gibney & Hansen 2005: 13

136 Gibney & Hansen 2003: 15

An open admission policy will not be accepted by the voters, because they prefer closed borders[137]. However, as governments legitimize immigration detention by referring to such purposes as deterrence and prevent absconcion, they suggest that interests of the society served by detention outweighs the individual's interest in not being deprived of his liberty, what Gibney calls the "trade-offs" of rights. This could be justified only, he says, if the judiciary supervises the terms of the trade by means of a sufficient judicial review[138]. In the light of the before mentioned lack of several kinds of rights in detention, it can be questioned if only a judicial review compensates this trade-off.

Let us now turn to the question why detention is perceived to be necessary to realize deportation or refusal of entry.

4.5.2 Why is detention considered to be the appropriate instrument?

Direct consequences of the physical deprivation of liberty

The first line of arguments used in order to rationalize immigration detention, has to do with the actual physical deprivation of liberty for the individual concerned.

Firstly, the fact that unauthorized immigrants are detained means simply that they are physically available for deportation or cannot enter the country. For instance in the case of failed asylum-seekers it is the practice that if they are not detained, the majority of them absconds what results in a "removal gap", for which "[t]he state's answer is detention, arguably the most certain way of ensuring the whereabouts and departure of individuals[139]". The same applies to irregular migrants. Once apprehended, the deprivation of liberty is the only instrument to make entirely sure that absconding is prevented.

Secondly, the deprivation of liberty involves that the detained immigrants can be subjected to procedures which facilitate their removal. One reason for the increase of the use of immigration detention is that immigrants who have to leave the country do not reveal their identity and do not have or do not give their identity documents. Unidentified or undocumented migrants cannot be expulsed. By detaining them, they can be subjected to repeated interviews with officials in charge of the removal process. Also they can be subjected to visits to or other forms of contact with embassies from the countries they

137 Gibney & Hansen 2003: 15

138 Gibney 2004: 252

139 Gibney & Hansen 2003: 11

possibly belong to[140]. In this sense, "[a]dministrative detention becomes the central link in a chain of control and information exchange between various state agencies"[141].

Thirdly, as a consequence of its intrusive character, deprivation of liberty in itself is an instrument to exercise pressure on irregular migrants to co-operate in the expulsion procedure. Added to the merely fact of being detained, the usually harsh detention regimens and unknown lengths of stay contribute to this pressure[142].

Fourthly, immigration detention can be perceived as "a territorial solution" by providing an immediate place for people who have disturbed the territorial ideal of a world divided in sovereign nation-states[143]. Humans are not supposed to move freely across borders in such a world as this system requires basically a sedentary way of life to be kept intact. After all, freedom of movement works against the main purpose of sovereign state power, namely maintaining social order[144]. Irregular migrants and asylum-seekers, who move without permission, "represent the nomadic excess"[145]. States use detention to capture this excess. Deprivation of liberty can therefore be viewed as forced sedentarization to restore the territorial ideal[146].

Fifthly, physical deprivation of liberty can be considered in the perspective of the *new penology.* Immigration detention fits the *new penology* model as people who are economically marginal and considered political dangerous are contained[147]. It fits also in a historical continuum of detention of groups that are perceived dangerous to the order of the nation-state[148]. Was immigration detention for instance in The Netherlands originally constructed as an instrument that was aimed at the individual and only meant to be used as an *ultimum remedium*, now it is changing into an instrument

> that is aimed at categories of persons, while individual circumstances of the case play an always lesser great important role. ... This counts both for the decision to detain as for the legitimation and judicial review of the use of this instrument[149].

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140 To be able to expulse an immigrant travel papers have to be issued by an embassy, for which it is necessary that the immigrant is accepted as a citizen by the country to which he will be expulsed.

141 Broeders 2010: 174

142 Broeders 2010: 179

143 Cornelisse 2010: 116-118

144 De Genova 2010: 58-59

145 Diken & Lausten 2003: 3

146 Cornelisse 2010: 116

147 Simon 1998; Khosravi 2009; Welch & Schuster 2005: 331; Welch 2002; Broeders 2010; Richard & Fischer 2008

148 Cornelisse 2008: 73

149 Cornelisse 2008: 73

The logic of immigration detention is not to deport all these immigrants or to prevent them from coming, but to "manage undocumented foreigners as a population" and to set them apart because irregular immigrants are defined as 'risk populations'[150]. Detention than functions "as a 'factory of exclusion' that keeps irregular migrants off the streets"[151].

Sixtly, immigration detention is assumed to be used as a punishment for seeking asylum, being a non-citizen or even an "anti-citizen"[152]

Besides these rationalizations which are related to the direct purposes of the deprivation of liberty, also symbolic purposes are attributed to immigration detention, what is discussed below.

Symbolic purposes of immigration detention

Detention serves also several symbolic purposes. Firstly, it presents to the own population an image of state power confirming its capacity to distinguish between the inside and the outside[153]. It is also an affirmation towards the population that the government takes seriously the supposed threat posed by immigrants. Immigration detention is thus a means of asserting power by governments[154] and sends a message to the population that the government is in control of immigration[155].

Secondly, detention doesn't only distinguish between inside and outside, but also contributes to its preservation because such a distinction does not reproduce itself[156]. By the act of detention the exclusion of the outsider is confirmed, what on its turn confirms the inclusion of the insider. In that meaning it is "a way to constitute citizenship"[157]. The immigration prison plays an important role in the process of distinguishing between those who pose no threat and those who are "out of place"[158].

Thirdly, it works as a deterrent for future potential migrants to prevent them from coming and for already present irregular migrants to prevent them to continue their irregular stay[159].

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150 Richard & Fischer 2008: 600

151 Broeders 2010: 182

152 See e.g. Welch & Schuster 2005; Dow 2007; Khosravi 2009

153 Cornelisse 2010: 115

154 Bosworth 2008: 211, Simon 2007: 603

155 Cornelisse 2010: 115

156 Walters 2010: 97

157 Khosravi 2009: 37

158 Bosworth 2008: 210

159 See for example Broeders 2010; Gibney 2004; Welch & Schuster 2005; Wilsher 2004; Cornelisse 2010; Dow 2007

A fourth line of thought concerning immigration detention is derived from the concept of *deportability*, the possibility of being deported[160] which forms a continuum with "detainability"[161]. The fear resulting from the always present threat of being detained and deported, is employed to create a form of discipline. The discipline imposed by *deportability* and *detainability* enlarges the already present legal vulnerability of illegal residing immigrants what results in a highly exploitable, docile workforce who is willing to work 'hard and scared'[162]. It is an instrument to civil obedience as well. States employ the *deportability* "as an effective disciplinary instrument to make unpopular foreign populations more malleable and force them into humility"[163] and as a way to discipline political dissent[164]. In the same way, *detainability* makes illegal residing immigrants to obey even the simplest rules out of fear to being detained. The intended consequence is that they can be governed with a minimum of capacity of law-enforcing institutions[165].

All these distinct purposes that are described to immigration detention makes it an indispensable and precious instrument in the eyes of the government of states all over the world. As Cornelisse put it: "states resort to the sharpest technique to achieve the related goals of imaginary unity, maintenance of the territorial order, and sedentarization"[166].

The next chapter discusses the subject of immigration detention in the Dutch politics.

160 De Genova 2002; De Genova 2010

161 De Genova 2010: 55

162 Calavita 2003: 406; Coutin 2005: 13 ; De Genova 2010 : 39

163 Wicker 2010: 240-1

164 Maira 2010: 320

165 Stronks 2008: 827

166 Cornelisse 2010: 118

5 IMMIGRATION DETENTION IN THE DUTCH POLITICS

5.1 Introduction

This chapter describes the findings of the analysis of parliamentary documents and interviews with (ex-) politicians. Dealt with are the different views held by the distinct political parties on the purposes of immigration detention, its preferable design and alternatives for detention. As can be derived from chapter four, these views are inseparable linked to the view one has on the rights of individuals versus the power of the state to restrain these rights. That subject is also treated in this chapter.

De first paragraph goes into the views on the purposes of immigration detention. These purposes can be distinguished in formal and symbolic purposes.

5.2 The formal aims of immigration detention

5.2.1 Introduction

Immigration detention was already in 1965 seen as a necessary part of the of the Dutch restrictive admission policy. In 1984 this necessity was emphasized, although it was presented in positive terms. The memorandum on immigration detention writes that detention was aimed at "the application of the regulations to ensure admission for those aliens who may be eligible for this"[1]. In this way the use of immigration detention was rationalized instead of emphasizing its restrictive nature. Besides this overall aim of detention, other purposes can be distinguished.

Immigration detention in its current sense is mainly regulated in sections 6 and 59 of the Aliens Act 2000. Those sections have their origins in respectively sections 7 and 26 of the Aliens Act 1965. Section 26 regulated detention with the purpose of expulsion, which later became known as aliens detention, and section 7 obliged aliens refused at the border to immediately leave The Netherlands. An amendment implemented in 1989 added the possibility of detaining these people, what is also called border detention. The aims of both

1 Memorandum, Kamerstukken II 1984-1985, 18737, nr.2: 1

types of detention can be separated in a formal purpose, as formulated in the text of laws, explanations of motives (for the creation of laws), policy memoranda, letters, and statements, and a symbolic goal which can be derived from statements made by members of parliament and occasionally those made by ministers, and from interviews with former politicians. These symbolic purposes however are not confirmed and approved of by all parties.

5.2.2 The formal aim of aliens detention: expulsion

The goal of section 26, which regulated immigrant detention, is clearly described in the explanatory memorandum accompanying the bill of the new Aliens Law, which was implemented in 1965. Section 26 was written to restrict the use of section 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] which offers the possibility to detain those aliens whose expulsion is ordered, or who are subject of an investigation which may result in expulsion. A new possibility for detention is thus legitimised by referring to the intention of restricting the use of this possibility. This reflects the intention to use it is an *ultimum remedium*, what can also be derived from the way this section was formulated. This formulation was comparable to the formulation of texts in the Penal Law and described the grounds on and cases in which immigrants may be detained, in order to prevent arbitrary detention.

The explanatory memorandum is less clear on the subject of the purpose of detention itself. The clarification of section 26 says that this section offers the possibility to "detain aliens whose expulsion is ordered, or who are the subject of an investigation that can result in deportation. Having the power to detain can in such cases not be missed"[3]. It can be derived from this formulation that there exist a close connection between detention and expulsion, although in the debates on the law section the prevention of absconding is emphasized. The CHU (Christian Historical Union, liberal protestants) Minister of Justice believed detention to be a vital tool to prevent "the danger of absconding" in case there was a real danger a migrant would abscond[4]. Later on it was emphasized increasingly that immigration detention had the purpose to expulse immigrants. In the 1984 policy memorandum regarding aliens detention the CDA (Christian Democratic Appeal, christian democrats) State Secretary stated that aliens detention based on section 26 "exclusively

2 Council of Europe (1950)

3 Explanatory memorandum, Kamerstukken II 1962-1963, 7163, nr.3: 16

4 Report, Kamerstukken II 1962-1963, 7163, nr. 9: 10

serves to effectuate expulsion"[5]. In the course of decades this has remained the formal purpose. Aliens detention "is at the service of the expulsion"[6], as was formulated by the PvdA (Party of Labor, social democrats) State Secretary in the policy memorandum on the removal of unauthorized aliens in 1990. According to the 1998 policy memorandum on aliens detention, also from the hand of a PvdA State Secretary, the aim was to "prevent that an alien makes his expulsion impossible by evading supervision"[7].

The formulation of section 59 of the Aliens Act 2000 emphasizes the relation between detention and expulsion more clearly than the former section 26. It says that, in specific cases and on specific grounds, an alien can be detained "with the view on expulsion". In the Aliens Circular it is again written very clearly: "Aliens detention is a measure which is aimed at effectuating the expulsion of an alien"[8].

From the above can be concluded that almost from the beginning the formal aim of aliens detention has been the effectuating of expulsion. It is an instrument at the service of expulsion of unauthorized immigrants. This aim in itself does not say anything about the way immigration detention should contribute to expulsion. After all, all roads lead to Rome. What was and still is under discussion is how immigration detention may be used to contribute to this aim. This is the subject of the next subparagraph.

5.2.3 Aliens detention as prevention of absconding and as lever

Aliens detention can contribute to the expulsion just by the deprivation of the physical liberty of an immigrant. In this way absconcion can be prevented and the physical availability for the expulsion guaranteed. All parties support the use of aliens detention in this manner as a consequence of the felt necessity of a policy of restricted admission, a vision that is shared by all parties. Furthermore all parties believe illegal residence is a problem and recognize that illegality should be combated. Even the left parties which have been always very critical towards immigration detention support immigration detention as it is used in this way. As De Wit (SP, Socialist Party, socialists) said:

> People who are here illegally and whom you get hold of in one way of another, and whom you can expulse, there is nothing wrong with that in itself. As far as we

5 Memorandum, Kamerstukken II 1984-1985, 18737, nr. 2: 8

6 Memorandum, Kamerstukken II 1989-1990, 19637, nr. 68: 9

7 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 2

8 Aliens Circular, Vc 2000 A6/5.3.1

> are concerned that is correct. However, and that is the actual practice, six months, nine months, one year, eighteen months, that is as far as we are concerned unacceptable. It may only be used for a short time, and when you know for sure that you can expulse someone. And not in the way of 'well, now we have someone and now we are going to sort out if we can expulse him and than we'll see by that time'[9].

In the case of this legitimization, it is often emphasized that there are no alternatives to aliens detention in the individual cases for effecting return. Means such as electronic house arrest and a reporting duty are no alternatives as there are no effective sanctions if these measures are not complied with[10]. During the interviews with Van de Camp (CDA), Nawijn (LPF, List Pim Fortuyn, right populists) and Kosto (PvdA) for instance it emerged that when there were open centers in the past, serving as an alternative to aliens detention or due to a lack of space in aliens detention, this always led to the disappearing of aliens.

The second reasoning concerning the question of how aliens detention contributes to the prevention of continuation of illegal stay, is that it exerts a pressure on the detainee towards cooperation on identification and obtaining of travel documents necessary for the expulsion. In the course of time the purpose of detention has shifted from effectuating expulsion by just the prevention of absconding, to the complete expulsion process including identification. In 1965 it was emphasized that the physical deprivation of liberty prevented that the refused immigrant could abscond as we saw above. Though in the memoranda of 1984 and 1998 aliens detention is called a 'means of coercion', it seems that this is more related to the forceful character which is inherent to imprisonment, and no reference was made to forcing cooperation.

Yet, already in 1984 refusing to cooperate on identification was a ground to place an alien in immigration detention, and was contributory to a longer duration of detention. In 1990 it appeared to be a problem that an increasing number of detained immigrants refused to cooperate on their identification. Subsequently they had to be released without their identity being determined, because the judge judged that the investigation did not proceed sufficiently. The policy memorandum of 1998 made clear however that not cooperating on the determination of identity legitimized a duration of detention exceeding the six months[11]. Although this shows that identification and immigration detention have for long been closely

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9 Personal interview

10 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 2

11 Although six months is not a time limit of the length of detention, it is the duration after which in general the interests of the aliens were considered to be more important as those of the state.

related, this relation has become more solid. According to De Wit (SP) it is currently, contrary to earlier on when it was used to keep people who could be expelled available for expulsion, used more “in order to pressure someone into telling his story, and that is the major change that took place, we lock someone up and he will eventually repent and start talking”[12]. That is currently even declared to be the formal purpose of detention. This is confirmed by the most recent formulations of the purpose of detention by the PvdA State Secretary in 2010. This purpose is “the keeping available for the expulsion procedure, the determining of the identity and preventing the alien from evading expulsion”[13]. Although this reveals nothing about exerting pressure, other utterances reveal that this is actually an important rationalization behind detention. In the words of again State Secretary Albayrak (PvdA) in 2008:

> [Aliens detention] … appears to explicitly be a means of pressure in order to achieve the cooperation of people at some point with effecting their return. … This detention is of course with the purpose of making the alien accept that a voluntary return is the only option[14].

Visser (VVD (People Party for Freedom and Democracy, conservative liberals), said exactly the same: “and when people cooperate, they do not have to be locked up at all”[15]. This is also the reason why repeatedly is put forward that immigration detention in fact is no detention at all. That detention is indeed used as a lever, has also been clearly declared in debates about the duration of detention. The politicians in power have always resisted a maximum length of detention, as is also considered in paragraph 5.4.2. The lack of a limited duration has always been legitimized by pointing out that a deadline would decrease the willingness of the alien to cooperate in effecting his return. This was also partly approved of by ‘the left side’. Halsema (GL, Green Left) seemed to agree with detention as lever as she proposed a maximum duration of three months in 1999, but “with the exception of the detention of aliens who frustrate the expulsion deliberately”[16]. This is remarkable, because this party has always been critical to the use of immigration detention beyond the physical availability for expulsion.

Criticism on the use of aliens detention as lever can be seen most clearly in the personal interviews with politicians. The element ‘punishment’ for not cooperating is the matter when

12 Personal interview

13 Letter minister, Kamerstukken II 2009-2010, 19 637, nr. 1353: 3

14 Proceedings, Handelingen II 2007-2008, nr. 80: 5619

15 Personal interview

16 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 2

detention is used as a lever, something that may never be the intention of aliens detention, according to Anker (CU) and Nawijn (LPF).

5.2.4 The formal aim of border detention

Border detention, in part, serves another aim than that of aliens detention. Border detention as it is now regulated under section 6 of the Aliens Law 2000 was not regulated in the original Aliens Act of 1965. The first subsection of section 7 of the Aliens Act 1965 stated: "Aliens who have been refused entrance to The Netherlands are obliged to leave the country at once, in compliance with the instructions with regard to this purpose given to them by an official charged with border control"[17]. The 1989 amendment added the possibility to "keep the aliens concerned in a space, assigned to them by the official charged with border control", which could be closed of[18]. According to the explanatory memorandum this detention aimed at accommodating aliens in order to prevent illegal border crossing[19]. Expulsion was not the goal as "the alien was not on Dutch territory and thus not needed to be removed from it"[20]. This "extraterritorial fiction" [21] was later abandoned. Border detention was connected to expulsion and is now also seen as "an instrument to effectively enforce return"[22].

5.2.5 Border detention as prevention of unauthorized border crossing and as lever

The physical deprivation of liberty in the case of border detention has been the instrument to ensure that the refused alien could not enter The Netherlands and, to lend this rationalization more weight, the entire Schengen area as is emphasized since 1988[23]. Put briefly, it is a means of preventing refused aliens from entering The Netherlands at the border. People who have not been admitted but are not returning immediately, have to be somewhere which led to the situation that they were being kept in the Transit Zone at Schiphol Airport. However, this was "undesirable seen from the perspective of a humane reception as well as the

17 Bill, Kamerstukken II 1963-1964, 7163, nr. 22: 2

18 Amended bill, Kamerstukken I 1988-1989, 20972, nr. 113: 1

19 Memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3

20 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 2

21Van Traa (PvdA), proceedings, Handelingen II 1988-1989, nr. 37: 2250

22 Report, Kamerstukken II 2009-2010, 19 637, nr. 1331: 25

23 Tweede Kamer, vergaderjaar 1988-1989, 20 972, nr. 3: 7

perspective of maintaining public order and calm, but also from the perspective of the guarding of the border and preventing illegal crossing of the border"[24]. Deprivation of liberty was seen as the only effective instrument as all other instruments will lead to unauthorized entry. The new measure regarding border detention was justified because it regarded a category of aliens which has tried "to pass-by the guarding of the border motivated and inventively" and

> which has the strong and explicit desire to stay in The Netherlands for a longer time. To realize this desire, they have been at great pains to pay for the usually considerable costs for an air trip. That they, when it appears that they are refused entry, when possible will try to hide from guarding of the border and from the domestic supervision of aliens, is thus not startling[25].

When it later on became clear that expulsion was relevant for this group as well, the physical availability, 'the keeping people with you for a while', was seen as a means of effecting expulsion, as can be seen in the words of State Secretary Albayrak (PvdA) in 2010:

> Refusal at the border and border detention is thus not only an instrument in the framework of the European agreements, but also a means of effective expulsion. If you need a little more time, you can keep people with you for a while and do further research[26].

Although not explicitly mentioned, it can't be seen why the use of immigration detention as lever towards cooperation with regard to the expulsion process should not apply to border detention. Furthermore, also for border detention a maximum duration is lacking. Only for asylum-seekers who probably will be rejected but for whom further research is necessary with regard to among others their identity, there is a 'soft' time limit of six weeks, comparable to the six months in aliens detention. However, here as well non-cooperation on the research justifies a longer detention[27]. From this could be concluded that also border detention serves as a lever to cooperate on identification.

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24 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 1

25 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 8

26 Report, Kamerstukken II 2009-2010, 19 637, nr. 1331: 25

27 Aliens Circular, Vc2000 C12/2.2.1

Border detention can, comparable to aliens detention, also be viewed as lever to leave the Netherlands. Regarding border detention it was mentioned several times that it was not really detention, as people could free themselves if they wanted to leave The Netherlands[28].

Summarizing, the formal goal of immigration detention is "the combating of illegal entrance of The Netherlands or preventing an alien from obstructing his expulsion by evading supervision" [29], with increased emphasis on detention as a lever to enforce cooperation of the immigrants regarding the expulsion procedure.

5.3 The symbolic purposes of immigration detention: deterrence

In addition to these formal aims, immigration detention serves another purpose, namely that of being a signal to (future) aliens who (want to) reside here unauthorized. It serves as a deterrent of potential future asylum-seekers and other aliens who would want to enter The Netherlands by irregular means, and as a discouragement for people who illegally reside here. In 1964 MP Meuling (ARP, Anti-Revolutionary Party, calvinists, later merged into the CDA) praised the Dutch border control because it "had a strong preventive effect and that it can be attractive to refugees to try it in countries which are known to have a less effective border control"[30]. The preventive effect of 'hard' measures was thus already recognized and appreciated by certain parties in that era.

During the amendment to section 7A in 1988 minister Korthals Altes (VVD) pleaded for border detention of (provisionally) refused aliens because he feared that without this measure "the inflow of aliens trying to enter The Netherlands via Schiphol Airport will increase substantially on the short term"[31]. In the opinion of Kosto (PvdA) this view was justified. It has been his experience when he was State Secretary in the beginning of the 1990's, that "when the border holding center was full, immigrants flowed in on Schiphol because they knew we will not be detained now, we can now walk on to the [open] centre, well that sort of desperate situations occurred now"[32]. Although the deterrent effect of immigration detention has always been appreciated by some parties, the way in which this is expressed by the VVD and the CDA has become tougher in the course of years, what the opinions as put by Van de Camp (CDA) shows:

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28 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 9; personal interviews with Kosto (PvdA) and Visser (VVD)

29 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 2

30 Proceedings, Handelingen II 1963-1964, nr. 63: 2211

31 Proceedings, Handelingen II 1988-1989, nr. 37: 2259

32 Personal interview

> but in the case of prevention, do not forget the Dutch government will bite back if necessary, I believe aliens detention to be essential. …The preventive element of aliens detention is present, which can not be discussed in The Netherlands, but I do dare to talk about this.

He later clarified that with 'preventive' he meant 'deterring' which had the goal of less people coming to The Netherlands. And as Kamp (VVD) advocated two years ago:

> When you lock people up, when you make clear that it is over and that it is no longer accepted, then you achieve – and I say so – that people will leave instead of coming. People are not hoping to be locked up. When people notice that the government decides you can achieve effect[33].

Fritsma (PVV, Party for Freedom, right populists) believed the government should take stronger action and use immigration detention more often, "because you otherwise send the wrong signal: even illegal aliens that show up at the door of the justice department, go back into illegality unhindered with little to fear in The Netherlands" [34].

Not all parties agree with aliens detention being used in this manner. Van ES (PSP, Pacifist Socialist Party) stated during the debate on the new section 7A that it is unacceptable that discouragement has become such an important criterion regarding such a radical curtailment of human rights[35] and 20 years later Anker (CU, Christian Union, christian-social party) states: "I do not believe aliens detention should ever be a deterrent, it is not meant for this"[36]. The SP and Green Left always have supported immigration detention only as an instrument to keep immigrants available for their expulsion.

5.3.1 The symbolic purposes of immigration detention: being tough to maintain public support for a refugee policy

A second symbolic element is the signal the government sends to its own citizens. It is emphasized that tough measures such as immigration detention are essential to maintain the

33 Report, Kamerstukken II 2008–2009, 19 637, nr. 1237: 10

34 Report, Kamerstukken II 2008–2009, 19 637, nr. 1237:36

35 Proceedings, Handelingen II 1988-1989, nr. 37: 2241

36 Personal interview

public support for, albeit limited, admission of aliens and asylum-seekers. That is why in many debates and policy memoranda on immigration detention, the policies are justified by pointing at this support[37]. This support has been difficult to maintain the last decades. People see that immigration affects their world, they see "their neighborhoods change color"[38] which leads to negative feelings towards immigrants. These feelings are exploited by rightwing politicians. As Kosto (PvdA) said:

> when that flow becomes larger, you will find more support in society [for taking restrictive measures], people feel threatened in their housing, people feel threatened in their employment, people feel they experience difficulty on the street.

Feelings of dissatisfaction and discontent accumulate. As a consequence

> a kind of prior xenophobia, that is always present, well, that can no longer be controlled when the inflow becomes massive, and that is what happened back then, and then individuals emerge that derive political benefit from it[39].

According to Van de Camp many people by now regard asylum-seekers, refugees, people that come here for family reunification and so on as one and the same, they are foreigners and those have to go. In order to maintain support for admitting refugees and regular immigrants, immigration detention and other restrictive measures are necessary, also because Pim Fortuyn and Wilders "often abuse this issue"[40]. Seen in this light, tough measures that contribute to a decrease in the inflow of immigrants take the wind out of the sails of xenophobic parties which eventually benefits 'real' refugees.

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37 E.g. Wijn (CDA), proceedings, Handelingen II 1999-2000, nr. 84: 5398- 5401;
Minister Verdonk (VVD) memoranda Kamerstukken II 2003-2004, 29 537, nr. 2: 5; 2003-2004, 29 344, nr. 1: 6;
Lambrechts (D66), report, Kamerstukken II 2003-2004, 29 344, nr. 19: 27;
Van der Staaij (SGP), proceedings, Handelingen II 2007-2008, nr. 80: 5611;
Albayrak (PvdA), report Kamerstukken II 2008–2009, 19 637, nr. 1237: 38;
personal interviews Anker (CU), Van de Camp (CDA), Kosto (PvdA) and De Wit (SP)

38 Personal interview former MP of the CDA

39 Personal interview

40 Personal interview

5.3.2 The symbolic purposes of immigration detention: satisfying voters

A third symbolic purpose of detention is hard to derive from official documents, although it can be derived from several interviews[41]. It is about the signal politicians send to their own citizens, supporters or other parties, namely that they, through repressive measures such as aliens detention, enforce the law and protect the citizens. As formulated by Van de Camp (CDA):

> There is always a political element towards the Dutch, the white Dutch, as well, enabling the government to say, look, we do not allow the country to be flooded with migrants or asylum-seekers, or strongly formulated, by black people, or very strongly formulated, by Muslims, or Islam. Immigration detention has a political element as well, look how well we take care of you, of those that are allowed to be here. You should not underestimate that, it is an ideological instrument as well[42].

This idea is indeed present in the CDA. Van Haersma Buma (CDA) fears that alternatives for the detention of aliens will not be effective, and "then we will later on have to explain to the society that we used a system that does not deliver benefits, but maybe only losses"[43].

It is also shown in the words of State Secretary Albayrak (PvdA) when she promised, under pressure of the PVV, VVD and CDA, to investigate the possibility to check the identity of those present at demonstrations, when it is suspected that there are illegal residing immigrants amongst the demonstrators, and detain them. "I am in real earnest!" she emphasizes, although she also adds that everything "should be within the laws of our democratic constitutional state"[44]. The PVV and VVD are conducting symbolic politics with regard to immigration detention in order to please their supporters, according to De Wit (SP):

> Symbolic politics, 100% sure, because they can not defend a human policy to their supporters. It simply means guys, get out of here, done, they only eat our bread in a matter of speaking, … that is the political background, that is the pressure to which the PVV and VVD are exposed. The supporters demand a tough policy. That is politics in The Netherlands.

41 Personal interviews Kosto (PvdA), De Wit (SP) and former MP of the CDA

42 Personal interview

43 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 29

44 Report, Kamerstukken II 2008–2009, 19 637, nr. 1237: 38

Every party wants to keep its supporters. Since it can be said that in general the feelings in society towards immigrants have become harsher, this also means that the policies of parties become harsher. According to a former MP (CDA) this creates a dilemma for the PvdA as their voters traditionally come from the working-class neighborhoods. Because they saw their neighborhoods change color they first changed to the SP and later on to populist parties, a thing in which Fortuyn played an important role[45]. Apart from that Middel (PVDA) argues that reality is more complex, with a divided support base with the extremes of the traditional voters that believe migration policies to be too harsh, and those living in the canal belts who believe it is too soft[46]. De Wit (SP) mentioned that a part of the grassroots of the CDA also didn't support the harsh party line on immigration[47].

We saw that immigration detention is widely supported by parties as an instrument of enforcing a restrictive immigration policy, but that there exist different views on which purposes immigration detention has. These different views have their effect on the opinions on the design of immigration detention, something that is further discussed in the next paragraph. The main concern here is how legal security is provided, the duration of the aliens detention and the detention regime.

5.4 What are the different views on the preferable design of aliens' detention according to the distinct political parties?

5.4.1 Legal protection regarding detention

As was discussed in chapter three, punishment under the Penal Law has developed into an *ultimum remedium*, what means that everything is being done what seems reasonably possible to prevent the use of the power to punish. Furthermore this principle requires that as few methods of coercion and punishment as possible are applied in each individual criminal case. Although it is formally no punishment, it is in general acknowledged by the political parties that immigration detention as well should be used as an *ultimum remedium*.

45 Personal interview

46 Proceedings, Handelingen II 1999-2000, nr. 83: 5360

47 Personal interview

Three issues are relevant in realizing the *ultimum remedium* principle. The first one is that it matters greatly that the measure is not applied categorically, but that in each individual case a balancing of the interests of the alien and those of the state takes place. The second one is that detention is only used as other, less radical instruments are considered but thought inappropriate. The third one is that a judge soon after the imposition of the measure of detention reviews if the principles above are applied. In the next subparagraphs the first and second issues are discussed, while paragraph 5.5 considers the use of alternatives.

Individual balancing of interests

Section 59 Aliens Act 2000

The parliamentary history shows that the different parties attached different value to the individual balancing of interests. Also there exist a major difference in the value attached to this with respect to border detention at the one hand and aliens detention at the other hand. The cases in which immigrants may be detained are described in the law text. Section 59 subsection 1 determines that aliens detention is possible in the case of an alien that "does not have a legitimate residence" or who "has a legitimate residence based on section eight, under f, g and h" (awaiting decisions on certain applications, objections or appeals). In terms of content this matches its predecessor, section 26 of the Aliens Act 1965.

Furthermore detention is only allowed on certain grounds, "when it is required in the interest of public order or national security"[48], according to the explanatory memorandum accompanying the bill for the later Aliens Act 2000. Whereas in 1964 the concept of public order was described as "amongst other things, a danger to public morals, as well as damage to foreign relations"[49], over time the scope of this public order criterion became narrower. A danger to the public order and national security is, "in accordance with jurisprudence, only the case when there are indications to suspect that the alien will obstruct expulsion by evading supervision"[50]. The jurisprudence has led to the formulation of situations which indicate that the alien probably will evade supervision. These indications are determined in the Aliens Circular. The public order concept has thus received an important meaning in the

48 Explanatory memorandum, Kamerstukken II 1998–1999, 26 732, nr. 3: 60

49 Explanatory memorandum, Kamerstukken II 1962-1963, 7163, nr. 3: 14

50 Explanatory memorandum, Kamerstukken II 1998-1999, 26 338, nr. 3: 60

sense that it can be tested[51]. Yet the text in the Aliens Circular is formulated in such a way that it leaves much discretionary space for the executive and judicial powers. The text reads that "the interest of the public order can require the detention furthermore for instance: …" and then the indications follow. The indications are not complete so the public order concept is still open to different interpretations. Also the indications comprise many situations that are almost inherent to illegal residence, like the lack of means of subsistence or having worked illegally. Other indications are, amongst others, illegal entry or having evaded supervision[52]. As a consequence it can be questioned whether these indications restrict the use of detention, but at least is an individual review required.

Another condition for aliens detention is that it is a measure "that can only be used to facilitate expulsion"[53]. There has to be a real prospect of expulsion which means that "concrete progress must be made in determining the correct identity and nationality, and the obtaining of the necessary documents of detained aliens"[54].

The description of cases in and the grounds on which detention may be applied and the required prospect of expulsion offer in theory guarantees to unauthorized immigrants that they are not detained categorical.

Although sometimes the desire was uttered to extent the scope of immigration detention, the responsible politicians have always emphasized that immigration detention, because of its "radical character"[55] can only be used as an *ultimum remedium*. It may only be applied when the goal of immigration detention "can not be achieved by other means"[56] and "in case it is strictly necessary to prevent that an alien who is to be expelled will obstruct his expulsion by evading supervision"[57]. In paragraph 5.5 is extensively dealt with alternatives for immigration detention. In all cases interests should be considered at the individual level, as was laid down in the first memorandum on immigration detention:

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51 The second subsection of section 59 is formulated in such a way that it can be derived that it need not to be proved that public order is endangered in the case of this individual alien. This was discussed as Rouvoet (RPF), De Wit (SP) and Halsema (GL) feared that aliens detention under this section would be applied categorically. For this, see Report, Kamerstukken II 1999–2000, 26 732, nr. 12. Eventually the formulation of the law remained unamended.

52 Aliens Circular, Vc 2000: A6/5.3.3.1.

53 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 4

54 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 2

55 See for example Memorandum, Kamerstukken II 1984-1985, 18737, nr. 2; Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 4; Report, Kamerstukken II 1999-2000, 26 732, nr. 7: 51; Letter State Secretary, Kamerstukken II 2001-2002, 26 338, nr. 6: 1; see for example also Report, Kamerstukken II 2009–2010, 19 637, nr. 1331

56 Bill, Kamerstukken II 1998–1999, 26 732, nr. 3: 2

57 Letter State Secretary, Kamerstukken II 2001-2002, 26 338, nr. 6: 1

> With the application of detention considerations of a general nature are not sufficient; this measure has to be indicated by facts or circumstances that apply to the alien as a person. The individual interest of the alien and the general interest of public order, public calm, and national security all have to be considered. An incorrect consideration of interests will lead to a cancellation of detention in case of testing by a judge[58].

The intention of the responsible politicians towards the use of immigration detention as an *ultimum remedium* can for instance be derived from the discussions preceding the Aliens Act 2000. Some proposals were intended to make it easier for the state to detain, but were rejected by the responsible politicians. One example is the rejection of a proposal from the executing bodies to leave out the specific grounds for detention in the Aliens Decree[59] in order to "prevent that a change of the grounds will lead to the need for a new order of detention being issued"[60]. The D66 minister and PvdA State Secretary for Justice did not find it to be desirable to "include an open norm in the law. From the point of view of legal security it is important that it can be derived from the law in which cases an alien can be detained"[61]. Another example is that the desire of the CDA-group in parliament to imperatively[62] formulate the sections regarding aliens detention and border detention was not acknowledged, because:

> [a]n optional provision offers the possibility to judge the proportionality and the subsidiarity of applying such a rule in individual cases. When possible these «can-provisions» will be filled in, in the lower issuing of rules. We believe that the legal security for the State and the alien will be sufficiently ensured in this way[63].

For section 6 there is attached less value to the individual balancing of interests as is shown in the next subparagraph.

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58 Memorandum, Kamerstukken II 1984-1985, 18737, nr. 2: 5

59 The Aliens Decree contains Orders in Council resulting from the Aliens Act. It regards formal-procedural issues and material regulations like criterions for admission of certain cetegories of aliens (Kuijer & Steenbergen 2005: 33)

60 Explanatory memorandum, Kamerstukken II 1998–1999, 26 732, nr. 3: 61

61 Explanatory memorandum, Kamerstukken II 1998–1999, 26 732, nr. 3: 61

62 Which means not a can-provision but a must-provision. A can-provision leaves discretionary space for the executive and judicial powers to apply a certain measure whether or not.

63 Report, Kamerstukken II 1999-2000, 26 732, nr. 7: 51

Section 6 Aliens Act 2000

The formulation of section 6 regarding border detention has been formulated more broadly compared to section 59. With the realization of section 7A, its predecessor, the grounds on which aliens may be detained as formulated in section 26 have been left out. As a consequence the public order element with the connected suspicion that this individual alien will evade supervision, is no longer relevant. An amendment for restoring this element when this section came into being in 1988 did not pass a vote, and was only supported by PvdA, the PPR (Political Party of Radicals, green, christian progressives), and the PSP[64].

In 1997 section 7A was again amended because at the moment it did not allow for border detention when an application for entrance was rejected. The new text in the bill was imperatively formulated, what led to questions of the PvdA, D66, GL and the SGP (Reformed Political Party, conservative christians) about which criteria were applied as detention was imposed. Although the minister (D66) and State Secretary (PvdA) ensured that there was no categorical approach because prior to "the decision to refuse further access an individual test is conducted by an official charged with border control"[65], they acknowledged that border detention could in principle be imposed on everyone who was refused entry. For the detention in itself thus an individual balancing of interests was not required. Therefore the PvdA and GL remained very distrustful with regard to whether detention would actually be individually reviewed in practice and whether it would be used as a measure of last resort[66]. An amendment proposed by the PvdA for building in a can-provision passed the vote, but a proposal by GL for determining criteria for application of section 7A in the law, Order in Council or decision was only supported by a minority, consisting of GL, the SP, the PvdA, and D66[67]. This resulted eventually in the current formulation of section 6, on the basis of which every alien who has been refused entry can be detained. From the formulation of the article, and the elaboration in the Aliens Circular, it appears that concrete testing criteria like those that apply to section 59, are lacking for section 6. There is also no mention of a requirement of a prospect of expulsion[68].

Exceptions are however made for families with children, which can only be detained under application of section 6 (as well as section 59) "in case there is cause for assuming that

64 Proceedings, Handelingen II 1988-1989, nr. 37: 2300

65 Report, Kamerstukken II 1996–1997, 25 172, nr. 5: 4

66 Proceedings, Handelingen II 1997-1998, nr. 33: 2653

67 Vote, Kamerstukken II 1997-1998, nr. 39: 3212; Amendment, Kamerstukken II 1997–1998, 25 172, nr. 10; Amendment, Kamerstukken II 1997–1998, 25 172, nr. 11

68 The prospect of expulsion is not required according tot the jurisprudence, see Kuijer & Steenbergen 2005: 531 and Baudoin et al. 2008: 101-105

expulsion can be effected within two weeks[69]". To asylum-seekers applies that when they are registered as asylum-seekers, the border detention can only be continued based on certain criteria that have been included in the Aliens Circular, because "the measures should always be proportional and subsidiary[70]"[71]. Immigration detention in the case of asylum-seekers and minors has regularly led to extra attention from parliament. Already in 1964 the only issue which was discussed regarding section 26 was the detention of refugees while the possibility to detain other aliens was taken for granted. Furthermore the aliens detention of a minor was the cause of the first policy memorandum on aliens detention in 1984 (which did however not lead to changes in the law or policies) and in the period round 2006 there was turmoil in parliament concerning the detention of minors, mainly families, which recently resulted in changes in the Aliens Circular. The most important of these changes has been a limitation of the duration of detention for families.

Despite the repeated assurances of the responsible politicians that immigration detention under section 59 as well as under section 6 of the Aliens Law 2000 only is used as an *ultimum remedium* and that always an individual balancing of interests takes place, criticism on the measure not being used as a means of last resort remains on the side of GL[72], the SP[73], the PvdA[74] and more recently the CU[75]. Regarding the protection of individuals from government actions in the case of detention not just the formulation of the sections that regulate immigration detention are of importance, but also the way in which the law regulates the testing of the enforcement of the law by the judge, which is discussed below.

69 Aliens Circular, Vc2000, A6/2.4

70 Proportionality refers to suitability and means that the used instrument is in proportion to the intended aim. Subsidiarity refers to the obligation to apply a lighter measure when possible (Aliens Circular, Vc2000, A6/1)

71 5558231/08/DVB/25 september 2008: 24 (response of the State Secretary for Justice to the report of Amnesty International regarding immigration detention.)

72 Proceedings, Handelingen II 1988-1989, nr. 37: 2241; Report, Kamerstukken II
1998-1999, 26 338, nr. 4: 1; 19 637; Report, Kamerstukken II 2008–2009, 19 637, nr. 1237

73 Proceedings, Handelingen II 2007-2008, nr. 73: 5130; Report, Kamerstukken II 2009–2010, 19 637, nr. 1331; personal interview De Wit (SP)

74 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 5; Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 6; Report, Kamerstukken II 2009–2010, 19 637, nr. 1331

75 Proceedings, Handelingen II 2007-2008, nr. 80: 5615

Judicial review

The matter of judicial review has emerged at times since 1976, when a bill was submitted for the expansion of legal protection and legal aid for aliens[76]. The party groups of the predecessors of the CDA and GL, and the PvdA, proposed to improve the legal position of the alien in immigration detention as a response to criticism by lawyers on inaccuracy in cases of immigration detention. The PPR and the PSP wondered why the guarantees of the criminal law did not apply for immigration detention. It was proposed that the order to detention should be given by a judge instead of a police official, and when the government would not agree on this, to have a judicial review after seven or ten days, and a moment of testing in the case of continuation of detention. These proposals however did not lead to an amendment. In 1997 Sipkes (GL) proposed an amendment in which she pleaded for a review within a week and monthly reviews after that. After all, the long term of the first judicial review "bears no relation to the criminal proceedings concerning temporary detention"[77] (where a test should be conducted within 3 days and 15 hours at the latest). Following this recommendation and recommendations from an international congress on aliens detention, State Secretary Cohen (PvdA) proposed in a policy memorandum on immigration detention to regulate by law that the test should be conducted after ten days at the latest and following this, every thirty days[78]. This was indeed included in the new Aliens Act 2000. The CDA remained critical with regard to this proposal

> because of the extra workload, the amount of extra personnel and financial means needed, as well as the coverage of this? How does this extra judicial procedure fit in the efforts to simplify the procedures and the combating of possibilities of extending a stay in The Netherlands through appealing or protesting against the decisions that have been taken?"[79]

D66, the VVD and the PvdA supported the proposal, and remarkably the VVD as well. Groen Links, D66 and the PvdA protested against the amendment coming into force with the new Aliens Act, as they believed that the legal position of the aliens needed urgent improvement. As MP Albayrak (PvdA) said: "[i]n the current situation the average criminal has more legal

76 Bill, Kamerstukken II 1975-1976, 13974, nr. 1-3

77 Amendment, Kamerstukken II 1997–1998, 25 172, nr. 8

78 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 1

79 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 3

certainty than an illegal alien that has been detained in aliens detention. This situation has to end as soon as possible"[80].

According to Sipkes (GL) 43% of the cases of alien detention were cancelled by either the IND (Immigration and Naturalization Service) or the judge within six weeks due to a lack of legal grounds[81], and the State Secretary reported in the policy memorandum that out of the 6000 cases that were treated in court, 2000 saw the detention measures being suspended by the IND several days before the trial. A cause for this could be that the Immigration and Naturalization Service concluded that legal mistakes have been made, and that there is no realistic prospect of expulsion or that the alien has already returned (so not all suspensions of detention are connected to unlawful detention). Out of the remaining 4000 cases 1000 cases saw the detention measure suspended because of legal mistakes, no realistic prospect of return and the finding that the IND or the Aliens Service did not make sufficient efforts to realize return[82].

At the first of April 2001 the amendment to advance the judicial review was implemented. However, at the start of 2003 the minister of Alien Affairs and Integration, Nawijn (LPF) submitted a proposal suggesting an amendment to the law in which he proposed to have the notification of the judge to take place after a maximum of 28 days and the trial concerning it to take place at the fourteenth day after the notification at the latest, and suspension of the monthly test because the cases of detention put to much pressure on the capacity of the Alien Chambers (40% of the total capacity available for the cases of aliens) [83]. This lead to strong protests by the SP, GL, and initially D66 as well. The D66 MPs were of the opinion that it was "unacceptable that problems with capacity would affect basic principles of justice like the principle of legal protection" [84]. In the end only GL and the SP voted against the proposal[85]. Although the minister acknowledged that the level of legal protection would be reduced, he mentioned that it was still in accordance with section 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because the alien could always file an appeal against detention[86]. Remarkable is that according to the National Budget for 2004 the judicial review was amended "to increase the effectiveness and efficiency of the immigration detention"[87].

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80 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 5

81 Amendment, Kamerstukken II 1997–1998, 25 172, no. 8

82 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 6

83 Explanatory memorandum, Kamerstukken II 2002–2003, 28 749, nr. 3: 1

84 Report, Kamerstukken II 2002–2003, 28 749, nr. 4: 2

85 Votes, Handelingen II 2003-2004,nr. 37: 2604-2605

86 Explanatory memorandum, Kamerstukken II 2002–2003, 28 749, nr. 3: 3

87 National budget, Kamerstukken II 2003–2004, 29 200 hoofdstuk VI, nr. 2: 30

In this case the legal protection of the alien depends on the quality and timing of the information that is given on the possibility to personally file an appeal against aliens detention. According to the 1998 policy memorandum the small number of such appeals could be explained by factors such as unfamiliarity with the possibilities of appeal, poor legal aid, language barriers and distrust towards the legal profession and courts[88]. During the discussion on the proposal for changing the judicial review Dijsselbloem (PvdA) voiced his concern about the quality of the counseling and Vos (GL) proposed a motion in order to legally ensure that the standard provision of information should be provided to people in aliens detention in a language they understand[89]. Minister Verdonk (VVD) advised against this motion, because this was in her opinion already the standard procedure. To the question of Vos (GL) how could be explained that many people are unaware of the possibilities for appeal and that it depended on their lawyer whether they received this information, the minister answered that she does not have any reason to doubt the standard procedure[90]. The motion was only supported by the SP and GL[91].

The amendment has led to the current situation that it can take up to 42 days before the judge delivers a verdict on the legitimacy of the detention, whereas it takes a maximum of three days and 15 hours under criminal law. This also means that often the alien will take no initiative in order to appeal, given the fact that “in a large number of cases the detention is suspended in the first month after an alien is detained, as a rule because the alien will be deported from The Netherlands”[92], which means that in many cases there is no possibility for a judicial review as the alien is no longer in The Netherlands. It also means that without the periodical tests, the people in alien detention depend on civil servants acting in name of the minister for suspension of detention after the obligatory judicial review.

Another point that has been repeatedly discussed in the parliamentary history of aliens detention is the duration of the detention.

88 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 6

89 Motion, Kamerstukken II 2003–2004, 28 749, nr. 7

90 Proceedings, Handelingen II 2003-2004, nr. 35: 2476

91 Votes, Handelingen II 2003-2004, nr. 37: 2605

92 Report, Kamerstukken II 2002–2003, 28 749, nr. 5: 3

5.4.2 Duration of the detention

The “purpose of detention is expulsion. In case this can no longer be realized, or when the chance of expulsion has substantially decreased, it must be stopped”[93].

Immigration detention does not have a maximum duration, except for aliens detention based on section 59 subsection 2 Aliens Act 2000 which concerns detention of those for whom “the for return essential documents are available, or available on the short term” and which has a maximum duration of four weeks. For the application of immigration detention to families with underage children and asylum-seekers maximum terms have been established in the Aliens Circular[94], but in exceptional cases deviation from these terms is possible.

With the establishment of section 26 as well as the discussion on the policy memorandum on aliens detention in 1984 the unlimited duration was no subject of discussion. The VVD and the CPN did worry about the occasionally too long duration of immigration detention[95], but there were no fundamental objections to the lack of a maximum duration. During debates on the amendment which leads to article 7A, all parties were critical of the unlimited duration of border detention, but only the PvdA, the PPR and the PSP voted in favor of an amendment setting the maximum duration at one month[96]. Later on voices were occasionally raised within the PvdA, SP and GL[97] in support of setting a maximum duration. Halsema (GL) and Albayrak (PvdA) pleaded, with exception for immigrants who purposely obstruct expulsion, for a maximum duration of three months because most expulsions occur within that period[98].

The responsible politicians have always resisted a maximum duration of immigration detention with a motive that has not changed. In 1988 minister Korthals-Altes (VVD) was opposed to this because it would be a “premium on delay” [99]; in 2000 State Secretary Cohen (PvdA) resisted because uncertainty about the duration can contribute to cooperation of the alien with expulsion[100]; in 2008 State Secretary Albayrak (PvdA) defended the unlimited immigration detention in front of the Committee for the Prevention of Torture and

93 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 9

94 Aliens Circular, A6/1.6; A6/2.7; A6/5.3.5

95 Report, Kamerstukken II 1984-1985, 18737, nr. 3

96 Proceedings, Handelingen II 1988-1989, nr. 37: 2300

97 Report, Kamerstukken II 1999-2000, 26 732, nr. 7: 34; Report, Kamerstukken II 1999-2000, 26 732, nr. 7: 96

98 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 2

99 Proceedings, Handelingen II 1988-1989, nr. 37: 2284

100 Proceedings, Handelingen II 1999-2000, nr. 85: 5498

Inhuman or Degrading Treatment or Punishment (CPT), which had recommended the adoption of a maximum duration as follows:

> I am not willing to … set a maximum term for the duration of the measure. In case of a predetermined maximum term there is a chance that, knowing this, the alien will cooperate with the effecting of his return to a lesser degree, because he knows that the return is not effected easily without his cooperation and cancellation of the measure follows if he sits out his term. The alien can also shorten the duration of the measure by cooperating with his departure[101].

She mentioned as well that when the future EU Return Directive would set a time limit, The Netherlands of course would implement this.

Jurisprudence has led to the current policy for aliens detention under section 59 subsection 1. This policy is that "after six months of detention the interest of the alien in being released in general outweighs the general interest in keeping the alien detained in order to further expulsion"[102]. Criteria for shortening or prolonging the duration of six months have been added in the Aliens Circular[103]. For instance not cooperating on the expulsion can result in a longer detention. However, eventually also an alien that does not cooperate on expulsion will be released due to the lack of the prospect of expulsion. Against the liking of Kamp (VVD):

> But people who succeed to prevent expulsion by simply not cooperating, they should be detained until they do cooperate. As far as I am concerned, that may take 20 years. The point is that they are able to effectuate their immediate release, by means of cooperation[104].

The formulation in the Aliens Circular concerning section 6 is noncommittal, namely "a measure with deprivation of liberty with a duration of more than six months should be subject to strict reviews"[105]. Criteria on the basis of which this review should be conducted are lacking.

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101 National budget, Kamerstukken II 2007–2008, 24 587 en 31 200 VI, nr. 245: 7

102 Aliens Circular, Vc2000 A6/5.3.5 ; also see Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1

103 Aliens Circular, Vc2000 A6/5.3.5 ; also see Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1

104 Report, Kamerstukken II 2008–2009, 19 637, nr. 1237: 34

105 Aliens Circular, Vc2000 A6/2.7

The Return Directive[106] obligated the Dutch government to amend the Aliens Act 2000 with regard to the duration of immigration detention. On December 24, 2010, the amended Act will come into effect. It limits the duration of aliens detention to six months with the possibility of extending it to 12 months in the case of a lack of cooperation on the part of the alien, or if documentation from third countries is being waited for[107].

Another often discussed and often criticized point in the execution of alien detention is the regime. This will be the subject of the next paragraph.

5.4.3 Regime

The regime in immigration detention centers has always been subject of discussion in the parliamentary history of immigration detention. The criticism that is mostly put forward is that this regime has a criminal character while it concerns an administrative measure. Especially the PvdA, GL, the SP, and to some degree D66 regularly brought the subject to attention by asking questions in parliaments or during discussions and consultations.

1965-1994

Already before 1984 the government promised to investigate the possibility for the reception of aliens outside of custody institutions or police stations, which again received attention because of the 1984 policy memorandum on immigration detention. The legal decrees relevant to the regime are stated in the memorandum:

> No further limitations apply to aliens who have been placed into custody other than those that apply to individuals who have been placed into provisional custody under the Criminal Code (section 26, subsection 4, Aliens Act). This is further specified in the Aliens Decree (section 84, subsection 3) which states that no other limitations apply to aliens other than those that are required by the goal of detention and order on the place of implementation[108].

106 Return Directive 2008

107 Explanatory memorandum, Kamerstukken II 2009–2010, 32 420, nr. 3: 15

108 Memorandum, Kamerstukken II 1984-1985, 18737, nr. 2:6

This last provision, wrote State Secretary Korte-Van Hemel (CDA), makes sure that "with regard to the detention of aliens a more flexible regime" *can* (my italics) be applied than in case of criminal detention[109], but it should fit within the prevailing regime. But she also remarked that according to the Aliens Act immigration detention should take place in Custody Institutions[110], which according to Haas-Berger (PvdA) leads to all limitations that apply to those subject to criminal detention, as they are subject to the same rules[111]. That is why the CPN, PVDA and D66 pleaded for a different reception service.

The parliamentary history concerning the regime shows that the responsible ministers always refused to provide a guarantee for a flexible regime written in law. Van Es (PSP) was critical of this attitude of the ministers in 1988:

> The soothing remarks by the State Secretary saying the bunk beds, the telephone and the ping-pong table on Schiphol-Oost are more than the minimally required, do not seem like a guarantee to me. It says nothing about possible new accommodations, formulating it euphemistically, on Zestienhoven and in Rotterdam harbor … It says nothing about rights during detention, which is of course much more important[112].

In 1989 it is once more repeated by the government in response to questions asked in parliament by the PPR, PSP and D66 on the matter that a flexible regime applies to immigration detention[113]. Following tensions in a Custody Institution used for immigration detention in State Secretary Kosto (PvdA) ordered the formation of a study group (commissie Boei) in 1990 which had to formulate a framework for immigration detention in The Netherlands with special attention for the regime and the buildings[114]. During a parliamentary debate Kosto referred to this when he brings up the subject of the construction of a "special facility for aliens". From the construction of this new facility

> one can derive the strongly present intention to construct humane facilities for people who in most cases have not committed any crime or offense. This

109 Memorandum, Kamerstukken II 1984-1985, 18737, nr. 2: 7

110 Report, Kamerstukken II 1984-1985, 18737, nr. 3: 3

111 Report, Kamerstukken II 1984-1985, 18737, nr. 3:2

112 Proceedings, Handelingen II 1988-1989, nr. 37: 2242

113 Parliamentary questions, Kamerstukken II 1988-1 989, nr. 1675

114 Report, Kamerstukken II 1989-1990, 21 300 VI, no. 11: 22

> intention has even taken shape in a special report [from the Commissie Boei, GS], that I have received with approval[115].

In 1993 the Regulation for Border Accommodations was implemented[116]. This Regulation was laid down in a Decree in 1993 and is still into force. It guarantees a more lenient regime in detention centers where detention under section 6 (7A at that time) is executed.

For the to be amended Aliens Act (what became the Aliens Act 1994), the government suggested to remove subsection 4 of section 26 (see note 108), which was strongly objected by Van Traa (PvdA) as this subsection was a guarantee for the regime being of at least the same quality as that for provisional custody. He proposed an amendment for bringing back this provision into the section of the law. He blamed the State Secretary for "keeping options open for shaping the regime in a manner to his liking"[117]. But according to State Secretary Kosto there is "no intention in this bill, other than the purification of the detention from the criminal aspects, and enable those liberties which are possible within immigration detention"[118]. Minister Hirsch Ballin (CDA) also justified the proposal in this manner and ensured that it would not imply a worsening[119]. The members of government also voiced their preference for the execution of immigration detention in detention centers where the lighter regime of the Regulation for Border Accommodations applied[120]. However, this statement did not lead to concrete guarantees either.

Later on the government proposed to replace subsection 4 of section 26 by the following: "By means of Order in Council rules are set concerning the regime to be applied to detained aliens, which include the necessary measures for control"[121]. This formulation was finally adopted.

Doubt is cast on the legitimation that the members of government gave for this amendment, namely to take immigration detention out of the criminal sphere. In a discussion with Leerling (RPF, Reformed Political Federation, orthodox christians), who was a proponent of a different type of reception centers for unauthorized immigrants, Kosto defended half a year later the fact that aliens detention concerns detention and therefore simply took place in a Custody Institution:

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115 Proceedings, Handelingen II 1991-1992, nr 18

116 Reglement Regime Grenslogies 1993

117 Proceedings, Handelingen II 1992-1993, nr. 91: 6783

118 Proceedings, Handelingen II 1992-1993, nr. 91: 6784

119 Proceedings, Handelingen II 1992-1993, nr. 89: 6653

120 Proceedings, Handelingen II 1992-1993, nr. 91: 6784

121 Memorandum, Kamerstukken II 1992-1993, 22 735, nr. 6: 3

> I agree with him [Mr. Leerling, GS] that the aliens are in no way detained on criminal grounds, but in immigration detention based on section 26 of the Aliens Act. In principle this is done in a Custody Institution, but I do not really see any other way. It concerns detention. The department of justice is the department that should do this. You can not trust this to another department, because they do not like locking up there and they do not have the task of locking up[122].

1994-2003

Letter on immigration detention 1998

In 1998 a letter to the parliament appeared from State Secretary Cohen (PvdA) concerning the detention of aliens, following the promise of the previous State Secretary Kosto who believed that immigration detention should play a central role in the policy on immigration and asylum-seekers. In this letter it was stated that recommendations by an international conference on immigration detention should be take into consideration[123]. These recommendations had as a point of departure "the special character of immigration detention, which should be expressed in the way in which it is executed"[124]. From this parliamentary document it can clearly be derived that a connection with criminal law is strived for: "[c]onsidering the administrative character and the goal of immigration detention it is logical to have it executed under at least the standard regime that applies to those detained on criminal grounds[125]. In the description of the desired regime the special character is shaped not by placing emphasis on a flexible regime, but on efficiency, namely a 'smooth course' aimed at return of the immigrant:

> In order to let immigration detention go smoothly, though in a responsible way, a regime that is adapted to the population is necessary. That regime is characterized by regular contacts with department staff, aid personnel and service personnel, and regime activities that can contribute to the return of the

122 Proceedings, Handelingen II 1993-1994, nr. 38: 17

123 Proceedings, Handelingen II 1997-1998, nr. 39: 3111

124 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 7

125 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 7

alien. For a successful actual expulsion knowledge of the relevant facts and circumstances concerning the individual alien is important[126].

At that moment there were return officials present at two locations, who had to support an alien in, and stimulate an alien to effectuate his return, and in all facilities return activities such as schooling could be offered.

The regime that was in force is described in the letter, namely the regime of limited community, corresponding with the standard regime for regular Custody Institutions. Put briefly, the regime means that the aliens can take part in activities together (labor, recreation, sports, airing). During the other periods the aliens stay in a space of residency, which can be an individual cell or a space for multiple people[127]. According to the State Secretary it is, taking into account the current situation, "logical" to enforce this regime as a standard for the detention of aliens[128]. Why this is logical is not explained.

In the letter it is considered to differentiate between regimes based on the degree of cooperation lent by the alien to his expulsion. Taking into account the behavioral and psychological conditions of the alien, a regime of general community should be possible for those willing to lend their cooperation to their expulsion. Detainees under this regime will stay in living and work spaces together and take part in activities together, except for the periods in which they have to stay in their space of residence. For people with psychological or behavioral problems an individual regime could be applied[129].

During the discussing of the letter in parliament the PvdA, D66, and GL pleaded for a regime that would take into account the nature of immigration detention, in the sense that it would become a more flexible regime. MP Albayrak (PvdA) pleaded for a more flexible regime under which the alien "is no longer subject to limitations other than those that are essential", like the regime under the Regulation on Border Accommodation[130], because it concerns a measure and not a punishment[131]. Halsema (GL) pleaded for a regime without a cell system, comparable to reception centers but with closed doors[132]. This proposal was rejected by State Secretary Cohen (PvdA) because it was, even if only regarded from the perspective of

126 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 7

127 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 7

128 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 10

129 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 10

130 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 5

131 Proceedings, Handelingen II 1998-1999, nr. 57: 3597

132 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 2

control, unachievable[133]. Halsema also proposed a motion for a more fitting and humane regime[134].

Letter on the regime in immigration detention 2001

Following the criticism on the regime a letter from State Secretary Cohen appeared two and halve years later, in which he further explored the possibilities offered by the Penitentiary Principles Act for such a regime. According to the letter, a regime should offer as much internal freedom of movement as possible, sufficient possibilities for security measures to guarantee the order and safety, and should where possible contribute to the return of the immigrant. The regime should make extensive security measures possible, like the application of violence, placement in isolation, disciplinary punishment, and forcing to undergo medical treatment. The legitimacy of this necessity is given by pointing at the population in immigration detention, namely aliens who have resided in The Netherlands illegally, who are not seldom arrested and placed in aliens detention after committing a criminal offense, and who are often restless and unruly because of the prospect of expulsion. Under the Regulation on Border Accommodation these security measures are not possible. When somebody causes problems in facilities where the RBA applies, he is transferred to a facility where more extensive security measures are possible. In order to make these measures possible under the RBA an amendment to the law would be necessary, something that the State Secretary rejected[135].

The letter also provided an overview of more flexible measures that have been adopted in the facility for immigration detention in Tilburg. The conclusion of the letter is that a more flexible regime is possible under the regime of general community of the Penitentiary Principles Act, under which possibilities of the limitation of basic rights are kept open in the case of security issues. This broader regime was more expensive, with as a consequence that a more flexible regime was still not possible in all facilities for aliens detention[136].

Following the letter the VVD resisted a liberalization of the regime and wanted a more sober regime as the standard (more sober than the current standard regime of limited community), except for use as a reward for cooperation.

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133 Memorandum, Kamerstukken II 1999-2000, 26 732, no. 7: 191

134 Proceedings, Handelingen II 1998-1999, nr. 57: 3598

135 Letter State Secretary, Kamerstukken II 2001-2002, 26 338, no. 6

136 Letter State Secretary, Kamerstukken II 2001-2002, 26 338, no. 6: 6

> The VVD parliamentary group would like to make maximum use of the existing differentiations within the detention regime as a means of rewarding cooperating aliens. The point of departure should the sober regime, after which the alien can promote to the regime of limited community and later on to the regime of general community[137].

The CDA opposed a more flexible regime as well, and together with the VVD she proposed a motion in which they asked the government not to adopt this regime. They motivated this by pointing out that a flexible regime would encourage criminal illegal aliens to obstruct expulsion even more often than they do already, and that it would cost another six million guilders annually[138].

The State Secretary was himself not a proponent of a system of bonuses because of the nature of immigration detention and because of the practical difficulties in determining whether someone is cooperating[139].

From 2004 onwards

After the letter about the regime a few more developments took place concerning the regime. Starting in 2004 the entire prison system was subject to substantial budget cuts, which led to more sober programs and accommodation within immigration detention[140]. The initiatives to improve the detention regime as expounded in the letter of 2001 were stopped. Furthermore, as a consequence of the intensified return policy two expulsion centers were constructed in order to meet capacity requirements. In the expulsion centers there was a “very sober regime and limited facilities”, which according to the minister was justified because the aliens would only be there for several days before they were expelled. Following questions by Dijsselbloem (PvdA) regarding the limited space for movement and airing and the fact that people were, at times, in these centers for over two months, minister Verdonk (VVD) answered in a way that is characteristic for the way that the government had responded to criticism on the regime in immigration detention: “[t]he largest part of the day those involved

137 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 4

138 Motion, Kamerstukken II 2001–2002, 26 732, nr. 99

139 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 9

140 Explanatory memorandum, Kamerstukken II 2003–2004, 29 200 hoofdstuk VI, nr. 2: 39

can freely walk about the expulsion center. I have been there and I must say the atmosphere is very friendly" [141].

Detention boats were also taken into use. Following a visit to one of these boats the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[142] concluded that the living conditions were acceptable but not for a prolonged stay. Because of the lack of space and fresh air she ordered the government to discontinue use of the boats as soon as possible[143].

Letter on the regime of immigration detention 2010

Following critical reports aliens detention received renewed political attention. Under the responsibility of State Secretary Albayrak (PvdA) and minsiter Hirsch Ballin (CDA) several changes were made concerning the regime which were laid down in a letter of June 2010. The goal of the reorientation was, according to this letter,

> to investigate how on the one side the effectiveness can be enhanced and on the other side justice can be done to the special character of aliens detention. …The purpose is a regime that contributes to the alien being capable to arrange material and emotional affairs as much as possible, as far as these are needed for the departure from The Netherlands[144].

Just like in the 1998 letter the concern is not so much for a more flexible regime, but for improving efficiency. The minister indicated that the way in which detention is executed,

> will show similarities with the way in which people are detained based on criminal grounds. There is no way of avoiding necessary security and control measures which will inevitably go hand in hand with the physical and regime attributes which characterize a detention location[145].

141 Parliamentary questions, Handelingen II, nr. 25: 1703

142 Part of the Council of Europe

143 Letter of minister, Kamerstukken II 2007-2008, 24 587 en 31 200 VI, nr. 245: 7

144 Letter minister, Kamerstukken II 2009–2010, 19 637, nr. 1353: 2

145 Report, Kamerstukken II 2009–2010, 19 637, no. 1353: 1

Despite the regime not being earmarked as structurally poor during the debate on the reports (a debate in which the VVD and PVV were not present), the PvdA and the CU believed there were too many incidents. Anker (CU) said that people under a tougher regime, than they may deserve, and that there happened too many incidents[146]. Later on he said: "[o]verall I believe it goes reasonably well, but that every now and then, incidents occur that can simply not be allowed, … I do not believe we have appalling circumstances here in The Netherlands"[147].

Spekman (PvdA) emphasized that following the reports a lot has been improved, but he still worried about the treatment in prisons. "There are numerous examples, that I have heard again today, which cause me to wonder why we do things this way[148]". He also believed the regime for single minor aliens to be too tough. GL and the SP believe the improvements in the regime do not go far enough and urgently wanted a fundamental change in the execution of the Aliens Act. As Azough said: "The State Secretary can simply not maintain the opinion that changing from one hour of visiting hours to two hours is a fundamental change in the regime of aliens detention" [149].

Opinions within the CDA seem to be divided. During the debate Van Haersma-Bruna remarked that immigration detention is expensive "and in response to the reports more possibilities for the aliens have been added which caused it to be even more expensive", from which one can derive that in his opinion the regime offers too many possibilities for the alien at too high costs. His fellow party member and former MP believed the regime in immigration detention does not suffice, something he explained on financial grounds. "

> It should not be allowed. They remain changelings in whom there is little interest. …The regime is 'degrading' is not something I want to say, but it is not right. There are some analogies with criminal law[150].

Van de Camp (CDA) thoroughly criticized the critical reports: "I believe it is quite a term to use against the Dutch government, I think it is unheard of, like we literally tighten the thumbscrew on people". Yet he indicated to be a proponent of detention facilities with a large internal freedom of movement in order to distinguish immigration detention from criminal detention, "because I do agree with the leftwing party groups in parliament on a failed

146 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 8-9

147 Personal interview

148 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 4

149 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 8

150 Personal interview

asylum-seeker not being a criminal, unless he has committed a crime. In case of illegal aliens things are already slightly different"[151].

Criticism on the regime can not expect much sympathy on the part of the VVD either. On similarities of the regime of aliens detention and of criminal detention Visser (VVD) asked: "Is that a problem? Can it not be similar, should it have been a hotel? I find that to be a very strange way of reasoning"[152]. He also believed The Netherlands has no reason to be ashamed for her detention facilities. In another remark it emerges that the regime can be viewed as a means of pressure with regard to cooperation to the expulsion, like we saw that for the bonus system. "Custody, detention should serve the goal it aims for, and it should be as short as possible, so all facilities should have that purpose, and also the lack of facilities". This thought could also be found with Kosto (PvdA) concerning border detention: it can last a very short time because the alien can simply leave, so the facilities can be sober.

Summarizing can be said that the parliamentary history concerning the regime shows that the government always refused to provide guarantees for a flexible regime written in law, except the Regulation on Border Accommodation which applies only to some detention centers. Several times the responsible members of government from the CDA, VVD and PvdA emphasized that already a lenient regime applied to immigration detention, despite criticisms of PvdA MP's, GL, the SP and the CU that the regime was not appropriate for immigration detention. Around the year 2000 and again around 2010 PvdA secretaries of state implemented policies which improved the regime for immigration detention. However, these policies are very vulnerable to budget cuts as the course of the policy written down in the 2001 letter showed. Furthermore the intentions behind these improvements can be questioned, because both times it was emphasized that improvements were aimed at increasing the willingness of the detainees to cooperate on their expulsion. The next paragraph deals with the issue of alternatives for immigration detention.

151 Personal interview

152 Personal interview

5.5 What are the views on alternatives for immigration detention by the distinct political parties?

5.5.1 The (in) effectiveness of immigration detention

The read thread throughout this research is the question why immigration detention is considered to be necessary in immigration policy. Therefore the question whether there exist alternatives to immigration detention is useful. The different parties indeed consider these alternatives, although with different intentions. The SP and GL have always been critical towards the use of immigration detention and have proposed several times other ways without detention to effectuate expulsion unauthorized immigrants. Sometimes they rationalized this by referring to the unproportionality of deprivation of liberty, and sometimes by referring to the effectiveness of detention which they found too low[153]. For these parties this is a proof that aliens detention is not used as an ultimate remedy[154]. Also the VVD, PVV, SGP and the CDA have often criticized the effectiveness of immigration detention but for these parties that led to proposals for more possibilities to deprive immigrants of their liberty. The PvdA, D66 and the CU tend sometimes to an extended use of alternatives without detention, but at the same time they support policy to intensify the use of pronouncement of undesirability. This policy includes detention as a criminal sanction.

Not everybody believes the effectiveness of aliens detention is insufficient. According to State Secretary Albayrak all the efforts made by the government in the case of aliens detention have led to an aliens detention that is effective:

> I do see that the way in which we apply aliens detention in The Netherlands has an effect on the actual return. The number of people that can be shown to leave through aliens detention is 60%, whereas the general departure percentage hovers round 40 or 45%. For aliens with criminal antecedents it even is as high as 70%. You can see that the means of aliens detention does have an effect on the actual expulsion. We should not forget that aliens detention only comes into

153 The percentages of the number of aliens that leave The Netherlands through immigration detention range from 50 to 66%, and 70% regarding illegal aliens with criminal antecedents (Proceedings, Handelingen II 2003-2004, nr. 35: 2474; Kamerstukken II 2003-2004, 29 344, nr. 19: 46; Kamerstukken II 2009–2010, 19 637, nr. 1331: 13). 153. In 1998 the most expulsions took place in the first month (58%). Between one and three months this percentage was 29%, after three months it was 13% (memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 11).

154 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331

> sight if people are unwilling to leave. A lot of people leave voluntarily and thanks to the policies of this cabinet their number has increased. People that would have been forced before now choose to depart voluntarily, often in cooperation with the International Organization for Migration (IOM). The approach during the aliens detention and the function of the return officials and the Return and Departure Service lead to an increasing willingness to cooperate. This is caused by the way in which they are handled and guided, and the configuration of the aliens detention[155].

Van de Camp does not see any problems in the numbers either, as he believes aliens detention is necessary "in the framework of prevention, do not forget the Dutch government will bite back if necessary". The system not being watertight, "that to me is part of the deal, I accept that as a drawback of our system, but that does not mean that I would like to leave the principle of aliens detention" [156].

Below the problematic character of alternatives without detention is discussed.

5.5.2 Views on the use of alternatives without detention

Is there an alternative?

The matter of 'alternatives' has always been problematic. This could already be seen in 1964, when aliens detention of refugees was legitimized by pointing out that detention is essential for preventing refugees from absconding. This also played a role during the 1988 amendment of section 7A. Most parties saw no alternatives for detention, as refused aliens would enter the Netherlands if not detained.

According to the PvdA and the PSP there existed indeed an alternative, namely accommodating aliens in an open reception center with the obligation to stay there. When they should not comply with this rule, detention under section 26 could still be applied. Minister Korthals Altes (VVD) and State Secretary Korte-van Hemel (CDA) argued against a similar proposal by the Supreme Court, because finding and arresting people is not as simple as detaining them[157]. Open reception facilities had indeed proved not to be an appropriate

155 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 13

156 Personal interview

157 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 7

alternative, they said. In 1982 aliens were detained in hotels surrounding Schiphol Airport, but that they absconded shortly before sentence was passed in their procedures. It also became too expensive due to the increasing numbers of aliens[158]. Looking back at the early 1990s, Kosto (PvdA) as well told that people disappeared immediately when had the opportunity to stay in an open center and could not be locked up in the border holding center[159]. Other alternatives were also not appropriate, as State Secretary Cohen (PvdA) sketched in 1998:

> the only alternative at this moment is the imposition of a notification obligation, but it will be clear that this instrument will not be sufficient in the case of aliens who already have the intention of evade measures of supervision. Other alternatives (such as the electronic house arrest known from criminal law) do not seem to be a realistic alternative, as there will be no stimulus for complying with the measure for aliens who reside in the Netherlands illegally. Moreover, one can not think of an effective sanction in the case an illegal alien does not comply. Normally that would no longer be possible in the case of people who have already evaded supervision. This means that aliens detention remains an essential instrument in a number of cases and that alternatives are not directly available[160].

After several critical reports on aliens detention the subject has enjoyed political attention again since 2008. Van Haersma Buma (CDA) pointed out the limitations of alternatives:

> Someone who cooperates with his return and clearly shows that he is doing everything in order to return, will not just end up in immigration detention. Someone who gives the impression that he does not want to participate will end up in immigration detention[161].

Exactly those people who will likely not cooperate with their return are placed in immigration detention, and exactly for this group alternatives would not work because they will use them to evade supervision. This problem became visible in 2008, when Chinese requested asylum en masse while they had already stayed in the Netherlands illegally for a long time. The VVD

158 Explanatory memorandum, Kamerstukken II 1988-1989, 20 972, nr. 3: 4

159 Personal interview

160 Memorandum, Kamerstukken II 1998-1999, 26 338, nr. 1: 2

161 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 10

and PVV both pleaded for locking up this group until expulsion had been effected, as a large part of the group already had absconded again. Anker (CU) also believed they should not be allowed to return to illegality. To the question of Kamp (VVD) of whether this meant that he was of the opinion that all Chinese should be detained until expulsion, Anker answered that this was a question of conscience to him because he believed immigration detention to be "a difficult instrument"[162]. However, he also found it hard to determine what the alternative would be in this case and left the issue to the State Secretary to be solved.

Alternatives: balancing the interests of the state and the immigrant

Despite the problem of finding alternatives, Van Velzen (SP), Azough (GL), Anker (CU) and Spekman (PvdA) believed that alternatives like working on return in the own environment of the immigrants should be used more often, and that new possibilities for alternatives should be investigated. Anker (CU) and Azough (GL) held the opinion that immigration detention is applied routinely and that alternatives based on the individual tests are used too little. As a result of the lack of data on the use of alternatives the State Secretary "comes of well with the assumption that immigration detention is used as an *ultimum remedium*"[163], according to Azough. Spekman (PvdA) argued for the use of alternatives because there are "people for whom the chance of fleeing is less than for others, or for whom the danger to society is not present at all"[164].

The State Secretary Albayrak (PvdA) was already working on alternatives at that time and still is. Alternatives for certain target groups are already being applied "when it is possible without risks"[165]. It concerns mainly families with underage children and failed asylum-seekers who still have a right to relief[166]. For single underage aliens without a criminal past an alternative will be investigated[167]. During a working visit to the United Kingdom pilots for alternatives executed over there have been discussed, but they did not prove to be effective. She also enquired to the methods used in Australia, which lead to an increase in voluntary departures[168]. It is not yet known if these investigations will lead to a policy change. The State Secretary thought electronic supervision not suitable as alternative, as an alien has a

162 Proceedings, Handelingen II 2007-2008, nr. 73: 5121

163 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 6

164 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 28

165 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 22

166 Letter minister, Kamerstukken II 2006–2007, 29 344, nr. 61

167 Letter minister, Kamerstukken II 2009–2010, 27 062, nr. 65: 5

168 Letter minister, Kamerstukken II 2009–2010, 19 637, nr. 1358

large interest in ‘disappearing’. It is suitable for those detained on criminal grounds “who are re-socializing or for whom the nature of their offence poses so little risk to society that we are willing to take the risk of them running off”[169]. For people who are placed in immigration detention se is unwilling to take this risk.

The greatest difficulty in the case of alternative methods appears to be the consideration of interests. The question here is what number of ‘disappearances’ is deemed to be acceptable. For instance Van Haersma Buma (CDA) was of the opinion that the use of alternatives is acceptable when the effectiveness in terms of expulsion is at least as high (60%) and “the other 40% does not completely disappear but stay nearby"[170]. A notable remark, as the 40% that are now released onto the street from immigration detention also ‘disappear’. Like the SP, GL, PvdA, and CU argue, inquiries and concrete data are necessary in order to find a balance between the interest of the state in keeping the alien available for expulsion, and the interest of the alien to exercise his right to liberty.

Whereas some parties would like to make less use of detention, other parties would like to make more use of it, for example by criminalizing illegality a crime and by declaring people undesirable. The SP and Groen Links were sometimes asked what they would want, such as for example by Kamp (VVD):

> I understand that ms. Halsema is against pronouncements of undesirability for making people who do not have permission to stay in the Netherlands leave the country. She was also against the Linking Act and against criminalizing illegal stay. What would she want to do in order to move people who have been refused to leave the country when they are not doing this?[171].

Halsema (GL) gave him a number of examples in response, like adding return provisions in trade agreements and the removal of the expulsion stamp from the passports and referred him to the proposals made by GL for furthering return. Van de Camp (CDA) asked several years later: “Can I then ask ms. Azough what her sanction would be for not reporting? She does not mean to give me the impression that she approves of people simply not reporting, without there being any consequences”. Although Azough (GL) answered that there should of course be sanctions she could not indicate which there should be[172].

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169 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 26

170 Report, Kamerstukken II 2009–2010, 19 637, nr. 1331: 29

171 Report, Kamerstukken II 1999-2000, 26 732, nr. 12: 17

172 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 19

5.5.3 Criminalization of illegality

Criminalization of non-lawful stay has already been considered in 1965, but it has not been adapted. Reasons given were that not every non-lawful stay is illegal and because it was not yet necessary as it was the intention

> to generally obligate aliens whose stay is not allowed according to those sections to immediately report to the police (section 17, second subsection). Not complying with the obligation to report is then punishable in accordance with section 44[173].

Since that time it has been a recurring consideration and desire since 1999 of the VVD, the CDA and now the PVV[174]. Below some arguments against criminalization are discussed.

Arguments against criminalization of illegal stay

First of all, one can be against the criminalization of an illegal stay as a matter of principle. As State Secretary Cohen (PvdA) said in response to the proposal for an inquiry into criminalization by Wijn (CDA) and Niederer (VVD): “I can not imagine that he is of the opinion that he believes that every means should serve the intended purpose. ... In the light of the proportionality that is connected with this issue[175]”, he believed there were enough means available in the law for fighting illegal stay. Anker (CU) was also certain of this: “immigration detention [can] never be a proportional punishment. … Criminalization no go, it must be proportional” [176]. His predecessor Huizinga is of the same opinion, because “only a very small part of illegal aliens is involved in criminality”[177]. Halsema (GL) is of the opinion that criminalization is inhumane, but made this statement in the context of failed asylum-seekers who are unable to go back[178], and Nawijn believes that you should be careful with

173 Explanatory memorandum, Kamerstukken II 1962-1963, 7163, nr. 3: 18

174 Motions, Kamerstukken II 2007-2008, 25 883, nr. 126 en 19 637, nr. 1188

175 Proceedings, Handelingen II 1998-1999, nr. 57: 3599

176 Persoonlijk interview

177 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 16

178 Proceedings, Handelingen II 1998-1999, nr. 57: 3597

criminalization of former asylum-seekers as well, because “the only thing they ask for is asylum”, contrary to illegal aliens that are here while they know they are not allowed to be here[179].

Secondly there are practical arguments connected with the inability to enforce this criminalization, which are supported by almost every party. The internal discussion within the CDA and the VVD on criminalization is mainly about this point. In 2002 the government announced illegality will be penalized, under the responsibility of minister Donner (CDA), minister Remkes (VVD) and State Secretary Hessling (LPF)[180]. This plan was shelved, because “at this moment it has not been convincingly proven that criminalization of illegal stay will lead to an actual reduction of the problem”[181], which was motivated by minister Verdonk (VVD) as follows. First of all the criminalization (with imprisonment as a sanction) will lead to a prolonging of the stay, while in the case of fighting illegality ending the stay as quickly as possible is the priority. Secondly the enforcement and persecution policies would probably be selective, because of the “relatively small significance of the punishable behavior and the limited capacity of the Public Persecutor and police”[182]. European countries such as Belgium, Germany, Finland and France where illegal stay is punishable with sanctions that vary from a fee to imprisonment, indicate that the penal provision can not be maintained in practice. They prefer to use administrative measures for ending the stay[183].

This last reason leads to another argument against criminalization, as shown by the statements by Van de Camp (CDA). His parliamentary group has, following decennia of inquiries into criminalization, “no desire at all for a new policy of semi-tolerance, which will certainly create much confusion towards Dutch citizens again”[184]. This case of "symbolic politics”[185] thus again leads to an image of the Dutch government being unable to enforce her laws.

Fourthly “all sorts of conditions and mechanisms are connected with criminal law, for the suspect, perpetrator, protection and so on, that do not apply to what happens in the alien-chain. I do not believe it to be comparable with theft, murder, arson etc.”, states Visser (VVD)[186], opponent of criminalization because of this reason and because of practical reasons.

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179 Persoonlijk interview

180 Letters ministers and State Secretary, Kamerstukken II 2002-2003, 28 684, nr. 1: 24

181 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 23

182 Memorandum, Kamerstukken II, 2003-2004, 29 537, nr. 2: 7

183 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 23

184 Proceedings, Handelingen II 2007-2008, nr. 73: 5119

185 Proceedings, Handelingen II 2007-2008, nr. 73: 5119

186 Persoonlijk interview

Fifthly, an argument from GL, the SP, and the Pvda, criminalization does not solve anything. As stated by State Secretary Albayrak: "the penalty is always finite, unless you say: you should imprison them for life. I can imagine mister Fritsma making such a proposal, so I will do it before he can. …When you can not expel someone, then you do not solve the problem by detention either"[187].

Sixthly it is argued by the PvdA, the VVD minister and the SGP that the current instruments of immigration detention and declaring someone undesirable, the "indirect criminalization" as Van der Staaij (SGP) called it, offer sufficient means to the reduction of illegal stay, certainly when the use of it is intensified[188]. "There is a specific alternative for it, namely declaring someone undesirable", according to State Secretary Albayrak (PvdA)[189].

What are the arguments used by proponents? These are listed below.

Arguments for criminalization

The first reason to penalize illegal stay is because illegal means that it is against the law. Because the law must be complied with, there must be a sanction which requires criminalization, as Wijn (CDA) stated[190]. Although the SGP had practical objections, she had no objections of principle against criminalization.

> We are talking here about illegal unlawful behavior here after all. In the light of for example a zoning plan, a henhouse that is too large can already be dealt with under criminal law. That is why we should not pretend it to be special when unlawful behavior is penalized as an *ultimum remedium*[191].

Minster Verdonk (VVD) provided a second argument, namely the symbolic function[192]. As formulated by Wijn (CDA): "We do not want people to illegally stay here. Then criminalization has a preventive and a deterring effect"[193]. According to Kamp (VVD) it is then obvious that

187 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 33

188 Proceedings, Handelingen II 1998-1999, nr. 57: 3599; Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 34; Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 33

189 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 33

190 Proceedings, Handelingen II 1998-1999, nr. 57: 3594

191 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 18

192 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 23

193 Proceedings, Handelingen II 1998-1999, nr. 57: 3594

illegal stay is not accepted which means people “will leave instead of come. People are not waiting to be locked up”[194].

Thirdly criminalization also implies that it becomes impossible for illegal staying immigrants to obtain a residence permit. This discourages illegal stay further, as can be found in a motion of Kamp and Fritsma (PVV)[195].

The fourth argument is that immigration detention does not result in expulsion because “there are judges who say that these people can simply leave again when there is no prospect of expulsion. That problem has yet to be solved and I believe it to be evident that it can only be solved by criminalization” (Fritsma, PVV)[196].

The fifth argument of the VVD and PVV is that by criminalization all those staying here illegally are targeted at once, while in the case of declaring someone to be undesired alien everyone will first have to be identified and declared undesired individually[197].

So far there have not been any bills proposing illegal stay to be criminalized, and in parliament there has never been a majority that favored criminalization, based on the arguments mentioned above. However, recently is for the second time in a coalition agreement the desire expressed to criminalize illegality, “although the enforcement of it will in particular be aimed on criminal persons and persons who cause inconvenience in order to expulse them as soon as possible”[198].

The next paragraph deals with declaring someone undesirable.

5.5.4 Pronouncement of undesirability

At the same time as the call for criminalizing illegal stay emerged, the desire emerged in parliament for expanding the possibilities for declaring someone undesirable. This desire found wider support compared to that of criminalization as it was also supported by the PvdA. A pronouncement of undesirability can be imposed after an individual balancing of interests of the immigrant and the state. An immigrant who is declared to be an undesirable alien and knows or can suspect this, can be punished with a maximum of six month detention or a fine when he is found in The Netherlands. Furthermore he is registered in the Schengen Information System what implies that he can not legally enter the entire Schengen

194 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 10

195 Proceedings, Handelingen II 2007-2008, nr. 73: 5129

196 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 35

197 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 7

198 Coalition agreement, Kamerstukken II 2010–2011, 32 417, nr. 15

area. Also it is impossible to get a residence permit[199]. During the preparations for the new Aliens Act 2000 it were mainly the MPs of the PvdA and CDA who favored this expansion. MP Albayrak (PvdA) wanted to amend the Aliens Act so that "the possibilities declaring someone undesirable are expanded"[200], and the CDA wanted an imperative provision for the pronouncement of undesirability[201]. State Secretary Cohen (PvdA) was of the opinion that the existing possibilities were sufficient and resisted a standardized declaring of undesirability, because he attached importance to an individual consideration of interests[202].

Some years later a collective motion was proposed by Dijsselbloem (PvdA), Van Fessem (CDA), Nawijn (LPF) and Visser (VVD) for a quicker pronouncement of undesirability in the case of illegally stay, for a longer maximum prison sentence for this and for immediately expelling undesired aliens after detention. The SGP also favored this. Van Fessem, Visser and Nawijn proposed also a motion for a standard application of the pronouncement of undesirability to illegal aliens found in the Netherlands and who have been told to leave the Netherlands before. Minister Verdonk (VVD) could imagine herself supporting such a motion, but the feasibility should be investigated seeing the large burden it would pose for the IND. She advised against the second motion, as she believed the maximum of six months of imprisonment to be enough and expulsion was already the goal[203]. She did announce an intensification of the use of the pronunciation of undesirability in 2003, though this concerns "illegally residing persons that are criminal and/or disturb public order"[204]. The RPF supported this policy[205].

Though the criteria based on which someone can be declared undesired remain unchanged, the pronouncement of undesirability has been applied more broadly in recent years. Where it first mainly concerned illegally staying aliens that committed serious crimes, over time it was used more and more, also in the case of less serious crime[206]. It was the intention of State Secretary Albayrak (PvdA) in 2008 to consequently declare aliens undesirable who "repeatedly commit" offences considered criminal in accordance with the aliens act. This for example concerns the non-compliance with a duty to report[207]. The Aliens Circular specifies this further: it concerns "an offence determined to be punishable in

199 IND 2007; Kuijer & Steenbergen 2005: 559

200 Report, Kamerstukken II 1998-1999, 26 338, nr. 4: 6

201 Proceedings, Handelingen II 1999-2000, nr. 85: 5498

202 Proceedings, Handelingen II 1999-2000, nr. 85: 5498

203 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 5; 28; 34

204 Memorandum, Kamerstukken II 2003-2004, 29 344, nr. 1: 20

205 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 16

206 Report, Kamerstukken II 1999-2000, 26 732, nr. 12: 17; personal interview De Wit (SP)

207 Letter State Secretary, Kamerstukken II 2007-2008, 19 637, nr. 1207: 3

accordance with section 108 of the Aliens Act twice"[208]. She executed a pilot, which "is meant to investigate how much a more consequent and directed use than before of an existing possibility to pronouncement of undesirability is a suitable instrument for reducing illegal stay in the Netherlands in the case of this target group"[209].

Criticism on the intensifying of the pronouncement of undesirability

The use of the pronouncement of undesirability led to critical questions mainly on the part of the SP and GL[210]. This criticism is first aimed to the fact that people who are unable to return to their country of origin, through no fault of their own, can be declared undesirable. This could in their view, seeing the large consequences of a pronouncement of undesirability, not be legitimized.

What MPs of D66, the RPF and GPV (Reformed Political Alliance, orthodox christians) and GL asked themselves during the preparation of the new 2000 Aliens Act, was whether the consequences of a pronouncement of undesirability were proportional compared to the grounds on which people could be declared to be undesirable. According to State Secretary Cohen these consequences were proportional[211]. GL mentioned another consequence, namely that it is punishable to provide relief to those declared undesirable who are still present in the Netherlands[212].

Another point of criticism uttered by De Wit (SP) is that the pronouncement of undesirability is applied too fast, "also when there is no real ground"[213]. As Azough (GL) said:

> Such a declaration should, according to my parliamentary group, mainly be aimed to criminal illegal aliens and illegal aliens that disturb public order. The impression is now created – and it is more than an impression, because it also emerges in the letter – that one is already declared to be undesirable when one for example fails to report in time[214].

208 Aliens Act, Vc2000 A5/2

209 Letter State Secretary, Kamerstukken II 2007-2008, 19 637, nr. 1207: 3

210 see for instance proceedings, Handelingen II 1999-2000, nr. 83: 5355; personal interview De Wit (SP)

211 Memorandum, Kamerstukken II 1999-2000, 26 732, nr. 7: 209

212 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 19

213 Persoonlijk interview De Wit (SP)

214 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237:18

A third argument is that this measure is not a sensible measure for the reduction of illegal stay. As De Wit (SP) said:

> The intensifying of the use of the pronouncement of undesirability for aliens can only be effective when they can actually be expelled. As long as the possibilities to expelling are not fully present, we risk creating a sort of illegal alien-carousel in the criminal law chain. The capacities of the public prosecutor will be increasingly burdened, without this leading to results. As these people were expellable, then a pronouncement of undesirability would not be necessary for expelling them, would it?[215]

State Secretary Albayrak (PvdA) responded that she believes that it will have a positive effect on the number of expulsions. However, her answer to the question asked by Fritsma (PVV) of why only one third of the number of aliens declared to be undesirable have been expelled in 2007, the doubt of De Wit and his arguments against criminalization seem to be confirmed. These aliens have not been expelled, because they first have to finish their imprisonment, because they still reside in immigration detention in order to arrange expulsion, because they left the Netherlands by themselves or because they evaded supervision[216].

5.5.5 Criminalization of illegal stay versus pronouncement of undesirability

The points of view of the CDA, VVD and SGP on the one hand and those of the SP and GL on the other hand do not come as a surprise. They respectively support and criticize both criminalization of illegal stay and pronouncement of undesirability. The opinions of the PvdA and the CU[217] could be regarded as ambiguous at the first sight. They have always resisted criminalization for principal reasons, although the PvdA the last few years has emphasized practical arguments. On the other hand they have always been proponents of an intensified use of the pronouncement of undesirability, although concerns have been voiced in the past

215 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237:12

216 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237:27

217 In the analyzed documents D66 remained rather silent on this subject, except in 1999 when she declared itself against criminalization (proceedings, Handelingen II 1998-1999, nr. 57: 3596)

over these measures having such drastic consequences. While for Anker (CU) criminalization was “no go”, he supported the pronouncement of undesirability,

> because you do end up in the Netherlands and then it is reasonable to expect that you cooperate a little, if not during your procedure then in your time afterwards. … You can expect people to get stamps, you can surround them with all the harsh clauses well not too many hard clauses but they should simply stick to the rules, … we have that notification obligation for a reason.[218]

This raises the question what is exactly the difference between the seriousness of violating the law by the fact of being unauthorized in The Netherlands and of violating the law by for instance not reporting while having an obligation to notify. In both cases they do not stick to the rules. This however can also be explained by the value that is added to the individual judicial review in which interests are balanced, what is exactly the difference between criminalization and pronouncement of undesirability as is mentioned below. This reflects also how the different parties deal with the tension between the interests of the state and the rights of individuals, including unauthorized immigrants. Different views on this subject underlie the differences in views on immigration detention and related matters, as is discussed in the next paragraph.

5.6 *Individual r*ights versus the power of the state

The research data show that the different views of the political parties on immigration detention and possible alternatives for this instrument reflect different notions of the *Rechtsstaat*, the constitutional state. Important differences regard the function of the state that they assume to be the main one and the question whether non-citizens may lay a claim on rights. The views on the constitutional state came the most to the fore in debates preceding the amended Aliens Act 1994 and debates about policy to combat illegal residence, the main rationale behind immigration detention. Therefore the first paragraphs describe the different interpretations of the concept of the constitutional state in relation with this policy.

218 Personal interview

As can be derived from chapter four, issues which are related to detention are inseparable linked to the view one has on the rights of individuals versus the power of the state to restrain these rights. That subject is also treated in paragraph one.

5.6.1 Interpretations of the concept of the 'constitutional state'

As is discussed in paragraph 5.2, the main objective of immigration detention is to expulse immigrants who reside illegally in The Netherlands, or to prevent refused aliens to transgress the border. The necessity of a policy of restricted admission is a vision that is shared by all parties. Furthermore all parties believe illegal residence is a problem and recognize that illegality should be combated. Unauthorized stay of immigrants is thought of as a problem especially since the 1990's for a variety of reasons which is left aside here. The conviction of all parties that immigration must be restricted and illegal stay must be combated, underlie the broad support for the use of immigration detention. The agreement ends however with these basic conviction and the parties differ substantially in their views on the degree of restriction and on the means that are justified in policy to restrict immigration and combat illegal stay. A different interpretation of the concept of the constitutional state plays an important role here and this difference makes a distinction possible between the political right, left and center. While the VVD, the CDA and the PVV on the right side use this concept for pointing out the duty of the government to enforce the law, especially GL and the SP on the left side emphasize the duty of the government to guarantee (legal) protection of unauthorized immigrants. Although D66, the CU and the PvdA have always emphasized this protection in their rhetoric, their political behavior reflected concessions with regards to the guarantee of legal protection (for instance their support for a lack of a maximum length of detention), what places them in the political center.

Protecting the law or protecting the individual

The core of a (democratic) constitutional state is, according to Visser (VVD), that: "decisions are made based on majorities, and such decisions are respected. This includes the separation of powers and compliance with decisions made by the judicature"[219]. This results in the necessity of immigration detention:

219 Personal interview

> we have section 2 of the constitution: the law determines who is admitted to The Netherlands. And if in the law certain conditions are written, than you have to comply with these conditions and that is also a task of the government to maintain this. And if people do not comply with these conditions, than the *ultimum remedium* is detention, unfortunately[220].

This difference of opinion explains the differing views on the problem of illegally residing aliens. Seen from the perspective of the VVD this is an unacceptable problem in a constitutional state, because it leads to a vulnerable society "because illegal aliens will, as a consequence of their position, will be tempted to perform activities that poorly relate to what is written in the law" [221], and because it shows a government incapable of enforcing her own laws:

> We live in a constitutional state, and this means that people from outside of The Netherlands who are not Dutch, can not determine by themselves whether they live here. For this, in our country, in our constitutional state, they need a residence permit from the government, and when you have not applied for one, or when it has been refused, you will have to leave. If you do not do that you will have to be expelled. The government should consequently seek out illegal aliens and detain them until expulsion can be realized. This happens very little. This barely happens at all [222].

The CDA sees a means of enforcing the law by using immigration detention to prevent illegal residence. "In order to prevent illegality, and, to put this first, to ensure that judicial processes and judicial verdicts are observed, you have to help people by detaining them"[223].

The left-wing parties emphasize the protection that people need to have. Anker (CU) views illegality as a problem for the constitutional state, but then because it is not possible to offer these people protection and "you can not do anything at all with them"[224]. On the proposal of the VVD to check the identity in the case of demonstrations or the presentation of petitions to the government and to take unauthorized immigrants into immigration detention,

220 Personal interview

221 Report, Kamerstukken II 2003-2004, 29 537, nr. 15: 19

222 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 2

223 Personal interview former MP CDA

224 Personal interview

Azough (GL) responsed by pointing out that that "is absolutely not according to our vision on The Netherlands as constitutional state"[225]. De Wit (SP) shared this opinion, as fundamental rights of people are violated, rights which are laid down in the constitution and apply to everyone on the Dutch territory like freedom of demonstration[226].

Dilemmas in making policy when regarding both the protection of the law and of the individual

The making of policy in order to reduce the presence of illegally residing aliens involves dilemmas if one values both aspects of the constitutional state. State Secretary Cohen outlines this dilemma during the debate on the new 2000 Aliens act by pointing out the importance he attaches to certain values that form the core of the constitutional state and that are more important to him than combating illegality, on the other side he argues that you, as a government, can not allow a failed asylum-seeker to stay here, because those procedures are part of that same constitutional state"[227]. Doing justice to both elements of the constitutional state might mean accepting some social phenomena. Like the comparison Nawijn (LPF) made with prostitution, which has always been, and always will be there, although reducing illegality must be attempted[228]. When Kamp (VVD) made a number of proposals that seriously affect the rights of illegal aliens, like the denial of the right to education and medical care to illegally residing aliens, Middel (PvdA) brings in this dilemma:

> I wonder if mister Kamp is aware that you need a sense of reality. If you live in a country with open borders you should consider illegality as a given, an unfortunate given. Having a democratic constitutional state, which both his party and my party stand for, means you can not take a number of measures, that you would have to take if you do that which mister Kamp has in mind. This dilemma of what should be done and what we can in theory agree on, but which actually is impossible, because we fortunately live in a constitutional state and a country with open borders, is what I miss in his plea[229].

225 Tweede Kamer, vergaderjaar 2008–2009, 19 637, nr. 1237: 44

226 Tweede Kamer, vergaderjaar 2008–2009, 19 637, nr. 1237: 38

227 Proceedings, Handelingen II 1999-2000, nr. 85: 5495

228 Personal interview

229 Proceedings, Handelingen II 1999-2000, nr. 83: 5341

This dilemma is also reflected in the problematic character of alternatives without detention that is discussed in paragraph 5.5. The desire of the SP, GL and sometimes the CU to protect for instance the right to liberty of unauthorized immigrants, conflicts with the desire to enforce the Aliens Act.

The SGP pointed already in 1988, when section 7A was discussed, to the conflicting interests of the state versus the legal protection of individuals:

> In the recent legal literature there is much discussion about the question whether the law msut be characterised as an insturmnet or as a guarantee. In my opinion should it have both. My parliamentary party cannot escape the impression however that the immigration law – as this case shows – mainly more is considered as an instrument of government policy than as guarantee for the legal protection, also from the alien[230].

However, these concerns did not result in a more lenient stance of the SGP towards immigration detention and related matters, as is shown in this chapter.

Another issue what comes to the fore in considering the main tasks of the state is whether unauthorized immigrants deserve the same protection as citizens, what is the subject of the next sub-paragraph.

Rights of citizens and rights of unauthorized immigrants

What is important in the discussions on the interpretation of the concept of the constitutional state is which individual has a right to protection from the government. Especially during the debates preceding the amended Aliens Act 1994 this concept came often to the fore. According to Wolffensperger (D66)

> the quality of a constitutional state [can] not only be measured by the way it treats its own subjects. The quality of the constitutional state is equally, and perhaps especially, dependent on the safeguards which we grant to aliens", although concessions to these safeguards are inevitable[231].

230 Proceedings, Handelingen II 1988-1989, nr. 37: 2257

231 Proceedings, Handelingen II 1992-1993, nr. 87: 6537

Under Dutch law Dutchmen and aliens are not equal by definition, as Schutte (GPV) stated. Though this may not result in the curtailment of the rights of aliens residing in The Netherlands, it is the responsibility of the Dutch legislator to determine for every concrete situation what the position of the alien will be, albeit equal or not to that of Dutch citizens[232]. The question is "how far you can go in keeping the same principles as much and as well as possible taking into account the principle of equality"[233], said van Traa (1993). However, according to the VVD and the CDA there is a clear difference between people with and without a right of residence. As Anker (CU) said that the parties which have the word 'freedom' in their name (the PVV and the VVD) should not use the instrument of detention too easily, as "deprivation of liberty is not just something. We have a constitutional state which we are proud of. We must be careful with that"[234], Kamp (VVD) response was the following:

> Surely mister Anker understands that the world "freedom" does not apply to people that are in The Netherlands without a residence permit? Do we not have a constitutional state? People are only allowed to be in The Netherlands when they have a residence permit? When one does not have a residence permit, one is not free to reside in The Netherlands [235].

Van de Camp (CDA) pointed out this difference as well. Answering the question of whether detention is not a very heavy measure with regard to illegal residence, he answered:

> Immigration detention has everything to do with the nationality laws. And once you have Dutch nationality you are also included in the legal protection of the Dutch nationality. So when you commit fraud with welfare benefits, you can eventually end up in prison, but first it is dealt with through fines … and cuts on your benefit. But there is an essential difference which is completely lost in this super-tolerant country, there is an essential difference between you are a Dutch citizen who is allowed to be here, or you are an resident, or you are a failed asylum-seeker or illegal alien that has no right to be here, and then you can let

232 Proceedings, Handelingen II 1992-1993, nr. 87: 6541

233 Proceedings, Handelingen II 1992-1993, nr. 88: 6598

234 Proceedings, Handelingen II 2007-2008, nr. 80: 5614

235 Proceedings, Handelingen II 2007-2008, nr. 80: 5614

> loose the most beautiful doctrines of human rights on it as far as I am concerned, but I am strict in this matter, you should not be here. Clear[236].

Until now unauthorized immigrants are granted some basic rights. In policy documents on illegal residence the view that "on humanitarian grounds illegal aliens have rights to a humane treatment" [237] is always used, which concretely means that minors have a right to education and youth welfare, and all have a right to necessary healthcare and legal aid. Though State Secretary Albayrak (PvdA) argued that she makes a maximum effort to combat illegal residence, she emphasized that everyone has rights, which derives from

> the democratic constitutional state that The Netherlands is, whether you are here legally or illegally. Though this may please some, it may not please others, but illegal aliens in The Netherlands are not without rights, and not at all outlawed[238].

Although other fundamental rights which apply to citizens, like the right to a subsistence level, do not apply to unauthorized immigrants, at least they are offered some rights.

As we saw in this chapter, the parliamentary history of immigration detention has been a struggle about the question how many rights should be granted to unauthorized immigrants and which rights should be guaranteed in law. The left parties have often tried to lay down as many rights as possible in law, while the right parties tried to restrict those rights. Lawmakers created the possibility in the law 45 years ago to deprive immigrants who have no permission to be here of their right to liberty with a view to expulsion. People in immigration detention enjoy legal protection against arbitrary detention as a consequence of the compulsory judicial test after 42 days at most which is laid down by law and the possibility to request suspension of detention at any time. However, the level of legal protection is much lower compared to that of criminal suspects in preventive custody, for whom the judicial test has to take place within three days and 15 hours. The lack of a maximum length of detention is also a restriction of the rights of people in immigration detention. Although for border detention a more lenient regime applies, for detention under section 59 Aliens Act 2000 there are no guarantees for a lenient regime laid down by law what resulted in a detention regime which cannot be distinguished from that for criminal convicts. The left parties and in the past also

236 Personal interview

237 Memorandum, Kamerstukken II 2003-2004, 29 537, nr 2: 2

238 Report, Kamerstukken II 2008-2009, 19 637, nr. 1237: 38

the PvdA have tried to improve the rights of people in immigration detention by proposals for a sooner judicial test, a more lenient regime and a maximum length of detention. The right parties have almost always rejected such proposals and tried several times to restrict possibilities for individual balancing of interests by proposals to leave out discretionary formulations of law texts and criminalization of illegal stay. Furthermore they proposed further possibilities to detain. The center parties rejected such proposals, but supported (or did not reject) the lack of a maximum length, the long term before the judicial test has to take place a regime grafted on the criminal law. Furthermore they supported an intensified use of pronouncement of undesirability. To what conclusions these findings have led, can be read in the next chapter.

6 CONCLUSIONS

6.1 It's all about sovereignty

Despite large societal, economic and political changes which occurred in The Netherlands the last decades, despite peaking and again declining numbers of asylum-seekers and despite a radical change in the composition of the population, the political rationalization of the instrument of immigration detention has remained remarkably the same over time. Since its origins in the Aliens Law 1965, the main rationale has been the prevention of absconding in order to secure the departure or expulsion of aliens without right to stay on or enter the territory of the Netherlands. The research data show that utilization of immigration detention with this purpose has always been supported by both the government and the entire parliament and forms its main legitimation. This approval with detention reflects the approval of the current division of the world in distinct territories with bounded populations and authorities, called states. Immigration detention in such a world can be viewed "as the proper and natural response of the sovereign state to those who violated its territorial sovereignty"[239]. It shows that the use of deprivation of liberty, the "sharpest technique"[240] of sovereign state power, is perceived to be necessary to effectuate the selection of those who may become insiders and those who must stay outside. After a centuries-long development of Western states the insiders became defined as the citizens on a demarcated territory governed by a sovereign authority, which represents the needs and wishes of these citizens. As one takes into account both Hobbes' concept of man and states as selfish, the observation of Enzensberger that humans are predisposed to sectional self-interest and xenophobia[241], and the durable perception that the prison is necessary for maintenance of order in the nation-state[242], the broad support for the instrument of immigration detention is expectable.

239 Cornelisse 2010: 101

240 ibid.

241 Enzensberger 1994: 106

242 Boutellier 2002; Cornelisse 2008; Hawkins 1976

6.2 The leftist rights and the rightist law and order

The political consensus about immigration detention ends by the acceptance that it is an essential necessity. With regard to its purposes, the ways in which immigration detention may contribute to its purposes and the preferable design of this instrument, a continuum from the 'left' to the 'right' is visible. The outcomes of the classification into left and right are dependent on the criteria that are used, although outcomes are often similar on main lines. The different views on immigration detention confirm a classification according to ideological views on freedoms and rights, in which the 'left' represents expanded personal freedoms and rights, and 'right' represents a preference for order, stability and the government as a firm moral authority[243]. These conflicting views fit in an historical continuum of balancing state power and individual rights. Was state power nearly unfettered in the beginning, in the course of centuries individual rights became always more important, what is reflected in the development of the penal law. The penal law is par excellence a site of conflicting interests, because "more than in other fields of law, sovereign power becomes really visible"[244]. At the one side are the interests of the state. The state is expected to maintain order, what requests that it takes decisive measures to counter disruptions of law and order. At the other side are the interests of individuals, which are threatened because the instruments that are considered necessary for maintaining order make deep inroads on the private life of citizens. Therefore criminal law has developed into an *ultimum remedium* to restrict the power of the state[245]. As a consequence of democratization it is not relevant anymore to characterize the conflict as one between the state and individuals. It has now become a conflict between the different views of distinct political parties. The conflict itself has not been ended, as becomes visible in a changed utilization of the penal law in which the power of the state becomes more pronounced at the expense of individual liberties[246]. The research data show that the conflicting views on these interests explain to a large extent the different views on the purposes and design of immigration detention. The view of the parties on the right extreme (see table 2) is that everything must be done what contributes to the prevention of the arrival of 'unwanted' immigrants and to the realization of the departure of such immigrants. After all, the arrival or presence of unauthorized migrants endangers the sovereignty and the 'law and order' of the state. The left argument is that immigration detention has to be an *ultimum*

243 Marks et al. 2006: 172

244 Mevis 2009: 37 (My translation)

245 Boutellier 2002: 123-124; Feeley & Simon 1992: 451

246 Feeley & Simon 1992; Kelk 2008; Garland 1996;

remedium and should, if applied, be as harmless as possible, otherwise the rights of the immigrants are unproportionally violated.

rights & freedom								**law & order**
left		centre	centre	centre				right
GL	SP	D66	PvdA	CU	SGP	CDA	PVV	VVD

Table 2: Left-right continuum immigration detention

6.3 Detention: to expulse, to discipline and to perform

The main issue with regard to immigration detention in which the left-right divide becomes visible is the opinion on the purposes detention may serve. These opinions determine the views on the design of and alternatives for detention.

The left parties are of the opinion that the only purpose may be the physical availability of the immigrant to prevent absconding and to organize the expulsion. The right and center parties find it legitimate to violate the right to personal liberty for the sake of other purposes. Most importantly it is a means to exert pressure on the immigrant towards cooperation with the procedure to realize his expulsion. The right parties and to a lesser extent the Dutch Labor Party (PvdA) also value immigration detention for its symbolic values with regard to deterrence and the signal 'of a strong state' that is being send to the population.

Considering these purposes, it can be concluded that the main purpose of detention is to discipline, what according to Foucault has been the function of the prison for centuries[247]. The lack of a time limit on detention and the design of the regime are instruments that are intentionally used to exert pressure on detainees towards cooperation, as is shown by the research data. Also is shown that detention is used as deterrent. The use of detention as both a means to exert pressure and a deterrent shows that the prison keeps its reformative and disciplining function. The non-detained unauthorized and potential immigrants are disciplined to depart or not to come. They are deterred by their *detainability*[248], by the threat they feel as a result of the risk of being detained. The detained immigrants are disciplined to cooperate obediently on their removal. In this sense the immigration detention center is used

247 Foucault 1989

248 De Genova 2010

"to normalize the abnormal, the anomaly"[249]. After all, unauthorized immigrants are an anomaly to the territorial ideal of the state. By the final purpose of detention, expulsion from the Dutch territory, this ideal is restored and the former illegal residing immigrant gets its normal status, that of outsider of the territory. The pressure and deterrence produced by immigration detention can therefore be outlined as tools "by which states violently reproduce the territoriality of the global system"[250].

Furthermore, immigration detention is used as a way to perform. The threats that unauthorized immigrants pose concerning the societal order and safety are mentioned several times in debates, policy papers and interviews. However, the essential reason why they have to be detained seems to be combating the risk they pose to the credibility of the government. After all, just by staying or entering unauthorized they circumvent state control. This mere fact questions the domestic and interdependence sovereignty of the state. Detention then, as part of the broader development of a *culture of control*,

> gives the appearance that 'something is being done' here, now, swiftly and decisively. … Punishment is an act of sovereign might, a performative action which exemplifies what absolute power is all about. Moreover, it is a sovereign act which tends to command widespread popular support[251].

Border detention has yet a different logic. Although it increasingly is viewed as an instrument to expulse, originally it was meant to hold up refused aliens, more precisely refused asylum-seekers, at the border on the Airport. In the beginning they were held in the Transit Zone at Schiphol Airport, later on they were transported to a closed center near the Airport. The government denied in first instance that it was a form of detention and considered it just as access denial, because these people had not yet entered the Netherlands formally. This was also called the "extraterritorial fiction"[252]: the aliens are not on the territory but indeed they are. It provides the best example for what Cornelisse calls "the territorial solution". A detention center provides "an immediate place for those who do not fit in the territorial ideal of the world"[253]. Yet the Supreme Court judged that it was unlawful detention what resulted in an amendment of the Aliens Law to make detention lawful.

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249 Foucault 1989

250 Cornelisse 2010: 118

251 Garland 1996: 460

252 Van Traa (PvdA), proceedings, Handelingen II 1988-1989, nr. 37: 2250

253 Cornelisse 2010: 18

These findings contradict the view of several authors who explain immigration detention by using the concept of the *new penology*. According to these authors immigration detention is used just to contain non-citizens to protect the society against the threats they should pose, both physical, economic and cultural threats and threats to state sovereignty. Detention in this view is used to "manage undocumented foreigners as a population" and to set them apart[254]. Detention than functions "as a 'factory of exclusion', that keeps irregular migrants off the streets"[255]. The results at hand suggest however that detention serves mainly the expulsion of people without right to enter or to stay and the deterrence of potential immigrants.

6.4 The left and the right on rights in detention: moving rightwards?

The different views that the left and the right have on the purposes of immigration detention are strongly related to the views they have on the design of immigration detention. The left finds it just a legitimate instrument when it is used in a proportional way to effectuate expulsion in a reasonable time, as an *ultimum remedium*. Therefore the leftists have always been strong proponents of a time limit on detention and of a more lenient regime in immigration detention. They have always acted as watchdogs with regard to an individual balancing of interests in a prompt judicial review in cases of immigration detention and with regard to structural or incidental shortcomings of the detention regime. The rightists have always resisted a maximum length of detention, improvements in the regime and advance of the judicial review. This can easily be understood as is taken into account that the rightists view also the exertion of pressure, deterrence and other symbolic values as purposes of immigration detention.

The PvdA has good reason to be between the left and the right, as is shown by a rather ambivalent stance towards issues that have important implications for the rights of individuals in immigration detention. Remarked is that this party has undergone a change. In the 1980's and early 1990's the PvdA parliamentarians could be placed on the extreme left side of the left-right continuum, but they moved rightwards after that time. Despite her political rhetoric about the value of rights for immigrant detainees and her recurrent confirmations that detention is an *ultimum remedium,* from a government position she has strongly resisted the introduction of a maximum length of detention. Furthermore, although she once made efforts

254 Richard & Fischer 2008: 600

255 Broeders 2010: 182

to advance the judicial review, she did not resist when this was amended again into the old situation that makes it possible that it takes forty-two days before a judge reviews the detention. These are both very important guarantees against indefinite and arbitrary detention, which are laid down in national law and international human rights standards because personal liberty is valued highly in a constitutional state[256]. Several times the PvdA has mentioned the dilemma in policy choices between two purposes of the constitutional state, namely the protection of the right of individuals against the state and to maintain law and order. Considering that she values both the protection of the individual against and the maintenance of the law by the state, one should expect that more weight should be attained to the interests of the individual in the far-reaching measure of detention.

Also the VVD has moved rightwards. She has been always a strong proponent of a restrictive immigration policy, but until the 1990's she respected fundamental rights for unauthorized immigrants as well. This changed in the late 1990's and since then this party, at least from a parliamentary position, has proposed measures that should deprive unauthorized immigrants of fundamental rights. As this process of moving rightwards already started in the 1990's, the "contagion of the right thesis", or more specifically of the populist right[257], cannot explain it as the era of Fortuyn started some years later. This applies also to the PvdA. With regard to immigration detention, the CDA, the SP and GL seem unaffected by influences of the populist right, as their stands on this issue have remained unaltered.

6.5 Immigration detention: law or counter-law?

In the Dutch system of immigration detention the detained individuals are not lawless. After all, they are detained in a legal way under the administrative law. This law came into being in the normal lawmaking procedures open to parliamentary debate. The cases of immigration detention are reviewed by means of an individual balancing of interests. Once in detention, people in immigration detention have the same fundamental rights as criminal detainees. Therefore it seems to go too far to speak of full-blown *securitization of immigration* as meant by Buzan & Weaver[258] in which normal political procedures are by-passed. However, as the Council of Europe[259] observed, the law on immigration detention is often insufficient. For

256 Wilsher 2004

257 Norris 2005: 268

258 Buzan & Weaver 2003

259 Council of Europe 2010

instance the debates about the removal of penal stipulations from the Aliens Act raise at least doubts on the intention of the lawmakers. One conclusion could be that these stipulations deliberately were removed to skip guarantees for immigrant detainees. Criticisms on the Dutch law regarding immigration detention of renowned national and international institutions focus on the lack of a time limit on detention, the lack of a compulsory judicial review within a short period of time and the lack of an appropriate, lenient detention regime. Although in December 2010 at least the theoretical possibility to indefinite detention will be ended due to the obligations emanating from the Return Directive, the government defended until the end the unlimited duration. These reduced rights of immigrant-detainees when compared to citizen-detainees show the risk that administrative detention involves with regard to the rights of detainees. The safeguards that in the course of centuries have been built in in the penal law do not apply for administrative detainees. Therefore it seems justified to regard the law on immigration detention as 'counter law', "in which 'traditional principles, standards and procedures of criminal law' are undermined"[260]. A situation could occur "that is outside the usual legal framework of the *Rechtsstaat*"[261], although it has to be taken into account that the whole framework of the constitutional state is liable to change. The maintenance of the law is increasingly prioritized at the expense of the level of an adequate legal protection for the citizen, the main characteristic for a constitutional state[262].

6.6 Alternatives: more or less deprivation of liberty?

Most parties consider immigration to be ineffective and inefficient because for a considerable part of the detainees it does not result in expulsion. Three alternatives for immigration detention are discussed extensively in the parliament. These are alternatives without deprivation of liberty, criminalization of illegal residence and extended or standard use of declaring aliens as undesired. This has a consequence, among others, that as an undesired alien is apprehended, he will be detained.

The left parties support the use of alternatives without deprivation of liberty, because detention is only legitimised as an *ultimum remedium*. They have always offered resistance to the criminalization of illegal residence and have always been very critical towards declaring aliens as undesired on both principal and practical grounds. The right parties, departing from a law and order stance, consider deprivation of liberty to be necessary for

260 Ericson 2007: 24, cited in Broeders 2010

261 Cornelisse 2010: 119

262 Kelk 2005: 588

attaining expulsion or departure from The Netherlands and for symbolic goals. They prefer other forms of deprivations of liberty, like criminalization, or a different use of immigration detention that make it possible to keep immigrants detained until expulsion is realized, “even if it takes twenty years”[263]. The centre parties have always offered resistance to mandatory application of declaring aliens as undesired and to criminalize illegal residence, but have been proponents of intensifying the use of declaring aliens as undesired. The use of non-detaining alternatives were an issue within the PvdA concerning border detention in the late 1980’s and are only since recently again the subject of debate. The PvdA State Secretary pronounced that she is a proponent of such alternatives only when there is “no risk” of absconding.

The risk of absconding forms the Achilles’ heel of leftist proponents for the use of alternatives without detention, and shapes the logic of the right in their argument that detention should be possible until expulsion is realized. Without deprivation of liberty apprehended unauthorized immigrants are likely to abscond, what is confirmed by the use of alternatives in the past and present. That is exactly what makes detention the “only logical response”[264] to unauthorized immigration. It is considered legitimate that the fundamental right on personal liberty of non-citizens is “traded-off”[265] against the right of states to exercise their sovereign power or claim over the legitimate use of violence.

6.7 Discussion

The question if immigration detention is indeed the only logical response evokes existential issues. Viewing it as ‘logical’ departs from a view on humankind as being only self-interested in which self-interested implies that outsiders of the own group are excluded at all costs. Apart from the question if it serves self-interest to act in such a way, another perception is possible as well, namely that "it is not self-interested rationality alone that motivates human behavior, but also the wish to act in a moral and responsible way"[266]. For some authors this means the abolishment of expulsion and immigration detention. They perceive the freedom of movement to be so intrinsically related to human life itself that it may not be restricted by political regimes at all[267]. In the same way cosmopolitanism takes “all humanity, irrespective

263 Report, Kamerstukken II 2008–2009, 19 637, nr. 1237: 34

264 Peutz & De Genova 2010 : 5

265 Gibney 2004: 252

266 Stein 1998: 421

267 De Genova 2010: 59

of place, along for the ride", thereby disregarding the particularity logic of the current territorial order[268]. This is often seen as the most ethically defendable point of view[269]. Yet, apart from the expectation that a world revolution in order to make human rights really universal will not take place in the short term, this ideal seems to neglect human reality. Group formation and territoriality (be it static or dynamic) have played a major role in human evolution because both contribute to having means of subsistence[270]. Removing one form of territoriality will inevitably lead to another form with problems again when violations of territorial boundaries occur. Therefore the views of some authors reflect a compromise between the right to exclude and acting moral and responsible. Accompanying the right to exclude with the obligations to prevent arbitrary detention[271], to respect human rights when someone as an *ultimum remedium* is detained and to prevent lengthy or indefinite periods of time[272], seem to be the most feasible for the moment. An important role is granted to lawmakers, the judiciary and the executive. Recommendations to realize this can be found in the Resolution on Detention of Asylum-seekers and Irregular migrants in Europe[273] and in the report of Amnesty International on detention of irregular migrants in The Netherlands. Another compromise is that such a restrictive immigration policy is accompanied by sincere, far-reaching political efforts to decrease the inequality in the world.

268 Nyers 2010: 417

269 Gibney 2004: 59

270 See for example Stone 1998; Kottak 2002

271 Gibney 2004: 252

272 Wilsher 2004: 934

273 Amnesty International 2008; Council of Europe 2010

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APPENDIX 1 Composition of governments

Period	Government	Coalition (party name and number of seats in the Lower Chamber)	Minister of Justice	State Secretary for Justice
1959-1963	De Quay	KVP (49), ARP (14), CHU (12)[274]	Mr. A.Ch.W. Beerman (CHU)	-
1963-1965	Marijnen	KVP (50), VVD (16), ARP (13), CHU (13)	Mr. Y. Scholten (CHU)	-
1965-1966	Cals	KVP (50), PvdA (43)[275], ARP (13)	Dr. I. Samkalden (PvdA)	-
1966-1967	Zijlstra	KVP (50), ARP (13)	Mr. A.A.M. Struyken (KVP)	-
1982-1986	Lubbers I	CDA (45)[276], VVD (36)[277]	Mr. F. Korthals-Altes (VVD)	Mr. V.N.M. Korte-van Hemel (CDA)
1986-1989	Lubbers II	CDA (54), VVD (27)	Mr. F. Korthals-Altes (VVD)	Mr. V.N.M. Korte-van Hemel (CDA)
1989-1994	Lubbers III	CDA (54), PvdA (49)	Dr. E.M.H. Hirsch Ballin (CDA)	Mr. A. Kosto (PvdA)
1994-1998	Kok I	PvdA (37), VVD (31), D66 (24)	Mr. W. Sorgdrager (D66)	Mr. E.M.A. Schmitz (PvdA)
1998-2002	Kok II	PvdA (45), VVD (38), D66 (14)	Mr. A.H. Korthals (VVD)	Dr. M.J. Cohen (PvdA, Aug 1998–Jan 2001), Mr. N.A. Kalsbeek (PvdA, Jan 2001–July 2002)
2002-2003	Balkenende I	CDA (44), LPF (26), VVD (24)	Mr. J.P.H. Donner (CDA)	Mr. H.P.A. Nawijn (LPF)
2003-2006	Balkenende II	CDA (44), VVD (28), D66 (6)[278]	Mr. J.P.H. Donner (CDA)	Drs. M.C.F. Verdonk (VVD)
2006-2007	Balkenende III	CDA (44), VVD (27)	Mr. J.P.H. Donner (CDA,, till-Sept'06), Dr. E.M.H. Hirsch Ballin (CDA, from Sept'06)	Drs. M.C.F. Verdonk (VVD)
2007-2010	Balkenende IV	CDA (41), PvdA (33), CU (6)[279]	Dr. E.M.H. Hirsch Ballin (CDA)	Mr. N. Albayrak (PvdA)
2010 -	Rutte	Minority cabinet of: VVD (34), CDA (21) Tolerated in the Lower chamber by the PVV (24)[280]	Mr. I.W. Opstelten (VVD) Minister of Security and Justice Drs. G.B.M. Leers (CDA) Minister for Immigration and Asylum:	Mr. F. Teeven (VVD) State Secretary for Security and Justice

Source: http://www.parlement.com/

[274] KVP (Catholic People Party, catholic democrats); ARP (Anti Revolutionary Party, calvinists); CHU (Christian Historical Union, liberal protestants)

[275] PvdA (Party of Labor, social-democrats)

[276] CDA (Christian Democratic Appeal, christian democrats).

[277] VVD: People Party for Freedom and Democracy, conservative liberals

[278] D'66 (Democrats 1966, a left liberal party which emphasises constitutional issues)

[279] CU (Christian Union). The CU aims at a christian social policy.

[280] PVV (Party for the Freedom, right-populist)

APPENDIX 2 LIST OF INTERVIEWED PERSONS

Name	Party	Political function	Date interview
Drs. E.W. Anker	CU	2007-2010: MP (Lower Chamber)	February 1, 2010
Anonymous	CDA	former MP (Lower Chamber)	December 28, 2009
Mr. Ing. Wim G.J.M. van de Camp	CDA	1986-2009: MP (Lower Chamber) 2009-present: Member of the European Parliament	December 21, 2009
Mr. A. Kosto	PvdA	1972-1989: MP (Lower Chamber) 1989-1994: State Secretary for justice 1994: MP/Minister of Justice 1994-2008: member Council of State	February 12, 2010
Mr. H.P.A. Nawijn	LPF, groep-Nawijn (ex-LPF), Partij voor Nederland	2002-2006: MP (Lower Chamber), minister	March 17, 2010
Drs. A.P. Visser	VVD	2003-2006: MP (Lower Chamber) 2008-present: city councillor	March 12, 2010
Mr. J.M.A.M. de Wit		1995-present: MP (Lower and Upper Chamber, chairman of the parliamentary party (Upper Chamber)	December 15, 2009

APPENDIX 3 List of Sensitising Questions to Code Frames

Sensitising Questions to Code Frames[281]

Full title
Issue (main issue, detail if necessary)
Date
Type/status of document
Event/reason/occasion of appearance
Audience

Voice/standing

Voice(s) speaking
Perspective
References: words/concepts (and where they come from)
References: actors
References: documents
Other references: events, etc.
Form (argumentation/style/conviction techniques/dichotomies/metaphors/contrasts)

Diagnosis

What is represented as the problem? Why is it seen as a problem?
Causality (what is seen as a cause of what?)
Who is seen as responsible for causing the problem?
Problem holders (whose problem is it seen to be? Active/passive roles, perpetrators/victims, etc.?)
Normativity (what is a norm group if there is a problem group?)
Legitimisation of non-problem(s)

Prognosis

What to do? Which action is deemed necessary and why?
Hierarchy/priority in goals.
How to achieve goals (strategy/means/instruments)?
Attribution of roles in prognosis

Call for action

Call for action or non-action
Who is acted upon? (target groups)
Boundaries set to action and legitimisation of non-action

[281] Roggeband & Vliegenthart 2007: 245