Immigration Detention, the Right to Liberty, and Constitutional Law

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About the Global Detention Project

The Global Detention Project (GDP) is a non-profit research centre based in Geneva, Switzerland, that investigates the use of detention in response to global migration. The GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) facilitating accountability and transparency in the treatment of detainees; and (3) encouraging scholarship in this field of immigration and refugee studies.

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By Daniel Wilsher

Summary: The right to personal liberty is one of the oldest recognized rights in liberal democracies, which raises fundamental constitutional questions about the use of detention as an immigration measure. Nevertheless, in the United Kingdom and other common law countries, lengthy immigration detention on a large scale has become the norm and is largely regarded as constitutional. Because migration power in these countries is framed as a power to detain pending expulsion, courts have struggled to draw clear boundaries around detention, thereby enabling the expansion of detention systems. Constitutions in continental Europe, on the other hand, have viewed immigration detention as a heterodox exercise of police power requiring greater judicial control and legislative time limits. For those in common law countries seeking to prevent excessive immigration detention, the legislative route appears to offer the most promise.

Introduction

The detention of immigrants raises fundamental questions for liberal constitutional law. The right to personal liberty is one of the oldest recognized rights in liberal democracies, long pre-dating modern human rights treaties. This "presumption of liberty" holds that the State has the burden of justifying any interference. This chapter will show that, in common law countries at least, the right receives very limited protection in the case of immigrants with a contested immigration status. Jurisprudence has struggled to detach disputes regarding the right to enter or remain from those relating to the right to personal liberty.

In its classical form, the *procedural* aspect of the right to liberty entails that no one should be detained without law and that all detainees should be swiftly brought before a court to establish the legal basis for their detention. The *substantive* aspect holds that detention for purposes outside of criminal proceedings is constitutional only in narrow circumstances. The widespread use of mass immigration detention in recent decades conflicts with this ideal in most cases. Constitutional courts have had to consider if such detention should be seen as **(a)** akin to the holding of criminal suspects and hence subject to the same safeguards or **(b)** a special regime linked to migration control and outside the mainstream of the constitution, like national security, over which governments should be given greater discretion.

Whatever overarching view is taken, courts must determine some limits in terms of time, purpose and conditions of detention. We must of course distinguish truly *constitutional* safeguards, which acknowledge that migrants' have fundamental rights, from legislative or administrative protections that can be taken away by politicians. This chapter examines the responses to this challenge from the common law countries of the United States, the United Kingdom, Australia and Canada. These are contrasted with the detention systems in the nations of the civil law tradition of the EU where time-limited detention under direct judicial control has been the legislative norm. It concludes that constitutional controls developed by courts have been modest, only checking the most serious excesses of indeterminate detention without rendering most detention any less arbitrary.

I. Rule of Law and Separation of Powers

As is well known, in the early days of the development of modern government, theorists debated the appropriate limits upon the state. Hobbes argued that ensuring security was the supreme obligation of the state and entitled rulers to virtually unlimited powers over both citizens and foreigners to preserve it (Hobbes [1651], 2008).[1] Locke and Montesquieu by contrast argued that government should be subject to more extensive limitations to protect fundamental rights and disperse power across the institutions of the state (Locke [1689]1949, Montesquieu [1748], 1902).[2] The English, American and French Revolutions saw these ideas begin to be asserted in practice, but it was not until the late 19th century that they became more widely exhibited in the constitutions of European nations. Following the Second World War, this liberal democratic model became standard in the West. Two of its key pillars derive from those early debates: the rule of law and the separation of powers.

The meaning of the rule of law may seem self-evident but is however open to widely different interpretations. For some theorists adopting a 'narrow view', it simply means that the laws have a sufficient degree of certainty and stability to guide citizens and that officials (including judges) execute them faithfully (see Craig, 2007).[3] For others, taking a wider view, the rule of law has a substantial component, which entails that the government not interfere with important rights in ways that are arbitrary, discriminatory or disproportionate (Bingham, 2011).[4] Judges are entitled and bound to strike down laws that breach this substantive test. This links directly to the idea of the separation of powers, which emphasizes the importance of legislative, executive and judicial functions being separately allocated within the state. On the wider view, courts should decide on the justice of individual cases that infringe important rights rather than leave this to the executive.

II. Right to Liberty, Habeas Corpus, and Immigration

The modern liberal state with its wide range of human rights is a recent development, but even during the days of absolutist monarchy the right not to be subject to 'arbitrary' arrest was one of the earliest to be asserted against the monarch as 'fundamental'. Courts began to protect citizens from arrest under prerogative powers that were claimed by the government but had doubtful basis in law. The courts developed the presumption of liberty such that individuals should not be held unless charged with an offence or under another specific legislative power. This was given expression in common-law countries by the writ of habeas corpus ('to have the body') which is simply an order directed to a jailer to provide legal justification for detention or release the detainee. The writ provides no substantial guarantee of liberty as such but it has been used on many occasions to challenge executive detention (Farbey, Sharpe and Atrill, 2011).[5] It thus came to symbolize the protection of liberty such that, for example, early English parliaments were forced to give it a constitutional status. Perhaps its greater importance was as a *highly effective remedy* against arbitrary detention. Constitutions have often contained extensive rights in theory but these have been difficult to enforce in practice because courts lacked the necessary remedies. Habeas corpus was specifically created as such a remedy. This said, its historical use merely stopped abuses of what we have characterized as a narrow view of the rule of law: the

[1] Hobbes, T. (2008) *Leviathan*,. Oxford: Oxford University Press.
[2] Locke, J. (1949) *Two Treatises of Government*,. New York: Dutton. Montesquieu, C.L.(1902) *The Spirit of the Laws*,. London: Grainger Bell.
[3] For a detailed discussion see Craig, P. (2007). 'Formal and Substantive Conceptions of the Rule of Law.', *Public Law* 467.
[4] Bingham, T. (2011) *The Rule of Law.,* London: Penguin Books.
[5] Farbey, J. and R.J. , Sharpe and S.R.J., Atrill S.,(2011) *The Law of Habeas Corpus,*. Oxford: Oxford University Press.

government had to show a power existed for the detention and that sufficient grounds existed to support this individual's detention. Habeas corpus case-law did not, in general, endorse the broader view of the rule of law such that courts should decide when detention powers (as opposed to their application to individual cases) themselves are justified in the wider sense of being just, fair or proportionate.

This later point has come to be of significance in relation to the detention of migrants. In the modern era, states have almost always relied upon a clear legislative power to detain migrants. Courts have also been able to review the grounds for detention in each case, to ensure that a detainee is a migrant and not a citizen. Thus, there has been no systematic breach of the rule of law in the narrow sense. The bigger question is how far immigration detention should be reviewed by the courts by reference to a broader, more open-ended set of considerations relating to a substantive right to liberty. This question has taxed constitutional courts and widely different conclusions have been reached. One of the key differences between the outcomes has turned on how far migrants, particularly those not lawfully present, can be seen to have equal liberty rights with citizens at all. Nowadays, it is considered elementary that states can, under all liberal constitutions, detain migrants in circumstances that they cannot detain citizens, namely when the state is acting under the migration power given to it by the constitution. The authorisation to enter or remain in a state generally conveys with it a right to be at liberty. Does the converse follow: in the absence of such authorisation, may a migrant be detained until their ultimate entry or expulsion?

The stark implication of such a conclusion is the possibility of indeterminate and indeed endless detention in cases where expulsion proves impossible. This question was not confronted until more recently with the rise of modern immigration controls and the greater use of detention as a technique of enforcement. Classical liberalism was conceived of at a time of largely open borders and therefore the idea of immigrants having lesser rights to personal liberty was not considered. Immigration restrictions were modest and detention therefore limited. In recent years, some governments have begun to assert a binary position; that decisions on the right to membership of the community are determinative of personal liberty rights too. Since governments, not judges, have the power to decide on which categories of migrants to admit as members of the community, on this logic, courts should not release unauthorised migrants into the community on 'constitutional' grounds where they fail to meet legislative rules on membership. The extent to which such inexorable logic has found constitutional support lies at the heart of modern debates over how far unauthorised migrants really are, even partial, members of society with some basic rights.

III. Early Constitutional Challenges: Indeterminate Detention

The tools and techniques of migration control have constantly evolved since the early 20th century when States first began to assert such a power, but physically constraining migrants on-board ships or at landing stations was the earliest such measure. This was conceived of as a necessary ancillary power to the objective of assessing migrants' rights to enter or remain through interrogation and then ensuring that they were removed if found not to be so entitled. The power was spelled out in legislation and attracted little comment because this 'processing' was generally brief and expulsion could be effected without undue legal or practical obstacles. The earliest constitutional cases from the United States thus sought to challenge the immigration decision itself, rather than the associated detention at landing stations like Ellis Island (see Chp. 1, Wilsher, 2012).[6]

[6] Wilsher, D. (2012) *Immigration Detention: Law, History, Politics,*. Cambridge: Cambridge University Press, Ch.1.

The potential for immigration detention to become indefinite however was first and infamously revealed as long ago as 1952 in the US Supreme Court decision in the case of *Shaughnessy v United States ex rel. Mezei* (1953) ('*Mezei*'). This man had been a long-term lawful resident in the United States who was arrested when he returned from Eastern Europe at the height of the Cold War. Under statutory powers, he was ordered to be deported by the government on undisclosed national security grounds and held at Ellis Island pending expulsion. When his deportation could not be effected because no other nation would accept him – he was de facto stateless – he challenged his deportation and indefinite detention. A well-established principle of US law holds that Congress completely sets the procedural and substantive terms upon which aliens can enter the United States. This applies even to those who are technically inside US territory but who remain in border zones or have been released from them on bail. This is known as the 'entry fiction' – such persons are treated as if they have never entered the United States and so have no constitutional rights. Constitutional rights only apply to those who have entered, even illegally. The majority of the Court held that *Mezei*, as an alien stopped outside the United States, had no constitutional right to be released as that would in effect grant him entry against the will of Congress. His 'safe-keeping' on Ellis Island was simply an expression of his exclusion from the mainland. He was free to leave if he could find another place to go and, to this extent, his prison had only 'three walls'. The majority declined to allow other nations to 'impose' him on the United States by not accepting him back. Under international law every nation had the sovereign right to determine who could enter its territory. These factors led the court to view his detention as simply a necessary incident of his exclusion, not raising a discrete constitutional issue. This notorious case showed how far courts would go to assimilate membership decisions with detention decisions, giving priority to the former so as to characterize government action as falling within the migration power and out-with the courts' traditional habeas corpus power.

The powerful but careful dissent by Justice Jackson criticized the unreality of the majority's extension of the entry fiction doctrine to confinement. He argued that the exclusion order was the proximate cause of the detention. As such, traditional habeas corpus principles should apply to the case. Once detained indefinitely, *Mezei* attracted some constitutional rights. Drawing the distinction between substantive and procedural liberty, Jackson accepted the principle that the government had broad power to protect the nation from harm by excluding and detaining immigrants although it would be unconstitutional to do this to citizens. However, he argued that procedural due process was a right of all persons detained within the court's jurisdiction. This entailed *Mezei*'s right to know the case against him and to have a court decide on the truth of this after a fair hearing. On Jackson's view, *Mezei* had the right to seek to request the government to prove its case that he was a danger to national security. By implication he would be released and returned to long-term residence if the government failed to discharge that burden. Jackson felt that upholding these procedural safeguards was the greatest guarantor of liberty.

IV. Limitations of Procedural Liberty Rights in an Era of Mass Detention

Jackson's dissent represents a classic re-statement of the role of courts in upholding the rule of law through individualized habeas corpus decisions even during the Cold War when national security concerns were upper-most. The more recent development of mass detention of migrants has been driven by a complex new politics and, because it is practised on such a large scale and has strong legislative support, courts have faced real political difficulty in controlling it even without the menacing context of the Cold War. Whilst developed nations continue to compete for migrant labour and skills through issuing work permits, an alternative narrative demanding aggressive restriction has emerged which is directed at irregular migrants and resident migrants who are no longer desirable. The legislature in the United States and Australia, for example,

have adopted mandatory detention provisions for groups such as asylum-seekers who would previously have been viewed as non-threatening from the national security perspective. Furthermore, ordinary criminals ordered deported have been subject to indefinite detention pending their expulsion.

These examples show detention itself being deployed to prevent unauthorised entry or the commission of further crime. Importantly, such detention has been imposed on whole categories of migrants by politicians who have asserted that detention is a key aspect of fulfilling their obligation to get migration under control. In the face of these measures, Jackson's optimism about the power of procedural safe-guards to defend liberty now looks misplaced. Once satisfied that a power to detain exists, then the role of the courts would be merely to decide on whether a detainee is a citizen or a foreigner (or, for example, an asylum-seeker or foreign criminal) and habeas corpus thus provides no protection against lengthy detention. This shows the limitations of the 'narrow', procedural version of the rule of law. Only if courts are willing to assert a right of substantive liberty for migrants can legislation that ostensibly permits indeterminate detention be subject to challenge. But, this entails courts limiting the government's power to have the final word on which types of migrants are released into the community and on how border controls are implemented.

It is at this point that we can see that the courts' approach to the detention question constitutional depends on how the State's migration power is characterized. How far should the migration power be viewed as overlapping with the national security power? The courts have traditionally shown the most extreme deference to the government in relation to assessments of national security. To the extent that uncontrolled mass-movements of people across borders fuel a political narrative of 'invasion,' it is easy to see why such analogies have sometimes resonated with courts. If a State claims that regaining 'control' requires it to impose a general incarceration of all irregular migrants, regardless of their individual character, then procedural safeguards are useless. There is no 'ground' of detention other than that a migrant has the characteristic of being unauthorised. The purpose of his or her detention is not distinct from that of all the others detained as part of the mass detention policy deemed necessary to restore, for example, public confidence in the government or to deter new arrivals.

In this case, the crucial issue is the degree to which courts defer to government assertions of the need for such policies. If the entry of migrants is viewed through the lens of national security, then deference is likely to be high. If, however, migration is viewed in less threating terms, courts will be more willing to demand strong justification for such 'group' detention policies on proportionality grounds. They may demand individualized rather than group detention. A second and related question is the extent to which *any* government policy of imposing hardship on irregular migrants is always to be characterized as an exercise of the migration power even if it does not clearly lead to any measurable change in migration numbers. Such measures are, of course, always asserted to have deterrent effects. To the extent that governments are granted broad discretion to interpret the extent of the migration power by the courts, then measures such as long-term detention (or indeed restrictions on irregular migrants' rights to work, be educated or to marry) which do not measurably lead to a reduced flow or increased expulsion of migrants at all, may be viewed nevertheless as migration control measures.

V. Constitutional Court Responses to Indeterminate Immigration Detention in the Common Law World

Since 2001 there have been a series of landmark judgments within common law countries on the constitutional position of migrants facing indeterminate detention. The diversity of responses has been striking given the fact that these courts share a common legal heritage in which habeas corpus holds pride of place. This range of opinion can be explained by both legal uncertainty as to the status of migrants but also by local political circumstances concerning the degree to which the relevant government is committed to detention as a central policy tool. There is thus an important element of political interaction in all these constitutional cases. It is also important to state that most detentions do not become prolonged beyond several months and have not attracted constitutional challenges. This is partly because detention space is limited and choices must be made; migrants must often be released for reasons of efficient use of resources if their cases are ongoing. Even those detained for longer periods may have recourse to bail hearings or other reviews of detention.

It is where these safeguards are absent or have failed to secure release that detention becomes prolonged and invites constitutional challenge. This is either because detention is mandatory according to legislation for certain groups until removal or, when detention remains discretionary, officials and bail judges have decided that they will not release a detainee due to their history of offending or flight risk.

United States. In the United States, the majority of the Supreme Court in *Zadvydas v Davis* [7] ('*Zadvydas*') ruled that indeterminate detention was, at least potentially, unconstitutional even when final deportation orders existed against convicted foreign criminals who had previously enjoyed residency status. This was so although such persons still presented re-offending or flight risks. *Mezei* was distinguishable because that case concerned entry to the United States. The Court maintained a sharp distinction between entry and post-entry cases so that only migrants in the latter could invoke constitutional rights to liberty. On the facts, *Zadvydas* had been detained for seven years after his deportation order was made final because no foreign government would accept him. The relevant legislation required the government to detain him during the 90-day 'removal period' and thereafter allowed (but did not require) ongoing detention with a discretion to release on bail. The government had established an administrative process with certain safeguards for detainees to show they were neither a flight nor re-offending risk. *Zadvydas*, with his long record of offending, could not show he was suitable for release. There was no challenge to the procedural fairness of that decision. Rather, the majority found that his right to substantive liberty meant that where the legislation was silent, the government was only allowed a 'reasonable period' after the 90-day removal period to effect his expulsion. The Court fixed this presumptively at six months and said that courts should decide for themselves on the likelihood of any removal occurring within six months.

At first glance, the majority decision thus appeared to recognize a constitutional right to be released into the community even where a migrant accepted that they had been fairly and lawfully refused the right to stay. This 'right of release' was a landmark, but the majority were influenced by the legislation not making it explicit that detention could or should proceed indefinitely until removal. It is possible that clearer words would have led the Court to reach a different conclusion. The Court merely said that it would interpret the statute in a manner so as to avoid a possible constitutional conflict. Thus, *Zadvydas* cannot be definitively viewed as establishing a 'constitutional' right of release where removal has stalled. The majority decision is rooted in their interpretation of the statutory detention power as having the purpose of

[7] 533 U.S. 678 (2001)

securing removal rather than aiming to protect the public. When that purpose could no longer be attained, detention must cease. It was thus viewed as an exercise of migration power rather than national security power. The judges also noted the use of preventive detention (at least for citizens) had only been found constitutional in narrow circumstances for particularly dangerous individuals and not for common criminals held under deportation powers.

The dissenting opinions are also interesting as they complete the range of positions away from the majority's substantive liberty view to a narrower procedural liberty view and, finally, the 'no liberty right' position. Thus Kennedy and Rehnquist followed the logic of Jackson's dissent in *Mezei* and would have given a constitutional (not just statutory) procedural right to challenge the government finding that *Zadvydas* was a flight risk or danger to the community. This entailed a possibility of release but did not upset the principle that the government could detain indefinitely where the facts so demanded. Such detention, they said, was not to be 'arbitrary' or 'capricious'. Scalia and Thomas sat at the most extreme position, and found that there was no right of release back into the community for migrants who had been ordered to leave. For them, the government's membership decisions were decisive in precluding any right to liberty; there was thus no substantive or procedural constitutional right to liberty for unauthorised foreigners.

The Supreme Court later confirmed in another case that its interpretation of the same statutory provision in *Zadvydas* also applied to those held at the border prior to admission.[8] This ruling meant that the 'entry fiction' principle was discarded because otherwise the same words in a statue would mean different things when applied to different classes of immigrants. The conclusion from these cases is that the binding Supreme Court authorities do apparently recognise a constitutional right to substantive liberty so that immigrants must be released on bond if their removal proceedings have stalled beyond six months after the final expulsion order. This is, however, qualified in cases where they are deemed to be non-cooperative with removal or when they are accused of being national security threats. Finally, in *Kim v Demore*[9] the Court made clear that mandatory detention during the deportation proceedings was constitutional: *Zadvydas* only applies one removal is no longer reasonably likely. Furthermore, if Congress had made its intention to support indefinite detention clearer, the result might have been different. To this extent, the right to liberty once removal is no longer foreseeable may be said to 'putatively' constitutional, rather than definitively so.

United Kingdom. The *Zadvydas* approach mirrored very closely that taken in the United Kingdom in the much earlier High Court decision in *R v Governor of Durham Prison ex parte Hardial Singh*[10] ('Hardial Singh'). This case also concerned prolonged detention following protracted efforts to secure documents to deport an immigrant who had exhausted his appeal rights. The statute again imposed no express time-period on detention, but Lord Woolf cited earlier British cases that made clear that the right to liberty was protected by common law principles for non-nationals as much as for citizens.[11] He implied limitations into the legislation such that detention could only be conducted for the purpose of removal, removal must be reasonably foreseeable and, finally, this must be achieved within a reasonable period. Subsequent cases have confirmed that the 'reasonable period', although determined by the courts, not the government, is not fixed. In fact, for those deportees convicted of serious offences who may present a continuing risk to the public, detention of four or five years has been found reasonably, particularly if the detainee have failed to co-operate or brought unmeritorious

[8] *Clark v Martinez* 543 U.S. 371 (2005)
[9] 123 S. Ct 1708 (2003).
[10] [1984] WLR 704
[11] *Sommersett's Case* (1772) 1 State Tr 1 at 20 concerned the right of a slave on board a ship in London to seek habeas corpus.

appeals.[12] By contrast, for more straightforward, non-criminal cases, detention beyond a year has been ruled excessive. [13]

The UK approach therefore recognises a substantive right to liberty for migrants that can support supervised release into the community, even in cases involving persons alleged to be dangerous. The high-water mark for this 'liberty-protecting' model was the Supreme Court decision in *A and others v Secretary of State for the Home Department*[14] which concerned indefinitely detained foreign nationals who were ordered deported due to them being suspected Islamic terrorists. This turned on an interpretation of the European Convention on Human Rights but was informed by common law case-law. The UK government accepted that there were many British citizens linked to the same Islamic terrorist groups but would not detain them because it had not passed legislation to allow this. The Court ruled that as the government accepted that it could not presently (or foreseeably) deport the foreigners because they would face torture, it was discriminatory to detain them for an indefinite period. This was because the Court took the view that detention was really being used for national security, not immigration purposes. The effect was that the government had to either detain similarly dangerous British nationals or release the foreign deportees. In the end, the government released the detainees having passed new legislation allowing close monitoring or house arrest for all suspected terrorists, regardless of nationality.

Australia. At the other end of the spectrum, in *Al Kateb v Godwin*[15] ('Al Kateb') a majority in the High Court of Australia (the Supreme Court) followed the 'no liberty without membership' approach when interpreting its constitutional and statutory framework. The political context was notably different: the government had for some years asserted a right to resist unwanted arrivals of asylum-seekers coming by sea from Southeast Asia. One policy tool adopted was mandatory and indefinite detention until an applicant for asylum had been granted refugee status or had been expelled. This was expressed in statutory form such that an applicant 'shall' be detained until removal or admitted. The Australian constitution does not contain a superior bill of rights but the right to liberty is recognized as part of the common law. Consequently, the courts would interpret ambiguous words in statutes in a manner consistent with the right to liberty. Furthermore, the constitution requires that the government leave penal powers to be exercised by courts as part of the separation of powers. Long-term detainees, who had been held for many years after expulsion proved impossible due to practical obstacles to removal, challenged the legislation.

The majority found that the legislation was not punitive in nature despite its harsh effects. They instead adopted a 'purposive' test and concluded that the aim was not to punish but rather to promote border control. There was no breach of the separation of powers. Turning to the interpretation of the statute, they rejected the argument that unauthorised migrants had a right to liberty at all until granted entry by the government. There was no case therefore for straining to interpret the statute in a manner consistent with the liberty of the detained migrants. The usual rule of statutory interpretation did not apply to unauthorized foreigners. In any event, removal had not been shown to be impossible; it might still happen at some point ('never say never'). The majority viewed unauthorised migrants as a kind of threat regardless of their criminal proclivity. They also saw release into the community as a de facto grant of citizenship. The state had a power to segregate unauthorised persons away from the community to prevent them from 'forcing' themselves on the community. This view is hard to defend given that any such release would be time-limited and on strict conditions designed to secure their removal at a later date.

[12] *Walumba Lumba (Congo) and Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC 12.
[13] *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888.
[14] [2004] UKHL 56
[15] [2004] HCA 37.

The absence of any assessment of the proportionality of detention arose from Australia's lack of a constitutional bill of rights giving the courts such a mandate.

By contrast, the minority judges in *Al Kateb* found the statute was not clear enough to permit indefinite detention because Parliament had not made it clear that detention should continue even if removal had become a purely speculative possibility, if not impossible. Given that the mandatory indefinite detention policy has been found by the international monitoring body to breach the right to liberty, it is not surprising that the Australian judiciary continues to be divided on the correctness of *Al Kateb*. Still, indefinite detention remains the law.

Canada. Turning to Canadian law, it is important to state that the Federal Court in *Sahin* in relation to s7 of the Canadian Charter of Fundamental rights sets out the basic approach to immigration detention for non-national security cases. This recognizes a substantive right to liberty for all migrants and protects it by reference to a set of factors that mirror those developed in UK *Hardial Singh* case-law. Thus, a court must look at: whether detention is to prevent absconding or crime; the period spent in detention already and the period likely to come; the burden of responsibility for the period in detention such as dilatoriness by the State or non-cooperation by the detainee and, finally, the alternatives to detention available. Thus, there is no set time limit, but a right of release does exist if the state cannot show that the public interest outweighs the liberty interest of the detainee in the circumstances.

What is more controversial is the approach taken in the special case of national security deportation where the approach taken by the Canadian Supreme Court in *Chakroui v Canada (Minister of Citizenship and Immigration)*[16] seemed to permit indefinite detention. In this case, very similar to *A and others* in its factual picture, three men (two refugees and one permanent resident) were held for several years pending their deportation. They had been determined to be terrorist threats after a judicial hearing. They were still awaiting a hearing on whether they would face torture if deported. Under Canadian case-law, in exceptional circumstances, even a person facing torture can be deported.[17]

The Supreme Court ruled that *A and others* was distinguishable for two reasons: first, the UK legislation expressly allowed detention even where removal was not possible (conceding that the prime goal was national security) and, second, that deportation from Canada remained a legal possibility (unlike the legal position in the UK) even if a torture risk was eventually established. These factors meant that the Canadian detentions should not be viewed as pure national security measures but rather could still be viewed as hinged to deportation action. There was no foreseeable removal date, but that was no objection to ongoing detention. For this reason, the powers were not found to discriminate against foreign nationals; citizens were not in a similar legal situation as they could never be deported.

The Supreme Court thus ruled that so long as procedural safeguards to challenge the finding of dangerousness were improved and courts could review the factors set out in *Sahin*, detention could continue for an indeterminate period. The complexity of the legal issues involved meant that detention would almost certainly be very long. In fact, none of the detainees were deported and, in the worst case, the immigrant was eventually released after seven years. This is reminiscent of the 'never say never' approach taken in *Al Kateb* which permits governments an open-ended power to engage in potentially endless negotiations with foreign states in an effort to secure the expulsion of unwanted, allegedly dangerous foreigners.

[16] [2007] SCC 9.
[17] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3

VI. European Union and The Control of 'Police' Powers

By contrast with relatively unchecked expansion of detention within common law countries, continental Europe has generally imposed greater legal constraints on the practice. This may stem in part from differences between the common law and civil law traditions. In broad terms, the civil law approach involves the creation of detailed legislation, including that pertaining to 'police' powers, which leaves little room for judicial development of the law. Certainly in the area of detention, the laying down of comprehensive codes has generally benefitted immigrants by placing greater constraints on government.

Within the major nations of the Europe Union, detention (of anyone, not just immigrants) is viewed as a police power and, as such, subject to a basic model of direct judicial control operated within a time-table. To this extent, the analogy is with police investigation and prosecution of suspects. Because of this, legislation regarding immigration detention has contained explicit time-limits on detention and automatic judicial review and ongoing supervision. Thus, the constitutional and political traditions within EU countries (except Britain) have generally led to better legislation and, as a result, fewer serious conflicts requiring the higher courts to rule on the constitutional status of immigration detainees.

Whilst detention has grown and become longer within EU states, the spectre of indeterminate detention has been avoided. In 2008, the EU introduced the Returns Directive[18] which gave Member States powers (but did not require) to detain migrants who had been ordered to leave the EU for up to eighteen months. The basic time-limit is six months but this can be extended for non-cooperation by detainees or their states of origin. The initial grounds permitted under the Directive are that there is a substantial risk of absconding and/or the detainee has not cooperated with the removal process. Nevertheless, the Directive merely sets a ceiling on detention and some Member States continued to adopt shorter periods in their legislation. Thus France has continued to limit detention to much briefer periods (now 45 days). Judges must decide on extending detention within 48 hours of arrest.[19] In Belgium, the maximum is five months. In Germany, the upper limit of detention is, in theory, the same as the EU Directive of 18 months. This said, the basic maximum period of detention for preparing the return of a detainee is six weeks. In cases of absconding risk, detention may in principle last six months. However, in practice the judges empowered to supervise the detention will set a time-table based upon detailed knowledge of the country of return and steps the authorities must take.[20] These constraints have generally resulted from a deliberative political process that takes places within a constitutional tradition of viewing any detention as requiring judicial supervision and a time-table.

The EU Directive has led to some states (including the Netherlands) increasing their maximum period of detention. The Directive, being legislation, is not however supersede the EU's constitutional law. The Charter of Fundamental rights of the EU contains a right to liberty in Article 6, but there has been little recourse to this by the Court of Justice of the EU (CJEU). The Court has however made clear that the Directive is exhaustive: detention beyond 18 months is not possible under EU law even if a person poses a security threat.[21] In addition, the CJEU in *Mahdi* gave migrants constitutional procedural protection to challenge detention by requiring judges to investigate all the facts before deciding on whether there was a risk of absconding and power to substitute their own view for that of the government.[22] The Directive's relatively long

[18] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[19] Constitutional Council Decision 92-307 DC of 25 February 1992.
[20] Federal Court of Justice (Bundesgerichtshof), Decision of 14.4.2011, 5 ZB 76/11
[21] Case C-357/09, PPU *Said Shamilovich Kadzoev (Huchbarov).*
[22] Case C-146/14 PPU *Bashir Mohammed Ali Mahdi*.

time limits have however not been found to be excessive by reference to substantive liberty rights thus far, although direct challenge on that point has not been put to the Court of Justice.

Conclusions

The experience of common law countries shows that open-ended detention has become a common reality. Faced with legislative authority for executive officers to incarcerate immigrants without time limits, courts have provided only modest constraints. The theoretical right, at the instigation of the detainee, to seek bail or review of the detention order has been viewed as an adequate safeguard against arbitrary detention. However, where such remedies are unavailable (if detention is mandatory) or have been exercised unsuccessfully (because a detainee has been judged a flight risk or dangerous by a judge) and yet removal has stalled, some courts have recognised a substantive right to liberty: a right of release into the community on supervised terms. This does nothing to regulate the vast majority of 'standard' cases.

The wider version of the rule of law is undermined when mass detention without real oversight is normalised. There is very little good evidence that the 'right' migrants are selected for detention. In Australia the government went further and passed legislation expressly requiring detention of all unauthorised persons until expulsion. The courts upheld this as constitutional. In fact, the Australian example could be copied elsewhere if more explicit statutory words were used. Common law courts continue to view detention as an aspect of the migration power that vests large discretion in the government to control borders. Detention of immigrants without judicial approval or clear limits has been accommodated.

This contrasts with the police powers traditions within the European continental nations. Here, the analogy to criminal trials has led to fairly complex legislative models that give a primary role to judges and set time-tables. The harmonisation Directive within the EU has led to some lowering of these standards but the national models have remained basically intact. For those in common law countries seeking to prevent excessive immigration detention, the legislative route appears to offer the most promise. It can lead to clear end-points and safeguards that courts have been both unwilling and ill-suited to deliver. Reform efforts can be supported by the collection and dissemination of data on matters (such as the ineffectiveness, cost and harsh effects of detention and the effectiveness of alternatives like community release) that the judicial forum does not easily accommodate.

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