



Unravelling the ‘crimmigration knot’: Penal subjectivities, punishment and the censure machine

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journals.sagepub.com/home/crj**Eleonora Di Molfetta**

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Abstract

This article explores the challenges that (cr)immigration practices pose to draw the boundaries of punishment by examining foreign national prisoners' penal subjectivities. More exclusionary and draconian migration policies have blurred the boundaries between border control and crime control, creating hybrid forms of punishment that, even if officially claimed as measures outside the criminal justice realm, inflict pain and communicate censure. Drawing on 37 in-depth interviews with foreign national prisoners facing expulsion in the Dutch penitentiary facility of Ter Apel, we detail how hybrid (cr)immigration practices are capable of imposing and delivering meanings that go well behind rooted significances and aims of administrative measures. Traditionally designed with preventive purposes, administrative measures have now become part of a project of social exclusion and reaffirmation of the worth of citizenship. This circumstance raises problematic questions for the legitimacy of the criminal justice system in dealing with non-citizens.

Keywords

Censure, crimmigration, deportation, foreign national prisoners, punishment, re-entry ban

Introduction

Located in the far north-east of the country, Ter Apel is one of the penitentiary facilities in the Netherlands specifically designed for foreign national prisoners facing expulsion.

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There, in a spatial reality hidden from public view, offenders without a legal residence permit and offenders who have lost their residence permit due to the commission of a crime serve their punishment knowing that at the end they ought to be expelled from the country. Ter Apel is the site where the ‘cimmigration crisis’ (Stumpf, 2006) is taking place, where the boundaries between crime control and migration control become blurred. The existence of penitentiary facilities particularly designed to hold foreign national prisoners goes beyond the Netherlands: indeed, other countries and jurisdictions, such as Norway (Ugelvik and Damsa, 2017) and the United Kingdom (Bosworth, 2012), have witnessed this presence within the realm of their penitentiary systems. These emerging trends delineate the latest developments of the criminal apparatus towards the control of unwanted mobility and territorial exclusion (Aas, 2014).

The merger between immigration and criminal law was first brought to light by Juliet Stumpf (2006), and since then the phenomenon has caught the attention of a growing body of scholars (Aas, 2014; Aliverti, 2012; Bosworth, 2016; Kaufman, 2015; Sklansky, 2012; Van Der Woude et al., 2014; Zedner, 2010). The convergence between the two domains of law, both substantially and procedurally, has created a parallel system in which immigration law has absorbed theories, methods and perceptions of the criminal justice system, while at the same time it has explicitly rejected procedural and normative safeguards (Legomsky, 2007). As Aas (2007: 81) has argued ‘the drawing of moral boundaries, a traditional concern of criminal law, is today performed not only through the discourse of punishment, but also through practices of banishment and expulsion’.

In recent years, scholars have started to question the challenges this hybrid administrative-criminal system poses to the traditional configuration of punishment (Aas, 2014; Bosworth, 2012; Kaufman, 2015; Turnbull and Hasselberg, 2017; Zedner, 2015). While deportation and re-entry bans are formally not qualified as punishment, they are practically ‘designed to punish’ (Dow, 2007). This new form of penalty directed at non-citizens, termed ‘bordered penalty’ by Aas (2014), is deeply exclusionary because it erects territorial and social barriers between ‘us’, the citizens, and ‘them’, the foreigners. In re-defining the boundaries of punishment in the ‘cimmigration era’ it is then necessary to consider practices and hybrid forms of punishment that, even if officially claimed as measures outside the criminal justice realm, are able to inflict pain and communicate censure (Aas and Bosworth, 2013; Barker, 2017; Kaufman, 2015; Zedner, 2015). With some notable exceptions (Barker, 2017; Brotherton and Barrios, 2009; Macías-Rojas, 2016; Schuster and Majidi, 2015), current scholarship has paid little attention to this second and maybe even more fundamental characteristic of punishment: its expressive message of condemnation.

The censure of punishment does not lie as much in its capacity to inflict hard treatment, but rather in its condemnatory stigma, in its ‘electrified fences’ (Hampton, 1984) that admonish the transgressor for breaking community norms and values. This article seeks to contribute to the small but growing body of research on the relationship between border control and punishment by looking at the experience of deportable foreign national prisoners in the Netherlands. Examining their perspectives provides a subjective testimony of how foreign national prisoners understand and perceive administrative measures, by emphasizing the tension between the nature of deportation and re-entry ban ‘in books’ and their significance ‘in action’ (Sexton, 2015). Relying on 37 in-depth

interviews with this group of prisoners, we detail how hybrid (cr)immigration practices are able to impose meanings that go well behind rooted significances and aims of administrative measures. Traditionally designed with preventive purposes, administrative measures have now become part of a project of social exclusion and reaffirmation of the worth of citizenship (cf. Bosworth, 2012; Gibney, 2013a; Kaufman, 2014). Within this project, the boundaries between punishment and administrative measures have become increasingly blurred because these measures are not legally qualified as punishment, but they re-produce the same meaning.

This article is structured as follows. The next section provides a theoretical examination of the challenges posed by recent immigration policies in drawing the boundaries of punishment. This is followed by a description of our case study showing how Dutch immigration policies have become more draconian and exclusionary over the last decades. After that, our methodological chapter provides an account of the fieldwork conducted in the penitentiary facility of Ter Apel. We then turn to our main empirical results, reporting the findings of interviews with foreign national prisoners. Here, we analyse how in practice hybrid measures demand a new configuration of penal power and punishment. The last section contains the conclusion, discussion and some recommendations for future research.

Unravelling the Knot: When Is Punitive Not Punishment?

Immigration law and criminal law used to be two entirely separated bodies of law, not only in their legal framework but also in the purpose of their measures (Bosworth, 2016; Legomsky, 2007; Stumpf, 2006). Preventive measures in immigration law were traditionally designed to prevent immigrants without a legal residence permit to enter or reside in a foreign country and to ensure the removal and return to their country of origin (Ashworth and Zedner, 2014). On this ground, their purpose is one of a preventive nature, bearing no link with any punitive essence. On the other hand, criminal law and punishment, by their own nature, have a communicative function that immigration law lacks as they speak with a distinctively moral voice (Simester and Von Hirsch, 2011: 4). However, since immigration law has become more unforgiving and exclusionary, the boundaries between punishment and preventive measures have become increasingly hard to mark and the echo of a censure started to be heard in immigration law and its measures as well.

Talking about punishment without drawing its boundaries might be understating the circumstance that punishment is a particular exercise of state power over individuals: as Burgh (1982: 193) pointed out, 'it involves the deliberate and intentional infliction of suffering' and to that extent, it must be distinguished from other forms of coercion. Punishment is an essentially contested and uncertain concept among scholars, especially with regard to its normative preconditions and moral justifications (Van Ginneken and Hayes, 2017; Zedner, 2015). Nonetheless, most certain is that at its core punishment involves unpleasantness and suffering (Hart, 1968) and carries a condemnatory message. The last aspect is particularly emphasized in the so-called expressive theories of punishment (Duff, 2001; Feinberg, 1965; Hampton, 1984; Primoratz, 1989). While advocates of 'expressionism' hold different views on the content of the message delivered by punishment and on its addressees, they agree that punishment has an expressive dimension

as it delivers a symbolic message of disapproval and reprobation. We believe the last aspect to be what most evidently marks the boundaries between other sanctions and punishment: administrative sanctions lack the ‘condemnatory bite’ of criminal law (Simester and Von Hirsch, 2011: 11). In this article, we attempt to draw the boundaries between preventive measures and punishment by placing emphasis on the condemnatory message delivered by punishment, a characteristic envisioned as a nodal point in unravelling the ‘cimmigration knot’ and distinguishing between criminal and administrative sanctions.

As many scholars have noted, while deportation is formally categorized as an administrative measure, due to its punitive character it can be better conceived of as a ‘blend of civil and criminal law’ – especially in the light of the burden imposed (Aliverti, 2012: 425; cf. also Bosworth, 2016; Dow, 2007; Kanstroom, 2000; Kaufman, 2014; Weber and Pickering, 2013; Zedner, 2015). Because the factual consequences of deportation are undoubtedly heavy and punitive, this circumstance might lead to different understanding of what is ‘punishment’ especially for immigrants who are embroiled in the criminal and immigration system at the same time. Indeed, while irregular immigrants can be expelled from the country due to the lack of a legal resident permit, offenders without a legal residence permit and offenders who lost their residence permit due to the commission of a crime are first punished and later subjected to administrative measures (Barna, 2011). Consequently, foreign national prisoners facing expulsion may perceive being punished excessively or disproportionately for their wrongdoings because they experience deportation as a ‘second’ or ‘double’ punishment (Turnbull and Hasselberg, 2017).

It is necessary to emphasize that, legally speaking, deportation does not constitute double punishment. Double punishment implies being punished twice for the same offence. Foreign national prisoners are first punished for their crime and later subjected to administrative measures for the lack – or the loss – of a legal permit to reside in a certain country. The European Court of Human Rights in *Üner v the Netherlands* has stated that withdrawal of a residence permit and expulsion from the country of a settled immigrant following a criminal conviction does not constitute double punishment since states are allowed to adopt preventive measures to protect society.¹ The Court has argued that deportation is a preventive and not a punitive measure that governments can adopt to safeguard society – regardless of the burden imposed by this measure on the offender (Fekete and Webber, 2010).

Nonetheless, stating rightfully that deportation is not a double punishment but a preventive measure adopted because of the violation of immigration law – and, as such, it bears no direct link with the criminal conviction – does not put an end to the debate on the hybrid nature of deportation. Rather, as Zedner (2015: 7) pointed out ‘the borders between penal and non-penal measures cannot be set by references to purpose alone; so the claim that a measure is primarily preventive does not necessarily take it outside the realm of punishment’. Following this line of reasoning, even if deportation aims primarily at preventing harm to the society, this circumstance by itself is not enough to collocate deportation outside the borders of what constitutes punishment. On the contrary, the punitive dimension and the social censure enclosed in this administrative measure are indicators of the need to redefine the borders of punishment by investigating hybrid practices and measures that seem to hold certain ‘traces’ of punishment (Fekete and Webber, 2010; Turnbull and Hasselberg, 2017; Zedner, 2015).

While administrative measures can encompass a punitive and ‘onerous’ dimension, and often they do so, to be conceived as punishment they need to comprise another thumping characteristic of punishment: its capacity to deliver a message of disapproval. Such communicative capacity entails that punishment not only delivers meanings, but also imposes meanings on others since penal practices signal wrongdoing and censure those who commit them in breach of community norms and values (Barker, 2017). Earlier studies conducted among deportees have reported feelings of social exclusion, stigmatization and rejection (Brotherton and Barrios, 2009; Macías-Rojas, 2016; Schuster and Majidi, 2015), all feelings in sharp contrast with the preventive nature of administrative measures. Drawing the boundaries of punishment within this hybrid legal system is not solely a theoretical exercise, but it is inherently connected with the question of how far governments can conceal the exercise of penal sovereignty under largely uncontrolled administrative powers (Aliverti, 2012; Barna, 2011; Dow, 2007; Kanstroom, 2000; Weber and Pickering, 2013; Zedner, 2015). As stated above, this article seeks to contribute to the debate on punishment and border control by providing an empirical account of how deportable foreign national prisoners construe their meaning of punishment. By emphasizing the subjectivity of those embroiled in this crime–immigration totem, their stories provide a rich and mottled portrayal of how the punished make sense of punishment and how preventive measures are perceived beyond their legal classification.

The Sliding Loss of Tolerance in Dutch Immigration Law

The Netherlands was among the first countries in Europe to introduce an immigration policy aimed at actively discouraging irregular entry and stay in the Dutch territory since the 1990s (Broeders, 2009; Van Der Leun, 2003). The Dutch government has taken extensive measures to combat illegal residence, such as the adoption of the ‘Linking Act’ in 1998: due to this new law, only immigrants with a residence permit can legally work in the country and obtain social security and other social benefits, such as health care and education (Leerkes, 2009; Van Der Leun, 2003). Over the last decades, administrative measures have become harsher and plainly exclusionary, effectively resembling criminal sanctions in terms of gravity – yet formally defined and applied as administrative measures (Leerkes and Broeders, 2010). Since 1990, the decision to revoke regular-resident immigrants’ permits is based on the so-called ‘sliding scale’ policy, which is contingent upon the duration of legal residence in the country and the seriousness of the offence. Originally introduced to offer legal certainty and uniformity, in recent years the policy has been exposed as a tool to demonstrate toughness towards ‘criminal immigrants’ and has repeatedly been made stricter. While in the past immigrants with a residence period of over 20 years could never have been expelled from the country, from 2012 onwards any immigrant – irrespective of their duration of legal residence – can have the residence permit revoked if he or she commits an offence carrying a term of imprisonment (Stronks, 2013).² As Kanstroom (2000: 1907) suggested, immigrants become *eternal guests* in a foreign country and, notwithstanding their long-term lawful residence, they may be expelled from the country due to the commission of a serious crime.

As expelling immigrants from the country is not a guarantee that the ‘dangerous’ outsiders will never return to the Netherlands, a re-entry ban can be used as an additional tool. A re-entry ban is an order issued by national authorities, which aims to prevent irregular immigrants from entering or staying in EU countries for a certain period. At the end of 2011, the Dutch government, in compliance with the Return Directive 2008/115/EC, introduced the possibility of imposing a re-entry ban on third-country nationals of up to *five* years. In the Netherlands, such re-entry ban normally affects non-EU immigrants who have been ordered to leave the country and have failed to do so or non-EU immigrants who have been convicted with a prison sentence (Van Der Woude et al., 2014). Additionally, in line with Art. 11(2) of the Return Directive, Dutch authorities may impose a re-entry ban of up to *20* years on third-country nationals who represent a threat to public order and national security.³ It is necessary to note that a prohibition to enter in or stay on the Dutch territory can also be issued against EU nationals, in spite of the provision regarding freedom of movement, as the Dutch authority can declare an EU-citizen ‘undesirable’ (*persona non grata*). According to Art. 27(1) of Directive 2004/58/EC this measure can only be adopted on grounds of public policy, public security and public health.

Because of these harsher immigration policies and expanding grounds for applying administrative measures, issuing deportation orders and re-entry bans to immigrants with a criminal history has been increasingly facilitated. As other scholars (Leerkes and Broeders, 2010; Van Der Woude et al., 2014) have noted, these changes in the Netherlands are indicators consistent with the alignment of criminal law and immigration law. Foreign national prisoners are the group more at risk of exclusion from the Dutch society, not only temporarily through imprisonment for their crime, but permanently through their subsequent deportation and re-entry ban.

Methodology

This article draws on data collected for a larger research project coordinated by Brouwer on the intersection of punishment and migration control in the Netherlands. The project comprised interviews with foreign national prisoners and government actors as well as analyses of secondary data. The data used for this article consist of 37 in-depth interviews with foreign national prisoners conducted between April and September 2016 with the assistance of several international graduate students. These interviews took place in the all-foreign nationals prison of Ter Apel, in the north-east of the Netherlands. The Dutch all-male prison has a capacity of 434 inmates and it is almost always fully occupied. Respondents were selected to reflect as much diversity as possible in terms of county of origin, age, time in the Netherlands before imprisonment, time spent in prison and remaining sentence length. Potential respondents were provided a letter explaining the purpose of the project and asking them if they wished to participate. There was no remuneration for their participation in the research.

Interviews were conducted as much as possible in respondents’ native language or another preferred language and lasted anywhere between 20 and 75 minutes. Interviews were semi-structured: we had a list of topics to which we wanted to bring detainees’ attention, but eventually conversations developed on their own towards themes that

affected them the most. Questions were based on two main themes: first, we were interested in knowing more about how they perceived the overlapping criminal and administrative procedure. Second, we focused our attention on the impact their possible expulsion from the Netherlands had on their imprisonment. We formulated our questions broadly in order to allow detainees to interpret them following their own feelings and ideas.

Before starting the interview, each detainee was given an explanation about the purpose of the research project and given the opportunity to ask questions. We also stressed the anonymity of the respondents and the confidentiality of the information shared. Each respondent subsequently signed an informed consent form. All but two respondents agreed to have the interview recorded; these have been recorded in detailed notes drawn up during and immediately after the interview. All recorded interviews were transcribed verbatim and, when necessary, translated into English by the interviewer. All data have subsequently been analysed with NVivo, coding the transcripts according to the relevant themes of the larger research project. Pseudonyms have been used in reporting data to ensure respondents' anonymity.

Rethinking the Boundaries of Punishment: Inside Foreign National Prisoners' Narratives

In unravelling the 'crimmigration knot' and attempting to re-define the boundaries of punishment, we have chosen to analyse these practices through the eyes of the punished. Drawing from the model of 'penal consciousness' developed by Sexton (2015), we focused our attention on the gap between what administrative measures are designed to be and what they practically *are* for those who experience them. We adopted this framework to emphasize the subjectivities of the punished and at the same time to account for the varieties of voices, stories and feelings that they shared with us.

Embroiled in a (cr)immigrant penitentiary system

Created in 2012 for reasons of efficiency, in Ter Apel foreign national prisoners without residence permit are incarcerated and prepared for deportation by the Repatriation and Departure Service (DT&V) who has based its offices within the prison. The circumstance of being embroiled in the criminal justice system and in the immigration system at the same time contributed to create feelings of exclusion: 'They have isolated us here, far from everything! In here, we foreigners are like outcast, you feel like a pariah, far from everything' (Juan, Colombia). Like Juan, many prisoners perceived that being hosted in a facility geographically remote was tied to their legal status, in a way that this solitary confinement – grounded in citizenship – reinforced exclusion and stigma. Marcel, a French citizen, who strongly contested his status as European, told us 'Ter Apel is in the middle of nowhere and here they have collected all the unwanted aliens, both the paperless and EU citizens, and everybody who is a foreigner is considered the same.' The very fact of serving their sentence in a designated facility apart from the others added symbolic meanings to their imprisonment. It communicated them to be the 'outsiders'; it cast an additional stigma of 'foreignness' to the stigma of 'criminals'. It was not only being imprisoned that inflicted pain; rather, it was being imprisoned as the

outcast that added burden and censure to their punishment: 'The Dutch system doesn't work for us because here they call us illegal people [...]. Since we came here, from the beginning we start to hearing that people in this prison are not welcome in the Netherlands' (Fadi, Iraq).

The official reason for which foreign national prisoners are held in Ter Apel is to facilitate their removal from the country. However, from their point of view, serving their sentence in a separated facility was tied to their condition of 'outsiders' in the country. As such, this (cr)immigrant penitentiary facility acted as a reminder of their legal status, or lack thereof, and echoed a message of exclusion and censure in which identity, belonging and punishment intertwine (Turnbull and Hasselberg, 2017).

Double punishment? The burden of deportation

Foreign national prisoners are not only serving their sentence in 'special' penitentiary facilities designed to host who come uninvited to the Netherlands, but they are also waiting to be expelled from the country. It is worth noticing that not all of them will meet this fate: while deportation may appear as an exercise of state unilateral power and control, this conception is misleading (Weber and Pickering, 2013). Deporting someone requires bilateral agreement between states – which often fails. Additionally, other situations may preclude the achievement of expulsion from the country, such as the fact that states may be unwilling to readmit the undesirable, states may be in disorderly situations that preclude any possibility of return or the offender does not have any documents with him and it is not possible to establish his identity or nationality (Walters, 2002; Weber and Pickering, 2013).

Whether deportation was experienced as double punishment seemed to be linked with the personal history of each detainee. When asked how they felt about the fact that they will be expelled from the Netherlands at the end of their sentence, some of them coped quite well with the idea. In particular, those who have been disappointed by their short time in the Netherlands or who have never even been inside the country because they were arrested at the border tended to not see any punitive nature in their expulsion from the country. On the contrary, they were often willing to go back to their country of origin. Marco, for example, had only recently arrived in the Netherlands for the first time. As he had no desire to stay in the country and is an Italian citizen – meaning he will receive a re-entry ban for the Netherlands only – he was practically looking forward to his deportation:

I am happy. I cannot wait more to go to Italy. I told them to send me immediately to Italy and give me 10 years of re-entry ban in the Netherlands. I do not care at all about staying here.
(Marco, Italy)

Yet obviously not all respondents shared these feelings. For example, Zhihao was at the end of his bachelor programme at the time he was arrested. He came to the Netherlands right after graduating from high school to learn English and continue his studies. Since he spent most of his youth in the country, he had plans for his future in the Netherlands:

Deportation affects me at most. I can say that. My point is that I did not finish my study. I had plans for a master and now this seems just a dream, a beautiful dream that has become impossible now. (Zhihao, China)

From the testimonies of those subjected to deportation emerged that previous stay or future ambitions in the country seem to play a major role in perceiving the ‘punitiveness’ of deportation. Various respondents had families in the Netherlands, including children. Reda, for example, had a pregnant girlfriend in the Netherlands, but was now facing deportation to Morocco. Juan had been in the Netherlands for over 20 years. He had previously been married to a Dutch woman, with whom he has three adult daughters who all live in the Netherlands. For these men the prospect of being separated from their loved ones was particularly painful as they believed they were being punished ‘too much’ for the crime committed and given ‘bigger punishment than they needed to have’. This feeling was particularly common among detainees who were long-term residents since they would be separated from their families, friends and the local community in which they had settled many years before. Because of the burden deportation posed on their lives, they experienced it as a second form of punishment, meaning they were effectively punished twice for the same offence (cf. Turnbull and Hasselberg, 2017).

The stigma of deportation

Deportation was not only perceived as punishment in light of its factual consequences, but also due to the censure it communicated. Moussa, a 50-year-old detainee, shared with us his feelings about being deported after serving his sentence:

Deportation? It is a double punishment. They want you to serve your time and you want to fight and reintegrate into society, but you keep being punished. It's like someone is stabbing you and it doesn't matter how much you try, they keep stabbing you. You have to face society, your moral values, your family, God, everything. And you lose everything. (Moussa, Ivory Coast)

For Moussa, the prospect of being deported after two years of regular employment compelled him to face himself and his community, as they will know he has been expelled from the Netherlands due to the commission of a crime. The stigma of deportation recurs in previous studies, in which those deported are stained either with the stigma of criminality (Brotherton and Barrios, 2009) or with the stigma of failure (Schuster and Majidi, 2015). The expressive dimension of deportation is drenched with censure and shame, and it inflicts additional pain to the one of imprisonment also because of *how* foreign nationals will be deemed by society once deported to their native countries. When we asked Viktor, a 40-year-old detainee from Serbia, how he felt about being deported after serving his sentence, he told us ‘It is too much. I am not a criminal. I am here and this is my fault and I know but after, this is just too much.’ Viktor contested his upcoming deportation on the ground that he is not ‘a criminal’ as the fact of being deported to his country of origin had more to do with his ‘criminality’ rather than with the loss of his residence permit.

With deportation being perceived as tied to criminality, it was particularly frustrating for some respondents that the decision to deport them was made outside of their criminal procedure. Because deportation is an administrative consequence of a criminal conviction, they frequently only found out about it after they had been convicted by a criminal court. This was also the case for Zhihao, who had hoped he could stay in the Netherlands after serving his sentence to finish his studies. The fact that the officers of the DT&V already started planning his deportation despite the fact that he still had an appeal going added to his sense of confusion:

Deportation wasn't in the court; they did not put it on the table when I was in court during the trial. After the trial, they come out with a lot of craps that you were not expecting. You should have told me, like letting me be prepared at least. I am now doing the highest court, for now I am still innocent, so why you are already doing this procedure? This is not right, I am still innocent right now and I have not been convicted. (Zhihao, China)

Zhihao did not realize that the deportation order against him was issued outside the criminal court that dealt with his case because deportation is an administrative measure. However, he contested such an order because, being still innocent, he is not stained with the stigma of criminality. Other respondents contested their deportation order and reported to us having been assisted by 'useless' criminal lawyers that were not able to provide them with information about their case or bargain over their term of imprisonment in light of their following deportation. In truth, criminal lawyers are often unaware of immigration law rules and of whether immigration authorities are issuing a deportation order against their clients. Nevertheless, foreign national prisoners felt they were entangled in a (cr)immigrant legal system in which their 'foreignness' marked the path of their legal case. Some respondents shared with us these feelings:

Even if I go to court and I say that to the judge, he will just say to me 'your own fault, you decide to come here as a foreigner'. (Roy, Suriname)

I went to court and my lawyer told me 'I can't do anything, you are a foreigner. If you were Dutch, I could have done something.' I understand. I feel this. (Nazmir, Albania)

The perceived interconnection between criminal and administrative procedures added to feelings of exclusion because within (cr)immigrant procedures images of 'foreignness' and 'criminality' are tied together. Hence, these procedures inflict extra pain on foreign national prisoners because *they are further stigmatized by how they sense themselves in the justice system*. It is not only the burden of being deported that inflicts pain, but also the circumstance of being deported because they are deemed to be criminals and foreigners, dangerous and 'others'. Some respondents contested such labels by appealing to their 'non-criminality' because they are not dangerous as they are deemed to be. Other respondents, rather, resigned themselves to their condition of 'foreignness' by acknowledging the fact the system 'doesn't work' for them because they are the others.

Re-entry ban: A forward-looking approach towards 'criminal immigrants'

For many respondents it was not only the deportation order they found troubling, but also the attached re-entry ban. Being banished for an extended period from the Netherlands or even the EU, the re-entry ban lay at the extremes of exclusion. Marco, an Italian detainee, has been declared 'undesirable' by the Dutch authorities and he cannot go back to the Netherlands for a certain period. Whereas he had no desire to return to the country, he expressed his concerns about re-entry bans for non-EU prisoners, who are not allowed to enter any EU countries for the time they are banned. He believed that whereas it was right to ban someone from returning to the Netherlands, preventing them from coming to other European countries as well was unduly harsh.

By preventing people from returning to *any* EU countries, the ban shows the other side of the coin of the freedom of movement for European citizens. Whereas it is a neglected research area by the academic community, this measure strongly affected foreign national prisoners' perception of their position in the justice system. Many respondents were very concerned about the re-entry ban issued against them because they felt they must deal with the consequences caused by this measure for a long period of time. Moussa, a detainee from Ivory Coast, is convinced that since he will not have the freedom to go to certain places, he will 'still being punished' for his crime. Amine, who used to live in France before being arrested in the Netherlands, believed he was being denied a second chance in Europe:

I don't know why they make people unable to come to Europe for 10 years. If I were banned only from the Netherlands, this would have been ok, but not from all Europe. They tell me to not come back to Europe for 10 years, but in life you never know. They are taking everything away from me. You can't ever know about the future. I told you, it can be a medical emergency or a woman, you can just get a second chance here, and they are taking that away from me. (Amine, Algeria)

This onerous measure reminded these outsider-prisoners of the worth of European citizenship in 'fortress Europe' (cf. Gibney, 2013a). Several respondents were born outside Europe but obtained citizenship in another EU Member State – this proved to be a valuable asset now as they could be deported to another European country and maintain considerable freedom of movement. However, for those who did not hold EU citizenship, the ban was perceived as extremely punitive, *de facto* as an additional punishment:

If you think about that, of course you say 'if you are a convicted criminal you have to get punished'. But you are punished two times: the time you sit in prison, plus the punishment you must not come here. (Marcel, Ecuador)

Other respondents considered a re-entry ban to be disproportionate to the crime committed because they had to 'pay twice for the same thing' – by *same thing* they were referring to the crime committed. A re-entry ban was widely experienced among our respondents as an ongoing punishment for their crime: it was not just a ban on going back to Europe, but also on their dreams, aspirations and wishes. After being deported, they will still face the consequences of their actions in the Netherlands in a much broader

spatial dimension. Eldi, an Albanian citizen, told us he was heavily affected by the prospect of being denied access to all EU countries for 10 years and he described a re-entry ban as a measure that 'locked him in his own country' as his freedom of movement will be partially curtailed for a long period. Because a re-entry ban has a direct impact on their futures by delimiting a geographical area in which they are not admitted – not only as residents, but also as visitors – there is no escaping the fact that such a measure is perceived as punishment. Despite the formal preventive nature of a re-entry ban, for foreign national prisoners the importance of the interests at stake – freedom of movement, separation from family and friends, denied opportunities – is such that, for them, this measure is a punishment in all but name.

No longer welcomed in Europe

A re-entry ban was interpreted as punishment not only due to its punitive component, but also due to the message our respondents read into it. Osman, a Bosnian citizen who was arrested after a one-month stay in the Netherlands, felt he was not 'good enough' to stay in the Netherlands:

The Netherlands is better than Bosnia, but they told me that I am not for this country. I am a criminal now and I cannot stay here. I have never committed a crime before. This was the first time. But for one crime, they kill me for my entire life. I am a criminal now for them and they will always consider me a criminal. (Osman, Bosnia)

Osman interpreted his re-entry ban as a message of disapproval, as though being banned was a sort of 'symbolic mark' inflicted on those branded undeserving to be members of the community. A re-entry ban is not a value-free administrative measure taken on preventive grounds, but rather is steeped in particular meanings, discourse and values. This measure poses a stigma on its recipients because it delivers, either accidentally or deliberately, a message of disapproval: foreign national prisoners, with their criminal behaviour, have shown themselves to be unworthy of remaining in the country. The rhetoric of stigmatization seems to be familiar among foreign national prisoners, both 'the banned' and 'the expelled'. Earlier studies on deportees described feelings of social exclusion, moral reprobation and stigma – *especially* for those deported after the commission of a crime, for whose deportation adds an 'extra dimension of shame to their experience' (Gibney, 2013b: 121).

The term *persona non grata* particularly bothered Urtan, a detainee from Albania, since he interpreted his declaration of undesirability as tied to censure. This condemnatory message was so intrinsic in the wording of the term that Urtan could not stop repeating it to us 'It's a little bit fanatic. *Persona non grata*. We are human beings, same as you. Do you know? It's highly important. *Persona non grata*. I don't know.' Urtan, as many others, had to cope with the expressive dimension of a re-entry ban: being banned from the Netherlands, more often from the whole European Union, communicated to them that their presence is no longer *desired*. For Yassine, a 28-year-old Moroccan who has been living in the Netherlands since he was 10 years old, being declared 'undesirable' conveyed a clear message:

The word says it all: you are ‘undesirable’. It is such an ugly word. You know what I mean? On paper it sounds matter-of-fact, but if you look at it closely: ‘you are undesirable, we do not want you here’. (Yassine, Morocco)

Yassine has committed a crime in the Netherlands and because of it he has been banned from the country. Whereas the pronouncement of undesirability is a preventive (administrative) measure, for those banned it seems to hold another meaning. This ‘medieval’ ban is experienced as rejection and exclusion, as foreigners do not fulfil any more the ‘requirements’ needed to be members of the community and thus they must leave. In a sense, administrative measures are capable of extending foreign national prisoners’ status as criminals because they lay down ‘a legal and caste-like stigma that lasts well *beyond* the punishment’ (Macías-Rojas, 2016: 164, emphasis in original). For non-members of the community, deportation and a re-entry ban are a reminder of the worth of membership: not only are foreign nationals excluded from those rights and protections granted to members, but they are also considered ‘unworthy’ of inclusion in the national community (Stumpf, 2006: 397). While ‘in books’ administrative sanctions are preventive, ‘in action’ they are experienced as penal mechanisms to exclude those deemed undeserving of membership. Deportation and re-entry bans have become a sort of *bordered punishment*: from being measures to prevent irregular entry and stay in a foreign country, they have now acquired the same weight and censure of punishment that places foreign national prisoners on the social and territorial fringes of society.

Conclusion and Discussion

‘Bordered penalty’ has disrupted the traditional significance of administrative measures for those who are not formally members of the community. While foreign national prisoners are still subjected to the normal judicial system, the latter has forgotten its own fundamental goals and has become more openly exclusionary and focused on borders and migration control (Aas, 2014; Kaufman, 2014; Ugelvik, 2012). At the same time immigration policies have symbolically shifted their dynamics – they reinforce social norms and values, preserve national identity and remind people of the worth of citizenship (Khosravi, 2011; Leerkes and Broeders, 2010). From our case study, it emerges that foreign national prisoners do not perceive a clear-cut distinction between punitive and preventive measures – in their eyes, there is a package of different punishments which are perceived as burdensome and exclusionary to the same degree. Deportation and re-entry bans are now permeated by the same censure embedded in criminal sanctions: foreign national prisoners have betrayed the hospitality of the country that let them in and consequently they are unwanted today and in the future (Gibney, 2013a; Stumpf, 2006).

Whereas drawing the boundaries of punishment has become a problematic theoretical exercise, giving voice to those tangled up in this hybrid legal system provides ample opportunities for thought. In line with earlier studies on deportees (Brotherton and Barrios, 2009; Macías-Rojas, 2016; Schuster and Majidi, 2015) our research stresses the importance of penal subjectivities in unravelling the ‘cimmigration knot’. While we would not dispute that the ‘hard treatment’ imposed by administrative measures is an

important element in their re-qualification as punishment, a perspective that focuses solely on this element largely overlooked the fact that administrative measures *can be* onerous and coercive, and often they are. Nevertheless, this characteristic by itself is not enough to qualify them as punishment. In this regard, it might be argued that the distinction between punishment and administrative measure eventually lies in the circumstance that punishment is meant to deliver a message of censure. As Simester and Von Hirsch (2011: 20) pointed out, 'blurring the moral voices leaves criminal law less distinct from civil law. It diminishes criminal law as a distinct, valuable, tool for social control and doing justice. It gunks up the censure machine.' Feelings of shame, stigma and exclusion are all part of the censure machine set in motion by punishment and should be seen as a crucial earmark in unravelling the 'crimmigration knot' and drawing the boundaries between criminal and administrative measures.

How do we re-define punishment in the 'crimmigration era'? Shall we abandon legal construction and official claims? Beckett and Murakawa (2012: 223) have argued for the necessity to develop a scholarly conception of punishment that is independent from legal categorization in order to illuminate 'legally hybrid pathways to punishment'. We believe there is some evidence to support such a claim. While legal scholars might be sceptical in bringing the concept of punishment outside the criminal justice system, it can hardly be denied that some 'traces' of punishment are visible in administrative measures as well. Besides compressing significantly the freedom of movement of those who receive them, deportation and re-entry bans are capable of imposing meanings on foreign national prisoners: deported because they are criminals, banned because they are unwanted. The message administrative measures communicate is in sharp contrast with the underlying scope of immigration law, the main purpose of which is to establish whether and under which circumstances foreigners are allowed to enter or stay in a country, and not to communicate unworthiness, stigma or censure. Given the crucial implications of these legal distortions, problematic questions for the legitimacy of our legal system are far from answered and call for further empirical research in the realm of the new dimension of punishment.

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Notes

1. *Üner v the Netherlands*, App. No. 46410/99 (ECtHR, 18 October 2006).
2. The term of imprisonment causing the withdrawal of the residence permit is directly proportionate to the duration of the legal residence in the Netherlands. This means that while

long-term residents might see their residence permit revoked only for the commission of crimes related to drug, violence and sex, short-term residents might see their residence permit revoked at their first 'misstep'.

3. The length of re-entry ban is not fixed in legislation and it is determined by the circumstances under which the ban has been issued; it varies from one to 20 years. In the case of a prison sentence, the minimum period of re-entry ban is three years.

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References

- Aas K (2007) *Globalisation and Crime*. London: SAGE.
- Aas K (2014) Bordered penalty: Precarious membership and abnormal justice. *Punishment & Society* 16(5): 520–541.
- Aas K and Bosworth M (eds) (2013) *The Borders of Punishment: Citizenship, Crime Control and Social Exclusion*. Oxford: Oxford University Press.
- Aliverti A (2012) Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology* 16(4): 417–434.
- Ashworth A and Zedner L (2014) *Preventive Justice*. Oxford: Oxford University Press.
- Barker V (2017) Penal power at the borders: Realigning state and nation. *Theoretical Criminology* 21(4): 441–457.
- Barna N (2011) Incarceration or deportation: Undocumented criminal aliens and policies of punishment. *Rutgers Race and Law Review* 12(2): 299–332.
- Beckett K and Murakawa N (2012) Mapping the shadow carceral state: Toward an institutionally capacious approach to punishment. *Theoretical Criminology* 16: 221–244.
- Bosworth M (2012) Subjectivity and identity in detention: Punishment and society in a global age. *Theoretical Criminology* 16(2): 123–140.
- Bosworth M (2016) *Border criminologies: Assessing the changing architecture of the crime and punishment*. Global Detention Project, Working Paper No. 10.
- Broeders D (2009) Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands. *Punishment and Society* 12: 169–186.
- Brotheron DC and Barrios L (2009) Displacement and stigma: The social-psychological crisis of the deportee. *Crime, Media, Culture* 5(1): 29–55.
- Burgh RW (1982) Do the guilty deserve punishment? *Journal of Philosophy* 79: 193–210.
- Dow M (2007) Design to punish: Immigration detention and deportation. *Social Research* 74(2): 533–546.
- Duff A (2001) *Punishment, Communication and Community*. Cambridge: Cambridge University Press.
- Feinberg J (1965) The expressive function of punishment. *The Monist* 49: 397–423.
- Fekete L and Webber F (2010) Foreign nationals, enemy penology and the criminal justice system. *Race & Class* 51(4): 1–25.
- Gibney M (2013a) Deportation, crime, and the changing character of membership in the United Kingdom. In: Aas K and Bosworth M (eds) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press, 218–236.
- Gibney M (2013b) Is deportation a form of forced migration? *Refugee Survey Quarterly* 32(2): 116–129.
- Hampton J (1984) The moral education theory of punishment. *Philosophy & Public Affairs* 13(3): 208–238.

- Hart HLA (1968) *Punishment and Responsibility*. New York: Oxford University Press.
- Kanstroom D (2000) Deportation, social control, and punishment: Some thoughts about why hard law makes bad cases. *Harvard Law Review* 11: 1889–1935.
- Kaufman E (2014) Gender at the border: Nationalism and the new logic of punishment. *Punishment & Society* 16(2): 135–151.
- Kaufman E (2015) *Punish and Expel: Border Control, Nationalism, and the New Purpose of the Prison*. Oxford: Oxford University Press.
- Khosravi S (2011) *'Illegal' Travellers: An Auto-Ethnography of Borders*. Basingstoke: Palgrave Macmillan.
- Leerkes A (2009) *Illegal Residence and Public Safety in the Netherlands*. Amsterdam: Amsterdam University Press.
- Leerkes A and Broeders D (2010) A case of mixed motives? Formal and informal functions of administrative immigration detention. *British Journal of Criminology* 50: 1–21.
- Legomsky SH (2007) The new path of immigration law: Asymmetric incorporation of criminal justice norms. *Washington & Lee Law Review* 64(2): 469–528.
- Macías-Rojas P (2016) *From Deportation to Prison: The Politics of Immigration Enforcement in Post-Civil Rights America*. New York: New York University Press.
- Primoratz I (1989) Punishment as language. *Philosophy* 64: 187–205.
- Schuster L and Majidi N (2015) Deportation stigma and re-migration. *Journal of Ethnic and Migration Studies* 41(4): 635–652.
- Sexton L (2015) Penal subjectivities: Developing a theoretical framework for penal consciousness. *Punishment & Society* 17(1): 114–136.
- Simester AP and Von Hirsch A (2011) *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*. Portland, OR: Hart Publishing.
- Sklansky DA (2012) Crime, immigration and ad hoc instrumentalism. *New Criminal Law Review* 15(2): 157–223.
- Stronks M (2013) Een bijna ongebreidelde beteugeling van de tijd: Een analyse van aanscherpingen van de glijdende schaal. *Nederlands Juristenblad* 34: 2306–2314.
- Stumpf J (2006) The crimmigration crisis: Immigrants, crime, and sovereignty power. *American University Law Review* 56(2): 367–419.
- Turnbull S and Hasselberg I (2017) From prison to detention: The carceral trajectories of foreign-national prisoners in the United Kingdom. *Punishment & Society* 19(2): 135–154.
- Ugelvik T (2012) Imprisoned on the border: Subjects and objects of the state in two Norwegian prisons. In: Hudson B and Ugelvik S (eds) *Justice and Security in the 21st Century: Risk, Rights and the Rule of Law*. Abingdon: Routledge, 64–82.
- Ugelvik T and Damsa D (2017) The pains of crimmigration imprisonment: Perspectives from a Norwegian all-foreign prison. *British Journal of Criminology*. Epub ahead of print 8 January 2018. DOI: 10/1093/bjc/azx067.
- Van Der Leun J (2003) *Looking for Loopholes: Processes of Incorporation of Illegal Immigrants in the Netherlands*. Amsterdam: Amsterdam University Press.
- Van Der Woude M, Van Der Leun J and Nijland J (2014) Crimmigration in the Netherlands. *Law & Social Inquiry* 39(3): 560–579.
- Van Ginneken E and Hayes D (2017) 'Just' punishment? Offenders' views on the meaning and severity of punishment. *Criminology & Criminal Justice* 17(1): 62–78.
- Walters W (2002) Deportation, expulsion, and the international policy of aliens. *Citizenship Studies* 6: 265–292.
- Weber L and Pickering S (2013) Exporting risk, deporting non-citizens. In: Pakes F (ed.) *Globalisation and the Challenges to Criminology*. Abingdon: Routledge, 110–128.

- Zedner L (2010) Security, the state, and the citizen: The changing architecture of crime control. *New Criminal Law Review* 13(2): 379–403.
- Zedner L (2015) Penal subversions: When is a punishment not punishment, who decides and on what grounds? *Theoretical Criminology* 20(1): 3–20.

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