On the European system of immigration detention

SEBASTIAN LUNDBY

Over the last few decades immigration detention has become a widespread and normalised practice in Europe. Accompanying this sudden growth is the emergence of a progressively more interconnected immigration and asylum policy in the European Economic Area. What has not followed is a consideration of these detention practices from a more holistic perspective, despite a need for cross-national research. This paper addresses this deficit in two ways. First, I explore the features of the European migration regime by reviewing the relevant asylum and immigration policies common to EU member states, and then attempt to establish an aggregate estimation of the number of detention sites and migrant detainees in the EU. Secondly, I consider the unintended effects that a methodological nationalism in research and public discourse has on the way detention practices are perceived and understood. In particular, I consider the contradiction between European detention practices and its progressive identity as a stronghold of human rights.

Introduction

The widespread detention of asylum seekers and unwanted migrants is a relatively new, yet increasingly normalised practice in contemporary Europe. Immigration detention is part of a broader effort of European states to formulate a common asylum and immigration policy to regulate desirable and undesirable movement into and within its borders (European Council, 1999). The sum of these efforts has been referred to as the European (or EU) migration regime (Cross 2009). Its roots can be traced back to the Dublin Convention in 1990 where the desire to codify a comprehensive framework to regulate immigration was first articulated (Cross 2009:172–173). This framework was further consolidated at the European summit in Tampere in 1999. Today that project has materialised, as evidenced by the growing body of legal instruments that administers movement within the EU and EEA.

The detention of non-EU (and non-EEA) national migrants plays an increasingly central role in achieving the goals of the European migration regime, though it has yet to be recognised as such. Hundreds of thousands of migrants across the continent are detained annually, often confined to facilities that barely meet their most basic needs (Mainwaring 2015:50). The exponential increase in the reliance on this practice creates a need for critical evaluation (Wong 2015:29).

While there is a growing literature on immigrant detention from the perspective of particular case study countries, scarcely any academic literature considers immigration detention from the perspective of Europe as a whole. Not even Eurostat, the European Union's statistical office, has attempted to compile any comprehensive data in the form of published reports. The overwhelming focus on isolated country case studies may be partially explained by what Wimmer and Glick Schiller (2002:302) term methodological nationalism, or 'the assumption that the nation/state/society is the natural social and political form of the modern world.' One

of the major implications of this assumption is that the 'social sciences have become obsessed with describing processes within nation-state boundaries as contrasted with those outside, and have correspondingly lost sight of the connections between such nationally defined territories' (Wimmer and Glick Schiller 2002:307). It is precisely these connections that appear to have been lost in the research on immigration detention in Europe.

While immigration detention is an increasingly global phenomenon, the European Union provides a particularly interesting case to explore—because of its transnational collective identity, the freedom of movement within its borders, and its growing reliance on detention practices that are fundamentally at odds with Europe's perceived cultural identity as a stronghold of human rights (Wilsher 2007:395). By scrutinising the treatment of migrants in detention in individual countries alone or in contrast to others, the complicity of all participating states in the shortcomings of the European system of immigration detention is obscured. Of course, variations exist and are manifested in national law, but the fact remains that these countries are united through a shared transnational legal framework. Nation-states, particularly those comprising the European Union, are institutions enmeshed in a paradigm of transnational processes of which migration is an fundamental aspect, and through which migration ought to be understood and discussed (Glick Schiller 2010:109).

This paper attempts to counter the methodological nationalism that today characterises the study of immigration detention in Europe by offering a more holistic take on the phenomenon. I do this in three ways. First, I describe the interconnected European migration regime with an emphasis on the materialisation of a broad system of immigration detention. Second, I ground policy considerations in empirical data compiled from various sources in an attempt to establish some idea of how extensive immigration detention in Europe really is. I consider the main limitations of the data currently available, and the challenges to obtaining sufficiently comprehensive or accurate numbers. The final section explores the moral and normative implications of methodological nationalism and liberal misconceptions of law in the study and discourse around immigration detention in Europe. Law has come to assume an elevated status in modern society, which can obscure its role in legitimating (systematic) acts of immorality and deflecting responsibility (Dossa 1999:73). Similarly, there is a historic tendency to view European atrocities as exceptions to the otherwise morally pure and progressive identity of Europe or the 'West'. Europe's moral power is produced and sustained in a manner that actively externalises negative connotations to the collective unit. One implication of the geographical arrangement of the European Union is that its southern and eastern frontiers are bearing the brunt of the common asylum and immigration policy. Consequently, they also bear the brunt of the blame for any exposed inadequacies in relation to the welfare of migrants. However, I argue that those states taking part in the system of immigration detention are legally and morally complicit in the system's shortcomings, particularly regarding migrant welfare.

The European migration regime

Due to the perceived problems associated with immigration, detention is an increasingly popular tool for EU members and related countries to limit irregular migration (Wong 2015:28). In a very short space of time the practice has not only been institutionalised and normalised; it has, in fact, become 'an inherent part of a policy package that has as its main aims to deter future migrants and to remove those already on national territory as rapidly and as effectively as possible' (Cornelisse 2010:2). The European migration regime is a large body of directives and regulations directly or indirectly involving the vast majority of the continent's states and is aimed at creating a common asylum and immigration policy. These

policies include the so-called 'Return Directive' (2008/115/EC), the Council Directive known as the Reception Conditions Directive (2003/9/EC) and its recast (2013/33/EU), the Dublin III Regulation (No 604/2013), the Asylum Procedures Directive (2005/85/EC) and its recast Directive (2013/32/EU), the Schengen Borders Code (Regulation 562/2006), and the Trafficking Directive (2011/36/ EU). Of these policies, the first four contain explicit provisions on the detention of third-country nationals (EMN, 2014:12).

The 'Return Directive' concerns the detention of irregular migrants awaiting return. It authorises the use of detention in order to carry out the removal process and applies from the point of preparation to the point of departure, whether it be voluntary or involuntary. Avoiding the risk of absconding and other potential obstructions were key motivations behind its implementation. The policy is common to all EU states including Norway, Iceland, Liechtenstein, and Switzerland. It contains more safeguards for the individual than any of the other policies above (EMN 2014:12–14). However, in her analysis of the directive, Cornelisse (2010:270–271) found that it simultaneously allows for said safeguards to be disregarded in certain—relatively ambiguous—situations. It also authorises an exceedingly long maximum duration of detention (12 months).

The policy commonly referred to as the Reception Conditions Directive relates only to applicants for international protection and sets out minimum standards for the reception of asylum seekers. Although at first glance it appears to encourage free movement for the asylum seeker, a closer look at the provisions to restrict movement and detain them reveals that the directive does little more than authorise the use of detention within a codified framework (Cornelisse 2010:269). A little less widespread than the former, it does not apply to Ireland, Denmark, or the EU associated countries that are bound by the Return Directive. Moreover, the UK chose not to opt in to the recast directive, but remains tied to the previous version. Still, it is in force in all the other 25 or so EU member states (EMN 2014:14).

The Asylum Procedures Directive exists to determine whether refugee status is to be granted or withdrawn and outlines the minimum standards for such procedures. As Cornelisse (2010:269) explains, the directive provides remarkably few safeguards for the individual. Its only premise for detention is that there must be more reasons beyond the fact that the person in question is an asylum applicant (Council Directive 2003/9/EC: Art. 18). The states sharing this legal instrument reflect those participating in the Reception Conditions Directive, the only exception being that Ireland, like the UK, chose to only opt in the original directive.

The above directives and regulations constitute some of the primary legal instruments that make up the 'policy package' regulating the detention of migrants in Europe (EMN 2014:12–14). Another crucial legal instrument deserving attention is the EU law commonly known as the Dublin Regulation—or the Dublin III Regulation, as it has now been recast a second time. It is the cornerstone of the broader Dublin System and is intended as a form of burden-sharing of asylum applications. In short, its aim is to 'determine rapidly the Member State responsible [for an asylum claim],' typically the participating state through which a migrant first enters (Regulation (EU) No 604/2013:Art. 5). The regulations emphasise that the purpose is to speed up the process of deciding whether or not international protection will be granted (Regulation (EU) No 604/2013). However, in reality, this policy puts the external border countries in the south and east at a serious disadvantage, as most asylum seekers first enter the European Union through these countries (Hurwitz 2009:123). Furthermore, as the last section will show, a 'Dublin transfer'—the movement of an asylum seeker in one European country to the responsible member state—often means long-term detention in poor

conditions for those subjected to them (Cornelisse 2010:11–22). All EU member states (including Denmark under special arrangements) as well as Norway, Iceland, Liechtenstein, and Switzerland have committed to the latest recast of the Regulation and so are engaged in an elaborate distribution system. By taking part in the Dublin Regulation, these states have committed to regulating the flow of asylum seekers at the expense of human welfare. In the process, moral responsibility too is regulated and even diluted as accountability becomes harder to determine.

Statistical overview

Though the legal instruments governing immigrant detention in Europe are clear, there is far less clarity about the numbers of immigrants affected by them. Considerable variations exist in the numbers recorded by various authors, academic and non-academic alike, on the prevalence of immigration detention in Europe. This section will look at the narrow body of research that has commented on immigration detention in Europe from a holistic standpoint, either directly or indirectly, and try to establish some numerical overview of the extent of these practices.

Despite a dearth of literature on this topic, there are a few significant works that attempt to provide a broader perspective on the state of immigrant detention in Europe. These include Cornelisse (2010), Wong (2015), and the European Migration Network (EMN) (2014), established in 2008 by the Council of the European Union (2008/381/EC). Whereas Cornelisse discusses immigration detention and human rights in Europe extensively and in depth, she refrains from presenting any concrete numbers on the prevalence of these practices, instead emphasising how difficult it is to 'obtain reliable figures' (Cornelisse 2010:7). The focus of Wong's book is similar, but it centres more on answering why states pursue increasingly contentious immigration policies. In contrast to Cornelisse, Wong (2015:130) lists some statistics to provide the reader with a sense of the immensity of what he calls 'the machinery of immigration control.' In fairness to Cornelisse, she is right to stress the lack of available data. The fact that not even Eurostat, the European Union's statistical office, has produced any reports of this kind has caused a reliance on independent organisations such as the Global Detention Project and Migreurop. The former is a non-profit research centre based in Geneva, and the latter constitutes an international network of NGOs, researchers and activists. In terms of numbers, these two are crucial. Indeed, many authors, including Wong (2015:130), have relied on statistics provided by precisely these organisations. Together with the report published by the EMN in November 2014, these make up the three main sources of statistics on immigration detention in Europe discussed here.

There are significant challenges to obtaining accurate and comprehensive statistics on immigrant detention in Europe. This may be explained in part by variations in scope and definitions. For example, as Migreurop (2005) explains, they use 'an extended definition of "camps,"' which is justified on the basis that more narrow definitions mask the fact that migrants held in (often remote or isolated) open centres have little more agency in terms of movement than migrants confined to closed centres (Migreurop 2005). Variations can also be explained by a lack of transparency or even by the use of flawed data. For example, the EMN has produced the most thorough and reliable statistics on the topic, but their findings are incomplete as some relevant countries chose not to participate in their study. Moreover, it appears that they included some incorrect figures while compiling an overview of the total number of migrants in detention in a year (EMN 2014:Annex 4). Presumably, they made the mistake of using the UK Home Office's data for the number of migrants in detention at any

one time. The total number in a year appears to be about eight to fifteen times higher than what they state (Silverman and Hajela 2015:2). What follows is an attempt to establish high and low aggregate estimates of the numbers of detainees and detention sites in the EU using the above and a few other sources. Where necessary, disaggregate sources are used to fill in the gaps if they are available.

The best attempt at an aggregate number of detention centres in the EU is also the most recent. Wong (2015:130) identifies 218 sites, but this number excludes more than 20 European countries, of which seven are EU member states. After borrowing statistics from the EMN (2014:Annex 3) and Ceccorulli and Labanca (2014:139) the total number amounts to 228. Note that adding these disaggregate figures does not exaggerate the total number of detention sites as their estimates are much more conservative than Wong's. In their study, the EMN identified just 128 facilities spread across 24 countries. Even if we were to borrow statistics for the remaining member states using the same figures as Wong and, again, Ceccorulli and Labanca, to fill in the gaps, it would amount to little more than 158 sites. Therefore, the aggregate number of detention facilities within the EU can range from about 158 to about 228, depending on the definition of choice. Of course, the full extent of European immigration detention practices is not limited to the EU's geographic territory. Migreurop, in fact, mapped out the full reach of the European detention system beyond its borders. Spanning the entirety of Europe and the countries bordering the Mediterranean and the Black Sea (excluding Russia), they found that the total amount of detention sites consistently increased from 324 in 2000 to 473 in 2012 (Migreurop 2012).

Variations in scope and definition are even more influential when trying to establish an aggregate estimate of migrants in detention. Narrowing the criteria of what counts as a site of detention automatically narrows the total number of detainees substantially. For example, Gill (2011:151) mentions in passing that there were 'half a million or so illegal immigrants detained across Europe' in 2008 and that most of them were held in Greece. This corresponds roughly to Migreurop's (2014) findings which suggest that 'close to 600,000 migrants are deprived of their liberty on the European Union's territory' every year. However, while being deprived of one's liberty is prohibited by the European Convention on Human Rights (ECHR1950)—except in certain circumstances—it is not necessarily synonymous with immigration detention. In other words, the above estimates may include forms of liberty deprivation other than detention as it is discussed here.

More conservative estimates presented by the EMN (2014:9) suggest the total number of detainees combined in 2013 was 92,575. Crucially, the EMN's statistics (2014) exclude EU nationals. As Migreurop (2014) points out, Romanians continue to face detention despite becoming EU citizens in 2007. Having accounted for statistical flaws and unrepresented countries by using disaggregate sources like Silverman and Hajela (2015:2) and Povoledo (2013), the total aggregate number of migrants in detention in the EU in 2013 amounts to just over 125,000. It is then safe to say that the yearly aggregate number of migrants detained in Europe is at least in the hundreds of thousands and at most 600,000 or so. Again, this depends on scope and definitions. Note, however, that it proved impossible to find any reliable figures for Romania, Cyprus, and Greece, but the available data seem to suggest that the numbers for the latter two are high (Gill 2011:151; Mainwaring 2015:50–57).

Norm or exception?

Of the hundreds of thousands subjected to immigration detention each year, many are made to suffer in poor conditions and often for extended periods of time. While durations and

conditions certainly vary from state to state, these practices are, as explained earlier, very much interlinked (Cornelisse 2010:11). Regarding duration specifically, the recast Reception Conditions Directive authorises a maximum detention of six months. However, this can easily be extended by a further twelve months in cases where returnees do not cooperate, or if there are delays in the process of obtaining documents from the country of origin (EU Directive 2013/33/EU). That being said, in some countries the average duration is relatively low. For instance, in Finland the average is 11.8 days. In countries typically on the receiving end of 'Dublin transfers,' however, the average time migrants spend in detention is substantially higher. To take just one example, the average duration in Malta is 180 days (EMN 2014:5–10). The conditions in detention centres on Malta have been condemned as 'appalling' and 'untenable in Europe which claims to be the home of human rights' (Cornelisse 2010:11). Malta is not alone in facing criticism. All over the continent, but particularly in the south, states are being criticised for inadequate treatment of migrants in detention. In Greece, for example, detention conditions are so poor that some participants of the Dublin Regulation have begun limiting the transfer of asylum seekers there (Troller 2008:98).

The problem with these criticisms is that they are almost always directed at individual countries alone or at the unfairness of burden-sharing, not at the collective body of states and legislation that make up the detention system as a whole. By ignoring the wider picture, the failures of any given country are effectively treated as exceptions to the rule. This feeds into the production of European identity and how its moral power is sustained. As postcolonial thinkers have observed, Europe (or the West) is routinely and unconditionally associated with 'political tolerance, democracy, and social and scientific progress' (Grovogui 2006:36). This metaphysical representation of European collective *unity* is only made possible by a regularly evoked process of European *disunity*, externalising morally unjustifiable events as exceptions. As Grovogui (2006:36) argues, 'imperial Spain may be blamed for bringing death onto the New World, Germany for Nazism and the Holocaust, and Italy for Fascism; but few would assimilate enslavement, totalitarianism, Nazism and Fascism with the West as essential features.' A similar line of thinking applies to injustices surrounding immigration detention practices today. Perpetuating methodological nationalism contributes to the whitewashing of Europe's perceived identity, and by extension, the nature of the EU's migration regulation. The effects of this academic tendency is observable in the scrutiny of 'Dublin transfers,' a key feature in the migration regime, where it can have the effect of masking the complicity of sending countries to the inhumane conditions that often await migrants in receiving countries. Consequently, many European countries are now successfully outsourcing human rights violations and the moral responsibility that comes with it to other European countries. The same can be said about the unaccountable practices funded by the EU and carried out directly or indirectly by its border agency, FRONTEX, to regulate movement of non-Europeans beyond the external borders of Europe (Andersson 2014).

The inadvertent whitewashing carried out by researchers is further exacerbated by a liberal naïveté regarding law. In a similar manner to what has been discussed so far, failures to protect the individual, in this case the migrant, are often characterised as legal exceptions. Common to all the legal instruments discussed in the first section is a representation that they exist to protect the individual, but they do not so much offer any further protection beyond what is already guaranteed elsewhere. If safeguards were really central concerns there would be a stronger emphasis on enforcing transparency, which there is not (Cornelisse 2010:272). Interestingly, the European Convention on Human Rights (ECHR) is rare among

international treaties in that it contains provisions that explicitly authorise the detention of migrants (ECHR Art. 5 (1) (f)). The idealistic status that law holds in Western society means that it is rarely perceived as the cause of injustice. Rather, injustices are attributed to abuse or disregard of law, or simply the absence of (sufficient) law. In this way, the responsibility for mistreatment of migrants is decentralised to individual detention sites and to the people who work in them. Thus, the problem is often framed as such: either people are to blame for not following the instructions of the law, or there is not a sufficiently strong presence of law on the detention site. In the case of the latter, sites of detention are often branded 'legal voids' or 'legal black holes,' thereby sanitising the law that legitimates detention and authorises disregard of safeguards (Johns 2005:613–635). Such misconceptions disguise the fact that the Dublin Regulation, for example, is incentivising detention as states increasingly rely on the practice and the law that legitimates it to maintain the flow of Dublin transfers. In other words, by codifying interdependency of a practice that relies on the use of detention to function smoothly, the states involved are essentially encouraged to detain and discouraged from developing alternatives to detention (Cornelisse 2010:13–14).

In the European migration regime, these two 'exception' phenomena—of law and European identity—work in tandem, distracting the observer from its dark side and preserving the moral currency of Europe. As this section has attempted to highlight, the shortcomings of the migration regime are in no way exceptions to the normal state of affairs. They *are* the normal state of affairs. They are not cultural or behavioural exceptions, nor are they legal exceptions as the liberal naïveté might suggest. Far from being legal voids, detention centres and the treatment of the migrants within them are legitimated by a plethora of law that constitutes the European system of immigration detention (Hussain 2007:1–19).

Conclusion

In relatively few years immigration detention has become a widespread and normalised practice in Europe. Accompanying this sudden growth is the emergence of a progressively more interconnected immigration and asylum policy in the EU and associated countries. What has not followed is a consideration of these practices from a more holistic perspective. Indeed, there is an observable deficit in academic literature on immigration detention in Europe as a whole. This paper has attempted to highlight and address that deficit in part by establishing an aggregate estimation of the number of detention sites and of migrant detainees in the EU. It has also emphasised the unintended effects that conventional approaches to immigration studies have on the way detention practices are perceived and understood. In doing so, the paper has brought attention to a system of immigration detention on which the European migration regime increasingly relies. It is grounded in a set of laws that at first glance appear to guarantee protection for the individual. However, a closer inspection soon reveals that they do little more than to create more law that justifies detention. As such, the European system of immigration detention is fundamentally at odds with the perceived cultural identity of Europe. The home of a system that deprives hundreds of thousands of individuals of their liberty every year on the basis of their (intended) movement cannot represent itself as a stronghold of human rights.

Sebastian Lundby is a Norwegian national who is in the final semester of a Masters in the Politics of Conflict, Rights and Justice at the School of Oriental and African Studies (SOAS), University of London, where he is concentrating on the effects of liberal misconceptions of law and the state. In the past he has written about the self-replicating power dynamics inherent in the international state system. He is currently involved with SOAS Detainee Support, a student-led initiative working in solidarity with asylum-seekers and other migrants in detention centres.

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