Legitimising detention and deportation of illegalised migrant families : reconstructing public controversies in Belgium and the Netherlands

Legitimizing detention and deportation of illegalized migrant families. Reconstructing public controversies in Belgium and the Netherlands.

Nathan Wittock (UAntwerpen), Laura Cleton (UAntwerpen), Robin Vandevoordt (UGent) & Gert Verschraegen (UAntwerpen)

Abstract

In Belgium and the Netherlands, the detention and deportation of illegalized migrant families with underage children has recently caused public controversy, resulting in the eruption of anti-deportation protests. This controversy is rooted in the unresolved tension for liberal states to protect children's rights on the one hand, while limiting 'unwanted migration' on the other. Previous literature documents protest reactions to efforts to deport families with underage children, as well as general state tactics to legitimize such coercion. This paper instead centers the state's legitimation work in response to societal protest and draws on publicly available material on two recent controversies: the Belgian debate on family detention and the determination of the child pardon in the Netherlands. For Belgium we highlight that the government frames detention as the 'ultimate measure', used only when less restrictive measures 'failed'. For the Netherlands we show how the government reallocates political responsibility from elected officials to bureaucrats. Both strategies transform what is essentially a moral-political debate into a web of administrative procedures and discussions on legal conditions. The Belgian and Dutch governments thus invisibilize moral conflict by drawing it outside the realm of democratic politics, to the backstage of bureaucratic administration.

Introduction

Over the last decades, the practice of deportation has emerged as a definite and increasingly pervasive technique of population management (De Genova & Peutz, 2010). Liberal states, including Belgium and the Netherlands, are willing and able to treat non-citizens in illiberal and cruel ways, despite their proclaimed commitment to human rights and practical concerns (Gibney, 2008). Meanwhile, the forced deportation of unauthorized migrants, and their administrative detention prior to it, have been subject to intense contestation. Capturing the public imagination, such practices have grown into one of the more controversial and politicized topics in public debate (Anderson, Gibney, & Paoletti, 2011; Rosenberger, Stern, & Merhaut, 2018).

The public controversy surrounding migrant detention and deportation becomes especially heated when it concerns families with underage children (Freedman, 2011; Rosenberger & Winkler, 2014). This observation is not exclusive to the European context: former U.S. president Trump's "zero-tolerance policy" at the U.S.-Mexico border, for example, recently spurred public outcry as it involved separating children from their adult caregivers for the sake of detaining and deporting the latter. Children occupy 'difficult territory' in liberal states' migration management policies, as the situation reflects the 'tension between commitments to protect children's rights on the one hand and to limit "unwanted migration" and secure borders on the other' (Sigona & Hughes, 2012). For proponents of migrant law enforcement, e.g. right-wing, nationalist politicians and their followers, families with underage children should be treated in the same way as other 'illegal migrants' who should be monitored, detained and removed from the nation state's territory. Discursively, illegalized migrant children are represented as 'threats' to Europe's moral social order because of their extraterritoriality. The presumed place for children is a domesticated, stable household and being away from that as a result of their migration journey renders illegalized migrant children *adult-others* (Crawley, 2011). For protest movements, parliamentary opposition members and legal advocates alike, children are impacted disproportionately by the deportation regime and should not be detained, as internationally enshrined in the Convention on the Rights of the Child (UN General Assembly, 1989). They particularly emphasize children's deservingness of legal residency due to their innocence, vulnerability and lack of choice in 'becoming undocumented' (Eastmond & Ascher, 2011; Freedman, 2009; Nicholls, Maussen, & de Mesquita, 2016).

These competing perspectives on the detention and deportation of migrant families force policymakers to explicitly legitimize their usage. While previous research documented how immigrants and protest movements react to deportation of families with underage children (Rosenberger et al., 2018), less is known about how states and policymakers faced with such protests legitimize their efforts to exclude illegalized migrant families. Specifically, we focus on two recent cases: the development of family units for the detention of families in Belgium and the determination of the Child pardon – a collective regularization for illegalized children and their families – in the Netherlands. We have purposively sampled Belgium and the Netherlands (Gobo, 2004) as their detention and deportation policies towards illegalized migrants are increasingly presented as acceptable in migration management, whilst differing in enforcement efforts and budgetary possibilities (Leerkes & Van Houte, 2020). We draw on newspaper articles, materials published by NGOs and government agencies, as well as parliamentary documents that center on these two controversies.

Our contribution is dual. First, we detail how states and policymakers respond to societal protest against detention and deportation of migrant families with underage children. We argue that the Belgian and Dutch governments transform a moral-political conflict about detention and deportation into a web of administrative and procedures, norms and arguments, so that they appear to be genuinely procedural problems which can be argued and decided on via legal instruments. Doing so, the Belgian and Dutch governments seek to "invisibilize" this moral conflict by drawing it to the backstage of bureaucratic administration and, according to them, outside the realm of democratic politics. In line with Wood and Flinders (2014, p.152), we describe this move as 'governmental depoliticisation': a distinct form of depoliticisation, which involves the attempt "to deflect blame and accountability from governments". Second, these cases are explicit examples of states balancing the protection of children's rights and dignity with the enforcement of deportation policies that dehumanize and criminalize non-citizens (Grace & Roth, 2020). We therefore empirically investigate how policymakers navigate the tension between migration management and their normative imagery of liberal, human rights-respecting states. The Belgian and Dutch governments do so by portraying detention and deportation as part of a rationalized process wherein the rule of law allegedly trumps the rule of emotions, sentiments and individual judgments by politicians. These strategies, however, do not solve the underlying ethical

problem but solely temporarily deflect it. The debate can therefore always be reopened as long as the underlying moral and ethical conflict is not resolved and new poignant cases inevitably emerge.

In what follows, we first survey the literature on anti-deportation protests and different politicization strategies that NGO's and protesters deploy. We then detail our understanding of legitimacy and legitimation work and outline the ways in which states generally account for their detention and deportation efforts. Second, we clarify our choice to study Belgium and the Netherlands, our data collection strategy and methods of analysis. In the results section, third, we discuss two legitimization strategies used by Belgian and Dutch policy actors. Based on our analysis of the Belgian government's development of family detention units, and how this affected their proposals to use less restrictive alternatives, we discuss a legitimization strategy that we will refer to as the 'ultimate measure' strategy. Following our discussion of the Dutch child pardon and the abolition of the State Secretary's discretionary power, we show how Dutch policymakers have reallocated political responsibility for deportation of children, from elected officials to specific bureaucratic agencies and committees. We term the latter a 'reallocation' strategy.

Deportation controversies: legitimacy and politicization

Anti-deportation protest and the politicization of deportation

At first sight, anti-deportation protests by protest movements and NGOs mainly challenge the state's legitimacy to deport specific individuals or families. Previous research has demonstrated how anti-deportation protests often focus on individuals who exhibit high levels of societal integration (Bader & Probst, 2018; Rosenberger & Winkler, 2014). In these instances, societal integration refers to their involvement in the community or participation in associations, good language skills, steady employment, engagement in school or at work (Nicholls et al., 2016; Rosenberger & Winkler, 2014). Protesters argue that these individuals have a legitimate claim to be exempted from the threat of deportation because of the intricate link between themselves and the society they live in, irrespective of formal membership status (Bosniak, 2007). When children are involved, such links will inevitably form through their access to the education system and kindergartens (Rosenberger & Winkler, 2014). Examples of protests that challenge the legitimacy of deportation as such seem to be much rarer. These

include campaigns for the collective regularization of undocumented migrants (Chimienti, 2011; Chimienti & Solomos, 2011) and coordinated efforts to disrupt attempted deportations (Hinger, Kirchhoff, & Wiese, 2018). A recent example of the latter protest includes the one in Glasgow that prevented the deportation of two individuals, yet centered on solidarity with refugees and asylum seekers in general (Brooks, 2021).

In the cases we study, the state's deportation efforts are met with intense contestation by a heterogeneous coalition of protest movements and NGO's. While migration policy is sometimes regarded "an elite-led highly institutionalized field with a relatively weak level of civil society engagement" previous research has shown that it is in fact durably influenced by NGOs through discursive action, alliance building and agenda-setting power (Statham & Geddes, 2006, p. 248). NGOs actively voice and propagate concerns with states' policy that are (latently) present among members of the citizenry (ibid., p. 248). Doing so they engage in "information politics" (Thrall, Stecula, & Sweet, 2014, p. 137) to add alternative frames to the discursive opportunity structure that would otherwise be dominated by migration management principles. A common strategy is to provide outlets for migrants' testimony about their experiences to show that they are "ordinary people with dependents who often experience isolation, discrimination, and the vulnerabilities associated with uncertain legal status" (Cullen, 2009, pp. 105-106). Alongside such communicative action strategies, NGOs also take action as "policy and norm entrepreneurs" (Piper & Rother, 2012, p. 1740) by building and maintaining alliances with each other and public officials to perform parliamentary lobbying. By challenging deporting states' legitimate use of coercive policies, protest mobilized by NGOs thus has a political agenda-setting effect, that pressures politicians to respond (Lipsky, 1968) and perform 'legitimation work' (Abrams, 2008).

Legitimacy and legitimation work at the backstage and frontstage
According to classic accounts by Max Weber (1978), the modern state can claim and maintain the monopoly of legitimate violence and coercion to enforce rules within a given territory as long as it is recognized as the legitimate holder of said monopoly by the citizenry. In liberal democratic states, he argued, rulers predominantly aim to establish and cultivate such recognition in the form of "legal authority"; "a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands" (ibid., p. 215). What is important in Weber's approach to legitimacy is

not so much that the state's commands are just or not (legitimacy is no synonym for justice) but rather that, even its most contentious commands, are obeyed by most people, most of the time, because there exists "a belief in legitimacy (…) which every [political] system attempts to establish and to cultivate" (ibid., p. 213). This implies that when the state's exercise of coercive control becomes highly challenged, for instance when it tries to detain and deport families with children, it is forced to engage in 'legitimation work' to defend its claims in front of the broader public (Ellermann 2009; Borrelli & Lindberg, 2019). In our case studies, this takes the form of legitimizing certain deportation and detention practices by emphasizing their procedural, administrative and legal fairness.

While scholars have questioned whether detention and deportation can be considered legitimate at all from a theoretical point of view (see e.g. Bosworth 2013, Lenard 2011), our article empirically investigates the tactics and techniques states deploy to gain and maintain such legitimacy. A useful distinction that helps us to do so, is to differentiate between legitimation work taking place on the backstage or frontstage of politics (Goffman, 1959). On the backstage, where policies are "done" and implemented (Wodak & Flowerdew, 2014), studies show that migration bureaucracies look nothing like the Weberian ideal of a rationalized, impersonal and hierarchical bureaucracy (Fassin, 2013; Kalir, 2019a; Ugelvik, 2016, Borrelli & Lindberg 2019). While policymakers may strive to render the tension between migration management and human rights frameworks workable for frontline caseworkers, the latter see that tension personalized in their day-to-day work with migrants and experience the 'legitimacy deficit' that goes with that tension (Ugelvik, 2016). These backstage actors continuously need to balance ethical conundrums and navigate unclear and contradictory policies (Eule, Borrelli, Lindberg, & Wyss, 2019). On the frontstage, where government presents itself to the broader public, legitimation work involves interventions into how a policy is framed and how information is selectively presented to the citizenry (Wodak & Flowerdew, 2014). Through these interventions governments try to shape different audiences' conception of the problem that is to be addressed and the available solutions to address it (Hajer & Uitermark, 2008). When the conceptions of the majority of the audience overlap with that of the government, frontstage legitimacy is highest. In the frontstage legitimation of coercive state power in detention and deportation, politicians present migration as putting a strain on scarce resources (e.g. jobs, housing, social welfare) which is to be avoided through strict immigration

controls. Detention and deportation are then portrayed as the consequences of people not respecting the necessary rules and restrictions to control entry.

From previous research on the ways liberal governments deal with the complications following their deportation efforts, we can distill three strategies used to legitimize detention and deportation. First, European countries frame deportation in a way that emphasizes the continued protection of deportees. So-called 'safe countries of origin lists', for example, identify countries where no widespread conflict or human rights abuses are known, suggesting that migrants deported to these countries face low risks of encountering violence or persecution. While using these arguments, states however often downplay more specific instances of persecution that may still occur in these countries, such as gender-based violence (Freedman, 2015).

Second, states have invested heavily in setting up so-called 'assisted voluntary return' (AVR) programs to legitimize their deportation efforts in case of 'non-compliance'. Such programs often offer shelter, financial incentives and re-integration counselling before migrants allegedly make the decision to return 'voluntarily'. AVR fulfills an important role in resolving the tension between the sovereign power to determine who has access to the national territory, and the liberal rule of law that constitutes their legitimacy. 'Staging' what is effectively expulsion as voluntary, AVR programs make it possible to conceal contradictions to the logic of the liberal state of law, as return is 'freely chosen' (Cleton & Chauvin, 2020).

Third, states rely on criminalizing illegalized migrants to legitimize coercive measures initiated against them. Criminologists suggest that migration has become an arena 'governed through crime' (Bosworth & Guild, 2008), as migrants are often assumed to constitute a source of potential risk, making their movement an intelligible object of policing and legitimate confinement. Research has documented how this logic disproportionally targets racialized immigrants (Kalir 2019b, De Noronha 2020) and extends to families detained at the U.S.-Mexican border (Antony, 2019). Similarly, policymakers in Belgium and France have framed debates on so-called 'transit migrants' as a matter of public safety rather than the protection of their rights (Vandevoordt, 2020). This logic makes illegalized immigrants themselves become responsible for their fate, as their own actions of breaking the law implies that they should also bear the consequences.

Migration control policies in Belgium and the Netherlands

The institutional and legal organization of deportation in Belgium and the Netherlands is informed by European Union Directive 2008/115/EC, the Return Directive. It stipulates a set of common rules, applicable to all 'third-country nationals' who do not, or no longer, fulfil the conditions for entry, stay or residence on EU territory. As such, there is a certain level of policy convergence in the form of an increased attention to deportation as a tool for migration control (Gibney, 2008). At the same time, there are notable differences between Belgium and the Netherlands.

Belgium can be considered a 'hampered deportation regime' (Leerkes & Van Houte, 2020) because it combines a pronounced interest in detaining and removing illegalized migrants with limited capacities and resources to do so. Even though Belgium has diplomatic relations in place to negotiate readmission agreements, a Federal police force that carries out checks on home addresses, and a dedicated government branch following up on orders issued to leave the territory, it has relatively few capacities and resources and mostly relies on 'softer' forms of territorial exclusion, such as 'assisted voluntary return' policies (ibid.).

The Netherlands is considered a 'thick enforcement regime' (Leerkes & Van Houte, 2020), as its attempts to remove as many illegalized migrants as possible is combined with a strong infrastructure and budget to do so. The Dutch government combines more direct 'territorial exclusion policies' with indirect 'social exclusion policies' that constrain livelihood chances. The former include signing international and bilateral agreements with countries of origin, an extensive and repressive 'assisted voluntary return' infrastructure, detention facilities throughout the country, a dedicated Aliens Police focused on detecting illegalized migrants (especially those with criminal records), and a formal procedure to carry out forced removal. The latter 'social exclusion policies' were brought together in the 1998 Linking Act that made accessing healthcare, education and other social services dependent on legal resident status (Van der Leun & Kloosterman, 2006).

Data and methods

Our data comprises documentary sources that we gathered through desk research in the Spring of 2020. We specifically searched for publicly accessible documents on detention and/or deportation of migrant families with children for the Netherlands and Belgium since 2008. Focusing on Belgium and the

Netherlands allows us to take into account variations described in the previous section while studying the broader trend of legitimizing detention and deportation in the face of societal protests. We focus on the period since 2008, starting with the European Return Directive that provided a more elaborate framework for EU Member States to organize 'soft' and 'hard' forms of deportation, including the so-called 'assisted voluntary return' programs and forced expulsion (Baldaccini 2009). Since then, return has become a more explicit point of attention in Belgian and Dutch migration policies. Drawing on an exploratory analysis of these documents, we decided to focus on the two most salient controversies that emerged in these two countries since then: the family units for the detention of families in Belgium and the Child pardon in the Netherlands.

Having selected these two controversies, we identified the most important NGOs and coalitions they formed in Belgium (e.g. Children's rights coalition, the platform Children on the Run, Amnesty International and Myria) and the Netherlands (e.g. Coalition No Child in Prison, Amnesty International and Defence for Children). We marked NGOs as 'important' when they were often mentioned or quoted in documents related to the ongoing conflict on family units in Belgium or the Child Pardon in the Netherlands. We then further sampled documents discussing the detention and deportation of families from their websites. Next, we also sampled publicly available documents by the Belgian and Dutch governments (e.g. Ministry/State Secretary press releases, proposed law, policy frameworks and reports on parliamentary debates). We sampled a total of 45 documents for Belgium and 33 for the Netherlands. Most documents selected are press releases (29), reports (20), governmental documents (9), and news articles and opinion pieces that were mentioned in NGO or government sources (11). The documents we selected discuss policy measures in either Belgium or the Netherlands and voice concerns (i.e. most NGO documents or governmental/parliamentary documents from members of the opposition) or defend detention and deportation policy (i.e. parliamentary documents or news articles interviewing members of the government). Table 1 in the annex provides an overview of the selected documents (with source, type, and reference code used in the endnotes).

We used NVivo12 to perform systematic stepwise coding (Bryman, 2001) in three rounds, conducted by the first author. First, the first author conducted open-coding staying very close to the language used in the documents (e.g. alternatives to detention, arguments against deportation, references

to migration policies becoming 'stricter' etc.). Second, he grouped the open codes into two main clusters (and a 'remaining group' category) used for Belgian and Dutch sources: 'return policy', and 'dealing with controversy'. In the third round, he grouped some of the codes into specific 'legitimization strategies' and presented these to the author-team: (1) ultimate measure, (2) reallocating political responsibility to specialist agencies, (3) smart budgeting strategies, (4) referencing human rights abidance, (5) blaming individual migrants, (6) depersonalization, and (7) referencing past or future elections to claim democratic legitimacy of pro-detention and deportation decisions. The team met in June 2020 to discuss these strategies and the codes linked to them for purposes of inter-coder reliability (ibid.).

While we found examples of the use of all these strategies in both countries, the first two strategies, i.e. ultimate measure and reallocating political responsibility, were most salient and particularly adequate to describe the overall legitimation strategies used in, respectively, Belgium and the Netherlands. Moreover, in Belgium, policymakers more explicitly used the third, fourth and fifth strategies (smart budgeting, referring to human rights and blaming individual migrants), and in the Netherlands, policymakers more explicitly used the fifth and sixth strategies (blaming individual migrants and depersonalization). The final listed strategy (e.g. politicians suggesting that the large number of votes they received in past elections mandate their strict migration control) was only used on rare occasions and is hence discarded from the empirical section.

Depoliticizing the controversy of deporting migrant families

The Belgian and Dutch governments generally portray administrative detention and forced return as necessary elements for successful migration management policies. These allow them, so their argument goes, to differentiate between citizens and non-citizens and to limit the risk of rejected asylum applicants absconding from state control.[1] NGOs, in contrast, challenge the routine use of such practices for being disproportionate responses to the administrative violation of unauthorized residence,[2] and for being a violation of the respect for children's 'best interests' (Art. 5 of the EU Return Directive[3]) and the right to family life (European Convention of Human Rights[4]). Furthermore, NGOs often argue that child detention always violates Article 2 §2 of the International Convention of the Rights of the Child,[5] since

children are punished for the acts of their parents.[6] As these pro- and anti-detention and deportation positions clash in the public sphere, our analysis suggests that policymakers turn to various *depoliticization* strategies. While the generalized concept of 'depoliticization' denotes the denial of political choice in social situations, we identify and interrogate how political elites try to shift the political nature of decisions. As such, we predominantly focus here on what Wood and Flinders (2014) distinguish as 'governmental depoliticization' (for more information on different types of governmental depoliticization see Flinders & Buller, 2006). In what follows we present two case studies wherein we detail how the Belgian and Dutch governments have done so in the context of the development of family units for the detention of families in Belgium and the determination of the Child pardon in the Netherlands.

Case 1. The Belgian cascade system of coercive measures

In Belgium, detention of families with children in closed centers was gradually made possible from the late 1990s onwards. In 1998, Belgium's first closed detention centers for illegalized migrants were established.[7] In the early days of these centers, officers would detain only the head of the family (one of the parents, usually the father) whenever possible and upon agreement with the entire family. The remaining family members were required to report to the authorities frequently. With this construction, authorities sought to pressurize entire families to depart upon the detained family member's scheduled deportation date. In practice, however, non-detained family members stopped reporting to authorities when this date came closer. This led to the separation of families, as the detained family member was often still deported.[8] Since the strategy was both ineffective – detention of one family member did not lead to effective deportation of entire families – and since family members ended up separated from one another, the state started detaining the entire family in the closed centers 127bis Steenokkerzeel or in Merksplas from 2008 onwards.[9] In 2009, then-State Secretary Melchior Wathelet (Walloon Christian-democrats) initiated plans to develop four closed *family units* in a new closed detention center beside center 127bis.[10] In 2010, however, the European Court of Human Rights convicted the Belgian state, in *Muskhadzhiyeva v. Belgium*, of human rights violations because families with children were not detained separately from other detainees.

With a legal change to the law of 15 December 1980 resulting in the addition of Article 74/9 in 2011,[11] policymakers introduced the legal norm to 'in principle' not detain families with underage children. Doing so, they claimed compliance with Article 15 of the European Return Directive, which states that 'prior to the consideration of detention, less restrictive measures *have* to be considered' (emphasis added).[12] Simultaneously, Belgian policymakers specified in Art. 74/9 §2 that, 'in preparation of [migrant families'] removal from the territory', they can be detained, 'for a period as brief as possible in a specific location, near the border, that has been adjusted to meet the family's needs.'[13] This specification of the circumstances under which detention in closed centers was allowed set the stage to follow through on the development of family units in a new closed detention center neighboring center 127bis.[14] These would eventually be opened on 11 August 2018.[15]

This set of actions constitutes what we describe as an 'ultimate measure' strategy, which seeks to legitimize detention in two ways. First, it allows policymakers to formally and in principle favor less restrictive alternatives to detention, while devoting insufficient time, money and energy to the development of these alternatives in practice. Second, because detention in closed centers is still allowed if strict conditions are adhered to, policymakers can avoid a debate on the fundamental legitimacy of detention if they can show that the centers fulfill the formally established requirements.

Principles vs. practice

Following the government's reasoning in Art. 74/9 §1, detention is 'in principle' not used. This means that the authorities formally favor the use of less restrictive alternatives. In Belgium, policymakers pay lip service to the policy of allowing families to be coached by government officials towards a 'voluntary return decision' in their own homes or in so-called *open return homes.*[16] These constitute the first steps in a cascade system of increasingly restrictive measures to press for families' departure.

> *'The law of 16 November 2011 anchored the legal principle in the Alien Act of 15 December 1980 prohibiting child detention. Those who proposed the law foresaw a cascade system wherein the family is first coached at home. If this fails, the family would be taken to an open center. Only when the family then refuses to leave the territory they can be detained in a closed center, and this for a period as brief as possible.'[17]*

While this cascade ostensibly favors the use of less restrictive measures, policymakers have used it to legitimize the eventual detention of migrant families. NGOs have highlighted that policymakers make use of what we call a *smart budgeting scheme*: overtly committing to develop alternatives to detention, but allocating too little time, effort and financial means to realize the full potential of these alternatives.[18] This allows them to argue that these underdeveloped alternatives are inefficient. For example, the Jesuit Refugee Service[19] argued that the open return homes had intentionally been underfinanced by the government in favor of developing the family units (i.e. the final step in the cascade).

'[The return homes alternative] never received the adequate funding needed to meet the specific needs of children. (…) In contrast, the family units that were opened in august 2018 on the terrain of the closed center 127bis in Steenokkerzeel had a high quality infrastructure, a specialist support staff for children and offered a diverse array of leisure activities. It's paradoxical that the administration's efforts to adjust the reception of families with children are located at 'the end of the chain'.'[20]

Voicing similar concerns, the Platform Children on the Run[21] suggested a paradox in the cascade system, since the less restrictive alternatives of coaching the families in their own home and residence in open return homes were 'not or barely financed' while the closed family units, 'which implies the imprisonment of families with children' did receive adequate financing. Echoing these arguments, members of the parliamentary opposition, such as Vanessa Matz (Walloon Christian-democrats), challenged how, 'some policy measures do not receive the necessary means to succeed, and are hence accused of being ineffective.' However, she argued, since insufficient funding had been allocated to development of these alternatives, 'nobody can say for certain that these alternatives do not work.'[22]

'Principally' favoring supposedly less-coercive alternatives like coaching, yet 'practically' devoting most time, energy and resources to the development of the most restrictive step in the cascade has a very important implication: it turns the entire system, and not only the 'ultimate measure' of closed detention, into an overtly coercive policy tool. Wherever illegalized migrants may be in the cascade, it is specifically developed to constrain individuals toward the final and most coercive element of forced incarceration. As suggested by the Platform Children on the Run,[23] the cascade system renders the notion 'voluntary' in voluntary return void of meaning. When individuals or families indicate unwillingness to

return, or act in any way counter to their departure, they are automatically moved to a more stringent and controlled area, to tire them out and prevent any efforts to fight for residency rights. Should they find themselves in closed detention centers, or worse, find themselves living under the radar, in "the worst possible condition" of 'illegality', politicians like Sarah Smeyers (Flemish nationalist party)[24] are quick to blame illegalized migrant children's parents for having made 'wrong decisions'. We found similar arguments in the Dutch context, which we will touch upon below.

Conditions over fundamentals

The second way that the 'ultimate measure' strategy seeks to legitimize the use of detention and deportation consists of steering clear of a fundamental debate on the legitimacy of detention by focusing on the circumstances under which migrant families with children are detained.

In June 2017, NGOs such as the Platform Children on the Run,[25] cooperating with Vluchtelingenwerk Vlaanderen, CIRÉ, Caritas International and JRS-Belgium, organized the campaign 'You don't lock up a child. Period.' They sought to challenge the legitimacy of detaining families with children fundamentally, regardless of the circumstances under which it occurs. However, when the family units opened on 11 August 2018,[26] the debate deteriorated into a petty discussion over the conditions of detention, instead of addressing the legitimacy of detention per se.

Policy actors actively fended off fundamental criticism of the units by arguing that they met European requirements. As Nahima Lanjri (Flemish Christian-democrats) highlighted, for example, families were 'separate[d] from other adults, there is room for leisure, playtime and recreation, the necessary staff and facilities for children are present and everything is in the child's best interests.'[27] Activities and games were organized during the day, families could receive visitors and there was a playground for the children. Teachers and nurses were present, and a doctor checked on the family on a regular basis. Even NGOs like Amnesty International,[28] although they remained critical, recognized that the family units were indeed designed to be suited to some form of confined family life. Amnesty describes that families were able to cook meals if they wanted to, choosing groceries from a list, which were then brought to the house. 'But beware, they cannot order too many potato chips or soda. That's unhealthy and so it is not in the child's best interest. As opposed to detention, of course.'[29]

Policymakers' use of this strategy, however, proved unsuccessful because of one specific circumstantial factor: the family units were located (too) close to the runway of Belgium's biggest airport, Zaventem.[30] Then State Secretary Theo Francken (Flemish nationalist party) defended the location and claimed that the state abided by maximum noise hindrance requirements and had even performed additional efforts by distributing earplugs.[31] They, in other words, claimed to follow the rules and regulations regarding the conditions in which families were detained. Nonetheless, the State Council suspended the Royal Decree of 22 July 2018 in April 2019,[32] because the proximity to Zaventem airport violated the 'adapted to the families' needs' precondition. While it could be argued that the proximity to Zaventem airport also constitutes a form of symbolic violence in the sense that families are continually confronted with their impending deportation, the State Council focused on the noise intensity, which could have a frightening effect on the children (in French, *un effet anxiogène;* §45). NGOs[33] celebrated the suspension and argued that the decision "makes it plain and simple: no matter how desperate the attempts to adjust any location – it is not possible to combine detention with the child's best interests."[34]

At the time of writing (Autumn 2020 – Summer 2021), the Royal Decree is still suspended, prohibiting the Belgian government to detain families with minor children. In the new Belgian Federal Government Coalition Agreement of the 'De Croo I government', however, the government has vowed to invest more time and efforts in the development of alternatives to migrant detention, and clearly states that, 'minors cannot be detained in closed detention centers' (Belgian Federal Government, 2020, p. 95). It is still unclear if and how this promise will be put into practice, but this agreement exemplifies the ongoing politicization of the issue.

Case 2. Dutch discretionary power and the Child pardon
Our second case describes a highly politicized societal debate in the Netherlands, regarding the deportation of 'rooted children' (i.e. children who have been living in and going to school in the Netherlands for quite some time) and their families. In 2019, the Dutch government introduced a set of policy measures in an attempt to depoliticize the issue. First, the discretionary decision-making power of the State Secretary – who could decide to go against a decision by the Immigration and Naturalization Service (IND) and domestic courts to deport specific families and or individuals – was reallocated to the head of the IND. Second, alongside this reallocation, an *objective poignancy assay ('De*

Schrijnenheidstoets') replaced the State Secretary's assessment of individual dossiers. While the latter was deemed too subjective, the objective poignancy assay comprises an evaluation of 'exceptional individual circumstances' that is performed by the head of IND at the beginning of a first application for a residence permit. 'Exceptional circumstances' might include, but are not limited to: severe medical issues (of one of the family members), the death of a family member in the Netherlands, gender-related vulnerabilities (e.g. honor killings and domestic violence) and traumatizing experiences that took place in the Netherlands. The IND is instructed to grant a residence permit only if such exceptional circumstances have taken place while the applicant resided in the Netherlands. Finally, the state terminated the policy device of the *Child pardon* (*'Kinderpardon')* which had allowed Dutch officials to award a residence permit to 'rooted children'.

Child pardon: politicizing through personalization

The Dutch state's policy measures from 2019 aimed to depoliticize the personalized debate regarding so-called Child pardon cases. Interestingly, the Child pardon had been introduced in February 2013 as a way to appease challengers of rooted children's deportation. The Child pardon provided the possibility to award a residence permit to illegalized children under specific conditions: parents and their children had to have applied for asylum, resided in the Netherlands for at least five years, cannot have absconded from government control for more than three months, have no criminal convictions or been convicted of war crimes.[35] This notion of a 'pardon' implies that children should be excused for the 'wrong choices' their parents made, especially for continuing illegalized residence in the Netherlands. Malik Azmani (Dutch liberal party)[36] for example suggested that illegalized migrant children's parents "are responsible for the fact that they have had the chance to become rooted in our society. I believe it is too easy to hold the government responsible. The parents are." This strengthens the idea, firstly, that children have 'no voice' in the legal applications and migration trajectories that affect their lives (cf. Belloni, 2020). Secondly, such arguments conveniently ignore that most of the parents that are blamed seek a safer, more promising environment to raise their children. It is the state that creates the condition of illegality for these families, and they therefore bear responsibility for the hardship that this condition entails.

While the Child pardon was meant to eliminate discussions on the detention and deportation of (families with) children playing out in the media and parliament, specific cases started to attract public attention again and *politicized* the debate more generally in late 2018.[37] Probably the best-known example of this politicization is the case of Armenian siblings Lili and Howick,[38] who arrived in the Netherlands with their mother in 2008. When the family's asylum application was rejected, their mother filed for a residence permit on the basis of the Child pardon in 2013. The organization Church in Action called for a fair Child pardon and drew attention to the case of Lili and Howick to exemplify the necessity for such a move.[39] When Lili and Howick's Child pardon request was denied, the mother filed a new asylum application for her children in May 2017. When this application was again denied, the Dutch authorities sought to arrest the family for a forced return in August 2017. However, the children were not present and the mother refused to disclose their location, leading to the deportation of the mother on 14 August 2017 without her children.[40] On 25 August 2017, the children were found and placed under the care of a foster family within their social network. The case took an interesting turn in the summer of 2018, when the Utrecht Court ruled in favor of a residence permit for Lili and Howick, because the government had insufficiently taken into account the conditions upon the children's return to Armenia. The State Secretary of Justice and Security, however, brought the case to the Council of State that in turn overruled the Utrecht Court's decision. As a result, the government was able to proceed with the children's forced removal. When the children went underground for a second time to prevent their deportation, which attracted widespread attention in the national news, the State Secretary decided to use his discretionary power and awarded the children a residence permit.[41]

Cases like these exemplify the tension between formal removal policies and how these formal policies play out in the everyday lives of families and children. The policy may sound efficient and well structured, yet these cases make clear to the Dutch public that in reality it leads to messy and damaging experiences. As such, elected officials become vulnerable to criticism of policy mechanisms that are otherwise largely unseen by the public. As the Dutch politician Maarten Groothuizen (social-liberal party) argued:

> *'Year after year we witness sad cases of children who are going to school here,*
> *who have made friends here and who have been taken up in their local*

communities. Despite their being rooted they cannot stay in the Netherlands. (…)
They have to go back to a country they do not know, have never been to or have
been to a very long time ago, without having a recollection of it. These poignant
cases give the abstract policy a face, bring it closer.'[42]

The government quickly criticized this personalization of harsh policies. As Malik Azmani[43] (liberal party) argued in parliament in 2019, 'these debates about individual cases are often highly politicized as they all appear in the media.' In fact, it had 'annoyed' him, 'how these individual cases are dealt with (…). In this House [of Representatives] today as well we have once again named individual, specific cases. (…) We should depoliticize these cases and limit their airtime in the media.'[44] One way to do so, according to him, was to abolish the Child pardon.

Abolishing the Child pardon: towards a depersonalized procedure

In 2019, Dutch policymakers moved to abolish the Child pardon and reallocate the State Secretary's discretionary power to grant rooted children a residency permit to the head of the IND. As an elected official, policymakers argued that the State Secretary would be under too much political influence to make such decisions.[45] The head of the IND, a non-elected public servant, would perform an allegedly *objective poignancy assay ('De Schrijnenheidstoets')* during every first asylum application. NGOs such as Defence for Children[46] quickly voiced their discontent, as they considered the State Secretary's discretionary decision-making power to be a necessary 'check' on the deportation system. The State Secretary, in the words of Bram Van Ojik (Green Party)[47] could always 'find it in his heart' to revoke a negative decision on an asylum application in case of extreme hardship. The Dutch government nevertheless pressed to abolish the discretionary power, arguing that '[i]t is important to bring this part of the procedure in standard practices instead of upholding the possibility for a politicized debate.'[48]

The reallocation of this power from the State Secretary to the head of the IND – much like the abolition of the Child pardon – clearly sought to limit the politicization of individual dossiers. In tandem, the government's decision to perform the poignancy assay in the context of a first asylum application was said to serve two goals. First, it would limit the instances of stacking of application procedures by asylum applicants. This argument refers to the idea that events happening after the initial asylum application, while the applicant is residing in the Netherlands without official authorization, should not

provide the basis for a new application. This seems to pre-empt a politicization of individual cases based on their 'societal integration'. Second, rendering this assay objectified and standardized would, in the words of Madeleine Van Toorenburg (Christian-democrats), allow for, 'a depoliticized assay, with extra attention to the needs and circumstances of children, about which the judge will have a say.'[49] Performing the new objective poignancy assay in the first asylum application procedure, would also, in the words of Maarten Groothuizen (social-liberal party), 'take the issue out of the political sphere.'[50]

These changes were not applied without criticism. Some members of the opposition argued that, by definition, the notion of poignancy is a subjective indicator.[51] Others mentioned that the transfer, both of the discretionary power and of the task of performing the poignancy assay, to civil servants would damage the potential for democratic checks and balances. As Bram Van Ojik[52] (Green Party) argued, 'You cannot place decision-making power over matters that are crucial to the life of an asylum seeker into the hands of a civil servant. (…) You have to legitimate decisions in front of this house.' Jasper Van Dijk[53] (social-democratic party) argued that the move would turn the IND into 'a 'butcher assessing the quality of its own meat'. Furthermore, there was some doubt as to whether the State Secretary – who is legally the head of the IND – really transferred decision-making power, or whether it was in fact merely a mechanism intended to hide the State Secretary's responsibility for the IND.[54]

Discussion and conclusion

The public controversy over the detention and deportation of families with underage children can be described as a tug of war between actors who defend deporting states' right to exclude non-citizens and actors that delegitimize these efforts. The Belgian and Dutch governments go great lengths to legitimize their use of 'coercive social regulation' (Ellermann, 2009). In this article, we have discussed specific legitimization strategies that they thereby pursue. As could be expected, these strategies are based on rational-legal authority that derives its legitimacy from a belief in the legality of enacted rules (Weber 1978). They establish this legitimacy by transforming what is essentially a moral-political debate on the acceptability of damaging experiences played out in the lives of illegalized migrant families and their children into a discussion on the procedural conditions under which states can detain and deport specific non-citizens. Specifically, we discussed how the Belgian government has emphasized that child

detention is the 'ultimate measure' used only when less restrictive measures have 'failed', and how the Dutch government has emphasized the 'objective, due process' followed in deciding to deport these children.

The ultimate measure strategy allows policymakers to legitimize detention and deportation in two specific ways. First, policymakers 'in principle' favor alternatives to detention whilst 'practically' devoting most time and energy to the development of the most restrictive step in the cascade. Following their reasoning, they would not have had to have recourse to these measures if illegalized migrants had 'cooperated' with their 'voluntary' return earlier in the chain of events. This reasoning blames illegalized migrants if and when they move from a less to a more restrictive measure. The ultimate measure strategy also drives the debate away from a focus on the fundamental legitimacy of detention and deportation toward a discussion of the conditions under which families with children can be detained. These are simultaneously specific and vague enough for policymakers and opponents of detention to engage in debates on the specificities of detention, including what 'meeting the families' needs' is supposed to entail.

Our discussion of the Dutch case exemplifies how officials reallocate the political responsibility for decisions to detain and deport specific individuals. Running through our discussion of the 2019 package deal of new measures responding to the increased public attention to Child pardon cases, we can see a clear strategy to depoliticize individual cases and keep supposedly emotional and flawed elected officials downwind from societal critique. The modus operandi for accomplishing these goals was to transfer decision-making power from the frontstage of elected politicians to the backstage bureaucratic apparatus, with professionals following preset procedures, using 'objective' rules and yardsticks to validate and legitimize their decisions. Reallocating power to non-elected officials diverts responsibility and democratic control.

The second aim of this article was to show empirically how policymakers navigate the tension between migration management and the normative imagery of liberal states respecting human rights. We contend that both strategies conceal the contradictions between deporting states' detention and deportation of illegalized migrant families and their devotion to the logic of the liberal state of law. The tension, in turn, continues to exist but is strategically *invisibilized* by the government. Starting with the

first strategy, and as research on AVR programs has similarly highlighted (Cleton & Chauvin, 2020), detention of illegalized migrant families is portrayed as part of a process in which these families have a certain level of *choice* and *control*. Families allegedly freely choose how to be involved in an openly accessible, human rights respecting opportunity structure embodied by the cascade system. Within this system, families themselves supposedly need to *know* that if they *choose not to cooperate* with their return in less freedom-restrictive steps of the cascade system, they will end up in administrative detention prior to their forced removal, or their children will become 'integrated'. This conceals how the only choice available to these families seems to be between paths of more or less resistance, all of which will inevitable head toward return. In the Netherlands, the supposedly subjective poignancy assessment as part of what we termed 'the reallocation strategy' is replaced by an objective assessment, taking the 'political decision' to exercise discretionary power out of the hands of the State Secretary. In this way, deportation decisions are placed within a framework where the rule of law allegedly trumps the rule of emotions, sentiments and individual judgments by the State Secretary. The head of the IND, a bureaucratic actor will now take a 'professional decision', unbothered by societal discontent and the need or desire to acquire democratic legitimacy for his decisions.

From the discussion of our cases, it is clear that attempts at depoliticization – while they can be successful – are often provisional. While the family units according to some were perhaps somewhat more suited to families' needs compared to earlier closed detention facilities, their proximity to the airport and the noise hindrance this brought proved grounds for a (re)politicized debate. And while the Child pardon was itself initially devised to move the debate on the deportation of illegalized migrant families with children to the backstage, public attention to these cases incited further attempts at depoliticization and, eventually, the abolishment of the Child pardon. Unsurprisingly, new poignant cases involving illegalized children dominated the Dutch news over the past months (e.g., Amsterdam-based Moroccan sisters Sofia and Najoua Sabbar or Syrian mother Tina and her son Jacob who are based in Nijmegen), sparking the debate again on finding 'durable solutions' for them. This shows that the governmental attempts to legitimize their coercive detention and deportation policies have only partially managed to close down the heated political debate, as the underlying tension between migration management and the normative imagery of liberal, human rights-respecting states has not been entirely

resolved. This debate can always be reopened when new poignant cases emerge, that challenge

government's legitimacy to deport and detain families with underage children.

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Notes.

[1] BE-PCotR_R_12-2015; BE-AI_PR_04-2019(1); NL-AI_R_10-2011; NL-Dom_R_02-2020

[2] NL-CGKidC_R_01-2014

[3] BE-PCotR_R_12-2015; BE-AI_PR_04-2019(1); NL-AI_R_10-2011; NL-Dom_R_02-2020

[4] BE-PCotR_R_12-2015

[5] BE-PCotR_R_12-2015

[6] BE-HRL_PR_08-2018(1)

[7] BE-G_PL-02-2019

[8] BE-G_PL-02-2019

[9] Detention of families with children in Merksplas was especially problematic given that the *Center for Illegals Merksplas* is the oldest, worst equipped detention center in Belgium; 'the buildings date back to 1875 and its original purpose was to imprison tramps' (BE-VlWVl_R_12-2016).

[10] BE-G_PL-02-2019

[11] BE-Myria_PR_08-2018

[12] NL-AI_R_02-2018(1)

[13] BE-G_PL-07-2011

[14] BE-G_PL-02-2019

[15] BE-AGII_PR_09-2018

[16] BE-Myria_R_12-2018

[17] Catherine Fonck (cdH) in BE-G_PL-02-2019

[18] BE-JRS_Rec_09-2018

[19] BE-JRS_Rec_09-2018

[20] BE-JRS_Rec_09-2018

[21] Baudouin Van Overstraeten of the Platform Children on the Run in BE-G_PL-02-2019, p. 16

[22] Vanessa Matz (cdH) in BE-G_PL-02-2019; p. 31

[23] BE-PCotR_R_12-2015

[24] Sarah Smeyers in BE-G_R-09-2019

[25] BE-PCotR_PR_06-2017

[26] BE-AGII_PR_09-2018

[27] Nahima Lanjri of the Flemish Christian Democratic party in BE-G_R-09-2018

[28] BE-AI_PR_08-2018

[29] BE-AI_PR_08-2018

[30] BE-G_R-09-2018; pp. 2-3

[31] BE-G_R-09-2018

[32] BE-AI_PR_04-2019(1); BE-AI_PR_05-2019

[33] BE-JRS_PR_04-2019

[34] BE-NANSEN_PR_04-2019

[35] NL-AI_EM_xx-2015

[36] Malik Azmani (Dutch liberal party) in NL-G_RPD_01-2019

[37] NL-NDb_NA_09-2018

[38] For a detailed description see NL-unicef_R_11-2019; pp. 50-52

[39] NL-KiA_ONA_10-2018

[40] It is important to note that from this moment on, Lili and Howick were treated as 'unaccompanied minors', for whom the transferal of legal guardianship and adequate care and reception upon their arrival back in Armenia has to be guaranteed prior to deportation. See Return Directive 2008/115/EC Art.10.'

[41] NL-NDb_NA_09-2018; NL-unicef_R_11-2019; pp. 50-52

[42] Maarten Groothuizen (D66) in NL-G_RPD_01-2019

[43] NL-G_RPD_01-2019

[44] Azmani in NL-G_RPD_01-2019

[45] NL-NOS_ONA_11-2018

[46] NL-NOS_ONA_11-2018

[47] Van Ojik (GroenLinks) in NL-G_RPD_01-2019

[48] Mark Harbers in NL-G_RPD_01-2019

[49] Madeleine Van Toorenburg (CDA) in NL-G_RPD_01-2019
[50] Maarten Groothuizen (D66) in NL-G_RPD_01-2019
[51] Attje Kuiken (PvdA) in NL-G_RPD_01-2019
[52] Bram van Ojik (GroenLinks) in NL-G_RPD_01-2019
[53] NL-G_RPD_01-2019
[54] Jasper van Dijk in NL-G_RPD_01-2019