

'Good Change' and Migration Policy in Poland

In a Trap of Democracy

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9.1 INTRODUCTION

In 2009, Professor Mirosław Wyrzykowski published a text in which he hypothetically considered whether a crisis in the democratic order could occur in a particular Member State of the European Union, and whether there are sufficient resources to protect liberal democracy from deformation.¹ He encouraged the reader to imagine that, as a result of democratic and free elections, a party (or a coalition) would come to power with revolutionary slogans, even if the revolution would take place only in the moral sphere, under the slogan of restoring 'public morality' (whatever that means). He noted that the victory of a political party proclaiming such slogans of a moral revolution, or a fundamental change in the existing status quo, usually followed a well-known pattern. Therefore, there would have to be a relatively large proportion of the population dissatisfied with the existing status quo, either lost or frustrated. At the same time, a significant number of people would not trust in the capabilities of civil society and would not understand that the modern model of power is not based on hierarchy and personification, but on cooperation and respect for the rules, that is to say, the rule of law, and not the individuals holding power.²

Professor Wyrzykowski argued that such a revolution would presuppose total control over state institutions, elements of a democratic society, the media and the judiciary. However, such a revolution would encounter obstacles, the first of which would be the constitution, as an amendment would

¹ Mirosław Wyrzykowski, 'Polityka a sądownictwo konstytucyjne – lekcja najnowszej historii RP' in Hanna Machińska (ed.), *60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych* (Oficyna Prawa Polskiego, 2009) 91–106.

² *Ibid.*, 94.

require either a qualified parliamentary majority or a referendum. Since it would be difficult to achieve sufficient support, political changes would have to be made by means of ordinary legislation. As the constitution and the whole state system is guarded by a constitutional court, the first thing to do was to make changes to that court, and then to the entire judiciary.³

Until recently, such a scenario seemed to be political fiction, but then it became a reality. When Jarosław Kaczyński's party, Law and Justice (Prawo i Sprawiedliwość – PiS), took over power in 2015, it led to a clear decay of liberal democracy. The policy of what was known as the 'good change' (the main slogan of PiS) affected respect for the human rights of the whole society, and certainly the rights of migrants, particularly asylum seekers.

What is more, the migration issue became the most significant element of the electoral campaigns in 2015 and 2018–2019,⁴ as the parliamentary and local elections coincided with the mass influx of voluntary and involuntary migrants to Europe, as well as terrorist attacks in France (2015) and in Belgium (2016). In general, the migration crisis was significant in helping the Law and Justice party to win elections in 2015.

The new, populist attitude to the migration crisis and asylum seekers appeared to be a litmus test of the resilience of democratic values and human rights. It was used to check how far the policy of division into 'us' and 'them', 'nation' and 'aliens', 'common welfare' and 'betrayal of national interests' would catch on in society, and whether it could be pursued in further politics. Unfortunately, this policy and model of narration has come to be seen as a successful tactic in elections and has been continued with other minority groups (e.g. LGBT).⁵

It is important to note that in Poland, we are not just dealing with an increase in the influence of a populist force on the political scene that is adverse to refugees and migrants, but with the takeover of all state institutions by the ruling majority. The capture of all (or almost all) of the state institutions means creating both a new internal and external policy, which is why the authors decided to consider this issue from an internal and external perspective, as Poland's attitude to the migration phenomenon and its failure to meet

³ Ibid., 97.

⁴ Agnieszka Mikulska-Jolles, *'Migranci, uchodźcy i ksenofobia w kampanii wyborczej 2018 – raport z monitoringu'* (Helsińska Fundacja Praw Człowieka 2018) <www.hfhr.pl/wp-content/uploads/2018/12/Kampania_raport_2.pdf> accessed 23 January 2021.

⁵ Agnieszka Mikulska-Jolles, *'Fake newsy i dezinformacja w kampaniach wyborczych w Polsce w 2019 roku - raport z obserwacji'* (Helsińska Fundacja Praw Człowieka 2020), 7ff <www.hfhr.pl/wp-content/uploads/2020/02/Fake-newsy-i-dezinformacja_final.pdf> accessed 23 January 2021.

its international obligations in the discussed area have appeared on international and European agendas.

In this study, the authors intend to prove that the legal and factual situation as of June/Spring 2021 does not allow the influence of the 'good change' on citizens to be separated from its influence on migrants (this chapter was written prior to the migration crisis at the Polish–Belorussian border of 2021). The approach to migrants' rights must therefore be analysed in a broader pattern, in light of democratic decay as it coincides with a restrictive policy towards asylum seekers.

For this reason, the first part of the paper will show the consequences of the key organs of power being taken over by people who are not open to migrant rights. Then the problem of the interplay between the crisis of democracy caused by Law and Justice and the migration law and policies of the Polish state will be discussed. The second part is dedicated exclusively to the current policy towards migrants, and the consequences of that policy within the country and on international forums. Finally, the authors will attempt to indicate a remedy that will safeguard migrants' rights (especially those of asylum seekers) against further erosion.

9.2 CONSTITUTIONAL AND POLITICAL BACKGROUND

9.2.1 *Constitutional Principles and the Decay of Democracy*

'[T]he robustness of democratic institutions under the rule of law cannot be disentangled from the character and motivations of those elected or appointed to high office.'⁶ This general truth about the way the state and its organs operate is crucial to obtain an understanding of the current approach to migrants and migration policy in Poland. After the fall of communism in 1989, the Polish state was organised along the lines of the West.⁷ A series of reforms carried out in 1989–1997 led to the introduction of a constitutional system corresponding to the one developed on the western side of the Iron Curtain after World War II.⁸ Among other things, this meant building the system of governance on such principles as the supremacy of the constitution, the rule of law, the separation of powers, the independence of the judiciary, the apolitical nature of the bureaucracy and extensive guarantees of human

⁶ Aziz Z. Huq, 'Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design' (2018) 65 *UCLA L Rev* 1506, 1530.

⁷ Wojciech Sokolewicz, 'Democracy, Rule of Law, and Constitutionality in Post-Communist Society of Eastern Europe' (1990) 86 *Droit Polonais Contemporain* 5, 5–6.

⁸ Daniel H. Cole, 'Poland's 1997 Constitution in Its Historical Context' (1998) 1998 *St Louis-Warsaw Transatlantic Law Journal* 1, 28ff.

rights.⁹ Migration was not a priority issue at that time, as Poland's economic backwardness meant it was not a destination country for migrants. Nevertheless, the Constitution adopted in 1997 introduced two forms of protection for involuntary migrants – asylum (granted under domestic law) and refugee status (modelled on Western solutions).¹⁰ The wider development of migration regulations (at a statutory level) came out of Poland's aspiration to integrate with the European Union and the country's gradual adaptation to the European pattern.¹¹ In fact, Poland's accession to the European Union in 2004 resulted in the construction of a whole new national migration law from scratch, which then became the showcase of the democratic transformation. To sum up, taking the year 2015 as a reference point, Polish regulations concerning the rule of law, human rights and migration at that time did not differ much from those operating in Western Europe. However, that year saw a political party come to power in Poland with unequivocally anti-immigrant slogans on its agenda. This was Law and Justice, led by Jarosław Kaczyński. By winning the presidential and then parliamentary elections, Law and Justice seized power not only over the office of president and both chambers of parliament, but also gained the possibility to appoint government officials, which means, among other things, taking control over a wide variety of executive branches. Using this ability, PiS gradually captured key judicial bodies (the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court) along with independent agencies that were appointed by those bodies, for example, the Supreme Audit Office, the Personal Data Protection Office and the National Council of Radio Broadcasting and Television.

While this takeover was not directly related to the issue of migration and migrants' rights,¹² it undoubtedly had an important impact in this field. Having a decisive influence on the legislative, executive, judiciary and control bodies, as well as independent agencies, Law and Justice possessed virtually unlimited and uncontrolled power to shape the state's migration policies. It is

⁹ Andrzej Bałaban, 'The New Role of Polish Constitution of 2 April 1997' in Kazimierz Działocha, Ryszard Mojak and Krzysztof Wójtowicz (eds), *Ten Years of the Democratic Constitutionalism in Central and Eastern Europe* (Morpol 2001), 46ff.

¹⁰ The Constitution of the Republic of Poland 1997, s 56.

¹¹ Michał Kowalski, 'From a Different Angle – Poland and the Mediterranean Refugee Crisis' (2016) 17 *German Law Journal* 967, 971.

¹² It has already been described in detail in the literature: Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2020). See also Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) 1 *Revista Forumul Judecatorilor* 104.

impossible to understand the linkage between the decay of democracy in Poland after 2015 and the country's policy towards migrants without realising this phenomenon.

9.2.2 'Good Change' in Action

To illustrate these processes, we will refer to some of the bodies and offices influencing the migration policy. First of all, the role of the media is crucial, as it has a significant impact on public opinion, and is therefore used by those who rule to shape the views of the population.¹³ One of the first steps taken by the PiS government was to create a new media order in Poland. This was done by establishing a new organ – the Council of National Media – a body not provided for in the Constitution. This Council was given numerous powers previously wielded by the National Council of Radio Broadcasting and Television, a body provided for in the Constitution as safeguarding media freedom. In this way, Law and Justice took full control over the public media in Poland.¹⁴ State channels very quickly became a government propaganda mouthpiece, but in the absence of independent bodies controlling the broadcast content, Law and Justice could freely use them to manipulate the public's mood in the area of migration, as will be discussed below.

The takeover of governmental offices, agencies and bureaucratic bodies responsible for migration issues allowed Kaczyński's party to shape policies in this area. For example, in 2013, the Government Plenipotentiary for Equal Treatment had announced the National Action Programme for Equal Treatment for the years 2013–2016. This programme included goals like ensuring the equal treatment of migrants on the labour market and reducing barriers to education for migrant children.¹⁵ After PiS came to power, the programme was never updated, although the migration crisis was at stake. What is more, when the plan expired in 2016, no new programme was ever developed. Finally, the Plenipotentiary was shuffled from the Chancellery of

¹³ Alicja Kononowicz, 'Populizm a ochrona praw migrantów' (2000) 31 *Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne* 93, 108 <<https://wuwr.pl/sppae/article/view/11867/10790>> accessed 23 January 2021.

¹⁴ Stanisław Jędrzejewski, 'Od "konserwatywnego kiczu" po "niestrawną propagandową papkę". Jak upadły media publiczne' (OKO.press, 6 February 2019) <<https://oko.press/od-konserwatywnego-kiczu-po-niestrawna-propagandowa-papke-jak-media-publiczne-znalazly-sie-tu-gdzie-sa/>> accessed 23 January 2021.

¹⁵ Pełnomocnik Rządu ds. Równego Traktowania, *Krajowy program działań na rzecz równego traktowania na lata 2013–2016* (Warszawa 10 grudnia 2013) <www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Poland_National-Action-Program-for-Equal-Treatment-2013-2016.pdf> accessed 23 January 2021.

the Prime Minister to the Ministry of Family and Social Policy in January 2020, a sharp decline in its standing that leaves the office insignificant.¹⁶ Therefore, the takeover of the office of Plenipotentiary by PiS not only meant that the previously planned pro-migration activities failed to be implemented, but also resulted in the marginalisation of a potentially important institution of democratic life. The Plenipotentiary was a thorn in the side of PiS that had to be dealt with. Not only because of the Plenipotentiary's policy in support of migrants, but also due to PiS's antipathy towards the Plenipotentiary's progressive approach to minority rights,¹⁷ which PiS treats as an ideological concept (especially 'gender ideology' and 'LGBT ideology').¹⁸ So, as we can see, migrants were placed in line with other groups stigmatised by 'good change'.

The same applies to the Commissioner for Children's Rights – Marek Michalak – who had been elected in 2013 and was actively advocating for children's rights during the migration crisis.¹⁹ After his term ended in 2018, his successor, Mikołaj Pawlak, appointed by PiS, no longer undertook such activities, instead choosing other priorities for action. 'Good change' in this field did not mean that migrants' problems were totally abandoned, but they had certainly been marginalised, with issues closer to the ideology of the ruling party jumping ahead on the agenda.²⁰

For the time being, the only remaining constitutional body active in protecting human rights in general that has not been taken over by Law and Justice is the Commissioner for Human Rights.²¹ According to the Polish Constitution, the Commissioner safeguards the freedoms and rights of everyone under the Polish jurisdiction (not only of Polish citizens), specified in any normative acts (not only those indicated in the Constitution).²² Due to this

¹⁶ Magdalena Chrzczonowicz, 'PiS po cichu wymienił Pełnomocnika ds. Równego Traktowania. A urząd do reszty zmarginalizował' (OKO.press, 4 March 2020) <<https://oko.press/wymienili-pełnomocnika-do-spraw-rownego-tractowania/>> accessed 23 January 2021.

¹⁷ Łukasz Woźnicki, 'Pełnomocniczka rządu ds. równego traktowania: Mniejszości próbują narzucić prawa większości' (Gazeta Wyborcza, 27 August 2020) <<https://wyborcza.pl/7,75398,26246110,pełnomocniczka-rządu-od-rownego-tractowania-mniejszosci-probuja.html>> accessed 23 January 2021.

¹⁸ Elżbieta Korolczuk, 'The Fight against "Gender" and "LGBT Ideology": New Developments in Poland' (2020) 3 *European Journal of Politics and Gender* 165, 165–167.

¹⁹ Numerous presentations in 2015–2018. See information about the activities available on the website <<http://bip.brpd.gov.pl/informacja-o-dzialalnosci-rpd>> accessed 23 January 2021.

²⁰ See information about the activities in 2019 <<https://brpd.gov.pl/wp-content/uploads/2020/05/Informacja-o-dzia%C5%82alno%C5%9B%C4%87i-RPD-za-rok-2019.pdf>> and in 2020 <www.senat.gov.pl/prace/posiedzenia/przebieg,548,2.html> accessed 2021.

²¹ According to the translation of the Polish Constitution at the Polish Parliament's website there is 'the Commissioner for Citizens' Rights'.

²² The Constitution of the Republic of Poland 1997, s 208.

wide range of powers, the Commissioner has the power to intervene also in matters of foreigners, refugees and migrants.²³ Unfortunately, being a body that was independent from PiS, the Commissioner faced obstruction by the government, which was reflected in the gradual reduction of funds for his office's activities.²⁴ Consequently, it resulted in the deterioration of the possibilities of intervention in all areas of his activity – in defence of the rights of both citizens and non-citizens, compared to what had been carried out before 2015.²⁵

The same process affects the functioning of NGOs. Government agencies can influence the existence of NGOs (simply by granting money, or not) and can, in that way, shape the framework for their activities. This does not mean that some areas of NGOs' activities are expressly prohibited; they are simply not supported by the state's money,²⁶ which in practice means that they are not performed.

The decrease in the level of protection for migrants is, in these cases, a side effect of the struggle of the PiS government against those authorities and bodies that remain independent and outside of its influence. Again, migrants are not an exclusive target. They became victims of a general crackdown between PiS and the institutions defending human rights. The decline in the level of protection for individuals under the rule of Law and Justice and problems with the treatment of migrants cannot be separated. These are phenomena that function simultaneously, two sides of the same coin.

An anti-migrant state policy does not have to be active. It is sufficient for the state to remain passive in such matters, which means that migration issues disappear from the government agenda. State reforms that could potentially support migrants simply ignore them and their specific situation. This process can be observed through the example of Poland's judicial reform carried out

²³ Rzecznika Praw Obywatelskich, 'Cudzoziemcy, uchodźcy, migranci' <www.rpo.gov.pl/pl/kategoria-tematyczna/cudzoziemcy-uchodzcy-migranci> accessed 23 January 2021.

²⁴ Rzecznika Praw Obywatelskich, 'Sejm zadecydował, że budżet Biura Rzecznika Praw Obywatelskich na 2021 rok wynosić będzie 51,187 mln zł.' (22 January 2021) <www.rpo.gov.pl/pl/content/sejm-obcial-wydatki-rpo-chodzi-o-biuro-rpo-ktore-sluzzy-obywatelom> accessed 23 January 2021.

²⁵ Rzecznika Praw Obywatelskich, 'Sejm obciął wydatki RPO. Tu nie chodzi o mnie, ale o Biuro RPO, które służy obywatelom. Adam Bodnar w senackiej komisji' (4 January 2021) <www.rpo.gov.pl/pl/content/budzet-rpo-na-rok-2021-%C2%A0informacja> accessed 23 January 2021.

²⁶ Anton Ambroziak, "'Dobra zmiana" dla NGO. PiS zamrozi pieniądze z Funduszu Inicjatyw Obywatelskich na rok. Zmieni też priorytety i zasady przyznawania dotacji' (OKO.press, 30 October 2017) <<https://oko.press/dobra-zmiana-dla-ngo-pis-zamrozi-pieniadze-funduszu-inicjatyw-obywatelskich-zmieni-tez-priorytety-zasady-przyznawania-dotacji/>> accessed 23 January 2021.

in 2017.²⁷ The changes did not cover any matters related to migrants or migration. When reforming, it could have been an opportunity to consider and improve the organisation of the courts in the area of migration. Today, decisions on the detention of a foreigner and court actions against administrative decisions on international protection and the right of residence are dealt with by two different types of courts – criminal and administrative. Unfortunately, the reform did not provide for a change in this division. No thought has been given to consolidating the judiciary in migration matters.

Sometimes the reforms even worsened the situation of migrants, despite not being the intention. Among the reforms introduced was the concept of drawing lots between judges. This solution has its advantages, but it does not necessarily work in migration cases, where a quick decision is needed from a judge who is familiar with the nuances of migration problems.

Taking into account what has been said above, we argue that the negative impact of Polish constitutional decay on the issues of migrants manifests itself not only in the liquidation of migration policies and diminishing the actions of the bodies supporting them, but also in ignoring their problems and specific nature, which in practice deepens their vulnerability.

9.2.3 *Primary Findings*

To sum up Poland's experience, this is a country where populism is not a potential threat, but a real fact. We advocate the concept of a 'strong' relationship between populism, the crisis of constitutional democracy and migration policies. In this sense, we perceive restrictive migration policies as an element of democratic decay. As we have tried to show, the crisis of democracy, which results in the incremental and systematic undermining of human rights, is also evident in matters of migration.²⁸

The Polish state's approach to migrants and asylum seekers requires further exploration in more detail. To explain this policy properly, it must be emphasised that the migration policy constitutes an element of a wider phenomenon. We realise that this concept of a link may not be seen so clearly from the perspective of most Western European countries, where populist politicians are only aspiring to take over power, but in the case of Poland, a country where populists have already come to power, it is based on fact.

²⁷ <www.iustitia.pl/79-informacje/1553-zalozenia-planowanej-reformy-sadownictwa-a-d-2017> accessed 23 January 2021.

²⁸ Michaela Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

The Polish experience also shows that if populists take full power, no one can count on self-safeguards included in the internal law. The Polish case shows that the rule of law will not defend itself. This has already been explained in the literature, based on the Polish example, looking at how the ruling party was able to bend the interpretation of the Constitution and the laws to achieve important regime goals.²⁹ The sad truth is that, no matter how well-designed a system is, its operation always depends on the course of action taken by the elected rulers.³⁰

After the takeover of power by Law and Justice, the Polish experience shows that the application of the law depends on the people wielding power. The guarantees contained in the legal system will not work unless someone is willing to use them. As law-making and law enforcement of the internal Polish law are under the control of Law and Justice, it is no longer possible to count on the *internal* law's ability to provide resilience against restrictive migration policies. If one seeks help in the law, it would rather have to be the international or European one. These issues will be discussed below.

9.3 THE PERSPECTIVE OF MIGRATION AND ASYLUM

9.3.1 *Facts*

In contrast to Western and Southern Europe, the migration crisis of 2015–2016 largely bypassed Poland. This is a kind of paradox because, despite the low risk of waves of migrants from Syria and Africa arriving in Poland, Law and Justice managed to skilfully exploit the migration crisis in Europe, rather than in Poland, by sowing fear of an influx of migrants. That is why some facts should be established.

First, migration into Poland after 2014 was determined by the situation in Ukraine following the occupation of Crimea by Russia, and subsequently by the conflict in Donbas. However, only a few Ukrainians were granted refugee status or subsidiary protection. On the other hand, a very liberal visa policy was adopted for Ukrainian citizens. At present, Ukrainian citizens constitute the largest group of foreigners legally living and working in Poland (about 1.2 million people). It is believed that many more Ukrainians would have applied

²⁹ Wojciech Sadurski, 'Constitutional Design: Lessons from Poland's Democratic Backsliding' (2020) 6 *Constitutional Studies* 59, 64–65.

³⁰ Wojciech Sadurski 'Constitutional Democracy in the Time of Elected Authoritarians' (2020) 18(2) *International Journal of Constitutional Law* 324, 331.

for international protection if they had not had the possibility of legally entering and staying in Poland.³¹

Second, from 2007 to 2016, the total number of applicants for international protection (mainly from the Caucasus) did not exceed 12,300 (in 2015 and 2016). In 2017, the number of foreigners applying for international protection in Poland suddenly fell sharply to a little over 5,000, and has been decreasing since then. In 2019, only 4,110 foreigners applied for international protection and it was granted to just 144 of these foreigners.³² It should also be added that it is characteristic for whole families, including children, to arrive in Poland.

Finally, a large number of proceedings for international protection are discontinued (there are usually more decisions on discontinuation than refusals), mainly due to foreigners absconding.

All these facts should be taken into account when describing Poland's migration policy, as they have appeared in the civil society reports, interventions of national human rights institutions, and on the international forum.

9.3.2 *Political Trends and Narration*

At present, the Act on Granting Protection to Foreigners in the Republic of Poland of 2003³³ and the Act on Foreigners of 2013³⁴ transpose EU law concerning third-country nationals into the Polish legal system. In general, these acts just about meet the requirements of the Common European Asylum System CEAS. In 2017 and 2019, substantial government proposals for amending the Act on Granting Protection to Foreigners were submitted. The drafts proposed, among other things, restrictive border procedures and stipulated that the inadmissibility or refusal of international protection or a permit to stay due to humanitarian reasons would oblige the foreigners to return, and would prohibit their re-entry into Poland or any other Schengen

³¹ Iza Chmielewska et al, *Obywatele Ukrainy pracujący w Polsce – raport z badania*, Departament Statystyki NBP Warszawa, 2016 <www.nbp.pl/aktualnosci/wiadomosci_2016/20161212_obywatele_ukrainy_pracujacy_w_polsce_-_raport_z_badania.pdf> accessed 5 November 2020.

³² In 2020 there were over 2,800 applications, but 2020 should not be considered due to the COVID-19 pandemic. Official statistics of the Office for Foreigners available at www.migracje.gov.pl.

³³ Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej Dziennik Ustaw 2003 nr 128 poz. 1176; 2018, poz. 51 and 107.

³⁴ Ustawa o cudzoziemcach Dziennik Ustaw 2013 nr 1650 and 2017 poz. 2206 and 2282; 2018 poz. 107 and 138.

State for a specified period of time.³⁵ In practice, this might lead foreigners with strong and good faith claims for asylum to refrain from exercising their fundamental human rights. The attempts to significantly change the law turned out to be unsuccessful, with the drafts receiving very negative reviews from UNHCR, NGOs, national institutions for human rights and the Supreme Court.³⁶ The legislative process was not completed before the parliamentary elections in October 2019, so it did not enter into force. Thus, at some point after 2015, the main changes concerning migration and asylum took place outside the legal sphere – through political strategy, debate and in the media.

After the Law and Justice party won the parliamentary elections in October 2015, the Council of Ministers cancelled the 2012 policy paper ‘Migration Policy of Poland – the Current State of Affairs and Proposed Actions’. It was not until June 2019 that the Council of Ministers presented a new proposed paper ‘Migration Policy of Poland’, being part of the Strategy for Responsible Development adopted in 2017.³⁷ Its authors emphasised, among other things, that the EU’s experience in the area of migration and integration, being based on a multicultural model, had become a failure, so it was necessary to adopt a new solution involving the concept of a leading culture. In this way, the system of integrating foreigners should become an obligation, not just an option to be chosen by foreigners. The aim of this new policy was primarily effective integration, but also the assimilation of any foreigners. The project focused on social cohesion and security issues, including counteracting illegal migration and the strengthening of border controls, thereby limiting attempts to abuse immigration or refugee procedures.

The project was subject to consultations and came under heavy criticism from civil society organisations;³⁸ it was not pursued further.³⁹ However, the

³⁵ The draft act – texts and legislative procedure available at <<https://legislacja.rcl.gov.pl/projekt/12294700/katalog/12410552#12410552>> accessed 5 November 2020.

³⁶ The opinions available at: <<https://legislacja.rcl.gov.pl/projekt/12294700/katalog/12410552#12410552>> accessed 5 November 2020.

³⁷ ‘Polityka Migracyjna Polski’ is a document clarifying the adopted policy in 2017 ‘Strategy for Responsible Development until 2020 (with an outlook up to 2030)’ <<https://interwencjaprawna.pl/wp-content/uploads/2019/06/Polityka-migracyjna-Polski-wersja-ostateczna.pdf>> accessed 17 November 2020.

³⁸ Opinion issued 1 July 2019 on ‘Polityka Migracyjna Polski’ <www.hfhr.pl/politykamigracyjnepolski> accessed 17 November 2020.

³⁹ December 2020, the Inter-ministerial Team for Migration accepted the diagnostic document, which will be the basis for the new Polish migration policy’s findings and recommendations. ‘Polityka migracyjna Polski – diagnoza stanu wyjściowego’ <www.gov.pl/web/mswia/polityka-migracyjna-polski-diagnoza-stanu-wyjsciowego> accessed 15 January 2021.

government's current migration approach follows the main ideas of this project. There is a clear Janus-faced policy towards migrants. On the one hand, in view of growing job vacancies that threaten the development of particular sections of the economy and given the ageing Polish society, migrant workers who integrate here easily (mainly from Ukraine) are accepted as a necessary labour force. This aspect of migration is not a controversial issue, though there is, unfortunately, no deep debate on issues such as the working conditions of economic migrants.

On the other hand, asylum seekers have been presented as a threat to the security and social cohesion of the state. This has led to an increase in xenophobic sentiment, primarily in the context of the possible migration of Muslims. This aspect of migration (or potential migration) to Poland, the mass influx of voluntary and involuntary migrants to Europe, as well as the threat of terrorism, became a hot topic of political slogans during the electoral campaigns of 2015 and 2018–2019.⁴⁰ Special attention should be paid to the narrative of the political debate and the media message that accompanied the change of power in Poland. Politicians associated with the political right remain very reluctant to accept applicants for international protection. They treat the refugee issue instrumentally, exploiting it for political purposes, without considering the refugees' actual situation or their human rights. After winning the campaigns, the politicians seemed to abandon the subject as useless, moving on to find another group to divide society into 'us' and 'them', all the while accepting an unprecedented number of economic immigrants.

The public media, taken over by the ruling majority, has proved to be extremely helpful in creating a negative image of refugees. Public radio and TV broadcasts have been used extensively to build up a hostility towards migrants, who were presented as a threat to Polish and European values, national security, culture, traditions and even national health.⁴¹ Referring to anti-migrant slogans and calling for the 'defence of common values' allowed Law and Justice to strengthen its popularity, which would not have been possible without ending the independence of the public media.

The 2018 pre-election scare campaign of the Law and Justice party may be a prime example of this tactic. The videos used during the campaign set out to frighten voters, offering a futuristic vision of Poland that accepted refugees

⁴⁰ See n 4.

⁴¹ Kamil Feifer, "Wiadomości" TVP: mordują uchodźcy. Fakty nie mają znaczenia' (OKO.press, 22 December 2016) <<https://oko.press/wiadomosci-tvp-morduja-uchodzcy-fakty-maja-znaczenia/>> accessed 23 January 2021.

from Muslim countries. It presented immigrants, especially refugees from Muslim countries, as a potential source of riots, assaults, rape or murder, and undoubtedly aimed to arouse feelings of reluctance and hostility in the majority of the audience. In the opinion of the Commissioner for Human Rights (ombudsman), the videos were undoubtedly political and persuasive in nature, and therefore could not be considered as a mere expression of the opinion or opinions of its creators. According to the Commissioner, the videos call for hatred; it does not deserve the protection guaranteed under the Constitution of the Republic of Poland⁴² or Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Commissioner tried to bring proceedings to classify the videos as 'hate speech', but the public prosecutor's office initially refused. The Commissioner twice filed complaints to the court against the refusals. In September 2020, after the court had issued decisions obliging the public prosecutor to start proceedings again, the public prosecutor discontinued the proceedings, stating that, after extensive analysis by three experts, it could not be accepted that the video amounted to incitement to hatred, as the goals of its authors were different. The Commissioner has again appealed against this decision,⁴³ but it is doubtful that his successor as commissioner, if one is elected by the Law and Justice party, will continue to be active on this matter.

This case also shows that politicians, the media and society in general have lacked a thorough, unbiased debate on the migration crisis and have failed to present the crisis in a broad context. The debate has mainly been limited to raising certain security issues and frightening the public.⁴⁴

9.3.3 (*Lack of*) *Solidarity and International Cooperation*

The reluctant attitude of the Polish authorities towards migrants coming to Europe is also visible on the international arena. Particularly clear evidence of this approach can be found in Poland's rejection of the Global Compact on Migration at the seventy-third session of the UN General Assembly.⁴⁵ In a statement issued by the Polish delegation, it was postulated that the Global Compact was not the right instrument to manage migration and that it did not

⁴² Dziennik Ustaw 1997 nr 78 poz. 483.

⁴³ Information available at the Commissioner's website <www.rpo.gov.pl/pl/content/rpo-po-raz-kolejny-umorzenie-sprawy-antyuchodzczego-spotu-pis-z-2018> accessed 10 January 2021.

⁴⁴ Michał Kowalski, 'From a Different Angle – Poland and the Mediterranean Refugee Crisis' (2016) 17 *German Law Journal* 6, 974.

⁴⁵ United Nations General Assembly Resolution of 19 December 2018. 'Global Compact for Safe, Orderly and Regular Migration' A/RES/73/195.

serve the best interests of Poland and its nationals, so Poland maintained its sovereign right to restrict the admission of non-nationals. The other arguments of the Polish delegation were strange to say the least. The huge number of migrant workers already in Poland was indicated as a factor preventing Poland against the reception of more asylum seekers. The delegation also pointed out the difficulty in implementing detention standards.⁴⁶

By not accepting the Global Compact,⁴⁷ a document of political dimension without legal power, Poland demonstrated a lack of goodwill towards promoting standards and norms concerning migration, as well as in cooperation between countries. In fact, it is difficult to find a rational justification for such an attitude, except to please its own voters.

Poland's reluctant approach to migration issues has also become a hot topic within the European Union. As mentioned above, the election campaigns in Poland also coincided with the process of relocating refugees, carried out from 2015 to 2017. It must be acknowledged that it was initially possible to expect consensus regarding migration, and that, after the elections in October 2015, the newly-elected government upheld its predecessor's undertaking to accept 7,082 asylum seekers from Italy and Greece as part of the Relocation and Resettlement Programme. However, the declared number of admitted asylum seekers was quickly reduced, and the relevant law to enable the relocations was never finally enacted. As a result, Poland failed to relocate asylum seekers from Italy or Greece. The politicians justified their position on security grounds, highlighting the terrorist attacks in Brussels in March 2016. The Ukrainian crisis and its potential consequences were also used as an excuse for rejecting any relocations.

Another argument against any relocations was the concept of on-site assistance; funding for this was significantly increased and a special Department for Humanitarian Aid was established in January 2018. Its task was the coordination and monitoring of assistance from Poland, mainly to those in need in North Africa and the Middle East. Since no complete report of the department's activity is currently available, it is difficult to assess the results of this initiative. Its future does not seem optimistic. The Ministry of Foreign Affairs failed to launch any calls for humanitarian aid projects in 2020 and has reduced development aid funding by one-third. The Syrians in Lebanon and Jordan, whose accommodation is financed by Poland, along with

⁴⁶ The video see at <www.unmultimedia.org/avlibrary/asset/2338/2338741> accessed 10 October 2021.

⁴⁷ Worth mentioning is that Poland did not protest against the New York Declaration in 2016.

patients in clinics in Kurdistan and victims of the conflict in Donbas, will all suffer the most.⁴⁸

It is worth adding that the ruling majority rejected not only the concept of relocation, but also the concept of humanitarian corridors. In this matter, the government's position turned out to be very tough, as even the Polish Catholic Church's initiative to organise humanitarian corridors for those in need of medical assistance did not meet with government approval.⁴⁹

Poland's position on relocation and solidarity among the EU Member States in matters of migration has always been consistently negative. First, Poland intervened against the relocation programmes in the case *Slovak Republic and Hungary v. Council of the European Union*. The Court, however, confirmed the legality of these programmes, concluding that Article 78 (3) TFEU allows the EU institutions to take all temporary measures necessary to respond rapidly and effectively to an emergency situation such as a sudden influx of migrants.⁵⁰

Then, Poland was one of three countries, together with the Czech Republic and Hungary, against which the European Commission launched infringement procedures in December 2017, reasoning that these Member States had failed to fulfil their obligations under the Relocation Decisions. The Court followed the opinion of Advocate General, Eleanor Sharpston⁵¹ and, on 2 April 2020, upheld the actions for the failure. The Court concluded that there had been an infringement of the decision adopted by the Council with a view to the mandatory relocation of 120,000 applicants from Greece and Italy. It also found that Poland and the Czech Republic had also failed to fulfil their obligations under an earlier decision that the Council had adopted with a view to the relocation, on a voluntary basis, from Greece and Italy of 40,000 applicants for international protection.⁵²

Finally, when negotiating the Dublin IV Regulation, the Polish Government expressed strongly opposition to any proposals for mandatory

⁴⁸ Marcin Żyła, 'Polska będzie mniej pomagać', *Tygodnik Powszechny* (Krakow 2 December 2019), 8.

⁴⁹ Magdalena Półtorak, The Polish Report (unpublished) contributed to 'Study on the feasibility and added value of sponsorship schemes as a possible pathway to safe channels for admission to the EU, including resettlement Final Report' (Directorate-General for Migration and Home Affairs October 2018).

⁵⁰ Joined Cases C-643/15 and 647/15 *Slovak Republic and Hungary v. Council of the European Union* [2017] EU:C:2017:631.

⁵¹ Joined Cases C-715/17, 718/17 and 719/17 *Commission v. Poland, Hungary and the Czech Republic* [2019], Opinion of E. Sharpston, ECLI:EU:C:2019:017.

⁵² Joined Cases C-715/17, 718/17 and 719/17 *Commission v. Poland, Hungary and the Czech Republic* [2020], ECLI:EU:C:2020:257.

and automatic redistribution mechanisms. Poland has indicated that any future compromise on the application of solidarity mechanisms should be based solely on solutions acceptable to all Member States.⁵³

9.3.4 *Human Rights Issues*

Poland's attitude towards various migrants, especially involuntary migrants, has been noticed on the international forum. When analysing observations, views and judgements of human rights treaty bodies and the European Court of Human Rights' judgements, three main points emerge. The first is the general issue of preventing xenophobia. The second point refers to the right to seek asylum. The last one relates to the unsolved problem of migrant detention.

9.3.4.1 Problem of Xenophobia

The international community formulated several recommendations and comments during the Universal Periodic Review in 2017. Many of them encouraged Poland to take an active stance in combating and raising awareness of racism and intolerant political rhetoric, as well as strengthening legal and other measures to address bias-motivated crimes, ensuring the prompt and effective prosecution of racist, xenophobic hate crimes. Many other recommendations related to the rule-of-law principle and the protection of the judiciary's independence, as well as to the reduction of funds for civil society organisations and national human rights institutions, as all these factors lead to diminishing the standard of human rights protection.⁵⁴

In the Concluding Observations of 2019 by the Committee on the Elimination of Racial Discrimination (CERD), Poland was advised to introduce educational campaigns on tolerance, aimed at eliminating prejudices and social stereotypes, and to ensure the proper registration, investigation, prosecution and conviction of perpetrators of hate speech and hate crimes.⁵⁵ All these remarks are fully justified, as the political narrative and the public

⁵³ A letter from the Ministry of Foreign Affairs to the President of the Senate of 9 July 2018, No. 905.

⁵⁴ Human Rights Council, Report of the Working Group on the Universal Periodic Review, September 2017 A/HRC/36/14, 11–29.

⁵⁵ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Poland of 29 July 2019, CERD/C/POL/CO/22–24, 6–7.

media have contributed to the xenophobic sentiment over the last few years. The prosecution of hate speech does not seem to be a priority.

9.3.4.2 Access to Territory

Bearing in mind these proposals to change migration policy and attempts to tighten up border procedures and, above all, the dramatic drop in asylum applications on Poland's eastern border, it is worth looking at this issue from the perspective of international bodies.

Already in 2016, the Human Rights Committee advised the Polish authorities to ensure that access to asylum would not be obstructed on the grounds of religious discrimination, or any other grounds prohibited by the Covenant on Civil and Political Rights, and to establish a proper screening system that will ensure asylum seekers are not returned to a country where there are substantial grounds to believe they may face a real risk of irreparable harm, such as that set out in Articles 6 (right to life) and 7 (ban on torture) of the Covenant.⁵⁶

The committee's recommendations failed to prove effective, as the committee received a communication in 2017 referring to a violation by Poland of Articles 2 (non-discrimination clause), 7 and 13 (rights of aliens) of the Covenant, due to its failure to register and accept an asylum application.⁵⁷

In 2019, two other committees issued their Concluding Observations in which they raised the problems of denied access to asylum procedures by border guards, refusal to register asylum applications and lack of access to legal assistance at the border.

These committees were the mentioned CERD and the Committee against Torture (CAT). The latter noted that individuals in need of international protection were not always given access to Poland, particularly at the Terespol border crossing from Belarus, and at the Medyka border crossing from Ukraine. In this context, CAT criticised a proposed amendment to the *Act on Granting Protection to Foreigners* concerning the introduction of accelerated border procedures as it claimed this would severely limit further access to Poland and result in the refusal of asylum claims and limits on the right to an effective remedy. The committee also stressed the asylum seekers' right to legal assistance. Finally, the committee said that Poland should refrain from

⁵⁶ Human Rights Committee, Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, 23 November 2016, 6–7.

⁵⁷ Communication no 3017/2017. The case is pending.

engaging in pushbacks and refoulement, and should set up accessible and protection-sensitive entry systems at border-crossing points.⁵⁸

However, the attitude to asylum seekers and the respect of their human rights are much better illustrated by a case brought before the ECtHR. The case *M.K. and others v. Poland* originated from the applications of three Chechen families with children who travelled to the Terespol border crossing. The applicants alleged that the Polish authorities had repeatedly denied them the possibility of submitting an application for international protection, despite their expressed wish to apply for asylum. They complained about a breach of *non-refoulement* under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights – ECHR), and invoked Article 4 of Protocol No 4 to the Convention, alleging that their situation had not been reviewed individually and that they were victims of a general policy that was followed by the Polish authorities with the aim of reducing the number of asylum applications registered in Poland. They also argued that lodging an appeal against a decision of denial of entry into Poland did not constitute an effective remedy, as it would not be examined quickly enough, would have no suspensive effect and would not be examined by an independent body. It is worth mentioning also the fact that their legal representative was denied the opportunity to meet them at the border checkpoint. Finally, the applicants complained that the Polish authorities had not complied with the interim measures granted to them by the Court, in breach of Article 34 of the Convention. In response to this last allegation, the Ministry of Foreign Affairs explained that the Convention did not apply, because the applicants were not present in Poland as a result of the refusal of entry.⁵⁹ This argument obviously remains in breach of Article 1 of the Convention, since ‘within their jurisdiction’ also means ‘being subject to border checks’. This arises from the ECHR jurisprudence and is a well-established concept in the area of human rights.⁶⁰ In its judgment, the Court⁶¹ found that Poland had violated all the aforementioned provisions of the ECHR. Currently, there is another, almost identical, complaint pending before the ECtHR, this time from a Syrian family. In the case *D. v. Poland*, the applicants complain not only about being repeatedly denied the possibility to submit an application for international protection, but they

⁵⁸ Committee against Torture, Concluding Observations on the Seventh Periodic Report of Poland of 29 August 2019, CAT/C/POL/CO/7, 9–11.

⁵⁹ See Chapter 4 in this volume.

⁶⁰ Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *Human Rights Law Review* 287, 339.

⁶¹ *M.K. and others v. Poland* App no 40503/17 and no 43634/17 (ECHR, 23 July 2020).

also allege that they are victims of a general policy adopted by the Polish authorities aimed at reducing asylum applications in Poland.⁶²

9.3.4.3 Detention

The specific nature of involuntary migration to Poland, where there is a high risk of asylum seekers absconding and the frequent application of the Dublin mechanism, has led to the issue of detention in Polish guarded centres being discussed on the international forum. The detention of asylum seekers, including families with children, is obviously not a new problem that has only emerged in recent years. It has been around for many years and has been reported on by NGOs previously.⁶³ Although the Human Rights Committee's Concluding Observations of 2016 and the Committee on the Rights of the Child's Observations on Poland's periodic report in 2015 encouraged Poland to the extensive application of alternative measures to avoid the detention of asylum seekers under the age of eighteen and families with children, the situation has not changed.⁶⁴ The same remarks appeared again in the CERD Observations in 2019. The committee noted 'the continuing practice of detaining children with their parents, or having unaccompanied or separated children in guarded prison-like centres for foreigners, which subject children to a traumatic experience and prevent those children from having access to full-time education.'⁶⁵

It should also be pointed out that the Fundamental Rights Agency saw the percentage of decisions imposing an alternative to detention increase from eleven per cent in 2014 to over twenty-three per cent in 2017,⁶⁶ which may either be recognised as progress or a failure.

Finally, the case of *Bistieva and others v. Poland*,⁶⁷ heard by the European Court of Human Rights (ECHR), clearly shows the specific nature of Polish

⁶² *D.A. v. Poland* App no 51246/17 (ECHR, Communicated on 7 September 2017).

⁶³ Tomasz Sieniow, *Stosowanie alternatyw do detencji cudzoziemców w Polsce w latach 2014–2015* (Instytut na Rzecz Państwa Prawa, Lublin 2016); Marta Górczyńska and Daniel Witko, *Research on the Applicability of 'the Best Interests of the Child' Principle as the Primary Consideration in Detention Decisions as Well as the Alternatives to Detention* (UNHCR, Helsińska Fundacja Praw Człowieka 2018).

⁶⁴ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Poland, 30 October 2015, CRC/C/POL/CO/3–4, 12.

⁶⁵ The Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Poland of 29 July 2019, CERD/C/POL/CO/22–24, 6–7.

⁶⁶ European Union Agency for Fundamental Rights Report 2018.

⁶⁷ *Bistieva and others v. Poland* App 75157/14 (ECHR, 10 April 2018).

asylum cases, both in terms of the situation (the unwillingness of foreigners to stay in Poland) and the solutions adopted by the Polish authorities concerning the detention of migrants, including families with children.⁶⁸ Concerning Article 8, the ECHR found that there had been a breach of the Convention because the detention of the applicant and her children for six months interfered with the effective exercise of their family life. In the Court's opinion, the authorities had not fulfilled their obligation to consider the family's detention as a last-resort measure, and had not taken into account any alternative measures. Acting in the child's best interests could not be limited to simply keeping the family together. In the *Bistieva* judgement, the Court also ruled that further action would need to be taken by Poland's authorities in order to prevent similar violations.

In June 2019, the government submitted a statement on the enforcement of this judgement, saying that Poland had fulfilled its obligations, among other things, by implementing and developing the regulation – 'Rules of the conduct of the Border Guard with respect to foreigners requiring special treatment'.⁶⁹

The Helsinki Foundation for Human Rights, monitoring the implementation of this judgement, took a different view in this case. In August 2019, it submitted to the Committee of Ministers of the Council of Europe a communication stating that the Polish authorities had failed to properly take into account the principle of assessing the best interests of the child in immigration proceedings, and that effective measures must be taken to prevent similar violations in the future. Therefore, the report concluded, judges and border guard officers should receive proper training on applying the principle of the best interests of the child and ECtHR case law in cases of immigration detention of minors, and the courts must incorporate a personalised assessment of the situation of the affected children when deciding to place a family in a guarded centre.⁷⁰

Certainly, issues concerning the detention of asylum seekers and irregular migrants is not only a Polish problem; indeed Poland is not even the biggest offender in this area. There are also a number of judgements and

⁶⁸ See also: Magdalena Anna Kosińska, 'Bistieva and Others v. Poland' (2019) 8 *Polish Review of International and European Law* 2, 129–139.

⁶⁹ Information on measures taken to implement the judgment in the case of *Bistieva and Others v. Poland* DH-DD(2019)931 <<https://rm.coe.int/1355th-meeting-september-2019-dh-action-report-11-06-2019-communicatio/168094ef06>> accessed 15 December 2020.

⁷⁰ Communication from Poland concerning the case *Bistieva and Others v. Poland* App no 75157/14) DH-DD(2019)678 <<https://rm.coe.int/1355th-meeting-september-2019-dh-action-report-11-06-2019-communicatio/168094ef06>> accessed 15 December 2020.

recommendations addressed to other governments. However, this issue has been selected to show clearly that human rights mechanisms become ineffective when there is no political will to take a serious look at the problem. The lack of will means that even binding international rulings may be circumvented or not implemented properly. This results in weakening the standard of the protection of human rights provided by international institutions.

At the same time, the detention problem highlights the importance of civil society organisations, the independence of national human rights institutions (here the Commissioner for Children's Rights) and judges for maintaining legal resilience.

9.4 CONCLUSION

The current political and social situation in Poland gives us a real-world look at the relationship in practice between the crisis of democracy and the rights of migrants, especially asylum seekers, in an era of democratic decay. In the Polish case, we would like to stress that it is difficult to consider 'legal resilience' as a mitigating factor. The seizure of the public media and almost all state institutions by the ruling majority, coupled with the reduction in support for civil society organisations undoubtedly affected the situation of migrants. In fact, in the area of migration policy and migrant rights, no special bending of the rules was required. It was enough to gather in one political hand the instruments of lawmaking, law enforcement and legal interpretation to pursue the migration policy in a direction welcomed by the ruling party. At the same time, the lack of independent watchdogs has severely limited the ability to supervise these processes, especially as a hostile approach to asylum seekers also appeared outside the legal sphere, on the political and practical levels.

Our findings confirm that in the event of a populist party taking over all the state institutions, migrants' rights cannot be considered in separation from the protection of human rights in general. Analysing the Polish experience, the breakdown of the constitutional rights system results in a decrease in migrants' rights protection just as it does for other social groups. However, lowering the general standards of human rights protection affects migrants in particular, as they should be treated as a group of human rights holders that is more vulnerable than most. Due to their situation, they are much less able to defend their 'general' human rights compared to citizens. Aside from this negative impact on the general standards of human rights protection, migrants suffer added detriments to their human right to asylum and principle of non-refoulement, as well as the right to an effective remedy in the case of being pushed back at the border.

The hostile attitude of politicians on the political right towards accepting refugees and the negative message expressed through public media has resulted in an aversion to asylum seekers and refugees that has increased xenophobic sentiment in society. At the same time, law enforcement agencies have not been sensitised to combating xenophobic crimes and hate speech. The progressive exchange of judges also lowers the standard of protection in this area.

Presently, upholding the rights of migrants, refugees, and asylum seekers (including detained children) is not in the interest of the bodies responsible for eliminating discrimination and ensuring equal treatment and policy. The only exception to this is the Commissioner for Human Rights, whose term of office is coming to an end. Finally, the increasingly difficult situation of civil society organisations hurts their ability to provide support for migrants, especially in terms of legal assistance and reception.

Moreover, the two phenomena – the breakdown of democracy and the issue of migrants' rights – appear to be complementary. They seem to interact with each other. Firstly, the migration crisis was exploited by PiS to take power. Jarosław Kaczyński's party used this crisis to mobilise voters during the 2015 and 2018 election campaigns (presenting migrants as a threat to Polish culture and economy, and PiS as the only force able to overcome this threat).

Second, after victory in the elections, PiS used and still uses the instruments of power that they gained in order to introduce restrictions in the flow of migrants, pursuing a strategy that directly or indirectly has a negative effect on migrants' rights. Thus, these two elements are actually combined. When the migrant crisis of 2015 diminished, the migration problem nearly disappeared from PiS's agenda and migrants were no longer presented as the main danger. Nevertheless, this style of policymaking remained, but the targets changed. Nowadays *other* social groups are in the firing line, shown as the main threat: the democratic opposition described as 'elites', LGBT and 'gender ideology'. This has resulted in various restrictions on judges, sexual minorities and women (the problem of reproductive rights). Nevertheless, it is easy to predict that, when the need again arises, migrants will return to the agenda, which will probably be combined with further restriction of their rights.

When it comes to the potential and limits of legal resilience in the migration context, the Polish experience shows that the way the law is used as an instrument of shaping social reality depends on the attitude of those who hold power. The Polish experience after Law and Justice took power over the parliament, the executive and the Constitutional Tribunal, and finally the Supreme Court shows unequivocally that there is no such thing as an inherent resistance of the law to being used improperly. The law cannot defend

itself but is a tool of the ruling politicians. This means that a change in the approach to migration law in Poland is inevitably combined with a change in the holders of power. They must be replaced by people with a different vision for policy in this respect. Therefore, what we are dealing with here is not primarily a legal, but rather a political problem, which may be overcome not by legal means (the law itself), but by the will of the people expressed at elections. However, in the current climate, even the opposition parties are not willing to put migrants' rights onto their agenda. Polish society's mindset about migrants has been ingrained so deeply that it is difficult to expect particular initiatives on their rights to appear in subsequent election campaigns. It would be too risky for either party.

Seeking support for legal resilience in international forums may also prove unsuccessful. Certainly, the international and European instruments are beyond the direct control of the Polish government, but everyday migration policy remains in the national domain.

The human rights treaty bodies have identified many discrepancies between Poland's law and practice in the area of human rights protection. The ECtHR has found a breach of the provisions of the ECHR, including the ban on torture in border cases. The CJEU has issued a ruling on the infringement of the solidarity principle due to the rejection of relocation decisions. In light of these findings by international bodies, it might be thought that they can offer a remedy forcing PiS to modify its attitude to migration. However, nothing could be further from the truth, as PiS does not care about external opinions, because the target group it wants to convince is its own voters. Contesting international consensus or the recommendations of human rights bodies is much easier, cheaper and more popular than reviewing the use of detention or raising the awareness of judges and state officials in relation to asylum seekers' rights.

What might make a difference to the 'good change'? Probably only the awakening of civil society and a red card shown at the next elections.