Article

Security First:

New Right-Wing Government in Poland and its Policy Towards Immigrants and Refugees.

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Abstract

The so-called refugee crisis in 2015 coincided with the Polish parliamentary electoral campaign. The effect of it was—for the first time in Poland—the introduction of migration policy to the political agenda of the right-wing and populist political parties on a massive scale. They presented migration as an issue of security—both national and cultural, direct and symbolic. The new government, acting since the end of 2015, included immigration and asylum issues into their political programme as a key element of national security. Their discourse about refugees is usually based on the differentiation: us and them. And ‘them’ are pictured as evil, dangerous, Muslim terrorists. The new government and its authoritarian style of governing has introduced a number of initiatives designed to deprive individuals of immigrant rights (like in the new so-called Antiterrorist Act from the mid of 2016, based on which every foreign citizen could be put under surveillance without any court control) or to stop refugee influx on the Polish territory in any way—directly from their country of origin (new amendments to asylum law are trying to introduce border and accelerated procedures) or under the UE resettlement and relocation programme (Poland is one of 3 EU Member States—along Hungary and Austria—that hasn’t relocated anyone). In this paper I will present in more detail the legal changes described above, their consequences and the so-called rationalities presented by the government.

Introduction

For most countries of the European Union, 2015 marked a discussion about the so-called migration crisis. Poland was no exception, although it was not directly affected by the influx of migrants from the Mediterranean basin. Still, the country opened a debate on the presence of refugees and the willingness of the Polish society to welcome them, as well as the mechanism of relocation and resettlement put forward by the European Commission (EC) in order to support the countries that bear the brunt of mass arrival of refugees and show European solidarity. For the first time in history migration became a subject that received extensive coverage in the media (mostly in negative terms) and very soon the number of people in favour of taking in refugees began to dwindle, so much so that in April 2016 two thirds of the Polish society were against the arrival of forced migrants.

Following the landslide victory, a new ultra-right government was formed at the end of 2015 by Law and Justice (Prawo i Sprawiedliwość, or PiS). The subject of security and protection against the threat of refugees, the subject that contributed to the party’s victory, was continually present in its business. One might hazard an opinion that refugees and asylum seekers became a ‘suitable enemy’ (Christie 1986) or ‘good enemy’ (Young 2007: 35-36) for the government, owing to the rhetoric in which PiS appealed for

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cultivation of national values, consolidating nationalist sentiments at the same time. According to Jacek Skiba, the Deputy Minister of Internal Affairs responsible for migration policy, ‘the safety factor is extremely important, which is particularly clear in view of the recent terrorist attacks’ (Klaus et al. forthcoming). The rhetoric of security and terrorist threat on the part of refugees continues to feature prominently in the statements of leading politicians (Kuisz 2017).

Consequently, Polish authorities began to systematically introduce mechanisms for criminalising migration. Naturally, the policy of ‘crimmigration’ (Stumpf 2006) is nothing new, since its elements had already been introduced by the previous governments. It was necessitated by the EU regulations with regard to migration and its control, also by means of establishing various databases collecting information on immigrants, both international (e.g. SIS II, Eurodac, VIS, Eurosur) and domestic (Aas 2011; Kmak 2015). The change in the policy of the new government, which resorts to authoritarian measures in numerous fields, e.g. undermining the position of independent courts, relied on introducing a strong discourse of public security into the debate on migration and to justify changes to the immigration and asylum law. Foreigners, including refugees, are depicted as individuals who cannot be trusted, and who, in order to protect the society, need to be subjected to increased control, if already in Poland, or prevented from entering the country (Klaus et al. forthcoming). Such approach justifies any intervention against them, which includes violence and depriving them of rights that other members of the society enjoy (Dauvergne 2013; Koulis 2013; Kmak 2015; Zedner 2013).

Increasing surveillance instruments in Poland in general

The biggest problem resulting from PiS’s governmental rule in Poland is the systematic and quick removal of checks and balances from the legal system. The first year and a half following the party’s coming to power, PiS paralysed the activity of the Constitutional Court, entirely subordinated the hitherto independent prosecutor’s office to the government by combining the functions of Prosecutor General and Justice Minister (who can now instruct prosecutors to start and conduct investigations) and transformed the public radio and television into a mouthpiece for the government (changing the name from public to national media), whose primary function is to spread party propaganda. Currently, courts are being subordinated through hijacking the right to summon new judges. Independent media are under constant threat (there are plans to ‘repolonise’ them, i.e. for the state to buy them out from private proprietors) as are non-governmental organisations and their leaders, accused of representing foreign interests. The process is dangerous inasmuch as it deprives a citizen of tools to defend oneself with against the abuses of power (Szymielewicz 2017; Kuisz 2017).

In January 2016 the so-called ‘surveillance law’ was passed, i.e. a package of laws pertaining to the access of the police and intelligence agencies to so-called metadata. The law improved a little the safety of citizens, introducing restrictions of access of authorities to some data (it is ‘only’ possible in the case of crimes prosecuted by the state, although they constitute 90 per cent of all crimes) and ordering the destruction of obtained data after a certain time, if it has not been utilised. However, the regulations ‘maintained the logic that metadata collection is less intrusive and therefore does not necessitate the same guarantees as “classical” surveillance. As a result, independent judicial oversight was not introduced and access to telecommunication metadata remained virtually uncontrolled’ (Szymielewicz 2017: 60).

‘Counteracting’ terrorist attacks—foreigner equals terrorist

An important change in terms of increased surveillance was passing of the Act of 10 June 2016 on Antiterrorist Activities. The regulations were adopted hastily, using the upcoming NATO summit and the World Youth Days, together with the accompanying visit of Pope Francis as an excuse, although abrupt changes in regulations always result in confusion among the services rather than improvement of their efficiency. The real reason behind the changes was a substantial increase in the powers of authorities to control people on the territory of Poland. The accepted definition of ‘terrorist activity’ is general enough

to allow a broad interpretation and subsequent interventions against randomly selected individuals (potential political opponents included).

The act gave rise to a new register of people involved in terrorist activity, which will be in the charge of the Head of Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego, or ABW). A new procedure for temporary arrest was also introduced, solely based on a ‘probability’ that a particular person committed, attempted to commit or prepared to commit a crime of a terrorist nature. Proceedings will be conducted by the court, based on materials that neither the arrested individual nor their defence lawyer will have access to (art. 26 Act on Antiterrorist Activities). Another new idea is the possibility of blocking internet sites containing material ‘pertaining to events of a terrorist nature’—theoretically it should be executed with the court’s consent, but the Head of ABW will be able to impose such a blockade preventively (with the consent of prosecutor general-cum-minister of justice). Additionally, all pre-paid telephone cards will need to be registered, in accordance with the new regulations (Szymielewicz 2017).

But the group most affected by the new regulations are foreigners (including citizens of other EU countries). In addition to all previous regulations, each foreigner might become a target of practically unrestricted invigilation by the Head of ABW, taking the form of phone tapping, bugging the house (also with cameras), access to all forms of correspondence along with all the data aggregated or sorted electronically by the person (art. 9 Act on Antiterrorist Activities); the Head of ABW has also obtained access to all databases where the information about foreigners are kept, and all this data can be acquired and stored without limitation.

Activities of this type—introducing controls over foreigners and stripping them of basic rights to defence and protection, and justified by terrorist threat, are familiar themes that other countries have exploited as well (e.g. Stumpf 2006; Dauvergne 2013). The term used to describe the situation is ‘*Feindstrafrecht*’ (enemy criminal law), as coined by Günter Jakobs. His definition assumed that there are individuals ‘who cannot be trusted to abide by the law on their own and subjects them to special restrictions for the sake of protecting the public’ (Ohana 2010: 741). Nowadays, those individuals are foreigners.

Expanding scope of immigrant detention

Detention of immigrants is a common practice in most countries of the Global North. It is perceived (or rather rationalised) as a means of providing internal security, yet in practice its primary roles are detention and punishment of immigrants. ‘[T]he detention machine directly produces and ratifies a difference of status among the population of a given territory, and, in so doing, differentially decomposes the forms of political membership, the recognition of rights, ultimately the very notion of citizenship’ (Rahola 2011: 104). Using detention is allowed by the EU law and, although criticised by international organisations (especially with regard to asylum seekers), it remains binding (Kmak 2015). It is worth emphasising, on the other hand, the positive aspects of the EU regulations with regard to detention—their controlling function prevents Member States from arbitrary application of confinement as its maximum duration is clearly established. In the UK, which is exempt from the regulations, the absence of such a timeframe leads to indefinite detention of migrants (Hasselberg 2014: 474).

In Poland, detention centres have been used since 1995 and the regulations concerning detention fully reflect the possibilities and restrictions allowed by the EU law. However, in January 2017, the Polish government proposed changes to how detention is applied. First of all, the list of foreigners who cannot be subjected to confinement has been drastically reduced. At the moment it contains all individuals who can be reasonably presumed to have suffered from any form of violence. The amendment will narrow them down to victims of torture and inhuman or humiliating treatment. The proposed amendments introduce so-called accelerated border procedures, a part of which is obligatory detention. According to this regulation, each asylum seeker applying for international protection in Poland could be referred to this procedure, i.e. detained.

Another amendment proposed by the Polish government is a modification of the way in which detention centres operate. Since 2012, there has been a visible relaxation of the regime that the foreigners have had to comply with (Białas and Klaus 2014), while in 2015 it was decided that the windows in the residential rooms in the centres no longer needed to be barred. The draft amendment from March 2017 anticipates the return of the bars. Moreover, following in the footsteps of Hungary, the Polish government approves the existence of detention centres where foreigners would live in shipping containers, behind fences fortified with barbed wire. This option, as justified, is a measure to be used in the case of a mass influx of asylum seekers, which seems highly unlikely in the Polish circumstances.

Poland and its relocation 'policy'

Although Poland declined the EU relocation scheme, Polish legal regulations were prepared to be part of it. Each asylum seeker reported for relocation in Poland must be carefully screened at a hot spot by a Border Guard officer, who verifies the identity of the asylum seeker, their country/region of origin (interview and the so-called language test conducted by an expert). Also, the applicant's biometric data will again be collected (art. 86c-86e of Asylum Act). In addition, in May 2016 a new amendment to the asylum law was passed, in accordance with which each asylum seeker, as part of the relocation scheme, will be screened by at least three services (the police, Border Guard and ABW) with a view to detecting potential threat to defence and security of the state or public order (art. 86f of Asylum Act). Negative verification by any of the services is tantamount to aborting the relocation of the person. The decision is not subject to review and is not accompanied by any justification. The authorities have de facto complete freedom in adopting the criteria for evaluating potential threat on the part of the foreigner. It has far-reaching consequences, since according to point 32 of the preamble of the council Decisions 2015/1601 'where a Member State has reasonable grounds for regarding an applicant as a danger to its national security or public order, it should inform the other Member States thereof'. Hence, it is through the decision of the Polish services that a foreigner is 'branded' as dangerous. This disproportion in proving the accusations levelled at foreigners and citizens by authorities is noted by Dauvergne (2013: 81): '[a]llegations which would not reach criminal law standards become the basis for withdrawing [from] protection'.

Closing the door

A lot of countries all over the world erect physical barriers to keep migrants away from their territories (e.g. Gerard 2014; Newell, Gomez and Guajardo 2017). The words 'threat' and 'vulnerability' recently have undergone a change in meaning and are no longer used to describe the need to protect refugees and asylum seekers. Instead, they function as the element of a risk assessment system and as a language of state security. 'In this context, vulnerability refers to vulnerability of the border (rather than of human crossing it) and involves the geographical attributes of the border, existence and effectiveness of border control measures (...). Irregular migrants, including those with legitimate protection needs, are therefore first and foremost defined through their risk qualities—as threats—rather than through their vulnerability' (Aas and Gundhus 2015: 9-10).

Poland is not unique in that respect and it also closes its doors on refugees. It is spared having to build a fence, though, for such a construction already exists on the Polish-Belarusian border and has done so ever since the times of the Soviet Union, with the maintenance handled by the Belarusian authorities (the so-called *sistiema* in Russian). Another stretch of the external border, with Ukraine, is equipped with an electronic system of CCTV cameras installed prior to Poland's joining the Schengen area in 2007, which is being constantly improved and expanded. The Polish side of the external border of the EU is therefore quite 'tight'.

Over the last twenty years, the majority of refugees entered Poland through the train border crossing in Terespol, on the border with Belarus. In the summer of 2015, Border Guard officers began a selection of

individuals wanting to apply for international protection and randomly denied entry to some of them. The situation has been deteriorating ever since, with more and more refugees (mainly from Chechnya and Tajikistan) ‘bouncing off’ the Polish border and staying in Brest, on the Belarusian side (with many camping at the train station). There are foreigners who have attempted to cross the borders over sixty times, some of whom were eventually allowed to file an asylum motion in Poland (Chrzanowska et al. 2016). The representatives of NGOs and the UNHCR are exempt from preliminary border controls, during which the Border Guard officer decides whether he wants to ‘hear’ the request for asylum. The Border Guard’s action enjoys the full support of the government, while Mariusz Błaszczak, the Minister of Internal Affairs, opined that Chechens did not need protection, since their country was not at war, and the situation in Terespol was merely ‘testing a new transit route for the influx of Muslim migrants into Europe’ (Klaus et al. forthcoming).

There is also a lack of legal instruments to help the refugees who have been denied entry. In March 2017, a group of attorneys from Warsaw travelled to Terespol to offer pro bono assistance to over fifty refugees from Chechnya, the victims of torture and persecution, in their attempt to enter Poland. They never reached their clients, who were immediately sent back to Belarus. This case of collective expulsion violates the rules of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (art. 4 of Protocol No. 4 to the Convention) and a number of applications against Poland were filed on this basis to the European Court of Human Rights.

Conclusions

The example of the countries of the Global North indicates that migrants are under constant scrutiny of various services and the intensity of different methods of surveillance is particularly acute with respect to his group. But usually, migrants are divided into groups and categories, in theory according to the potential threat they pose, in practice based on which countries or regions they come from. Based on this distinction, they are granted different kinds of rights or exposed to different kinds of controls. We can therefore single out the bona fide travellers and ‘crimmigrants’ (Aas 2011) or, in line with Kmak’s (2015: 87) suggestion, ‘the Good, the Bad and the Ugly’, with asylum seekers falling into the last category. The lowest status is assigned to the citizens of so-called ‘deviant states’, who are treated with particular distrust solely because they hold citizenship of a country yielding the biggest number of refugees or undocumented migrants (Aas 2013). It is them that borders are sealed from, by physical means (walls, fences) or electronic (databases of unwelcome individuals). The Polish case demonstrates that the government could use different techniques to present migrants to public opinion as ‘the Bad’ or ‘the Ugly’—namely, only as a threat. By doing so, the government feels encouraged to develop severe or, in the case of ‘the Ugly’, even more severe forms of control and surveillance over migrants.

All these measures are met with various attempts at circumvention on the part of migrants, who come up with ‘neutralisation techniques’ which, in turn, provoke ‘counterneutralisation techniques’ on the part of authorities (Marx 2009). As a result, various criminal groups profit from the situation at the cost of impoverished migrants. Clearly, migration movements cannot be stopped and the determination of people fleeing persecution, human rights violations and abject poverty and seeking refuge in the Global North knows no bounds. Shutting off legal migration channels by tightening migration laws compels people to resort to treacherous paths of illegal migration and leaves them at the mercy of criminals (Newell, Gomez and Guajardo 2017; Aas 2013; Belloni 2016; Gerard 2014). Poland has joined the ranks of countries that are introducing increasing restrictions on the coming refugees and exert substantial control over them, although neither the migrant situation (and a relatively low influx of refugees accompanied by a still relatively low number of migrants living in Poland), nor the so-called question of security justify such measures.

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