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Different and Unequal. About Legal Exclusion in the System of International Protection in Poland

Abstract

This paper aims to demonstrate the impact of cultural differentiation related to the country of origin of refugees on their legal status and fundamental human rights and freedoms when entering Poland between 2021 and 2023. Due to the broad nature of the topic, the paper presents a selection of examples to illustrate the legal exclusion of certain groups seeking international protection in Poland. There is a demonstrable correlation between particular instances of human rights violations and the process of formulating and implementing legislation. Due to the multidimensionality of this issue, the paper is not intended to be exhaustive, but rather to outline a situational framework and background for more detailed analyses concerning systemic solutions for differentiating between refugees and migrants according to their country of origin when admitting them to a country and providing them with support.

KEYWORDS: legal exclusion, migration crisis, Poland, refugees, migrants, social exclusion, Belarusian-Polish border

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„In such a reality the number of interpersonal encounters and contacts increases sharply, and it is their nature and quality, and our increasingly frequent and various relations with Others, that will determine the climate of the world we live in.”

Ryszard Kapuściński, *The Other*^[1]

1 | Introduction

The term “legal exclusion” – a form of social exclusion – refers to a situation in which the way the law is applied hinders or prevents a particular group of people from exercising their rights. Although instances of legal inclusion are on the increase, the subject remains underrepresented in the existing literature.

In the last decade, more than 100 million individuals have been compelled to abandon their homes in search of asylum, within or beyond their country of origin. This development has also had a significant impact on Europe, which has been confronted with mass migration since 2011. After the peak in 2015, serious shortcomings in the common migration, asylum and external border management policies of the European Union were identified. It also became clear that different Member States took fundamentally different approaches to the problem. The “solidarity crisis” that resulted has made migration an important issue in the political discourse, and an intrinsic component of the identity of political parties. In Poland, as in other EU member states, there has been a notable increase in the number of applications for international protection in recent years. According to data from the Office for Foreigners, 9,933 such applications were filed in 2022 – a 22% increase over the previous year.^[2]

In Poland, the intensifying dynamics of these processes, coupled with the absence of a unified and comprehensive migration policy^[3] and the

¹ Ryszard Kapuściński, *The Other* (Nowy York-Londyn: Verso 2008), 42.

² Zestawienia roczne Urzędu do Spraw Cudzoziemców. <https://www.gov.pl/web/udsc/zestawienia-roczne>.

³ The programme “Migration Policy of Poland – current state and postulated actions”, in force since 2012, was cancelled by the Council of Ministers in 2016 at the request of the Minister of Internal Affairs and Administration (MSWiA). In turn, a draft resolution of the Council of Ministers on adopting a “Migration

anti-refugee campaign initiated by the Law and Justice Party in 2015, have politicised the issue of international migration.^[4] In the second half of 2021, the government's policy of limiting migration from the Middle East and Africa^[5] was translated into concrete action. In response to the humanitarian crisis caused by the hybrid actions of Belarusian and Russian special services aimed at generating migration pressure, new measures and resources were implemented to secure the state border. The main objective was to prevent all foreigners, regardless of their status, from entering Poland. Unfortunately, in many cases these actions violated the fundamental rights enshrined in the Universal Declaration of Human Rights and the Convention Relating to the Status of Refugees adopted in Geneva on 28 July 1951 (the "Geneva Convention"), the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union.

In this paper, I analyse the interrelationships between human rights violations and the law-making and law-enforcement processes. I show that non-egalitarian access to protection and legal assistance for persons seeking international protection is a manifestation of legal exclusion, and I argue that, since 2021, Poland has engaged in a process of intentional and direct legal exclusion of certain categories of persons seeking to enter its territory, who are culturally and religiously distant from Poles, including those seeking international protection. This exclusion is politically motivated, directly and indirectly, and has been supported by the adoption of regulations that seriously violate the norms of domestic, European, and international law.

Policy of Poland – directions for action 2021-2022" was withdrawn in 2022. On 15 October 2024, the Council of Ministers adopted a document "Take Back Control. Ensure security. Poland's comprehensive and responsible migration strategy for 2025-2030".

⁴ Magdalena Lesińska, "Upolitycznienie emigracji i diaspory. Analiza dyskursu politycznego w Polsce w latach 1991-2015" *Studia Migracyjne – Przegląd Polonijny*, No. 3 (2016): 14. <https://www.migracje.uw.edu.pl/wp-content/uploads/2017/03/SM-PP-2016.pdf>.

⁵ Dominika Liszkowska, "Procesy sekuratyizacji i desekuratyizacji migracji w Polsce w kontekście migracji z Ukrainy po wybuchu wojny rosyjsko-ukraińskiej (2022)" *Sprawy międzynarodowe*, No. 2 (2023): 89-112. <https://czasopisma.isppan.waw.pl/sm/article/view/2305/2012>.

2 | Exclusion, Social Exclusion and Legal Exclusion. A Review of Selected Concepts and Notions

To provide a comprehensive analysis of the issue at hand, it is essential to discuss the fundamental concepts that will be referred to throughout this paper. These include exclusion and social exclusion, with particular focus on one dimension: legal exclusion. Exclusion is not just a recent phenomenon; it has a long history, dating back to antiquity. Historically, all societies have experienced fluctuations in the material circumstances of their members, with some individuals compelled to operate outside the conventional parameters of a normative existence. Being excluded means that one individual or group has been rejected by another or others. The concept can be applied to diverse groups and collectivities, and is manifest in various domains of social or economic life. In the academic literature, the term is often used interchangeably with “marginalization”; it emerged in France during the 1970s, and came to be very widely used in the late 1990s. It is noteworthy that the issue of exclusion has also drawn considerable attention in the Polish literature for a long time. The *Etymological Dictionary of the Polish Language*, by Wiesław Borys, states that the verb “exclude” [“wykluczać”] has been in use in Polish since the 19th century, as a direct translation of the Russian word “isključit”.^[6] The long tradition of studying the phenomena of exclusion and marginalisation in Poland is also evidenced by Stefan Czarnowski’s text *People dispensable in the service of violence* (1935). In it, among the marginalised the author includes professional criminals, vagrants and people living out of casual labour and charity, but also honest people who, for various reasons, “cannot find their place in the world.” What all these categories of individuals have in common is their perceived role as “parasites on the social organism.”^[7] A similar approach is taken by Hilary Silver, who posits that exclusion describes the relationship between the participating community and those who do not

⁶ Anna Piotrowicz, Małgorzata Witaszek-Samborska, “Wykluczenie i wykluczony we współczesnej polszczyźnie,” [in:] *Język polski – między tradycją a współczesnością. Księga Jubileuszowa z okazji stulecia Towarzystwa Miłośników Języka Polskiego*, ed. Ewa Horyń, Ewa Młynarczyk, Piotr Żmigrodzki (Kraków: Wydawnictwo Naukowe UP, 2021), 139.

⁷ Stefan Czarnowski, „Ludzie zbędni w służbie przemocy” *Głos współczesny*, No. 1 (1935): 1-2. Piotrowicz, Witaszek-Samborska, „Wykluczenie i wykluczony we współczesnej polszczyźnie”, 140.

participate.^[8] Hierarchical groups in positions of power, whose defining characteristic is often cultural and institutional dissimilarity, purposefully restrict the access of “outsiders” to valuable resources through a process of social closure.^[9] In contrast, Fred Mahler states that the excluded are those who are deprived of equal rights due to a lack of access to political, economic, and cultural power.^[10] This deprivation contributes to the inability of the excluded individual or social group to participate in particular spheres of life that they would otherwise reasonably be expected to enjoy.

Whether an individual is permitted to participate fully in society may be conditioned by the social and economic system, beliefs and customs – but also by the law.^[11] Historical examples, such as the history of the Jews in the Third Reich or the situation of the black population in the USA and South Africa during the period of racial segregation, show that one of the root causes of the exclusion or marginalisation of certain social groups can be the existing legal order.^[12] Legal exclusion, of course, is only one of many areas that fall under the broader concept of social exclusion^[13] – a term with a much shorter pedigree (having appeared in the literature at the beginning of the 21st century), although problems such as marginalisation by and in the law, inequality before the law, and pathologies in the application of the law and decision-making processes had been raised in the literature before then.^[14]

⁸ Hilary Silver, „Social Exclusion and Social Solidarity: Three Paradigma” *International Labour Review*, No. 6-8 (1994/1995): 543. [https://www.bristol.ac.uk/poverty/ESRCJSPS/downloads/research/uk/1%20UK-Poverty,%20Inequality%20and%20Social%20Exclusion%20\(General\)/Articles%20\(UK%20general\)/Silver-Social%20Exclusion%20and%20Social%20Solidarity.pdf](https://www.bristol.ac.uk/poverty/ESRCJSPS/downloads/research/uk/1%20UK-Poverty,%20Inequality%20and%20Social%20Exclusion%20(General)/Articles%20(UK%20general)/Silver-Social%20Exclusion%20and%20Social%20Solidarity.pdf).

⁹ Tadeusz Kowalak, *Marginalność i marginalizacja społeczna* (Warszawa: Dom Wydawniczy ELIPSA, 1998), 33.

¹⁰ Fred Mahler, „Maldevelopment and Marginality,” [in:] *Insights into Maldevelopment. Reconsidering the Idea of Progress*, ed. Jan Danecki (Warszawa: Instytut Polityki Społecznej UW, 1993), 193.

¹¹ Kowalak, *Marginalność i marginalizacja społeczna*, 33.

¹² Ibidem, 170-171.

¹³ Alhamudin Maju Hamonangan Sitorus, “Disability and Social Exclusion in the Legal Process: Women as Victims of Sexual Violence”, *Marwah: Jurnal Perempuan, Agama dan Jender*, No. 1 (2022): 37-51. <https://ejournal.uin-suska.ac.id/index.php/marwah/article/view/16508>. Andrzej Kojder, “Dyskretne formy wykluczenia prawnego,” [in:] *Naznaczeni i napiętnowani. O wykluczeniu politycznym*, ed. Maria Jarosz (Warsaw: Oficyna Naukowa, 2008), 58.

¹⁴ Katarzyna Majdzińska, „Wykluczenie prawne jako fakt społeczny,” [in:] *Ubóstwo i wykluczenie społeczne. Wymiar ekonomiczny, społeczny i polityczny*, ed. Agnieszka

It is important to distinguish, first of all, between equality before the law and equality under the law. The latter requires “that laws be made in such a way that no one is discriminated against or privileged. [...] Equality therefore does not mean sameness, but equal treatment of equal subjects.”^[15] Secondly, legal exclusion is not the same as legal discrimination. In the case of exclusion, the difference in treatment is usually not sanctioned by the law, but “results primarily from the practice of applying the law.” And this last fact is the most important in the process of exclusion – “certain groups are deprived of rights formally granted to them.”^[16] As Andrzej Kojder points out, although “certain legal restrictions are necessary for reasons of security and the requirements of the general organisation of collective life,” they should in no way be dictated by discriminatory prejudices.^[17]

Generally speaking, legal exclusion deprives individuals or groups of certain rights, status, membership, benefits or opportunities through legal mechanisms. According to Kojder, legal exclusion is “the inaccessibility of part of the addressees of the law to entitlements (permits, competences, etc.) that are declaratively (by law, *ex lege*) enjoyed by all citizens.”^[18] Examples of legal exclusion, therefore, include unequal access to legal protection and assistance,^[19] but also legal regulations and/or administrative decisions that “show more «care and respect» for some people (members of a certain social class, occupational category or religious group) than for others (meaning that some are favoured and others discriminated against)”.^[20] In such cases, “legal exclusion is thus a particular kind of inequality and lack of impartiality in the law” that constitutes a violation of the essence of the law and its constitutive principles. “For it means, as Ronald Dworkin writes, treating someone as less than human or as a person less worthy of concern than others.”^[21] A broader view has been proposed by Margaret Davies, where legal exclusion can also be reflected in the values and

Grzędzińska, Karolina Majdzińska, Anna Sulowska (Warszawa: Bramasole, 2010), 416-417.

¹⁵ Kojder, „Dyskretne formy wykluczenia prawnego,” 51.

¹⁶ Witold Klaus, „Prawo jako instrument mający zapewnić równość w społeczeństwie,” [in:] *Różni, ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*, ed. Witold Klaus (Warszawa: Stowarzyszenie Interwencji Prawnej, 2013), 14.

¹⁷ Andrzej Kojder, „Wykluczenie prawne jako fakt społeczny,” [in:] *Prawo i wykluczenie. Studium empiryczne*, ed. Anna Turska (Warszawa: C.H. Beck, 2010), 20.

¹⁸ Kojder, „Dyskretne formy wykluczenia prawnego,” 58.

¹⁹ Ibidem.

²⁰ Ibidem, 57-58.

²¹ Ibidem.

language adopted or enforced by the law, even where, in principle, formal equality is recognised. Exclusion can take on forms much more subtle and covert than legally established or legally tolerated discrimination.^[22]

The approach I propose differs from previous ones in several respects. Firstly, in the past, the focus was mainly on single aspects, such as economic or structural barriers, whereas I emphasise the multi-dimensionality of the barriers that can figure in legal exclusion. Secondly, rather than only addressing lack of access to legal institutions, I also consider lack of access to legal protection and the resources needed for the full exercise of rights, and explicitly address the *consequences* of legal exclusion, such as marginalisation and reduced capacity to fully exercise civil and human rights. By placing legal exclusion in a broader social context, this approach also emphasises that it is a systemic problem that affects the ability of individuals and groups to participate fully in society, and recognises that legal exclusion is not static, but dynamic: it can change depending on the social, economic, and cultural context. Understanding this dynamic is crucial to effectively addressing legal exclusion and formulating policies that can adapt to changing conditions.

3 | Legal Bases for Refugee Status and International Protection in Poland

The material and legal bases for granting refugee status, and the main rights and freedoms of refugees, are laid down in the Geneva Convention of 28 July 1951 (Journal of Laws of 1991, No. 119, item 515) and the New York Protocol of 31 January 1967 relating to the Status of Refugees (Journal of Laws of 1991, No. 119, item 517). However, these legal acts do not specify what principles and procedures are to be applied when considering whether to grant international protection. In Poland, these issues are regulated by

²² Margaret Davies, „Exclusion and Identity of Law” *Macquarie Law Journal*, Vol. V (2005). <http://classic.austlii.edu.au/au/journals/MqLawJl/2005/2.html>.

the Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland (the “Act”).^[23]

In accordance with Art. 2, paragraph 2 of the Geneva Convention, and Art. 13(1) of the Act, persons who flee their country because of a well-founded fear of being persecuted in their country of origin for reasons of race, religion, nationality, political opinion; or membership of a particular social group, may be granted refugee status. Persons who are threatened with loss of life or health in their country of origin for reasons other than those listed above may be granted what is known as subsidiary protection. The basis for initiating a procedure for granting international protection, which means legalising the stay of such a person on the territory of Poland, is the submission of an application to the Head of the Office for Foreigners, through the Commander of a Border Guard division or post. The principle of non-refoulement and the social and housing rights of refugees are regulated by separate legal acts. This principle, although originally a treaty norm, is now a customary norm of a universal nature. According to the United Nations High Commissioner for Refugees (UNHCR), it meets the definition of international customary law, as expressed in the Statute of the International Court of Justice, and is also binding on States that are not parties to the Geneva Convention and the New York Protocol.^[24]

4 | Mass Detention in Guarded Centres for Foreigners

In Poland, there are three types of centres for persons applying for international protection:

²³ Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Journal of Laws of 2003, No. 128, item 1176 z późn. zm.). <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20031281176/U/D20031176Lj.pdf>.

²⁴ Olga Łachacz, „Zasada non-refoulement w międzynarodowym prawie uchodźczym- zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?” *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. XV (2017): 2. <https://europeistyka.uj.edu.pl/documents/3458728/138959185/O.+%C5%81achacz.pdf>.

1. Reception and residence centres, where asylum seekers are registered, their entitlement to social assistance is verified, and epidemiological examinations are carried out;
2. Residence centres, where people are accommodated while they apply for refugee status;
3. Guarded Centres for Foreigners (GDC).

The tasks involved in providing assistance to persons in the refugee procedure in Poland, including providing accommodation in the first two types of centres, are carried out by the Head of the Office for Foreigners, with the support of the Department of Social Assistance. According to data available on the Office's website, there are currently nine centres of this type in Poland, one of which is a reception centre.^[25] All these centres are open. Residents can move freely about the premises; and can leave between 6 a.m. and 11 p.m. Guarded centres for foreigners are run by the Border Guard (BG). There are currently six such centres, supervised by the Foreigners' Board at the Border Guard Headquarters. The grounds for placing an alien in a detention centre are listed in Art. 398a of the Aliens Act and Art. 88a par. 1 of the Act on the Protection of Aliens on the Territory of the Republic of Poland. Reasons for a court to issue a decision on placement in a guarded centre may include: the likelihood of a decision being issued on the foreigner's obligation to return, or the need to ensure the enforcement of a decision on the foreigner's obligation to return. Persons applying for international protection in Poland may also be referred to a GDC in the following circumstances: to establish or verify their identity; to gather information, with their participation, on which their application for international protection is based, and where that information cannot be obtained without detention; where there is a substantial likelihood that the applicant, or the person for whom the applicant is acting, will abscond; if the person cannot be transferred immediately to another Member State under the "Dublin procedure". In fact, the law only allows the border control authorities to detain a foreigner: if there is a strong likelihood that the applicant, or the person on whose behalf the application is made, will abscond, and they cannot be immediately transferred to another Member State under the Dublin procedure; if there is a well-founded suspicion

²⁵ Ośrodki dla cudzoziemców ubiegających się o udzielenie ochrony międzynarodowej, <https://www.gov.pl/web/udsc/osrodki-dla-cudzoziemcow-ubiegajacych-sie-o-udzielenie-ochrony-miedzynarodowej>.

that the application for international protection was made solely to delay the issuance or enforcement of a decision on the foreigner's obligation to return; or if this is necessary for reasons of defence, national security, or public safety and order. By law, the border control authorities may also apply alternative measures to detention, such as: reporting to a designated authority at specified intervals, paying a financial guarantee, or residing in a designated place.^[26]

According to international standards, referral to a detention centre for aliens crossing the border in an irregular manner should be an extra-coordinated measure, to be used only when normal detention measures are not possible. According to the Commissioner for Human Rights, human rights NGOs, and others, the vast majority of persons who manage to cross the Polish-Belarusian border and apply for international protection in Poland are automatically detained and, without a proper assessment of their situation, transferred to guarded centres for aliens. These facilities are total institutions, in the sense used by Erving Goffman. Their constitutive feature is isolation from the outside world. This is evident both materially (walls, bars, barbed wire, locks, gates, motion detectors, extensive surveillance, monitoring and control systems, etc.) and immaterially, "in the form of procedures of behaviour in a closed institution and restrictive rules of access to the space of the centre by people from outside the institution." In addition, the physical privacy of people in these institutions is severely restricted, "firstly because of the small amount of space referred to in the literature as «personal», and secondly, because of the exposure associated with the constant surveillance of common areas (outside, living rooms, toilets and bathrooms)."^[27]

Although deprivation of liberty should only be used in special and exceptional situations, the available data confirm that, in Poland, in recent years, the capacity of detention centres has been systematically increased at the expense of custodial measures. Between 30 June and 31 December 2021

²⁶ Ustawa z dnia 12 grudnia 2013 roku o cudzoziemcach (Journal of Laws of 2013, item 1650), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20130001650/U/D20131650Lj.pdf>.

²⁷ Dariusz Niedźwiedzki, Jacek Schmidt, Maciej Stępka, Przemysław Tacik, *Strzeżone ośrodki dla cudzoziemców w Polsce jako kultura organizacyjna. Analiza prawna, politologiczna, socjologiczna i antropologiczna Ekspertyza przygotowana na zlecenie Komitetu Badań nad Migracjami Polskiej Akademii Nauk* (Kraków-Poznań: PAN, 2021), 14. https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/284042/niedzwiedzki_schmidt_stepka_tacik_strzezone_osrodki_dla_cudzoziemcow_w_polsce_2021.pdf.

alone, the number of places for foreigners in detention centres more than quadrupled (from 595 to 2,308).^[28]

As shown in Table 1, in 2021-2023, there were operational centres in Biała Podlaska, Białystok, Kętrzyn, Krosno Odrzańskie, Lesznowola and Przemyśl, as well as three temporary guarded centres for foreigners in Wędrzyn (SOC branch in Krosno Odrzańskie), Biała Podlaska (GDC branch in Biała Podlaska) and Czerwony Bór (GDC branch in Białystok). Temporary detention centres for foreigners operated from August 2021 – August 2022. Within the GDCs in operation, there were separate wards for men (including men with physical disabilities), families, and unaccompanied minors.

Table 1. Types of guarded detention centres for foreigners in Poland in 2021-2023

	2021	2022	2023
Biała Podlaska	families	families	men
Białystok	families	men	men
	men		
Kętrzyn	unaccompanied minors	unaccompanied minors	men (mobility impaired)
	families	families	men
Krosno Odrzańskie	men	men	men
Lesznowola	families	families	families
		men	unaccompanied minors
Przemyśl	men	men	men
	families		

Source: author's compilation based on data provided by the Border Guard Headquarters.

Situation on 31 December of each year

The increase in the number of foreigners in GDCs is also confirmed by data from district courts. For example, the District Court in Białystok

²⁸ In 2021. The Head of the Office for Foreigners temporarily handed over the building of the centre in Biała Podlaska and part of the centre in Czerwony Bór to the Border Guard for the purpose of establishing temporary guarded centres for foreigners. In 2021, due to a significant increase in the number of foreigners attempting to cross the Belarusian-Polish border, a centre was established in Wędrzyn (it operated in the military barracks on the grounds of an active military training ground). Foreigners were also accommodated in containers in Lesznowola and Kętrzyn, as well as in a sports hall in Kętrzyn.

recorded a 6,140% increase in the number of cases of foreigners being placed in a GDC in 2021, compared to 2020. On the other hand, the District Court in Bielsk Podlaski received 52 such applications in 2020, and 793 in 2021.^[29]

Due to the dynamic increase in the number of foreigners detained in GDCs, their situation, and whether their fundamental rights were being respected, became the subject of inspections by, among others, the Commissioner for Human Rights and the Supreme Audit Office (SAO). The Commissioner was particularly concerned about cases of detained foreigners who had experienced violence and trauma, and were in poor psychophysical condition. The level of medical and psychological care observed in the GDCs was far from sufficient; and could lead to a deterioration of their health through secondary victimisation.^[30] These findings were also confirmed by statements made by the Supreme Audit Office after its inspection. The audit carried out at the temporary GDC in Czerwony Bór found that foreigners detained there did not have adequate access to basic medical care or proper psychological care. In addition, for more than two months after the centre opened, detainees were unable to use the internet. The operator of the centre, the Podlaski Division of the Border Guard, also failed to fulfil its obligations under Art. 28(5), read together with Art. 28(1) of the Act on the Granting of Protection to Foreigners, by failing to comply with the deadlines for accepting applications for international protection.^[31]

The rapid growth in the number of people detained in GDCs also led to the adoption of new legal regulations that blatantly violate detainees' right to dignity. According to a decree of the Minister of Interior and Administration of 13 August 2021, the minimum area of a GDC^[32] per person was

²⁹ Marta Rękawek-Pachwicewicz, *Sprawozdanie z panelu dyskusyjnego w Sądzie Okręgowym w Białymstoku nt. „Praktyczne aspekty oraz problemy wyłaniające się na tle stosowania przepisów ustawy z dnia 12 grudnia 2013 r. o cudzoziemcach oraz ustawy z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej”*, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://prawomiedzynarodowe.ms.gov.pl/api/files/view/1955543.pdf&ved=2ahUKEwiFjOL32cuGAXVjbPEDHcJND6YQFnoECBYQAQ&usg=AOvVaw2K2soD8zq_GAFfooRkF4_9.

³⁰ „Sytuacja cudzoziemców w ośrodkach strzeżonych w dobie kryzysu na granicy Polski i Białorusi. Raport z wizytacji Krajowego Mechanizmu Prewencji Tortur”, 12.

³¹ *Przygotowanie organów państwa na wypadek masowego napływu cudzoziemców do Polski*, *Wystąpienie Pokontrolne D/21/506* (Warsaw: Najwyższa Izba Kontroli, 2022).

³² Previously, the minimum area per foreigner placed in detention was 3 m² for men and 4 m² for women and minors.

reduced to two square metres.^[33] This is lower than the minimum applicable in prisons, where, according to international standards, the living space provided for a detainee in a multi-person room should be at least four square metres. This minimum standard is in line with the recommendations of the European Committee for the Prevention of Torture (CPT), which, since 1996, has been urging Poland to introduce it, pointing out that the previous standard (three square metres) did not provide satisfactory living space.^[34]

Especially concerning persons who have not committed any crime, deprivation of liberty is a severe measure that should only be used when other possibilities have been considered and found insufficient to protect the individual or the public interest. Any decision to detain a person, then, should be based on the principles of legality, finality, and proportionality. According to a judgment of the European Court of Human Rights, this means that “it is not sufficient that the deprivation of liberty should be in accordance with national law, but that it should be necessary in the circumstances.”^[35]

A similar view has been expressed by the Commissioner for Human Rights: migrants should be detained only as an exceptional measure, decided on a case-by-case basis, in accordance with the principle of proportionality. Despite the existence of alternatives, this *ultima ratio* measure was widely used against persons who managed to cross the Belarus-Poland border and applied for international protection in 2021-2023.^[36]

³³ Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 sierpnia 2021 r. zmieniające rozporządzenie w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców (Journal of Law of 2021, item 1482), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001482/O/D20211482.pdf>.

³⁴ Ośrodek dla cudzoziemców w Wędrzynie nie spełnia standardów ochrony ich praw. Wnioski po trzeciej wizytacji BRPO. <https://bip.brpo.gov.pl/pl/content/rpo-wedrzyn-cudzoziemcy-osrodek-standardy>.

³⁵ Orzeczenie Europejskiego Trybunału Praw Człowieka z dnia 4 kwietnia 2000 r. w sprawie Litwa przeciwko Polsce, skarga nr 26629/95, [https://etpcz.ms.gov.pl/etpccontent/\\$N/99000000000001_I_ETPC_026629_2095_Wy_2000-04-04_001](https://etpcz.ms.gov.pl/etpccontent/$N/99000000000001_I_ETPC_026629_2095_Wy_2000-04-04_001).

³⁶ „Sytuacja cudzoziemców w ośrodkach strzeżonych w dobie kryzysu na granicy Polski i Białorusi. Raport z wizytacji Krajowego Mechanizmu Prewencji Tortur”, 11-12.

The apparent inertia of the courts, which de facto “leave in the hands of the BG the real right to decide on the deprivation of liberty,”^[37] fails to respect people’s fundamental rights and the inherent dignity of every human being, regardless of their origin, legal status, or the reasons behind their migration decision. This is all the more worrying because the Commissioner for Human Rights’ observations also confirm that a number of fundamental rights have been violated in these facilities, largely due to overcrowding and a difficult staffing situation.^[38] Particularly concerning are reports of foreigners who had gone through violence and trauma, or were in poor psychophysical condition, being detained, even though this is inconsistent with Art. 88a(3) of the Act on the Protection of Foreigners on the Territory of the Republic of Poland. Since, as mentioned above, the level of medical and psychological care provided in these institutions is far from adequate, being detained there can lead to a deterioration of health, especially in the case of minors and families with children.

5 | “Such Persons will be Returned to the State Border” – Meaning Legalised Refoulement

The Regulation of the Minister of Interior and Administration of 20 August 2021^[39] introduced the possibility of expelling any person from the territory of the Republic of Poland who crossed the state border outside an

³⁷ Niedźwiedzki, Schmidt, Stępka, Tacik, *Strzeżone ośrodki dla cudzoziemców w Polsce jako kultura organizacyjna. Analiza prawna, politologiczna, socjologiczna i antropologiczna Ekspertyza przygotowana na zlecenie Komitetu Badań nad Migracjami Polskiej Akademii Nauk*, 101-102.

³⁸ „Sytuacja cudzoziemców w ośrodkach strzeżonych w dobie kryzysu na granicy Polski i Białorusi. Raport z wizytacji Krajowego Mechanizmu Prewencji Tortur,” 11-12.

³⁹ Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 r. zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych (Journal of Laws of 20 August 2021, idem 1536), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001536/O/D20211536.pdf>.

official border crossing point.^[40] At the same time, the Act on Protection of Foreigners in Poland was amended to allow the authorities to ignore applications for international protection from foreigners apprehended outside a border crossing point. These changes were criticised by the OSCE Office for Democratic Institutions and Human Rights^[41] and the Office of the United Nations High Commissioner for Refugees in Warsaw,^[42] among others. In turn, the Commissioner for Human Rights of the Council of Europe informed the European Court of Human Rights of its decision to intervene as a third party in proceedings before the ECHR under Art. 36(3) of the European Convention on Human Rights, and to submit written observations in the case of *R.A. and Others v. Poland* (No. 42120/21) concerning the situation of migrants and asylum-seekers stranded at the Polish-Belarusian border.^[43]

The above legislative changes to Polish law have formalised the refoulement of persons seeking international protection. There is also evidence that the uniformed services have already systematically and repeatedly returned migrants and asylum-seekers to Belarus, regardless of their individual situations, despite this potentially exposing them to torture or inhumane and degrading treatment by the Belarusian services. Furthermore, those persons were deprived of the right to individual proceedings, and of the possibility of applying for protection in Poland. The failure of the Polish authorities to provide humanitarian assistance, and the restrictions on access to the border area imposed on persons and organisations providing humanitarian and legal assistance, have undoubtedly contributed to a deterioration of already tragic existential conditions. As a result,

⁴⁰ Traffic at the border crossing in Kuźnica was suspended indefinitely on 9 November 2021, in Bobrowniki on 10 February 2023, and the crossing in Połowce was closed even earlier (in March 2020).

⁴¹ *Urgent Opinion on Draft Amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic at Certain Border Crossings*. https://www.osce.org/files/f/documents/3/3/498252_o.pdf.

⁴² *UNHCR apeluje o zakończenie impasu na granicy polsko-białoruskiej*. <https://www.unhcr.org/pl/13303-unhcr-apeluje-o-zakonczenie-impasu-na-granicy-polsko-bialoruskiej.html>.

⁴³ *Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights R.A. and others v. Poland* (no. 42120/21). <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a5527a>.

many people have died^[44] or suffered serious damage to their health. The illegality of the border guards' actions in this respect was confirmed for the first time by the District Court in Bielsk-Podlaski, 7th Criminal Division, in Hajnówka, on 28 March 2002. The justification for the verdict stated, among other things, that Border Guard officers did not inform the Afghan citizens involved of the reasons for their detention or of their rights, did not draw up a record of their detention, and did not accept the applications for international protection the migrants wished to submit – which became the direct cause of their unlawful deportation abroad. According to the Court, the Border Guard also violated Art. 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Art. 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, by deporting detainees in violation of the prohibition of collective expulsion, without examining whether there was a risk of a violation in Belarus of the prohibition of torture or other inhumane or degrading treatment. Moreover, they deported them at night, without proper equipment or preparation, to the area of the Białowieża Forest Strict Reserve, putting their lives and health in danger. The court judgment also confirmed that the Order of the Minister of Internal Affairs and Administration of 20 August 2021 was issued in excess of its legal authority, and as such should not be applied. Another ruling in a similar case was issued on 15 September 2022 by the Provincial Administrative Court in Białystok. It stated that the return of foreigners was contrary to the provisions of national law, including the Constitution of the Republic of Poland, and international agreements binding Poland. It also reiterated that the above-mentioned Border Regulation was unconstitutional, as it concerned matters already regulated by law, and was issued in excess of the legally delegated authority. Poland was also mentioned in a report published by the EU Commissioner for Human Rights, *Pushed beyond the borders. Four areas requiring urgent action to end human rights violations at Europe's borders*, as one of the countries using return procedures that are incompatible with international law (including violations of the principle of non-refoulement, the prohibition of collective expulsions, and the right to an effective remedy).^[45] The unlawfulness of these actions was confirmed

⁴⁴ By 8 December 2024, the Border Group had documented 89 deaths in the Poland-Belarus border crisis.

⁴⁵ *Poprawić stan przestrzegania praw człowieka na granicy polsko-białoruskiej. Marcin Wiącek pisze od premiera – odpowiada MSWiA.* <https://bip.brpo.gov.pl/pl/content/rpo-komisarz-praw-czlowieka-pushbacki-granica-odpowiedz>.

in subsequent rulings, including a ruling of the Provincial Administrative Court in Białystok of 15 September 2002, on the unlawfulness of the practice of Border Guard officers returning aliens to the state border line under the provisions of the Border Regulation.^[46] The Provincial Administrative Court in Warsaw also issued four rulings annulling orders to depart from the territory of the Republic of Poland (Ref. IV SA/Wa 420/22, IV SA/Wa 471/22, IV SA/Wa 615/22 and IV/Wa 615/22), issued by the Commander-in-Chief of the Border Guard. According to the court, those decisions were issued in violation of the provisions of administrative procedure, including through improper collection of evidence,^[47] so no order to leave the country could be issued under Art. 303b sec. 1 of the Aliens Act. The contested decisions represented a failure by Poland to comply with the principle of non-refoulement^[48] and its obligations under the UN Convention Relating to the Status of Refugees, the EU asylum *acquis* and the European Convention on Human Rights.

Due to the lack of uniform data, it is difficult to determine the actual number of pushbacks on the Polish-Belarusian border. Only some have been registered with the issuance of a decision to leave the territory of the Republic of Poland. Up to 5 July 2023, the Border Guard did not keep separate records of persons turned back at the state border in accordance with § 3 (2b) of the Regulation of the Minister of Internal Affairs and Administration of 13 March 2020 on the temporary suspension or restriction of border traffic at certain border crossing points; such persons were included in the category “prevented”.^[49] From the definition of the Ministry of Interior and Administration, a “prevented person” is a person who tried

⁴⁶ Wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 15 września 2022 r., sygn. II SA/Bk 492/22).

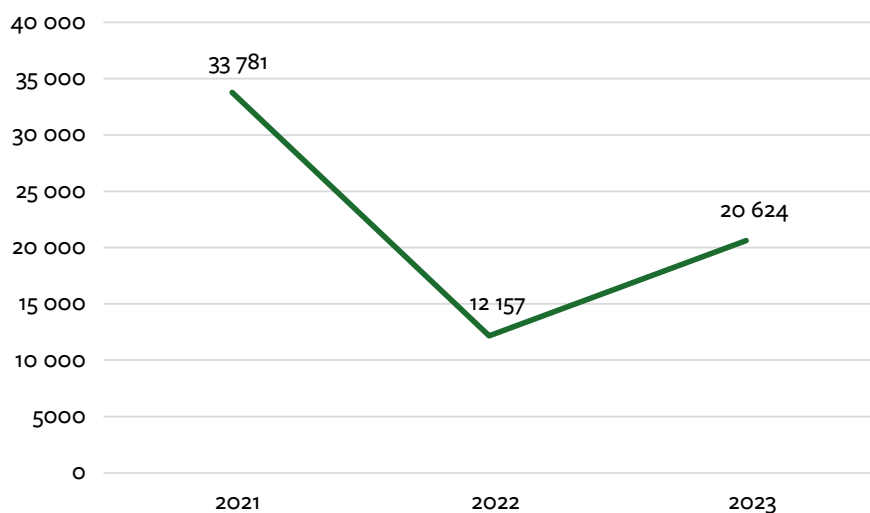
⁴⁷ For example, the judgment of the Provincial Administrative Court in Warsaw of 20 May 2022 stated that the only basis for ordering a foreigner to leave the territory of the Republic of Poland “was the border crossing protocol, signed only by a Border Guard officer,” while the factual justification of the decision was based on general and abstract assertions. Judgment of the Provincial Administrative Court in Warsaw of 20 May 2022, ref. IV SA/Wa 615/22). <https://ecre.org/wp-content/uploads/2022/06/Judgment-20-May-2022-case-No-IV-SA-Wa-615-22.pdf>.

⁴⁸ This rule prohibits refusing to admit a foreigner at the border, obliging them to return, or expelling them in any way, to a state where their life or freedom would be threatened on the grounds of race, religion, nationality, membership in a particular group, or political opinion.

⁴⁹ Odpowiedź na interpelację nr 341 w sprawie stosowania push-backów na granicy polsko-białoruskiej. <https://www.sejm.gov.pl/Sejm10.nsf/Interpelacja-Tresc.xsp?key=CZYFKR&view=null>.

to cross the border illegally and was prevented from doing so directly at the border (e.g., while trying to overcome a technical barrier), where no penal-administrative measures were taken against the person (e.g., the person was returned to the neighbouring side) or the person was instructed and turned back in accordance with § 3 (2a) and (2b) of the Regulation of the Minister of Interior and Administration of 13 March 2000).^[50]

Chart 1. Prevention of irregular border crossings at the border with Belarus in 2021-2023



Source: Situation on the border with Belarus, <https://dane.gov.pl/pl/dataset/3121>

From data obtained from the Podlaskie Branch of the Border Guard by the Egala Association, from 21 August 2021 to 15 December 2022 alone, officers of the Podlaskie Division of the Border Guard carried out 47,296 diversions to the state border.^[51]

Despite the above-mentioned court rulings confirming that pushbacks are incompatible with Polish, European, and international law, they are still being used by Polish border guards against persons who, while not belonging to any of the categories of persons entitled to cross the border, are found outside a border crossing point, or at a border crossing point

⁵⁰ Ibidem.

⁵¹ Bartosz Rumieńczyk, *Prezydent dziękuje Straży Granicznej. Ależ nie ma za co...* <https://oko.press/prezydent-dziekuje-strazy-granicznej-alez-nie-ma-za-co>.

where border traffic has been suspended or restricted. In the period from 5 July 2023 to 16 January 2024 alone, there were 6,070 cases of pushbacks across the border with Belarus, under § 3 (2b) of the Regulation of the Minister of Internal Affairs and Administration of 13 March 2020.^[52]

6 | Summary

The problem discussed in the article could be illustrated with many more examples, confirming that, in recent years, there have been numerous violations in Poland of the basic norms of equality before the law and respect for others. The analysis made here demonstrates that, since 2021, there has been a process of deliberate and direct legal exclusion of certain categories of migrants who want to enter the territory of Poland, including people who want to apply for international protection.

Even though derogations from the principle of equality should not be made to achieve political or pragmatic goals, the migration policies and practices adopted in Poland in 2021-2023 disproportionately affected certain ethnic groups. While there are important differences between contemporary legal exclusion and historical racial segregation, particularly in terms of intent and explicit legal frameworks, there are also significant similarities between them in terms of the discriminatory effects and systemic barriers they create for excluded groups. Like racial segregation, the forms of systemic legal exclusion outlined, such as mass detention and pushback, perpetuate inequalities and prevent refugees and migrants, mainly from Africa, the Middle East and South Asia, from exercising their fundamental rights. This is all the more worrying given that, according to the Granica Group, almost 40 per cent of those attempting to cross the Belrusian border into Poland are vulnerable persons: women (20 per cent, including those in an advanced stage of pregnancy), minors (13 per cent), the elderly and people with disabilities, coming from countries with

⁵² Odpowiedź na interpelację nr 341 w sprawie stosowania push-backów na granicy polsko-białoruskiej, <https://www.sejm.gov.pl/Sejm10.nsf/Interpelacja-Tresc.xsp?key=CZYFKR&view=null>.

long-standing armed conflicts or political crises and destabilisation, including Syria, Iraq, Yemen, Sudan and the Democratic Republic of Congo.^[53]

The difference in the way people stranded on the Polish-Belarusian border were (and are) treated was particularly evident after the outbreak of the war in Ukraine, when public institutions responded almost immediately to the massive influx of refugees from that country. Reception centres were set up near border crossings, a hotline was set up by the Office for Foreigners, as was a government website with information for incoming refugees (ua.gov.pl). On 12 March 2022, the Act on Assistance to Ukrainian Citizens in Connection with the Armed Conflict on the Territory of Ukraine^[54] (Journal of Laws of 2022, No. 583) was adopted, under which Ukrainian citizens acquired a number of rights. The most important of these are: legalisation of residence and automatic permission for temporary residence in Poland for a period of up to 18 months, the right to work without a permit (special regulations have also been adopted to regulate the employment of doctors, nurses, midwives, educators, child-care workers, psychologists, teachers, teaching assistants, the possibility of social employment and the right to register as unemployed and to look for a job), the right to a one-off cash benefit of PLN 300, the right to the 500+/800+ benefit, the right to use care and educational facilities, and the right to medical care. In addition, persons who declared their intention to stay on the territory of Poland were also granted temporary protection under Art. 106(1) of the Act of 13 June 2003 on the Protection of Foreigners on the Territory of the Republic of Poland.

Thus, the examples of legal exclusion discussed in this article bear disturbing similarities to historical racial segregation, in their effects and mechanisms of discrimination. Indeed, their result is a violation of international obligations, leading to systematic exclusion. Although the main burden of preventing the emergence and expansion of marginalised groups lies with the state, we are currently witnessing its growing weakness. The increasing securitisation of migration policy, including the measures taken to protect the state's borders, means that the state is currently unable to guarantee the safety, and does not respect the fundamental rights and

⁵³ <https://www.facebook.com/grupagranica/posts/pfbidoonDqBk3JuGm-87SxxmzUDeGqp1PoyQK44M4JAQNVD3cig3gtpySPriLxvktMf4uNQL>.

⁵⁴ Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa (Journal of Law of 2022 item 583), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220000583/U/D20220583Lj.pdf>.

freedoms of, the victims of forced migration orchestrated by the Belarusian regime.

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