

Right-Wing Populism, Crumbling Migrants' Rights and Strategies of Resistance in Belgium

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12.1 INTRODUCTION

In constitutional terms, the current moment in world history is marked by democratic decay and constitutional erosion.¹ Within Europe, Poland and Hungary are the blueprints of 'illiberal democracy'² and 'constitutional backsliding' in the hands of authoritarian populists.³ But given the transnational nature of the challenges that confront liberal democracy, no state can be presumed risk-free from the populist threat.⁴

In Belgium, as in other European countries,⁵ the (constructed) 'migration crisis' of 2015 has further boosted support for right-wing populist policies. As Cas Mudde has argued,

framing of a spike in asylum-seekers as a 'refugee crisis,' together with rhetoric linking this 'crisis' to terrorism, created a 'perfect storm' for the populist radical right. It brought their key issues – immigration, security, and Euroskepticism – to the top of the agenda, and it made voters more receptive to nativist, authoritarian, and populist appeals.⁶

The image of a perfect storm points towards complex entanglement of processes of democratic decay, (right-wing) populism and migration. In a range of

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¹ Zachary Elkins, 'Is the Sky Falling? Constitutional Crises in Historical Perspective', in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 55–56.

² *Ibid.*, 243–256; Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary'.

³ *Ibid.*, 257–275; Wojciech Sadurski, 'Constitutional Crisis in Poland'.

⁴ See the Introduction to this volume.

⁵ See the other country studies presented in this volume.

⁶ Cas Mudde, as cited in Cathryn Costello, 'Overcoming Refugee Containment and Crisis' (2020) 21 *German Law Journal* 20.

countries, would-be authoritarian populists have seized upon a series of crises – in Europe, these include the economic crisis of 2008, the ‘migration crisis’ of 2015, the ‘terrorism crisis’ of 2015–2016 and most recently the COVID-19 crisis of 2020–2022 – to centralize state power in their own hands. They have done so by incrementally undermining core elements of constitutional democracy, in particular the separation of powers and the rule of law.⁷

Although there are clear linkages between migration, right-wing populism and democratic decay, a conceptual distinction should nevertheless be maintained between the undermining of migrants’ rights, on the one hand, and genuine democratic decay, on the other.⁸ The former occurs in virtually all European states, whereas the latter is – for now – limited to a few specific states (Poland and Hungary, in particular).⁹ Even when restrictions of migrants’ rights are widespread and far-reaching, this phenomenon does not amount, in and of itself, to a dismantling of the constitutional-democratic order. The need to retain a conceptual distinction between both processes – the undermining of migrants’ rights and democratic decay – is confirmed by the Belgian case.

In Section 12.2, we argue that the risk of genuine democratic decay in Belgium is minute, given that a series of constitutional safeguards prevents hostile take-over of government by authoritarian populists. These constitutional safeguards ensure, in particular, that the separation of powers, and the checks and balances it entails, continues to function adequately. In other words, a robust constitutional framework provides for constitutional resilience against the threat of authoritarian populism in Belgium.

At the same time, we posit that an *indirect* relationship does exist between the (hypothetical) threat of would-be authoritarian populists to constitutional democracy and the undermining of migrants’ rights. A genuine risk exists – and has materialized in Belgium – that ‘mainstream’ political parties co-opt nativist and populist policy proposals on migration in an effort to cut off support for radical-right populist parties. To put it crudely, migrants are being thrown under the bus in exchange for electoral support. Particularly during

⁷ See Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press 2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Broadway Books 2018). See also Stephen Gardbaum, ‘The Counter-Playbook: Resisting the Populist Assault on Separation of Powers’ (2020) *Columbia Journal of Transnational Law* 1.

⁸ For further discussion, see the Introduction to this volume. See also Chapters 10, 11 and 13 on Italy, Austria and Sweden.

⁹ See Chapter 1 by Vladislava Stoyanova in this volume (suggesting that restrictive migration laws and policies are a common feature of liberal democracies).

the 2014–2019 legislative term, severe disregard for and active targeting of migrants by the Belgian federal government has resulted in systematic weakening of their rights, a process we refer to as the crumbling of migrants' rights.

In Section 12.3, we show that a series of legislative initiatives and policy decisions on migrants in the 2014–2019 period has contributed to the crumbling of migrants' rights. We also, and particularly, set out to identify elements of legal resilience against this process. In doing so, we build on the conclusion of Section 12.2 that the separation of powers remains intact in Belgium. As a result, and unlike in countries like Poland and Hungary, civil society actors have been able – and often forced – to resort to the independent courts in a bid to safeguard migrants' rights in the face of restrictive laws and regulations. Our main finding is that at a time when lobbying and policy suggestions no longer sufficed, judicial action became a prominent tool to cut back rights-restricting migration measures, but with mixed results. This leads us to the overall conclusion that, in Belgium, the combination of a vocal civil society and an independent judiciary provides a relevant site of resistance against the dismantling of migrants' rights. From a migrants' rights perspective, however, the judicial outcomes lead to a nuanced assessment.

12.2 CONSTITUTIONAL RESILIENCE AGAINST (WOULD-BE) AUTHORITARIAN POPULISTS

We begin by explaining why, in our estimation, the risk of genuine democratic decay in Belgium is minute, in light of a series of safeguards embedded in the constitutional framework, as it operates in practice.

Any hostile take-over of government, followed by incremental undermining of the rule of law and the separation of powers, as has occurred in Hungary and Poland, could arguably only come from the radical-right and nativist *Vlaams Belang* (Flemish Interest) party. *Vlaams Belang* combines the thin ideology (or political style)¹⁰ of populism with a nationalist (i.e. pro-Flemish), nativist (i.e. anti-migration) and radical-right (especially anti-Muslim) ideology.¹¹ In 2004, the party's predecessor *Vlaams Blok* (Flemish Bloc) was found to have incited hatred and discrimination against migrants by blaming them for the 'misery of the native population' under the slogan 'Our own people

¹⁰ Rogers Brubaker, 'Why Populism?' (2017) 46 *Theory and Society* 357.

¹¹ Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 6 and 34.

[volk] first'.¹² In the wake of the criminal trial, the party changed its name to *Vlaams Belang* and reached its electoral zenith, claiming twenty-four per cent of the vote in the 2004 regional elections.¹³

Although the party's official discourse and programme have since 'softened',¹⁴ discourse analysis shows that it continues to 'mobilize populism and (sub-state) nationalism'.¹⁵ Aside from advocating for increased use of direct democracy, as populist parties tend to do, *Vlaams Belang* continues to construe migrants and Muslims as dangerous 'outsiders' from which the 'pure' Flemish people must be protected; something the 'politically correct elite' is unwilling or unable to do.¹⁶ It is, in other words, evident that *Vlaams Belang* draws heavily on the right-wing populist playbook that has served Fidesz (in Hungary) and Law and Justice (in Poland) so well.

Until recently, this was not much cause for concern as *Vlaams Belang* was thought to have been (again) reduced to a marginal party after its 2004 electoral success (24%), with a large segment of its former electorate now supporting the right-wing nationalist *Nieuw-Vlaamse Alliantie* (N-VA – New Flemish Alliance). In the 2014 federal elections, for instance, *Nieuw-Vlaamse Alliantie* secured 32.5% of the vote whereas *Vlaams Belang* managed to convince just 6% of the electorate, barely above the electoral threshold of 5%. In the wake of the 2015 'migration crisis', however, recent election cycles have been a powerful reminder that the *Vlaams Belang*'s populist discourse and radical-right policies continue to appeal to the electorate. During the 2019 national elections, *Vlaams Belang* rebounded from its dismal 2014 result to claim 18.5% of the vote (results in Flanders). This corroborates findings by Dennison and Geddes that anti-immigration parties have benefitted from an increase in salience of migration issues among voters in the wake of the 'migration

¹² See Court of Appeals (Ghent), 21 April 2004.

¹³ For discussion, see Eva Brems, 'Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism' (2006) 4 *International Journal of Constitutional Law* 702.

¹⁴ But note that the 2019 electoral programme still contains thirty-three policy proposals that are in manifest violation of human rights, primarily those of migrants, Muslims, and criminal suspects and prisoners. See Eva Brems et al, *Schendingen van mensenrechten in het verkiezingsprogramma 2019 van Vlaams Belang* (October 2019), available at www.uhasselt.be/Documents/faculteiten/rechten/RapportMensenrechtenVBprogramma.pdf (the authors of this chapter are co-authors of this research report).

¹⁵ Emilie van Haute, Teun Pauwels and Dave Sinardet, 'Sub-state Nationalism and Populism: the Cases of Vlaams Belang, New Flemish Alliance and DéFI in Belgium' (2018) 16 *Comparative European Politics* 965.

¹⁶ See Brubaker (n 10), 363 (for a general description of right-wing populism).

crisis'.¹⁷ Pre-COVID-19 polls even put *Vlaams Belang* at an all-time high of twenty-eight per cent of voting intentions, well ahead of all other parties, including the Flemish-nationalist *Nieuw-Vlaamse Alliantie* (21%).¹⁸ In light of these data, renewed attention for the (hypothetical) threat of *Vlaams Belang* to the Belgian constitutional order is warranted.

12.2.1 Robust Constitutional Framework

Given the electoral resurgence of *Vlaams Belang*, considered against the backdrop of global democratic decay, it is important (or at least prudent) to assess how resilient the Belgian constitutional framework is against capture by would-be authoritarian populists. If we take Hungary and Poland as the blueprints of rule of law backsliding, authoritarian populists would need to achieve two objectives to mount a credible threat to the Belgian constitutional order. First, they must be in government. Second, once in government they must be able to implement an 'illiberal-democratic' agenda.

For a combination of reasons, it is extremely unlikely – if not impossible – for would-be authoritarian populists to achieve both objectives. A series of 'primary' constitutional safeguards prevent hostile takeover of the Belgian constitutional order by a single political party. A further series of 'secondary' constitutional safeguards would prevent constitutional capture even if would-be authoritarian populists manage to enter a coalition government. In combining these primary and secondary safeguards, the Belgian constitutional framework mirrors Stephen Gardbaum's 'counter-playbook' of constitutional resilience. Composed of constitutional design features that ensure adherence to an 'anti-concentration principle', the counter-playbook ensures that the separation of powers continues to operate in a robust manner.¹⁹

First, a series of constitutional safeguards shield the Belgian constitutional order from hostile takeover by a single political party. We call these safeguards 'primary', since they foreclose a precondition for the incremental dismantling of the constitutional order: authoritarian populists claiming a (super)majority of seats in Parliament.²⁰ The most important primary safeguards are

¹⁷ James Dennison and Andrew Geddes, 'A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe' (2019) 90 *The Political Quarterly* 107.

¹⁸ X, 'Peiling: extremen op winst, N-VA verliest het zwaarst', *De Morgen* (14 March 2020).

¹⁹ Gardbaum (n 7).

²⁰ It is, admittedly, conceivable that multiple populist parties with an authoritarian slant co-exist in the same country. The threat of a *coalition* of authoritarian populists should therefore not be

entrenchment of an electoral system based on proportional representation (PR) and the federal structure of the Belgian State.

Since 1920, the Belgian Constitution provides that elections take place according to the PR system.²¹ Quasi-constitutional legislation provides the same for regional elections.²² Since 1993, Belgium is also formally ‘a federal State composed of Communities and Regions’.²³ For the purposes of this chapter, one of the most important consequences of the federalization process was the split (completed by the end of the 1970s) of the formerly unitary ‘traditional’ parties in separate Flemish and Francophone parties.²⁴ The Constitution moreover *requires* that the federal government is composed of at least two political parties: one Flemish, one Francophone (this is the bare constitutional minimum; in practice there are always more).²⁵ Furthermore, while the radical right has enjoyed electoral successes in recent years in Flanders, the same cannot be said of the counterpart of *Vlaams Belang* in Wallonia. The *Front National*, forced to rebrand itself as *Démocratie Nationale* in 2012 following a complaint by Marine LePen, has thus far not garnered the same level of support as its radical-right counterpart in Flanders.

The combined effect of these elements – several of which are constitutionally entrenched – is a fragmented multiparty system and the inevitability of coalition governments.²⁶ This fragmentation has produced democratic challenges,²⁷ but it also guarantees that any federal government is necessarily a *coalition* government. It is, in other words, impossible for a single political

neglected, as Chapter 10 on Italy in this volume confirms. Some of the points that follow apply to such (hypothetical) coalitions.

²¹ See current article 62 Constitution. For most elections (municipal elections being the exception), the D'Hondt system is used to assign seats. See Electoral Code 1894, article 167.

²² Article 29 Special Act on Institutional Reform (1980).

²³ Article 1 Constitution.

²⁴ Lieven De Winter and Patrick Dumont, ‘Belgium: Delegation and Accountability under Partitocratic Rule’ in Kaare Strøm et al (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press 2003) 256.

²⁵ See article 99 Constitution (requiring that the federal government ‘is composed of an equal number of Dutch-speaking and French-speaking Ministers’).

²⁶ De Winter and Dumont (n 24), 256.

²⁷ See Audrey Vandeleene and Lieven De Winter, ‘Introduction: Candidates between Parties and Voters – A Triadic Relationship in the Belgian Partitocracy’ in Audrey Vandeleene, Lieven De Winter and Pierre Baudewyns (eds), *Candidates, Parties and Voters in the Belgian Partitocracy* (Palgrave Macmillan 2018) 27 (‘Large multiparty coalitions force government parties to conclude gigantic compromises [...] which in the end rarely satisfy the parties’ distinctive electorates’).

party to successfully take over government at the federal level.²⁸ One of the preconditions of constitutional capture in Poland and Hungary is thus precluded in Belgium. Although the relevant constitutional provisions were not designed with a potential risk of democratic erosion in mind, they effectively ensure a robust level of constitutional resistance against authoritarian populism.²⁹ At the regional level, some of these safeguards are not in effect, while the influence of the others is muted. As a result, it is possible – although it remains unlikely – for the radical-right to take over government in the Flemish region. The (ultimately failed) coalition talks between the right-wing nationalists of *Nieuw-Vlaamse Alliantie* and the radical-right populists of *Vlaams Belang* in the wake of the 2019 regional elections were a disturbing signal of potential threat of democratic erosion at the regional level.

Second, even if – hypothetically speaking – would-be authoritarian populists would circumnavigate the primary safeguards and manage to enter a coalition government,³⁰ a series of ‘secondary’ constitutional safeguards would still prevent them from implementing an ‘illiberal-democratic’ agenda. These secondary safeguards ensure robust protection of the separation of powers, thereby shielding the constitutional order from capture by (any) coalition government.

Most of these secondary safeguards originate in the deep distrust of the executive that informed the drafting of the Belgian Constitution in 1831. To protect the newly founded constitutional democracy, a series of checks on the executive branch of government and a Bill of Rights were included in the liberal Constitution to shield citizens against ‘overly autocratic interferences’ by government.³¹ The constitutional framework has by and large remained the same,³² at least in terms of rights provisions and checks and balances.³³ Yet,

²⁸ Since the 1970s, federal cabinets have been composed of four to six political parties on average. See Dewinter and Dumont (n 24), 256; Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 2012) 34.

²⁹ See Gardbaum (n 7), 28 (arguing that federalism ‘dispers[es] power by increasing the number of independent political entities’ and noting that ‘three of the four paradigms of structural populism [Hungary, Turkey and Poland] involve unitary states’) and 36 (‘a PR electoral system is to be preferred [since in] pure PR systems, a single party rarely obtains the legislative majority necessary to govern alone’).

³⁰ This is extremely unlikely to occur, especially at the federal level, given the *cordon sanitaire* that surrounds *Vlaams Belang*.

³¹ Jan Velaers, *De Grondwet: Een artikelsgewijze commentaar – Deel I* (die Keure 2019) 14.

³² It has, of course, been seriously overhauled to enable the evolution from a decentralized unitary state to a federation.

³³ Although a number of new rights provisions have been inserted over time, among others to protect the rights of the child, and several socio-economic rights and the rights of persons with a disability.

the contemporary political reality of ‘particracy’³⁴ – that is, a form of government in which political parties are the *de facto* seat of power – effectively enables the executive to dominate the legislature, contrary to what the constitutional framework envisages.³⁵

This makes it all the more important to assess secondary constitutional safeguards that can keep ‘muscular’ coalition governments in check.³⁶ Given what we know about the blueprint of constitutional capture, the independence of the judiciary is particularly important. Here, the experience in Poland and Hungary shows that *constitutional* courts are among the first targets of would-be authoritarian populists.³⁷ Once the principal guardian of the Constitution has been captured, constitutional review effectively ceases to exist. As the Polish experience shows, authoritarian populists can subsequently push blatantly unconstitutional legislation through Parliament without fear of repercussions. It is, therefore, pivotal to assess how resistant constitutional courts are against capture.

In Belgium, quasi-constitutional legislation that can only be amended by supermajority ensures that the judges of the Constitutional Court are appointed for life,³⁸ that their nomination by Parliament requires a supermajority (two-thirds of the vote),³⁹ and that the President of the Court is elected by the judges themselves.⁴⁰ Equally significantly, the composition of the Constitutional Court is intentionally politicized, in the double sense that half of the Court’s twelve judges are former politicians *and* – perhaps more curiously – that the ideological balance among the twelve judges is intended to reflect the electoral power relations between all ‘mainstream’ political parties. Whereas the former requirement is entrenched in quasi-constitutional legislation,⁴¹ the latter was deliberately left out of the legal framework.⁴² In political practice, however, it is generally adhered to in the nomination process (that is, nominees are selected from a pool of candidates with the

³⁴ Vandeleene and De Winter (n 27), 27 (describing Belgium as a particracy and defining the latter as an ‘excessive case of party dominance’).

³⁵ De Winter and Dumont (n 24), 266; Dave Sinardet, ‘From consociational consciousness to majoritarian myth: Consociational democracy, multi-level politics and the Belgian case of Brussels-Halle-Vilvoorde’ (2010) *Acta Politica* 355.

³⁶ Samuel Issacharoff, ‘Democracy’s Deficits’ (2018) 85 *University of Chicago Law Review* 499.

³⁷ Given space restrictions, only constitutional courts are discussed here.

³⁸ Article 32 Special Act on the Constitutional Court.

³⁹ *Ibid.* (judges are nominated by the House of Representatives or the Senate on a rotating basis).

⁴⁰ *Ibid.*, article 33.

⁴¹ *Ibid.*, article 34.

⁴² Toon Moonen, *De keuzes van het Grondwettelijk Hof: Argumenten bij de interpretatie van de Grondwet* (die Keure 2015) 181.

‘correct political colour’ for the vacant seat).⁴³ Moreover, radical-right parties such as *Vlaams Belang* are currently excluded from this informal power sharing mechanism by political agreement, as a result of which they are not able to nominate judges to the Constitutional Court. Pursuing, by design, an ideological balance on the Constitutional Court may raise fundamental questions in other respects, but it does ensure that no single political party (or political family) can dominate the Court. In this sense, the politicized nature of the Court’s composition is an additional element in the shield that protects it from capture by a (hypothetical) malignant government.

Although the Belgian judiciary is robustly independent in most respects, the Hungarian and Polish experiences also reveal that the entire Belgian judiciary, from the Constitutional Court to the lowest courts, is in one crucial respect vulnerable to capture. The retirement age of judges is *not* constitutionally entrenched in Belgium. Instead, just as in Hungary and Poland, it is determined by statute *and* higher than the general retirement age of 65 (70 for judges on the Constitutional Court, Council of State and Supreme Court of Cassation and 67 for judges on all other courts).⁴⁴ The strategy of Fidesz and PiS to capture the judiciary by lowering the statutory pension age for judges could, hypothetically speaking, therefore be transplanted to Belgium. At the same time, however, replacing the forcibly retired judges with government-friendly ‘cronies’ would still be a less-than-straightforward exercise, given that judicial appointments are made by the constitutionally entrenched High Council of the Judiciary.

Aside from the rules on retirement age for judges, some other potential vulnerabilities emerge when the Belgian constitutional framework is assessed against Gardbaum’s counter-playbook. The three most significant potential vulnerabilities can only be touched upon here.

First, political parties are not regulated in the Constitution. Although political parties are the most powerful actors in the Belgian ‘particracy’,

⁴³ But see the recent controversy over the Senate’s vote *against* the nomination of Zabia Khattabi, a member of the Green party *Ecolo*, to an open seat on the Court. A number of political parties, including *Vlaams Belang* and the Flemish-nationalist N-VA, voted against Khattabi. N-VA voted against since it opposed this particular nomination, arguing (inaccurately) that the candidate should be excluded as she had allegedly intervened to prevent the deportation of a migrant who was travelling on the same plane as her. Ann De Boeck, ‘Zakia Khattabi (Ecolo) verliest stemming, Vivaldi-coalitie hangt in de touwen’, *De Morgen* (17 January 2020), www.demorgen.be/politiek/zakia-khattabi-ecolo-verliest-stemming-vivaldi-coalitie-hangt-in-de-touwen~b63cff7d/.

⁴⁴ See in that order, article 4 Act of 6 January 1989; article 104 Coordinated Acts on the Council of State; article 383 Judicial Code.

effectively enabling the executive to dominate the legislature, they are not even mentioned in the Constitution. As Kim Lane Scheppele explains, '[w]ithout constitutionalized processes in which parties can be assessed, the building blocks of a democratic state can become subject to internal corruption and eventually to a potentially anti-democratic turn'.⁴⁵

Second, although the Senate persists as an institution, it has been stripped of most of its law-making powers.⁴⁶ Given the broader context of the primary and secondary constitutional safeguards discussed above, the lack of bicameralism is unlikely to generate a *direct* threat to the constitutional order. But from the perspective of constitutional resilience (and of federalism theory),⁴⁷ it remains a potential vulnerability, given the experience in Hungary and Poland.⁴⁸

Third, Belgium lacks a number of fourth and fifth branch institutions that, especially when constitutionally entrenched, could provide some resistance against democratic erosion.⁴⁹ Until 2019, Belgium did not have an overarching human rights institution, an omission for which it was repeatedly criticized by UN and Council of Europe monitoring bodies. An independent federal human rights institution has since been installed, which, however, only has advisory and reporting powers.⁵⁰ Even more significant, from the perspective of preventing democratic decay, is the absence of an independent electoral commission. Instead, a combination of constitutional, quasi-constitutional and statutory provisions give the respective parliaments the *exclusive* authority to review the validity of their own elections.⁵¹ This generates obvious problems for the independent monitoring of elections, which has led the Grand Chamber of the European Court of Human Rights to rule that the Belgian framework violates article 3 of Protocol 1 to the European Convention on Human Rights (the right to free elections).⁵²

⁴⁵ *Ibid.*, 512–513.

⁴⁶ With very few exceptions (article 77 Constitution), the Senate can no longer initiate the law-making process (article 75 Constitution).

⁴⁷ See Lijphart (n 28), 38 (arguing that '[t]he principal justification for instituting a bicameral instead of a unicameral legislature is to give special representation to minorities, including the smaller states in federal systems'; and noting that the Upper House 'must have real power').

⁴⁸ Gardbaum (n 7), 30.

⁴⁹ *Ibid.*, 47.

⁵⁰ Article 5 Act of 12 May 2019 tot oprichting van een Federaal Instituut voor de bescherming en de bevordering van de rechten van de mens.

⁵¹ See article 48 Constitution; article 231 Electoral Code 1894; article 31(1) Special Act on Institutional Reform.

⁵² *Mugemangano v Belgium* App no 310/15 (ECHR, 10 July 2020).

12.2.2 *Interim Conclusion*

In the first part of this chapter, we have in essence taken a particular form of democratic decay, namely ‘rule of law backsliding’,⁵³ as our frame of analysis. Evaluated through that lens, a series of primary and secondary constitutional safeguards make the Belgian constitutional order more resilient to capture than the constitutional order of Hungary and Poland. A Hungary-type scenario in which (would-be) authoritarian populists incrementally dismantle the liberal-constitutional order by changing the ‘rules of the game’ appears impossible in Belgium.⁵⁴ Similarly, a Poland-type scenario in which (would-be) authoritarian populists use statutory means to achieve the same illiberal ends is unlikely to unfold in Belgium.⁵⁵ Yet, to conclude that all is well with Belgian constitutional democracy would be (much) too swift. The Polish and Hungarian experiences have taught us to look *beyond* the obvious scenarios to carefully scrutinize other warning signs of democratic decay.

Throughout the first section of our chapter, we have focused on the threat posed by would-be authoritarian populists. In one respect, this initial focus is justified, given the resurgence of the nativist and radical-right *Vlaams Belang* in the polls. In another respect, however, an exclusive focus on this single political party would dramatically underestimate the potential impact of right-wing populism in Belgium. Experience from around the world indicates that (former) ‘mainstream’ parties may pose a much bigger threat to liberal democracy than radical-right parties do. It is, in that respect, crucial to evaluate the impact of co-optation, or ‘poaching’,⁵⁶ of populist policies and discourse by mainstream political parties.

In an important contribution to the debate on constitutional resilience, Rosalind Dixon and Anika Gauja have approached such co-optation in a cautiously optimistic manner.⁵⁷ After considering the drawbacks of what they call ‘policy responsiveness’ by mainstream parties, Dixon and Gauja conclude

⁵³ Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 10 (defining rule of law backsliding as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’).

⁵⁴ See Chapter 8 on Hungary in this volume.

⁵⁵ See Chapter 9 on Poland in this volume.

⁵⁶ Brubaker (n 10), 379.

⁵⁷ Rosalind Dixon and Anika Gauja, ‘Australia’s Non-populist Democracy? The Role of Structure and Policy’ in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 397.

that ‘a quasi-populist turn in mainstream democratic politics is a price worth paying for preserving the minimum core of a democratic system, in the face of a credible threat of illiberal populist takeover’.⁵⁸

It strikes us that the operative word, here, is ‘credible’. Above, we have argued that a series of constitutional safeguards make a hostile takeover of the Belgian constitutional order by would-be authoritarian populists unlikely. To the extent that this renders the threat *not* credible, the ‘quasi-populist turn’ in mainstream politics becomes highly suspect (and in our view indefensible). Rather than turning a blind eye to the impact of ‘policy responsiveness’, we should take it seriously. We do so in the remainder of this chapter by analyzing the impact on migrants’ rights, in particular.

12.3 CRUMBLING MIGRANTS’ RIGHTS AND STRATEGIES OF RESISTANCE

In Belgium, mainstream political parties are not attempting to capture the courts, control the media or shut down universities. There is, in short, no genuine risk of rule of law backsliding. Nevertheless, throughout this section we reveal a pattern of restrictive migration laws and policies that has caused migrants’ rights to crumble in Belgium. We simultaneously show that, in terms of resistance to this development, civil society organizations and courts emerge as crucial actors to secure a minimum level of human rights compliance and uphold the rule of law. However, even though the Constitutional Court and the Council of State have put a brake on some of the more restrictive migration measures, they did not adopt a maximalist approach to the protection of migrants’ rights.

Migration has been a sensitive political issue in Belgium in recent years. This is evident – to pick just one prominent example – from how the previous federal government fell over public endorsement of the UN Global Compact for Safe, Orderly and Regular Migration at the Intergovernmental Conference in Marrakesh at the end of 2018. A few months earlier, then Prime Minister Charles Michel had expressed Belgium’s support for the Compact at the UN General Assembly. This endorsement went by almost entirely unnoticed. In the lead-up to the more public Intergovernmental Conference in Marrakesh, however, the Global Compact suddenly became a subject of heated debate. The right-wing nationalist *Nieuw-Vlaamse Alliantie*, a key member of the coalition government that had previously not objected to endorsement of

⁵⁸ *Ibid.*, 420.

the Compact, began to raise critical concerns against it.⁵⁹ The ethno-nationalist and populist nature of the debate is illustrated by the fact that – while a parliamentary hearing with expert witnesses on the Global Compact was ongoing – the *Nieuw-Vlaamse Alliantie* launched a malicious social media campaign against the Compact. Using style, images and language eerily similar to that of the radical right *Vlaams Belang*, the party firmly rejected what it now called the ‘Marrakesh Pact’.⁶⁰ The radical shift in discourse was arguably due to the *Nieuw-Vlaamse Alliantie* belatedly realising that a policy decision on migration it had endorsed as coalition partner (i.e. endorsing the Global Compact) could well lead to a substantial loss of votes to *Vlaams Belang*. Ultimately, the *Nieuw-Vlaamse Alliantie* left the federal government over a non-binding international instrument – a unique event in Belgian constitutional history (where coalition partners rarely leave coalition governments prematurely, and definitely not over a non-binding text).

We focus our analysis in this section on the 2014–2019 period because this legislative term has come to an end and thus allows for an overall analysis. From 2014 until 2018, Theo Francken of the Flemish-nationalist *Nieuw-Vlaamse Alliantie* was Secretary of State for Asylum and Migration. When his party left the government at the end of 2018 over the Global Compact, the liberal minister Maggie De Block became responsible again for asylum and migration – as had been the case in the 2009–2014 legislative term.

In this five-year period, a landslide of legislative and regulatory changes have aimed to ‘optimize’ the asylum procedure, fight against sham relations, increase (child) immigration detention, facilitate removal for reasons of public order and national security, and emphasize migrants’ individual responsibility to integrate.⁶¹ As a result of all these measures, migrants’ substantive and procedural rights have been put under pressure. This is not to say that migrants’ rights had not already been weakened prior to 2014, for instance in relation to family reunification.

⁵⁹ Nieuw-Vlaamse Alliantie, ‘Waarom de N-VA zich verzet tegen het migratiepact van Marrakesh’, 4 December 2018, www.n-va.be/migratiepact.

⁶⁰ The claims regarding the Global Compact were not empirically substantiated or lacked nuance at best. See Ellen Desmet, ‘Het Migratiepact: aanleidingen voor de crisis en beleidsuitdagingen voor België’ in Toon Moonen, Ellen Desmet and Tom Ruys (eds), *Het Migratiepact: kroniek van een crisis. Actuele vragen uit internationaal recht, grondwettelijk recht en migratierecht* (die Keure 2021), 7–35.

⁶¹ The legislative changes to the federal Aliens Act almost doubled from 179 in the 2009–2014 legislative term to 367 in the 2014–2018 period under State of Secretary Francken. See Lorraine Kihl, ‘La suédoise, hyperactive sur le dossier migratoire’, *Le Soir* (21 August 2019).

The rights-restrictive measures adopted between 2014 and 2019 have met resistance. Civil society organizations have been vocal in denouncing the lack of nuance, accuracy and inclusivity in the public debate. But their proposals, geared towards human rights compliant policy changes, were usually not taken into account, as the space for dialogue with civil society virtually disappeared (12.3.1). In response, civil society organizations have begun to challenge the legality of (some of) these measures by filing complaints at the Constitutional Court (12.3.2) and the Council of State (12.3.3).⁶² In some instances, but certainly not all, these courts have taken up their role of watchdog of human rights by annulling, suspending or nuancing the most far-reaching provisions. Finally, some cracks in the separations of powers could be observed, exemplified by the disregard for (quasi)judicial decisions – a worrying tendency from a rule of law perspective (12.3.4). In the conclusion we emphasize the critical role of civil society and courts in challenging rights-restrictive migration policies as the main takeaway from the Belgian case.

12.3.1 *Deteriorating Quality of the Law-Making Process*

The 2014–2019 legislative period was characterized by a deteriorating quality of the law-making process, through the undermining of the advisory function of the Council of State and the virtual disappearance of dialogue with civil society.

An emblematic case was the huge ‘asylum bill’ submitted by the federal government in June 2017, amending many provisions of the Aliens Act.⁶³ Even though the bill contained some measures to protect persons with special procedural needs, its chief objectives were to reform the asylum procedure in order to create ‘clear, efficient, quick and high-quality procedures with a focus on the fight against abuse’, on the one hand, and to strengthen the effectiveness of return policy, on the other.⁶⁴ Then Secretary of State Francken used the ‘urgency procedure’ to obtain the advisory opinion of the Legislation Section of the Council of State on the preliminary draft. This reduces the period within which the Council has to provide advice to thirty days.⁶⁵ With regard to the impact of the bill on the right to an effective

⁶² The applications were mostly submitted by NGOs, yet often together with the Bar Council of French- and German-Speaking Lawyers and sometimes with the Federal Migration Centre Myria.

⁶³ *Parl. St.* Chamber, Doc. 54 2548/001, 22 June 2017.

⁶⁴ *Ibid.*, 7.

⁶⁵ *Ibid.* The period was extended by roughly a week by email.

remedy, as guaranteed by article 13 of the European Convention on Human Rights, the Council of State strikingly noted:

[C]onsidering the period within which the Legislation Section must provide advice and considering the fact that it is a particularly complex matter, it is not possible to check at this stage whether the combination of the different modifications brought by the preliminary draft will not have the effect that, in certain cases, the right to an effective remedy is disproportionately affected.⁶⁶

Given that the Council of State was not granted the time to assess the cumulative impact of the proposed changes, it put the ball back into the Secretary of State's court by advising him

to supplement the explanatory memorandum in order to identify more clearly the new elements that could negatively impact the right to an effective remedy and to explain why this impact is not so disproportionate that the effectiveness of the remedy is endangered.⁶⁷

Both civil society organizations and UNHCR refused to accept a last-minute invitation to discuss the bill in the Committee on the Interior of the Chamber of Representatives, due to a lack of sufficient preparation time.⁶⁸ Notwithstanding critical opinions by independent human rights actors such as UNHCR, the Federal Migration Centre Myria and the Data Protection Authority, the 'Asylum Act' was adopted by the plenary assembly in November 2017 without substantive modifications.

12.3.2 *Challenging Laws before the Constitutional Court*

The Constitutional Court is competent to review legislative acts, that is acts adopted by the federal parliament or by the parliaments of the communities and regions. The Court assesses their compliance with the fundamental rights enshrined in the Constitution and with the division of competences between the federal state, the communities and the regions.⁶⁹ Actions for annulment must generally be brought within six months of the publication of the challenged act.⁷⁰ This section analyzes the most relevant actions for annulment of

⁶⁶ *Ibid.*, 222.

⁶⁷ *Ibid.*

⁶⁸ Tine Danckaers and Louise Hantson, 'Belgische asielwet lijkt op Vlaamse koterij', *MO Magazine*, 26 October 2017, www.mo.be/nieuws/belgische-asielwet-lijkt-op-vlaamse-koterij.

⁶⁹ Article 142 Constitution; article 1 Special Act on the Constitutional Court.

⁷⁰ Article 3 Special Act on the Constitutional Court. In addition, tribunals may refer preliminary questions to the Court at any time. Article 26 Special Act on the Constitutional Court.

migration legislation provisions adopted in the 2014–2019 period, upon which the Constitutional Court has delivered judgment. While the Court has (partially) annulled some provisions, we conclude that a real protection of migrants' rights would have implied a more stringent review.

Some actions for annulment were pending at the moment of writing, such as an action brought against the new Belgian Maritime Code of 2019 concerning the fundamental rights of stowaways.⁷¹ Most recently, the Constitutional Court annulled the detention period of up to eight months for Union citizens and their family members who are ordered to leave the territory for reasons of public order or national security (see generally 12.3.2.2).⁷²

12.3.2.1 International Protection

The Asylum Act, discussed above as to its deficient drafting process, included various measures which, in the view of civil society and human rights actors, undermined fundamental rights. Even though the Constitutional Court declared some provisions void and provided interpretative clarifications for others, it upheld the legality of the most controversial ones.⁷³

On the one hand, the Court held that the preservation of original documents establishing the identity or nationality of the applicant during the whole course of the procedure (including on appeal) constituted a violation of the applicant's right to respect for private life.⁷⁴ Moreover, the possibility for the Commissioner General for Refugees and Stateless Persons to keep certain elements related to sources of information confidential beyond what is allowed by the EU Asylum Procedures Directive, did not respect the rights of defence of the applicant.⁷⁵ In addition, the Court (partially) annulled provisions regarding the possibility to communicate in certain procedures the notes of the asylum interview together with the decision rather than before,⁷⁶ the application of the accelerated procedure,⁷⁷ and the starting point to calculate the period of four weeks during which asylum seekers can be

⁷¹ Case no. 7354 on the docket of the Court. See generally Petra Baeyens, Mathieu Beys, Deborah Weinberg and Julie Lejeune, 'Les droits fondamentaux restent à quai? Le statut juridique des passagers clandestins dans les ports belges' (2020) *Revue du droit des étrangers* 5.

⁷² Constitutional Court 23 December 2021, no. 187/2021, following *Ordre des barreaux francophones and germanophone and Others* C-718/19 (CJEU, 22 June 2021).

⁷³ Constitutional Court 25 February 2021, no. 23/2021.

⁷⁴ *Ibid.*, B.22.

⁷⁵ *Ibid.*, B.72.3.

⁷⁶ *Ibid.*, B.67.6.

⁷⁷ *Ibid.*, B.95.3; see also B.99.4.

detained at the border.⁷⁸ The annulment of these provisions was also justified because they failed to respect the minimum standards established in the EU Asylum Procedures Directive.

On the other hand, many provisions that had been heavily criticized by independent human rights actors and NGOs prior to the adoption of the Asylum Act, were left untouched. For instance, the Constitutional Court did not agree with the applicants that the definition of the ‘risk of absconding’ was too vague and could lead to arbitrary detention.⁷⁹ Moreover, the Court found that the rules for detention of asylum seekers at the border are a ‘*lex specialis*’ compared to the general rules on detention in the EU Reception Conditions Directive. As a consequence, they do not need to provide the same guarantees when this is not considered feasible in light of the objective of ‘effective border control’.⁸⁰ In this way, the Court sanctions the current practice of systematic detention of asylum seekers at the border.⁸¹

Another illustration concerns the right to respect for private life. When the Commissioner General for Refugees and Stateless Persons has good reasons to assume that an applicant is holding back information, he can request access to their digital devices (e.g., cell phone, laptop). A refusal of the applicant is interpreted as a refusal to cooperate, which may negatively impact the decision regarding international protection. During the drafting process, the Secretary of State had responded to the critical opinions of the Data Protection Authority and UNHCR by announcing a royal decree with additional guarantees – which is still not in place.⁸² The Constitutional Court considered that the interference with the right to respect for private life did not cause any disproportional consequences, in light of the legitimate aim of assessing the application for international protection.⁸³

Finally, with the aims of ‘simplification and harmonization’, the time period to contest a decision denying international protection – normally thirty days – was reduced. In some cases, the already shorter appeal period of fifteen days was further reduced to ten days, for instance for an asylum seeker in detention. In other cases, the appeal period was shortened from ten to only

⁷⁸ Ibid., B 125.5.

⁷⁹ Ibid., B.117.4.

⁸⁰ Ibid., B.122.7-122.8.

⁸¹ NANSEN Note 2018/01, April 2018, <https://nansen-refugee.be/wp-content/uploads/2020/08/NANSEN-NOTE-2018-01-Asielzoekers-aan-de-grens-grensprocedure-en-detentie.pdf>.

⁸² Data Protection Authority (then Privacy Commission), Advice CO-A-2017-047, 11 October 2017; UNHCR, Advice 4 October 2017, *Parl. St.* Chamber, 2016–17, Doc. 54-2548/004. Currently, the Commissioner General does not make use of this possibility, awaiting the royal decree.

⁸³ Constitutional Court 25 February 2021, no. 23/2021, B.33.4.

five days, for instance for an asylum seeker in detention who wants to appeal an inadmissibility decision of a subsequent application. The Court found that these periods of ten and five days are sufficient for the appeal to be considered an effective remedy.⁸⁴

In this respect, it is to be noted that the Constitutional Court did not assess the *combined* effect of the modifications of the asylum legislation on the right to an effective remedy, as the Legislation Section of the Council of State had suggested to the Secretary of State (see 12.3.1). The Court only evaluated the legality of each amendment in itself.

12.3.2.2 Removal for Reasons of Public Order or National Security

In 2017, various provisions of the Aliens Act were revised ‘in order to strengthen public order and national security’, in the wake of the Paris and Brussels terrorist attacks.⁸⁵ Legally residing third-country nationals⁸⁶ can now receive an order to leave the territory ‘for reasons of public order or national security’, whereas before it was required that they had ‘damaged public order or national security’.⁸⁷ This vague language, together with the abolishment of the prior advice of the Commission of Advice for Foreigners, gives the Immigration Office a wide power in decisions to end residence of third-country nationals for reasons of public order or national security.

Moreover, the exception that persons born in Belgium or who had moved to Belgium before the age of twelve could not be deported for reasons of public order or national security, was removed.⁸⁸ This implies that persons can now be sent back to a country of which they have the nationality but where they never or only during their childhood lived. The exception was removed ‘because of the fight against terrorism and radicalisation’.⁸⁹ Finally, the automatic suspensive effect of appeals against decisions taken for reasons of public order or national security was also removed.⁹⁰

⁸⁴ *Ibid.*, B. 143.1.2 (ten days) and B. 143.2.2 (five days).

⁸⁵ See Joyce De Coninck and Yasmina El Kaddouri, ‘Openbare orde en nationale veiligheid in de Belgische Vreemdelingenwet: individuele rechten theoretisch en illusoir?’ (2018) *Tijdschrift voor Vreemdelingenrecht* 302; Julien Hardy, ‘Ordre public: modifications législatives et jurisprudence récentes’ in Sylvie Sarolea (ed.), *Immigrations et droits. Questions d’actualité* (Larcier 2018) 97.

⁸⁶ Refugees are excluded from these provisions (article 20, 2nd para Aliens Act).

⁸⁷ Article 21 Aliens Act, as modified by Act of 24 February 2017.

⁸⁸ This exception had been introduced in the Aliens Act in 2005.

⁸⁹ *Parl. St.*, Chamber 2016–17, Doc 2215/3, 5.

⁹⁰ *Parl. St.*, Chamber, 2016–17, Doc. 54 2216/001, 3. See article 39/79, § 3 Aliens Act, as modified by Act of 15 March 2017.

These measures were unsuccessfully contested before the Constitutional Court.⁹¹ The Court did provide some interpretative clarifications, which ‘took off the sharp edge’.⁹² For instance, referring to the case law of the European Court of Human Rights requiring a ‘very weighty reason’ to deport a settled migrant,⁹³ the Court held that the parliamentary works indicate that the provision allowing to deport persons born in Belgium or who arrived here before the age of twelve, ‘mainly had the situation in mind of young foreigners who have committed very serious crimes that are linked with activities of terrorist groups or who pose an immediate danger for national security’.⁹⁴ In this way, the potentially broad application of the provision was limited. Nevertheless, the Court could have taken a more rights-protective stance, for instance regarding the impossibility to contest an entry ban when still on the Belgian territory.⁹⁵ Instead, the Court endorsed the broad interpretation and application powers granted to the administrative authorities related to removals for reasons of public order or national security.⁹⁶

12.3.2.3 Integration as a Residence Condition

In 2016, integration was inserted as a residence condition, in that the Immigration Office can put an end to certain residence rights when the person concerned has not made ‘a reasonable effort to integrate’.⁹⁷ The Aliens Act mentions the following criteria to assess a person’s efforts to integrate: integration courses, work, studies, vocational training, language knowledge, active participation in social life, and criminal history. The last criterion of criminal history has been annulled by the Constitutional Court as being too broad and not proportionate to the goal of integration and

⁹¹ Constitutional Court 18 July 2019, no. 112/2019 (on the act of 24 February 2017); Constitutional Court 18 July 2019, no. 111/2019 (on the act of 15 March 2017).

⁹² See Luc Denys, ‘Noot bij GwH 18 juli 2019, nr. 112/2019 en GwH 18 juli 2019, nr. 111/2019: De nieuwe openbareordewetten gewikt en gewogen door het Grondwettelijk Hof (2020) Tijdschrift voor Vreemdelingenrecht 44.

⁹³ *Maslov v. Austria* App no 1638/03 (ECHR, 23 June 2008), para 75; *Ndidi v. the United Kingdom* App no 41215/14 (ECHR, 14 September 2017), para 81.

⁹⁴ Constitutional Court 18 July 2019, no. 112/2019, B.24.6. Note that ‘mainly’ leaves some room for interpretation.

⁹⁵ Denys (n 92) 52.

⁹⁶ Christelle Macq, ‘Retrait du droit au séjour et éloignement pour motifs d’ordre public: les lois du 24 février 2017 et du 15 mars 2017 validées, sous réserve d’interprétations, par la Cour Constitutionnelle’, *Cahiers de l’EDEM*, September 2019, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/cour-constitutionnelle-arrets-n-111-et-112-2019-du-18-juillet-2019.html>.

⁹⁷ Art. 1/2 Aliens Act, inserted by Act of 18 December 2016.

participation.⁹⁸ The Court also held that a lack of (sufficient) proof of efforts to integrate cannot suffice to not prolong or revoke a residence right, but that there must be other reasons as well (e.g. not living together anymore in cases of family reunification).⁹⁹

12.3.2.4 The Fight against ‘Manifestly Unlawful Appeals’

In 2017, the procedure which aims to fight manifestly unlawful appeals before the Council for Alien Law Litigation was simplified, in that the Council can now immediately impose a fine in the hearing in which it handles the appeal, instead of in a subsequent hearing.¹⁰⁰ An action for annulment was dismissed by the Constitutional Court.¹⁰¹ The Court did provide two interpretative clarifications. First, the Council for Alien Law Litigation must specify in its notification the particular reasons inducing it to consider to rule on the manifestly unlawful character of the appeal – instead of the current general statement included in the notification.¹⁰² Second, the impact of the appeal on the defendant cannot be taken into account when determining the amount of the fine, as the fine only aims to fight the improper use of judicial proceedings – and in this sense differs from a compensation for damages caused by reckless litigation.¹⁰³

12.3.2.5 Sham Acknowledgements

Family law has been instrumentalized in order to achieve migration policy objectives. Belgian public authorities have increasingly invested in the fight against ‘sham’ relations: first sham marriages, then sham legal cohabitations, and now also sham paternity acknowledgements. In 2017, the latter were legally defined as acknowledging a child with the apparent and sole intention of obtaining an advantage related to residence rights (for oneself, the child or the person who needs to consent to the acknowledgement).¹⁰⁴ The

⁹⁸ Constitutional Court 4 October 2018, no. 126/2018, B.40.8 – B.41.

⁹⁹ *Ibid.*, B.19.2.

¹⁰⁰ Article 39/73-1 Aliens Act, as modified by Act of 19 September 2017.

¹⁰¹ Constitutional Court 24 October 2019, no. 150/2019.

¹⁰² *Ibid.*, B.7.

¹⁰³ *Ibid.*, B.10.2.

¹⁰⁴ Article 330/1 Civil Code, inserted by Act of 19 December 2017.

acknowledgement will thus not be registered when fraudulent intention is presumed, even when there is a biological link between the father and the child.¹⁰⁵

Before the 2017 legislative change, the public prosecutor could only demand the cancellation of an acknowledgement afterwards. Now, the civil status registrar may proactively suspend the procedure to request advice from the public prosecutor or even refuse to draw up a paternity acknowledgement because of (suspicions of) fraud.¹⁰⁶ Such a refusal has far-reaching consequences, in that the child will not have a legal father. According to Verhellen, this provision was inserted without the existence of 'transparent figures and scientific studies that adequately map the phenomenon of sham acknowledgement'.¹⁰⁷

In its advisory opinion, the Legislation Section of the Council of State had been very critical of the bill. In its view, the lack of an obligation for the civil status registrar to consider the best interests of the child when refusing an acknowledgement constituted a violation of the Constitution and of the Convention on the Rights of the Child.¹⁰⁸ Moreover, the possibility to refuse an acknowledgment in case of a biological link, would violate the best interests of the child and their right to respect for private and family life.¹⁰⁹ The legislator did not take this criticism into account. Neither did the Constitutional Court.

In a judgment of 2020, the Constitutional Court overall upheld the new legislation on fraudulent paternity acknowledgement; it only found the lack of appeal possibilities against the civil status registrar's refusal to draw up an acknowledgement unconstitutional.¹¹⁰ This issue has meanwhile been remedied by the legislator.¹¹¹ Disturbingly, the Court thus did not find it problematic that, in cases of fraud, the civil status registrar is not required to consider the best interests of the child.¹¹² Finally, the Court did not find

¹⁰⁵ Isabelle de Viron, 'La loi sur la reconnaissance frauduleuse en droit belge' in Sylvie Sarolea (ed.), *Statut familial de l'enfant et migrations* (Université catholique de Louvain 2018) 49.

¹⁰⁶ Article 330/2 Civil Code, as modified by Act of 19 December 2017.

¹⁰⁷ Jinske Verhellen, 'Schijnkerkenningen: Internationale families opnieuw in de schijnwerpers' (2016) *Tijdschrift voor Internationaal Privaatrecht* 103.

¹⁰⁸ Article 22bis Constitution and article 3 Convention on the Rights of the Child. Council of State, Legislation Section, Advice 60.382/2, 9 January 2017, 28.

¹⁰⁹ *Ibid.*, 30.

¹¹⁰ Constitutional Court 7 May 2020, no. 58/2020, B.28.

¹¹¹ Article 330/2 Civil Code, as modified by Act of 31 July 2020.

¹¹² Constitutional Court 7 May 2020, no. 58/2020, B.19. Somewhat confusingly, the Constitutional Court does recognize that any decision impacting the child, should consider their best interests, see B.18 and B.13.

any discrimination between Belgian citizen children and children from parents regularly residing in Belgium, on the one hand, and children with at least one irregular parent, on the other. Both categories are not comparable, as no risk of circumventing migration legislation exists in the former case.¹¹³

12.3.3 *Challenging Regulations before the Council of State*

The Belgian Council of State is composed of two sections with diverging powers. One section sits as the highest administrative court with the power to review and annul administrative decisions made and decrees issued by the executive branch of government (it also acts as a court of cassation within the administrative courts system).¹¹⁴ A different section, the Legislation Section, issues non-binding advisory opinions to the legislative branch of government on (most) bills.¹¹⁵ The first section and its powers of judicial review are most pertinent for the purposes of this chapter. We will thus focus on its case law.

12.3.3.1 Administrative Fees

As from 2 March 2015, the admissibility of certain applications for residence permits was made conditional upon the payment of a contribution for compensating the administrative costs related to the processing of the application.¹¹⁶ On 1 March 2017, the amounts were increased to 60, 200 or 350 euro, depending on the type of application. The Council of State annulled the royal decrees putting in place these fees, because the Belgian State had not demonstrated that their amount was reasonably proportional to the cost of the service.¹¹⁷ This annulment did not have the expected effect though (see 12.3.4).

¹¹³ *Ibid.*, B.31.2.

¹¹⁴ Article 160 Constitution; article 14 Organic Laws on the Council of State.

¹¹⁵ Article 160 Constitution; article 2 Organic Laws on the Council of State.

¹¹⁶ At the time, the amounts were 60, 160 or 215 euros. Article 1/1 Aliens Act.

¹¹⁷ Council of State, Administrative Litigation Section, 11 September 2019, no. 245.403 (annulling the royal decree of 16 February 2015); Council of State, Administrative Litigation Section, 11 September 2019, no. 245.404 (annulling the royal decree of 14 February 2017). The Constitutional Court had already exempted recognized stateless persons (who in Belgium do not automatically obtain a residence right – another gap in legal protection) from this fee. See Constitutional Court 22 February 2018, no. 18/2018, B.19.6.

12.3.3.2 Access to International Protection and Reception Conditions

In order to cope with the (constructed) reception ‘crisis’, a quota had been introduced. As from 22 November 2018, the number of applications for international protection that could be made at the Immigration Office was limited to 50 per day. This decision was not taken via a law, a royal or ministerial decree, or a circular letter. It was first announced in a press article, and confirmed the day after on Secretary of State Francken’s Facebook and Twitter accounts.¹¹⁸ A coalition of NGOs obtained the suspension of the measure as a matter of extreme urgency: the Council of State held that the measure *prima facie* made effective access to the international protection procedure ‘excessively difficult’.¹¹⁹ By that time, the then new liberal Minister of Asylum and Migration, Maggie De Block, had already ‘decided not to apply any quota’.¹²⁰

Nevertheless, in early 2020, Minister De Block also took a contested decision to deal with the increased pressure on the reception system. Two groups of asylum seekers, who were depicted as ‘abusing’ the system, were excluded from material reception conditions: persons in relation to whom the period for a Dublin transfer had passed and persons with an international protection status in another EU Member State. This exclusion is contrary to both the Belgian Reception Act and the EU Reception Conditions Directive.¹²¹ Again, no regulatory measure underpinned the exclusion; rather only instructions from the Federal Agency for the Reception of Asylum Seekers (Fedasil). A coalition of NGOs requested the Council of State to suspend and annul the instructions. After the auditor of the Council of State recommended their annulment, the Federal Agency for the Reception of Asylum Seekers repealed the instructions, and the case was closed before the Council of State.¹²² Nonetheless, later instructions of the Agency regarding the accompaniment

¹¹⁸ Council of State, Administrative Litigation Section, 20 December 2018, no. 243.306, para 3.

¹¹⁹ *Ibid.*, para 19.

¹²⁰ *Ibid.*, paras 8–9. Given that no formal measure supported this policy change after the Minister’s nomination on 9 December 2018, the Council of State held that the applicants had an interest to challenge the measure.

¹²¹ Article 4 Reception Act of 12 January 2007; article 20 Reception Conditions Directive (recast).

¹²² Council of State, Administrative Litigation Section, 24 September 2020, no. 248.352. The Federal Agency for the Reception of Asylum Seekers has been condemned in individual cases for not providing reception, see, e.g., Labour Court Brussels, 22 January 2020, no. 20/4/C.

of applicants in the Dublin procedure have been criticized for partially reinstating the revoked instructions.¹²³

12.3.3.3 Child Immigration Detention

The Belgian Aliens Act allows for the possibility of child immigration detention. In 2013, the Constitutional Court confirmed the legality of this provision, under the condition that detention conditions are adapted for children – an assessment which accrues to the Council of State.¹²⁴ Even though the Constitutional Court's position is in line with that of the European Court of Human Rights,¹²⁵ most other human rights actors, including the UN Committee on the Rights of the Child, hold that the detention of children for immigration reasons always constitutes a violation of their rights.¹²⁶

Notwithstanding this legal possibility, Belgium had stopped detaining children in closed centres since 2009, in light of various condemnations by the European Court of Human Rights regarding the unacceptable conditions in which children had been detained.¹²⁷ Instead, 'return houses' for families with children were established, which received international praise.¹²⁸

Yet, in August 2018, the government started to detain again families with children, dissatisfied with the rate of absconding from these return houses but without having carried out an in-depth evaluation. To that end, it constructed 'family units' in a closed centre near Brussels Airport – which were allegedly more adapted to the needs of children and would thus respond to the criticism of the European Court of Human Rights. The detention regime in these family units was laid out in a new royal decree, which was challenged before the Council of State.¹²⁹

¹²³ Agency for Integration and Civic Integration, 'Nieuwe instructie van Fedasil over begeleiding van bewoners in Dublinprocedure', 9 October 2020, www.agii.be/nieuws/nieuwe-instructie-van-fedasil-over-begeleiding-van-bewoners-in-dublinprocedure.

¹²⁴ Constitutional Court 19 December 2013, no. 166/2013.

¹²⁵ *Mubilanzila Mayeka and Kaninki Mitunga v. Belgium* App no 13178/03 (ECHR, 12 October 2006) para 100.

¹²⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, *Joint general comment No. 4 (2017) / No. 23 (2017)*, 16 November 2017, UN Doc. CMW/C/GC/4-CRC/C/GC/23, para 10.

¹²⁷ *Mubilanzila Mayeka and Kaninki Mitunga* (n 125); *Muskhadzhiyeva and others v. Belgium* App no 41442/07 (ECHR, 19 January 2010); *Kanagaratnam and others v. Belgium* App no 15297/09 (ECHR, 13 December 2011).

¹²⁸ These open return houses are not an alternative for detention, but an alternative form of detention, since the persons do receive a detention title.

¹²⁹ Royal decree of 22 July 2018.

In April 2019, the Council of State suspended a number of provisions of this royal decree, because children could be detained up to one month without excluding family units in places where children would be exposed to ‘particularly significant noise pollution’.¹³⁰ Given that the only existing family units were located next to Brussels Airport, this judgement had as a consequence that families with children were no longer detained.

However, the hopes created among civil society actors by this judgment of suspension were reduced in October 2020. In its first judgment on the merits, the Council found some complaints inadmissible, annulled some provisions of the royal decree, and reopened the debates as to the remainder of the complaints.

The complaints regarding the absence of provisions excluding the most vulnerable children (e.g. with disabilities or of very young age) from detention, the lack of specific obligatory training for the personnel, and the lack of prohibition to wear a uniform within the family units, were declared inadmissible. The Council of State found the royal decree illegal insofar as families may be restricted to two hours per day of access to outdoor space to guarantee order and security, personnel has unconditional access to the family unit between 6 a.m. and 10 p.m., and adolescents of minimum sixteen years old may be put in isolation for twenty-four hours when they present a danger to security.¹³¹

Even though these annulments limit some prerogatives of the personnel, the Council of State has not ensured an adequate protection of the human rights of families with children who would be detained.¹³² In particular, the judgement has been criticized for its formalistic approach: the Council of State held that it could only check the positive measures included in the royal decree to ensure that the detention conditions were adapted to children, but that it could not assess measures that were lacking in the decree. The Council held that it was up to the other courts to assess the implementation of the royal decree. This implies that persons first have to be detained – and their rights potentially violated – before they can challenge this in court. In conclusion, the judgment displays a ‘diminished and fragmentary’ protection of children’s rights.¹³³

¹³⁰ Council of State, Administrative Litigation Section, 4 April 2019, no. 244.190.

¹³¹ Council of State, Administrative Litigation Section, 1 October 2020, no. 248.424.

¹³² Germain Haumont and Emmanuelle Bribosia, ‘Quand se renvoyer la balle transforme les voies de recours en matière de détention des enfants migrants en un dédale kafkaïe’, *Cahiers de l’EDEM*, November 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/conseil-d-etat-arret-n-248-424-du-1er-octobre-2020.html>.

¹³³ *Ibid.*

The policy note of the current Secretary of State Sammy Mahdi of the party *Christian Democratic and Flemish* (CD&V) states: ‘minors cannot be held in closed centers’.¹³⁴ Nevertheless, the case before the Council of State, in which the Belgian government defends the position that the detention regime in the family units is appropriate to detain children, was continued. In its final judgment, the Council of State declared the remainder of the complaints inadmissible. These related, among others, to the lack of a prohibition in the royal decree to establish family units in places where children would be exposed to air and noise pollution (diverging from its earlier suspension on this ground), and to the vagueness of the provisions, which could lead to an arbitrary implementation.¹³⁵

12.3.4 *Disregard of (Quasi-)Judicial Authority: Small Cracks in the Separation of Powers?*

A basic characteristic of a solid rule of law is that the executive power respects the decisions of the judiciary power. When the executive power does not agree with certain judgments, it should amend the laws and regulations that the judges applied. In the 2014–2019 legislative period, some instances occurred where judicial authority in relation to migrants’ rights was questioned and/or ignored by the executive power. Two examples relate to topics discussed above, namely administrative fees and child immigration detention. A third illustration concerns humanitarian visas.

First, even though the Council of State held that the Belgian government had not demonstrated the proportionality of the amount of the administrative fees to the cost of the service, the Immigration Office, strikingly, continues to charge administrative fees for certain residence applications. It does so based upon a technical-legal argumentation that certain other royal decrees regulating these fees had not been annulled by the Council of State. However, these decrees are based on the same argumentation which has been declared invalid by the highest administrative court of the country. Even the Flemish Agency for Integration and Civic Integration – a government agency – argues that the continued charging of these fees is illegal.¹³⁶

¹³⁴ *Parl. St.* Chamber, Doc. 55 1580/014, 4 November 2020, 34.

¹³⁵ Council of State, Administrative Litigation Section, 24 June 2021, no. 251.051.

¹³⁶ Agency for Integration and Civic Integration, ‘Raad van State vernietigt retributie verblijfsaanvragen’, 1 October 2019, www.agii.be/nieuws/raad-van-state-vernietigt-retributie-verblijfsaanvragen.

Second, in September 2018, the UN Committee on the Rights of the Child ordered, as a provisional measure, the release of a Serbian family from the closed centre. The Immigration Office refused to comply with the measure, stating that ‘the UN Committee does not have competence on this matter in Belgium.’¹³⁷ Even though the Committee on the Rights of the Child is a ‘quasi-judicial’ authority, this is problematic because Belgium has ratified the third Optional Protocol to the Convention on the Rights of the Child on a communications procedure. Consequently, as the Committee noted in one of its views, ‘by becoming a party to the Optional Protocol, [Belgium] has recognized the competence of the Committee to determine whether there has been a violation of the Convention.’¹³⁸

A final illustration of the disregard of judicial authority concerns a humanitarian visa case. In 2016, a Syrian family applied for a short-stay humanitarian visa at the Belgian consulate in Lebanon on the basis of the EU Visa Code.¹³⁹ In their application, they explicitly mentioned their intention to apply for international protection upon arrival in Belgium. The Immigration Office rejected the application. In appeal, the Council for Alien Law Litigation suspended the decision in an emergency procedure. The Council held that the Immigration Office had breached its duty to state reasons and ordered the Immigration Office to take a new decision within forty-eight hours, as a provisional measure.¹⁴⁰ The second decision was, however, basically identical to the first one, so the scenario repeated itself.¹⁴¹ When also the third decision of the Immigration Office remained the same, the Council itself ordered the issuance of a humanitarian visa.¹⁴²

Even though this judgement was immediately enforceable, the Immigration Office refused to deliver the visa. The applicants therefore aimed to enforce the judgment via the ordinary judiciary. The Court of Appeal confirmed the first instance decision of imposing a penalty payment of 4000 euro per day of delay in issuing a visa for the four family members.¹⁴³ Yet, the then Secretary of State Francken persevered in resisting to comply

¹³⁷ Lieslot Terryn, ‘VN-Kinderrechtencomité beveelt vrijlating Servisch gezin uit 127bis , DVZ gaat hier niet op in’, VRT NWS, 26 September 2018, www.vrt.be/vrtnws/nl/2018/09/26/vn-kinderrechten-comite-beveelt-vrijlating-servisch-gezin-uit-st/.

¹³⁸ UN Committee on the Rights of the Child, *Y.B. and N.S. v. Belgium*, 5 November 2018, UN Doc. CRC/C/79/D/12/2017, para 10.

¹³⁹ See Astrid Declercq, ‘Het humanitair visum: balanceren tussen soevereine migratiecontrole en respect voor de mensenrechten’ (2017) *Tijdschrift voor Vreemdelingenrecht* 118.

¹⁴⁰ Council for Alien Law Litigation 7 October 2016, no. 175.973.

¹⁴¹ Council for Alien Law Litigation 14 October 2016, no. 176.363.

¹⁴² Council for Alien Law Litigation 20 October 2016, no. 176.577.

¹⁴³ Brussels Court of Appeal 7 December 2016, no. 2016/KR/119.

with the Council's judgement – hereby challenging the fundamentals of the rule of law. On the contrary, his party, the *Nieuw-Vlaamse Alliantie*, launched a social media campaign against the judges of the Council, who were depicted as 'detached from reality'. The fact that the Council's judgement was a reaction to the failure of the Immigration Office to properly state reasons, disappeared from the public debate. Both the attitude of the Secretary of State and the social media campaign were criticized by other political parties.¹⁴⁴ From a rule of law perspective, it is highly problematic that a Secretary of State refused to comply with an immediately enforceable judgment. As the Court of Justice of the European Union recently confirmed, 'the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.'¹⁴⁵

12.4 CONCLUSION

Our analysis in this chapter shows that the Belgian constitutional framework provides relatively robust protection against democratic decay. A series of primary and secondary constitutional safeguards renders hostile take-over of government by would-be authoritarian populists extremely unlikely (if not impossible). Rule of law backsliding of the variety witnessed in Poland and Hungary thus appears inconceivable in Belgium. Crucially, however, most of the constitutional safeguards that prevent a *hypothetical* slide towards authoritarianism only provide weak constraints, at best, against the *very real* and systematic undermining of migrants' rights. A PR electoral system, for instance, provides no bulwark against governing parties that *agree* to undermine migrants' rights. This situation is aggravated by the fact that persons without Belgian citizenship have no voting rights in federal and regional elections, which gives politicians less of an incentive to duly consider their fundamental rights.

In another sense, therefore, Belgium is just as vulnerable as other European states to co-optation of restrictive migration proposals by mainstream parties. As we have shown throughout this chapter, the dangers of co-optation in Belgium are real. Belgian migration policy in the period 2014–2019, formulated and implemented under a centre-right coalition, has been characterized

¹⁴⁴ For the substantive outcome of this case, see *M.N. and Others v. Belgium* App no 3599/18 (ECHR, 5 March 2020).

¹⁴⁵ *Alekszj Torubarov v. Bevándorlási és Menekültügyi Hivatal* C-556/17 (CJEU, 29 July 2019) para 57.

by multiple efforts to weaken the legal and actual position of migrants in general, and asylum seekers, family migrants and irregular migrants in particular. Fundamental rights, such as the right to respect for family life and the right to liberty, are under pressure. The accumulation of various 'small' legislative and policy changes has caused migrants' rights to crumble.

Our analysis indicates that the *combination* of a strong civil society and an independent judiciary is key to offer resistance against this development. Civil society actors initiating judicial proceedings has been the most effective means of challenging rights-restricting migration measures in Belgium. If no cases for annulment of such measures are brought before the courts, they cannot annul them. Spurred on by civil society initiatives, the judiciary has at least halted some of the most egregious measures infringing upon migrants' rights, such as the asylum quotas. Yet, more subtle or systemic measures aimed at undermining migrants' rights have often not been questioned by these same courts in their – at times legalistic and formalistic – analysis. The Constitutional Court seems to focus, for instance when assessing the legality of the Asylum Act, on its compatibility with clear, delineated provisions included in EU law (in particular the Common European Asylum System). By contrast, the Court seems to be more reluctant to engage in broader assessments as to how certain changes, especially cumulatively, impact on human rights. In this sense, our conclusion is that the highest courts of Belgium have safeguarded *minimal* respect for migrants' rights, whereas a *maximalist* interpretation of migrants' rights could have led to a more stringent and critical review of the contested migration laws and regulations.