

CHAPTER V

MIGRATION AND REFUGEE AFFAIRS: ROLE OF CONSTITUTIONAL COURT IN POLAND, HUNGARY, THE CZECH REPUBLIC, SLOVAKIA, SERBIA, CROATIA, SLOVENIA AND ROMANIA



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Abstract

The chapter highlights the roles of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. A national constitutional court exists in these countries in accordance with the supreme law regulations. The common denominator is that each national constitutional court has the power to a) assess the compatibility of lower-level legislation with higher-level legal regulations, specifically with the supreme law in a given country (constitution, fundamental law, etc.) and b) derogate or repeal, and sometimes temporarily suspend, in part or whole, legal norms declared unconstitutional. Aside from certain differences, these competencies seem to be a shared standard across all the analysed states. Additionally, in each state analysed, some regulations within the supreme law are about migration and asylum. The combination of these regulations with the indicated powers of national constitutional courts potentially allows for strong influence on topics related to migration and asylum, at least theoretically. Therefore, this chapter examines the jurisprudence of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. The primary insights from this jurisprudence were presented and examined in terms of the power of position and image of position. This served as the basis for proposing an original

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methodology to assign a specific role to each national constitutional court and then to make an assignment.

Keywords: constitutional law, migration, asylum, sovereignty, constitutional courts, comparative law.

1. Introduction

This study's central question is the constitutional courts' roles in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania concerning migration and refugee affairs. This involves primarily, though not exclusively, an analysis of the relevant jurisprudence of the constitutional courts of the selected countries. First, the constitutional status of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania is presented. The aim is to show what legitimacy and competencies constitutional courts have in the analysed countries and whether there are any differences. Then, we discuss the constitutional aspects of migration and refugee affairs in these countries. The aim is to verify whether there is a legal basis for migration and asylum within the norms of the highest national law. In other words, the objective is to examine whether the highest law of a given country contains provisions that enable the national constitutional court to thematically focus on migration and refugees and exercise its competences in this area. The third part of this chapter is an analysis of the relevant case law of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. This analysis illustrates the image of position and the power of position of the national constitutional courts in migration and asylum matters, which is crucial for the subsequent part the paper, involving categorising the role of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania concerning migration and refugee affairs. The result of this categorisation does not only assign each national constitutional court one of the defined roles in the field of migration and asylum but also determines the hierarchy (significance) of these roles. The penultimate part of this chapter presents proposals for a standard concerning the constitutional court's role in asylum and refugee affairs, followed by the paper's conclusions.

2. Constitutional status of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania

In Poland, the constitutional status of the national constitutional court is determined by the provisions of the Constitution of the Republic of Poland (CRP).¹ Under Art. 188 points from (1) to (5) CRP, the Constitutional Tribunal² shall adjudicate regarding the following matters: (1) the conformity of statutes and international agreements to CRP; (2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; (3) the conformity of legal provisions issued by central State organs to CRP, ratified international agreements and statutes; (4) the conformity to CRP of the purposes or activities of political parties; (5) complaints concerning constitutional infringements, as specified in Art. 79 (1) CRP.³ Article 189 CRP stresses that the Constitutional Tribunal shall settle disputes over authority between the central constitutional organs of the state. According to Art. 190 (1) CRP, judgments of the Constitutional Tribunal shall be of universally binding application and final. According to Art. 190 (2) CRP, judgments of the Constitutional Tribunal regarding matters specified in Article 188 CRP, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, the judgment shall be published in the Official Gazette of the Republic of Poland (*Monitor Polski*). According to Art. 190 (3) CRP, a judgment of the Constitutional Tribunal, shall take effect from the day of its publication. However, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such a period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the budget, the Constitutional Tribunal shall specify the date for the end of the binding force of the normative act concerned after seeking the opinion of the Council of Ministers. Pursuant to Art. 190 (4) CRP, a judgment of the Constitutional Tribunal on the non-conformity to the CRP, an international agreement or statute, of a normative act based on which a legally effective judgment of a court, a final administrative decision, or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other

1 The Constitution of the Republic of Poland [Online]. Available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (Accessed: 2 August 2023).

2 In Poland, in fact, this is not constitutional court but constitutional tribunal (It's only a semantic difference based on history).

3 According to Art. 79 (1) CRP, in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the CRP of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in CRP; This is constitutional complaint.

settlement in a manner and on principles specified in provisions applicable to the given proceedings. Pursuant to Art. 190 (5) CRP, a majority vote shall make judgments of the Constitutional Tribunal. Additionally, in light of Art. 193 CRP, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the CRP, ratified international agreements, or statutes if the answer to such a question of law will determine an issue currently before such a court.⁴

The Fundamental Law of Hungary (FLH)⁵ contains provisions defining national constitutional courts' status. According to Art. 24 (1) FLH the Constitutional Court shall be the principal organ for protecting FLH. Art. 24 (2) points from a) to g) FLH provides that the Constitutional Court: a) shall examine adopted acts not yet promulgated for conformity with FLH; b) shall, at the initiative of a judge, review the conformity with FLH of any law applicable in a particular case as a priority but within no more than ninety days; c) shall, based on a constitutional complaint, review the conformity with FLH of any law applied in a particular case; d) shall, based on a constitutional complaint, review the conformity with FLH of any judicial decision; e) shall, at the initiative of the Government, one-quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with FLH of any law; f) shall examine any law for conflict with any international treaties; g) shall exercise further functions and powers as laid down in FLH⁶ and in a cardinal act.⁷ Art. 24 (3) points from a) to c) FLH provides that Constitutional Court: a) shall, within its powers set out in Art. 24 (2) b), c), and e) FLH, annul any law or any provision of a law which conflicts with FLH; b) shall, within its powers set out in Art. 24 (2) d) FLH, annul any judicial decision which conflicts with FLH; c) may, within its powers set out in Art. 24 (2) f) FLH, annul any law or any provision of a law which conflicts with an international treaty. In light of Art. 24 (3) FLH, the Constitutional Court shall also determine the legal consequences set out in a cardinal act. What is also important, in accordance with Art. 24 (4) FLH, is that provisions of a law that were not requested to be reviewed may be reviewed and annulled by the Constitutional Court, but only

4 Other important constitutional regulations related to the Constitutional Court in Poland: Art. 191 CRP (Entities legitimized to apply to the Constitutional Tribunal); Art. 192 CRP (Entities legitimized to initiate a competence dispute before the Constitutional Tribunal); Art. 194 CRP (Composition of the Constitutional Tribunal); Art. 195 CRP (The status of the Constitutional Tribunal judges); Art. 196 CRP (Immunity); Art. 197 CRP (Organization and procedure).

5 Fundamental Law of Hungary. [Online]. Available at: <https://njt.hu/jogszabaly/en/2011-4301-02-00> (Accessed: 2 August 2023).

6 For example in the light of Art. 13 (5) FLH, Constitutional Court shall have the power to conduct the impeachment procedure against the President of Hungary (see whole Art. 13 FLH).

7 FLH is appended with numerous cardinal laws, which regulate the individual fields in detail, such as laws regarding local governments, the election of Members of Parliament, the protection of families, state assets, efficient state management and budgetary responsibility.

if there is a close substantive connection between them and the provisions requested to be reviewed.⁸

In the Czech Republic, the statutes of the constitutional court are regulated by provisions of the Czech Republic's Constitution (CCR).⁹ Pursuant to Art. 83 CCR, the Constitutional Court is a judicial body charged with protecting constitutional rules. Pursuant to Art. 87 (1) CCR (points from a) to m), the Constitutional Court shall rule on: a) repeal of laws or individual provisions thereof should they contravene the constitutional order; b) repeal of other legal regulations or individual provisions thereof should they contravene the constitutional order or the law; c) constitutional complaints filed by territorial self-government bodies against illegal interventions by the State; d) constitutional complaints filed against final decisions and other interventions by agencies of public authority, violating constitutionally guaranteed fundamental rights and freedoms; e) appeals against decisions in matters of confirmation of the election of a Deputy or Senator; f) reservations on loss of eligibility and on incompatibility of holding the office of Deputy or Senator according to Art. 25 CCR;¹⁰ g) impeachment by the Senate of the President of the Republic under Art. 65 (2) CCR;¹¹ h) the Presidential proposal to repeal a decision of the Chamber of Deputies and the Senate according to Art. 66 CCR;¹² i) measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it can be implemented in a different manner; j) whether a decision on the dissolution of a political party, or another decision regarding the activity of a political

8 Further part of Art. 24 FLH contains also important regulations concerning Constitutional Court in Hungary: Art. 24 (5) FLH (Review FLH or the amendment of FLH; Examination criterion; Entities legitimized to apply for such an examination); Art. 24 (6) FLH (Procedure concerning review FLH or the amendment of FLH; competences of Constitutional Court in relation to such an examination); Art. 24 (7) FLH (Public hearing); Art. 24 (8) FLH (Composition, election, incompatibilities, term of office); Art. 24 (9) FLH (legal basis for the cardinal act).

9 Constitution of the Czech Republic [Online]. Available at: <https://www.psp.cz/en/docs/laws/1993/1.html> (Accessed: 14 August 2023).

10 According to Art. 25 CCR, the office of a Deputy or a Senator shall be terminated by: a) refusal to take the oath of office or by taking the oath with reservation; b) expiration of the electoral term; c) resignation from office; d) loss of eligibility; e) dissolution of the Chamber of Deputies in the case of Deputies; f) emergence of incompatibility of office under Art. 22 CCR.

11 According to Art. 65 (2) CCR, President of the Republic may be prosecuted for high treason at the Constitutional Court based on the Senate's suit. The punishment may be the loss of his presidential office and of his eligibility to regain it.

12 According to Art. 66 CCR, if the office of the President of the Republic is vacated and a new President has not yet been elected or has not yet taken his oath of office, as well if the President of the Republic is unable to execute his official duties for serious reasons, and if the Chamber of Deputies and the Senate has adopted such resolution, the execution of the presidential duties pursuant to the provisions of Art. 63 (1) (points a), b), c), d), e), h), i) and j) CCR, and Art. 63 (2) CCR shall appertain to the Prime Minister. The Chairman of the Chamber of Deputies shall be entrusted with execution of official duties of the President of the Republic specified in Art. 62 (points a), b), c), d), e), k) and l) CCR at the time when the Prime Minister executes the defined duties of the President of the Republic. If the office of the President of the Republic has been vacated at the time when the Chamber of Deputies is dissolved, the execution of these duties shall appertain to the Chairman of the Senate.

party, conforms to constitutional or other laws; k) disputes regarding the scope of the jurisdiction of state agencies and territorial self-government agencies, unless such disputes are under the jurisdiction of a different body; l) on the remedy against a decision adopted by the President of the Republic not to announce a referendum concerning the accession of the Czech Republic to EU; m) on whether the procedure of the referendum concerning the accession of the Czech Republic to EU is in accordance with the Constitutional Act on Referendum concerning the Accession of the Czech Republic to EU and the implementing regulation related thereto. Pursuant to Art. 87 (2) CCR, the Constitutional Court shall also decide on the conformity of international agreements under Arts. 10a CCR¹³ and 49 CCR¹⁴ with the constitutional order before their ratification. The agreement could not be ratified until the Constitutional Court ruling was delivered. Pursuant to Art. 87 (3), points a) and b) CCR, a law may stipulate that in place of the Constitutional Court, rulings shall be issued by the Supreme Administrative Court in respect of a) repeal of legal regulations or their provisions, which violate the law; and b) disputes regarding the scope of the jurisdiction of state agencies and territorial self-government agencies, unless such disputes are under the jurisdiction of a different body. Pursuant to Art. 89 (1) CCR, a ruling issued by the Constitutional Court, shall be enforceable upon its promulgation in a manner set by law unless the Constitutional Court rules differently on its enforcement. Art. 89 (2) CCR additionally emphasises that enforceable rulings of the Constitutional Court shall be binding for all agencies and individuals. Finally, pursuant to Art. 89 (3) CCR, a decision of the Constitutional Court, whereby, in accordance with Art. 87 (2) CCR, the inconformity of an international agreement with the constitutional order is pronounced, prevents ratification of the agreement until such an inconformity is eliminated.

In Slovakia, the Constitution of the Slovak Republic (CSR)¹⁵ applies. This Act lays down legal norms that regulate the status of constitutional courts. According to Art. 124 CSR, the Constitutional Court shall be an independent judicial authority vested with the mandate to protect constitutionality. Pursuant to Art. 125 (1) points from a) to d) CSR, the Constitutional Court shall decide on the conformity of: a) laws with CSR, constitutional laws, and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law; b) government regulations, generally

13 According to Art. 10a CCR: (1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution; (2) An approval of the Parliament is required to ratify an international agreement stipulated in Art. 10a (1) CCR unless a constitutional law requires an approval from a referendum.

14 According to Art. 49 CCR, an approval of both Chambers of Parliament is required to ratify international agreements: a) governing rights and duties of persons; b) of alliance, peace, or other political treaties; c) which result in the membership of the Czech Republic in an international organization; d) that are economic of a general nature; (e) on other issues to be governed by the law.

15 Constitution of the Slovak Republic [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 5 August 2023).

binding legal regulations of Ministries and other central state administration bodies with CSR, with constitutional laws, with international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law and with laws; c) generally binding regulations pursuant to Art. 68 CSR,¹⁶ with CSR, with constitutional laws, and with international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law, save another court shall decide on them; d) generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration pursuant to Art. 71 (2) CSR,¹⁷ with CSR, with constitutional laws, with international treaties promulgated in the manner laid down by a law, with laws, with government regulations, and with generally binding legal regulations of Ministries and other central state administration bodies, save another court shall decide on them. Pursuant to Art. 125 (2) CSR, if the Constitutional Court accepts the proposal for proceedings according to Art. 125 (1) CSR, it can suspend the effect of challenged legal regulations, their parts, or some of their provisions if fundamental rights and freedoms may be threatened by their further application and if there is a risk of serious economic damage or other serious irreparable consequences. Pursuant to Art. 125 (3) CSR, if the Constitutional Court holds by its decision that there is an inconformity between the legal regulations stated in Art. 125 (1) CSR, the respective regulations, their parts, or some of their provisions shall lose effect. The bodies that issue these legal regulations shall be obliged to harmonise them with CSR, with constitutional laws and international treaties promulgated in the manner laid down by law, and if it regards regulations stated in Art. 125 (1) b) and c) CSR also with other laws, if it regards regulations stated in Art. 125 (1) d) CSR also with government regulations and with generally binding legal regulations of ministries and other central state administration bodies within six months of the promulgation of the Constitutional Court's decision. If they fail to do so, these regulations, their parts, or their provisions will lose effect six months after the promulgation of the decision. Pursuant to Art. 125 (4) CSR, the Constitutional Court shall not decide on the conformity of a draft law or a proposal of other generally binding legal regulations with CSR with an international treaty promulgated in the manner laid down by law or constitutional law. Pursuant to Art. 125 (5) CSR, the validity of a decision on the suspension of the effect of the challenged legal regulations, their parts, or some of their provisions shall terminate at the promulgation

16 According to Art. 68 CSR, in matters of territorial self-administration and for securing the tasks of self-administration provided by a law, the municipality and the higher territorial unit may issue generally binding regulations.

17 According to Art. 71 (2) CSR, when exercising the powers of state administration, a municipality and a higher territorial unit may also issue generally binding regulations within their territory upon authorization by a law and within its limitations. Exercise of state administration transferred to a municipality or to a higher territorial unit by a law shall be directed and controlled by the government. A law shall lay down the details.

of the decision of the Constitutional Court if the Constitutional Court has not already cancelled the decision on suspension of the effect of the challenged legal regulation because the reasons for which it was adopted had terminated. Finally, according to Art. 125 (6) CSR, decision of the Constitutional Court issued pursuant to Arts. 125 (1), (2) and (5), CSR shall be promulgated in the manner laid down for the promulgation of laws. A valid judgment by the Constitutional Court shall be generally binding. What also seems to be important and interesting is that, in accordance with Art. 128 CSR, the Constitutional Court shall give an interpretation of CSR or constitutional law if the matter is disputable. The Constitutional Court's judgment on the interpretation of CSR or constitutional law shall be promulgated in a manner laid down for the promulgation of laws. This interpretation is generally based on the date of promulgation.¹⁸

In Serbia, the status of constitutional court is governed by the Constitution of the Republic of Serbia (hereinafter: CRS).¹⁹ Pursuant to Art. 166 CRS, the Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms. Constitutional Court decisions are final, enforceable, and generally binding. The jurisdiction of the Constitutional Court in Serbia is determined by Art. 167 CRS, according to which the Constitutional Court shall decide on 1) compliance of laws and other general acts with CRS, generally accepted rules of international law, and ratified international treaties; 2) compliance of ratified international treaties with the CRS; 3) compliance of other general acts with the law; 4) compliance of the statute and general acts of autonomous provinces and local self-government units with the CRS and the law; and 5) compliance of general acts of organisations with delegated public powers, political parties, trade unions, civic associations, and

18 The specificity of CSR is such that in other provisions of this legal act there are important legal regulations determining the competences of the constitutional court. In the light of the provisions of Arts. from 125a to 129 CSR, the Constitutional Court in Slovakia also has some competence in the scope of: the conformity of negotiated international treaties with CRS and constitutional law (see Art. 125a CRS); the conformity of the subject of a referendum with CRS and constitutional law (see Art. 125b CRS); disputes over competency between the central state administration bodies (see Art. 126 CRS); complaints of natural persons or legal persons (see Art. 127 CRS); complaints of the bodies of territorial self-administration (see Art. 127a CRS); the complaint against decision verifying or rejecting verification of the mandate of a Member of Parliament (see Art. 129 (1) CRS); the conformity of election of the President of the Slovak Republic, the elections to the National Council of the Slovak Republic, and the elections to local self-administration bodies with CRS and the law (see Art. 129 (2) CRS); complaints against the result of a referendum and complaint against the result of a plebiscite (see Art. 129 (3) CRS); the conformity of a decision dissolving a political party or movement or suspending political activities with the constitutional laws and other laws (see Art. 129 (4) CRS); prosecution by the National Council of the Slovak Republic against the President of the Slovak Republic in matters of willful infringement of CRS or treason (see Art. 129 (5) CRS); the conformity of a decision on declaring an exceptional state or an emergency state and other decisions connected to this decision with CRS and constitutional law (see Art. 129 (6) CRS).

19 Constitution of the Republic of Serbia [Online]. Available at: http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf (Accessed: 11 August 2023).

collective agreements with CRS and the law. Art. 167 CRS also emphasises that the Constitutional Court shall 1) decide on the conflict of jurisdictions between courts and state bodies; 2) decide on the conflict of jurisdictions between republic and provincial bodies or bodies of local self-government units; 3) decide on the conflict of jurisdictions between provincial bodies and bodies of local self-government units; 4) decide on the conflict of jurisdictions between bodies of different autonomous provinces or bodies of different local self-government units; 5) decide on electoral disputes for which court jurisdiction is not specified by law; and 6) perform other duties stipulated by the CRS and laws. In addition, Art. 167 CRS provides that the Constitutional Court shall decide on banning a political party, trade union organisation, or civic association and shall perform other duties stipulated by the CRS. Pursuant to Art. 168 CRS, proceedings assessing constitutionality may be instituted by state bodies, bodies of territorial autonomy, local self-governments, and at least 25 deputies. The Constitutional Court may have also instituted this procedure. Art. 168 CRS also contains other important regulations concerning the Constitutional Court. First, any legal or natural person shall have the right to institute proceedings to assess constitutionality. Second, the law or other general acts that do not comply with the CRS or the law shall cease to be effective on the day of the publication of the Constitutional Court decision in the official journal. Third, before passing the final decision, and under the terms specified by the law, the Constitutional Court may suspend the enforcement of an individual general act or action undertaken on the grounds of the law or another general act whose constitutionality or legality it assesses. Fourth, The Constitutional Court may assess the compliance of the law and other general acts with the CRS, compliance of general acts with the law, even when they ceased to be effective if the proceedings assessing the constitutionality have been instituted within no more than six months since they ceased to be effective.²⁰

In Croatia, the applicable law is the Constitution of the Republic of Croatia (CRC),²¹ which contains legal norms specifying the status of the Constitutional Court. Pursuant to Art. 129 CRC, the Constitutional Court of the Republic of Croatia 1) shall decide upon the compliance of laws with CRC; 2) shall decide upon the compliance of other regulations with CRC and laws; 3) may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings; 4) shall decide on

20 Other important constitutional regulations related to the Constitutional Court in Serbia: Art. 169 CRS (Assessment of constitutionality of the law prior to its coming into force); Art. 170 CRS (Constitutional appeal); Art. 171 CRS (Ensuring the enforcement of decisions); Art. 172 CRS (Organisation of the Constitutional Court. Election and appointment of the Constitutional Court justices); Art. 173 CRS (Conflict of interest. Immunity); Art. 174 CRS (Termination of the tenure of office of the Constitutional Court justice); Art. 175 CRS (The manner of deciding in the Constitutional Court. The Law on the Constitutional Court).

21 Constitution of the Republic of Croatia [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/inline-files/CONSTITUTION_CROATIA.pdf (Accessed: 9 August 2023).

constitutional petitions against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by CRC; 5) shall monitor compliance with CRC and laws and shall report to the Croatian Parliament on detected violations thereof; 6) shall decide upon jurisdictional disputes between the legislative, executive and judicial branches; 7) shall decide, in conformity with CRC, on the impeachment of the President of the Republic; 8) shall supervise compliance of the platforms and activities of political parties with CRC and may, in compliance with CRC, ban non-compliant parties; 9) shall monitor whether elections and referenda are conducted in compliance with CRC and laws and shall resolve electoral disputes falling outside the jurisdiction of the courts; 10) shall perform other duties specified by CRC. Pursuant to Art. 131 CRC, the Constitutional Court shall repeal a law if it finds it unconstitutional. The Constitutional Court of the Republic of Croatia also repeal or annul any other regulations if it finds them unconstitutional or illegal. Additionally, in the cases specified in Art. 129(1)(3) CRC,²² if the Constitutional Court of the Republic of Croatia finds that a law is non-compliant with the CRC and law or that another regulation is non-compliant with the CRC and law, it shall hand down a decision pronouncing non-compliance with the CRC or law.

In Slovenia, the constitutional status of the national constitutional court is determined by the provisions of the Constitution of the Republic of Slovenia (CRSa).²³ Pursuant to Art. 160 CRSa, the Constitutional Court decides on: the conformity of laws with CRSa; the conformity of laws and other regulations with ratified treaties and with the general principles of international law; the conformity of regulations with CRSa and with laws; the conformity of local community regulations with CRSa and with laws; the conformity of general acts issued for the exercise of public authority with CRSa, laws, and regulations; constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts; jurisdictional disputes between the state and local communities and among local communities themselves; jurisdictional disputes between courts and other state authorities; jurisdictional disputes between the National Assembly, the President of the Republic, and the Government; the unconstitutionality of the acts and activities of political parties; other matters vested in the Constitutional Court by CRSa or laws. Art. 160 CRSa also provides that in the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such a treaty with the CRSa. The opinion of the Constitutional Court binds the National Assembly. The

22 According to Art. 129(1)(3) CRC, the Constitutional Court of the Republic of Croatia may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings.

23 Constitution of the Republic of Slovenia [Online]. Available at: <https://www.us-rs.si/media/constitution.pdf> (Accessed: 15 August 2023).

next part of Art. 160 CRSa states that unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication based on the criteria and procedures provided by law. Another important regulation is Art. 161 CRSa. According to this provision, if the Constitutional Court establishes that a law is unconstitutional, it will abrogate it in whole or in part. Such an abrogation takes effect immediately or within a period, as determined by the Constitutional Court. This period did not exceed one year. The Constitutional Court annuls *ab initio* or abrogates other regulations or general acts that are unconstitutional or contrary to the law. Under the conditions provided by the law, the Constitutional Court may, up until a final decision, suspend, in whole or in part, the implementation of an act whose constitutionality or legality is being reviewed. Additionally, if the Constitutional Court establishes the unconstitutionality of a regulation or general act in deciding on a constitutional complaint, it may, under the provisions of Art. 161 CRSa, annul *ab initio* or abrogate such regulation or act. Importantly, the legal consequences of Constitutional Court decisions shall be regulated by the law.²⁴

In Romania, the constitutional status of the constitutional court is determined by the norms of the Constitution of Romania (hereinafter: CR).²⁵ Pursuant to Art. 142 (2) CR, the Constitutional Court shall be the guarantor of the supremacy of the CR. Pursuant to Art. 146 points from a) to l) CR, the Constitutional Court shall have the following powers: a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as *ex officio*, on initiatives to revise CR; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators; d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; f) to guard the observance of the procedure

24 Other important constitutional regulations related to the Constitutional Court in Slovenia: Art. 162 CRSa (Proceedings before the Constitutional Court); Art. 163 CRSa (Composition and Election); Art. 164 CRSa (Early Termination of Office of a Constitutional Court Judge); Art. 165 CRSa (Term of Office of Judges); Art. 166 CRSa (Incompatibility of Office); Art. 167 CRSa (Immunity).

25 Constitution of Romania [Online]. Available at: <https://www.presidency.ro/en/the-constitution-of-romania> (Accessed: 22 August 2023).

for the election of the President of Romania and to confirm the ballot returns; g) to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; h) to give advisory opinion on the proposal to suspend from office the President of Romania; i) to guard the observance of the procedure for the organisation and holding of a referendum, and to confirm its returns; j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens; k) to decide on the objections of unconstitutionality of a political party; l) to carry out also other duties stipulated by the organic law of the Court. Pursuant to Art. 147 (1) CR, the provisions of the laws and ordinances in force, as well as those of the regulations that are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the CR. Given this limited length of time, provisions found to be unconstitutional shall be suspended *de jure*. Pursuant to Art. 147 (2) CR, in cases of unconstitutionality of laws, before the promulgation thereof, the Parliament is bound to reconsider those provisions to bring them into line with the decision of the Constitutional Court. Pursuant to Art. 147 (3) CR, if the constitutionality of a treaty or international agreement has been found, according to Art. 146 (1) b) CR, such a document cannot be the subject of an objection to unconstitutionality. A treaty or international agreement found to be unconstitutional should not be ratified. Pursuant to Art. 147 (4) CR, the decisions of the Constitutional Court shall be published in the Official Gazette of Romania. According to their publication, decisions shall generally be binding and effective only in the future.

The list of relevant constitutional provisions in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania is important for this study. The reason for this is that although the constitutional courts of these countries are regulated slightly differently, it is possible to find commonalities, perhaps reflecting a certain paradigm, features, or competences of these state bodies. However, starting with a brief indication of the differences, it should be noted that these differences are sometimes noticeable and may concern specific functions and competences or the internal organisation of constitutional courts. For example, this concerns the competences or functions of constitutional courts, which are not obvious to this type of state body, for which the impeachment procedure can be an example. However, these differences do not involve systemic positions or essential constitutional competencies. Such elements seem universal standards and constitute a common matrix of constitutional regulations in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. It should also be emphasised that the indication of these common features or competences of constitutional courts will significantly improve by unifying to some extent, the subjective scope of the analysis and the determination of the role of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in migration and refugee affairs. This was the first and most important step in the analysis. Therefore, by

focusing on similarities, it is appropriate to emphasise the corresponding elements of the constitutional statuses of constitutional courts in the indicated countries. First, although it may seem an obvious conclusion, in each of these countries, a state body such as the constitutional court functions because it has been provided with a place in the structure of the state. Second, the general status of the constitutional courts in each of these countries is regulated at the constitutional level by the norms contained in the most important legal acts of a particular country. This means that in these countries, the constitutional court ranks as a constitutional body and is an important element of the state system. Third, in each of these countries, the main task of the constitutional court is to respect the supreme constitutional law of the state (regardless of the nomenclature: Constitution, fundamental law, etc.) concerned with its interpretation and application. This means that in each of these countries, the constitutional court is the only body in the entire state system equipped with appropriate instruments to assess and enforce the constitutionality of the legal system. This is because, first, in each of these countries, in light of Arts. 188 CRP, 24 (2) FLH, 87 (1) CCR, 125 (1) CSR, 167 CRS, 129 CRC, 160 CRSa, and 146 CR, the Constitutional Court has the power to assess the compatibility of lower-ranking legislation with higher-ranking legal regulations, particularly with the supreme law in a given country (constitution, fundamental law, etc.). Second, after the assessment of constitutionality and in the event of unconstitutionality being detected, in light of Arts. 190 (3) CRP, 24 (3) FLH, 87 (1) CCR, 125 (2) and (3) CSR, 168 CRS, 131 CRC, 161 CRSa, and 147 CR, constitutional courts also act as negative legislators in each of these countries.²⁶ This means that the constitutional courts in each analysed country have the power to derogate or repeal, and sometimes also temporarily suspend, in part or in whole, legal norms declared unconstitutional. However, they do not have the right to create and introduce norms into the legal order. Hence, in the literature, their role is sometimes referred to as that of negative legislators.

These elements constitute a common normative standard for the constitutional status of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. However, it should be noted that simply referring to the provisions of the constitutional court contained in the Supreme Law in a given country (constitution, fundamental law, etc.) is not sufficient to determine the role of the constitutional court of that country in migration and refugee affairs. Such considerations only provide a basis for the conclusion that the constitutional court in a selected country is competent in interpreting provisions of the Supreme Law, which is connected with further competencies, such as conformity assessment and derogation of unconstitutional law. However, to determine the role of a country's constitutional court in migration and asylum affairs, it is necessary to check whether the country's supreme law contains legal norms on asylum, migration, or refugees. This element is important because such legal provisions contained in the Supreme

²⁶ In terms of the concept of "negative legislator", see: Cieślak, 2008, p. 61; Decision of the Polish Constitutional Tribunal of 10 June 2020, K 3/19, OTK-A 2020, item 27.

Law of a given country open the way for the constitutional court to speak thematically focused on migration and refugees and exercise its competences in this area. Second, a simple reference to provisions in a given country's supreme law related to asylum, migration, or refugees is insufficient for this study. Such considerations will only provide a basis for concluding that the Constitutional Court is entitled (in the abstract) to exercise its constitutional powers in migration and refugee affairs where the subject of its jurisprudence may be relevant provisions of the Supreme Law of a given country. Nevertheless, the Constitutional Courts' role in migration and refugee affairs in the country remains unclear. To this end, it is necessary to analyse the case law of the constitutional courts of selected countries that have relevant constitutional powers and are legitimate in exercising these competences in migration and refugee affairs. This shows how the National Constitutional Court views its role in this regard. It may turn out that despite the Supreme Law of a given country giving clear competencies and legitimising their use in matters of migration and refugee status, the constitutional court itself refrains from exercising them or sees them to a very limited extent. This may be related to EU law on the one hand and constitutional identity on the other. Finally, it may turn out that the constitutional court sees its competences and uses them broadly or sees these competences but at the same time refrains from exercising them, indicating that it reserves the right to intervention only in borderline situations. Therefore, to determine whether the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania perceive their role in migration and refugee affairs as active or passive, it is necessary to examine their relevant case law.

3. Migration and refugee affairs in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania – Constitutional aspect

In Poland, migration and refugee affairs are regulated by the CRP. Under Art. 56 (1) CRP, foreigners shall have the right of asylum in the Republic of Poland under the principles specified by the statute. Art. 56 (2) CRP emphasises that foreigners who seek protection from persecution in the Republic of Poland may be granted refugee status in accordance with international agreements to which the Republic of Poland is a party. It is also worth noting that in accordance with Art. 37 CRP, on the one hand, anyone under the authority of the Polish State shall enjoy the freedoms and rights ensured by the CRP; on the other hand, Art. 37 CRP also provides that exemptions from this principle concerning foreigners shall be specified by statute.²⁷

²⁷ In the subject of refugee and migration affairs in Poland, see, for example: Czaplinski, 1994, pp. 636–642; Klaus, 2017, pp. 523-528; Łukasiewicz, 2017, pp. 47-70.

In Hungary, migration and refugee affairs are regulated by the FLH. Pursuant to Art. XIV (1) FLH, no foreign population shall be settled in Hungary. A foreign national, not including persons with the right to free movement and residence, may only live in Hungary under an application individually examined by the Hungarian authorities. The basic rules regarding the requirements for submitting and assessing such applications shall be laid down in a cardinal act. Art. XIV (2) FLH states that foreigners residing in Hungary can only be expelled under lawful decisions. Collective expulsion shall be prohibited. Pursuant to Art. XIV (3) FLH, no one shall be expelled or extradited to a state where there is a risk of being sentenced to death, tortured, or subjected to other inhuman treatment or punishment. The next regulation is Art. XIV (4) FLH, a provision containing a very important legal norm in refugee law. According to this provision, Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or the country of their habitual residence for reasons of race, nationality, membership in a particular social group, religious, or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin or any other country. The same provision also states that a non-Hungarian national shall not be entitled to asylum if he or she arrives in Hungary from any country where he or she was not persecuted or directly threatened with persecution. The last part of Art. XIV FLH, namely Art. XIV (5), states that the basic rules for granting asylum shall be laid down in a cardinal act. Hungarian FLH has another relevant and important legal norm concerning migration and refugee affairs. Art. 46 FLH states that police will participate in preventing illegal immigration.

In the Czech Republic, CCR provides a legal framework for the state and the rule of law. The CCR does not specifically address migration or refugee affairs. Nevertheless, the CCR contains important provisions, namely Art. 3, according to which an integral component of the constitutional system of the Czech Republic is the Charter of Fundamental Rights and Freedoms (CFRF).²⁸ Thus, when analysing the constitutional order in the Czech Republic globally, both CCR and CFRF should be considered. It should be noted that the CCR contains a legal framework for the national constitutional court, and the CFRF contains asylum and migration regulations. Under Art. 43 CFRF, the Czech Republic grants asylum to persecuted aliens to assert their political rights and freedom. An asylum may be denied to someone who has acted contrary to fundamental human rights and freedoms. In addition, Art. 14 of the CFRF is an important provision guaranteeing freedom of movement and residence. Anyone who legitimately stays within the territory of the Czech Republic has the right to leave freely. These freedoms may be limited by law if they are unavoidable for the security of the state, maintenance of public order, protection of the rights and freedoms of others, or, in demarcated areas, to protect nature. Every

28 Charter of Fundamental Rights and Freedoms (Czech Republic) [Online]. Available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (Accessed: 3 October 2023).

citizen is free to enter the Czech Republic. No citizen may be forced to leave his or her homeland, and more importantly, an alien may be expelled only in cases specified by law. Therefore, whether the CCR contains legal migration and asylum affairs standards should be answered negatively. However, whether the constitutional order in the Czech Republic contains legal norms on migration and asylum affairs should be answered positively because the CFRF should be considered part of the Czech Republic's constitutional order.²⁹

In Slovakia, migration and refugee affairs are regulated by CSR. Pursuant to Art. 53 CSR, the Slovak Republic shall grant asylum to aliens persecuted for exercising political rights and freedoms. Such asylum may be denied to those contradicting fundamental human rights and freedoms. The law lays down these details. This is the basic legal provision. However, CSR also contains a legal norm in Art. 23, which links migration and asylum affairs. This provision guarantees freedom of movement and residence, and everyone residing legally in the Slovak Republic has the right to leave its territory freely. Such defined freedoms may be restricted by law if necessary for national security, maintenance of public order, health protection, or protection of the rights and freedoms of others and in the interest of environmental protection in specified territories. What is important is that, according to Art. 23 CSR, a citizen must not be forced to emigrate or be expelled from their homeland, and an alien may be expelled only in cases provided for by law.³⁰

In Serbia, migration and refugee affairs are regulated by the CRS. According to Art. 13 CRS, pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by CRS and law, except the rights to which only citizens of the Republic of Serbia are entitled under CRS and law. According to Art. 39 entry and stay of foreign nationals in the Republic of Serbia shall be regulated by law. A foreign national may be expelled only under the decision of the competent body in a procedure stipulated by the law, and if the time to appeal has been provided for him and only when there is no threat of persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinions, or when there is no threat of serious violation of rights guaranteed by the CRS. On the other hand, regulations directly concerning the right to asylum are provided in Art. 57 CRS. According to this legal norm, any foreign national with a reasonable fear of prosecution based on race, gender, language, religion, national origin, or association with some other group or political opinion shall have the right to asylum in the Republic of Serbia. The law regulates the procedure for granting asylum. Last but not least, part four of CRS, entitled "Competences of the Republic of Serbia", contains a list of Serbia's competences. One of the elements of this list is the

29 In the subject of refugee and migration affairs in Czech Republic, see, for example: Jelínková, 2019, pp. 33-45; Szczepanikova, 2011, pp. 789-806; Drbohlav, 2003, pp. 194-224; Bauerová, 2018, pp. 397-420.

30 In the subject of refugee and migration affairs in Slovakia, see, for example: Pechočiak and Hrdá, 2017, pp. 32-40; Androvičová, 2017, pp. 197-220; Brljavac, 2017, pp. 91-107; Bolečeková, 2017, pp. 564-581.

competence that Serbia shall organise and provide for a border crossing system and control trade in goods, services, and passenger traffic over border crossings, as well as the status of foreigners and foreign legal entities.³¹

In Croatia, migration and refugee affairs are regulated by the CRC. According to Art. 26 CRC, all citizens of the Republic of Croatia and aliens shall be equal before the courts, governmental agencies, and other bodies vested with public authority. Arts. 48 and 49 CRC are also interesting legal regulations, from which it follows that first, a foreign person may exercise the right of ownership under the conditions specified by law, and second, foreign investors shall be guaranteed free transfer and repatriation of profits and invested capital. Nevertheless, Croatia's most important constitutional regulation regarding migration and asylum is Art. 33 CRC. Under this legal standard, foreign citizens and stateless persons may be granted asylum in Croatia unless they are prosecuted for nonpolitical crimes and activities contrary to the fundamental principles of international law. The same provision also emphasises that no alien legally in the territory of the Republic of Croatia shall be banished or extradited to another state, except in cases where decisions made in compliance with an international treaty or law are enforced.³²

In Slovenia, migration and refugee affairs are regulated by CRSa. Pursuant to Art. 13 CRSa, in accordance with treaties, aliens in Slovenia enjoy all the rights guaranteed by the CRSa and laws, except for those rights pursuant to the CRSa or law-only citizens of Slovenia enjoy. CRSa, in its Art. 32 affirms the fundamental right to freedom of movement, the ability to choose one's place of residence, freedom to exit the country, and the right to return at any time. Nonetheless, it stipulates that this right can be restricted by legal measures only when such limitations are deemed necessary to uphold the progress of criminal proceedings, prevent the transmission of infectious diseases, safeguard public order, or are essential for the nation's defence. Furthermore, the law permits foreign nationals to regulate entry into the country and the duration of their stay, all of which are established through legal provisions. Art. 47 CRSa additionally safeguards the interests of Slovenian citizens by prohibiting their extradition to foreign nations. By contrast, the extradition of aliens is permissible only in instances covered by binding treaties involving Slovenia. In its provisions concerning migration and asylum, the CRSa explicitly acknowledges the rights of asylum. As outlined in Art. 48 CRSa, within the confines of the law, foreign nationals and stateless individuals who face persecution due to their dedication to human rights and fundamental freedoms are entitled to seek asylum.³³

31 In the subject of refugee and migration affairs in Serbia, see, for example: Lukić, 2016, pp. 31-43; Bobić and Šantić 2020, pp. 220-234; Rajović, 2014, pp. 28-49; Lažetić, 2018, pp.131-178.

32 In the subject of refugee and migration affairs in Croatia, see, for example: Gregurović and Dubravka, 2012, pp. 99-113; Borozan, 2017, pp. 141-163; Harvey, 2006, pp. 89-144; Spadina and Kovacevic, 2023, pp. 467-485. Jorens, 2023, pp. 467-485.

33 In the subject of refugee and migration affairs in Slovenia, see, for example: Vezovnik, 2018, pp. 39-56; Beznec and Gombač, 2023, pp. 250-265; Geddes and Andrew, 2016, pp. 587-605; Meško et al., 2018, pp. 495-527. Kury and Redo, 2018, pp. 495-527.

In Romania, migration and refugee affairs are regulated by the CR. First, Art. 3 (4) CR unequivocally prohibits the displacement or colonisation of foreign populations on the territorial expanse of the Romanian State. The fundamental aim of this constitutional provision was to safeguard the unity and integrity of the state's territory. Nevertheless, the most pivotal legal regulation was enshrined under Art. 18 CR when addressing migration and asylum affairs in Romania. To expound upon this, Art. 18 (1) CR expressly mandates that foreign nationals and stateless individuals residing in Romania are entitled to the broad protection of their rights and possessions, as stipulated by CR and other applicable laws. This crucial safeguard is augmented by the legal framework outlined in Art. 18 (2) CR, which underscores that the right to seek asylum and the determination of its grant or revocation shall be executed following the provisions of the law, in conformity with international treaties and conventions to which Romania is a part. Furthermore, pursuant to the rules outlined in Art. 19 (3), the CR, the extradition of foreign nationals and stateless individuals may solely be carried out with strict adherence to an international agreement or based on reciprocity principles. This underscores Romania's commitment to uphold its international obligations and standards in migration and refugee affairs.³⁴

The norms of the highest law (constitution, fundamental law, etc.) relevant to migration and asylum in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania are presented above. These regulations are not identical, but they all prioritise international agreements and human rights and protect those facing persecution while ensuring the power to protect sovereignty, national interests, and security. For this reason, it can be said that the constitutional provisions governing migration and refugee affairs in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania demonstrate a shared commitment not only to respect human rights and international agreements but also to address migration and asylum issues with full respect for sovereignty. While each nation has its unique set of constitutional articles, common themes include recognising the right to asylum and protection from extradition in countries where persecution or harm may occur. Based solely on the wording of the abovementioned provisions of the Supreme Law (constitution, fundamental law, etc.), Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania seek to strike a balance between protecting sovereignty and national interests, such as territorial integrity and national security, and fulfilling their international obligations to protect people from persecution or violence. However, in this case, this depends on national constitutional courts' interpretation of the law and how they define their role in migration and asylum affairs.

This part of the academic paper also leads to another important conclusion: in every analysed country, there are regulations of the highest law (constitution,

³⁴ In the subject of refugee and migration affairs in Romania, see, for example: Elrick and Ciobanu, 2009, pp. 100-116; Zlătescu, 2014, pp. 37-49; Matei and Cocosatu, 2009, pp. 403-440; Goga, 2019, pp. 148-160.

fundamental law, etc.) concerning migration and asylum affairs. The legal foundations of asylum are more specific than migration's; however, both elements are visible within the highest law. This is an important observation because it means that not only does every national constitutional court have power (especially the power to assess the compatibility of lower-ranking legislation with higher-ranking legal regulations, particularly with the supreme law in a given country, such as the constitution or fundamental law; the power to derogate or repeal, and sometimes also temporarily suspend, in part or in whole, legal norms declared unconstitutional), but that they can also theoretically use it in matters related to migration and asylum cases. Nevertheless, as already noted, the mere observation of this fact is only evidence that, in theory, constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can use their powers concerning migration, refugees, and asylum issues, including in the context of protecting sovereignty and the perspective of EU legislation (of course, if the state is a Member State of EU). However, the question of whether, and if so, how, the constitutional courts of these countries decide to intervene in such matters can only be answered through an analysis of their case law.

4. Relevant case law of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania

In light of Arts. 56 and 37 CRP, 24 (1) FLH, 83, 87, and 89 CCR, 124, 125, and 128 CSR, 166, 167, and 168 CRS, 129 and 131 CRC, 160 and 161 CRSa, 142, 146, and 147 CR in conjunction with Arts. 79, 188, 189, 190, and 193 CRP, XIV(1), and 46 FLH, 3 CCR, 43, and 14 CFRF, 53, and 23 CSR, 13, 39, and 57 CRS, 26, 48, 49, and 33 CRC, 13, 32, 47, and 48 CRSa, 3 (4), 18, and 19 CR regarding migration and asylum, the national constitutional court in Poland, Hungary, Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania holds the power to assess the compatibility of lower-tier legal acts with higher-tier legal acts, particularly with CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR. In incompatibility and hence unconstitutionality cases, it also possesses the power to annul and occasionally temporarily suspend legal acts deemed unconstitutional in migration and asylum matters. This applies to any legal act subordinate to CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR and should apply to all except CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR. This stance can be assumed after scrutinising the pure content of the supreme laws in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. Nevertheless, legal practices have particular interpretive significance, particularly court cases before the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. On the one

hand, the jurisprudence of a specific national constitutional court serves as an invaluable source of guidance on interpreting the provisions of the CRP, FLH, CCR, CFRE, CSR, CRS, CRC, CRSa, and CR. On the other hand, it also answers how a national constitutional court perceives its role and understands its powers. This is crucial because, as previously mentioned, a national constitutional court may interpret its role broadly or narrowly, displaying either a proactive or a passive approach. Ultimately, the jurisprudence of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can reveal whether these courts consider themselves strong defenders of national constitutionality, merely as observers or enforcers of decisions made by other decision-making bodies, or even as non-playing substitutes or non-players.

In Poland,³⁵ the Constitutional Court has not addressed migration, refugees, or asylum issues in its rulings. However, this does not mean that decisions that could be valuable for the analysis in this study were not made. First, the Constitutional Court highlighted the significance of broadening the rights and liberties of non-citizens, particularly EU residents. This broadening fortified their legal status substantially, enabling them to oversee matters in Poland without obtaining citizenship.³⁶ Second, the Constitutional Court acknowledged the common good as a crucial constitutional concept that moulds the connection between international and national law. It underlines Poland's willingness to embrace the global order, particularly EU law, as long as it adheres to the essential principles of the CRP, including the common good, sovereignty, democracy, and the rule of law. The Court emphasised the importance of evaluating each transfer of authority in light of the development of Poland's constitutional identity.³⁷ Third, The Constitutional Court concluded that the foundational principles stated in Chapter I of the Polish Constitution, which contributed to the common good, should not precede the provisions in Chapter II. The Court conveyed its conviction that while the common good holds significance, issues related to human rights should not be neglected when fulfilling public responsibilities, regardless of an individual's nationality.³⁸ Fourth, the Constitutional Court allowed the establishment of limitations on human rights based on nationality criteria.³⁹ Fifth, the Court stressed that certain constitutional rights, such as the right to public information and the right to vote in local elections, are extended to foreigners by legislators.⁴⁰ Sixth, the Constitutional Court emphasised that the principle of loyalty deter-

35 See in general: Syryt, 2023, pp. 283–309.

36 Decision of the Polish Constitutional Tribunal of 18 January 2012, Kp 5/09, OTK ZU no. 1/A/2012, item 5.

37 Decision of the Polish Constitutional Tribunal of 26 June 2013, K 33/12, OTK ZU no. 5/A/2013, item 63.

38 Decision of the Polish Constitutional Tribunal of 29 April 2003, SK 24/02, OTK ZU no. 4/A/2003, item 33.

39 Decision of the Polish Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU no. 7/2000, item 260.

40 Decision of the Polish Constitutional Tribunal of 31 May 2004, K 15/04, OTK ZU no. 5/A/2004, item 47.

mines the legal situation not only for citizens but also for foreigners and other private entities subject to Polish authority.⁴¹ Seventh, the Constitutional Court did not negate the admissibility of the continued storage of telecommunications data concerning foreigners under Polish authority, especially if there were serious and justified suspicions regarding their involvement in activities threatening national security.⁴² Eighth, the Constitutional Court underscored that foreigners in Poland must adhere to Polish law, even in cases of forced migration.⁴³ Ninth, the Constitutional Court defined the EU order as autonomous, although it was genetically based on international law. This underscores the importance of preserving Poland's constitutional values.⁴⁴ The Constitutional Court clarified that the right to fair trial applies to everyone, including Polish citizens, foreigners, and stateless individuals.⁴⁵ Eleventh, the Constitutional Court affirmed that the privilege of participating in local government elections could be broadened to encompass EU citizens affiliated with local communities. The Court stressed the necessity for a meticulous definition of the extent of transferred competencies, excluding delegating competencies linked to fundamental matters delineating specific state entities' jurisdiction. Moreover, it emphasised that the transfer of competencies should not compromise the existence of Polish state institutions. Furthermore, the Court expressed its belief that EU law provisions should not contradict the CRP and should not impede Poland's functioning as a sovereign and democratic state.⁴⁶ The Constitutional Court indicated that the presumption of the constitutionality of EU Treaties can only be rebutted when there is no interpretation of the treaty and the CRP that allows for the compatibility of treaty provisions with the CRP. The Constitutional Court stressed that it must consider the context of the consequences of its judgment in terms of constitutional values and principles and the impact of the decision on state sovereignty and its constitutional identity. The Constitutional Court explained that, regardless of the difficulties associated with determining a detailed catalogue of competencies that cannot be transferred, issues subject to an absolute prohibition on transfer should encompass provisions that define the guiding principles of the CRP and provisions concerning individual rights that determine the identity of the state, particularly the requirement to protect human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity, the requirement for

41 Decision of the Polish Constitutional Tribunal of 7 February 2001, K 27/00, OTK ZU no. 2/2001, item 29.

42 Decision of the Polish Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU no. 7/A/2014, item 80.

43 Decision of the Polish Constitutional Tribunal of 11 April 2000, K 15/98, OTK ZU no. 3/2000, item 86.

44 Decision of the Polish Constitutional Tribunal of 19 December 2006, P 37/05, OTK ZU no. 11/A/2006, item 177.

45 Decision of the Polish Constitutional Tribunal of 20 September 2006, SK 63/05, OTK ZU no. 8/A/2006, item 108.

46 Decision of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU no. 5/A/2005, item 49.

a better implementation of constitutional values, and the prohibition of delegating constitutional powers and competencies to create competencies.⁴⁷ Additionally, on 7 October 2021, the Constitutional Court issued a new judgment regarding EU Law. The Constitutional Court ruled that specific provisions of the Treaty on the European Union⁴⁸ could threaten Poland's sovereignty and constitutional identity. The Constitutional Court emphasised the importance of interpreting EU law under the values and principles of the CRP, expressing concerns about the potential violation of national sovereignty by EU law. The Constitutional Court stressed the need to balance preserving member states' sovereignty and the EU's identity. The Court highlighted that the interpretation of EU provisions that eliminate national sovereignty or pose a threat to national identity was inconsistent with the Lisbon Treaty.⁴⁹

In Hungary,⁵⁰ the Constitutional Court first emphasised its power to assess whether the joint exercise of competences under Art. E (2) FLH⁵¹ violates human dignity, fundamental rights, the sovereignty of Hungary, or its identity based on its historical constitution. However, according to the Court, such an analysis is permissible only in exceptional situations and as a last resort in constitutional dialogue among member states and within the scope of the Constitutional Court's jurisdiction. The Constitutional Court stressed that in issues related to asylum and migration, both aspects of sovereignty and constitutional identity must be considered. Furthermore, the Constitutional Court emphasised the importance of constitutional identity by presenting a list of fundamental values covered by this domain, such as freedoms, the separation of powers, republican forms of government, public autonomy, religious freedom, the proper exercise of power, parliamentarism, equality of rights, respect for the rule of law, and the protection of nationalities residing in Hungary. From the perspective of the Constitutional Court, these values are considered crucial and can only be removed from Hungary in the case of a permanent loss of sovereignty and independence. The Constitutional Court stressed that sovereignty and constitutional identity are interconnected in various ways and that both elements must be considered simultaneously in specific cases.⁵² Second, the Constitutional

47 Decision of the Polish Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU no. 9/A/2010, item 108.

48 Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

49 Decision of the Polish Constitutional Tribunal of 7 October 2021, K 3/21, OTK-A 2022, item 65; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007, p. 1–271).

50 See in general: Berkes, 2023, pp. 9–31.

51 According to Art. E) (2) FLH, with a view to participating in EU as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the “Founding Treaties”, exercise some of its competences arising from FLH jointly with other Member States, through the institutions of EU. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in FLH and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.

52 Decision of Hungarian Constitutional Court 22/2016 (XII. 5.).

Court analysed the potential consequences of not using the competences mentioned in Article E (2) FLH. The Constitutional Court expressed concerns that failing to enforce these powers could lead to the permanent and mass settlement of foreigners in Hungary without democratic authorisation, potentially violating Hungary's right to identity and self-determination based on human dignity. The failure of Hungary to enforce these competencies could result in significant and uncontrolled changes to the traditional social environment of Hungary's residents. The Constitutional Court emphasized that the principle of preserving sovereignty applies to all competences that have not been exclusively transferred to the EU under the Treaty on the Functioning of the European Union (hereinafter: TFEU).⁵³ The Constitutional Court highlighted the interconnection between constitutional identity and sovereignty. In this context, the Court recognised that preserving Hungary's constitutional identity is closely related to its sovereignty and that maintaining sovereignty is crucial for protecting constitutional identity. The Constitutional Court also emphasised the importance of safeguarding values constituting Hungary's constitutional identity, such as linguistic, historical, and cultural traditions. These values, which have evolved throughout the country's history, are considered inviolable legal facts that international agreements or changes in the FLH cannot change. Importantly, the Constitutional Court emphasised the need to protect human dignity, even in the face of EU actions that may pose a threat to that dignity, expanding the understanding of one's constitutional competencies and allowing for the non-application of EU law in exceptional cases and under certain conditions, which, in the Court's opinion, enhances control over fundamental rights.⁵⁴ Third, the Constitutional Court noted that the exercise of competencies through EU institutions cannot exceed what is necessary according to international agreements. Emphasising the principle of reserved sovereignty, the Constitutional Court stated that the joint exercise of competence cannot violate Hungary's inalienable right to determine its territorial unit, population, form of government, or state structure. On the other hand, in the same judgment, the Constitutional Court ruled that a person who is not a Hungarian citizen and enters Hungary through a country where he or she was not persecuted or threatened with persecution has no right to apply for asylum as a fundamental subjective right. The Constitutional Court stressed that, in such a situation, these individuals have a fundamental right to have their asylum application considered under the rules for granting asylum. The Constitutional Court also noted that Hungary, as a sovereign state, independently determines its constitutional organisation and legal system without subjecting its sovereignty to other states. In this regard, sovereign power includes full and exclusive control over people residing in Hungary.⁵⁵ Fourth, the Constitutional Court pointed out that the FLH establishes legal conditions for granting asylum,

53 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

54 Decision of Hungarian Constitutional Court 32/2021 (XII. 20.).

55 Decision of Hungarian Constitutional Court 2/2019 (III. 5.); In the scope of the last sentence also: Decision of Hungarian Constitutional Court 9/2018 (VII. 9.).

determining whether a particular person qualifies for international protection. The Court also emphasised that individuals applying for international protection have certain guarantees under Hungarian law. Additionally, as in the previous case, the Constitutional Court stated that protection was not granted to individuals who entered Hungary through a country where they were not persecuted or threatened with persecution.⁵⁶

First, in the Czech Republic,⁵⁷ firstly, in 2006, the Constitutional Court ruled that the delegation of competencies from national bodies to EU institutions was a conditional process. According to the Court, the Czech Republic retains sovereignty, and delegated competencies are subject to formal and material conditions. This formal condition restricts delegation to compliance with the fundamentals of Czech sovereignty. The material condition pertains to how delegated competencies are exercised and how they must safeguard the essence of the rule of law. The Constitutional Court serves as a guardian and is ready to intervene when necessary.⁵⁸ Second, in 2006, the Constitutional Court stated that the courts could not assess individual EU norms unless EU developments threatened the essence of the constitutional order. The Court emphasised this was an exceptional and unlikely situation but allowed individual assessments. Additionally, the Court stressed that it could assess the constitutionality of a specific EU act if it was doubtful because of a conflict with essential elements of the democratic rule of law. Importantly, the Court noted that EU developments did not need to threaten these elements; it was sufficient if a specific EU norm violated them. Regarding the laws adopted to implement EU laws, the Constitutional Court mentioned that if the implemented EU norms leave no discretion in choosing appropriate measures, they lack the competence to assess their compatibility with the Czech Republic's constitutional order. However, it was also noted that there are certain exceptions.⁵⁹ Third, the Constitutional Court highlighted that the primacy of EU Law in the Czech Republic depends on whether EU legal norms are valid and effective (in the context of the Lisbon Treaty, the Constitutional Court, while assessing this legal act, found that it was not yet valid or effective). The Court also pointed out that the fundamental rights and freedoms of individuals, principles of democracy, people's sovereignty, the separation of powers, and the concept of the rule of law constitute the essential elements of a democratic rule of law. This could be relevant to the constitutional identity and the material conditions mentioned earlier.⁶⁰ Fourth, the Constitutional Court rejected a judgment of the Court of Justice of the European Union (CJEU), deeming it contrary to Czech law, and indicated that the CJEU exceeded the competencies transferred by the Czech Republic to the

56 Decision of Hungarian Constitutional Court 3/2019 (III. 7.).

57 See in general: Otta, 2023, pp. 211–237.

58 Decision of Czech Constitutional Court, 8 March 2006, Case No. ÚS 50/04.

59 Decision of Czech Constitutional Court, 3 May 2006, Pl. ÚS 66/04.

60 Decision of Czech Constitutional Court, 26 November 2008, Pl. ÚS 19/08.

EU under Art. 10a CCR.⁶¹ Fifth, in 2020, the same Constitutional Court expressed the belief that only the CJEU could issue binding interpretations of EU Law⁶² and also stated that it was obligated to refer preliminary questions to the CJEU if the interpretation of EU Law was unclear.⁶³ Sixth, the Constitutional Court noted that Arts. 78 (3) and 79 (1) TFEU essentially transposed Art. 64 (2) of the treaty establishing the European Community,⁶⁴ with the change brought about by the Lisbon Treaty strengthening the European Parliament's role in EU decisions. Additionally, the Constitutional Court observed that Art. 79 (5) TFEU explicitly grants Member States the right to determine the volume of third-country nationals entering their territories to seek work or engage in business, allowing the Lisbon Treaty to leave the regulatory mechanism of the movement of third-country nationals to Member States. In light of this, the Constitutional Court considered this regulation acceptable under Art. 10a CCR and not in conflict with the constitutional order.⁶⁵ Seventh, the Constitutional Court emphasised that ensuring effective migration control can be considered a valid and lawful objective of the legislation.⁶⁶ Eighth, the Constitutional Court pointed out that the right to asylum is not an absolute entitlement. In this context, the Constitutional Court considered that neither the CFRF nor international human rights agreements to which the Czech Republic is a party mandate the automatic granting of asylum to applicants. Importantly, the Constitutional Court underlined that the decision to refuse political asylum to foreigners does not necessarily violate Art. 43 CFRF.⁶⁷ Ninth the Constitutional Court recognised that foreigners do not have a constitutionally guaranteed fundamental right to enter and reside in the territory of the Czech Republic, as the sovereign state decides without discrimination under what conditions foreigners can stay in its territory.⁶⁸ Tenth, the Constitutional Court concluded that the Czech legislature had significant discretion in determining deportation penalties, including imposing them on foreigners for an indefinite period, under the constitutional order.⁶⁹

In Slovakia,⁷⁰ the Constitutional Court first confirmed its authority to assess the compatibility of national law with primary EU law, classifying it as equivalent to international treaties. The Constitutional Court based its interpretation on CSR, which

61 Decision of Czech Constitutional Court, 31 January 2012, Pl. ÚS 5/12; According to Article 10a CCR, an international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution. An approval of the Parliament is required to ratify such international agreement unless a constitutional law requires an approval from a referendum.

62 Decision of Czech Constitutional Court, 3 November 2020, Pl. ÚS 10/17.

63 Decision of Czech Constitutional Court, 7 April 2020, Pl. ÚS 30/16.

64 Treaty establishing the European Community, OJ C 325, 24.12.2002, pp. 33–184.

65 Decision of Czech Constitutional Court, 3 November 2009, Pl. ÚS 29/09.

66 Decision of Czech Constitutional Court, 27 November 2018, Pl. ÚS 41/17.

67 Decision of Czech Constitutional Court, 30 January 2007, IV ÚS 553/06.

68 Decision of Czech Constitutional Court, 9 December 2008, Pl. ÚS 26/07.

69 Decision of Czech Constitutional Court, 18 September 2014, III ÚS 3101/13.

70 See in general: Gregová, 2023, pp. 111–132.

assigns the Constitutional Court to assess the compatibility of national regulations with CSR, constitutional laws, and international treaties. Importantly, the Constitutional Court established the principle that EU primary law takes precedence over Slovak law in accordance with Art. 7 (2) CSR.⁷¹ However, the Constitutional Court introduced a self-limiting approach. This means that if the Constitutional Court finds that a national law is incompatible with CSR, there is usually no need for further examination of its compatibility with EU law. In this matter, the Constitutional Court also addressed a hypothetical situation in which national law is in line with CSR but irreconcilable with EU primary law, and this issue cannot be resolved through the principles of EU law interpretation. In such cases, the Constitutional Court suggests amending CSR, but this decision falls beyond the competence of the Constitutional Court in Slovakia.⁷² Second, the Constitutional Court emphasised the commitment to respect human rights, drawing on the opinions and positions of international human rights bodies. The Court referred to reports from the Norwegian Helsinki Committee⁷³ and the intervention of the Commissioner for Human Rights of the Council of Europe submitted to the European Court of Human Rights⁷⁴ to use these documents as the basis for its decision and assessment of individuals seeking asylum in Greece. This case illustrates the Constitutional Court's dedication to protecting fundamental rights in line with international human rights norms.⁷⁵ Third, the Constitutional Court stressed the importance of expeditious decision-making by courts in the context of detention decisions. The Constitutional Court believed that it is the task of the courts to strike a balance between the right to a prompt decision in cases of deprivation of liberty under Art. 5 (4) of the European Convention on Human Rights (hereinafter: ECHR)⁷⁶ and the right to maintain minimal procedural standards in the investigative process.⁷⁷ Fourth, in its jurisprudence, the Constitutional Court interpreted the substantive core doctrine, which included human rights, democracy, and the rule of

71 According to Art. 7 (2) CSR, the Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120 (2) CSR.

72 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 3/09, 26 January 2011.

73 Norwegian Helsinki Committee (NHC), NOAS and Aitima, *Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece*, 2009.

74 Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 2, of the European Convention on Human Rights, Application No. 30696/09 M.S.S. v. Belgium and Greece, Strasbourg, 31 May 2010, CommDH.

75 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 110/2011, 31 May 2011.

76 European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 24 October 2023).

77 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 147/2013, 9 October 2013.

law. It seems that this can be compared with constitutional identity.⁷⁸ Fifth, the Constitutional Court noted that in the context of marriage between a foreign national and a Slovak citizen, the criteria set out in Art. 8 (2) ECHR require a proper legal assessment of the refusal to grant permanent residence to determine whether such a refusal may be considered an interference with the right to respect for family life in a given case.⁷⁹ Sixth, the Court explained the relationship between detention and deportation proceedings. The Constitutional Court emphasised that although these processes are separate, they are not completely independent or isolated from each other. The Constitutional Court also pointed out that the restriction on personal liberty in cases of detention for deportation was closely related to the purpose of detention itself.⁸⁰ Seventh, the Constitutional Court emphasised the broad discretion of state authorities in regulating issues related to foreigners' stay, especially in the area of the right to long-term residence. The Constitutional Court added that there is no subjective right to obtain permanent residence and that the Slovak authorities have significant discretion in this matter.⁸¹ Eighth, the Constitutional Court noted that, according to Slovak law, one of the legitimate reasons for revoking the right to temporary residence is the discovery of circumstances justifying the rejection of the application, including situations in which a third-country national provides false or misleading information, presents false documents, or uses documents belonging to another person.⁸² Ninth, the Constitutional Court emphasised the need to balance the protection of private and family lives with the interests of state security. The Constitutional Court noted that in some cases, to ensure the interests of state security, it is necessary to consider the criminal history of foreigners applying for one form of legal residence within the country. However, according to the Constitutional Court, examining whether State interference, including public authority, is justified in the case of national laws concerning foreigners is inevitable.⁸³ Tenth, in 2023, the Constitutional Court issued a judgment stating that EU Law has a unique character defined by the CJEU, establishing a separate legal order binding on member states and their courts. The Constitutional Court also emphasised that EU law establishes the principle of the primacy of its provisions in cases where national regulations cannot be interpreted following the requirements of EU law. Interestingly, according to the Constitutional Court, in such cases, national courts are obligated to fully consider EU law when making decisions.⁸⁴

78 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 7/2017, 31 May 2017; Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 21/2014, 30 January 2019; Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 16/2019, 2 April 2020; Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 8/2022, 25 May 2022.

79 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 331/09, 16 December 2009.

80 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 264/09, 19 October 2010.

81 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 480/2014, 12 February 2015.

82 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 414/2016, 21 June 2016.

83 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 675/2017, 10 November 2017.

84 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 15/2020, 15 March 2023.

In Serbia,⁸⁵ the Constitutional Court frequently rules individual cases based on constitutional complaints.⁸⁶ It is rare for a court's decision to pertain to general matters,⁸⁷ although there is sometimes room to interpret a general standard. Nevertheless, a few statements from the Court of Serbia concerning asylum and migration are worth noting. First, the Constitutional Court found, relying on European Court of Human Rights (hereinafter: ECtHR) jurisprudence, a violation of Art. 32 (1) CRS⁸⁸ because it determined that the Administrative Court had infringed the applicant's right to a fair trial by issuing a judgment lacking proper reasoning. The Constitutional Court also emphasised the importance of considering whether a person deserves complementary protection, especially after it had been determined during judicial proceedings that refugee status could not be granted.⁸⁹ Second, based on ECtHR jurisprudence, the Constitutional Court emphasised that the list of safe countries in Serbia could not be automatically applied without considering reports from the United Nations High Commissioner for Refugees.⁹⁰ Third, related to the previous case, the Constitutional Court found that the list of safe countries in Serbia could not be applied automatically without thoroughly assessing whether a specific country could be considered safe in each case. The Constitutional Court stressed that asylum authorities should thoroughly examine all complaint documentation. The Constitutional Court emphasised that an asylum application should not be rejected solely because the person was transported through a country on the list of safe countries if the asylum procedure in that country was inconsistent with international law.⁹¹ Fourth, the Constitutional Court emphasised that the right to freedom is a fundamental constitutional right and, referring to ECtHR jurisprudence, noted that depriving someone of their freedom is subject to specific legal requirements. The Constitutional Court underlined a distinction between the right to freedom and freedom of movement. The Constitutional Court also observed that Serbia has the right to control its borders and establish the identities of individuals staying illegally without identification.⁹² Fifth, the Constitutional Court emphasised that in the context of an allegation of discrimination, complaining individuals must prove that

85 See in general: Krstić, 2023, pp. 133-156.

86 Decision of Serbian Constitutional Court, Uz-5331/2012, 24 December 2012; Decision of Serbian Constitutional Court, Uz-3651/2015, 27 July 2022; Decision of Serbian Constitutional Court, Uz-6006/2016, 19 December 2018; Decision of Serbian Constitutional Court, Uz-1189/2015, 1 April 2021.

87 Decision of Serbian Constitutional Court, IUo-812/2012, 24 April 2013; Decision of Serbian Constitutional Court, IUo-45/2020, 25 October 2020.

88 According to Article 32 (1) CRS, everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them.

89 Decision of Serbian Constitutional Court, Uz-6596/2011, 30 October 2014.

90 Decision of Serbian Constitutional Court, Uz-1286/2012, 29 March 2012.

91 Decision of Serbian Constitutional Court, Uz-3548/2013, 19 September 2013.

92 Decision of Serbian Constitutional Court, Yz 1823/2017, 20 January 2021.

they were treated differently from individuals in a similar situation. In this context, and citing ECtHR jurisprudence, the Constitutional Court highlighted that discrimination occurs when a person is treated less favourably than another person in a similar situation.

In Croatia,⁹³ the Constitutional Court emphasised the importance of aligning domestic case law with international legal obligations arising from the ECHR. The Court noted that it is essential for Croatia to adhere to relevant legal justifications and ECtHR case law because these standards constitute the binding norms of international law for Croatia.⁹⁴ Second, the Constitutional Court stated that, due to the compatibility of the referendum question with EU law, the CRC, given its legal force, takes precedence over EU law.⁹⁵ Third, the Constitutional Court decided not to conduct investigations into the application of EU Law on its initiative in cases where applicants failed to substantiate their claims regarding violations of EU migration law and did not refer to any judgments of the CJEU.⁹⁶ Fourth, the Constitutional Court found a violation of the CRC when the court did not apply the *acquis* of the European Union within the Dublin system, a common European asylum protection system. Despite the complainant's lack of reference to EU law, the Constitutional Court invoked the principle of mutual trust among the member states participating in the Dublin system. In this context, the Constitutional Court emphasised that the principle of mutual trust imposes an obligation on Croatian authorities, including judicial authorities, to respect decisions made by the relevant bodies of other countries participating in the common Dublin system.⁹⁷ Fifth, the Constitutional Court emphasised that prohibiting inhuman or degrading treatment is one of the most important values in democratic societies. In this context, the Constitutional Court stressed that if there were legitimate grounds to believe that an individual in the receiving state would be exposed to treatment, contrary to Art. 3 ECHR, under such circumstances, the individual could not be deported to that country. The Constitutional Court believes that national authorities have a duty to thoroughly examine the conditions in a third country, particularly the availability and credibility of its asylum system and how the authorities of that third country implement their asylum regulations in practice.⁹⁸ Sixth, the Constitutional Court emphasised the importance of two key principles: equivalence and effectiveness. The Constitutional Court underlined that these principles, based on established CJEU jurisprudence, require that procedural provisions concerning the protection of rights under EU law be at least as favourable as those concerning similar national actions (the principle of equivalence) and should not be constructed to practically hinder or excessively hinder the use of

93 See in general: Ofak, 2023, pp. 187–209.

94 Decision of Croatian Constitutional Court, U-III-3304/2011, 23 January 2013.

95 Decision of Croatian Constitutional Court, U-VIIR-1159/2015, 8 April 2015.

96 Decision of Croatian Constitutional Court, U-III-6958/2014, 27 February 2018.

97 Decision of Croatian Constitutional Court, U-III-208/2018, 10 July 2018.

98 Decision of Croatian Constitutional Court, U-III-4865/2018, 4 March 2021.

rights granted by EU law (the principle of effectiveness).⁹⁹ Seventh, the Constitutional Court explained the principles of the applications for international protection. The Constitutional Court highlighted the importance of assessing circumstances “*ex nunc*”, meaning that the assessment should consider facts known or knowable by the relevant state authorities when deciding on international protection applications. The Constitutional Court stated that when granting international protection, the state must assess the risk of ill-treatment in the country where the applicant would be returned. According to the Constitutional Court, this assessment should focus on the foreseeable consequences, considering the country’s general situation and the applicant’s situation. In this context, the Constitutional Court also added that the relevant authorities must consider all relevant evidence and that the assessment of this threat should be rigorous. However, the Constitutional Court noted that international protection applicants may have difficulty providing evidence due to their particular circumstances; therefore, the benefit of the doubt should be applied when assessing the credibility of their statements and documents. The Constitutional Court emphasised that even if some details of the applicant’s testimony seem unconvincing, it does not necessarily weaken the overall credibility of their claim. Additionally, the Constitutional Court noted that in the case of victims of domestic violence, there was a need for sensitivity and understanding during their interviews because of the psychological effects of violence.¹⁰⁰

In Slovenia,¹⁰¹ the Constitutional Court first identified two possible violations of non-refoulement principles. These involve directly deporting an individual to a country where they face persecution or indirectly deporting them to a third country, which could subsequently deport them to a place of persecution.¹⁰² Second, in a case concerning the recognition of family members in the context of international protection, the Constitutional Court referred to Art. 14 CRSa.¹⁰³ Even though this constitutional provision does not explicitly mention homosexuality as a legally protected category, the Constitutional Court indicated that the non-discrimination principle also protects same-sex relationships as it fits within other personal circumstances. Considering Slovenia’s legal provisions concerning the right to unite with family members (in terms of international protection), the Constitutional Court noted that this includes same-sex spouses regardless of whether they are officially registered, married in another country, or living together in a partnership.¹⁰⁴ Third,

99 Decision of Croatian Constitutional Court, U-III-424/2009 and U-III-1411/2009, 17 December 2019.

100 Decision of Croatian Constitutional Court, U-III-557/2019, 11 September 2019.

101 See in general: Cvikl and Flander, 2023, pp. 51–87.

102 Decision of Slovenian Constitutional Court, U-I-59/17, Official Gazette of the Republic of Slovenia, No. 62/2019, 18 September 2019.

103 According to Article 14 CRSa, in Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. All are equal before the law.

104 Decision of Slovenian Constitutional Court, U-I-68/16, Up-213/15, Official Gazette of the Republic of Slovenia, No. 49/2016, 16 June 2016.

in the context of the freedom of movement for asylum seekers, the Constitutional Court found that the obligation to conduct interviews and obtain prior consent for residence at a private address may constitute proportional limitations on freedom of movement, if necessary, to ensure satisfactory living conditions. However, the Constitutional Court has also stated that restrictions on movements operating based on automatism are disproportionate and unconstitutional.¹⁰⁵ Fourth, the Constitutional Court has pointed out that a request to extend international protection should be treated the same as a new application for international protection. The Constitutional Court disagreed with the view that adopting such a rule would violate the principle of efficiency, which aims to save time and cost in the procedure. The Constitutional Court affirmed that applicants for international protection have the constitutional right for both administrative bodies and courts to consider all their claims, whether based on previous or new claims.¹⁰⁶ Fifth, the Constitutional Court confirmed the right to unite with family members (international protection), even for relatives not formally recognised as family members.¹⁰⁷ Sixth, to increase the efficiency of legal asylum proceedings in Slovenia, a decision was made to introduce and apply simplified procedures. In this regard, the Constitutional Court determined that if an asylum seeker claims any form of violence or persecution, the use of any simplified procedure in such a case is excluded.¹⁰⁸ Seventh, the Constitutional Court emphasised that every decision to reject an asylum application must involve in-depth assessments to ensure that the applicant is not exposed to life or health risks due to torture, mistreatment, or similar actions in their country of origin. The Constitutional Court stressed that national authorities should not oversimplify this task by presenting general or naïve explanations. Drawing on the ECHR and ECtHR jurisprudence, the Constitutional Court recognised the need for rigorous scrutiny in this regard.¹⁰⁹ Eighth, the Constitutional Court also emphasised that persistently ignoring an applicant's request for supplementary protection could significantly violate his or her right to a fair trial.¹¹⁰

In Romania,¹¹¹ the Constitutional Court first observed that these structures do not acquire super-competence or sovereignty by transferring certain competencies to EU structures. The Constitutional Court stated that EU member states decided

105 Decision of Slovenian Constitutional Court, U-I-95/08, Up-1462/06, Official Gazette of the Republic of Slovenia, No. 111/2008, 15 October 2008.

106 Decision of Slovenian Constitutional Court, U-I-189/14, Up-663/14, Official Gazette of the Republic of Slovenia, No. 82/2015, 15 October 2015.

107 Decision of Slovenian Constitutional Court, U-I-309/13, Up-981/13, Official Gazette of the Republic of Slovenia, No. 6/2015, 14 January 2015.

108 Decision of Slovenian Constitutional Court, Up-96/09, Official Gazette of the Republic of Slovenia, No. 57/2009, 09 July 2009.

109 Decision of Slovenian Constitutional Court, Up-763/09, Official Gazette of the Republic of Slovenia, No. 80/2009, 17 September 2009.

110 Decision of Slovenian Constitutional Court, Up-2963/08, Official Gazette of the Republic of Slovenia, No. 22/2009, 05 March 2009.

111 See in general: Nicu, 2024.

to collectively exercise certain powers that traditionally belonged to the sphere of national sovereignty. The Constitutional Court also noted that, in the current era of global challenges, international development, and global-scale human communication, national sovereignty can no longer be perceived as absolute and indivisible without risking unacceptable isolation.¹¹² Second, the Constitutional Court affirmed that the essence of the EU lies in member states relinquishing certain competencies to achieve common goals without ultimately infringing upon their national constitutional identities.¹¹³ Third, the Constitutional Court emphasised that member states retain the powers essential for maintaining their constitutional identity. The Constitutional Court underlined that the transfer of powers and establishing new guidelines within the already transferred competencies fell within the constitutional margin of freedom for member states.¹¹⁴ Fourth, the Constitutional Court determined that Romania accepted that, in areas where exclusive competence belongs to the EU, regardless of international treaties, implementing the resulting commitments should adhere to EU rules. Thus, under the compatibility clause in Art. 148 CR,¹¹⁵ Romania cannot adopt a normative act conflicting with the commitments made by an EU member state. Additionally, the Constitutional Court stressed that Romania faithfully adhered to obligations arising from its accession to the EU without encroaching upon its exclusive competencies. However, the Constitutional Court emphasised that this is subject to a constitutional limit expressed by what is defined as a national constitutional identity.¹¹⁶ Fifth, the Constitutional Court noted that the CR reflects the will of the people, implying that it cannot lose its binding force solely because

112 Decision of Romanian Constitutional Court, no. 148, 16 April 2003, published in the Official Monitor of Romania, no. 317, 12 May 2003.

113 Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012.

114 Decision of Romanian Constitutional Court, no. 104, 6 March 2018, published in the Official Monitor of Romania, no. 446, 29 May 2018.

115 According to Art. 148 CR, (1) Romania's accession to the constituent treaties of EU, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of EU, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) Such a regulation shall also apply accordingly for the accession to the acts revising the constituent treaties of EU. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the content of Article 148 (2) CR are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the EU institutions for approval.

116 Decision of Romanian Constitutional Court, no. 887, 15 December 2015, published in the Official Monitor of Romania, no. 191, 15 March, 2016; Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012; Decision of Romanian Constitutional Court, no. 64, 24 February 2015, published in the Official Monitor of Romania, no. 286, 28 April 2015.

of the discrepancies between its provisions and European provisions.¹¹⁷ Sixth, the Constitutional Court expressed the belief that the right to freedom of movement must be restricted by a judge.¹¹⁸ Seventh, the Constitutional Court observed that when the decision at the first instance is both final and immediately enforceable, it breaches the right to defence under Art. 24 (1) of the CR,¹¹⁹ particularly affecting potential refugee applicants who are unable to secure an effective and suspensive review of the first-instance decision.¹²⁰ Eighth the Constitutional Court ruled that legal regulations foreseeing the lack of the possibility to directly complain about the field of international protection and the absence of the possibility to file a complaint through a representative violated Art. 21 CR,¹²¹ which guaranteed the principle of free access to justice.¹²²

5. Categorization of the role of constitutional court in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania concerning migration and refugee affairs

After presenting the selected positions of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania, it is time to categorise their roles in migration and asylum issues. These two Parameters were decisive. The first Parameter is the jurisprudence of the National Constitutional Court on migration and asylum. In this case, the national constitutional court can adopt two general positions: a) it pronounces migration and asylum matters either specifically (concerning the interpretation of specific provisions) or generally (regarding the interpretation of legal principles), or b) it does not pronoun migration and asylum matters. This Parameter is substantive, as it concerns the interpretation of migration, refugees, or asylum law. It mostly has an internal character, as it mostly pertains to domestic law. However, in the latter

117 Decision of Romanian Constitutional Court, no. 80, 16 February 2014, published in the Official Monitor of Romania, no. 246, 7 April 2014.

118 Decision of Romanian Constitutional Court, no. 106, 11 April 2001, published in the Official Monitor of Romania, no. 416, 26 July 2001.

119 According to Art. 24 (1) CR, the right to defense is guaranteed.

120 Decision of Romanian Constitutional Court, no. 176, 29 May 2001, published in the Official Monitor of Romania, no. 374, 11 July 2001.

121 According to Art. 21 CR, every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests. The exercise of this right shall not be restricted by any law. All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term. Administrative special jurisdiction is optional and free of charge.

122 Decision of Romanian Constitutional Court, no. 604, 20 May 2008, published in the Official Monitor of Romania, no. 469, 25 June 2008.

case, international or EU law interpretations may exist. Nevertheless, even in such a case, it will still be the interpretation of the law applicable within the given country and thus still internal. This is true with one exception, where the national constitutional court may see its obligation to use preliminary ruling procedures for the CJEU as dependent on the second Parameter. The second Parameter also determines whether the national constitutional court speaks on migration and asylum matters and represents the voice of the highest national constitutional judicial body or the highest constitutional judicial body in the respective country, even above international bodies. If the National Constitutional Court has not yet spoken about migration and asylum matters in its jurisprudence, the second Parameter indicates its potential future stance. The second Parameter involves checking whether and, if so, how the national constitutional court speaks about its relationship with EU law. The National Constitutional Court adopted three positions. It can be argued that a) national law (constitutional), including the competencies of the national constitutional court, is above EU law; b) national law (constitutional), including the competencies of the national constitutional court, is generally above EU law and claims that the national constitutional court does not intend to use its competences for now, but will not hesitate to do so in an exceptional situation requiring a response (reserved right to intervene); and c) national law (constitutional) is under EU law. Because of this Parameter, the chapter presented the positions (case law) of selected national constitutional courts on this subject, although not necessarily all judicial cases were related to competence in migration and asylum matters. National constitutional courts prefer to take a general stance in this area, presenting the principle of interpreting the relationship between domestic and EU law. However, such a general position can reveal much about understanding this relationship within a specific area of competence. This Parameter is institutional or systemic as it concerns the interpretation of legal principles within the system of a given country. This is the answer to the question of the hierarchy and level of importance of domestic law and the national constitutional courts to EU law, including CJEU jurisprudence. This Parameter also has an external character, as it concerns the interpretation of the systemic or institutional relationship of the state with the international organisation, the EU. It is worth noting that in the case of these two Parameters, it is still possible that the National Constitutional Court has not issued any decisions that fit the outlined topics. If this is the case, it will signify a question mark because each of the analysed national constitutional courts from the considered countries can issue such judgments, as per the analysis of the relevant constitutional law provisions (mentioned above).

It's worth noting that the substantive internal and systemic/institutional external Parameters are unequal. In the case of the EU member states, substantive internal Parameters are less important than systemic/institutional external Parameters. This is because if a national constitutional court sees its position to the EU as an executor of EU law, where EU law is above national (constitutional) law and is understood under CJEU jurisprudence, in its substantive jurisprudence,

such a national constitutional court would have no decision-making margin at all or a minimal one. This means that the role of a national constitutional court in migration and asylum matters either does not exist or is insignificant. Hence, systemic/institutional external Parameters might determine the significance of substantive internal Parameters. However, without substantive jurisprudence from the National Constitutional Court, it is impossible to present an interpretation of the law made by the National Constitutional Court regarding migration and asylum matters. In such a situation, one can only say that the potential interpretation of such a national constitutional court might have legally significant or insignificant importance, but relevant jurisprudence is necessary to determine the image of this interpretation. This leads to the conclusion that the presented Parameters form a complementary system. Based on this, the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can be assigned to one of the following categories: a) strong specific, b) strong unspecific, c) moderate specific, d) moderate unspecific, e) weak specific, f) weak unspecific, g) unknown strong specific, or h) unknown strong unspecific.

Considering the outlined assumptions and the jurisprudence of the National Constitutional Courts thus far, Table 1 presents the results of the correlation between this jurisprudence and Parameter 1 (substantive internal Parameter, where the variants are: a) the national constitutional court expresses itself generally (regarding the interpretation of legal principles) and/or specifically (concerning the interpretation of specific provisions) on migration and asylum matters; b) the national constitutional court has not yet expressed itself on migration and asylum matters) and Parameter 2 (systemic/institutional external Parameter, where the variants are: a) the national constitutional court speaks about the relationship with EU law and argues that national law (constitutional), including the competences of the national constitutional court, is above EU law; b) the national constitutional court speaks about the relationship with EU law and asserts that national law (constitutional), including the competences of the national constitutional court, is generally above EU law and claims that the national constitutional court does not intend to use its competences for now but will not hesitate to do so in an exceptional situation requiring a response (reserved right to intervene); c) the national constitutional court speaks about the relationship with EU law and argues that national law (constitutional), including the competences of the national constitutional court, is under EU law; d) the national constitutional court has not yet expressed itself on the relationship with EU law).

Table 1. Correlation of jurisprudence of national constitutional courts with substantive internal Parameter and systemic/institutional external Parameter¹²³

Country	Parameter 1		Parameter 2			
	variant a)	variant b)	variant a)	variant b)	variant c)	variant d)
Poland	☒	☑	☑	☒	☒	☒
Hungary	☑	☒	☑	☒	☒	☒
Czechia	☑	☒	☒	☒	☑	☒
Slovakia	☑	☒	☒	☒	☑	☒
Serbia	☑	☒	☒	☒	☒	☑
Croatia	☑	☒	☑	☒	☒	☒
Slovenia	☑	☒	☒	☒	☒	☑
Romania	☑	☒	☑	☒	☒	☒

Table 1 indicates the classification of the jurisprudence of the national constitutional court into two variants for Parameter 1 and four variants for Parameter 2. This classification is based on the rule that the national constitutional court of a specific country should be assigned the variant most consistent with its jurisprudence. However, this classification requires further explanation. In Poland, although the National Constitutional Court takes a firm stance on its relationship with EU Law, it has not yet been pronounced on issues related to migration and asylum. The fact that the court's jurisprudence concerns the rights, freedoms, and obligations of foreigners in Poland does not change this verdict because it does not pertain to asylum or migration issues. Therefore, Poland was classified as variant b) of Parameter 1. In the Czech Republic, the National Constitutional Court expressed a view most aligned with variant b) of Parameter 2 in 2006; however, in 2020, it issued a ruling departing from that view and proposed an interpretation aligned with variant c) of Parameter 2. Hence, the Czech Republic was classified as variant c) of Parameter 2. In Slovakia, this situation is similar to that in the Czech Republic. Until 2023, the jurisprudence of the national constitutional court was closest to variant a) of Parameter 2, but in 2023, a ruling was issued in alignment with variant c) of Parameter 2. Therefore, Slovakia was classified as variant c) of Parameter two. In Serbia, the National Constitutional Court did not have the opportunity to take a position regarding its relationship with EU law because Serbia is not a member state of the EU. For this reason, Serbia was classified as variant d) of Parameter 2.

123 Source: Author's own elaboration.

This classification leads to different conclusions regarding the roles of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in matters related to migration and asylum. However, the rules used for such an evaluation are outlined before an assessment of such a role is presented. Firstly, Parameter 2 determines the legal significance of Parameter 1. Parameter 2 indicates the power of the position held by a national constitutional court in a particular country. In other words, this Parameter indicates whether the national constitutional court holds the position of solely the highest national constitutional judicial body or whether it holds the position of the highest constitutional judicial body in the country, including the above international bodies. This leads to the conclusion that the power of the national constitutional court's position based on its jurisprudence can be categorised into one of the following groups: a) strong, b) moderate, c) weak, and d) unknown strong. Categorisation into group a) occurs when the jurisprudence of the national constitutional court has been classified into variant a) of Parameter 2. Categorisation into group b) will occur when the jurisprudence of the national constitutional court has been classified as variant b) of Parameter 2. Categorisation into group c) will occur when the jurisprudence of the national constitutional court has been classified as variant c) of Parameter 2. Categorisation into group d) will occur when the jurisprudence of the national constitutional court has been classified into variant d) of Parameter 2. The exception to this rule will only be the National Constitutional Court of Serbia because Serbia is not an EU member state. This means that the national constitutional court in Serbia did not have the opportunity to issue a ruling related to the relationship between national law (constitutional law), including the competencies of the national constitutional court in Serbia and EU law. Although Serbia is a candidate for the EU, it does not engage in complex competency interactions. This reasoning leads to the conclusion that the national constitutional court in Serbia automatically holds the status of the highest constitutional judicial body in Serbia, including the above international bodies, as it currently does not engage with EU law and CJEU jurisprudence (which could potentially contribute to the issuance of a ruling by the national constitutional court of Serbia regarding the relationship between national law (constitutional) and its competencies with EU law). Serbia's membership in other international organisations does not alter this conclusion because the legal norms of international law serving as the foundation for these other international organisations do not impact the status of the national constitutional court in Serbia. This occurs even though the national constitutional court in Serbia often refers to the ECtHR jurisprudence. Thus, regarding the specific power assignment to the National Constitutional Court, assigning Serbia to Group a) strong is justified. Further emphasis is needed on the significant differences between this situation and the practices of the National Constitutional Court in Slovenia. Despite issuing rulings related to migration and asylum, and Slovenia being an EU member state, the national constitutional court in Slovenia has never ruled concerning the relationship between national law (constitutional) and its competencies as a national constitutional court in Slovenia with EU law. In this instance, even though the national constitutional court in Slovenia had the opportunity

to address this issue, it never did so. Second, based on the results of the correlation between the jurisprudence of the national constitutional courts and Parameter 1, which has a substantive and internal character, one can conclude that the image of the position of the national constitutional court can be assigned to one of the following groups: a) specific and b) unspecific. Categorisation into group a) occurs when the jurisprudence of the National Constitutional Court has been classified into variant a) of Parameter 1. Categorisation into group b) will occur when the jurisprudence of the national constitutional court has been classified into variant b) of Parameter 1.

Based on these assumptions, one can conclude that specific national constitutional courts play a role in migration and asylum matters. The assessment of this role is based on two premises. The first is the premise of the power of position, and the second is the premise of the image of position. In other words, combining the power of the position with its image addresses the question of the role of the national constitutional court in migration and asylum matters. Within the first premise, each analysed country can be assigned to one of four groups: a) strong, b) moderate, c) weak, and d) unknown strong. In the context of the second premise, each analysed country can be assigned to one of two groups: a) specific and b) unspecific. Therefore, the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can be assigned one of the following roles in migration and asylum matters: a) strong specific; b) strong unspecific; c) moderate specific; d) moderate unspecific; e) weak specific; f) weak unspecific; g) unknown strong specific; h) unknown strong unspecific.

Table 2. Role of national constitutional courts in Poland, Hungary, Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in migration and asylum matters¹²⁴

Country	Role
Poland	strong unspecific
Hungary	strong specific
Czechia	weak specific
Slovakia	weak specific
Serbia	strong specific
Croatia	strong specific
Slovenia	unknown strong specific
Romania	strong specific

124 Source: Author's own elaboration.

The results of correlating the power of position with the image of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania are indicated in Table 2, which led to an assessment of the roles of these national constitutional courts in migration and asylum matters according to the presented criteria. The justification for this assessment is as follows: First, the Polish Constitutional Court was classified into variant b) of Parameter 1 and variant a) of Parameter 2; hence, its position power was categorised into group a) strong, while the position's image was categorised into group b) unspecific, leading to an assessment of its role as strong unspecific. Second, the Hungarian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its position power was categorised into group a) strong, while the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific. Third, the Czech Constitutional Court was classified into variant a) of Parameter 1 and variant c) of Parameter 2; thus, its power of position was categorised into group c) weak, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as weakly specific. Fourth, the Slovak Constitutional Court was classified into variants a) of Parameter 1 and c) of Parameter 2; thus, its power of position was categorised into group c) weak, while the position's image was categorised into group a), leading to the assessment of its role as weakly specific. Fifth, the Serbian Constitutional Court was classified into variants a) of Parameter 1 and d) of Parameter 2; thus, its position's image was categorised into group a). However, owing to the previously argued exception, the power of position was categorised into group a) strong. Therefore, the Serbian Constitutional Court assigned the role of strong specifics. Sixth, the Croatian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its position power was categorised into group a) strong, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific. Seventh, the Slovenian Constitutional Court was classified into variant a) of Parameter 1 and variant d) of Parameter 2; thus, its position power was categorised into group d) unknown strong, while the position's image was categorised into group a) specific, leading to the assessment of its role as unknown strong specific. Eighth, the Romanian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its power of position was categorised into group a) strong, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific.

Finally, arranging the hierarchical order of the roles of national constitutional courts from top to bottom and considering the results of the analysis, it should be noted that the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania have varying degrees of significance. The first level of significance should be assigned to the "strong specific" role. This role was assigned to the national constitutional courts in Hungary, Serbia, Croatia, and Romania. The second level of significance should be assigned to the role of "strong unspecific". This role has been assigned to Poland's National

Constitutional Court. The third level of significance should be assigned to the role of “moderate specific”. This role has not been assigned to any national constitutional court. The fourth level of significance should be assigned to the role of “moderate unspecific”. This role has not been assigned to any national constitutional court. The fifth level of significance was assigned to the role of “weak specific”. This role was assigned to the Czech Republic and Slovakia national constitutional courts. The sixth level of significance should be assigned to the role of “weak unspecific”. This role has not been assigned to any national constitutional court. However, roles such as “unknown strong specific”, assigned to the Constitutional Court in Slovenia, and “unknown strong unspecific”, not assigned to any national constitutional court, cannot be classified into any level of significance until the power of position is known.

This leads to the important conclusion that the national constitutional courts in Hungary, Serbia, Croatia, and Romania were classified at the first significance level. This means that their rulings on migration and asylum matters must be considered within their country and at the EU level. Additionally, it is crucial to remember that migration and asylum issues based on the EU nomenclature are shared competencies. Therefore, assigning a high level of significance to the role of the National Constitutional Court has become increasingly important. A slightly less important role in this context is the national constitutional court in Poland, which has been classified at the second significance level. However, it is important to note that if the national constitutional court in Poland made rulings on asylum and migration, it would automatically qualify for the first level of significance. However, national constitutional courts in the Czech Republic and Slovakia were classified in a less favourable position, at the fifth significance level. This indicates that while the rulings of these national constitutional courts are important within their national structures at the EU level, they are less or not significant. This is primarily because migration and asylum fall under shared competencies regulated by primary EU law. Consequently, in line with the decisions of the national constitutional courts in the Czech Republic and Slovakia, the EU may not consider its positions on migration and asylum matters. Meanwhile, the mystery lies with the national constitutional court in Slovenia, which will determine its position once, if ever, it issues a ruling regarding the relationship between national (constitutional) law and its competencies with EU law.¹²⁵

125 This chapter pertains to migration and asylum matters, but the conclusions drawn here may have broader applications.

6. Proposal of the standard concerning the role of the constitutional court in asylum and refugee affairs

Considering the scope of this publication, and without repeating what has already been written elsewhere, the proposal of a standard concerning the role of the constitutional court in asylum and refugee affairs should refer to another publication that was also part of the international research project of the Central European Professors' Network.¹²⁶ In brief, the proposal suggests that EU member states, while safeguarding their independence and sovereignty, should take the stance that, as national entities, they are fully legitimate in making binding interpretations of EU primary law concerning the principles of conferral, proportionality, and subsidiarity. Even though EU member states under such circumstances might opt to create a new structure at the international level, including within the EU, the most natural solution would be for their national constitutional courts to act as megaphones. This proposal seems to provide valuable guidance for EU member states and EU candidate countries such as Serbia.

7. Conclusions

The considerations in this chapter lead to the conclusion that there is currently no common standard concerning the role of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania regarding migration and asylum issues. There are certain similarities or even convergences in terms of the power and image of these positions. This also implies assigning similar or sometimes the same roles to migration and asylum. However, it is essential to remember that the image of the position categorised here as specific or unspecific carries different substantive loads. While these similarities are visible, each national constitutional court's approach to substantive matters is somewhat different, reflecting the specificity of national identity. Conversely, the position of each national constitutional court concerning structural or institutional issues is more susceptible to methodological analysis. This is an important distinction because while it is challenging to expect the emergence of a common substantive standard (image of the position), it is feasible to anticipate the development of a shared institutional/structural standard (power of the position), even when utilising the proposed method outlined in this chapter. Additionally, this chapter leads to another significant conclusion: For the significance of the roles of national constitutional courts in countries engaged in complex competency interactions with the EU, defining the

126 See: Oręziak.

relationship between national (constitutional) law and the competencies of the national constitutional court with EU law, including CJEU case law, is crucial. Hence, it can be concluded that, in the context of interactions between EU member states and the EU, the significance of the role of the national constitutional court in migration and asylum matters is determined by defining the relationship between national law (constitutional), including the competencies of the national constitutional court, and EU law, including the CJEU competencies. This conclusion is also valuable for EU candidate countries (e.g. Serbia).

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