CHAPTER XII

Returning of Irregular Migrants and Legal Certainty in Specific Central European States: A Comparative Perspective

Mateusz Tchórzewski

Abstract

The study is dedicated to the question of returning irregular migrants from the point of view of issues related to legal certainty. The topic is approached from a comparative perspective considering chosen Central European states: Hungary, Poland, Slovakia, the Czech Republic, Croatia, Slovenia, and Romania. These countries are characterised by distinct approaches to addressing irregular migration. The study juxtaposes and analyses these approaches. A concise analysis of the notion of legal certainty is conducted. It emphasizes the importance of ensuring predictability from the point of view of affected migrants. The study then discusses the relevant pieces of legislation that regulate the situation of migrants in these particular states. Court decisions, including selected judgements of national constitutional and administrative courts as well as specific judgements of the Court of Justice of the European Union and the European Court of Human Rights, are considered. Certain tensions, related to the relationship between national law and the law of the European Union, can be observed in some instances. These tensions may be seen as detrimental from the point of view of realising the principle of legal certainty and should be addressed by either modifying the EU's policies regarding migration or by granting Member States more discretion in terms of managing the aforementioned issue. This need is a result of divergent circumstances and related attitudes which exist in different states. These circumstances include, but are not limited to, the coercive engineered migration

Mateusz Tchórzewski (2024) 'Returning of Irregular Migrants and Legal Certainty in Specific Central European States: A Comparative Perspective'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 463–489. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_12

which should be viewed in the broader context of the security situation in Northern and Central Europe.

Keywords: returning irregular migrants, legal certainty, migration crises.

1. Introduction

The issue of migration is undoubtedly one of the main challenges faced by European states. It is difficult to overestimate its effects, in terms of both advantages and possible disadvantages, on the affected countries' societies and economies. Nevertheless, whereas legal (regulated or purposefully unregulated) migration is, as a rule, beneficial for the affected states and societies, illegal migration may be, depending on the specific context, problematic and, in some circumstances, even dangerous from the perspective of the affected states' societies.

When considering issues related to laws that regulate migrations, the interests of migrants should be considered with due attention to different categories of migrants. In particular, the situation of economic migrants should be differentiated from the situation of refugees.

The interests of migrants should also be considered, to a certain degree, from the point of view of the capabilities of receiving states and societies. This issue, if not accounted for, may have important negative consequences for the actual protection of migrants' rights. This can occur through, *inter alia*, practices conducted by states that themselves follow international standards regarding migrant protection. This includes *sui generis* outsourcing, where immigrants may be stopped before they can reach the areas where an effective system of human rights protection is in place. It may be carried out by states that do not abide by human rights protection standards, with implicit consent or even support from states that themselves guarantee high standards in terms of human rights protection. This means that certain states that abide by the international human rights protection standards may, in reality, contribute to violating them by proxy.

The notion of legal certainty should be considered crucial from the perspective of the aforementioned issues. The possibility of predicting what actual treatment and legal circumstances a migrant will face is a key issue for such persons, as their situation is in itself characterised by significant levels of uncertainty. This uncertainty stems from, amongst other things, being away from familiar and naturally understandable environments. This uncertainty is further exacerbated by the status of irregular migrants. Being able to predict how one's situation will be treated in such contexts is highly relevant from the point of view of migrants' legitimate interests, as it is a condition for effective planning of actions related to migration. This statement

appears to be true regardless of the migrants' motivations and situation and is especially relevant from the point of view of returning a migrant.

This text focuses on the issue of legal certainty in relation to returning irregular migrants, approached from a comparative perspective. This perspective considers a number of Central European states, that is Hungary, Poland, Slovakia, Czech Republic, Croatia, Slovenia, and Romania. These countries share certain important social, economic, and cultural characteristics that stem from, amongst other things, sharing a communist past. It is noteworthy that these communist systems were, in most cases, largely dependent on a third country (the Soviet Union) that could dictate to them, according to its own interests, crucial aspects of both foreign and domestic policies. Another relevant similarity can be observed here—the aforementioned nations were, to varying degrees,[1] also subject to foreign imperial rule before the 20th century. At the same time, the relevant states are members of the European Union (EU). These commonalities allow for a sufficient degree of similarity to conduct effective legal comparative work. The historical conditions outlined above may contribute to relatively limited degrees of trust in extranational intervention, even if said intervention comes from an institution in which the given state voluntarily participates.

Said countries also form a continuous geographic space that is largely situated on the fringes of the EU. This signifies that, as a group, they may be considered an area with identifiable similarities in their objective situations. This makes a comparative analysis relevant from both the theoretical and practical points of view.

Additionally, several of them were or are subject to extraordinary circumstances—migration crises that, from the perspective of this chapter, can be typified into two categories: the refugee-migrant crisis[2] and artificial migration crisis (coercive engineered migrations).[3] The question of legal certainty in such contexts takes on additional complexity, as it may be argued that the existing EU framework and regional international law struggle with effectively addressing issues stemming from the abovementioned circumstances.

1 The character of this imperial rule varied for different nations over time. Examples include the Kingdom of Hungary within Austro-Hungary after the compromise of 1867 and the Kingdom of Poland under Russian rule during 1815–1832. Each of these respectively serves as an example of a very substantial autonomy within historical borders and a relatively limited autonomy exercised on only a portion of the historical territory.

2 Such events are often identified as a migration crisis. It is important to note that migrants do not constitute a homogenous or single group. See Hammond, 2015, p. 3. The refugee migration created friction between certain EU member states and was asymmetrical, especially in Central European countries. This asymmetry was seen as a significant reason for diverse interests in different EU countries, which makes implementation of a coherent EU policy particularly difficult. See Karolewski and Benedikter, 2018, p. 113.

3 This term refers to cross-border movements of populations that are created intentionally to induce pression from target states. It is noted that, in this context, doubts may arise about whether states facing such hostile policies should be able to derogate from their obligations related to expulsion. See Huttunen, 2022, abstract.

2. Issue of legal certainty in national, EU, and international law

This part of the chapter discusses the general notion of legal certainty. The definitions and implications formulated in the contexts of both national and EU law are considered.

It must be noted the legal certainty (the principle of legal certainty) is very complex, has a rich and deep history, and is evolving. Therefore, it is discussed here in a concise manner from the point of view of the subject matter.

Emergence of the principle of legal certainty is being attributed to the 19th-century German *Rechtsstaat*, which is considered a more state-based approximation of the rule of law.[4] Legal certainty is formally seen as the possibility of foreseeing the effects of one's behaviour, and legal security can be considered as additionally including material elements such as the social minimum for each citizen.[5] The following elements of legal certainty, in the context of judicial application of the law, can be pointed out: predictability of whether a decision will be issued, predictability of the issued decision's content, and predictability of the issued decision's consequences.[6]

From the point of view of the subject matter, it is particularly relevant to discuss the notion of legal certainty as understood by the judicature. The notion of legal certainty is referred to in case law of the Polish Constitutional Court, Polish Supreme Administrative Court, and Polish Supreme Court. In its judgement of 21 October 2023,[7] the Polish Supreme Administrative Court stated that the national court is obliged to guarantee efficient protection of a person, that is, the resolution of a case while considering the demands posed by the principles of legal certainty (protection of legitimate expectations) and non-retroactivity of the law. The court stated that legal certainty, in the European cultural sphere, is perceived as an important value that is fundamental to the legal systems built upon the principle of the rule of law.

4 It is argued that the nature of this principle, as interpreted by the Court of Justice of the EU, can be understood by dwelling into the past. The political logic of the principle of legal certainty, which favours the political order, was arguably the first to emerge. From Antiquity to the Middle Ages, the need to ensure law's stability and accessibility is argued to have ensured the effectiveness of rules established by authorities rather than the protection of individuals. The three other logics, which are argued to have particular impacts on the development of the principle of legal certainty, include the Cartesian logic, theory of social contract, and development of individual rights. Montesquieu connected the Cartesian logic of legal certainty with its subjective logic. The 19th century is said to have continued the quest for certainty initiated by the scientific revolution. This century also set the stage for the German *Rechtsstaat,* French *État de droit*, and theorisation of the older English rule of law, which have in common the idea of a political power that guarantees individual rights and is subjected to legal principles such as legal certainty. In the 20th century, some scientific discoveries, such as Heisenberg's principle of certainty, undermined the claims of legal certainty. See Meerbeeck, 2016, pp. 276–279.

5 Spyra, 2006, cited in Wojciechowski, 2014, p. 10.

6 These were pointed out by J. Wróblewski. See Wojciechowski, 2014, p. 27.

7 No. I FSK 1104/22, Lex no 3484894.

Case law of the Polish Supreme Administrative court further postulated considering the principles of legal certainty, protection of acquired rights, and protection of legitimate expectations on the ground of the law's application.[8] In its judgement of 28 March 2023,[9] the Polish Supreme Court stated that the principle set out in Art. 2 of the Constitution of the Republic of Poland[10] results in the necessity to ensure legal security of the individual, legal certainty, predictability of statutory law, and loyalty of the state towards citizens. These should contribute to building individuals' trust in the state. The legal security of citizens should be understood not only formally as the predictability of the public authorities' actions, but also as an effective protection of individuals' life and interests. The Polish Supreme Court also stated in the judgement of 15 February 2023[11] that the principle of a democratic state ruled by law is expressed by, amongst other things, the necessity to ensure legal certainty. In this context, it was highlighted that extraordinary proceedings, which serve to overturn final court judgements, should be applicable only to the most important and evident faults of judgement as well as faults that materialise within the appropriate proceedings.

The principle of legal certainty has been the subject of several judgements of the Court of Justice of the EU (CJEU). In the judgement of 24 July 2023, the CJEU stated that

> That fundamental principle of EU law requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences. That principle constitutes an essential element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States.[12]

In the judgement of 28 March 2017,[13] the CJEU stated that the principle of legal certainty, being a fundamental principle of EU law, requires rules to be clear and precise to allow individuals to ascertain their rights and obligations without a doubt so they may act accordingly.

Legal certainty in the context of EU law has an important dimension—the relationship between EU law and the law of Member States. This relationship can be categorised as clear from the point of view of EU law. However, from the point of

8 Judgment of the Polish Supreme Administrative Court from 2 July 2019, I FSK 119/17, Lex 2703336 and, *inter alia,* judgement of the Polish Supreme Administrative Court from 24 March 2021, FSK 2099/19, Lex no. 3209271.

9 No. II NSNc 85/23, Lex no. 3512802.

10 According to Art. 2 of the Polish Constitution, the Republic of Poland is a democratic state ruled by law that realizes the principle of social justice.

11 No. II NSNc 16/23, Lex no. 3490779.

12 Case no. C-107/23 PPU, ECLI:EU:C:2023:606, para. 114.

13 Case no. C-72/15, ECLI:EU:C:2017:236, para. 161.

view of the law of Member States, this relationship has a certain degree of ambiguity in some instances and is not altogether clear. Conflicts within these dimensions may be detrimental to the realisation of the principle of legal certainty. In the judgement of 19 November 2019,[14] the CJEU stressed that the principle of the primacy of EU law establishes the pre-eminence of EU law before the law of Member States and requires all their bodies to provide full effect to various EU provisions. At the same time, the law of a Member State cannot undermine the effect accorded to these provisions in the territories of those states. The national courts must, to a maximal extent, interpret national law in line with the requirements of EU law. If it is impossible to interpret national law in compliance with the requirements of EU law, the appropriate national court should give full effect to the provisions of EU law and, if necessary, refuse to apply any conflicting provisions of national law. In the judgement of CJEU of 24 June 2019,[15] the court stressed that the principle according to which national law must be interpreted in conformity with EU law requires that the entirety of domestic law must be considered, and the methods of interpreting the law, recognised by domestic law, must be applied to ensure that the EU law is fully effective. At the same time, a national court cannot validly argue that it is impossible for it to interpret the national law in a manner consistent with EU law because such a provision has consistently been interpreted in a manner incompatible with EU law[16] or has been applied in such a way by national authorities.

3. Returning irregular migrants in specific Central European countries and legal certainty

3.1. Hungary

The issue of legal certainty in relation to the returning of irregular migrants has certain idiosyncrasies in respect to Hungary. One of them is that Hungary was one of the states particularly affected by the 2015 migration-refugee crisis. Another important issue, from the point of view of the principle of legal certainty, focuses on the tensions between Hungary and the EU. These idiosyncrasies also include the fact that the CJEU deems Hungary to have broken EU law in relation to, *inter alia*, Hungary's policy regarding migration. In the judgement of 17 December 2020,[17] the

14 Cases nos. C-585/18, C-624/18, and C-625/18, ECLI:EU:C:2019:982, paras. 158–160.

15 Case no. C-573/17, EU:C:2019:530, paras. 77 and 79.

16 See also CJEU judgments of 8 November 2016, case no. C-554/14, EU:C:2016:835; and of 6 November 2018, case no. C-684/16, EU:C:2018:874.

17 Case no. C-808/18, ECLI:EU:C:2020:1029, paras. 288 and 289.

CJEU brought up the principle of legal certainty. It stated that the provisions of the directive (EU law) must be implemented with unquestionable binding force. At the same time, said provisions should be implemented with the appropriate specificity, precision, and clarity needed to satisfy the requirement of legal certainty under which the concerned persons must be enabled to ascertain the full extent of their rights. Moreover, if a Member State lays down detailed rules that govern the exercise of these persons' right to remain in its territory, as enshrined in appropriate EU law, such rules must be defined with sufficient clarity and in a precise manner so that the applicant for international protection can ascertain the exact extent of that right and that it is possible to assess whether such rules are compatible with EU law.

It has been stated that Hungary was attempting to avoid a large number of migrants transiting through its territory while allegedly misusing the EU asylum framework, which, arguably, was not designed for such movements. Generally, while some lower courts of Hungary may be considered more open to the influence of the CJEU and the European Court of Human Rights (ECtHR), Hungary's Constitutional Court has taken a more sovereigntist position, and the government is reluctant to implement crucial judgements of the CJEU and ECtHR.[18] In this context, Hungary is said to have raised the idea of diverging from the main conception of the present EU framework and not allowing asylum applications to be submitted on the EU territory as a rule; the aim is to eliminate factors giving rise to abuse.[19] It was further stated that although legal standards that were in force in the EU have their roots in the Geneva Convention, the European asylum law has evolved *via* the layering of a legal superstructure onto the Geneva Convention. Judicial and legislative actions, accumulating over decades, caused the European asylum system to be, in certain ways, more permissive compared to other major democratic jurisdictions.[20]

It should be noted that the Hungarian Constitutional Court stated that joint exercise of competences through the institutions of the EU may not lead to lower levels of protection of the fundamental rights compared with that required by the Fundamental Law. The Hungarian Constitutional Court further held that if the joint exercise of competences, which takes place through the institutions of the EU, is incomplete, Hungary is to have a right, in accordance with the presumption of reserved sovereignty, of exercising the relevant non-exclusive field of competences of the EU, until the aforementioned institutions take the necessary measures from the point of view of ensuring the effectiveness of the joint exercise of competences.[21] Another position of the Hungarian Constitutional Court merits attention. In this position, the court stated that protection of Hungary's inalienable rights to determine its territorial unity, population, form of government, and structure of the state is to be considered a part

18 Polgári and Nagy, 2021, cited in Töttős, 2023, p. 360.
19 Töttős, 2023, p. 360–361.
20 Šimonák and Sheu, 2021, cited in Töttős, 2023, p. 361.
21 Töttős, 2023, p. 352.

of its constitutional identity.[22] The notion of constitutional identity is argued to have been created against external, especially EU, law.[23] It should be added that the Hungarian version of the identity review mechanisms was classified as one that reveals a clear tendency towards hard conflict between the national courts and the CJEU.[24] At the same time, the Hungarian Constitutional Court stated that it is not in a position to assess if the incomplete effectiveness of the joint exercise of competences was resolved in a specific case, nor was it able to take a position on whether a CJEU judgement can lead to a situation where foreign nationals become a part of Hungary's population. This was to be judged by an appropriate authority charged with applying the law rather than the Hungarian Constitutional Court itself. It was also stressed that an abstract interpretation of the Fundamental Law must not have the goal of reviewing the judgements of the CJEU, and that the procedure of the Hungarian Constitutional Court did not extend to the review of the primacy of EU law.[25]

Conflicts between the Hungarian national law and EU law, as well as related tensions between the national constitutional courts and, in particular, the CJEU, especially when connected with substantial political tensions between the EU and a Member State, should be considered substantially detrimental from the perspective of realising the principle of legal certainty. Such tensions seem to exist in Hungary, most importantly in terms of law, but also in terms of the related political tensions. These uncertainties do not seem to be completely offset by certain ambiguities that appear to be present in the relevant jurisprudence of the Hungarian Constitutional Court.

3.2. Poland

The issue of the principle of legal certainty, in the context of returning irregular migrants, is particularly complex in Poland for several reasons.

The first factor that merits consideration is that Poland is an example of an EU Member State that is subject to a very specific form of migration; this form can be defined as hostile, artificial migration and is defined in the literature as coercive engineered migration.[26] Such migration can be described as a systematic policy implemented by a hostile state to put pressure on the targeted state to obtain political or economic concessions. Moreover, these policies should be considered here in the broader context of clearly formulated, very serious military threats aimed at Poland by states implementing said policy.[27] These threats put the lives of Poland's inhab-

22 Ibid.
23 Várnay, 2022, cited in Töttős, 2023, p. 353.
24 Spieker, 2020, cited in Töttős, 2023, p. 353.
25 Töttős, 2023, p. 353.
26 Huttunen, 2022, abstract.
27 This is connected to the real danger of using coercive engineered migration as part of broader activities aimed at legitimising or facilitating military aggression. It should also be noted that, based on the historical examples, coercive engineered migrations used as a tool to obtain different types of concessions may be seen as instruments with reasonable probability of resulting in success

itants in very real danger. Only some of the EU Member States face such threats. This may contribute to a divergence between Member States regarding the measures seen as necessary and legitimate to adequately address said threats.

At the same time, Poland is affected by the refugee-migrant crisis, and its reaction thereto is one of the reasons for its ongoing tensions with the EU. The results of the recent parliamentary elections may have significant effects on the dynamics of the relations between Poland and the EU.

Additionally, the conflict between Poland and the EU is not limited to the aforementioned issues. Another field thereof is the validity of the status of certain judges within Poland's judiciary branch.[28] This includes, but is not limited to, the controversial status of several judges of the Polish Constitutional Court. Therefore, an additional layer of difficulties in relation to the principle of legal certainty is created, as specific judgements of certain Polish courts may be controversial in terms of their validity.

The circumstances outlined above make the issue of legal certainty especially relevant within Poland's current legal circumstances, including in the context of returning irregular migrants.

In the context of this subject matter, the Constitution of the Republic of Poland provides, in Art. 56, that foreigners shall have the right of asylum in the Republic of Poland in accordance with the principles specified by statute. Furthermore, foreigners in the Republic of Poland who seek protection from persecution may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is party.

or partial success. Such instances include Libya obtaining financial aid from the EU (defined as a partial success, 2006); Nauru obtaining financial aid from Australia (defined as a success, 2004); North Korea obtaining financial aid as well as political support from China (defined as a success, mid 1990s), Albania obtaining food aid, financial credits, and other assistance from Italy (defined as a success, 1990–1991); Vietnam obtaining political-diplomatic recognition as well as aid (defined as a success, 1989–1990s); East Germany obtaining financial aid from Sweden (defined as a success, 1984–1985); East Germany obtaining aid, technical assistance, and border fixity from West Germany (defined as a success, 1983–1986); Honduras obtaining military aid, training, and a security pact from the United States (defined as a success, early 1980s); Thailand obtaining financial aid from the United States and France (defined as a success, 1982); and Haiti obtaining financial and military aid from the Unites States (defined as a success, 1979–1981). See Greenhill, 2010, pp. 120–121.

28 In this context, the decision of 14 February 2023, no. I FSK 2040/22, Lex no. 3487409, of the Polish Supreme Administrative Court merits attention. It was connected to the status of a judge who was nominated in a procedure that was controversial as to its validity. The scope of this work does not allow for a more in-depth analysis of this controversy or its roots. Nevertheless, it was argued before the court that, among other things, the controversial status of judges makes such judges uncertain about their future if the government in power at the time of the ruling were to lose power. Consequently, such judges were argued to support the current government's "propaganda." The Supreme Administrative Court decided that the particular circumstances of this judge can lead one to assume that there may be an infringement of the standards of independence and impartiality. Factors such as him previously being a judge of the Provincial Administrative Court and his evaluation by a judge of the Supreme Administrative Court, as well as the opinion of the president of the Provincial Administrative Court in Poznan (his candidacy was deemed to be exceptional), were considered dully.

Rules that govern the entry of foreigners into Polish territory and their transit therethrough, as well as their stay and departure, are regulated by the Act of 12 December 2013 on Foreigners.[29] Moreover, rules that govern the granting of protection to foreigners in the territory of the Republic of Poland can be found in the Act of 13 June 2003 on Granting Protection to Foreigners Within the Territory of the Republic of Poland.[30] Particular proceedings take place based on the Code of Administrative Proceedings,[31] which applies insofar as the provisions of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland do not state otherwise.

A foreigner is defined by Art. 3 point 2 of the Act on Foreigners as any person who does not have Polish citizenship. It is not relevant whether the person possesses a citizenship of another state or is stateless.[32] Foreigners can apply for a refugee status based on Art. 13 para. 1 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland if, because of a well-founded fear of persecution in the state of origin based on race, religion, nationality, political beliefs, or membership of a specific social group, they cannot or are not willing to benefit from the protection of that state.[33] Grant of a refugee status has grounds when there exist well-founded reasons to conclude the possibility of persecution. The term "possibility" means that persecution may take place, although it is not certain or probable, and the requirement to establish "reasonable grounds" indicates the need to establish both objective and realistic indications of a risk of persecution.[34] Based on Art. 15 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland, a foreigner who does not meet the conditions for granting the status of a refugee is granted subsidiary protection if the return to the country of origin may put the foreigner at risk of a real danger of incurring serious harm[35] due to the following reasons: (a) death penalty; (b) torture or inhumane or humiliating treatment or penalty; or (c) serious and individualised threat to life or health caused by a general use of violence against the civilian population in a situation of an international or internal military conflict.

Additionally, according to Art. 106 para. 1 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland, foreigners who are arriving en masse to the territory of the Republic of Poland and have left their country of origin or specific geographic area because of a foreign invasion, war, civil war,

29 Journal of Laws 2023, item 519, consolidated text, as amended.

30 Journal of Laws 2022, item 1264, consolidated text, as amended.

31 Act of 14 June 1960 Code of Administrative Procedure (consolidated text Journal of Laws of 2023, item 775 as amended).

32 Ryszka, 2023, p. 243.

33 The status of a refugee is also granted, based on Art. 13 subsection 2 of this legal act, to a minor born in the territory of Poland who is a child of a foreigner who was granted the status of a refugee in Poland.

34 Chlebny, 2006, p. 53, cited in Ryszka, 2023, p. 244.

35 Additionally, the given person must not be willing or able to benefit from protection in the country of origin.

ethnic conflicts, or blatant infraction of human rights can be granted temporary protection in the territory of the Republic of Poland without regard to whether their arrival was spontaneous or as a result of an aid granted to them by the Republic of Poland or international community.

It is important to note that the traffic at border crossing points with the Russian Federation, Republic of Belarus, and Ukraine has been suspended since 15 March 2020 until further notice.[36] This was done based on the Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points (Ordinance on the Temporary Suspension).[37] This ordinance was issued based on Art. 16 para. 3 point 2 of the Act of 12 October 1990 on the Protection of the State Border.[38] Art. 3 para. 2a of the Ordinance on the Temporary Suspension allows for turning back to the state border line certain persons who are found to be at a border crossing point where the border traffic was suspended or restricted or outside the territorial scope of the border crossing point. The ruling of the Provincial Administrative Court in Białystok of 13 April 2023[39] merits attention in the context of the aforementioned legal act. The court stressed that the institutions of subsidiary protection have the aim to ensure that a decision obligating the return of a person will not be executed if, upon returning, that person would be threatened by the dangers pointed out by the relevant legal provisions. The court also indicated that the necessity for EU Member States to follow the non-refoulement principle stems not only from the legislative activities related to the implementation of relevant directives, but also directly from the primary law of the EU. Furthermore, the secondary EU law, having the rank of a regulation (which has a general character, is binding in its entirety, and is directly applicable in all EU Member States), directly mandates respecting the non-refoulment principle while applying the regulations affecting the flow of persons through the internal and external borders of Member States. The court concluded that neither national law nor circumstances (including the migration crisis on the EU external border, which was caused by external factors) can justify not respecting the principle of non-refoulment. This includes circumstances wherein foreigners are crossing the borders of the Republic of Poland by illegal means. According to the court, interpretation of the non-refoulment principle should aim for a balance between the necessity of protecting the state border and respecting the rights of foreigners, which stem from specific provisions of the international and EU law. The court further stated that a state authority's application of a provision of a lower rank while ignoring the statutory, EU, and international law constitutes a breach of law.

36 Ukraine was later excluded from the list of affected countries.
37 Journal of Laws 2020, item 435, as amended.
38 Journal of Laws 2022, item 295, as amended.
39 Judgment of the Provincial Administrative Court in Białystok of 13.04.2023, II SA/Bk 145/23, Lex No 3546573.

Another noteworthy issue related to legal certainty is regarding the relocation of migrants between different EU Member States. In this context, the CJEU judgement of 2 April 2020[40] merits attention. It was stated therein that

> In this connection, according to settled case-law of the Court of Justice, although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of EU law. As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Art. 36, 45, 52, 65, 72, 346 and 347 TFEU, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of EU law and its uniform application.

Furthermore, it was pointed out that

> … although Art. 72 TFEU provides that Title V of the Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities.

In the Polish context, tensions between EU law and national law, as well as complex tensions within the Polish legal system, are detrimental from the point of view of realising the principle of legal certainty.[41]

3.3. Slovakia

In the Slovak Republic, Act no. 404 of 21 October 2011 on Residence of Foreigners is the legal basis for the procedure of returning irregular migrants for whom a decision of returning has been made. This legal act regulates reasons, as well as

40 Case nos. C-715/17, C-718/17, and C-719/17, ECLI:EU:C:2020:257, paras. 143, 145.

41 Moreover, recent changes in the Polish political landscape seem to indicate the possibility of a change in the dynamics of the aforementioned tensions. This is because of the results of recent parliamentary elections in Poland. It is noteworthy that the probable new parliamentary majority is unlikely to be able to overturn the expected presidential veto as regards the relevant changes in statutory law. As a result, assuming a lack of a compromise between major political actors, certain tensions within the Polish law and between the Polish law and EU law may persist. It is worth highlighting that the relevant practices of state authorities as well as the content of statutory law are largely determined by political factors.

the forms and means, of realising the return of a migrant. The form of the return is contingent on the assessment of a given situation and status of the third-country national at a given moment of time. To identify the optimal form of return, state authorities can check a given person by using the Slovak Information Service, examining the given person's testimony, and considering cooperation with Member States of the EU or non-governmental organisations.[42] The return process depends on issues such as the security situation in the EU, migration flows, and situation in the country of intended return (country of origin of the third-country nationals). Hence, the return process must be comprehensively adapted to the aforementioned circumstances. The Act on Residence of Foreigners defines administrative expulsion as a decision of the police, according to which the foreigner does not have or has lost the right to stay in the territory of the Slovak Republic and is under obligation to leave its territory. Slovak law also defines the reimbursement of the costs of the administrative expulsion and obstacles for such expulsion, which are correlated with the international obligations to which Slovakia is bound in terms of asylum law (principle of non-refoulement) and human rights.[43] It should be noted that the decision regarding administrative expulsion is executed by the police if (among other things) (a) the third-country national fails to depart within the time period proscribed in the decision regarding the administrative expulsion; (b) the administrative decision regarding the expulsion does not impose the period for departure; (c) the third-country national is to be returned to the territory of a different state in accordance with an international agreement (readmission agreement); (d) the third-country national is unable to leave for the reason of not having any valid travel documents, or (e) the third-country national fails to leave the country under the assisted voluntary return within the period specified in the decision regarding administrative expulsion or intentionally avoids the assisted voluntary return upon notification by the organisation conducting the assisted voluntary return programme.[44]

It is worth highlighting that, according to statistics in the context of Slovakia, the biggest proportion of irregular migration does not involve illegal crossing of the external (internal) border but rather an unlawful presence in its territory. Additionally, statistical data suggest that Slovakia remains a transit state.[45]

Moreover, it is important to note in the context of the Slovak Republic that the legal remedies available in relation to detention can be characterised as very limited. The affected person may file a claim with an administrative court in accordance with Act no. 162 of 21 May 2015 Administrative Procedure Code,[46] thus seeking an annulment of both the detention decision and the decision on extending the detention. It is also possible to file a claim with an administrative court regarding an

42 Elbert, 2024.
43 Elbert, 2024.
44 Elbert, 2024.
45 Elbert, 2024.
46 Zákon č. 162/2015 Z.z. Správny súdny poriadok.

administrative expulsion. Additionally, all foreigners must have access to legal aid provided by institutions such as the Centre for Legal Aid (Centrum právnej pomoci) or non-governmental organisations, which include the Human Rights League (Liga za ľudské práva) and Slovak Humanitarian Council (Slovenská humanitná rada).[47] Slovakian law further stipulates that detention of an asylum seeker should be a measure that is applied very rarely. The authorities, however, have repeatedly re-detained persons with the status of an asylum seeker after their application for asylum. The relevant practices were subject to judicial review. Analysis of the specific judgements suggests that the authorities strongly refer to insufficient information in justifying their decisions. It is worth noting that the authorities adapt their practices to the judicial decisions as soon as relevant judgements come into force.[48]

3.4. Czech Republic

From the point of view of Czech law and returning of irregular migrants, the two most relevant pieces of legislation are the Act on the Residence of Foreigners in the Territory of the Czech Republic[49] and the Act on Asylum.[50] Additionally, the case law of the Constitutional Court of the Czech Republic has a significant impact on the interpretation of the relevant legislation.[51]

It is worth noting that, in response to a preliminary question formulated by the Czech Supreme Administrative Court, the CJEU has taken a position according to which

> … Article 2(n) and Article 28(2) of the Dublin III Regulation, read in conjunction, must be interpreted as requiring that the objective criteria underlying the reasons for believing that an applicant may abscond must be established in a binding provision of general application. In any event, settled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section, such as in the main proceedings in the present case, cannot suffice.[52]

In respect to the relation between Czech law and EU law, and the possible tensions related thereto, it is noteworthy that the Czech Constitutional Court was the first (among the constitutional courts of EU Member States) to describe a decision of the CJEU as ultra vires and, thus, as one that cannot be given effect in the Czech Republic. This took place in the Constitutional Court judgement of 31 January 2012[53]

47 Elbert, 2024.
48 Elbert, 2024.
49 Act no. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic.
50 Act no. 325/1999 Coll., on Asylum.
51 Zorková, 2023, p. 367.
52 Judgment from the 15 March 2017, case no. C-528/15, ECLI:EU:C:2017:213, para. 45.
53 Case no. Pl. ÚS 5/12.

(the Holubec judgement).[54] This case was connected to a long-lasting dispute between the Czech Constitutional Court and Czech Supreme Administrative Court related to the issue of pensions in the context of the breakup of Czechoslovakia. There existed a dispute between these courts in terms of their prerogatives. Czech administrative courts disagreed with the case law of the Czech Constitutional Court. This resistance was taken up by the Czech Supreme Administrative Court, acting as the highest judicial entity in terms of administrative justice. This conflict led the Czech Supreme Administrative Court to involve the CJEU by deciding, after requesting and receiving a reply from the CJEU, that the rule established by the Czech Constitutional Court does not apply as a result of its conflict with EU law. Moreover, the Czech Supreme Administrative Court acknowledged its judicial opponent to be the supreme guardian of the Constitution and, as such, to have the right to declare that relevant CJEU case law exceeded the powers delegated to the EU. The Czech Constitutional Court consequently ruled that, in particular circumstances, the CJEU has departed from the powers the Czech Republic vested to the EU.[55] This may *de facto* mean that the Czech Constitutional Court, in very specific circumstances, attributed to itself the right to decide upon the limits of the prerogatives of the CJEU. Such an approach can be deemed problematic from the point of view of the EU's internal legal cohesion, particularly in terms of the uniform understanding of (the content of) its law. However, the Czech literature pointed out that the significance of the Holubec judgement should be considered marginal from the point of view of the relationship between the Czech national law and EU law. This is because said ruling has its origins in the political as well as judicial circumstances of the Czech Republic, rather than being a coherent and future-oriented contribution meant to shape the Czech Constitutional Court's position regarding EU law.[56] The Czech literature on the subject also pointed out that the Czech Constitutional Court is, as a rule, open to the transfer of powers from the Czech state to the EU. At the same time, the court is said to respect the primacy of the EU law. However, it monitors this transfer and expresses its preparedness to intervene if the EU were to exceed its limits or threaten the essential requirements of the Czech Republic as a democratic state governed by the rule of law. The Czech Constitutional Court also stated that it cannot imagine under what circumstances such an intervention could occur.[57] This is relevant from the point of view of potential tensions between the EU and Czech national law, which can be observed in certain other states of the region and can have a detrimental effect from the perspective of realising the principle of legal certainty. Regarding the Czech Republic, the jurisprudence of its Constitutional Court suggests the possibility of a future conflict between the Czech national and EU law.

54 Otta, 2023, p. 219.
55 Otta, 2023, p. 221.
56 Otta, 2023, pp. 219–220.
57 Otta, 2023, p. 235.

The aforementioned jurisprudence seems to cautiously reserve, so to speak, the possibility of such a conflict in the future without realising it at a given time.

3.5. Croatia

Croatian legislation that regulates issues related to migration and asylum were developed following the EU and Schengen *acquis communautaire* based on the Constitution of the Republic of Croatia.[58] Art. 26 of the Croatian Constitution states that aliens are equal to the citizens of Croatia before the courts, governmental agencies, and other bodies vested with public authority. The most important piece of legislation regulating the consequences for irregular entry or stay of third-country nationals in Croatia is the Aliens Act.[59] The asylum system is regulated by the International and Temporary Protection Act.[60]

The main authority charged with general implementation of the migration and asylum policies in Croatia is the Ministry of the Interior. The Croatian Ministry of the Interior is a unified, hierarchical organisation characterised by high degree of subordination of lower-tier organisational units to the higher organisational units, as well as by a centralised organisational model.[61] Relevant decisions of competent authorities may be subject to judicial review by an administrative court and, under certain conditions, to an appeal to the High Administrative Court. Additionally, if there is a violation of the constitutional rights of an individual, a constitutional complaint may be filed with the Croatian Constitutional Court.[62] Decisions of competent authorities regarding the refusal of aliens' right to enter, stay, or reside are considered to be administrative acts and, as such, are regulated by the provisions of the General Administrative Procedure Act.[63] Said act has a general character and is applicable to all proceedings regarding any administrative matter. It is also important to note that other, specialised laws regulate certain procedural issues differently than the aforementioned act. In such cases, the General Administrative Procedure Act must be respected and applied as a subsidiary source of law on any issue that is not regulated by specialised legislation concerning migration and asylum. As already mentioned, in cases where no appeal against a given administrative decision is available, there is a possibility of initiating an administrative dispute before an administrative court. In circumstances proscribed by law, a claim postpones the enforcement of a decision. However, it is possible that the court will decide that a claim is to have an effect of postponing an enforcement of a decision if such enforcement would cause damage to the claimant that would be difficult to repair and if the postponement is not

58 Official Gazette, no. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010—consolidated text, 5/2014.
59 Official Gazette, no. 133/2020, 114/2022, 151/2022.
60 Official Gazette, no. 70/2015, 127/2017, 33/2023.
61 Lalić Novak, 2024.
62 Lalić Novak, 2024.
63 Official Gazette, no. 47/2009, 110/2021.

contrary to the public interest.[64] An appeal is not available for a decision regarding an expulsion or return. However, there is a possibility of initiating an administrative dispute. Such dispute may also be initiated regarding a ban on entry and stay, as well as a decision to revoke a ban on entry and stay. There is also a possibility of initiating administrative disputes against decisions related to accommodation in a centre (detention). It is worth adding that a regular, *ex officio* judicial review is being conducted of the lawfulness of extensions of detention decisions.[65] In most available cases, the courts confirmed the administrative decisions issued by the competent authorities. It was often stated in this context that the decision issuing authority correctly established the existence of circumstances indicating the risk of avoiding the obligation to leave the Republic of Croatia.[66] The apparent complacency of courts in this regard is being described as a shortcoming in addition to the issue of access to legal remedies in the return procedures (lack of legal skills and knowledge of Croatian language being essential barriers in terms of access to courts) and the issue of lack of transparency in the functioning of the Croatian Ministry of the Internal Affairs (the ministry being the main competent authority for issues related to the prevention of irregular crossings of the state border and stay in the state's territory).[67]

In terms of ECtHR decisions related to Croatia, which fall within the scope of this study, *M.H. and Others v. Croatia*[68] as well as *Daraibou v. Croatia*[69] merit particular attention. In the former case, the issue was centred on the death of a minor who was an Afghan national and died from being hit by a train after being ordered by the Croatian authorities to return to the territory of Serbia after, allegedly, being refused asylum. This case also involved the detention of applicants who were seeking international protection. The court found that the Croatian authorities' investigation into the death should be considered ineffective. Furthermore, the detention of children was considered a form of ill treatment. It was additionally argued that some applicants were subject to collective expulsion from Croatia and that the Croatian state impeded the possibility of effective exercise of the applicants' rights, which included restricting their access to a lawyer. It was also highlighted, in the respect of the detention of children, that the detention lasted for a prolonged time period (compounded by the applicant children's perception of the situation as never-ending) because of Croatian authorities' failure to act within the required timeframe. Such treatment was viewed as one that could be sufficiently severe to engage Art. 3 of the European Convention on Human Rights. The court also stated that a violation of Art. 5, insofar as the possibility of applying less coercive measures of detention, was possible. The overly lengthy proceedings before the administrative courts, which have

64 Lalić Novak, 2024.
65 Lalić Novak, 2024.
66 Lalić Novak, 2024.
67 Lalić Novak, 2024.
68 Application nos. 15670/18 and 43115/18, 18 November 2021.
69 *Daraibou v. Croatia*, application no. 84523/17, 17 January 2023.

dealt with relevant asylum applications as well as reviewed the validity of concerned detentions, was also criticised. The court further stated that

> … it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.[70]

The case of *Daraibou v. Croatia* concerned a situation wherein the border police found the applicant together with three other persons in a truck with Croatian licence plates. It was found these persons had entered the territory of Croatia clandestinely by avoiding border control. They were taken to a police station and searched. No dangerous objects were found on them. Afterwards they were arrested. After interviewing them, the police issued decisions ordering their expulsion. Their readmission was announced to the Serbian police as it was established that they had entered the Croatian territory via Serbia. Meanwhile, they were accommodated in an immigrant detention facility. The standard of their accommodations was questionable as they were located in a basement, in premises that measured about 9 m^2 and did not have a toilet or running water. The room was under video surveillance. The persons in question effectively disabled the video surveillance and started an intense fire within the premises. The fire spread across the room and part of the corridor, resulting in loss of electricity for the entire facility. Eight police officers entered the basement trying to rescue the detainees. The fire brigade and an ambulance were called. One of the persons died, whereas the applicant and two other detainees were taken out of the detention room and moved to the hospital. They were all severely injured. Some time later, two other detainees died from injuries sustained in the fire. The applicant recovered and was released from the hospital. It was found that the personnel responsible for supervising the detainees had not noticed the preparation or starting of the fire, which was in breach of their duties. Moreover, several cigarette stubs were found on the premises where the migrants were accommodated, indicating that they had been smoking. The officers were suspended from service. The First-Instance Disciplinary Court found one of the officers responsible for serious breach of duty and, considering mitigating circumstances such as the fact he had put his own life in danger to save the detainees, he was fined. The other officer was acquitted. Some time later, the applicant filed for asylum in Croatia, but his asylum request was subsequently refused. After a period of time, an investigation was opened in respect of the applicant based on a reasonable suspicion that he, together with three other detainees, had caused a fire by throwing flammable material into a pile with careless disregard of the possibility of starting a dangerous fire; thus, he had negligently endangered lives as well as property of substantial value, with his actions resulting in the death of three persons. The applicant

70 See para. 319 of the abovementioned decision and the case law cited therein.

appealed against the decision to open the aforementioned investigation and was subsequently expelled from Croatia to Morocco and was prohibited from re-entering the European Economic Area for a set period of time. Afterwards, the applicant's appeal against the decision to open an investigation in respect to him was dismissed by the Croatian court, which concluded that the available evidence confirms the reasonable suspicion that the applicant indeed committed a criminal offence. The investigation was then terminated as the applicant had left Croatia and his whereabouts were unknown. The applicant, relying on the substantive and procedural aspects of Arts. 2 and 3 of the European Convention on Human Rights, complained that the Croatian state was responsible for not preventing the fire that occurred in the detention centre, as a result of which he had suffered severe, life-threatening injuries. He also argued to no effective investigation was carried out in that respect. The court considered that this case should be examined under both the procedural and substantive limbs of the European Convention on Human Rights. The applicant argued that he did not have an effective remedy at his disposal. Furthermore, he argued that due to the lack of an effective criminal proceedings, he had not been in an effective position to take advantage of any available remedy, as the ability to elucidate the facts of the case was often solely in the hands of Croatian state officials or authorities. He further stated that he was unable to lodge a constitutional complaint because there had been no final decision on his rights or obligations. He did not, at any point of time, have the status of a victim; hence, he could not successfully pursue his interests at the Croatian Constitutional Court as a victim. Additionally, said Constitutional Court's practice in relevant matters had not been consistent, and, in any event, its decision could not have changed his status in terms of criminal proceedings. The ECtHR stated that

> As regards the applicant's complaint under the substantive limb of Art. 2 of the Convention, the Court reiterates that the burden of proof to show that there had existed an available and effective domestic remedy both in theory and in practice for the applicant's Convention grievances lies on the Government …. It notes in this connection that the decision of the Constitutional Court referred to by the Government concerned a complaint under the State's negative obligation not to expose the complainants to inadequate conditions of detention, whereas the applicant's complaint in the present case related to the authorities' positive obligation to prevent a life-endangering fire in a detention facility. The two situations are therefore not identical, as the Government seemed to suggest …. In any event, the said decision was adopted a year after the applicant had lodged his application with the Court; given the circumstances, the Court sees no reason to depart from the general rule on exhaustion of domestic remedies …. In view of the above, the Court considers that the Government did not succeed in showing that, at the time of the lodging of his application with the Court on 19 December 2017, a constitutional complaint constituted an effective remedy concerning positive obligations of the State under Article 2 of the Convention.

It also stated that

> … even where it is not established that the authorities knew or ought to have known about any such risk, there are certain basic precautions which police officers and prison officers should be expected to take in all cases in order to minimize any potential risk to protect the health and well-being of the arrested person.[71]

It was decided that the complaint was admissible, and that there had been violations of Art. 2 of the European Convention on Human Rights under both its substantive and procedural limbs.

3.6. Slovenia

The Slovenian literature highlighted that the return procedure in the Republic of Slovenia is strongly linked to the international protection procedures because of the large number of foreigners illegally entering the territory of the Republic of Slovenia and expressing their intention to apply for international protection.[72]

The competent authority, in a single procedure (as set out in Art. 49 of the Law on International Protection),[73] first assesses the conditions for granting refugee status and, if they are not met, the conditions related to granting of subsidiary protection status. The competent authority can either grant the application for international protection and the status of a refugee or subsidiary protection status, or reject the application as unfounded (in ordinary proceedings) or as manifestly unfounded (in accelerated proceedings). The primary source of information regarding the situation of the relevant country, within the decision-making process related to granting of international protection, is the asylum seeker. Such persons must credibly point out as well as explain the circumstances that may be decisive from the point of view of a given application.[74]

The removal of a foreigner from the territory of the state in an enforcement action which results from an issued and enforceable decision. This means that the affected person is brought to the state border and sent across it or handed over to the authorities of a third country. Removal may be applied only to foreigners who (a) failed to leave the country within the time limit set for their voluntary return, b) were not granted an extension of the time limit for their voluntary return, (c) were subject to a ban on entry, and (d) were subject to the secondary sanction of expulsion from the country.[75]

71 See paras. 68 and 84 of the aforementioned decision.
72 Žiga and Hacin Valič, 2023, p. 336.
73 Official Journal of the Republic of Slovenia, no. 16/17, officially consolidated text.
74 Žiga and Hacin Valič, 2023, p. 325.
75 Žiga and Hacin Valič, 2023, p. 329.

3.7. Romania

According to the Romanian Asylum Law, persons seeking international protection as a result of fear of persecution or serious harm in their country of origin enjoy certain rights and, at the same time, are required to fulfil certain obligations in terms of the asylum process. These rights include the (a) right to assistance by a lawyer during the asylum procedure, (b) right to being informed, (c) right to the access to an interpreter, (d) right to being contacted and assisted by a non-governmental organisation or the United Nations High Commissioner for Refugees, and (e) right to access their personal asylum file and request its copies.

The obligations in this respect include the obligations to (a) be photographed as well as fingerprinted, (b) provide true and complete information regarding one's identity and reasons for seeking protection, (c) provide the available documents regarding the given person's identity, (d) hand over other relevant documents, (e) participate in the asylum interviews, and (f) not leave the country irregularly.[76]

The general principle of non-refoulement is being applied in Romania. However, it is affected by certain exceptions in cases concerning so-called "undesirable" persons. The category of the so-called "undesirable" persons includes situations wherein classified information or "well-founded indications" suggest(s) that a foreigner, who is an asylum seeker or a person with a refugee status, intends to commit terrorist acts or other national security concerns are involved.[77] At the same time, Romanian law does not provide for a special remedy against a decision concerning a refusal of entry. However, such decisions may be challenged before administrative courts possessing territorial jurisdiction over a given area.[78]

From the point of view of legal certainty and returning of irregular migrants, while considering that Romania is an EU Member State, certain decisions of Romania's Constitutional Court merit attention. In Decision no. 406 related to the status and regime of refugees in Romania,[79] the Romanian Constitutional Court stated that it

> … has repeatedly ruled on the provisions of art. 5 point 2 of Government Ordinance no. 102/2000 regarding the status and regime of refugees in Romania, ruling, for example, by Decision no. 321 of April 18, 2006, published in the Official Monitor of Romania, Part I, no. 402 of May 9, 2006, that they do not contravene the provisions of art. 22 of the Constitution nor those of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, regarding the prohibition of torture.

In the context of the relationship between Romanian law and EU law, the Constitutional Court of Romania has taken a position according to which,

76 Lazăr, 2023, pp. 176-177; Lazăr, 2024.
77 Lazăr, 2024.
78 Lazăr, 2024.
79 Official Monitor, Part I no. 511 of 13 June 2006, cited in Nicu, 2024.

> … through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, through its capacity, a "super-competence", a sovereignty of their own. In reality, the member states of the European Union have decided to jointly exercise certain powers that, traditionally, belong to the field of national sovereignty. It is obvious that in the current era of the globalization of humanity's problems, interstate developments and inter-individual communication on a planetary scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of unacceptable isolation.[80]

In another decision related to the aforementioned issue,[81] the Constitutional Court of Romania stated that

> Therefore, by joining the legal order of the European Union, Romania accepted that, in the fields where the exclusive competence belongs to the European Union, regardless of the international treaties it has concluded, the implementation of the obligations resulting from them to be subject to the rules of the European Union. Otherwise, it would lead to the undesirable situation that, through the international obligations assumed bilaterally or multilaterally, the member state would seriously affect the competence of the Union and, practically, substitute it in the mentioned fields. That is why, in the field of competition, any state aid falls under the purview of the European Commission, and the procedures for contesting it belong to the jurisdiction of the Union. Therefore, in the application of art. 11 para. (1) and art. 148 para. (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, not interfering with the exclusive competence of the European Union and, as established in its jurisprudence, by virtue of the compliance clause included in the text of art. 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it committed itself as a member state. Of course, all the previously shown have a constitutional limit, expressed in what the Court qualified as "national constitutional identity."

This stance of the Romanian Constitutional Court does not seem conducive to circumstances in which substantial tensions arise, in terms of the relationship between the national law of a Member State and EU law, with all the consequences of these tensions in the field of legal certainty.

80 Decision no. 148 of 16 April 2003, published in the Official Monitor of Romania, Part I, no. 317 of 12 May 2003, cited in Nicu, 2024, in press.

81 Decision no. 64 of 24 February 2015, published in the Official Monitor of Romania, Part I, no. 286 of 28 April 2015, cited in Nicu, 2024, in press.

4. Conclusions

It can be argued that considering the legitimate interests of affected states is also in the interest of irregular migrants, as it serves to safeguard the long-term functioning of the international (European) system of human rights protection. If affected states cannot sufficiently protect their legitimate economic, social, political, and geopolitical interests within the system of human rights protection (conversely, if these legitimate interests are not sufficiently addressed within the framework of the EU), then, in the long term, the functioning of the very system can be threatened. The threats to its existence (and effectiveness) can stem from electoral backlash that can put in power governments hostile to effective mechanisms of human rights protection. Another threat can be posed by a practice by which governments that formally abide by human rights standards may be incentivised to prevent migrants from ever reaching their borders via formal cooperation or collusion with states that do not respect such standards. As a result, migrants may never reach areas where they can enjoy the protection of their rights, thus being effectively deprived of them. Finally, artificial migrations can be used as a hostile policy, conducted by a non-abiding state and aimed at putting coercive pressure on an abiding state. The latter practice can be especially dangerous as, if tolerated, it incentivises further similar activities that may create the possibility of non-abating intensive artificial migration. If such intensive artificial migration is not addressed, it may not only create certain social tensions (which intense migrations typically do in the short term), but also pose a significant threat to the very security of a given state while also serving as a tool of intimidation at the disposal of authoritarian governments.

From the point of view of legal certainty, it is important to highlight the issue of certain national courts questioning or diverging from the positions taken by the CJEU, particularly in the context of the effective primacy of EU law over national law. This relates to instances of national courts considering it their prerogative to be the final authority regarding the actual content (meaning) of EU law (most notably the treaties). It should also be noted that the linguistic and, perhaps more importantly, cultural differences that exist between different Member States of the EU may cause the understanding of particular sources of EU law to differ substantially in reality. This may be attributed to nuances in the legal cultures of particular states, as well as to issues connected to the translation and implementation of legal acts and CJEU case law. These difficulties may exist even when the formal status of appropriate legal acts and case law is not being questioned. If national courts independently diverge from the positions adopted by the CJEU, there may be different positions related to the formal content of EU law. This may impact the effectiveness of EU law and, at the same time, significantly decrease legal certainty in terms of both the legal systems of particular Member States and the EU as a whole.

The problem outlined above adds additional layers of legal uncertainty. Law, by its very definition, cannot guarantee absolute certainty, but it should serve to maximise it to the highest possible degree. Natural deficiencies that manifest within

the law[82] may be exacerbated by conflicts between national courts (Member States) and the CJEU (the EU) related to primacy and the actual content of the law. These conflicts may become chronic. As a result, for a protracted time period, there may exist a significantly decreased degree of legal certainty that may extend, but may not be limited, to areas of law that regulate migration. This area of law seems particularly susceptible to the abovementioned problem, as it is also highly politicised and connected to some of the vital interests and dilemmas of the affected states and societies. This situation can be remedied in at least two ways. The first is the EU's adoption of a framework that will effectively address the issue of migration in a way that is acceptable from the point of view of the interests and values of Member States. If such a solution were to be adopted, the risk of EU legal framework's fragmentation is likely to decrease. The second direction involves giving the Member States more discretion in terms of choosing the way of dealing with the controversial challenges they face. This may reduce the incentive for the realisation of tensions between the legal systems of Member States and the EU.

It should be added that the realisation of the principle of legal certainty is not the only value that should be considered in the context of legal issues related to migrations and migrants' rights. Other values, including effectiveness of the law and national security, should also be considered when deciding in what circumstances decreased legal certainty may or should be tolerated. The need to pursue the realisation of the principle of legal certainty should be balanced with, in particular, the need to ensure both basic national security and effectiveness of the law.

82 These may include issues such as questionable quality of the legislation, contexts of different pieces of legislation contradicting each other, lack of uniformity in terms of case law created by national courts, and excessively high pace of changes within the law.

References

Bibliography

Chlebny, J. (2006) 'Ustalanie okoliczności faktycznych w sprawie o udzielenie cudzoziemcowi ochrony', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2006/6, pp. 52–63.

Greenhill, K. M. (2010) 'Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion', *Strategic Insights,* 9(1), pp. 116–159; https://doi.org/10.7591/9780801458668.

Grote, R., Morales Antoniazzi, M., Paris, D. (2021) *Research Handbook on Compliance in International Human Rights Law*, Cheltenham: Edward Elgar Publishing.

Hammond, T. G. (2015) 'The Mediterranean Migration Crisis', *Foreign Policy Journal*, 19 May 2015. [Online]. Available at: https://www.foreignpolicyjournal.com/2015/05/19/the-mediterranean-migration-crisis/ (Accessed: 19 October 2023).

Huttunen J. (2022) *Coercive engineered migration and the prevention of entry of asylum seekers – a choice between two evils for the receiving European States*, Helsinki: University of Helsinki.

Lalić Novak, G. (2024) 'Return policies for irregular migrants and rejected asylum seekers in Croatia', *Central European Journal of Comparative Law,* 5(1) (in press).

Lazăr, I. (2023) 'Considerations Regarding the Legal Regime and Theory of Illegal Migration in Romania', *Law, Identity and Values*, 3(2), pp. 157–186; https://doi.org/10.55073/2023.2.157-186.

Lazăr, I. (2024) 'Some Considerations on the Practical Issues Related to Illegal Migration in Romania', *Central European Journal of Comparative Law,* 5(1) (in press).

Karolewski, I. P., Benedikter, R. (2018) 'Europe's refugee and migrant crisis: Political responses to asymmetrical pressures', *Politique Européenne*, 60, pp. 98–132; https://doi.org/10.3917/poeu.060.0098.

Elbert, L. (2024) 'Irregular Migrants in the Slovak Republic: Return and Readmission', *Central European Journal of Comparative Law,* 5(1) (in press).

Meerbeeck, J. V. (2019) 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust', *European Law Review*, 1(41), pp. 276–279.

Nicu, A. L. (2024) 'The Practice of the Constitutional Court of Romania Concerning Migration and Refugee Affairs', *Central European Journal of Comparative Law* 5(1) (in press).

Otta, Š. (2023) 'The Practice of National Constitutional Courts Concerning Migration and Refugee Affairs – The Czech Republic', *Law, Identity and Values*, 3(2), pp. 211–237; https://doi.org/10.55073/2023.2.211-237.

Polgári, E., Nagy, B. (2021) 'The chances of observing human rights in an illiberal state: diagnosis of Hungary' in Grote, R., Morales Antoniazzi, M., Paris, D. (eds.) *Research Handbook on Compliance in International Human Rights Law*, Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781788971126.00013.

Ryszka, J. (2023) 'Irregular Migration in Poland and the Importance of Readmission Agreements in Theory and Practice', *Law, Identity and Values*, 3(2), pp. 239–263; https://doi.org/10.55073/2023.2.239-263.

Spieker, L. D. (2020) 'Framing and managing constitutional conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts', *Common Market Law Review*, 57(2), pp. 361–398; https://doi.org/10.54648/COLA2020031.

Spyra, T. (2006) *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni*, Warszawa: Wolters Kluwer Polska.

Šimonák, V., Scheu, H. C. (2021) 'Back to Geneva: Reinterpreting Asylum in the EU', *European View*, 20(1), pp. 237–238; https://doi.org/10.1177/17816858211061792.
Žiga, T., Valič, P. H. (2023) 'The Republic of Slovenia's Return Procedures for Irregular Migrants and Asylum Applicants in Theory and Practice', *Law, Identity and Values*, 3(2), pp. 311–342; https://doi.org/10.55073/2023.2.311-342.
Töttős, Á. (2023) 'Hungary's Policy and Practice on Illegally Staying Migrants', *Law, Identity and Values*, 3(2), pp. 343–363; https://doi.org/10.55073/2023.2.343-363.
Várnay, E. (2022) 'The Hungarian sword of constitutional identity', *Hungarian Journal of Legal Studies*, 63(2), pp. 79–106; https://doi.org/10.1556/2052.2022.00380.
Wojciechowski, M. (2014) *Pewność prawa*, Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.
Zorková, E. (2023) 'Theory and Practice of Returning Irregular Migrants in the Czech Republic', *Law, Identity and Values*, 3(2), pp. 365–384; https://doi.org/10.55073/2023.2.365-384.

Judgements of the Court of Justice of the European Union

Judgement of the Court of Justice of the European Union of 24 July 2023, case no. C-107/23 PPU, ECLI:EU:C:2023:606.
Judgement of the Court of Justice of the European Union of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.
Judgement of the Court of Justice of the European Union of 2 April 2020, case nos. C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.
Judgement of the Court of Justice of the European Union of 19 November 2019, case no. C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.
Judgement of the Court of Justice of the European Union of 24 June 2019, case no. C-573/17, ECLI:EU:C:2019:530.
Judgement of the Court of Justice of the European Union of 6 November 2018, case no. C-684/16, ECLI:EU:C:2018:874.
Judgement of the Court of Justice of the European Union of 28 March 2017, case C-72/15, ECLI:EU:C:2017:236.
Judgement of the Court of Justice of the European Union of 8 November 2016, case no. C-554/14, ECLI:EU:C:2016:835;

Judgements of the European Court of Human Rights

Judgement of the European Court of Human Rights of 17 January 2023, Daraibou v. Croatia, application nos. 84523/17.
Judgement of the European Court of Human Rights of 18 November 2021, M.H. and Others v. Croatia, application nos. 15670/18 and 43115/18.

Judgements of Polish courts

Judgement of the Supreme Court of 28 March 2023, no. II NSNc 85/23, Lex no. 3512802.
Judgement of the Supreme Court of 15 February 2023, no. II NSNc 16/23, Lex no. 3490779.
Judgement of the Polish Supreme Administrative Court of 21 October 2023, no. I FSK 1104/22, Lex no. 3484894.
Judgement of Supreme Administrative Court of 14 February 2023, no. I FSK 2040/22, Lex no. 3487409.

Judgement of the Supreme Administrative Court from 24 March 2021, no. FSK 2099/19, Lex no. 3209271.
Judgment of the Supreme Administrative Court from 2 July 2019, I FSK 119/17, Lex no. 2703336.
Judgment of the Provincial Administrative Court in Białystok of 13 April 2023, no. II SA/Bk 145/23, Lex no. 3546573.

Legal sources

Act no. 162 of 21 May 2015 Administrative Procedure Code Zákon č. 162/2015 Z.z. Správny súdny poriadok.
Act on the Residence of Foreigners in the Territory of the Czech Republic, no. 325/1999 Coll., on Asylum.
Act of 12 December 2013 on Foreigners, Journal of Laws 2023, item 519, consolidated text, as amended.
Act of 13 June 2003 on Granting Protection to Foreigners Within the Territory of the Republic of Poland, Journal of Laws 2022, item 1264, consolidated text, as amended.
Act of 12 October 1990 on the Protection of the State Border, Journal of Laws 2022, item 295, as amended.
Act of 14 June 1960 Code of Administrative Procedure, consolidated text Journal of Laws of 2023, item 775 as amended.
Aliens Act, Official Gazette, no. 133/2020, 114/2022, 151/2022.
Constitution of the Republic of Croatia, Official Gazette, no. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010, consolidated text, 5/2014.
Decision no. 64 of February 24, 2015, Official Monitor of Romania, Part I, no. 286 of April 28, 2015.
Decision no. 406 related to the status and regime of refugees in Romania, Official Monitor, Part I no. 511 of 13 June 2006.
Decision no. 148, Official Monitor of Romania, Part I, no. 317 of May 12, 2003.
General Administrative Procedure Act, Official Gazette, no. 47/2009, 110/2021.
International and Temporary Protection Act, Official Gazette, no. 70/2015, 127/2017, 33/2023.
Law on International Protection, Official Journal of the Republic of Slovenia, no. 16/17, officially consolidated text.
Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points (hereinafter: the Ordinance on the Temporary Suspension, Journal of Laws 2020, item 435, as amended.