

ISSUES RELATING TO MIGRATION AND REFUGEES IN THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE JURISPRUDENCE OF THE CONSTITUTIONAL TRIBUNAL

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ABSTRACT

Issues relating to migration and refugees are becoming increasingly important worldwide, requiring various kinds of analyses, including legal analyses. Poland is no exception. Owing to its binding international agreements, the country must ensure certain standards for the protection of migrants and refugees. Although primarily established by international law, the national legal framework is also relevant. Certain standards are derived from the Constitution of the Republic of Poland and the jurisprudence of the Constitutional Tribunal. Although the Polish Constitution does not mention migrants as such, and the concept of a refugee appears in the context of the right to obtain this status, based on art. 56 sec. 2, the system's legislator ensures that the interests of these persons are protected. Indeed, migrants and refugees as foreigners are covered by Polish law and its guarantees, including constitutional guarantees. The article analyses how migration and refugee issues are regulated in the Constitution of the Republic of Poland and the jurisprudence of the Constitutional Tribunal. By analysing the constitutional provisions and relevant case laws, this article aims to present the constitutional legal framework in Poland for these issues and examine the extent to which these solutions are appropriate and whether the Polish Constitution requires modifications or amendments in this regard.

Shaping the position of migrants and refugees must comply with constitutional standards, including the general principles of loyalty, proportionality, and equality. Exceptions and limitations may be established by law and must meet the conditions of art. 31 sec. 3 of the Constitution. Differentiating the constitutional position of citizens and foreigners with regard to certain rights, especially those serving the realisation of the principle of the Nation's sovereignty, is justified and cannot be treated as discrimination. This is justified by the functions of the state and its obligations to citizens as expressed in the Constitution.

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1. Introduction

Migration has an enormous impact on the societies and economies of both the countries from which migrants originate and the countries to which they migrate. By going beyond the borders of their countries of origin, migrants enter the jurisdiction of other entities, which can be both an opportunity and a risk for them. The process of migration has various spheres of influence, requiring legal regulations that are important in providing for the security, social inclusion, economic development, predictability, and protection of migrants' human rights. Therefore, appropriate legislation would allow for a controlled flow of migrants enabling countries to manage the process effectively.

Legal solutions are intended to guarantee protection of migrants' rights. Migration laws also serve to protect the human rights of migrants. Legal regulations ensure equality to migrants in terms of access to basic rights such as labour rights, healthcare, education, and decent treatment. Therefore, by protecting the rights of migrants, countries can prevent exploitation, discrimination, and human rights violations.

Additionally, legal regulations relating to migration allow for a smooth control of people movement and contribute to security in the host country. They help verify the identity and purpose of migrants' visit to the host country and reduce illegal immigration. Further, adopting appropriate procedures, such as document verification and conducting security surveys, can help minimise risks to national security.

Furthermore, legal regulations concerning migration allow for a better integration of migrants into the host society. Providing for migrants' rights and obligations, such as access to education, healthcare, and employment, can help them build a new life. Adopting such regulations also facilitates adaptation of migrants to the host country and reduces the risk of social tensions arising from cultural differences.

Since migration impacts the economy of both migrants' home and host countries, adopting legal regulations of migration allows for better managing this impact and exploiting the benefits of migration. Regulations on migrant employment, working conditions, wages, and social security contribute to preventing exploitation and maintaining economic stability.

Finally, legal regulations relating to migration provide an opportunity for anticipation and socio-economic planning. Countries can develop migration

policies based on their demographic needs, labour markets, and development goals, thus making it easier to plan for better infrastructure, public service, and social support for migrants.

Since migration involves different states and the international community, it is important to develop and implement uniform standards regarding migration and the protection of migrants, especially forced migrants such as refugees. The appearance of foreign nationals on the territory of a foreign state also requires determining their legal status in the context of rights granted. This is also a constitutional issue as it relates to the distinction between citizens and non-citizens and the extent of protection afforded. These issues are worth analysing from the perspective of constitutional arrangements and legislation developing the constitution and in the context of possible practice.

There is little in the Constitution of the Republic of Poland² explicitly addressing these issues, with the result that no established practice has been developed in the jurisprudence of the Constitutional Tribunal regarding standards for migrants and refugees. However, the specific constitutional framework and guarantees for these persons can be derived from the general provisions on the status of the individual in the state and the constitutional position of foreigners.

Therefore, this paper aims to identify the constitutional status of migrants and refugees in Polish law and to analyse to what extent the status in question is considered in the jurisprudence of the Constitutional Tribunal, which adjudicates the hierarchical compatibility of the law.

While reviewing the legislation, case laws, and the literature on the subject, the constitutional basis for framing issues related to migration and migrants, including guidance for the legislator in this regard, will be considered. The study refers only to constitutional issues. Other matters, including international, EU, and administrative law, will be mentioned only to show the normative context of the analysis.

2. Constitutional principles shaping the position of migrants and refugees

The 1997 Constitution RP is established by the sovereign, which is the Nation, as is clear from the preamble and Art. 4 of the Constitution RP. All citizens of the Republic of Poland are the Nation. The Republic itself is a common good of all citizens. The citizen is, therefore, the basic subject of all activities of public authorities, as the state has special obligations towards the citizen. According to the doctrine, the common good is the sum total of those conditions of social life, thanks to which

2 | Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, item 483, as amended (Constitution, Constitution RP).

individuals, families, and other communities can more fully and easily achieve their own perfection.³

Commentators on Art. 1 of the Constitution RP point out that the definition of 'all citizens' fits the view of the Republic into the traditional concept of the common good as a state. The common good includes all constitutional values, including those expressed directly in the Constitution RP and those interpreted from it. Therefore, the common good cannot be opposed to other values.⁴ Therefore, it should be agreed that the concept of the common good adopted in the Constitution RP defines three areas of constitutional regulations fundamentally important for clarifying the contents of Art. 1: (a) freedoms, rights, and obligations of the individual, (b) functioning of public life institutions, and (c) law-making, which is the basic instrument for implementing constitutional values.⁵ Among them, it is important that the common good presupposes the good of the individual, which becomes the goal of the state and the law.⁶

A person with the status of a citizen is part of a collective subject – the sovereign – and he participates in shaping his will, enjoys certain freedoms and rights, has certain duties, and is under the protection of the state.

It should be noted, however, that the growing role of human rights and freedoms, and the belief that they belong to every human individual and are primarily related to the state, has meant that modern constitutions generally guarantee the enjoyment of constitutional rights and freedoms for all people. This is also stated in Art. 37 of the Constitution RP.⁷

Expanding the scope of freedoms and rights to which foreigners are entitled impacts the assessment of a citizen's status as the subject of aspirations of persons wishing to obtain such status. The elimination of numerous previous restrictions and prohibitions concerning foreigners has strengthened their legal position and allows them to arrange their life affairs in Poland without obtaining citizenship. This applies primarily to foreigners who are citizens of the Member States of the European Union, guaranteeing free movement of persons, goods, services, and capital.⁸

The Constitutional Tribunal explains as follows:

[T]he Constitution, in its entirety, expresses a certain objective system of values, the implementation of which should be facilitated by the interpretation and application of individual constitutional provisions. To define this system of values, the provisions

3 | Bulletin of the Constitutional Committee of the National Assembly, 1995, pp. 90–91.

4 | Zdyb, 2018, pp. 25–26; Zdyb, 2001, pp. 190, 193–195.

5 | Trzeciński, 2005, p. 455.

6 | *Ibid.*, p. 454.

7 | Exceptions are also included in the Constitution, which, for example, reserves for citizens the right to participate in a referendum and in the election of the President, deputies, and senators (Art. 62 of the Constitution RP), the right to social security (Art. 67 of the Constitution RP), and right to health care services financed from public funds (Art. 68 sec. 2 of the Constitution RP).

8 | Judgment of the Constitutional Tribunal of 18 January 2012, Kp 5/09, OTK ZU No. 1/A/2012, item 5.

on the rights and freedoms of the individual, located primarily in Chapter II of the Constitution, play a central role. Among these provisions, the principle of inherent and inalienable human dignity occupies a central place.⁹

The above implies that the common good is to protect the individual, which has a greater scope than protecting just the citizens. Besides Art. 30 of the Constitution RP, the common good also indicates the dignity, justification of individual rights and freedoms, and implementation limits. There is no opposition between the concept of the common good and human dignity. Dignity is closely related to the notion of the common good.¹⁰ This allows for discussion on constitutional guarantees not only for citizens but also for foreigners.

In judgment K 33/12, the Constitutional Tribunal recognised the principle of the common good as one of the fundamental constitutional principles shaping relations between international law and national law. The Tribunal explained,

The Constitution defines the relations between international law and national law primarily in accordance with the principles of the common good, sovereignty, democracy, the rule of law and the favor of domestic law with international law. On the basis of these principles, it can be concluded that Poland is opening up to the international order. The effect of the transfer of competences is usually a complicated system of dependencies between the state, its authorities and an international organization. Therefore, the conferral of powers should always be assessed from the point of view of the principles shaping constitutional identity.¹¹

It is also important in shaping the legal status of foreigners in Poland, including the rights and duties of migrants and refugees.

The Constitutional Tribunal emphasises that the systemic principles contained in Chapter I of the Constitution RP, which are intended to contribute to the achievement of the common good of all citizens, cannot take precedence over the provisions of Chapter II. This means that this body recognised that although the common good is subordinated to all citizens, those areas related to human rights cannot be omitted in implementing public tasks, regardless of citizenship.¹²

The indicated approach aligns with the state's objectives in Art. 5 of the Constitution RP according to which, the Republic of Poland safeguards the independence and inviolability of its territory, ensures human and citizen freedoms and rights

9 | Judgment of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK ZU No. 3/1999, item 38.

10 | Judgment of the Constitutional Tribunal of 30 October 2006, P 10/06, OTK ZU No. 9/A/2006, item 128.

11 | See judgment of the Constitutional Tribunal of 26 June 2013, K 33/12, OTK ZU No. 5/A/2013, item 63. See also, for example, the judgment of the Constitutional Tribunal of 11 March 2015, P 4/14, OTK ZU No. 3/A/2015, item 31 and the Decision of the Constitutional Tribunal of 2 June 2015, P 35/15, OTK ZU No. 6/A/2015, item 85.

12 | Judgment of the Constitutional Tribunal of 29 April 2003, SK 24/02, OTK ZU No. 4/A/2003, item 33. See similarly, S. Wronkowska-Jaśkiewicz in a separate sentence to the Decision of the Constitutional Tribunal of 6 April 2011, SK 21/07, OTK ZU No. 3/A/2011, item 28.

and the security of citizens, safeguards national heritage, and ensures the protection of the environment, guided by the principles of sustainable development. The constitution-maker does not limit its jurisdiction to citizens but guarantees freedoms and human rights to all people who come under the authority of the Republic of Poland. Thus, although the Constitution RP is aimed at the implementation of the common good as the good of the citizens of the Republic of Poland, it does not leave other entities unprotected, considering the universality of human rights, the source of which is dignity (Art. 30 of the Constitution), and Poland is obliged to comply with international law that is binding on it, including the law relating to migration, migrants, and refugees.¹³ This is expressed in Art. 37 sec. 1 of the Constitution RP, whereby, 'Whoever is under the authority of the Republic of Poland enjoys the freedoms and rights provided for in the Constitution'.

3. A migrant and a refugee as a subject of constitutional freedoms and rights in Poland

As per Art. 37 sec. 1 of the Constitution RP, the right to enjoy the freedoms and rights provided for in the Constitution for everyone under the authority of the Republic of Poland also includes foreigners. This is based on the principle that every human being, regardless of nationality, is entitled to rights and freedoms that require state protection. Each person is endowed with dignity, which is the source of that person's rights and freedoms. Therefore, the constitutional status of a migrant or refugee has to be related to those provisions of the Constitution RP that apply to natural persons without differentiation between citizenship and foreigners.

Importantly, the legislator recognises that not all rights must be guaranteed to the same extent. It allowed for exceptions to the principle expressed in Art. 37 sec. 1 of the Constitution RP with regard to foreigners. These may be defined by law. Therefore, the universal enjoyment of rights and freedoms is not absolute. It is subjectively limited, which is significant in the context of the migration issues analysed in this study. However, exceptions to the principle of universal use of constitutional rights and freedoms in relation to foreigners have to be specified in the act. The legislator does not have any discretion in determining them. An act limiting the exercise of freedoms and rights guaranteed by the Constitution has to be consistent with the Constitution RP and the values expressed therein, including such rules as the principle of adequacy (Art. 2 of the Constitution RP), principle of proportionality (Art. 31 sec. 3 of the Constitution RP) or principle of equality (Art. 32 of the Constitution of the RP).

Exceptions to the principle of universal exercise of constitutional freedoms and rights referred to in Art. 37 sec. 1 of the Constitution RP are also formulated by the constitution-maker in those provisions wherein he reserves certain rights

13 | More about this commitment in Gałka, 2018, pp. 115–121.

and freedoms exclusively for Polish citizens, or – as in the case of Art. 56 of the Constitution RP – for foreigners. The reference to the law in Art. 37 sec. 2 applies only to those rights and freedoms guaranteed to everyone in the Constitution RP.

To determine the status of migrants in Polish constitutional law, it is necessary to remember that in international law, it is assumed that all persons residing on the territory of a given state are subject to its jurisdiction under the principle of *qui in territorio meo est, etiam meus subditus est*. From this, it follows that the state is entitled to shape the legal status of these persons based on the relevant norms of internal law. International law also accepts the right of a state to differentiate the legal status of persons residing on a state's territory in accordance with the criterion of citizenship. The state exercises jurisdiction over its citizens, irrespective of where they are (personal sovereignty). Foreigners are subject to the state's jurisdiction only when they stay on its territory (territorial sovereignty).

Although in the past, states had much freedom in determining the legal status of foreigners on their territory, recognising it as one of the elements of their sovereignty,¹⁴ this freedom began to be gradually restricted by the creation of minimum standards in international law for the protection of individual rights, which a state should equally guarantee to every person.¹⁵ The concept of minimum standards limited the state's freedom in granting rights to foreigners based on reciprocity, that is, exercising the rights guaranteed to citizens conditional on granting the latter similar rights by the state of which the foreigner is a citizen. It is recognised that certain fundamental rights are vested in every human being anywhere in the world, regardless of their citizenship, which is derived *inter alia* from the universal meaning of the principle of the dignity of the human person.¹⁶ The conviction was that a state cannot make the exercise of these fundamental rights by foreigners dependent on a similar decision of another state.

Presently, the legal status of foreigners in the country of their residence is shaped not only by the domestic laws of that country but also by international laws (mainly bilateral and multilateral agreements). Through bilateral agreements, states determine the legal situation of their citizens in the territory of other states and of citizens of other states in their territory. In multilateral agreements, states establish general regulations regarding the legal status of an individual, the application of which is not dependent on the citizenship of the applicant or the country of residence.¹⁷

What is important is the obligation to guarantee to the same extent freedoms and rights to own citizens and foreigners residing on the territory of a given state applies primarily to personal rights. Other rights can only be granted by the state

14 | Ehrlich, 1958, p. 603.

15 | Kędzia, 1991, p. 487.

16 | Sokolewicz, 2007, p. 1.

17 | The first international agreements relating to foreigners concerned the protection of religious and national minorities (e.g. peace treaties after World War I). It was only in the Charter of the United Nations that the idea of protecting human rights in a universal dimension was explicitly expressed. Most of the international conventions adopted later obliged the states parties to guarantee the rights and freedoms of these conventions regulated by any person under their jurisdiction, regardless of their nationality.

only to its citizens, especially if the exercise of these rights is related to the exercise of power by the sovereign.¹⁸

Art. 37 sec. 2 allows for the possibility of the legislator introducing restrictions on the exercise of rights and freedoms by foreigners provided for in the Constitution RP. The condition regarding the statutory form of interference in the sphere of rights and freedoms of this category of beneficiaries of constitutional rights and freedoms formulated in this provision is not the only requirement binding the legislator. Therefore, Art. 37 sec. 2 of the Constitution RP cannot be treated as a *lex specialis* in relation to Art. 31 sec. 3 of the Constitution RP. This means that all other conditions of a substantive nature listed in the latter provision have to be met in the process of legislative interference with constitutional freedoms and rights. Restrictions on the use of constitutional rights and freedoms by foreigners are therefore necessary in a democratic state for its security or public order, the protection of its environment, public health, and morals, or the freedoms and rights of other persons. Nevertheless, these restrictions may not infringe on the essence of freedoms and rights.¹⁹

The repetition in Art. 37 sec. 2 of the Constitution RP of the formal condition requiring that restrictions be introduced by law does not deprive this provision of its self-existent meaning. It directly foredeems the admissibility of establishing human rights restrictions based on the criterion of nationality.²⁰ It gives the legislator consent to a different shaping of the legal status of foreigners and Polish citizens. It also excludes the possibility of challenging, in principle, restrictions on constitutional rights and freedoms established according to the criterion of citizenship or its lack thereof.

Furthermore, Art. 37 sec. 2 of the Constitution RP also indicates that restrictions relating to exercising constitutional freedoms and rights by foreigners may be broader than those with respect to Polish citizens. Finally, Art. 37 sec. 2 of the Constitution RP is an exception to the principle of universality of enjoyment of constitutional rights and freedoms. Given this, the article should be interpreted narrowly. In other words, if there is no explicit decision of the legislator with regard to a restriction, a foreigner may exercise the right or freedom in question to the same extent as a Polish citizen. Art. 37 sec. 2 of the Constitution allows for the establishment of exceptions to the principle that anyone under the authority of the Republic of Poland can enjoy the freedoms and rights guaranteed thereby. However, this provision must not be understood as leaving room for arbitrariness of decisions in this extended space. Hence, any norms limiting the scope of enjoyment of rights and freedoms by foreigners must satisfy the premises of Art. 31 sec. 3 of the Constitution RP.²¹

It should be noted that the rights and freedoms reserved in the Constitution RP for Polish citizens do not have to be extended to foreigners by the legislator.

18 | Nita-Świątłowska, 2016, sec. 40.

19 | Uziębło, 2007, p. 144.

20 | See judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260.

21 | Garlicki, 2003, p. 18.

However, if the rights and freedoms are granted by law, then they will not have the status of constitutional rights and freedoms. Consequently, the restrictions by the legislator will not have to meet the conditions under Art. 31 sec. 3 of the Constitution RP. Nevertheless, the statutory regulation of rights and freedoms must respect basic constitutional standards, particularly the requirement of equality and prohibition of discrimination. While these rights and freedoms will not be protected by way of a constitutional complaint, one can seek their enforcement by other means of constitutional protection, such as the right to a court, the right to challenge judgments and decisions, the right to compensation or application to an ombudsman, which, according to Art. 208 sec. 1 of the Constitution RP, 'safeguards the freedoms and rights of the human being and the citizen set out in the Constitution and in other normative acts', and therefore – contrary to the name of this body – its competences are not limited to civic issues.²² The right to public information and voting rights in local elections are examples of constitutional rights extended to foreigners by the legislator.²³

It is also accepted that rights and freedoms of a political nature closely linked to the relationship of citizenship attaching the individual to the state should not be granted by the legislator to individuals who do not possess citizenship. This is justified by the principle of the sovereignty of the Nation expressed in Art. 4 of the Constitution RP, which, according to the preamble thereof, comprises all citizens of the Republic of Poland. However, this restriction does not apply to local government elections because the bodies elected in these elections do not so much exercise power on behalf of the Nation as a whole but only on behalf of a specific local self-governing community. The latter – pursuant to Art. 16 sec. 1 – comprises 'all the inhabitants of the units of the basic territorial division' and thus all the inhabitants of municipalities, districts, and voivodeships, regardless of citizenship.²⁴

Given the foregoing, it must be concluded that the Constitution RP extends its guarantees to everyone under its authority, including migrants and refugees. Human beings with inherent dignity enjoy protection regarding human rights, including those provided by the Constitution. Constitutional protection does not encompass the rights reserved to citizens, especially political rights closely related to the realisation of the principle of sovereignty of the Nation, as well as other rights such as social rights, which, as part of public tasks, are implemented by public authorities for the realisation of the common good. This, however, does not preclude foreigners, including migrants, from being granted rights at the

22 | See examples of the ombudsman's speeches in cases of refugees and migrants: Office of the Commissioner for Human Rights. *Cudzoziemcy, uchodźcy, migranci* [Online]. Available at: <https://bip.brpo.gov.pl/pl/kategoria-tematyczna/cudzoziemcy-uchodzcy-migranci> (Accessed: 15 June 2023).

23 | See judgment of the Constitutional Tribunal of 31 May 2004, K 15/04, OTK ZU No. 5/A/2004, item 47.

24 | The Constitutional Tribunal in its judgment of 11 May 2005, K 18/04 (OTK ZU No. 5/A/2005, item 49) stated that membership in a self-governing community is determined by 'the place of residence (centre of life activity), which is the basic type of ties in this type of communities'. The Tribunal therefore confirmed that the right to vote for local government bodies could be extended to EU citizens who are members of a self-governing community.

statutory level. Nevertheless, such rights are not subject to the same protection as constitutional rights. The parliament may also introduce restrictions concerning exercising constitutional freedoms and rights by foreigners. However, these restrictions must meet proportionality requirements and must not be based on discriminatory criteria.

Furthermore, it should be emphasised that foreigners, including migrants and refugees on the territory of the Republic of Poland, enjoy protection guarantees under international law. In fact, one of the main principles of the state system is its observance of international law, which is binding. Under the provisions of the law, the aforementioned subjects may participate in the country's political, social, and economic life. Their status is regulated primarily through the act of 12 December 2013 on foreigners.²⁵ This act defines the principles and conditions of foreigners' entry into, transit through, stay in, and departure from the territory of the Republic of Poland, the procedures, and the authorities competent in these matters, with the proviso that certain non-citizens are excluded from its regulations because the status of these subjects is determined by other provisions, especially those relating to the EU law.²⁶ Among the acts directly relating to matters concerning foreigners, the following also apply: Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland²⁷; act of 14 July 2006 on the entry into, stay in, and departure from the territory of the Republic of Poland of nationals of the Member States of the European Union and their family members²⁸; the act of 20 April 2004 on employment promotion and labour market institutions²⁹; and the act of 24 September 2010 on population records.³⁰ Additionally, the status of foreigners is further specified by implementing provisions (regulations) that concern, for example, the application for granting a foreigner a temporary residence permit, the application for granting a foreigner a permanent residence

25 | Journal of Laws of 2023, item 519, as amended.

26 | The act on foreigners shall not apply to 1) members of diplomatic missions and consular offices of foreign states and other persons treated as such on the basis of laws, agreements, or generally established international customs, provided that they are reciprocal and have documents confirming the performance of their functions entitling them to enter the territory of the Republic of Poland and stay in this territory, with the exception of Arts. 23, 32, 58, 60 to 63, 66(4) and (5), 67 to 74, 78(1), 79(1) and (2), 80, 90 to 92 and 96 and 97 of the act; 2) citizens of the Member States of the European Union, Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation and their family members who join or reside with them; 3) family members of citizens of the Republic of Poland within the ambit of Art. 2(4)(b) of the act of 14 July 2006 on entry into the territory of the Republic of Poland, stay, and exit from this territory of citizens of the Member States of the European Union and members of their families (Journal of Laws of 2021, item 1697), who join them or stay with them; 4) citizens of the United Kingdom of Great Britain and Northern Ireland referred to in Art. 10(1)(b) and (d) of the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ. UE L 29, 31.01.2020, p. 7) and their family members, unless otherwise provided by law.

27 | Journal of Laws of 2022, item 1264, as amended.

28 | Journal of Laws of 2021, item 1697.

29 | Journal of Laws of 2023, item 735.

30 | Journal of Laws of 2022, item 1191, as amended.

permit, an invitation template, an application form template for entering an invitation into the register of invitations and the amount of funds that the inviting party should have, the documents issued to foreigners, visas for foreigners and their prolongation, cases in which the entrustment of work to a foreigner on the territory of the Republic of Poland is permissible without requiring a work permit, or the issuance of a work permit to a foreigner.

Of course, in addition to the provisions indicated above, and in other acts, particularly in the field of administrative law, specific provisions are laid down for non-citizens, including those that have to do with the acquisition of real estate by foreigners, the conduct of business activity by such persons, the participation of such persons in hunting, etc.

Standards for shaping the status of foreigners can also be found in the jurisprudence of the Constitutional Tribunal, which rules on the hierarchical compatibility of the law. Specifically, when analysing the principle of a democratic state of law, the Constitutional Tribunal, in its early rulings, pointed to the need for the state to build citizens' trust in the state and the laws it enforces (the principle of loyalty). At one point, it elaborated on this principle, explaining that when examining the compatibility of normative acts with the principle of the individual's trust in the state and in the laws it proposes, it is necessary to determine to what extent the individual's expectation that he will not expose himself to legal consequences that he could not have foreseen when making decisions and taking actions is justified. An individual must always reckon that a change in social or economic conditions may require a change in the existing laws and the immediate implementation of new legal regulations. The Constitutional Tribunal emphasised that the principle of loyalty determines the legal situation not only of citizens but also of foreigners and other private entities under the authority of the Republic of Poland. This is why the term 'principle of the protection of the individual's confidence in the state and the law' seems appropriate.³¹ In view of this, it may be considered that the standards of a democratic state of law derived from Art. 2 of the Constitution, including those relating to the protection of an individual, apply in shaping the status of foreigners, including migrants and refugees.

Analysing the issue of protecting personal data and acquiring information about individuals, the Constitutional Tribunal explained that in Art. 51 sec. 2 of the Constitution RP, the legislator explicitly prohibits acquiring information about 'citizens'. This could suggest a possibility for state authorities to obtain, collect, and store information about other entities (e.g. foreigners) to a much wider extent than about citizens, thus leading to unnecessary information in a democratic state. A consequence of this would be differentiating the legal protection of individuals' privacy based on their citizenship status. The Constitutional Tribunal does not exclude such differentiation. Still, it cannot be treated as a principle, and in any case, it cannot lead to arbitrary differentiation of subjects in terms of those constitutional freedoms and rights that the legislator itself has not characterised

31 | See judgment of the Constitution Tribunal of 7 February 2001, K 27/00, OTK ZU No. 2/2001; judgment of the Constitutional Tribunal of 25 June 2002, K 45/01, OTK ZU No. 4/A/2002, item 46.

as civil ones. However, in terms of the contents of Art. 30 and Art. 37 sec. 1 of the Constitution RP, the same standards of interference with constitutional freedoms and rights must be adopted as a general rule, regardless of whether the subject has Polish citizenship.

Indeed, every subject under the authority of the Republic of Poland, i.e. under Polish law, irrespective of citizenship status, may legitimately expect protection against unjustified interference with his or her freedoms and rights. Owing to this, there is a need to establish the same standards for the acquisition, collection, or storage of data by state authorities in the course of investigative activities in relation to all entities under the authority of the Republic of Poland. Exceptions to this rule are allowed in the act relating to foreigners who are subject to Polish law. The Tribunal confirmed that Art. 37 sec. 2 of the Constitution RP cannot be treated as a *lex specialis* excluding the application of Art. 31 sec. 3 of the Constitution, as in that case, foreigners would have no constitutionally guaranteed rights. Any restriction of freedoms or rights not reserved exclusively to citizens must therefore be proportionate within the meaning of Art. 31 sec. 3 of the Constitution and, moreover, must not violate their substance. The consequence of the binding Art. 37 sec. 2 of the Constitution is the possibility of a more flexible interpretation of the individual premises constituting the principle of proportionality, justifying a greater level of interference in the freedoms and rights of foreigners than those of citizens. The wording of the Art. also supports this position. For instance, Art. 51 sec. 2 of the Constitution explicitly insists on the existence of a premise for obtaining, collecting, and storing data on citizens.³² The above assumption does not exclude the admissibility of a different definition of the premise for obtaining and handling of data in relation to persons not being subject to the Polish law (e.g. data obtained by intelligence services on the activities of foreign entities abroad), although in any case such actions of state authorities must be within the standards of the rule of law. A condition for obtaining information on individuals in confidence is that a procedure is established for the immediate selection and destruction of unnecessary and inadmissible material. This solution prevents state authorities from making unauthorised use of legally collected information and storing it just in case it proves useful for other purposes in the future. The interference with the privacy of individuals will not only be the one-off acquisition of data about an individual, but also any subsequent operation on these data, including storage or secondary use in the course of other proceedings. At the same time, the Constitutional Tribunal does not negate the admissibility of further storage of telecommunications data concerning foreigners under the authority of the Republic of Poland, particularly if there are serious and justified suspicions about their involvement in activities threatening state security, including terrorism and organised crime. This differentiation in the degree of protection is primarily set in Art. 51 sec. 2 and Art. 37 sec. 2 of the Constitution

32 | See judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260; judgment of the Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU No. 7/A/2014, item 80.

RP.³³ The indicated standard is relevant for migrants arriving onto the territory of the Republic of Poland and refugees, and it has to strike a balance between privacy and state security.

Another important issue that should be highlighted is a question of the obligations of persons on the territory of Poland. According to Art. 83 of the Constitution, 'Everyone has the duty to obey the laws of the Republic of Poland, and in light of Art. 84', 'Everyone is obliged to pay public burdens and benefits, including taxes, as defined in the act'.

The fact that foreigners stay in Poland, regardless of the reason for their arrival, does not exclude them from the obligation to comply with Polish law, even if the migration is forced. Further, Art. 84 of the Constitution also establishes the principle of universality of public burdens.³⁴ Universality implies the obligation of 'everyone' to bear public burdens and benefits, and therefore both natural persons – citizens and foreigners – and legal persons are specified in the act.³⁵

When analysing the constitutionality of certain provisions of the act on foreigners, the Constitutional Tribunal referred to the institution of family reunification, which creates favourable conditions for the stabilisation of foreigners coming to Poland for family reunification. This facilitation offers more favourable conditions for obtaining an entry visa and granting of a residence permit for a fixed period in Poland, particularly for a short period of three years of uninterrupted stay in the territory of the Republic of Poland before applying for a settlement permit.

The Constitutional Tribunal explained that the institution of family reunification was introduced into the act on foreigners as part of the process of adaptation to the EU law in line with the resolution of 1 June 1993 on the harmonisation of family reunification. A foreigner benefiting from the right to family reunification is consequently in a more favourable situation than a foreigner arriving in Poland under general rules, who has a mandatory period of at least five years of uninterrupted stay on the territory of the Republic of Poland before applying for a permit to settle. Although the solution is a derogation from the principle of equality, the principle is not absolute. A differentiation may be permissible if it is relevant and proportionate and is justified by the values defending the different treatment. The differentiating criteria adopted in the case of the institution of family reunification correspond to the conditions of differentiation developed in the case law of the Constitutional Tribunal and finds constitutional justification.³⁶ In Art. 18 of Chapter

33 | Judgment of the Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU No. 7/A/2014, item 80.

34 | Judgment of the Constitutional Tribunal of 11 April 2000, K 15/98, OTK ZU No. 3/2000, item 86.

35 | Działocha, 2003, p. 7.

36 | As part of the equality test, the Constitutional Tribunal examines whether (1) the criterion of differentiation is reasonably related to the purpose and content of a given regulation; (2) the weight of the interest that differentiation is intended to serve is in proportion to the importance of the interests that will be affected by the differentiation; and 3) the criterion of differentiation is related to other values, principles, or constitutional norms justifying different treatment of similar entities (e.g. the judgment of the Constitution Tribunal of 30 October 2019, P 1/18, OTK ZU No. A/2019, item 61.

I of the Constitution RP, the definition of the foundations of the political system of the Republic includes the principle of the protection of marriage and the family. Similarly, Art. 71 of the Constitution obliges state authorities to be particularly concerned about the welfare of the family.³⁷ This perspective is considered when shaping the legal status of migrants and refugees. Additionally, it is necessary to guarantee the protection of the rights of the child and consider child welfare, in accordance with Art. 72 of the Constitution RP.

The Constitutional Tribunal also analysed the compatibility of the former provisions on the Supreme Administrative Court insofar as they excluded the right to a court in cases concerning the expulsion of a foreigner illegally staying in Poland.³⁸ On this occasion, the Tribunal explained that an illegal stay on the territory of Poland is primarily associated with failure to comply with the lawful requirements for the border crossing itself, or with the failure to comply with the conditions (time limit) of stay specified by a visa or, in the case of visa-free travel, by an international agreement. The conditions for crossing the border are defined by the legislator. Unless a systemic interpretation of the provisions of the act and the content of international agreements give grounds for a different conclusion, a foreigner may cross the border and stay on the territory of Poland if he holds a valid passport document and a valid visa. Crossing the border in violation of these provisions is an indication of an illegal stay on the territory of Poland. Further, failure to comply with the conditions of stay stipulated by a visa or, in the case of visa-free travel, by an international agreement means that the foreigner's stay is classified as illegal. In such a case, an expulsion procedure may be implemented. However, this is only one of the possible cases wherein this procedure can be used. Notwithstanding this, initiating a procedure in cases aimed at expulsion of foreigners staying legally is also specified in the act. According to the Tribunal, the recognition of a violation of the right to a court depends on understanding the nature of the illegality of the stay in the territory of the Republic of Poland. If one adopts a narrow understanding, then the right to a court may be restricted. The control of access and residence of foreigners on the territory of a particular state is a right of that state, which has a constitutionally defined discretion in this respect. This control should be carried out, *inter alia*, through the application of the relevant border protection legislation and implemented by the relevant border services. The attitude towards the law in force in Poland, as well as the manner of crossing the Polish border (legal or illegal), may provide legitimacy for differentiating between foreigners in terms of a decision on expulsion. Possible shortcomings of the authorities in the application of the law, including decisions on the legality or illegality of a stay in Poland, can be eliminated using the institutions and procedures provided for by the law. The fact that they are 'under the sovereignty of the Republic of Poland' implies an obligation to submit to the Polish law and the legal norms derived therefrom, regardless of their place in the hierarchy of sources of

37 | See judgment of the Constitutional Tribunal of 19 May 2003, K 39/01, OTK ZU No. 5/A/2003, item 40.

38 | Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260.

law, as long as such norms comply with the provisions of the Constitution. Such a state of affairs may prejudice not only the exercise of constitutionally protected rights and freedoms, but also the need to comply with exceptions to the rule if constitutionally justified.³⁹

Thus, it may be concluded that the status of a migrant as a subject of constitutional freedoms and rights must be analysed in the context of the general guarantees of human rights regulated by the Constitution RP. A migrant can thus exercise those freedoms and rights that the legislature has provided for everyone. Indeed, migrants as foreigners have the same personal dignity as citizens. The rights reserved to citizens in the Constitution can be exercised by citizens only when this is provided for in the acts. Indeed, the constitutional right of citizenship itself does not exclude a statutory extension to foreigners if this is constitutionally justified and consistent with the values contained in the Constitution. However, it should be borne in mind that statutory rights enjoy less protection than constitutional rights,⁴⁰

Finally, one should bear in mind that since Poland complies with its binding international law, migrants are also protected on the territory of Poland by the international law, as referred to in Art. 9 of the Constitution. They may therefore enjoy freedoms and rights under the international law insofar as the Republic is bound by it.

Under 'international law', Art. 9 of the Constitution also includes legal acts belonging to the legal system of the European Union. Today the term 'international law' no longer means the same law that was taught, written about, and applied a hundred years ago. 'Many autonomous regimes with their own name, set of entities, subject scope, axiology, or system of dispute resolution and potential sanctions have emerged from it. They are also international law'.⁴¹ It should be emphasised that the Constitutional Tribunal also defines the EU order as 'autonomous, albeit genetically based on international law'.⁴² In the constitutional law literature, the nature of EU law in relation to international law is not clearly explained, but constitutional issues related to these orders are usually analysed jointly, and the context in which the Constitution uses the phrase 'international law' or 'law established by an international organisation' is also referred to as EU law.⁴³

The legal consequence of Art. 9 of the Constitution is that the legal system in force on the territory of the Republic of Poland is multi-component; in other words,

39 | Ibid.

40 | Muzyczka, 2013, pp. 55–56.

41 | Muszyński, 2022a, pp. 11–41; Muszyński, 2022b, pp. 34–69.

In the legal doctrine, a dispute is observed between autonomists, who regard EU law as a separate legal system, and internationalists, who claim that the EU law system is part of the general system of international law (see Mik, 2000, pp. 293–295). K. Wójtowicz writes that EU law is a system separate from international law. However, he does not explain how this division is related to the concept of international law referred to in the Constitution RP, Wójtowicz, 2014, pp. 15–36.

42 | See Decision of the Constitutional Tribunal of 19 December 2006, P 37/05, OTK ZU No. 11/A/2006, item 177.

43 | On the problems and specificity of EU law within the meaning of the Constitution of the Republic of Poland, see Wojtyczek, 2014, p. 26.

subsystems of legal regulations from different legislative centres co-apply in Poland.⁴⁴

The state's obligation to observe international law in external relations is based primarily on international law. This means that in external relations, Art. 9 of the Constitution does not create a new obligation. The obligation to act in accordance with international law stems from the principle of good faith and the principle of *pacta sunt servanda*.⁴⁵

Observance of international law in internal relations is more closely related to the principles of constitutional law and other norms of the domestic legal order. Art. 9 of the Constitution plays a special role in the process of interpreting the law, as well as in strengthening the argumentation in the process of justifying decisions, which is clearly noticeable in the jurisprudence of the Constitutional Tribunal. Compliance with the international laws binding on the Republic of Poland implies an obligation to formulate Polish laws in such a way as to consider the understanding of legal institutions that are subject to the regulations of national laws, which exist within international laws.⁴⁶ The Constitutional Tribunal also believes that a derivative of the obligation to ensure compliance of legislation with international laws binding on Poland is the obligation to interpret binding legislation in such a way that fullest possible compliance is ensured.⁴⁷ The meaning of Art. 9 of the Constitution in internal relations relates to the fact that the obligation to comply with the norms of international laws also applies to acts whose position has not been clearly defined in other provisions of the Constitution. In this case, it is about sources of international laws not listed in Art. 87 of the Constitution RP.⁴⁸

Poland's accession to the EU through the ratification of an international agreement resulted in the state and its bodies being bound by treaties and laws enacted by this international organisation, including the law on migration or refugees.⁴⁹ At the same time, it should be borne in mind that the manner of fulfilling international obligations falls within the exclusive competence of the state. Thus, it depends on the state and its political system on how it fulfils its international obligations.⁵⁰ For the implementation of the *pacta sunt servanda* principle, what counts is the achievement of a specific effect resulting from the commitments made.

Of particular relevance to the constitutional position of migrants is Art. 56 of the Polish Constitution, according to which,

44 | Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49. See also: Wasilkowski, 1997, p. 15.

45 | Wasilkowski, 2006, p. 12.

46 | Syryt, 2019, pp. 98–100.

47 | See judgment of the Constitutional Tribunal of 28 March 2000, K 27/99, OTK ZU No. 2/2000, item 62.

48 | Czaplinski and Wyrozumska, 2004, p. 31.

49 | See more about the legislation in this area: Common European Asylum System [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en (Accessed: 5 August 2023); European Union Agency for Fundamental Rights, 2020; Immigration policy: <https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy> (Accessed: 5 August 2023).

50 | Muszyński, 2023, p. 32.

1. Foreigners may exercise their right of asylum in the Republic of Poland under the terms of act. 2. A foreigner who seeks protection from persecution in the Republic of Poland may be granted a refugee status in accordance with international agreements binding the Republic of Poland.

The legal regulations of refugee status eligibility have been elevated to a constitutional status.

3. Constitutional guarantees for the protection of migrants and refugees

The constitutional legislator has ensured that whoever is under the authority of the Republic of Poland enjoys the freedoms and rights guaranteed by the Constitution RP. The special arrangements for foreigners are set out in Art. 56 of this act. They concern the right to asylum and refugee status, whereby specific rules are laid down by appropriate legislation. These rights may be asserted within the limits of the law, as indicated by Art. 81 of the Polish Constitution.

Although the right to asylum is included in the chapter on human rights, there is no clarity on its scope.⁵¹ The legislator excluded the possibility of protecting the right to asylum through a constitutional complaint, with the result that no practice could develop in this regard in tribunal jurisprudence.⁵²

It is worth noting that the Polish Constitution does not define the terms 'asylum' or 'right to asylum'. They are also not specified in the laws, although Art. 3 pt. 1 of the act on foreigners indicates that the term 'asylum' as used in the act refers to asylum as defined in Art. 90 of the act on granting protection to foreigners in the territory of the Republic of Poland. Indeed, this provision sets out the conditions for an asylum application. However, it does not provide a definition of this institution. The literature accepts that asylum is a form of protection granted by a state within its territory to refugees, based on the principle of non-deportation and on their rights of an international character or as recognised by that state.⁵³

The literature points out that the right to asylum specified in Art. 56 sec. 1 of the Constitution is the right of a state to grant refuge within its territory to a person prosecuted in its territory for political activity.⁵⁴ This position is subject to criticism. Indeed, the current Polish Constitution does not restrict the ability to obtain asylum in the territory of Poland exclusively to persons persecuted for political activities.⁵⁵ In view of this, an interpretation is proposed according to which the essence of the right to asylum implies granting refuge to a person without Polish

51 | Banaszak, 2012, p. 339; Florczak, 2003, pp. 36–38.

52 | See Art. 79 sec. 2 of the Constitution RP.

53 | Kuczma, 2014, pp. 283–293; Zdanowicz, 2007, p. 218.

54 | Skrzydło, 2013, p. 67.

55 | Nita-Światłowska, 2016, Legalis.

citizenship in the territory of the Republic of Poland, involving the right to enter and permanently reside within the said territory under the conditions set out in the act, based on regulations arising from binding international agreements. Asylum understood in this way is sometimes referred to in the literature as 'territorial asylum' to distinguish it from 'diplomatic asylum'.⁵⁶ By granting asylum to a foreigner, the Republic of Poland assumes sovereign authority over the asylum-seeker and undertakes to grant him a broader scope of protection than that guaranteed to other foreigners.

A foreigner who has been granted the right to asylum in the Republic of Poland may permanently reside in Poland, acquire the right of entry and the right to legally reside in the territory of the Republic of Poland. An asylum-seeker acquires the right to settle in Poland, whereas a person who has been granted refugee status obtains only a limited-time residence permit in Poland.⁵⁷

In Art. 56 sec. 1 of the Constitution RP, when defining the circle of subjects who may benefit from the right to asylum, the legislature uses the term 'foreigners'. If there is no legal definition of the word in the Constitution RP, it is reasonable to refer to the understanding inherent in the study of law and to consider it as the stipulated concept.⁵⁸ This concept is however, clarified in the act on foreigners, whereby, Art. 3 point 2 defines a foreigner as a person without Polish citizenship. In view of this, it may be concluded that the right to asylum guaranteed by Art. 56 sec. 1 of the Constitution RP applies to both foreign nationals and stateless persons (*apatrides*). This definition is in line with the international laws binding Poland. Unlike in the case of refugee status, the Constitution RP does not specify situations in which the legislator may consider protection by granting the right to asylum.⁵⁹ As is clear from administrative court case law, granting asylum is one of the prerogatives of the state and is therefore optional even if the conditions formulated in this provision are met. It is a discretionary decision.⁶⁰ However, rules relating to the granting of asylum must be laid down by law, which means that no arbitrary action can be taken. The law in question must also implement constitutional principles and values, including those related to the democratic rule of law, the principle of proportionality, and the protection of inherent human dignity. In other words, the legislative definition of the situations to which the legislature attaches access to the right of asylum is subject to assessment through the prism of constitutional guarantees and international obligations binding Poland. Such a law may be subject to assessment regarding its compatibility with the Constitution or international agreements ratified with prior consent by law (Art. 188, points 1 and 2 of the Polish Constitution). The conditions for exercising the right to asylum in the Republic of Poland are set out in the act on granting protection to foreigners in the territory of the Republic of Poland.

56 | Banaszak, 2012, p. 338; Florczak, 2003, p. 31.

57 | Winczorek, 2000, p. 137.

58 | Banaszak, 2012, p. 338.

59 | Płachta, 1998, p. 89.

60 | See e.g. judgment of the Provincial Administrative Court in Warsaw of 29 January 2008, Ref. V SA/WA 2289/07, *Legalis*.

It should be emphasised that, in view of the provisions conflicting with Art. 91 sec. 2 of the Constitution, provisions of statutory rank enacted to implement Art. 56 sec. 1 of the Polish Constitution are of a subsidiary nature in relation to regulations arising from international agreements binding Poland. They primarily define the national procedure before the authority to obtain asylum status. However, the subsidiarity of statutory solutions is not that they are applicable only if there is no international law regulating the issue in question. They can also be applied when an international agreement binding Poland does not feature a specific regulation on a particular issue or when it does not have the attribute of self-execution.

Art. 56 of the Constitution RP also indicates the possibility for a foreigner to obtain refugee status. Here, the legislator is more specific in outlining the conditions for benefiting from such protection. Art. 56 sec. 2 of the Constitution RP provides that refugee status, under international agreements binding the Republic of Poland, may be obtained by a foreigner who seeks protection from persecution in the Republic of Poland. The possibility of obtaining refugee status is constitutionally guaranteed only to the extent that it arises from an international agreement binding Poland. Protection in terms of refugee status cannot be enforced through a constitutional complaint (Art. 79 sec. 2 of the Constitution RP).

As with asylum, the legislator does not clarify what refugee status involves. In view of this, reference can be made to legal and jurisprudential language and how the institution in question has been framed in legislation.

According to Art. 13 of the act on granting protection to foreigners in the territory of the Republic of Poland, a foreigner is granted refugee status if, as a result of a well-founded fear of persecution in his or her country of origin on account of race, religion, nationality, political beliefs, or membership in a particular social group, he or she cannot or does not wish to avail the protection of that country. Refugee status is also granted to a minor child of a foreigner who has been granted refugee status in the Republic of Poland, born within its territory. In the same provision, the legislator has clarified what constitutes persecution for granting refugee status. According to the legislator persecution must, by its very nature or repetition, constitute a serious violation of human rights, particularly rights whose revocation is inadmissible under Art. 15 repealing the application of the obligations in a state of public emergency, item 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950,⁶¹ or be an accumulation of various acts or omissions, including those constituting violations of human rights, whose impact is as severe as the persecution referred to above.

The Supreme Administrative Court, in its 1 February 2000 ruling, that is, under the former act on foreigners, pointed out that, in specifying the substantive legal prerequisites justifying the refusal to grant refugee status to a foreigner, the act refers to the Geneva Convention and the New York Protocol and does not provide for additional prerequisites here. On the contrary, Art. 56 sec. 2 of the Constitution RP stipulates that the application for refugee status shall be made in accordance with international agreements binding the Republic of Poland. Therefore, it would be unacceptable to interpret regulations of a statutory rank, particularly those

61 | Journal of Laws of 1993, item 284, as amended.

including the provisions of the act on foreigners, in such a way as to make it incompatible with Art. 9 and 91 item 2 of the Constitution RP and with Art. 56 sec. 2 of the Constitution RP, which provides for the possibility of obtaining refugee status 'under the international agreements binding the Republic of Poland'.⁶²

Unlike the right of asylum, the decision to grant a foreigner refugee status is not discretionary. If a person fulfils the requirements of the Geneva Convention, he or she may legitimately expect to be granted refugee status. A foreigner who has been granted refugee status may permanently reside in Poland. He or she gains the right of entry and the right of legal residence on the territory of the Republic of Poland. Unlike an asylum-seeker who gains the right to settle in Poland, a person who has been granted refugee status obtains only a residence permit in Poland for a definite period. Granting refugee status does not protect a foreigner from extradition. As explained by the Administrative Court in Warsaw, the prohibition resulting from Art. 604 § 1 point 1 of the Code of Criminal Procedure does not prevent the extradition of a foreigner permanently residing in the territory of the Republic of Poland and benefiting from any form of protection granted to him by the decision of its competent authority, provided for by refugee status, subsidiary protection, or temporary protection. Considering this perspective of the provision, only the right to asylum is relevant.⁶³

It should be emphasised that individual guarantees concerning both refugee status and the right of asylum cannot be found in the Constitutional Tribunal case laws but in the case laws of administrative courts and the Supreme Court. They are concerned with the procedures for assigning given statuses and incidental issues, for example, extradition.

Although the protection of constitutional rights and freedoms by means of a constitutional complaint does not concern the rights of refugee status and the right of asylum on the territory of Poland, foreigners, including migrants and refugees, are not deprived of the means to protect their rights. Since they are under the authority of the Republic of Poland and are entitled to certain constitutional freedoms and rights, they are also protected by constitutional means, particularly through the right to a court (Art. 45 sec. 1 and Art. 77 sec. 2 of the Constitution RP), a complaint for damages (Art. 77 sec. 1 of the Constitution RP), the right to appeal (Art. 78 of the Constitution RP), an application to the Commissioner for Human Rights Art. 80 of the Constitution RP), and a constitutional complaint, subject to Art. 79 sec. 2 of the Constitution RP. In this set of measures, the most important is the right to a court. As the Constitutional Tribunal explains, the constitution-maker broadly determines the personal scope of the right to a court. It is granted to every natural person, that is, a Polish citizen, a foreigner, and a stateless person.⁶⁴ The material scope of the right to a court is determined by the concept of 'case',

62 | Ref. No. V SA 859/99 (unpublished).

63 | Decision of the Court of Appeal in Warsaw of 26 October 2010, Ref. II AKZ 791/10, KZS 2011, No. 10, item 54.

64 | See e.g. the judgment of the Constitutional Tribunal of 2 June 1998, K 28/97, OTK ZU No. 4/1998, item 50; judgment of the Constitutional Tribunal of 20 September 2006, SK 63/05, OTK ZU No. 8/A/2006, item 108.

understood in the jurisprudence of the Tribunal as an autonomous concept, other than that adopted in individual branches of law because it refers to the basic function of courts, which – in accordance with Art. 175 sec. 1 of the Constitution – is the administration of justice. The Tribunal has consistently advocated a broad understanding of the ‘case’: it occurs whenever it is necessary to decide on the rights and freedoms of an individual and his or her interests protected by law, both in the event of their violation or threat and in the event of the need to determine them authoritatively.

Therefore, migrants and refugees, within the scope of their constitutional rights, can benefit from the protection offered by the abovementioned measures. Otherwise, the freedoms and rights declared in the Constitution RP cannot be fully implemented.

4. Conclusion

The findings from the above analysis lead to the conclusion that although the Constitution RP does not mention migrants as such, and the concept of refugee appears in the context of the right to obtain this status based on Art. 56 sec. 2, the system’s legislator did not leave these persons out of its interest. Indeed, migrants and refugees as foreigners are covered by Polish law and its guarantees, including constitutional guarantees, first because of the general principle expressed in Art. 37 sec. 1 of the Constitution RP that anyone under the authority of the Republic of Poland may exercise constitutional freedoms and rights. Second, the subjects of the constitutional freedoms and rights assured to everyone can be migrants and foreigners by virtue of their personal dignity, which is the source of these rights, regardless of their citizenship. This is why they are guaranteed freedom of movement within the territory of the Republic of Poland and the choice of place of residence and stay. Everyone is free to leave the territory of the Republic of Poland (see Art. 52 sec. 1 and 2 of the Constitution RP). They are also subjects of fundamental rights, especially personal rights. Third, the legislature has provided guarantees for foreigners in the form of a possibility to apply for the right of asylum and refugee status (Art. 56 of the Constitution RP). Foreigners can assert their freedoms and rights through judicial and administrative means. They can also apply to the ombudsman in their cases.

Shaping the position of migrants and refugees must comply with constitutional standards, including the general principles of loyalty, proportionality, and equality. Exceptions and limitations may be established by law and must meet the conditions of Art. 31 sec. 3 of the Constitution RP.

Importantly, it should be borne in mind that differentiating the constitutional position of citizens and foreigners with regard to certain rights, especially those serving the realisation of the principle of the Nation’s sovereignty, is justified and cannot be treated as discrimination. This is justified by the functions of the state and its obligations to citizens as expressed in the Constitution RP.

A review of the constitutional provisions on human freedoms and rights makes it possible to conclude that for foreigners too, the guarantees are broad. The legislator considers them when shaping the content of the law on migration and refugees. While it must comply with the binding international laws in doing so, it is careful not to take measures that contradict constitutional principles and values.

Although the catalogue of constitutional freedoms and rights is extensive, in the current form of the Constitution RP, there is no need to modify it to expand the regulations for migrants and refugees. This is regardless of the legislator's assumptions: the legislator is bound by the basic principle that determines the status of every person in the state, namely, the principle of dignity, which is the source of all constitutional freedoms and rights, and public authorities must respect this dignity and assist in its realisation.

It should be emphasised that so far the issue of refugee and migration law has not been the subject of the Constitutional Tribunal's statements. If one looks for references of the Tribunal regarding the matter in question, some standards can be found in cases where the Tribunal referred to the rights of citizens and foreigners in Poland, especially in the context of citizenship. However, these are not matters directly related to migrants or refugees.

The Constitutional Tribunal also did not assess international law (international agreements) concerning migration, migrants, and refugees. Neither has it commented on migration issues in the context of the division of competences between Poland and the EU. Therefore, no position has been taken in this regard.

It should be emphasised that owing to the fact that the Constitutional Tribunal may only examine the compliance of international agreements with the Constitution, the question of the Constitutional Tribunal's statements on EU derivative law is significantly limited. To make an assessment, the initiator of the proceedings would have to indicate that the treaty provides for a specific norm concerning the issue of refugees, migration, and migrants, which is inconsistent with the Constitution. This also limits the Constitutional Tribunal's field of expression. Changes in the field of migration law would have to be introduced in the treaty so that the Constitutional Tribunal could directly adjudicate them.

The Constitutional Tribunal could examine derivative law in the form of a constitutional complaint or a legal question, but the number of formal conditions to be met implies that a given assessment can only be considered hypothetically. In a legal question, the court could ask the Constitutional Tribunal if it had any doubts about whether the EU derivative law on migration that it wants to apply in the case is consistent with the Constitution. So far, no court has asked the Tribunal such questions. As far as constitutional complaint is concerned, the complainant would have to exhaust all legal means and get a final decision of the court or public administration body issued on the basis of EU derivative law (and not every law is directly applicable in a Member State). Additionally, in a constitutional complaint, it would not be possible to question the fact that EU law goes beyond the scope of competences transferred to the EU, because the control model in the case of a constitutional complaint can only be the provisions on constitutional freedoms and rights, with the exception that the right to asylum or to obtain refugee status is excluded from this directory. This was decided by the legislator in 1997.

The indicated subject matter was also not the subject of statements by the Constitutional Tribunal in the context of the limits of European integration and the scope and limits of the transfer of competences of a Member State of the European Union.

It should be noticed that the issue of the limits of the transfer of competences to the EU was the subject of judgments of the Constitutional Tribunal. Regarding the issue of the scope of division of competences between Poland and the EU, the Constitutional Tribunal commented on this subject in general terms (see the judgments of the Constitutional Tribunal Ref. No. K 18/04⁶⁵ and Ref. No. K 32/09⁶⁶).

The Constitutional Tribunal indicated as shown:

The conferral of competences in certain matters must be understood both as a prohibition on conferring all the competences of a given authority, on conferring competences in all matters in a given field, and as a prohibition on conferring competences on the substance of matters determining the remit of a given authority. Therefore, it is necessary to precisely define the areas and indicate the scope of competences covered by the transfer. There are no grounds for assuming that in order to meet this requirement, it would be enough to retain, even for the sake of appearances, competences in the competence of constitutional bodies in a few cases. The fears of the applicants expressed at the hearing are not justified. Actions as a result of which the transfer of powers would undermine the sense of existence or functioning of any of the organs of the Republic of Poland would also be in clear conflict with art. 8 sec. 1 of the Constitution.⁶⁷

Moreover, the Constitutional Tribunal is of the opinion that neither Art. 90 sec. 1 nor Art. 91 sec. 3 constitutes a basis for delegating authorisation to an international organisation (or its organ) to enact legal acts or take decisions that would be contrary to the Constitution RP. The regulations indicated here cannot be used to transfer competences to the extent that it would prevent the Republic of Poland from functioning as a sovereign and democratic state.

In the judgment K 32/09, the Constitutional Tribunal added that the presumption of the constitutionality of the EU treaties may be rebutted only after it has been established that no such interpretation of the treaty and of the Constitution exists that would allow stating the compliance of the treaty provisions with the fundamental law. The Constitutional Tribunal cannot fail to consider the context of the effects of its judgment from the point of view of constitutional values and principles, as well as the consequences of the judgment for the sovereignty of the state and its constitutional identity.⁶⁸ So far, the Constitutional Tribunal has not linked migration or refugees with constitutional identity. The Tribunal explained

65 | The judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49.

66 | The judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU No. 9/A/2010, item 108.

67 | The judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49.

68 | The judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU No. 9/A/2010, item 108.

that, regardless of the difficulties associated with establishing a detailed catalogue of non-transferable competences, the matters covered by the complete prohibition of transfer should include provisions specifying the guiding principles of the Constitution and provisions regarding the rights of an individual determining the identity of the state, including the requirement to ensure the protection of 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, as well as the requirement to ensure better implementation of constitutional values and the prohibition of delegating constitutional powers and competences to create competences. The Constitutional Tribunal also spoke about sovereignty and the scope of the integration process. These can be the bases on which this organ could possibly develop in the future instruments for constitutional review of possible treaty provisions that would concern migration and refugees.

Judgment Ref. No. K 3/21 of the Constitutional Tribunal⁶⁹ is concerned with the strict issue of EU law encroaching on the core competencies of the constitutional organs of the state in terms of deciding on its system (here: the judiciary). This is an issue different from migration, refugee, and asylum matters. However, these issues do not concern the structure of the state and its bodies, but concern human rights; therefore, if a given issue appeared in the Constitutional Tribunal, additional arguments and measures should be developed to assess the constitutionality of the given solutions. The existing jurisprudence of the Constitutional Tribunal on the limits of the transfer of competences to the EU may prove insufficient in this case.

However, if such cases were brought before it, the sub-constitutional law shaping the situation of these entities, as well as the obligations of the public authority towards them, would have to meet the standards outlined above regarding the constitutional status of an individual in the state, as well as the principle of proportionality and Poland's obligation to comply with international law that is binding on it with respect to the primacy of the Constitution RP according to Art. 8 sec. 1 of this act.

69 | The judgment of the Constitutional Tribunal of 7 October 2021, K 3/21, OTK ZU A/2022, item 65.

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