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Special Issue
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EDITORIAL

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EDITORIAL

THE GROWING BUT UNEVEN ROLE OF EUROPEAN COURTS IN (IM)MIGRATION GOVERNANCE: A COMPARATIVE PERSPECTIVE

Veronica Federico,* Madalina Moraru† and Paola Pannia‡ §

"Tu lascerai ogne cosa diletta
più caramente; e questo è quello strale
che l'arco de lo essilio pria saetta
Tu proverai sì come sa di sale
lo pane altrui, e come è duro calle
lo scendere e 'l salir per l'altrui scale." [1]

I. INTRODUCTION: ADJUDICATING IN TIMES OF CRISIS

The context in which European and domestic courts adjudicate migrants' rights has never been more complicated than it has been in recent years. A socio-political reality of sequential crises (economic, refugee, rule of law and Covid-19)[2] has empowered the executive to make decisions with regard to migration with minimal legislature and judicial supervision and launch 'open

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‡ Post-doctorate Research Fellow in Comparative Public Law, Law Faculty, University of Florence.
§ We are grateful to the editorial team of the EJLS for their valuable cooperation and careful work throughout the publication process.
[1] 'You shall leave everything you love most dearly: this is the arrow that the bow of exile shoots first. You are to know the bitter taste of others' bread, how salt it is, and know how hard a path it is for one who goes descending and ascending others' stairs'. Dante Alighieri, *The Divine Comedy* (first published 1472, Courtney Langdon (trs), Harvard University Press 1921) vol 3, canto 17, lines 55-60.
[2] Erik Jones, R Daniel Kelemen and Sophie Meunier, 'Failing Forward? Crises and Patterns of European Integration' (2021) 28 Journal of European Public Policy 1519.

 doi:10.2924/EJLS.2022.001

attacks on case law'.[3] The ever-increasing number of persons in need of access to asylum is likely to increase even further over the next decade.[4] Nevertheless, States have increasingly implemented deterrence policies (e.g. push-and pullbacks,[5] walls and fences,[6] variegated forms of detention,[7] and exclusion from procedural and socio-economic rights),[8] which have limited individuals' access to asylum proceedings and socio-economic rights, violating international obligations to observe the principle of non-

3 *M.A and others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018) Concurring Opinion of Judge Pinto de Albuquerque, para 2; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197. For more on governmental backlash against courts as part of the rule of law crisis generally, see Monika Szulecka, 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of Admitting Asylum Seekers in Poland' [2022] (special issue) European Journal of Legal Studies 171.

4 More than 1% of the global population is forcibly displaced. UNHCR 'Statistical Yearbook: 2019 Edition' (New York 2019) UN Doc ST/ESA/STAT/SER.S/38. On future predictions, see UNHCR, 'Displaced on the Frontlines of the Climate Emergency' (ArcGIS StoryMaps, 22 April 2021) <https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903> accessed 21 March 2022.

5 Madalina Moraru, 'Generalised Push-Back Practices in Europe: The Right to Seek Asylum Is a Fundamental Right' (2022) 1 Quaderns IEE 154. See also Szulecka (n 3).

6 Ibid.

7 For examples, see Danai Angeli and Dia Anagnostou, 'A Shortfall of Rights and Justice: Judicial Review of Immigration Detention in Greece' [2022] (special issue) European Journal of Legal Studies 97; Louis Imbert, 'Endorsing Migration Policies in Constitutional Terms: The Case of the French Constitutional Council' [2022] (special issue) European Journal of Legal Studies 63. For a more general discussion, see Madalina Moraru and Linda Janku, 'Czech Litigation on Systematic Detention of Asylum Seekers: Ripple Effects across Europe' (2021) 23 European Journal of Migration and Law 284.

8 For examples, see Paola Pannia, 'Questioning the Frontiers of Rights: The Case Law of the Italian Constitutional Court on Non-European Union Citizens' Social Rights' [2022] (special issue) European Journal of Legal Studies 133; Madalina Moraru, 'The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy' [2022] (special issue) European Journal of Legal Studies 21.

refoulement and protect fundamental rights.[9] Such barriers have resulted in increasing casualties, leading to an unaddressed humanitarian crisis.[10] Moreover, we argue that these policies gradually erode the right to asylum, transforming it into a theoretical construct, accessible in practice to only the very few refugees who are not caught by these containment practices.[11] As Alison Mountz has lamented, these tendencies may ultimately prove to be signs of 'the physical, ontological and political death of asylum itself'.[12]

However, the EU's recent open borders policy and Member States' expressions of solidarity towards Ukrainians fleeing the Russo-Ukrainian war represent a different narrative than the 'fortress Europe' approach taken in 2015-16.[13] The EU's reactions to these two refugee crises show a varied approach towards the enforcement of the right to asylum and migrants' rights depending on the specific geopolitical background of the refugee crisis and the entry rights enjoyed by the third-country nationals (especially in terms of visa requirements) prior to the crisis. While the open borders narrative

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9 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) 32 International Journal of Refugee Law 668; Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' [2021] European Constitutional Law Review 1.

10 Julia Black, Maritime Migration to Europe: Focus on the Overseas Route to the Canary Islands. IOM 2021, Geneva and IOM Missing Migrants Project Data.

11 See Madalina Moraru, 'The EU Fundamental Right to Asylum: In Search of Its Legal Meaning and Effects' in Sara Iglesias Sanchez and Maribel Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021); Paola Pannia, 'Tightening Asylum and Migration Law and Narrowing the Access to European Countries: A Comparative Discussion' in Veronica Federico and Simone Baglioni (eds), *Migrants, Refugees and Asylum Seekers' Integration in European Labour Markets: A Comparative Approach on Legal Barriers and Enablers* (Springer 2021).

12 Alison Mountz, *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago* (University of Minnesota Press 2020).

13 Jessica Schultz and others, 'Collective Protection as a Short-term Solution: European Responses to the Protection Needs of Refugees from the War in Ukraine' (EU Immigration and Asylum Law and Policy, 8 March 2022) <https://eumigrationlawblog.eu/collective-protection-as-a-short-term-solution-european-responses-to-the-protection-needs-of-refugees-from-the-war-in-ukraine/#more-8300> accessed 31 March 2022.

towards the displaced Ukrainians is to be welcomed, it is too early to predict how long this different discourse is going to last (or rather to what extent we are really witnessing a change of paradigm), as well as how the socio-economic and civil rights of the displaced Ukrainians will be ensured in the long run and under which particular legal status (limited to temporary protection, refugee or subsidiary protection, long-term residence).[14] In the likely scenario that Member States confer a variable geometry of rights on Ukrainians, the judicially developed human rights standards discussed in this Special Issue will prove useful.

The portrayal of asylum seekers as abusing the Common European Asylum System ('CEAS'), placing a burden on economy,[15] and posing a threat to security[16] has reverberated among the European population, leading to the rise of populist parties whose governments defy European and domestic jurisprudence upholding European Union (EU) asylum norms and rule of law standards.[17] Moreover, the perpetual political stalemate with respect to reforming the CEAS[18] has left room for mushrooming national responses

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14 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of "Free Choice"' (EU Immigration and Asylum Law and Policy, 7 March 2022) <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> accessed 31 March 2022; Meltem İneli Ciğer, '5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022' (EU Immigration and Asylum Law and Policy, 7 March 2022) <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> accessed 2 April 2022.

15 Adel-Naim Reyhani and Gloria Golmohammadi, 'The Limits of Static Interests: Appreciating Asylum Seekers' Contributions to a Country's Economy in Article 8 ECHR Adjudication on Expulsion' (2021) 33 International Journal of Refugee Law 3. See also Pannia (n 8).

16 This is particularly vivid in Poland. See Szulecka (n 3).

17 Bruno De Witte and Evangelia Lilian Tsourdi, 'A. Court of Justice Confrontation on Relocation–The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union (2018) 55 Common Market Law Review 1457; Evangelia Lilian Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 17 European Constitutional Law Review 471.

18 Since the 2015 refugee crisis, the European Commission has put forward two proposals for reforming the CEAS: one in 2016 and another in 2020. European

prioritising the fight against irregular migration and restriction of access to asylum rather than developing European solidarity in asylum and migration policies.[19]

States combine external migration control practices that reduce legal entry pathways and escape the radar of judicial review[20] with more subtle forms of internal migration control.[21] Everywhere in Europe, states have structured their welfare systems to reflect and consolidate choices and perceptions about "wanted" and "unwanted" migrants (i.e. based on the supposed burden they place upon the state).

Within this charged political context, European and domestic courts have been increasingly seized to decide on the conformity of Member States' deterrence policies and exclusion practices with international and supranational migration and human rights norms, as well as with migrants' constitutionally recognised rights and the essential value of the rule of law in a democratic society. By highlighting practices such as generalised push- and pullbacks, immigration detention and derivate measures that similarly

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Commission, 'Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (6 April 2016) COM(2016)197 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (23 September 2020) COM(2020)609 final. However the future of the 2020 reform is still uncertain. See Daniel Thym (ed), 'Special Collection on the "New" Migration and Asylum Pact' (EU Immigration and Asylum Law and Policy, October 2020-February 2021) <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/> accessed 31 March 2022.

19 Luisa Marin, Simone Penasa and Graziella Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 European Journal of Migration and Law 1.

20 Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311.

21 Andrew Geddes, 'Migration and the Welfare State in Europe' (2003) 74 The Political Quarterly 150; Ilker Ataç and Sinenglinde Rosenberger, 'Social Policies as a Tool of Migration Control' (2019) 17 Journal of Immigrant & Refugee Studies 1; Pannia (n 8).

deprive asylum seekers and immigrants of their right to liberty, such cases have inherently required courts to adjudicate incidentally on the decades-old tension between the declared interests of receiving States and the rights of refugees, asylum seekers, migrants and irregularly present third country nationals.[22] As central pillars of the rule of law and human rights enforcement, courts have the potential to ensure checks and balances against the growing trend of executivization of immigration policies.[23] Doubtlessly, 'courts are central to the rule of law',[24] and apex courts are even more so, as they should, by definition, protect the principles of legal certainty and the equal treatment of everybody by guaranteeing the uniform interpretation of the law, ensuring that states comply with international human rights and migration norms, as well as the constitution, in the production of migration law and, with specific reference to constitutional courts, defending the normative superiority of the constitution and the coherence of the system of values.[25]

Hence, investigating what European and domestic courts say on migrants' rights becomes, on the one hand, an interesting exploratory ground for investigating the role of courts on the rule of law in the 21st century. On the other hand, it facilitates the discussion of migration governance through the lens of case law, which often tends to remain a *domain reservé* for practitioners and specialists of migration law. By doing so, this Special Issue proposes a new analytical perspective, highlighting specificities and common trends in strategic litigation and courts' reasoning to allow for a critical discussion of the role of the courts in migration governance and their capacity to elaborate

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22 Since the adoption of the 1951 Convention relating to the Status of Refugees: 189 UNTS 137 (hereinafter the 1951 Refugee Convention).

23 Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 The Theory and Practice of Legislation 71.

24 Cheryl Saunders, 'Courts with Constitutional Jurisdiction' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 414.

25 By 'apex courts' we refer to those courts with jurisdiction to interpret and apply the constitution and eventually sanction constitutional breaches, as well as supreme courts with jurisdiction to unify the jurisprudence of ordinary courts by solving normative disagreements.

new legal paradigms to regulate this specific policy domain.[26] In spite of a growing scholarly focus on apex courts' role in migration governance, the topic still lacks systematic and comparative analysis covering various legal forms of migration and the reasoning of both transnational and domestic courts. In fact, a large majority of the works published so far has focused on specific national case studies, supranational courts, or migrant segments (such as refugees, irregular or economic migrants).[27] The considerable number of national cases analysed in this Special Issue, complemented by its analysis of the European Court of Justice and its comparative approach, contributes to filling a gap in both migration and constitutional law. This Special Issue aims thus to expand the analysis of the role of courts in shaping migration governance by approaching the issue from a contemporary rights-based perspective.

Indeed, the comparative discussion of a number of European and domestic courts' reasoning patterns and variables opens the way for unveiling inconsistencies and contradictions in the way the rule of law is conceived in contemporary European democracies. While European courts are bound by the same international and supranational norms governing asylum and

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[26] See Christian Joppke, 'The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union' (2001) 34 Comparative Political Studies 339; Gallya Lahav and Virginie Guiraudon, 'Actors and Venues in Immigration Control: Closing the Gap Between Political Demands and Policy Outcomes' (2006) 29 West European Politics 201; Leila Kawar, 'Juridical Framings of Immigrants in the United States and France: Courts, Social Movements, and Symbolic Politics' (2012) 46 International Migration Review 414; Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System* (Bloomsbury 2014).

[27] See e.g. Hélène Lambert and Guy S Goodwin-Gill, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010); Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 Human Rights Law Review 287; Violeta Moreno-Lax *Accessing Asylum in EuropeExtraterritorial Border Controls and Refugee Rights under EU Law* (Oxford Univeristy Press 2019); Madalina Moraru, Galina Cornelisse and Philippe de Bruycker, *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020). For a notable exception, see Giovanni Carlo Bruno, Fulvio Maria Palombino and Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR edizioni 2019).

migration, and should in principle provide similar interpretations of domestic deterrence policies based on the principle of uniform and effective implementation of EU law, there is nonetheless judicial disagreement over whether courts have jurisdiction to assess such barriers[28] and whether these barriers comply with the international and supranational norms (e.g. Refugee Convention, European Convention on Human Rights, EU law).[29]

Against this backdrop, this Special Issue collects articles addressing the following questions: How do Courts position themselves vis-à-vis the political power in the migration domain, which is a context characterized by radical attacks on the rule of law? What are the effects of judicial assessments on asylum seekers, migrants, refugees and immigrants' rights in Europe? What is the reasoning underlying judgments on asylum- and migration-related matters? In responding to these questions, the articles in this Special Issue go beyond mere summaries of the key national cases on asylum seekers', migrants' and immigrants' rights, identifying the challenges from inside and outside of the judiciary which led to incoherent jurisprudence and concluding by offering a constructive path towards improving identified deficiencies.

This editorial explains the selection of jurisdictions, courts and rights analysed in this Special Issue (Section II), briefly summarizes the contributions included herein (Section III) and illustrates the common themes that have emerged from these contributions on the role of courts in (im)migration governance (Section IV).

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[28] For instance, on assessing the legality of EU-Turkey Statement, compare Case T-192/16, *NF v European Council* EU:T:2017:128 with Council of State (Greece), Decision 805/2018; Council of State (Greece), Decision 806/2018.

[29] For instance, on the legality of detention in border centres, compare *Ilias and Ahmed v Hungary* App No. 47287/15 (ECtHR, 21 November 2019) with Administrative Tribunal of Paris (France), Decision 1602545/9 of 22 February 2016; Tribunal of Florence (Italy), Case 14046/2017;Tribunal of Genoa (Italy), Case 12716/2017; Tribunal of Rome (Italy), Case 62213/2017; Case C-924/19 and C-925/19 *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* EU:C:2020:367. On the legality of pushbacks, compare Constitutional Court of Serbia, Decision Už-1823/2017 of 9 December 2020 with Constitutional Court of Croatia, Decision of 18 December 2018; Constitutional Court of Croatia, Decision of 4 March 2021.

II. What European Courts Say on Migrants' Rights: Patterns and Variables

This Special Issue choses to focus on Greece, France, Italy and Poland, which are Member States located at the EU's external borders that have experienced a dramatic increase in migration flows in the last decade while also being affected by parallel crises impacting the economy and the rule of law, which have resulted in anti-refugee sentiments encouraged by political discourse. Over the last few decades, successive governments in these countries have thus modified aspects of immigration law, mostly following a restrictive trend.

In Greece, the government responded to the EU-Turkey statement in March 2016 and the 2020 pandemic by escalating its longstanding policy of generalised immigration detention.[30] Similarly, the Italian government has responded with an increasingly security-based and regressive approach, culminating in 2018 with the Salvini Decree, which has severely curtailed foreigners' rights.[31] The effects of this and other related measures have been only partially mitigated by the actions of Courts and by a new Law Decree (n. 130/2020).[32] Along the same lines, immigration has become an increasingly heated political issue in France. The legislative framework regulating the legal status of foreigners has been subjected to frequent changes over the past forty years, mostly aimed at tackling irregular migration while narrowing down the legal entry channels into the country, restraining access to

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30 See Angeli and Anagnostou (n 7).

31 DL 4 ottobre 2018, n 113, Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata, converted with amendments by L 1 dicembre 2018, n 132.

32 DL 21 ottobre 2020, n 130, Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale, converted with amendments by L 18 dicembre 2020, n 173.

international protection and imposing more and more residency conditions on foreigners. Finally, while Polish authorities appear to have adopted a more ambiguous stance on migration and asylum – becoming renowned for its "liberalizing" approach toward migrant workers – restrictive tendencies are also on display in this context. Since 2015, the government has explicitly adopted a closed-door policy toward asylum seekers and refugees, except those coming from 'culturally close' countries in Eastern Europe, as well as regions with a Polish diaspora or ethnic Poles.[33]

In some cases, even European institutions have aligned themselves with the restrictive policies enacted at the domestic level. Restrictions on the procedural requirements for asylum and immigration hearings, as well as gaps in EU secondary legislation on the protection of the right to be heard, can be considered paradigmatic of this tendency.[34]

The articles in the Special Issue analyse the role of courts, in particular supreme or constitutional courts (the Polish Supreme Administrative Court,[35] the Italian Constitutional Court,[36] the French Constitutional Court,[37] and the Greek Council of State[38]), but also lower administrative courts and supranational courts (the Court of Justice of the EU (CJEU)[39] and the European Court of Human Rights (ECtHR)[40]) in ensuring asylum seekers', refugees', migrants' and immigrants' civil and socio-economic[41] rights – both procedural and substantive – within a political context of rights' reduction and exclusion. Immigration detention has been on the rise in all national jurisdictions covered by this Special Issue, in the context of

33 Szulecka (n 3).

34 See Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' COM (2020) 609 final; Galina Cornelisse and Marcelle Reneman, 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality' (2021) 26 European Law Journal 181.

35 Szulecka (n 3).

36 Pannia (n 8)

37 Imbert (n 7)

38 Angeli and Anagnostou (n 7).

39 Moraru (n 8).

40 Szulecka (n 3); Angeli and Anagnostou (n 7).

41 Pannia (n 8).

increased migration flows and public perceptions of immigrants as a threat to security and public order. Nevertheless, the approaches of the Greek Council of State and the French Constitutional Court on immigration detention have been diametrically opposed. It will be shown that litigation has been resorted to as a strategy to unblock access to asylum procedure and ensure its enactment according to precepts of access to justice.

Building on the case-law of the CJEU and four national case-studies (France, Greece, Italy and Poland, which present a high variability in terms of the structure of the legal system and the traditional role of the courts in it, as well as numbers of immigrants and types of immigration), this Special Issue provides the reader with a critical overview of the most significant aspects of courts' jurisprudence and argumentation techniques in the migration-related domain in Europe. In terms of overarching patterns, courts have been characterised neither by a pronounced activism nor by a uniform, transformative jurisprudence. On the contrary, the articles in this Special Issue suggest that courts exercise a sort of Janus-faced attitude. As has been seen in France and Greece, for instance, some courts assume the traditional role of 'mouthpiece of the law', restricted to applying the law as it is, thus reinforcing existing patterns of social exclusion and rubber-stamping migration policies whose conformity with supranational and constitutional fundamental rights is questionable. Meanwhile, other courts such as the CJEU and the Italian Constitutional Court have taken on the role of active protectors of rule of law and constitutional rights. Moreover, in recent decades, the Europeanization of migration law has contributed to judicial empowerment, which has been used, on occasion, by both constitutional and ordinary courts to actively improve the conditions of vulnerable groups of migrants that have, in one way or another, been left behind by the political system.

The four countries examined provide a variety of important insights into migrants', refugees' and asylum applicants' entry channels and statuses, legal frameworks and fundamental rights protection. Despite the harmonisation efforts at the EU level, differences persist at various levels among European countries. Those differences are determined by different patterns of migration flows – that is, refugees, beneficiaries of subsidiary and humanitarian protection and asylum applicants, on the one hand, and

economic migrants, on the other. The Greek and Italian articles, for example, illustrate how the cumulated effects of the economic and the so-called refugee crisis have put a high degree of political pressure on courts when deciding on migrants' rights. Concerns about effective management of justice have led to emphasis on fast delivery of judgments and the restriction of access to social welfare benefits, which has contributed to a certain judicial self-restraint and efforts to balance rights effectiveness with critical economic exigencies. Nevertheless, neither large influxes nor dire socio-economic conditions have obstructed the emergence of new paradigms of justice from the Italian Constitutional Court and Greek courts, particularly those implementing European judgments. This means that, despite what governments and their policies suggest, the economic costs of migration are not incompatible with fundamental rights protection.

On the other hand, the analysed countries also have different legal, political and court systems, which influence how legislators, policymakers and courts react to the migration inflows. The design, functions, impact and legitimacy of the judiciary and of apex courts are crucial in understanding and comparing their jurisprudence,[42] as well as their role in the current migration governance system in its broadest sense. This is best exemplified by the French article, which shows how the political fragility of the Constitutional Council and its election system has contributed to a politicisation of its migration-related jurisprudence. In the same vein, the Polish case illustrates a worrying trend of lack of enforcement of judgments by the executive, whereas in systems where courts are salient players in the political process, as in Italy, governments and legislatures are more receptive of their judgments.

Interestingly, notwithstanding such diversity, courts throughout Europe find themselves in the same challenging position. They are caught between two equally strong but opposing tensions. On the one hand, following the imperatives of the globalising doctrine of fundamental rights,[43] courts are

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42 Paul Brace and Melinda Gann Hall, 'Studying Courts Comparatively: The View from the American States' (1995) 48 Political Research Quarterly 5; Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts' (2013) 61 The American Journal of Comparative Law 173.

43 Andrew Clapham, 'The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity', in Marcelo G. Kohen (ed), *Promoting Justice, Human*

called upon to protect the rights and dignity of one of the most vulnerable categories of individuals in current times: migrants.[44] On the other hand, courts have to respect and enforce the nation-states' prerogative to maintain both their discretional power over the entry and residence of aliens and the distinction between citizens and aliens, which, since the emergence of the post-Westphalian notion of statehood, defines their sovereignty.[45] Balancing these two requirements, which assume different shades in the different jurisdictions, is not an easy task, and it does not depend exclusively on pure legal reasoning. Indeed, adjudicating cases involving migrants' rights quite often requires courts to tailor their arguments to fit a larger audience, as migration is one of the most politically, socially and economically sensitive domains of current times.[46]

The number of cases brought to the courts' attention is growing and these cases cover the whole spectrum of the asylum and migration policy domain: from immigration law (entering the country and the EU with which legal status and under which conditions, the right to international protection and to other forms of national protection and non-refoulement) to fundamental freedoms and civil liberties; from socio-economic rights to integration measures. The focus changes across the articles. The purpose of this Special Issue is to offer a multifaced and multi-dimensional mosaic in which each of the different national "tiles" contributes to a greater understanding of one of the most challenging political, social and legal questions of the new

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Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international (Brill Nijhoff 2007); Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016).

44 Ayten Gündogdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press 2014); Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford University Press 2016).

45 Marinella Marmo and Maria Giannacopoulos, 'Cycles of Judicial and Executive Power in Irregular Migration' (2017) 5 Comparative Migration Studies 1.

46 Paul Statham and Andrew Geddes, 'Elites and the "Organised Public": Who Drives British Immigration Politics and in Which Direction?' (2006) 29 West European Politics 248; Nathaniel Persily, Jack Citrin and Patrick J Egan, *Public Opinion and Constitutional Controversy* (Oxford University Press 2008).

millennium for Europe, that is: the governance of migration at both Member States' and Union levels.

III. Overview of This Special Issue

This Special Issue[47] starts with an article that analyses how the CJEU has shaped new rights to be heard for asylum seekers and irregular migrants and contributed to the enhancement of legal accountability of domestic executives. The task of the CJEU to guarantee EU-derived rights for migrants has not been easy given the limitations to its jurisdiction resulting from the principles of conferred powers and national procedural autonomy, as well as the opposing views coming from the litigants, governments and domestic courts. The conflict resolution approach of the CJEU has been one of small but steady steps towards enhancing the European standards of protection of the right to be heard of asylum seekers and immigrants compared to the domestic level. Nevertheless, the Court's approach in shaping migrants' rights has given rise to criticism, either for being too active or too restrained. In the first years after the entry into force of the Charter of Fundamental Rights of the EU, the CJEU was praised for actively promoting the human rights of migrants.[48] In recent years, the CJEU has faced criticism that it displays passivity, self-restraint and a lack of constitutional vision in migration.[49]

A re-examination was therefore needed, and conclusions must be drawn – both about what can be demanded of the CJEU and what can be expected from the normative frameworks within which the Court operates. Moraru's article argues that none of the labels ascribed to the CJEU's role on migrants' rights apply to the case law on the right to be heard. The Court has not displayed a straightforward deferential, idiosyncratic, protectionist or activist role. Instead, the Court's conflict-resolution interpretation reflects a

47 The articles in this Special Issue were submitted between June and September 2021.

48 Costello (n 44).

49 Daniel Thym, 'A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases' (2019) 21 European Journal of Migration and Law 166; Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' (2020).

compromise between various conflicting judicial preferences that materialised in small but steady steps towards an inviolable core of an asylum seekers' and immigrants' right to be heard that goes beyond some of the domestic standards of protection.

This introductory and contextualising contribution allows the subsequent four articles to focus on different national case-studies. The cases of France, Greece, Italy and Poland illustrate specific national traits in terms of immigration phenomena and of rights litigation, highlighting peculiar aspects of courts' involvement in migration governance, their contributions and their limitations in crafting new paradigms through their *ratio decidendi*.

In the French case, Imbert argues that the Constitutional Council 'has endorsed, for the most part, the legislator's immigration policies'.[50] Despite various fundamental rights achievements, whereby the Council confirmed that foreigners are protected by the Constitution, 'filled in part of the gaps' regarding foreigners' constitutional rights and struck down laws prolonging administrative detention or lacking sufficient effective judicial remedies,[51] the Constitutional Council has predominantly followed a similar approach to that of the legislator. As the 'fight against irregular migration' became an overarching goal of immigration policies pursued by the legislator and the administration, the Council translated this aim into constitutional terms by linking it to the safeguarding of public order, an objective of constitutional value against which foreigners' rights – even the most fundamental – are often balanced.[52] Little space for different legal paradigms is allowed.

In Greece, the development of the jurisprudence has been heterogenous, often with inconsistent outcomes, especially on immigration detention, which is the focus of the article. Anagnostou and Angeli argue that, while the Greek system of allocating jurisdiction over immigration detention to a single administrative judge has the advantage of speed and flexibility, nevertheless, the lack of a second instance jurisdiction has a number of detrimental consequences. The authors show how Greece's peculiar judicial system undermines rights protection and reinforces legal ambiguity and

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50 Imbert (n 7) 64.

51 Cons const, décision n° 89-269 DC du 22 janvier 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, cons 33, 42.

52 Imbert (n 7) 95.

inconsistency. Moreover, this system shields lawmakers from the kind of judicial review that is conducive to rights protection and compliant with the ECHR and EU law. As already mentioned, the Greek case clearly shows how the institutional design of domestic court systems is crucial to enabling courts to fulfil their rule of law mandate in migration law. The article calls for an institutional reform that would allow for higher administrative courts, such as the Council of State, to act as appellate courts and review the constitutionality of detention orders. This would strengthen the ability of national judges to resolve long-standing normative questions about the law. It would ultimately lead to a kind of judicial control that is more coherent and more conducive to human rights protection.

Shifting from detention to welfare rights, the Italian article highlights how the judicialisation of migrants' rights has progressively led to the constitutionalisation of those very same rights, which means that the Italian Constitutional Court has often moved from the position of 'negative lawmaker'[53] to opt for transformative jurisprudence, whereby the inclusion of aliens has impacted the very nature of rights. A number of rights have been extended by the Court to foreigners who, although excluded from democratic processes, have turned to the courts as the only channel for their welfare claims and the only possibility to vindicate their position in their host society. The Italian Constitutional Court has proven to be crucial in securing foreigners' social rights against restrictive legal provisions approved by the legislator. Its decisions were mostly driven by the principles of non-discrimination and solidarity, which were given priority over other considerations such as budget constraints and political choices tied to the allocation of economic resources. However, the Court's reasoning is not plain and coherent. When social rights do not serve 'primary needs' or are not related to 'fundamental inviolable rights', the Court has conditioned foreigners' access to social rights upon the requirement of EU-long term residence or other prolonged residency status.[54]

An overarching theme in the European courts' case-law is the relationship between national and supranational courts, which sometimes becomes a proper dialogue. In the Polish case, the juxtaposition of the observably weak

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53 Hans Kelsen, *La giustizia costituzionale* (Carmelo Geraci tr, Giuffrè 1981) 257.

54 Pannia (n 8) 165.

role of national courts with the great expectations linked to legal intervention by international bodies, in particular the ECtHR, is paradigmatic. Szulecka claims that the crisis of the rule of law and the threatened independence of the judiciary, combined with the spread of anti-immigrant and anti-refugee sentiments, exacerbate the inefficacy of Polish national courts' jurisprudence, especially when it is 'incompatible with [the government's] vision for forced migration management'.[55] The Italian case, in contrast, shows a different approach. In 2020, the Italian Constitutional Court resorted to the preliminary reference procedure, asking the CJEU to offer an interpretation of relevant EU labour migration provisions in order to determine the compatibility with EU law of domestic provisions conditioning access to maternity and childbirth allowances to the possession of an EU-long term residence permit.[56] The subsequent decisions of the Court of Justice[57] and the Italian Constitutional Court[58] represent an example of a fruitful and collaborative dialogue, which has resulted in an expanded protection for foreigners' social rights.[59]

IV. The Role of Courts and the Rule of Law in (Im)migration Governance

The domain of migration is peculiar compared to other fields of law for a number of reasons. Firstly, the law-making and decision-making processes in the field are characterized by an evident unbalance, at least at national and EU levels. Asylum seekers, refugees and immigrants do not have a say (at least directly) in the law-making and decision-making processes that so crucially affect their lives. This perspective is particularly interesting for the study of

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55 Szulecka (n 3) 208.

56 Corte cost, 30 luglio 2020, n 182, available in English at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf> accessed 8 April 2022.

57 Case C-350/20 *OD and Others v Istituto nazionale della previdenza sociale (INPS)* EU:C:2021:659.

58 Corte cost, 11 gennaio 2022, n 54.

59 For a recent wider analysis of the added value of judicial dialogue on fundamental rights protection, see Federica Casarosa and Madalina Moraru, *The Practice of Judicial Interaction in the Field of Fundamental Rights - The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022).

courts. The role of the courts in protecting minorities' rights against the 'tyranny of the majority' has been a cornerstone of the checks and balances doctrine since the 18th century.[60] More recently, it has been revamped and reframed in terms of the courts' counter-majoritarian role to protect particularly vulnerable (or 'insular') minorities.[61] But aliens, as just mentioned, are not ordinary minorities, as they are formally and explicitly excluded from the 'democratic membership' by not possessing the right to vote.[62] This means that, in the field of immigration, the role of the courts may become ontologically counter-majoritarian.

Courts represent one of the most extreme proving grounds for what Norberto Bobbio names 'the age of rights'; that is, the affirmation of the law *ex parte populi*.[63] Indeed, due to the non-liquet rule, judges cannot refrain from responding to migrants' claims that they receive. By adjudicating on migrants' rights, judges inevitably end up giving space to migrants' claims, which, otherwise, would be at risk of remaining unheard. Against the fallacies of migration policies and the legal systems' voids, courts provide foreigners with a public forum to voice their demands for justice. How far courts push this aspect of their role depends not solely on the legal context, but also on the cultural, political, institutional, historical and socio-economic context in which the courts are embedded, on the patterns of migrants' rights litigation and on the recognition of a different role for international and EU norms in

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60 James Madison, 'The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts' *The New York Packet* (1 February 1788) <https://avalon.law.yale.edu/18th_century/fed47.asp> accessed 26 March 2022; John Adams, *A Defence of the Constitutions of Government of the United States of America*, vol 3 (C Dilly and John Stockdale 1788).

61 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); Alexander M Bickel, *The Least Dangerous Branch* (Yale University Press 1986); A Girardeau Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (New York University Press 1993).

62 Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000); Rainer Bauböck, *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press 2006); Jean-Thomas Arrighi and Rainer Bauböck, 'A Multilevel Puzzle: Migrants' Voting Rights in National and Local Elections' (2017) 56 European Journal of Political Research 619.

63 Norberto Bobbio, *The Age of Rights* (John Wiley & Sons 2017).

the review of the constitutionality and legality of migration policies and laws, as will be discussed in the articles.

Secondly, the principle of separation of powers has had a different configuration in migration whereby the executive has historically been allocated a privileged role compared to the legislature and the judiciary – so much so that, in several jurisdictions, the executive has enjoyed plenipotentiary powers. The refugee and Covid-19 crises have amplified the imbalance among state powers by throwing legislatures into a state of crisis. The secondary role of parliaments and the constant erosion of the possibility for democratic scrutiny can be regarded as a general trend throughout the countries analysed in this Special Issue. Indeed, most countries bypass the use of ordinary legislation to rule over migration and frequently resort to decrees or other informal acts, such as communications, standard operating procedures and circulars, thereby *de facto* eliminating parliamentary control and concentrating into the hands of the executive both decision-making and implementation.[64] This is not irrelevant for the rule of law and for the role of courts in enforcing it. Therefore, the articles in this Special Issue analyse these shifts in the separation of power doctrine and the ways in which courts have attempted to counterbalance the plenipotentiary powers of the executive. These judicial findings in the field of migration can inform newer theories on the separation of powers doctrine.[65] Studying courts' jurisprudence in such a domain, therefore, is useful for a better understanding of the migration governance system, on the one hand, and on the endurance of the rule of law of contemporary democracies, on the other hand.

The national case studies of this Special Issue analyse the approach of various courts – supranational, ordinary and constitutional – reviewing various categories of rights –procedural (right to be heard), social and economic (access to social welfare benefits and employment rights), civil (right to

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64 Veronica Federico and Paola Pannia, *The Ever-Changing Picture of the Legal Framework of Migration: A Comparative Analysis of Common Trends in Europe and Beyond*, in Soner Barthoma and Andreas Onver Cetrez (eds), *RESPONDing to Migration : A Holistic Perspective on Migration Governance* (Acta Universitatis Upsaliensis 2021) 15.

65 David Bilchitz and David Landau (eds), *The Evolution of the Separation of Powers*, (Edward Elgar 2019).

liberty) and specific substantive (access to international protection) – covering a wide range of migrants – economic third country nationals, asylum seekers, irregular migrants. This kaleidoscope of rights, legal statuses and types of courts facilitates useful insights through the identification of patterns of resemblance and divergence in how courts approach migrants' rights and the impact on their judgments of key constitutional tenets such as the separation of powers principle. While the analysed courts have each displayed some degree of activism in expanding their remit and review powers, they differ in terms of the canons of interpretation they employ and the outcomes they reach, with the French and Italian courts in particular reflective of opposite approaches. Therefore, the articles will explore whether there has been an empowerment of judges in the field of migration, characterised by an extension of judicial review and remedial powers. Such a judicial empowerment of courts in migration governance would inevitably alter mainstream migration governance theories, whereby the access to territory and civil, political and social rights of migrants are the prerogative of the legislature and executive. Moreover, the findings of this Special Issue inform how judicial empowerment in migration alters more general theories on the rule of law, the constitutional state, democratisation and the principal-agent dynamic.

The articles contained in this Special Issue show how migration often becomes the battleground for determining crucial aspects of domestic constitutional design and deciding on politically charged challenges to immigration policies. These include the role of judges vis-à-vis the executive (such as in France, Poland and Greece), the division of competence among different levels of government (as in the Italian example), the relationship between the legislative and the executive (see the French example) and the vertical division of powers between the EU and the Member States (CJEU). Finally, this also suggests how courts' decisions on migration (and the way in which it is managed and understood) can end up affecting the constitutional equilibrium of the country, in a "game of mirrors".

Adjudicating Migrants' Rights: What Are European Courts Saying?

The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy

Madalina Moraru*

This article analyses a decade of jurisprudence of the Court of Justice of the European Union (CJEU, the Court) to show how the Court has shaped asylum seekers' and immigrants' right to be heard and to determine the added value of its jurisprudence to the protection of the right to be heard at EU and domestic levels. The article asks whether the CJEU has developed a specific conception of this right and whether this conception aligns with any of the existing scholarly characterisations of the CJEU's approach to migration: activism, passivism, idiosyncratic, or favouring the interpretation of governments or referring courts. The article finds that, taken together, the CJEU's judgments have shed light on the scope of application of the right to be heard and enhanced the overall protection of this right for asylum seekers, returnees, and visa applicants by crafting common standards of when and how to hear individuals and by delimitating tasks between administrative authorities and courts. The CJEU has thus filled significant gaps in EU secondary legislation on the protection of the right to be heard; established good conduct principles for administrative hearings; and empowered domestic courts to ensure the legal accountability of the executive and effective remedies for third-country nationals.

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Nevertheless, the domestic implementation of the right to be heard, as shaped by the CJEU, is still incoherent.

Keywords: Court of Justice of the European Union; preliminary reference procedure; right to be heard; EU Charter of Fundamental Rights; general principles of EU law; visas, asylum, immigration, return procedures; remedies

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I. Introduction: Background to the Increasing Litigation on the Right To Be Heard before the CJEU

At a moment when the reform of the Common European Asylum System (CEAS)[1] and the Return Directive[2] is in stalemate due to divergent domestic political interests, the judiciary, as politically neutral and impartial arbitrators between human rights and states' migration interests, have become the forum of last resort for solving at least some of the many issues affecting the functioning of the CEAS. This article analyses a decade of jurisprudence of the CJEU to show how the Court has shaped asylum seekers' and immigrants' right to be heard and the impact of its judgments on domestic jurisprudence.

These cases highlight some critical socio-legal realities. Notably, more and more Member States have limited the number of both administrative and judicial hearings in asylum and immigration proceedings before adopting an administrative decision that could negatively impact the rights of individuals[3] based on the rationale of migrants abusing rights and a governmental focus on reducing irregular migration.[4] In addition to reducing hearings before administrative authorities and courts, a practice of *de facto* disregarding final judgments that were enforcing hearing rights has developed in certain jurisdictions, further undermining asylum seekers' right to be heard.[5]

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1 See Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM (2020) 609 final (2020 Pact on Asylum and Migration).

2 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 (Return Directive).

3 See, for instance, Elisa Enrione, 'Domestic Asylum Procedures between EU Law and Populist Parties' Agenda: A Growing Challenge to A Growing Challenge to Asylum Seekers' Human Rights? The Cases of Italy, Sweden and the UK', Master Thesis 2019, 157 <https://unipd-centrodirittiumani.it/public/docs/Master_thesis _Elisa _Enrione.pdf> accessed 7 April 2022.

4 Loïc Azoulai, 'Europe Is Trembling. Looking for a Safe Place in EU Law' (2020) 57 Common Market Law Review 1675.

5 See Case C–556/17 *Toubarov* EU:C:2019:626. On Poland, see Monika Szulecka, 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of

The limitations on asylum and immigration hearings in terms of quantity, length, and procedural thoroughness are the result of iterative processes between the Member States' ministries of internal affairs and the European Commission, which already started to emerge in the aftermath of the refugee crisis. For instance, in 2017 the European Commission issued recommendations to the Member States on how to enhance the effective implementation of the Return Directive. One of the proposed solutions was a new, harmonised, common return procedure which merges the hearing regarding the return decision with that related to the asylum claim.[6] This recommendation was subsequently endorsed in a 2017 report of the European Migration Network (EMN) on effective returns,[7] and later on codified by the proposal for an Asylum Procedures Regulation of the 2020 Pact on Asylum and Migration.[8]

However, this effort to design more flexible and speedy immigration proceedings does not take into account the social realities of asylum proceedings. In several jurisdictions, these can take at least 3 years,[9] a period so long that changes in the security of the country of origin, or in the private and family life or health of the third country national might occur in the

Admitting Asylum Seekers in Poland' [2022] (special issue) European Journal of Legal Studies 171.

6 Commission Recommendation (EU) 2017/432 of 7 March 2017 on Making Returns More Effective when Implementing the Directive 2008/115/EC of the European Parliament and of the Council [2017] OJ L66/19, recommendation 12.

7 European Migration Network, *The Effectiveness of Return in EU Member States: Challenges and Good Practices Linked to EU Rules and Standards – Synthesis Report* (European Migration Network 2017) (EMN 2017 Report on Effective Returns). The EMN is composed of national contact points appointed by national governments.

8 Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' COM (2016) 467 final, arts 53, 54; Commission, 'Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' COM (2020) 611 final.

9 See, for instance, the arguments of the Belgian governments in Case C-233/19 *B v CPAS de Liège* EU:C:2020:397. See also Case C-756/21 *International Protection Appeals Tribunal and Others*, pending.

meantime. These changes, in turn, may justify an individual re-assessment of the legality of return. The separate hearing of asylum seekers and immigrants is thus essential for preventing violations of the principle of *non-refoulement*,[10] a non-derogable right, particularly when the return proceedings take place long after the finalisation of asylum adjudication.[11] Moreover, oral statements are often the sole evidentiary proof that these individuals' narratives are credible.[12] In addition, in-person hearings help administrative authorities and courts to clarify the complex social, legal, and cultural circumstances on the basis of which the correct immigration status is determined.[13]

The essential role played by the right to be heard in immigration status determination (ISD) proceedings has been recognised, to a certain extent, by EU secondary law, which requires the Member States to provide several guarantees: a mandatory right to oral hearing by the administrative authorities assessing asylum claims;[14] additional hearing guarantees for minor asylum seekers;[15] a right to appeal negative asylum administrative decisions before a domestic court;[16] and a right for irregularly staying third-country nationals to appeal a return-related administrative decision before a court or

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10 Case C-277/11 *MM v Minister for Justice, Equality and Law Reform and Others* EU:C:2012:253 (*MM (1)*), Opinion of AG Bot; Case C-585/16 *Alheto* EU:C:2018:584, paras 145-49; Case C-517/17 *Addis* EU:C:2020:225, Opinion of AG Hogan, para 74.

11 See Charter of Fundamental Rights of the European Union [2012] OJ C326 (EU Charter), art 19(2).

12 The asylum applicant is often not in possession of documentary or testimonial sources and can commonly base his or her application only on his or her own statements. See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 1992).

13 Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan 2019).

14 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L180/60 (Recast Asylum Procedure Directive), art 14.

15 See Recast Asylum Procedure Directive, art 24; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast) [2013] OJ L180/96 (Recast Reception Conditions Directive), art 23.

16 Recast Asylum Procedure Directive, art 46.

administrative authority.[17] In addition, the right to be heard is recognised as part of various fundamental rights enshrined in the EU Charter of Fundamental Rights (EU Charter): the right to good administration (Article 41(2)); the right to an effective judicial remedy (Article 47(2)); and the rights of the child (Article 24). It is also guaranteed as part of the general principles of EU law of good administration and rights of defence, and as part of the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights (ECHR).[18]

This complex normative overlap of the various legal sources enshrining the right to be heard has raised questions of authority and conflict-resolution at the national level,[19] which have been answered in different ways by the Member States, and by domestic courts, as will be shown below. Heated political debate and judicial disagreements have developed within and across the Member States about the number of necessary hearings, about the timing, content, and conduct of administrative and judicial hearings, and about effective remedies in immigration procedures. In the politically charged context of prioritisation of irregular migration and incoherent domestic jurisprudence, the CJEU's approach has been decisive in solidifying common outcomes, ensuring both effective implementation of EU law and the fulfilment of human rights obligations.

Regarding the CJEU's jurisprudence on the right to be heard, the few academics who have approached the topic have classified the Court's interpretation as judicial activist,[20] or as restrictive or idiosyncratic

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17 Return Directive, art 13.

18 Bucura C Mihaescu Evans, 'I. "The Right to Be Heard" as a Sub-Component of Good Administration' in *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System* (1st edn, Nomos 2015).

19 This falls within the more general debate on normative hierarchy in legal pluralism, see Kaarlo Tuori, 'On Legal Hybrids and Perspectivism', in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014).

20 Paul Craig, 'EU Administrative Law - The Acquis European Parliament Study' (European Parliament 2010); Mihaescu Evans (n 18).

interpretation.[21] These opinions fit into the wider migration scholarly debate, where competing conceptions have developed on the CJEU's role: activist human rights interpretation;[22] passive towards protecting migrants' rights;[23] deferential to governmental views;[24] administrative rather than constitutional;[25] or judicially autonomous from Member States' political preferences.[26] This literature on the CJEU's role in asylum and migration has mostly overlooked the national context of the referrals for preliminary ruling, and the subsequent implementation of the CJEU's preliminary rulings, or addressed only some of the CJEU's preliminary rulings on the right to be heard in asylum and immigration. In light of these sustained contestations and the limited contextual analysis of the CJEU's preliminary rulings, this article holistically analyses all of the Court's judgments[27] on perhaps the most

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21 Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17 European Journal of Migration and Law 104; Chiara Favilli, 'The Standard of Fundamental Rights Protection in the Field of Asylum: The Case of the Right to an Effective Remedy between EU Law and the Italian Constitution' (2019) 12 Review of European Administrative Law 167.

22 Geert de Baere, 'The Court of Justice of the EU as a European and International Asylum Court' (2013) Leuven Centre for Global Governance Studies Working Paper No. 118; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015); Andrew Geddes and Peter Scholten, *The Politics of Migration and Immigration in Europe* (Sage 2016).

23 Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in Tamara Ćapeta, Iris Goldner Lang and Tamara Periš (eds), *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing, forthcoming in 2022).

24 Lisa Heschl and Alma Stankovic, 'The Decline of Fundamental Rights in CJEU Jurisprudence after the 2015 "Refugee Crisis"' in Wolfgang Benedek, Philip Czech, Lisa Heschl, Karin Lukas and Manfred Nowak (eds), *European Yearbook on Human Rights* (Intersentia 2018).

25 Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44 European Law Review 139.

26 Marie De Somer, *Precedents and Judicial Politics in EU Immigration Law* (Springer 2018).

27 That is from January 2012, when the CJEU delivered its first judgment on the right to be heard in asylum proceedings, and until September 2021 – the date this article was submitted.

essential right in immigration status determination (ISD) proceedings: the right of asylum seekers, returnees, and visa applicants to be heard by administrative authorities and courts before the latter adopt decisions affecting their stay in the EU and fundamental rights.

The article aims to establish how the CJEU has shaped the right to be heard, and asks, in particular: whether the CJEU's conceptualisation of this right tends to endorse the interpretation put forward by the referring courts or that of the government of the referring state; whether the interpretation of the right to be heard in ISD proceedings is similar to the judicial interpretation of this right as developed in other public law fields; and whether or not the CJEU's judgments enhance the level of protection of the right to be heard in ISD proceedings as stipulated by EU secondary legislation. When assessing the shape given by the Court to the right to be heard, the article takes into consideration the inherent competence limitations faced by the CJEU under the EU law principle of national procedural autonomy.[28] The article also explores the outcome of preliminary rulings by the CJEU on the domestic jurisprudence of the countries in which the reference originated.

Using a contextualist approach,[29] the article claims that the CJEU's interpretation of the right to be heard does not conform to only one of the

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[28] The CJEU has limited jurisdiction to establish remedies, only as required by the principles of equivalence, effectiveness and effective judicial protection, since the establishment of remedies falls under domestic competences. See Case C-33/76 *Rewe* EU:C:1976:188. Additionally, the CJEU's jurisdiction depends on the national courts requesting preliminary rulings, and the referral behaviour of national courts varies greatly. See Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' (2020) 27 Journal of European Public Policy 912.

[29] This means assessing the CJEU's judgments within the national legal, jurisprudential and political context of the reference for a preliminary ruling; and tracing the impact of the CJEU judgments at the national level. The article builds on the contextualist approach as promoted by Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75(1) American Journal of International Law 1; Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Alec Stone Sweet, *The Judicial Construction of Europe*

aforementioned judicial approaches, but rather that the Court has moved in different directions, displaying traces of activist, constitutional, and restrictive interpretation in its judgments. The article argues that judicial diplomacy is the overarching approach, whereby the CJEU shapes the right to be heard as a compromise between various conflicting domestic judicial preferences without fully endorsing the interpretation of any of the main actors involved in the preliminary reference procedure.[30]

To support this claim, the article first shows how the CJEU has displayed activist and constitutional interpretations by recognising a new right to be heard for asylum seekers and returnees directly on the basis of the EU law general principle of the rights of defence and Article 47(2) of the EU Charter (section II). Next, the article illustrates a different form of judicial diplomacy, whereby the CJEU tempered its previous activist interpretation of the right to be heard with instances of deference towards national discretion in shaping the form and content of the hearing by administrative authorities (section III). Finally, the article argues that, in shaping the remedy for violations of the EU fundamental right to be heard, the CJEU has exercised both activist interpretation by extending the judicial review powers of national courts, but also restrictive interpretation as regards the burden of proof (section IV). In conclusion, the article argues that the CJEU has not only shed light on the relationship between the overlapping norms on the right to be heard of asylum seekers, returnees, and visa applicants, but that it has also widened the scope of the right to be heard and added guarantees to those that already exist in various strands of EU asylum and immigration secondary legislation on the basis of the general principle of rights of defence and Article 47 of the EU Charter. Nevertheless, various factors are identified

(Oxford University Press 2004); Karen Alter, *The European Court's Political Power* (Oxford University Press 2009).

30 Domestic judgments leading up to the reference for a preliminary ruling and those implementing the CJEU preliminary rulings have been provided by judges and lawyers within the framework of the framework of the ACTIONES, e-NACT and ReJUS projects funded by the European Commission. Summaries of most of the individual judgments can be found in the following databases: 'CJC Database' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/> accessed 7 April 2022; 'Database Index' (Re-Jus Judicial Training Project) <https://www.rejus.eu/content/database-index> accessed 7 April 2022.

as influencing the outcome of the preliminary ruling on domestic jurisprudence, which may lead to further jurisprudential convergence or divergence regarding the interpretation of the right to be heard.

II. The CJEU's Legislative Gap-Filling Role: Recognising New Rights to be Heard in Asylum and Immigration Proceedings

The organisation of hearings by administrative authorities during ISD proceedings falls, in principle, under Member States' procedural autonomy.[31] This default principle has been interpreted by the Member States as allowing for broad limitations on the EU right to be heard in asylum and immigration proceedings. For instance, even if asylum seekers are conferred a right to be heard by administrative authorities,[32] some Member States do not organise an administrative hearing when the asylum seeker is considered to come from a safe third country.[33]

In immigration proceedings, the Return Directive allows Member States to merge the administrative decision regarding the legal status of third-country nationals with the decision to return those whose stay was found to be illegal.[34] Some Member States take advantage of this procedural flexibility by issuing a single decision that merges several ISD-related decisions. For example, in Hungary, a third-country national might be issued a single administrative decision combining a refusal of the application for international protection, a return or removal decision, and an entry ban.[35] While the combined procedure increases procedural efficiency, it might not ensure the right to be heard in relation to each of the legal statuses attributed to a third-country national. The shortcomings of combining immigration procedures are an increased risk of misqualification of legal status (e.g. an

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31 Case C-161/15 *Bensada Benallal* EU:C:2016:175, para 24.

32 See Recast Asylum Procedure Directive, art 14.

33 This was the case in Germany under Recast Asylum Procedure Directive, art 33(2)(a). See more in *Addis* (n 10).

34 See Return Directive, art 6(6).

35 See Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others* EU:C:2020:294, Opinion of AG Pikamäe, para 77.

asylum seeker might be considered a returnee),[36] and an increased risk of violation of the principle of *non-refoulement*,[37] as well as of other human rights such as the right to private and family life.[38] Despite these shortcomings, more Member States[39] have adopted the combined ISD procedure following the recommendation of the European Commission,[40] based on the thinking that multiple hearings are merely delaying or even jeopardising the finalisation of procedures.[41] Furthermore, the 2020 Pact on Asylum and Migration will make the single, combined hearing the default European model.[42]

The CJEU has been the *ultima ratio* for defending the shrinking right to be heard of asylum seekers and immigrants. National courts from Ireland and France have asked the CJEU whether third-country nationals should be afforded a right to be heard *before* assessing various different legal statuses (i.e. refugee, subsidiary protection, returnee), or whether the executive combined model of one hearing is in line with EU law requirements. In 2011, the Irish High Court asked the CJEU to settle judicial divergences in Ireland but also

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36 European Parliament Study on The Return Directive 2008/115/EC, European Implementation Assessment (20 June 2020) (EP Study 2020).

37 See, for instance, the CJEU in Case C-249/13 *Boudjlida* CLI:EU:C:2014:2431, para 68.

38 Due to the fact that third-country nationals do not have the opportunity to inform about changes occurred in the private and family life, their health or the political situation of the country of origin or habitual residence as part of the right to be heard. See *MM (1)*, Opinion of AG Bot (n 10), para 43; Case C-560/14 *MM (2)* EU:C:2016:320, Opinion of AG Mengozzi, paras 58-60.

39 See the EMN 2017 Report on Effective Returns (n 7) section 6.4.

40 See Recommendation 12(a) of Commission Recommendation (EU) 2017/432 (n 6).

41 See Case C-166/13 *Mukarubega* EU:C:2014:2031, Opinion of AG Wathelet, para 87; the governments' observations in *Boudjlida*(n 37); Case C-181/16 *Gnandi* EU:C:2018:465.

42 For a detailed analysis, see Madalina Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (EU Migration Law Blog, 14 January 2021) <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/> accessed 7 April 2022.

among courts from different Member States[43] regarding the number of hearings in the Irish two-step procedure for international protection. It asked whether asylum seekers have a separate right to be heard before the assessment of their subsidiary protection claim;[44] and whether public authorities should disclose their intentions and evidence to asylum seekers.[45] In *M.M.(1)*, the Court held that it is necessary for the applicant to be heard again for the purpose of considering his or her application for subsidiary protection, and that the previous hearing for the purpose of refugee status determination is insufficient to fulfil the requirement of the EU fundamental right to be heard as protected by Article 41(2) of the EU Charter.[46] This new right to be heard was established directly on the basis of Article 41(2) EU Charter, thus filling a gap in the Qualification Directive[47] and Irish implementing legislation.

The referring court interpreted the CJEU's judgment as requiring Ireland to introduce a new right to an oral hearing before the administration adopts a decision on the claim for subsidiary protection. However, the CJEU did not refer *expressis verbis* to a right to an oral hearing, but only to the more general right to be heard, which can take various other forms, such as written statements. The expansive interpretation of the referring court sparked a

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43 The Irish High Court was of a different opinion than the Dutch Council of State. Compare, for instance, *Ahmed v Minister for Justice, Equality and Law Reform* [2011] IEHC 560 with the Dutch Council of State jurisprudence from 2007. For an analysis, see Madalina Moraru, *Rejus Casebook – Effective Justice in Asylum and Immigration* (University of Trento 2018) 66 <https://www.rejus.eu/sites/default/files/content/materials/rejus_casebook_effective_justice_in_asylum_and_immigration.pdf> accessed 7 April 2022 (ReJus Casebook).

44 The Irish High Court did not address this precise question. See more in Jasper Krommendijk, 'Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement' (2020) 2 European Papers 825.

45 Case C-277/11 *MM v Minister for Justice, Equality and Law Reform and Others* EU:C:2012:744, para 55 (*MM (1)*).

46 Ibid para 90.

47 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (Qualification Directive).

new round of requests for a preliminary ruling at the initiative of the Irish Supreme Court.[48] This time, the CJEU was asked whether its previous finding of a right to a separate hearing in *M.M.(1)* implied a right to an oral hearing before the assessment of the subsidiary protection claim. The CJEU rejected this interpretation of the right to be heard in *M.M.(2)*, but the Court nevertheless confirmed the obligation to ensure the right of asylum seekers to be heard within the procedure assessing the subsidiary protection claim separately from the refugee status procedure.

Following this back-and-forth between the Irish courts and the CJEU, the Irish legislator decided to change its two-step procedure for international protection to the single-step approach followed by most Member States.[49] While one might thus think that the intense judicial interaction has strengthened the protection of the right to be heard, in practice, the new one-step approach has actually eased the Irish government's procedural tasks. It is thus no longer required to organise two separate hearings, but only one oral hearing to assess both refugee and subsidiary protection status.[50]

The *M.M.(1)* preliminary ruling provoked a snowball of horizontal and vertical judicial interactions that allowed the CJEU to continue shaping the EU fundamental right to be heard across different phases of the ISD proceedings, and across Member States with diverse hearing systems. For instance, the *M.M.(1)* preliminary ruling was interpreted by some of the French first instance administrative courts as requiring an obligation on the Prefecture to hear a third-country national not only in the context of the rejection of a residence permit, but also to make a return decision.[51] This judicial interpretation introducing a mandatory additional hearing was contrary to the case-by-case view of hierarchically superior French

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48 C-560/14 *M v Minister for Justice and Equality* EU:C:2017:101 (*MM (2)*).

49 Irish International Protection Act 2015 of 30 December 2015. See more in ReJus Casebook (n 43) 70.

50 Starting in 2016, the Irish International Protection Act replaced the dual system with a single procedure for assessing asylum and subsidiary protection claims in parallel. See above (n 49).

51 Brigitte Jeannot, 'Le droit d'être entendu : une application décevante en droit des étrangers' (Syndicat des Avocats de France, October 2015) <http://lesaf.org/wp-content/uploads/2016/03/4-droit-des-etrangers-octobre-2015.pdf> accessed 5 May 2022.

administrative courts.[52] Since the administrative tribunals did not convince the courts of appeal of their interpretation of the right to be heard based on the *M.M.(1)* preliminary ruling,[53] the administrative Tribunals of Melun[54] and Pau[55] asked the CJEU to confirm their interpretation of the EU fundamental right to be heard. The purpose of the referral was thus to obtain the CJEU's endorsement of a national judicial interpretation divergent from the more restrictive interpretation of the right to be heard supported by the executive and hierarchically superior courts.[56]

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52 Such as: courts of appeal and the French Council of State. Courts of appeal recognised a certain margin of discretion to national (administrative and judicial) authorities to decide on a case-by-case basis whether or not to hear third-country nationals in return-related cases. See Administrative Court of Appeal of Lyon, *Préfet de l'Ain v Luc BG,* n°12LY0273, 14 March 2013. For a commentary on this approach see, Marc Clement, 'Droit d'être entendu, droit de la défense et obligation de quitter le territoire : à propos de l'arrêt CAA Lyon du 14 mars 2013' (ELSJ, 29 April 2013) <http://www.gdr-elsj.eu/2013/04/29/asile/droit-detre-entendu-droit-de-la-defense-et-obligation-de-quitter-le-territoire-a-propos-de-larret-caa-lyon-du-14-mars-2013-m/> accessed 7 April 2022. From 1991, the Council of State followed a restrictive interpretation of rights of defence in immigration proceedings, whereby it excluded the application of EU general principles of law to expulsion cases and exempted the administration from a prior adversary procedure in immigration cases; see Council of State, *Préfet de Police v. Demir*, n°120435, 19 April 1991; CE, *Hammou* n° 306821-30682, 19 October 2007; *Barjamaj*, n° 307999, 28 November 2007; *Silidor*, n° 315441, 26 November 2008.

53 The French administrative courts of appeal had not considered it useful to submit a preliminary question following the judgment of the Lyon Administrative Court of 14 March 2013. See CAA Lyon 14 March 2013, *M Halifa*, n° 12LY02704; CAA Lyon 14 March 2013, *Préfet de l'Ain c/ M Bepede Guehoada*, n° 12LY02737 – 12LY02739; CAA Nancy 16 May 2013, n° 12NC01805; CAA Marseille 8 June 2013, n° 12MA04450.

54 The referring court in Case C-166/13 *Mukarubega* EU:C:2014:2336.

55 The referring court in *Boudjlida* (n 37).

56 For a similar judicial strategy of involving the CJEU, see the approach of the Czech Supreme Administrative Court in *Al Chodor* case, No. 29/2015/SZD/LJ (Case C-528/15 *Al Chodor* EU:C:2017:213). For a detailed analysis of the strategy see Madalina Moraru and Linda Janku, 'Czech Litigation on Systematic Detention of Asylum Seekers: Ripple Effects across Europe' (2021) 23 European Journal of Migration and Law 284.

In *Mukarubega* and *Boudjlida,* the CJEU did not fully endorse the referring court's interpretation. The Court held that, in principle, a third-country national should be heard before any individual measure is taken that adversely affects him or her.[57] However, where national authorities have exercised the margin of discretion to simultaneously adopt a decision determining a stay to be illegal and a return decision, as afforded to them by the Return Directive,[58] 'those authorities need not necessarily hear the person concerned specifically on the return decision'.[59] Nevertheless, the CJEU established clear requirements that national administrations must fulfil before they decide to skip a second hearing, namely:

> that [a] person had the opportunity to effectively present his or her point of view on the question of whether the stay was illegal, and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision,[60]

either because of errors in assessment or because of new evidence.[61] As long as public authorities comply with the substantive content of the right to be heard, its procedural design – whether in the shape of one or multiple hearings – was left to the Member States' decision, just as the Return Directive had envisaged.

The CJEU thus initially displayed a judicial activist approach by recognising a new right to be heard to returnees on the basis of the EU general principle of rights of defence, which was then tempered by a deferential approach towards Member States' policy choices as guaranteed under Article 6(6) of the Return Directive. Therefore, the *Mukarubega* case represents a partial success of the referring court to impose its interpretation over hierarchically superior courts: the CJEU's preliminary ruling did invalidate the French Council of State's restrictive interpretation.[62] However, the case-by-case

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57 Case C-349/07 *Sopropé* EU:C:2008:746, para 49; *Mukarubega* (n 54) paras 46-48.

58 See Return Directive, art 6(6).

59 See *Boudjlida* (n 37) para 54 (also stated in *Mukarubega* (n 54) para 60).

60 Ibid.

61 *Boudjlida* (n 37) para 37.

62 That is, of automatic rejection of an administrative hearing before the adoption of a return decision. See n 48.

approach followed by the majority of French courts of appeal[63] was legitimised over the mandatory hearing approach proposed by the referring first instance administrative courts.

Domestic courts from Belgium,[64] Greece,[65] Lithuania,[66] and the Netherlands[67] subsequently used the preliminary rulings on the French references to expand the scope of the right to be heard in domestic ISD proceedings. These courts interpreted the preliminary rulings as requiring a mandatory administrative hearing in relation to each of the return-related decisions the administration can adopt, regardless of whether the domestic return procedure is combined or separate. Exceptions would be allowed only if they conform to the good administration principles of clarity, foreseeability, and transparency in administrative decision-making. While these courts have not engaged in direct dialogue with the CJEU, their citation of preliminary rulings originating in other jurisdictions has nevertheless helped to enhance the protection of the right to be heard. For instance, in Belgium, the Aliens Office began to send a formal letter to invite foreign nationals to express their views before withdrawing their right to stay.[68]

In terms of fundamental rights protection, the continuous judicial dialogue with domestic courts has helped the CJEU to refine its position on the legal source for the asylum seekers' and irregular migrants' right to be heard by

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63 Whereby the necessity of a second administrative hearing is to be established on a case-by-case basis.

64 Belgian Council of Alien Law Litigation (CALL), case No 126.219, judgment of 25 June 2014; CALL, case No. 230.293, judgment of 24 February 2015; CALL, case No 233.257 judgment of 15 December 2015. These cases are summarised in the REDIAL database. 'REturn Diretive DIALogue (European University Institute) <euredial.eu> accessed 7 April 2022.

65 See, for instance, Thessaloniki Administrative Court, case No 717/2015.

66 Case No eA-2266-858/2015 of 7 July 2015. For a commentary, see Irmantas Jarukaitis and Agnė Kalinauskaitė, 'The Administrative Judge as a Detention Judge: The Case of Lithuania', in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds) *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 237.

67 See Madalina Moraru and Geraldine Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural safeguards', Migration Policy Centre Redial Research Report 2016/03, 11-13.

68 Ibid.

domestic authorities. After a Charter activist phase,[69] the Court reverted to the general principle of the rights of defence as legal source for the application of the right to be heard in domestic asylum and immigration procedures. The right to be heard in migration proceedings thus follows other fields of EU administrative law, such as customs, competition, and terrorism-related sanctions.[70] As regards the level of protection of the right to be heard conferred by Article 41(2) of the EU Charter and the general principle of rights of defence, the Court seems to recognise a functional equivalence of the two legal sources.[71] Notably, the Court held that the 'right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person'.[72] Furthermore, the observance of the right to be heard is required even where the applicable EU secondary legislation does not expressly call for it.[73]

In conclusion, the jurisprudence analysed in this section shows, first, an activist CJEU which has recognised a new right to be heard *before* public authorities adopt decisions negatively affecting the rights of asylum seekers and returnees during ISD proceedings. This apparent judicial activism, however, has a constitutional legal basis in the CJEU's role of reviewing the conformity of EU secondary legislative acts[74] and their domestic implementation[75] with fundamental rights as guaranteed by general

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69 In the first preliminary rulings on the right to be heard, the CJEU cited EU Charter (n 11), art 41(2) as legal basis. See *MM (1)* (n 45); Case C-604/02 *HN* EU:C:2014:302 (on the more general right to good administration).

70 Angela Ferrari Zumbini, 'The Power to Tax without Due Process of Law' (2019) 11 Italian Journal of Public Law 119.

71 Of the same opinion, see also French Council of State, *Ouda,* n°375423, 5 June 2015; Evangelia Lilian Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy' (2019) 12(2) Review of European Administrative Law 143.

72 See, *inter alia*, Case 17/74 *Transocean Marine Paint Association v Commission* EU:C:1974:106, para 15; Case C-7/98 *Krombach* EU:C:2000:164, para 42; Case C-249/07 *Sopropé* EU:C:2008:746, para 36.

73 *Sopropé* (n 72) para 38.

74 Consolidated Version of the Treaty on the Functioning of the European Union [2013] OJ C326, art 263.

75 Ibid arts 260, 267.

principles of EU law and the EU Charter.[76] As regards the multi-layered overlapping sources of the right to be heard, the CJEU has brought legal clarity to the scope of application of the right to be heard by piecing together the relevant EU Charter provisions and the general principles of rights of defence and good administration in a perfectly matching puzzle. In its constitutional role, the CJEU requires domestic authorities to ensure the safeguards on the right to be heard, irrespective of the form of the administrative hearings. At the same time, the CJEU displayed a deferential side by recognising the Member States' procedural freedom to decide on the form of hearing as long as they guarantee the right to be heard. In a nutshell, the CJEU's shaping of the scope of application of the right to be heard thus represents a compromise between Member State authorities' different conceptions of procedural fundamental rights.

III. The CJEU Shaping Common Rules for the Conduct of Domestic Administrative Hearings: Instances of Constitutional, Activist, and Deferential Interpretation

The previous section has shown a particular instance of the CJEU's judicial diplomacy, one that combines constitutional thinking, that is recognising new rights to be heard on the basis of general principles of EU law, with a deferential interpretation which has allowed Member States to continue the one-hearing practice in narrow and limited situations.

In practice, however, the national discretion confirmed by the CJEU, whereby various administrative hearings can be merged into one, has resulted in the blurring of the domestic duties of good administration and in a lower level of protection of the principle of *non-refoulement*. Several reports[77] and scholars[78] note how the merged administrative hearing practice did not result in full incorporation of the right to be heard guarantees. For instance, Member States do not regularly impose a duty on the administration to

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76 As established by Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

77 EMN 2017 Report on Effective Returns (n 7); EP Study 2020 (n 36).

78 Valeria Ilareva 'The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 351.

conduct an *ex officio* assessment of the risk of *refoulement* outside the rigid limits of international protection claims assessed under the Qualification Directive,[79] although other circumstances could also trigger violations of the principle of *non-refoulement*.[80]

This section will show that, following several preliminary references, the CJEU has developed common rules on the content of the hearing, that is the questions to be addressed and avoided as well as the circumstances to be assessed during administrative hearings, and the form of the administrative hearing, in particular its orality and adversarial nature.

1. Oral or Written Administrative Hearings in ISD Proceedings?: Activist and Deferential Interpretations

EU secondary law on asylum and immigration does not impose a common format for administrative hearings throughout ISD proceedings. Falling under the purview of the Member States' procedural autonomy, domestic administrative hearings can be organised in the format of an oral interview,[81] or an assessment of written observations. In asylum and immigration procedures, where the applicant's statements play a central role and where it is often impossible to provide documentary evidence, practitioners underline the importance of a personal hearing to verify the consistency, plausibility, completeness, and exhaustiveness of an individual's narrative, which together determine the credibility of the claim.[82] Although an oral hearing has been held to be the fullest possible expression of the right to be heard in asylum adjudication,[83] the use of other hearing formats, especially within subsequent

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79 See more in EP Study 2020 (n 36) 50-53.

80 See for instance the CJEU conclusions in *Boudjlida* (n 37) para 68. See also Case C-562/13 *Abdida* EU:C:2014:2453; Case C-239/14 *Tall* EU:C:2015:824.

81 The only exception is the first administrative hearing during asylum adjudication, which has to be in an oral format (i.e. interview). See Recast Asylum Procedure Directive, art 14(1).

82 Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C* EU:C:2014:2111, Opinion of AG Sharpston, para 68; *MM (2)*, Opinion of AG Mengozzi (n 38); Luciana Breggia, 'L'audizione Del Richiedente Asilo Dinanzi al Giudice: La Lingua Del Diritto Oltre i Criteri Di Sintesi e Chiarezza' [2018] Questione Giustizia 193; Gill and Good (n 13).

83 See *MM (2)*, Opinion of AG Menozzi (n 38) para 58.

ISD proceedings such as subsidiary protection or return procedures, has proliferated throughout Europe in pursuit of procedural efficiency.[84]

National courts confronted the technical question of establishing the conditions under which an oral administrative hearing is mandatory against the backdrop of divergent Member State approaches. The issue of protecting the orality of hearings arose in proceedings where an individual had already been heard once by administrative authorities, but a new administrative oral hearing was requested in relation to a subsequent and different immigration procedure (e.g. subsidiary protection or return).

Conflicting domestic judicial views on whether an administrative hearing should be organised in an oral or written format triggered a request for a preliminary ruling. The Irish Supreme Court, disagreeing with the interpretation of the *M.M.(1)* preliminary ruling by the High Court,[85] asked the CJEU to clarify whether its ruling implied that only oral hearings could completely fulfil the right to be heard.[86] In *M.M.(1)*, the CJEU did not expressly require the administrative hearing before the assessment of subsidiary protection to be held in an oral format, but only ruled that a separate right to be heard should be recognised.[87] The CJEU continued this line of functional interpretation of the right to be heard in *M.M.(2)*.[88] Notably, the CJEU accepted written observations in a template questionnaire as potentially a sufficient guarantee for the protection of the right to be heard in the Irish two-step system of international protection. Diverging from the Opinion of the Advocate General,[89] the Court held that the personal interview conducted during the context of an asylum application

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84 For more details, see the EMN 2017 Report on Effective Returns (n 7).

85 See *MM v Minister for Justice* [2013]IEHC 9. For a full summary, see 'Ireland, M v Minister for Justice and Equality, (C-277/11 and C-560/14)' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/data/data?idPermanent=350> accessed 7 April 2022.

86 The previous section discussed the *MM (1)* and *MM (2)* only from the perspective of the CJEU recognising a right to be heard in addition to the EU secondary norms on asylum, whereas this section discusses these two judgments from the perspective of the format of the hearing, that is oral versus written.

87 See *MM (1)* (n 45) para 95.

88 See *MM (2)* (n 48) para 28.

89 See *MM (2)*, Opinion of AG Mengozzi (n 38) para 58.

could be relevant and, thus, used in the context of a subsequent application for subsidiary protection.

Nevertheless, the CJEU required that an

> interview must also be arranged if it is apparent — in light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, state of health or the fact that he has been subjected to serious forms of violence — that [an interview] is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.[90]

In conclusion, the CJEU established that for those who need it most – vulnerable groups of asylum seekers and immigrants – the right to be heard should commonly be interpreted as implying a right to an oral hearing. Furthermore, it clarified that administrative hearings may be conducted in written format as long as they can guarantee the principle of individual assessment required by Article 4(3) of the Qualification Directive.[91] Once again, the CJEU signalled that national procedural autonomy cannot be absolute, instead limitations are imposed by the right to an individual hearing. The CJEU's diplomatic attempt at conflict resolution by prioritising only some asylum seekers and immigrants as deserving of a right to an oral hearing raises issues regarding the legitimacy of its definition of 'vulnerability'. Whereas the ECtHR looks at all asylum seekers as 'vulnerable',[92] the CJEU seems to consider 'vulnerable' only those asylum seekers with special needs.

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90 See *MM (2)* (n 48) para 51.

91 For a confirmation of the mandatory nature of the principle of individual assessment in relation of administrative hearings of asylum seekers, even those coming from a 'safe third country'. See Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim* EU:C:2019:219, para 98.

92 See *Tarakhel v Switzerland* App No 29217/12 (ECtHR, 4 November 2014; Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38 Netherlands Quarterly of Human Rights 12.

2. Judicial Shaping of the Adversarial Principle During Administrative Hearings: The Long-Awaited Constitutional Vision

ISD proceedings are a hybrid adjudication process involving both administrative and judicial bodies, where the judiciary exercises a supervisory function vis-à-vis the administration following an appeal lodged by the third-country national. Certain characteristics of administrative adjudication in these proceedings[93] have prompted questions about the extent to which administrative hearings should follow the fair trial guarantees applicable to judicial hearings, such as the adversarial principle.[94] Domestic courts noticed that in other administrative law fields (e.g. competition law and smart sanctions), the CJEU recognised that certain components of the adversarial principle should also apply to administrative hearings. For instance, a person adversely affected by an individual measure must be placed in a position to analyse all relevant information relied on against them,[95] and the individual must have the opportunity to express their views[96] following a period of reflection which is sufficient, but which also allows the administrative authority to act effectively.[97] Furthermore, if necessary, the aid of a legal counsel should be available during the administrative phase of adjudication.[98]

Following a request for preliminary ruling from a French first instance court, the CJEU had the opportunity to confirm whether the safeguards of the adversarial principle should apply cross-sectorially.[99] Mr Boudjlida complained of a lack of opportunity to effectively express his point of view

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93 Such as: the mandatory nature of administrative adjudication, unlike the judicial phase; the wide fact-finding powers of the administration; and the binding legal force of their decision, which can be final if it is not appealed before the courts, and result in decisions which can breach the principle of *non-refoulement*.

94 The CJEU defined the adversarial principle as the principle according to which 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them'. See Case C-300/11 *ZZ v Secretary of State for the Home Departmen*t EU:C:2013:363, para 54.

95 Joined Cases C-100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* EU:C:1983:158, paras 14-23.

96 Joined Cases C-46/87 and 227/88 *Hoechst* v *Commission* EU:C:1989:337, paras 52, 56.

97 Case C-28/05 *Dokter and Others* EU:C:2006:408, paras 73-79.

98 See *Hoechst* (n 96) paras 14-16.

99 *Boudjlida* (n 37).

regarding his legal status before the Prefect adopted a return decision. In particular, he complained that the administration did not disclose the evidence held against him, did not offer a sufficient period of reflection to prepare for the interview, and that he did not benefit from the assistance of a legal counsel.

Based on the different aims pursued by administrative proceedings in competition *versus* asylum and immigration, the CJEU rejected the full application of the adversarial principle as part of the right to be heard in return proceedings. The following components of the adversarial principle were rejected by the Court: the right to call and cross-examine witnesses;[100] to be warned, prior to the interview, that the administration is contemplating adopting a return decision; to have access to information on the basis of which the administration depends for justification for that decision; and to be given a period of reflection.[101] Nevertheless, the CJEU did recognise some of the guarantees of the adversarial principle as applicable in ISD proceedings. Notably, the third-country national has the right to be informed, before the administrative hearing, of the objective(s) of the interview, and of the possible consequences for the legal status of the individual.[102] In addition, the CJEU also recognised the right to use assistance provided by a defender or legal counsel during the administrative phase of return procedures, even if only at the individual's own expense.[103]

The CJEU's restricted acknowledgement of the applicability of the adversarial principle in ISD proceedings did not lead to a general lowering of the standards surrounding the right to be heard at the national level. For instance, the Irish legislator adopted a legislative amendment (operative from 24 November 2013) enhancing the adversarial principle in the context of subsidiary protection procedures.[104] The following rights of asylum seekers were thus recognised by the Irish legislator: to be informed of any recommendations to grant or refuse subsidiary protection; to be sent any

100 *MM (2)* (n 48) para 55.

101 *Boudjlida* (n 37) para 55.

102 Ibid para 62.

103 Ibid.

104 ReJus Casebook (n 43) 70.

supporting documentation; and the right to request an oral hearing and to call witnesses upon appeal.[105]

The approach of the CJEU to the application of the adversarial principle in regular asylum and return proceedings[106] should be differentiated from the Court's approach in cases where denial of a legal status was based on threats to national security or public policy. In this latter category of cases, the Court has recognised a high threshold of disclosure of evidence by the public authorities, similar to competition and 'smart sanctions' cases. In *ZZ,* the CJEU held that an individual holding both EU citizenship and a third country's nationality

> must be informed of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective.[107]

The application of this threshold of evidence disclosure in cases falling outside the ambit of EU citizenship has long been the subject of cross-nationally divergent jurisprudence.[108] Recently, the CJEU clarified that its interpretation of the obligation of disclosure of evidence developed in the *ZZ* case also applies in the field of the common visa policy.[109] Notably, the right to good administration, as a general principle of EU law, requires the administration to give reasons for its decisions refusing a visa application based on Article 32(1)(a)(vi) grounds of the Visa Code.[110] In addition, the right to an effective remedy laid down in Article 47 of the EU Charter requires public authorities to disclose evidence to the extent that the concerned visa applicant must be able: (i) to ascertain the specific grounds on which the

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105 Ibid.

106 As in *Boudjlida* (n 37) and *MM (2)* (n 48).

107 *ZZ* (n 94) para 63.

108 For instance, the UK and Polish Supreme Administrative Court did not expand the ZZ principles outside EU citizenship related cases. See ReJus Casebook (n 43) 140-47.

109 Joined Cases C-225/19 and C-226/19 *RNNS and KA* EU:C:2020:951.

110 Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas [2009] OJ L243/1, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council [2013] OJ L243/1.

refusal is based; and (ii) to identify the Member States that objected to the application. In line with the judgment delivered by the ECtHR[111] one month before the aforementioned *R.N.N.S and K.A* case, the CJEU developed a constitutional view of a common principle of *audiatur et altera pars* which applies to all cases where the legal status of an individual is rejected or denied based on threats to public policy or national security.

3. Towards a Pre-Determined Administrative Hearing Procedure: The CJEU's List of Questions to be Addressed during Administrative Hearings

In a series of preliminary rulings starting with the *M.M.(1)* case, the CJEU has clarified that administrative and judicial authorities have both positive and negative obligations regarding the questions to be addressed to asylum seekers and returnees during hearings. Standards imposed by the judiciary are more detailed for return-related hearings given that the Return Directive does not include provisions on returnees' right to be heard. Asylum-related EU secondary legislation, on the other hand, does provide for guidelines on the conduct of asylum hearings. For instance, the Recast Asylum Procedure provides for minimal common guidelines, referring to gender and vulnerability issues, the presence of an interpreter, and the right to read and ask questions related to the report of the interview drafted by the competent administrative authority.[112] In addition, Article 4 of the Qualification Directive provides circumstances that public authorities must assess as part of the credibility assessment.[113]

The duty of cooperation incumbent upon administrative authorities[114] has been used by the CJEU to set out positive obligations for administrative authorities, such as the obligation to address questions and collect evidence from asylum seekers that would ensure complete, up-to-date, or relevant information about the general situation in the country of origin or transit countries that relates to the substantiation of the asylum application.[115] On

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111 *Muhammad and Muhammad v Romania* App no 80982/12 (ECtHR, 15 October 2020).

112 See Recast Asylum Procedure Directive, arts 15-17.

113 See n 47.

114 See Qualification Directive, art 4(1).

115 *MM (1)* (n 45) para 66.

the basis of the same duty of cooperation, the CJEU requires national authorities to ask questions aimed at ensuring the respect of fundamental rights, such as Article 1 (human dignity), Article 4 (prohibition of torture and other ill treatments), and Article 7 (respect for private and family life) of the EU Charter.[116] Human dignity issues have often been raised in hearings of health-related asylum claims, which have been recognised as pertaining to vulnerable asylum applicants.[117] Following the CJEU's preliminary ruling in the *Ahmedbekova* case*,* Articles 4 and 7 of the EU Charter, in conjunction, have been held to require an assessment of an application for international protection on an individual basis, 'taking into account the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family ties to the person at risk, himself exposed to such a threat'. In conclusion, regarding positive hearing obligations of administrative authorities in asylum proceedings, the CJEU required a thorough and rigorous check of the personal circumstances of the individual asylum applicant, including questions pertaining to the protection of fundamental rights, in particular Articles 1, 4, 7, 24 and 47 of the EU Charter. The Court consistently rejected the adoption of negative asylum decisions based on pre-determined mathematical formulas or general assessments or statements.[118]

Regarding negative hearing obligations, in the *A, B and C case,* the CJEU set out key principles by excluding questions and evidence (e.g. videos or photos) regarding the applicants' sexual life or practices[119] on the basis of Articles 1 and 7 of the EU Charter.[120] These prohibited types of evidence and questions do not, however, exonerate administrative authorities from carrying out in-depth hearings. On the contrary, the CJEU emphasised that the interview should be designed to assess the personal or general circumstances surrounding the application, 'in particular, the vulnerability of the applicant,

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116 Joined Cases C-199/12 to C-201/12 *X, Y, Z* EU:C:2013:720; Joined Cases C-148-150/13 *A.B.C* EU:C:2014:2406.

117 See Case C-353/16 *MP* EU:C:2018:276. The list of questions to be addressed in health-related asylum claims will be further clarified in a pending case, Case C-756/21 *X v IPAT*.

118 See in particular Case C-901/19 *CF and DN* EU:C:2021:472.

119 Joined Cases C-148-150/13 *ABC* EU:C:2014:2406.

120 Ibid.

and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant'.[121] While the Court did not reject the use of expert reports (e.g. forensic psychologists' expert opinion) in the assessment of facts and circumstances of asylum claims based on sexual orientation grounds, it clearly found the use of projective personality tests in sexual orientation asylum cases to be inappropriate.[122] Relying on Principle 18 of the Yogyakarta Principles (protecting individuals from medical abuses based on sexual orientation or gender identity), and on Articles 1, 4, and 7 of the EU Charter, the CJEU clarified that a final asylum decision must be based on the individual assessment of all personal circumstances pertaining to each case, including sexual orientation matters.[123]

The CJEU's list of questions and circumstances has been completed by domestic courts when implementing the *A, B and C* preliminary ruling. Dutch courts clarified the information that public authorities have to include in their decisions on the basis of the right to good administration: the questions addressed; how weighing of evidence regarding persecution on grounds of sexual orientation was performed; and the statements held to lack credibility which influenced the final administrative decision. The absence of such information was considered a breach of transparency by the reviewing domestic courts, justifying judicial annulment of the administrative decision.[124]

The CJEU has further shaped the content of the right to be heard by also defining a non-exhaustive list of minimum questions in return-related proceedings. Namely, the administrative authorities have to obtain: the third-country national's view on the legality of his or her stay; facts that could justify the authorities to refrain from adopting a particular return-related

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121 Ibid para 70.

122 Case C-473/16 *F* EU:C:2018:36.

123 Ibid para 62; 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (The Yogyakarta Principles, March 2007) <http://yogyakartaprinciples.org/ wp-content/uploads/2016/08/principles_en.pdf/> accessed 7 April 2022.

124 See 'European Union, CJEU, A, B and C, Judgment of 4 December 2014' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/data/data?idPermanent=336> accessed 7 April 2022.

decision, in particular information that could correct an error or add information as regards his or her personal circumstances;[125] facts that justify exceptions to the expulsion;[126] social circumstances of the irregular migrant, including the best interests of the child, family life and the state of health of the individual concerned and risks of *non-refoulement*;[127] the third-country national's view on the detailed arrangements for his or her return, including the possibility to extend the period of voluntary departure under Article 7(2) of the Return Directive.[128] In addition, the CJEU clarified the legal force of evidence in return proceedings. Notably, public authorities cannot base their return-related decisions solely on the criminal record or prior rejection of an asylum claim, or on illegal stay or entry. The hearing must go beyond addressing these aspects.[129]

The impact of the CJEU's judgments has been particularly felt in those jurisdictions that had systematically conducted summative hearings.[130] First, domestic courts gained a concrete EU code on administrative hearings as standard for the legality review of administrative decisions. Second, domestic judicial review of the duty of good administration became more inquisitorial in order to ensure the right to good administration as an individual, concrete right. Notably, the Supreme Administrative Courts of Lithuania and Bulgaria[131] interpreted the duty of good administration as also including a

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125 *Boudjlida* (n 37) paras 37, 55.

126 Ibid para 47.

127 Ibid para 48. As regards the states of health that are relevant for both the suspension of return and for recognition of subsidiary protection, see respectively *Abdida* (n 80); Case C-353/16 *MP v Secretary of State for the Home Department* EU:C:2018:276.

128 *Boudjlida* (n 37) para 51.

129 Ibid.

130 Such as Italy. See Alessia di Pascale, 'Can a Justice of Peace be a Good Detention Judge? The Case of Italy' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 301.

131 Supreme Administrative Court of Bulgaria, *Gladkih v the Director of Regional Directorate of Border Police,* case No 11574/2011; Supreme Administrative Court of Lithuania, *ZK v Kaunas County Police Headquarters*, case No A-2681/2012, decision of 3 September 2013; *MS v. Migration Department under the Ministry of Interior*, case No A-69/2013, decision of 20 June 2013. For a summary of these cases see

duty to give returnees a period of reflection that ensures sufficient time to gather necessary evidence, as well as a duty to properly inform individuals of the purposes of the hearing to be held.

In a nutshell, the CJEU developed a code of conduct on administrative hearings in ISD proceedings based on Article 47 of the EU Charter and general principles of EU law, in particular good administration and rights of defence. In spite of the CJEU's constitutional contribution to enhance rule of law standards during asylum and immigration hearing procedures, the transformative effect of the Court's jurisprudence has had more impact on domestic judicial review than on EU legislation.[132]

IV. Remedies for Procedural Irregularities in Administrative Hearings: Traces of Constitutional, Activist, and Deferential Interpretation

The previous sections have shown how the CJEU and its dialogue with domestic courts have contributed to the recognition of new rights to be heard in domestic ISD proceedings by fleshing out their content and form. Nevertheless, these achievements would remain wholly theoretical in the absence of effective remedies for violations of the right to be heard. The current migration context, characterised by increasing fast-track asylum and

Madalina Moraru and Geraldine Renaudiere, 'REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy: Articles 12 to 14 of the Return Directive 2008/115' (2016) REDIAL Research Report 2016/04 <https://cadmus.eui.eu/bitstream/handle/1814/43924/MPC_REDIAL_2016_04.pdf> accessed 7 April 2022.

[132] See See Daniel Thym (ed), 'Special Collection on the "New" Migration and Asylum Pact' (EU Immigration and Asylum Law and Policy, October 2020-February 2021) <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/> accessed 31 March 2022.

immigration policies,[133] limitation of domestic judicial review,[134] and executive non-compliance with domestic judgments[135] has been endangering the system of effective remedies for violations of the right to be heard. Article 47 of the EU Charter and the general principle of EU law of rights of defence have been instrumental in the CJEU's clarification and enhancement of judicial hearing obligations and review powers of domestic courts over administrative decisions, which have ultimately led to ensuring effective judicial remedies and the respect of the rule of the law of in both asylum and return proceedings.

At the national level, procedural irregularities in the conduct of administrative hearings – be it mere shortcomings or absence of a hearing – are often considered 'minor' faults that do not automatically lead to annulment of the administrative decision unless they affect its substance.[136] *G&R* is the first case where the CJEU assessed the appropriate remedy for lack of hearing a returnee before the administrative authority adopted the prolongation of pre-removal detention by 12 months. The CJEU agreed with the referring Dutch Council of State that such an irregularity should not automatically lead to the annulment of an administrative decision. Instead, following its previous approach in competition and terrorism-related caselaw, the CJEU held that such an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for the contested irregularity, the outcome of the procedure might have been different.[137] While the CJEU established a common remedy for violations of the right to be heard across public law fields, it introduced an

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133 See, for instance, International Centre for Migration Policy Development, *The Asylum Appeals Procedure in Relation to the aims of European Asylum Systems and Policies* (International Centre for Migration Policy Development 2020). See also Giusepe Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management' (ASILE Blog, 20 November 2020) <https://www.asileproject.eu/the-eu-pact-on-migration-and-asylum-and-the-dangerous-multiplication-of-anomalous-zones-for-migration-management/> accessed 7 April 2022.

134 Elisa Enrione (n 3).

135 See, for instance, Case C-556/17 *Torubarov* EU:C:2019:626; Szulecka (n 5).

136 For instance, in the Netherlands and Germany, according to the legal context provided in Case C-383/13 PPU *G&R* EU:C:2013:533 and *Addis* (n 10).

137 See *G&R* (n 136) para 40.

additional safeguard in immigration cases.[138] Notably, the CJEU established a duty on national courts to *ex officio* assess whether,

> in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.[139]

This judicial empowerment could be interpreted as a refinement of the CJEU's previous approach on remedies developed in competition and taxation, but also as a compromise between ensuring enhanced protection of the right to be heard when absolute human rights are at issue, and respect of the principle of national procedural autonomy.

In the field of asylum, Article 46(3) of the Recast Asylum Procedure Directive provides for more extensive review rights compared to the above-mentioned judicial review powers in return-related proceedings. This provision stipulates that domestic courts should carry out 'a full and *ex nunc* examination of both facts and points of law'. At the national level, the potential of this Article has been significantly limited by inherent features of the predominant asylum adjudication model of non-inquisitorial administrative proceedings[140] and rule-of-law backsliding. In a series of preliminary rulings originating from Bulgaria,[141] Germany,[142] and Hungary,[143] the CJEU has clarified the meaning of EU law notions of 'full' and 'ex nunc' judicial review required under Article 46(3) in line with the hierarchically superior norm of Article 47 of the EU Charter.

The first case where the CJEU addressed the oral judicial hearing powers and obligations of domestic courts is the *Sacko* case, concerning manifestly

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138 Compare the preliminary ruling in *G&R* (n 136) para 40 (CJEU uses 'must') with the preliminary ruling in Case C-129/13 *Kamino* EU:C:2014:2041, para 81 (CJEU uses 'may'). On the CJEU shaping the right to be heard in the field of custom duties, see more in Zumbini (n 70).

139 Ibid.

140 See ReJus Casebook (n 43) 209-215.

141 *Alheto* (n 10).

142 *Addis* (n 10).

143 *Torubarov* (n 135).

unfounded or other inadmissible asylum applications.[144] An Italian legislative reform from 2017 introduced the system of video-recording an asylum seeker's administrative interview, which had been considered as rendering oral judicial hearings necessary only in exceptional circumstances. However, this technology had not been effectively implemented so that courts only received the transcript of the administrative interview, but not the video-recording tape.[145] Italian courts disagreed on whether they should hold oral judicial hearings as a rule in these circumstances.[146]

In *Sacko*, the CJEU followed a deferential interpretation of the right to be heard by holding that a right to an oral judicial hearing in asylum proceedings cannot be derived from Article 47 of the EU Charter or a systematic reading of Articles 12, 14, 31, and 46 of the Recast Asylum Procedure Directive, even if the administration had not submitted a video recording of the interview with the asylum seeker in the case file. However, the CJEU allowed domestic courts to dismiss the appeal without hearing the asylum applicants in strict circumstances, that is only if an oral hearing was conducted according to the guarantees set out in Articles 14-17 of the Recast Asylum Procedure Directive, if the report or the transcript of the interview was placed in the case file in accordance with Article 17(2) of the Recast Asylum Procedure Directive, and as long as domestic courts considered it unnecessary to organise an oral hearing to ensure a full and *ex nunc* examination of both facts and points of law as required under Article 46(3) of that Directive. Nevertheless, the CJEU's findings should be confined to the specific circumstances of the case, which involved an asylum application considered manifestly unfounded at the domestic level.

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144 Case C-348/16 *Sacko* EU:C:2017:591.

145 Gabriele Serra, 'Mancanza di videoregistrazione del colloquio dinanzi alla Commissione territoriale e obbligatorietà dell'udienza di comparizione delle parti nel giudizio di protezione internazionale: la posizione della Corte di cassazione' (Questione Giustizia, 13 September 2018) <https://www.questionegiustizia.it/articolo/mancanza-di-videoregistrazione-del-colloquio-dinan_13-09-2018.php> accessed 7 April 2022.

146 See the referral order sent by the Tribunal of Milano. Angelo Danilo De Santis, 'L'eliminazione dell'udienza (e dell'audizione) nel procedimento per il riconoscimento della protezione internazionale. Un esempio di sacrificio delle garanzie' [2018] (2) Questione Giustizia 206.

This careful manoeuvring of the CJEU between two opposite principles – national procedural autonomy and human rights protection – resulted in a great deal of uncertainty on the precise application of the *Sacko* judgment in the Italian context. The Italian referring court decided to organise an oral hearing in an accelerated asylum procedure because it found the information submitted by the administration to be incomplete and insufficiently up-to-date for the court to effectively ensure its EU law mandate under Article 46(3) of the Recast Asylum Procedure Directive.[147] However, neither the *Sacko* preliminary ruling, nor the referring court's follow-up judgment managed to unify the Italian jurisprudence on the necessity of oral judicial hearings in asylum adjudication.[148] Several years from the delivery of the preliminary ruling in the *Sacko* case, the Italian jurisprudence continued to diverge due to conflicting interpretations of the preliminary ruling by the Italian supreme court (Court of Cassation).[149]

The CJEU caselaw following *Sacko* has dealt with judicial powers and duties of oral hearings and review within the wider context of the separation of powers between the executive and the judiciary, and rule of law issues in asylum and immigration. The lower the executive accountability guarantees, the more intrusive is the CJEU's re-design of the national system of remedies. For instance, in *El Hassani*,[150] where the Polish administration was entirely exempted from a judicial review of its visa refusals, the CJEU required the conferral of a right to judicial appeal to rejected visa applicants on the basis of Article 47 of the EU Charter.

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147 For a summary of this decision, see Martina Flamini, 'The Right to be heard in international protection proceedings before the Italian Judge', in Federica Casarosa (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights – The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022) 288.

148 See Cristina Dallara and Alice Lacchei 'Street-level Bureaucrats and Coping Mechanisms. The Unexpected Role of Italian Judges in Asylum Policy Implementation' (2021) 26(1) South European Society and Politics 83.

149 Ibid. The Cassation Court has only very recently taken a unified approached on the mandatory nature of oral judicial hearing. See Sez 1, n 01785/2020, Rv 656580-01.

150 Case C-403/16 *El Hassani* EU:C:2017:960.

Within a rule-of-law backsliding context, where administrative authorities repeatedly disregard final judgments in asylum adjudication, the CJEU fills the gap in the effective protection of Article 47 of the EU Charter by empowering domestic courts to draw on international sources outside the confines of national procedural law.[151] When administrative authorities aim to bypass judicial review of their decisions on return procedures by disguising new decisions as mere amendments of previous ones, the CJEU re-designs the shape of the national remedy to compensate for shortcomings in the rule of law system. For instance, in *FMS and others,*[152] the CJEU required Hungarian law to extend the right to appeal to those third-country nationals whose country of return had been changed by the public authority compared to the issued return decision. Administrative authorities thus cannot be exempted from judicial review of their decisions in ISD proceedings, nor can judicial review be entirely deprived of its inquisitorial nature. In the *Mahdi* case,[153] Bulgarian courts were recognised to have the power to assess, on their own initiative, new facts and legal elements outside the evidence provided by the administration in pre-removal detention proceedings. In addition, they were recognised to have the power to establish additional remedies to those recognised at the national level, such as the power to establish alternative measures to pre-removal detention, or to release an irregularly staying third-country national from pre-removal detention.

The CJEU has further shaped the requirements for holding an oral judicial hearing in *Alheto*.[154] Notably, the Court held that an oral judicial hearing is mandatory in asylum adjudication, even if not expressly required under domestic law, when a court intends to examine a new ground of inadmissibility, which has not been examined by the competent administrative authority, based on new evidence that has come to light after the appeal of the administrative decision. Article 47 of the EU Charter would require an interpretation of the 'full and ex nunc' examination set out in Article 46(3) of the Recast Asylum Procedure Directive, under which a domestic court can handle the asylum application exhaustively 'without there

151 See *Torubarov* (n 135).

152 Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and others* EU:C:2020:367.

153 C-146/14 PPU *Mahdi* EU:C:2014:1320.

154 *Alheto* (n 10).

being any need to refer the case back to the determining authority'.[155] The CJEU clarified that if additional evidence compared to the one analysed by the administrative authority is taken into account by a domestic court, then an oral judicial hearing is necessary in order to allow the individual to express, in person and in a language with which he or she is familiar, his or her view concerning the applicability of that ground to his or her particular circumstances.[156] In *Alheto*, the Court also added essential safeguards for the respect of the rule of law in asylum which has experienced a growing domestic backlash within the context of executive aggrandizement and non-compliance with judicial assessments.[157] The CJEU underlined that the effectiveness of Article 46(3) of the Recast Asylum Procedure Directive would be undermined if, following a decision of a court including full assessment of the asylum application, the competent administrative or quasi-judicial authority disregards that assessment or does not adopt a decision within a short period of time.[158]

The CJEU's approach to remedies was further clarified in the context of remedies for lack of administrative hearings in accelerated asylum proceedings. In *Addis,*[159] the German authorities decided to deport a rejected asylum seeker without hearing him, although he had argued that his transfer would amount to a violation of his rights under Article 4 of the EU Charter due to precarious living conditions in the Member State of transfer. The CJEU required judicial annulment of the administrative decision and that the case be sent back to the administration to conduct the individual and oral hearing according to the rules set out in Articles 14-17 of the Recast Asylum Procedure Directive. This finding establishes a higher protection of the right to be heard in accelerated asylum proceedings compared to pre-removal detention proceedings, as set out in the *G&R* case. The reasons for the CJEU's change of remedy could be, first, the importance of the mandatory individual oral interview within the asylum adjudication, which does not

155 Ibid para 112.

156 Ibid paras 114, 130.

157 Evangelia Lilian Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 17 European Constitutional Law Review 471; and Szulecka (n 5).

158 *Alheto* (n 10) para 148.

159 *Addis* (n 10).

differentiate between admissibility and merits assessment; and, second, the asylum seeker's allegation of a risk of violation of his absolute fundamental right to prohibition of ill-treatments under Article 4.[160] The CJEU noted that a personal interview run by the administration within asylum adjudication benefits from a wide range of guarantees,[161] which neither the Directive nor domestic law guarantee during the judicial hearing (e.g. orality, and interview with a same-sex officer). As long as the judicial hearing cannot ensure the full range of guarantees provided by the Recast Asylum Procedure Directive during administrative hearings, domestic courts are required to set aside the administrative decision as null, rather than performing a hearing with lower guarantees than under the administrative phase of asylum adjudication.

In conclusion, the remedies developed by the CJEU for violations of the right to be heard in ISD proceedings illustrate first, a constitutional vision whereby the same remedy for violation of the right to be heard should be recognised across EU policies (e.g. migration, competition, trade sanctions).[162] However, variations exist in the CJEU jurisprudence. Notably, in *G&R,* the constitutional ambition resulted in a restrictive interpretation of the right to be heard, even if the right to liberty or the principle of *non-refoulement* was at issue. However, in *Alheto* and *Addis*, the CJEU refined its constitutional vision of the right to heard by including annulment of administrative decision and mandatory judicial hearing as remedies for violation of the right to be heard by the administrative authorities in asylum adjudication. Judicial empowerment to establish new remedies, which have traditionally been reserved for the executive, appears to be the solution found by the CJEU to an ineffective system of national remedies stemming from rule of law shortcomings.[163] In this way, the Court actively re-designed

160 See, in particular *Addis* (n 10) para 54.

161 See Recast Asylum Procedure Directive, arts 15-17.

162 That is: an infringement of the right to be heard results in annulment only if, had it not been for the contested irregularity, the outcome of the procedure might have been different. *G&R* (n 136).

163 For instance, a new right to judicial review was recognised in *El Hassani* (n 150) and a duty to organise oral judicial hearings when new grounds of inadmissibility are considered in *Alheto* (n 10). In addition, the Court extended judicial hearing powers beyond the limits of administrative evidence (*Mahdi* (n 153), *Abdida* (n 80), Case C-652/16 *Ahmedbekova* EU:C:2018:801 and *Alheto* (n 10) and guaranteed the

domestic ISD proceedings to ensure a delicate balance of powers between the administration and the judiciary. However, the CJEU showed judicial deference to domestic policy options when the principles of equivalence, effectiveness, and effective judicial protection are respected.

V. Conclusions: The CJEU's Judicial Shaping of the Right to be Heard - Achieving a Delicate Balance between Divergent Interests?

The right to be heard of asylum seekers, returnees and visa applicants has been a highly politicised topic. This right falls within two areas of law – procedure and immigration – which have long been considered by the Member States as falling within their exclusive competences. The right has been further politicised by being increasingly presented as a hindrance to effectively combating irregular migration and preventing threats to national security. Countering the executive-driven model of hearing rights, domestic courts have acted as rule of law guarantors, interpreting the right to be heard also in light of EU primary and secondary legislation. Within this context of divergent interests – fighting irregular migration vs. protection of fundamental rights, and primacy of EU law over respect of national procedural autonomy – the CJEU has had to decide on the scope, content, and effects of the EU fundamental right to be heard in domestic ISD proceedings. By exercising judicial diplomacy, the Court has reconciled various conflicting interests, principles, and policies by using constitutional, activist, and deferential interpretations of the right to be heard. Ultimately, the scope of the right to be heard in ISD proceedings has gained precision and enhanced protection through the judicial interactions between the CJEU and domestic courts.

The constitutional mindset of the CJEU has manifested in the development of common principles governing the scope of application of the right to be heard, the conduct of administrative hearings, and remedies. These migration-specific principles have then gained constitutional status by also

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preservation of judicial hearing powers that courts used to possess before executive or legislative reforms adopted in response to the so-called refugee crisis (*Sacko* (n 144) and *Torubarov* (n 135)).

being applied in other EU law areas.[164] Fundamental rights as guaranteed by general principles of EU law of rights of defence and good administration, as well as Article 47(2) of the EU Charter have been invoked by the CJEU as legal basis for recognising new rights to be heard for asylum seekers, visa applicants and returnees. The CJEU held that even if 'the applicable legislation does not expressly provide for such a procedural requirement',[165] domestic authorities are obliged to confer the right to a hearing before they adopt a decision on the legal status that could negatively affect the individual's rights.

As part of its constitutional role, the CJEU has established the necessity of orality of administrative hearing for vulnerable categories of asylum seekers (*M.M.(2)*). It has developed a common prototype of hearing guidelines derived from fundamental rights (*M.M(1), A, B and C)*, and it became the guarantor of the rule of law at the domestic level by re-establishing the balance of powers between executive and judiciary in the enforcement of EU law. This development has been particularly prominent in those asylum and migration cases occurring against the background of rule-of-law backsliding (e.g. *Torubarov*, *FMS and others*). The CJEU has thus reinstated domestic courts in their constitutional role of ensuring checks and balances in an executive-dominated field. On the basis of the right to an effective judicial remedy, enshrined in Article 47 of the EU Charter, domestic courts can thus organise judicial hearings as compensation for irregularities in administrative hearings beyond the limits of domestic procedural laws (*G&R* and *Sacko*). Furthermore, they have an obligation to organise oral hearings as corollary of the adversarial principle when they examine new grounds of inadmissibility in asylum adjudication for the first time (*Alheto*). The CJEU has also extended the judicial review of domestic courts to new facts and evidence beyond those submitted by the administration (*Mahdi*, *Alheto*, and *Ahmedbekova*), and

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164 For instance in consumer protection, see Case C-472/11 *Banif Plus Bank* EU:C:2013:88; C-119/15 *Biuro* EU:C:2016:987. See more in Federica Casarosa, *ReJus Casebook on Effective Justice in Consumer Protetion* (University of Trento 2018) <https://www.rejus.eu/sites/default/files/content/materials/rejus_casebook_effective_justice_in_consumer_protection.pdf> accessed 7 April 2022.

165 *MM (1)* (n 45) para 86.

recognised the reformatory powers[166] of domestic courts beyond the limits of procedural law (*Torubarov* and *Mahdi*). Immigration fields that were under discretionary executive control have been brought within the judicial review purview (*El Hassani*), and courts were recognised as the sole authority competent to provide for effective legal remedies in return proceedings in spite of the more permissive wording of the Return Directive (*FMS and others*).[167]

In its constitutional role, the CJEU has manifested both an activist and deferential or restrictive interpretation of the human right to be heard. The legislative gap-filling role exercised by the CJEU, particularly regarding the right to be heard of returnees, might seem like a manifestation of judicial activism, similar to the re-design of division of powers between the administration and judiciary on the basis of the EU law general principle of rights of defence and Article 47(2) of the EU Charter.[168] However, this manifestation of judicial activism is tempered by a restrictive interpretation of the right to be heard regarding the actual number of administrative hearings in combined asylum and return proceedings; the orality of judicial asylum hearings; and the type of remedy for violations of the right to be heard. On these issues, the CJEU has respected the policy choices made by the Member States within the margin of discretion afforded by the relevant EU secondary legislation on asylum and immigration. As long as Member States comply with the tryptic of requirements – equivalence, effectiveness, effective judicial protection of the right to be heard – and more recently with rule of law safeguards, the Court will not challenge the design of immigration procedures (e.g. the merging of hearings in relation to asylum and return procedures into one single administrative hearing as in *Boudjlida* and *Mukarubega*), nor will it impose the principle of orality to judicial hearing (*Sacko*). However, as highlighted above, when rule of law guarantees are

166 By reformatory powers, this article refers to the power to recognise international protection as such, thus going beyond the mere power of quashing the administrative decision, which is commonly describe as cassatory power. For more, see Ida Staffans, 'Evidentiary Standards of Inquisitorial Versus Adversarial Asylum Procedures in the Light of Harmonization' (2008) 14 European Public Law 615.

167 *FMS and others* (152) para 129.

168 As exemplified in *El Hassani* (n 150), *Alheto* (n 10) *Torubarov* (135) and *Addis* (n 10).

imperilled, the CJEU establishes wide judicial review and reformatory powers to compensate for illegitimate executive overreach (*Torubarov* and *FMS and others)*.

National courts have started preliminary reference procedures in an attempt to legitimise[169] their own specific interpretation of the right to be heard against the opposing views of the executive,[170] hierarchically superior courts,[171] majority judicial opinion,[172] or even the CJEU.[173] The Court has thus had to reconcile not only diverging interpretations between judiciary and the executive, but also diverging domestic judicial preferences on the correct interpretation of the right to be heard. The CJEU has not fully endorsed the opinions put forward by the referring courts, be they expansive fundamental rights interpretation (e.g. *Boudjlida* and *Mukarubega*), self-restrained (*Sacko*), executive deferential (*G&R*), or Charter-centred (*Mahdi*). Nevertheless, when essential elements of the rule of law were at issue, such as judicial independence, the CJEU has shown a higher endorsement of domestic courts' views formulated in the referrals (*Torubarov*, *FMS*). The outcome is a construction of the right to be heard by the CJEU that is different from the various interpretations put forward by the referring courts and the Governments. Nevertheless, this has not always resulted in ensuring the full potential of fundamental rights protection, as shown by the remedy established in the *G&R* case. The CJEU could have further adapted the remedy by placing the burden of proof on the infringing public authorities, and still be considered as acting in compliance with the EU law principle of procedural autonomy. Notably, the CJEU has refined this initial approach to

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169 On legitimation theory as motivation for cooperating with the CJEU, see Juan A. Mayoral, 'Judicial empowerment expanded: Political determinants of national courts' cooperation with the CJEU' (2019) 25 European Law Journal 374. This work expands on previous judicial empowerment theories developed by Weiler (n 29); Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

170 The Bulgarian Administrative Court of Sofia in *Mahdi* (n 153) and the Hungarian Administrative and Labour Court of Pécs in *Torubarov* (n 135).

171 See, for instance, the Tribunal of Melun and Pau in *Mukarubega* (n 54) and *Boudjlida* (n 37).

172 Tribunal of Milan in *Sacko* (n 144). See also Dutch Council of State in *G&R* (n 136), in reply to a developing opposing judicial view.

173 See Irish Supreme Court in *MM (2)* (n 48).

the remedy in more recent caselaw (e.g. *FMS and others* and *Alheto*). The preliminary rulings delivered within the rule of law and migration crises have strengthened the judicial empowerment theory as a solution for effective remedies.

Nevertheless, the reality of domestic judicial implementation of CJEU judgments show that, despite the prolific judicial interactions, the shape of the right to be heard has developed unevenly across the Member States. This is mainly due to the different domestic judicial understandings of the national discretion recognised in the preliminary rulings. While some jurisdictions show a high convergence of judicial views on the shape of the right to be heard,[174] others still disagree on key issues.[175] Various factors seem to influence domestic judicial convergence, such as the clarity of operational guidance and benchmarks phrased by the CJEU, the consistent interpretation of the supreme courts, and the extent of judicial review and remedial powers of domestic courts.[176] In this context, judicial interaction could further serve to settle judicial disagreement and set standards for policy-making with which the EU institutions would be wise to engage in the ongoing legislative reform of asylum and migration governance.

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174 Such as Lithuania, Belgium, Bulgaria.

175 For instance, see the case of Italy in the follow-up to the *Sacko* (n 144) preliminary ruling, as described in section IV.

176 In Italy, for instance, unlike the other jurisdiction, the supreme court had delivered varied interpretations of the *Sacko* (n 144) preliminary ruling; Italian asylum judges enjoy the widest judicial review and remedial powers across the Member States.

ENDORSING MIGRATION POLICIES IN CONSTITUTIONAL TERMS: THE CASE OF THE FRENCH CONSTITUTIONAL COUNCIL

Louis Imbert*

This article sets out to inquire into the French Constitutional Council's approach when dealing with immigration matters. It seeks to demonstrate how the Council's case law has endorsed, for the most part, the legislator's immigration policies, recognizing extensive police powers and striking down only the most excessive provisions of immigration laws. It is argued here that the Council's seemingly neutral methods of reasoning are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences. An overall analysis of the Council's case law sheds critical light on the main methods of reasoning advanced by the Council to endorse immigration policies, even in their most recent restrictive trends. The Council has clearly opted in favor of stricter immigration control, deliberately rejecting a rights-based approach.

Keywords: immigration, French Constitutional Council, constitutional review, methods of reasoning, constitutional reasoning, constitutional rights

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I. INTRODUCTION

As in neighboring countries, immigration policies in France have taken a repressive turn in the past few decades, focusing more and more on the 'fight against irregular migration', both at borders and inside the country. The constant pace of legislative reforms is revealing in this regard. Almost every Government since 1980 has modified aspects of immigration law, mostly following a restrictive trend. In this context, the role of French courts appears more essential than ever. In the early 1970s, the *Conseil constitutionnel* (French Constitutional Council) began taking on responsibility for the protection of fundamental rights guaranteed by the French Constitution (and related documents). However, although the Council confirmed early on that *étrangers* (foreigners) are protected by the Constitution,[1] it has also been inclined to maintain an important margin of action for the legislator and the administration, on the basis of increasingly significant public order considerations.

This article sets out to inquire into the French Constitutional Council's approach when dealing with immigration matters. It seeks to demonstrate

[1] Cons const, décision n° 89-269 DC du 22 janvier 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, cons 33. For the purpose of this article, we will use the term "foreigner" as the equivalent of the French term *étranger*. Article L. 110-3 of the *code de l'entrée et du séjour des étrangers et du droit d'asile* (French immigration code, CESEDA) defines *étrangers* as 'persons who do not hold French nationality, whether they have a foreign nationality or whether they do not have any nationality'. For the most part, this article deals more specifically with policies targeting individuals who are not citizens of the European Union (EU). Since the 1990s, EU citizens have acquired important rights attached to their fundametibntal freedom of movement within the EU. They are shielded by EU law from most French immigration control measures.

how the Council's case law has endorsed, for the most part, the legislator's immigration policies, recognizing extensive police powers and striking down only the most excessive provisions of immigration laws. The Council's role in confirming the main paradigms of French immigration policies can be understood first and foremost as one of translating the legislator's policies into constitutional terms.

While there are critical commentaries of specific cases pointing this out,[2] as well as a few systematic analyses of the earlier case law of the Council,[3] there is a strong need for an updated critical analysis of the Council's case law on immigration policies. This article aims at filling this significant academic gap by providing a critical overall analysis of the Council's case law on immigration matters (53 decisions since 1980). The analysis sheds critical light on the main methods of reasoning followed by the Council to endorse immigration policies, even in their most recent restrictive trends. It is argued here, from a legal realist perspective, that the seemingly neutral methods of reasoning used by the Council are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences.

This article is divided into four parts. Part II will introduce the historical, political, institutional and legal context in which the Council has reviewed immigration policies. Part III will deal with the ways in which the Council has generally endorsed immigration policies in constitutional terms. Part IV will demonstrate that the Council has loosened its protection standards throughout the past decades, especially when dealing with immigration detention regimes, which have been significantly expanded since their creation in the early 1980s. Part V will provide some concluding remarks.

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2 See e.g. Serge Slama, 'Les lambeaux de la protection constitutionnelle des étrangers' (2012) 90 Revue française de droit constitutionnel 373-386.

3 Bruno Genevois, 'Le Conseil constitutionnel et les étrangers' in Xavier Robert (ed), *Mélanges Jacques Robert* (Montchrestien 1998) 253-277; Olivier Lecucq, 'Le statut constitutionnel des étrangers en situation irrégulière' (LLD thesis, Université d'Aix-marseille 1999); Raymond Coulon, *Des droits de l'homme en peau de chagrin. Le droit des étrangers dans la jurisprudence du Conseil constitutionnel* (L'Harmattan 2000); Justin Kissangoula, *La Constitution française et les étrangers. Recherches sur les titulaires des droits et libertés de la Constitution sociale* (Librairie générale de droit et de jurisprudence 2001).

II. Context of the Constitutional Council's Case Law

This second part will introduce some basic context on the recent history and politics of immigration, the rise of the Constitutional Council as the potential guardian of fundamental rights in France and the indeterminacy of the French Constitution as regards the status of foreigners. This context will help illustrate the role of the Constitutional Council when reviewing immigration laws. It will demonstrate that the Council enjoys a rather wide margin of action on immigration matters as it is not particularly constrained by the Constitution in this regard.

1. Historical and Political Context: Contested Immigration Policies

Like other Western countries, France has a long history of policies aimed at controlling human mobility.[4] Until the 19th century, such policies mostly focused on vagrant and indigent individuals, whether French or foreign.[5] Borders were local and national, as passports were required both internally and externally.[6] It was only in the second half of the 19th century that the "immigration problem" emerged and that policies aimed at foreigners as such – understood unambiguously as non-nationals rather than as mere outsiders – started to proliferate.[7] An 1849 law consolidated the French administration's power of *expulsion*, the deportation of foreigners for reasons

4 Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2002).

5 In this regard, there are striking parallels with policies in place at the time in other countries. For a comparative perspective, see Fahrmeir, Faron and Weil (n 4). On the emblematic case of the United States, see in particular Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600-2000* (Cambridge University Press 2015).

6 Gérard Noiriel, 'Surveiller les déplacements ou identifier les personnes ? Contribution à l'histoire du passeport en France de la Ière à la IIIe République' (1998) 30 Genèses 77.

7 Gérard Noiriel, *Le Creuset français. Histoire de l'immigration. XIXe – XXe Siècle* (Editions du Seuil 2006), 71; Laurent Dornel, *La France hostile. Socio-histoire de la xénophobie (1870-1914)* (Hachette Littératures 2004).

of public order.[8] Between the late 1880s and the 1920s, other specific pieces of legislation were adopted to increase control over foreigners. Following the adoption of a decree in 1888, foreigners had to declare their residence to local authorities.[9] From 1917 onwards, they were required to obtain an identity card from the *préfet* (prefect) and to declare their first residence and any subsequent movement within the country, including any change of residence.[10] The 1930s witnessed a new wave of restrictive laws, in the context of a devastating economic crisis and rising xenophobia and antisemitism. A *décret-loi* (decree-law) adopted in May 1938 enacted more repressive immigration control measures, in addition to assembling existing ones in an unprecedented effort to offer a general legislative framework.[11]

After the Second World War, a new general framework was adopted.[12] It would become the basis for contemporary French immigration law, which was eventually codified in the mid-2000s as CESEDA. From 1945 to the late 1960s, France was in dire need of foreign labor. Authorities seldom enforced immigration control measures and foreigners were often able to obtain documentation once they had arrived in France.[13] In the early 1970s, as the country entered a lengthy economic crisis (related to the oil shock) and suffered massive unemployment, authorities announced their intention to close borders. Regulations were adopted to block labor and family migration and later on to foster or even force the departure of foreigners residing in

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8 See articles 7 and 8 of the *loi du 3 décembre 1849 sur la naturalisation et le séjour des étrangers en France*. For a brief summary of previous legislation, see Danièle Lochak and François Julien-Laferrière, 'Les expulsions entre la politique et le droit' (1990) 12 Archives de politique criminelle 75.

9 *Décret du 2 octobre 1888 relatif aux étrangers résidant en France*. See also *loi du 8 août 1893 relative au séjour des étrangers en France et à la protection du travail national*.

10 *Décret du 2 avril 1917 portant création d'une carte d'identité à l'usage des étrangers*.

11 *Décret-loi du 2 mai 1938 sur la police des étrangers*.

12 *Ordonnance du 2 novembre 1945 relative à l'entrée et au séjour des étrangers en France*.

13 Danièle Lochak, 'Les politiques de l'immigration au prisme de la législation sur les étrangers' in Didier Fassin, Alain Morice and Catherine Quiminal (eds), *Les Lois de l'inhospitalité. Les politiques de l'immigration à l'épreuve des sans-papiers* (La Découverte 1997) 31-32; Catherine Wihtol de Wenden, 'Ouverture et fermeture de la France aux étrangers. Un siècle d'évolution' (2002) 73 Vingtième Siècle. Revue d'histoire 33.

France.[14] A decree was successfully challenged before the *Conseil d'État* (Council of State), which recognized in a 1978 landmark decision that foreigners were entitled to the right to lead a normal family life.[15] This was an important step given the Council of State's longstanding reluctance to review the substance of immigration control measures.[16]

With immigration becoming an increasingly heated political issue, legal reforms have been adopted almost every two to three years since 1980.[17] Such reforms have mostly followed a restrictive trend, imposing more and more conditions on the residence of foreigners in France, reducing legal entry pathways as well as procedural and substantial guarantees and facilitating and aggravating deportation and detention measures.[18] In general, French immigration policies, as pursued by the legislator and the administration, have tended to focus more and more on the '*lutte contre l'immigration irrégulière*' ('fight against irregular migration'), while preserving the right to

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14 See e.g. *circulaire n° 9-74 du 5 juillet 1974 du secrétaire d'Etat auprès du ministre du travail, relative à l'arrêt provisoire de l'introduction de travailleurs étrangers*; *circulaires n° 11-74 du 9 juillet 1974, n° 17-74 du 9 août 1974 et n° 22-74 du 27 décembre 1974 du secrétaire d'Etat auprès du ministre du travail, suspendant provisoirement l'introduction en France des familles des travailleurs étrangers*; *circulaire n° 77-280 du 20 juin 1977 relative à l'application de 'l'aide au retour'*.

15 CE, Ass, 8 décembre 1978, *GISTI, CFDT et CGT*, n° 10097, 10677, 10679, Rec p 493.

16 In 1836, the Council of State refused to review the legality of administrative acts of deportation and detention, deeming these acts 'high police' powers of the French administration, immune from judicial review. CE, 2 août 1836, *Naundorff*, n° 12843, Rec p 379. It was only very gradually that the Council of State asserted authority to review such acts. At first, only questions of administrative procedure were open to challenge. See Stéphane Duroy, 'Le contrôle juridictionnel des mesures de police relatives aux étrangers sous la Troisième République' in Marie-Claude Blanc-Chaléard and others (eds), *Police et migrants : France 1667-1939* (Presses Universitaires de Rennes 2001) 91-104.

17 For a brief historical account of the evolution of immigration law between 1945 and 2011, see Thomas Ribémont, *Introduction au droit des étrangers en France* (De Boeck 2012) 12-20.

18 For a general overview of issues regarding the fundamental rights of foreigners in France, see Le Défenseur des droits, *Les droits fondamentaux des étrangers en France* (mai 2016) <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/736160170_ddd_rapport_droits_etrangers.pdf> accessed 15 January 2021.

asylum only to a minimal extent.[19] Recently, greater emphasis has been placed on 'integration', a vague term crystallizing ideological debates regarding the place of immigrants in France.[20] These debates rely, at least in part, on the widely held misconception that the proportion of foreigners has increased significantly over the course of the last century in France. Although the current proportion (7.6 per cent in 2020) is the highest attained over the past century, it is only slightly above 1931 and 1982 levels (6.6 and 6.8 per cent, respectively).[21]

In the past few decades, MPs and Senators have lodged numerous challenges before the Constitutional Council, mostly arguing that certain laws violated the constitutional rights of foreigners.[22] While the Council of State remains significant in reviewing the legality of administrative acts in the field of immigration,[23] the Constitutional Council has undoubtedly become a new battleground for politically charged challenges to French immigration

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19 For a critical account of this trend, see Karine Parrot, *Carte blanche. L'Etat contre les étrangers* (La Fabrique 2019).

20 Danièle Lochak, 'L'intégration comme injonction. Enjeux idéologiques et politiques liés à l'immigration' (2006) 64 Cultures & Conflits 131.

21 In 2020, there were around 5.1 million foreigners in France, thus amounting to 7.6 per cent of the total population of France (67 million inhabitants). This proportion has varied significantly over time. It went from 6.6 percent in 1931 to 4.1 per cent in 1954. It then peaked at 6.8 per cent in 1982 before decreasing to 5.5 per cent in 1999. It has increased again during the past two decades. 'L'essentiel sur… les immigrés et les étrangers' (Institut national de la statistique et des études économiques, 1 July 2021) <https://www.insee.fr/fr/statistiques/3633212> accessed 29 October 2021.

22 In some rare cases, members of Parliament have argued that the law in question granted excessive rights to foreigners and did not protect French nationals sufficiently. See in particular Cons const, décision n° 89-261 DC du 28 juillet 1989, *Loi relative aux conditions de séjour et d'entrée des étrangers en France*; Cons const, décision n° 91-294 DC du 25 juillet 1991, *Loi autorisant l'approbation de la convention d'application de l'accord de Schengen…*. The French Parliament is composed of two chambers: the *Assemblée nationale* (National Assembly) and the *Sénat* (Senate). Members of the National Assembly are called *députés* (MPs).

23 The Council of State also reviews the conformity of administrative acts to the European Convention of Human Rights, in particular article 8 which safeguards the right to respect for private and family life. CE, Ass, 19 avril 1991, *M. Belgacem*, n° 107470, Rec p 152; CE, Ass, 19 avril 1991, *Mme Babas*, n° 117680, Rec p 162.

policies on constitutional grounds.[24] Hence the necessity to examine carefully the approach followed by the Constitutional Council in order to determine the role it has played in the governance of migration policies.

2. Institutional Context: The Rise of the Constitutional Council

A general introduction to the Constitutional Council and its rise is necessary to understand the role it plays in French jurisprudence. Created by the 1958 Constitution which founded the current Fifth Republic, the Council is composed of two types of members.[25] Nine ordinary members are appointed for nine-year non-renewable terms by three different political figures (three by the President of the Republic, three by the President of the Senate and three by the President of the National Assembly). A third of them are renewed every three years. A significant number of these ordinary members are former politicians who have served as members of Parliament and/or as government ministers.[26] In addition to the ordinary members, former Presidents of the Republic automatically become *membres de droit* (ex officio members) of the Council. However, not all of them have sat on the Council.[27]

The Constitutional Council was created primarily to protect the prerogatives of the executive power, which had been reinforced by the Constitution of the Fifth Republic.[28] Hence the institution's designation as a Council rather than a Court, which also reflects the traditional hostility towards judges in French legal culture. Initially, the Council could only review legislative bills before their promulgation, upon referrals by the President of the Republic, the Prime Minister, the President of the Senate or the President of the National Assembly.[29] However, the Council later acquired new powers, both through constitutional reforms and on its own initiative.

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24 The European Court of Human Rights and the European Court of Justice have also emerged as significant battlegrounds for challenges to French immigration laws.

25 Article 56 of the 1958 Constitution.

26 Francis Hamon and Michel Troper, *Droit constitutionnel* (Librairie générale de droit et de jurisprudence 2020) 804.

27 Ibid 806.

28 Ibid 802.

29 Article 61 of the 1958 Constitution.

In a landmark 1971 decision, the Council itself expanded its *normes de référence* (reference standards) beyond the four corners of the 1958 Constitution, resolving to consider also the documents referenced in the first paragraph of the Preamble to the 1958 Constitution.[30] Following this decision, the *bloc de constitutionnalité* (an expression used by constitutional law experts such as Louis Favoreu to designate the set of norms holding constitutional value in France) gradually expanded to include the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the 1946 Constitution and the 2004 Charter for the Environment, as well as various principles and objectives of constitutional value.[31] This led to a much more substantial kind of review, extending *inter alia* to questions of fundamental rights protection.

Meanwhile, in 1974, a constitutional reform authorized referrals by any group of sixty MPs or Senators.[32] This became a new tool for opposition MPs and Senators, sparking an increase in referrals. This trend was reinforced by a major constitutional reform adopted in 2008 which opened a new preliminary ruling mechanism, the *question prioritaire de constitutionnalité* (QPC), to all litigants.[33] This procedure now allows any litigant, under certain conditions set by a 2009 organic law, to challenge the conformity of a legal provision to the rights and freedoms guaranteed by the Constitution.[34] Admissible requests are transferred by lower courts to the competent supreme court (Council of State or Court of Cassation), which may refer the matter to the Constitutional Council. This mechanism marked a significant change for at least three reasons. First, it opened up the possibility for litigants (including foreigners)[35] to challenge the constitutionality of laws, albeit only on the basis of rights guaranteed by the Constitution.[36] Second,

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30 Cons const, décision n° 71-44 DC du 16 juillet 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*.

31 Louis Favoreu and others, *Droit constitutionnel* (Dalloz 2018) 136.

32 *Loi constitutionnelle n° 74-904 du 29 octobre 1974 portant révision de l'article 61 de la Constitution*.

33 Articles 29 and 30 of *loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*.

34 *Loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*.

35 Article 61-1 of the Constitution does not set any condition of nationality.

36 Questions of legislative procedure, amongst others, thus remain out of reach for mere litigants.

this new mechanism allowed litigants to challenge the constitutionality of laws *after* their promulgation. Previously, once a law was promulgated, it was nearly impossible to challenge on constitutional grounds. Under this new procedure, a wide range of laws previously immune from challenge could now be brought under scrutiny by litigants. Third, as had been expected, this constitutional reform led to a further increase in the number of decisions rendered by the Council.[37] All these changes have reinforced the potential role of the Constitutional Council as a guardian of the rights of foreigners.

3. Legal Context: Constitutional Indeterminacy Regarding the Status of Foreigners

There are only two references to foreigners in the 1958 Constitution, despite the country's immigration history and the prior existence of a general legislative framework on the admission and residence of foreigners. The only explicit reference can be found in article 53-1 of the 1958 Constitution.[38] The other reference is implicit, incorporated by reference to paragraph 4 of the Preamble to the 1946 Constitution.[39] Both of these provisions pertain to the right to asylum, as they regulate the status of 'any man persecuted in virtue of his actions in favor of freedom'.[40]

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37 Hamon and Troper (n 26) 842.

38 'The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds'. Unless otherwise stated, translations of constitutional provisions are those provided on the English version of the Constitutional Council's website.

39 'Any man persecuted in virtue of his actions in favor of liberty may claim the right of asylum upon the territories of the Republic'.

40 The term *étranger* (which can also mean 'foreign' or, as part of the expression *à l'étranger*, 'abroad') can be found in three other provisions of the Constitution, which do not relate to the status of foreigners. Article 14 provides that 'the President of the Republic shall accredit ambassadors and envoys extraordinary to *foreign* powers; *foreign* ambassadors and envoys extraordinary shall be accredited to him'. Article 35 provides that 'the Government shall inform Parliament of its

The Constitution is otherwise silent on the status of foreigners. While the *bloc de constitutionnalité* contains various mentions of 'citizens', the interpretation of this term cannot be established with certainty.[41] In the rich and varied constitutional tradition of France,[42] citizens are not necessarily nationals, meaning that foreigners are not necessarily excluded from the category of citizens. However, references to *nationaux français* (French nationals) and to *le peuple français* (the French people) seem to exclude foreigners unambiguously. Foreigners do not participate in the exercise of national sovereignty, since it 'shall vest in the people, who shall exercise it through its representatives and by means of referendum'.[43] They are therefore not entitled to vote,[44] with the minor exception of citizens of the European Union, who are eligible to vote for and, under certain restrictions, hold office as members of city councils.[45]

Elsewhere in the *bloc de constitutionnalité*, in particular in the 1789 Declaration on the Rights of Man and of the Citizen, references are made to *les hommes* (men), *tout homme* (every man), *l'individu* (the individual), *nul* (none) and

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decision to have the armed forces intervene *abroad*, at the latest three days after the beginning of said intervention'. Lastly, article 73 provides that overseas departments and regions are not authorized to determine rules regarding certain areas, including '*foreign* policy'. Emphases added.

41 For a detailed analysis, see Danièle Lochak, 'L'étranger et les droits de l'homme' in *Service public et libertés : mélanges offerts au professeur Robert-Édouard Charlier* (Editions de l'Université et de l'enseignement moderne 1981) 615-633; Danièle Lochak, 'La citoyenneté : un concept juridique flou' in Dominique Colas, Claude Emeri and Jacques Zylberberg (eds), *Citoyenneté et nationalité. Perspectives en France et au Québec* (Presses Universitaires de France 1991) 179-207; Kissangoula (n 3).

42 Since 1789, France has known sixteen different constitutions.

43 Article 3 paragraph 1 of the 1958 Constitution. See also article 3 of the 1789 Declaration on the Rights of the Man and of the Citizen, which provides that 'the principle of any Sovereignty lies essentially in the Nation. No corporate body, no individual may exercise authority that does not expressly emanate from it'.

44 Article 3 paragraph 4 of the 1958 Constitution: 'All French *nationals* of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute.' Emphasis added. I have slightly modified the English translation provided by the Constitutional Council – which uses the term 'citizens' – to reflect the nuance between the terms nationals and citizens.

45 Article 88-3 of the 1958 Constitution.

chacun (each person). These expressions appear to encompass both nationals and foreigners,[46] although doubts have been raised when interpreting some of these terms.[47] Beyond this terminological matter, one searches in vain for a constitutional provision explicitly granting immigration powers to either the legislator or the executive. Although article 34 of the Constitution grants the legislator the power to set rules regarding nationality as well as 'civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties', it confers no explicit power upon Parliament regarding immigration matters.[48]

Former Constitutional Council Secretary General and Councillor of State Bruno Genevois confirms this constitutional indeterminacy as he notes that

> the main obstacle faced by the Constitutional Council [...] resides in the fact that the constituent did not take into account the situation of foreigners. Unlike the Fundamental Charter of other European countries, there are no general provisions on non-nationals in the 1958 Constitution [...].[49]

Genevois instead observes imprecision and 'great heterogeneity' within the *bloc de constitutionnalité* with respect to foreigners.[50] He believes that 'attempting to ground the constitutional rights of foreigners following a literal approach would have led to a great many approximations and even

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46 Henri Labayle, 'Le statut constitutionnel des étrangers – Rapport français' in Pierre Bon (ed), *Etudes de droit constitutionnel franco-espagnol* (Economica 1994) 31.

47 Members of the Constitutional Council have expressed hesitation as to the meaning of the word 'individual', notwithstanding the fact that it seems to refer universally to all persons. During a deliberation session, Councillor Jacques Robert stated: 'Indeed, the 1946 Preamble asserts that "the Nation provides the individual and the family with the conditions necessary to their development". Does the nation provide these conditions to all or to nationals only? I am not sure whether everyone, whoever they are, is targeted by this provision.' Minutes of the deliberation session of 22 January 1990, 33 (my translation).

48 Articles 34 and 37 of the Constitution define the substantive scope of statutes and regulations, respectively. According to article 37, any matter falling outside of the areas listed by article 34 is subject to regulation. Following a strict interpretation of both provisions, one might therefore conclude that immigration is a matter of regulation, not statute. However, the Constitutional Council has long recognized a broad scope for statutes, leaving considerable space for legislative intervention.

49 Genevois (n 3) 254-255 (my translation).

50 Ibid 255 (my translation).

inconsistencies.'[51] In a similar vein, Professor Henri Labayle wrote in the 1990s that

> the constitutional status of foreigners in France is marked by uncertainty and ambiguity. Uncertainty, [...] due to the silence of the Constitution, and ambiguity, above all, regarding the place to which domestic law assigns non-nationals. While it is true that the fundamental text and the rights it guarantees should bear an identity and a project, one is forced to recognize that the French Constitution only expresses indifference, if not ignorance, when it comes to immigration law.[52]

Due to this constitutional indeterminacy, the Constitutional Council has been compelled to 'fill in part of the gaps'[53] regarding the respective scope of the constitutional rights of foreigners and the immigration powers held by the legislator and the executive. This has undoubtedly provided the Council with a wide margin of action. Given these weak constitutional constraints, the Council could have followed a rights-based approach. As Parts III and IV will now show, it has instead aligned much of its case law with the immigration control priorities set by the legislator and the administration.

III. Endorsing Immigration Policies on Principle

This third part will explore the ways in which the Constitutional Council has endorsed immigration policies as a matter of principle. The Council has done so by recognizing extensive police powers in the legislator and exercising its usual self-restraint on matters of constitutional challenge. By deeming constitutional most of the legal provisions brought under its review, the Council has expressed stable support for immigration policy preferences set by the legislator and the Government. This part will inquire into the specific methods of reasoning relied upon by the Council in support to such policy preferences.

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51 Ibid (my translation). He mentions the example of article 34 of the 1958 Constitution, according to which 'statutes shall determine the rules concerning: - civic rights and the fundamental guarantees granted *to citizens* for the exercise of their civil liberties [...]'. Ibid (my translation, emphasis in original).

52 Labayle (n 46) 48 (my translation).

53 Ibid 42 (my translation).

1. Recognizing Extensive Police Powers

As soon as the Constitutional Council started to review immigrations laws, it recognized broad legislative powers in the field of immigration. It has provided two complementary for doing so. Both were spelled out in a landmark decision rendered on 13 August 1993, which is considered to have established the 'constitutional status of foreigners'.[54] First, foreigners can be treated differently by the legislator since they are 'placed in a different situation than that of nationals' in the immigration context.[55] Consequently, immigration rules do not violate the principle of equality, as they pursue general interest goals. This justification has been applied to uphold concrete measures criticized by members of Parliament as discriminatory.[56] The Council has also stated that immigration measures can only affect foreigners and are therefore not discriminatory.[57] Another way in which the Council has justified the differential treatment between nationals and foreigners has been to assert that 'no principle or rule of constitutional value guarantees to foreigners general and absolute rights of access to and residence in the national territory'.[58] This formula has been reiterated by the Council many times.[59]

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54 Cons const, décision n° 93-325 DC du 13 août 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*. See Bruno Genevois, 'Le statut constitutionnel pour les étrangers' [1993] Revue française de droit administratif 871.

55 Ibid cons 2 (my translation). For an earlier assertion of this argument, see Cons const, décision n° 89-266 DC du 9 janvier 1990, *Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 7.

56 See e.g. Cons const, décision n° 93-325 DC (n 54) cons 13, 133.

57 Ibid cons 31, 72.

58 Ibid cons 2 (my translation).

59 Cons const, décision n° 97-389 DC du 22 avril 1997, *Loi portant diverses dispositions relatives à l'immigration*, cons 36; Cons const, décision n° 2003-467 DC du 13 mars 2003, *Loi pour la sécurité intérieure*, cons 35, 83; Cons const, décision n° 2003-484 DC du 20 novembre 2003, *Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité*, cons 28, 38, 46; Cons const, décision n° 2005-528 DC du 15 décembre 2005, *Loi de financement de la sécurité sociale pour 2006*, cons 14; Cons const, décision n° 2006-539 DC du 20 juillet 2006, *Loi relative à l'immigration et à l'intégration*, cons 6; Cons const, décision n° 2011-631 DC du 9 juin 2011, *Loi relative à l'immigration, à l'intégration et à la nationalité*, cons 64; Cons

The second way in which the Council has justified broad legislative powers in the field of immigration has consisted in stating that foreigners' 'entry and residence conditions may be restricted by administrative police measures conferring extensive powers on public authorities and relying on specific rules'.[60] This position has also been recalled in a significant number of subsequent decisions.[61] The Council has also confirmed that it is for the legislator 'to determine, in conformity with constitutional principles, and considering its public interest goals, measures applicable to foreigners' entry and residence in France'.[62] Deeming most immigration control measures part of administrative police prerogatives has had far reaching consequences which will now be explored.

A. Rejecting Criminal Law Guarantees

The first consequence of characterizing most immigration control measures as administrative police measures is that it places them outside the scope of criminal law guarantees. Akin to the United States Supreme Court's old case law considering that deportation is not 'punishment for a crime',[63] this move

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const, décision n° 2017-674 QPC du 1 décembre 2017, *M. Kamel D.*, cons 4; Cons const, décision n° 2018-762 DC du 15 mars 2018, *Loi permettant une bonne application du régime d'asile européen*, cons 9; Cons const, décision n° 2018-717/718 QPC du 6 juillet 2018, *M. Cédric H. et autre*, cons 9; Cons const, décision n° 2018-770 DC du 6 septembre 2018, *Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie*, cons 87.

60 Cons const, décision n° 93-325 DC (n 54) cons 2 (my translation). For an earlier assertion of this principle, see Cons const, décision n° 89-266 DC (n 55) cons 6. It seems the Council was initially merely describing the regime established by the *ordonnance du 2 novembre 1945 relative à l'entrée et au séjour des étrangers en France* before the current Constitution was even adopted. In subsequent decisions, the assertion nevertheless became autonomous and appears to have become an implicit principle of French constitutional law.

61 Cons const, décision n° 2011-631 DC (n 59) cons 64; Cons const, décision n° 2017-674 QPC (n 59) cons 4; Cons const, décision n° 2018-762 DC (n 59) cons 9; Cons const, décision n° 2018-770 DC (n 59) cons 87.

62 Cons const, décision n° 97-389 DC (n 59) cons 24 (my translation).

63 *Fong Yue Ting v United States*, 149 US 698, 730 (1893). Three justices issued dissenting opinions in which they expressed their 'utter' disagreement.

has allowed the Council to refrain from examining claims asserting a range of rights attached to criminal procedures.

The Council has determined that in the exercise of its immigration powers the legislator may resort to either criminal or non-criminal measures.[64] As regards criminal measures, the legislator is quite free to determine the definition of criminal offenses and the penalties associated with them.[65] Such measures must however respect criminal law guarantees provided for in the *bloc de constitutionnalité*, in particular those contained in the 1789 Declaration of the Rights of Man and of the Citizen. The legislator may also resort to non-criminal – i.e. administrative – measures. The Council rarely challenges the legislator's characterization of a measure as non-criminal.[66] As early as 1980, the Council established that *expulsions* (a specific type of deportation that applies to individuals considered as a serious threat to public order pursuant to article L. 631-1 of CESEDA) were 'police measures which do not follow the same objectives as criminal repression'.[67] Based on this characterization, the Council upheld a provision that 'grants the administration with the power to take an expulsion measure based on facts which may justify a criminal conviction, but for which no permanent conviction has been pronounced by the judiciary authority'.[68] The Council therefore set aside the claim made by members of Parliament that the provision would violate the presumption of

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64 Cons const, décision n° 89-261 DC (n 22) cons 12; Cons const, décision n° 93-325 DC (n 54) cons 7.

65 See inter alia Cons const, décision n° 96-377 DC du 16 juillet 1996, *Loi tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire*, cons 11; Cons const, décision n° 98-399 DC du 5 mai 1998, *Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile*, cons 7.

66 For an exception, see Cons const, décision n° 93-325 DC (n 54) cons 49. The measure at issue was an *interdiction du territoire* (re-entry ban) that was automatically applied to individuals targeted by an *arrêté de reconduite à la frontière* (deportation measure). However, in 2011, the Council reversed its position and considered that an *interdiction de retour* (re-entry ban) was a mere police measure. Cons const, decision n° 2011-631 DC (n 59) cons 52.

67 Cons const, décision n° 79-109 DC du 9 janvier 1980, *Loi relative à la prévention de l'immigration clandestine et portant modification de l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 6 (my translation).

68 Ibid (my translation).

innocence principle, guaranteed by article 9 of the Declaration of the Rights of Man and of the Citizen.

A few other examples will further illustrate the serious consequences of characterizing immigration measures as non-criminal. In the landmark August 1993 decision referenced above, the Council characterized refusal of entry decisions as relying on administrative police rules specific to foreigners. Accordingly, such decisions were not subject to criminal law guarantees and could be executed automatically.[69] In a March 2003 decision, the Council deemed that the withdrawal of a temporary residence card for reasons of public order was 'not a sanction but a police measure', to which the presumption of innocence therefore did not apply.[70] In a September 2018 decision, the Council refused to classify immigration detention as a criminal sanction even though the maximum length of such detention had been extended three months.[71] Consequently, it was not subject to the principle of legality. Finally, in December 2019, the Council decided that refusal of entry and border detention were not 'sanctions having the character of punishment, but police administrative measures', meaning that police interviews conducted in such connection could continue to take place without the assistance of a lawyer.[72]

B. Favoring Public Order over Rights

The second and main consequence of characterizing immigration control measures as administrative police measures is that it frames the Council's inquiry as one of balancing the rights of foreigners against the safeguarding of public order, which was first recognized as an *objectif à valeur constitutionnelle* (objective of constitutional value) outside of the immigration context in 1982.[73] Under traditional principles of French administrative law, administrative police measures may restrict fundamental rights in order to preserve public order. The Constitutional Council took direct inspiration

69 Cons const, décision n° 93-325 DC (n 54) cons 7.

70 Cons const, décision n° 2003-467 DC (n 59) cons 85 (my translation).

71 Cons const, décision n° 2018-770 DC (n 59) cons 69.

72 Cons const, décision n° 2019-818 QPC du 6 décembre 2019, *Mme Saisda C.*, cons 12 (my translation).

73 Cons const, décision n° 82-141 DC du 27 juillet 1982, *Loi sur la communication audiovisuelle*, cons 4-5.

from the Council of State's landmark *GISTI* ruling of 1978[74] when, in 1986, it first decided that public order considerations could prevail over foreigners' rights.[75] Later on, the Council presented its reasoning as a process of '*conciliation*' – a balancing operation pitting the public order principle against foreigners' rights. This would seem to imply that that there is no hierarchy between those two elements and that they hold the same value. However, in most cases, the Council has favored public order over foreigners' rights. Between 1986 and 2019, in the thirty-three instances in which the Council balanced public order against rights, whether explicitly or implicitly,[76] twenty-eight provisions were upheld[77] and a further three were upheld subject to *réserves d'interprétation* (explained below in Part III.2),[78] while only

74 CE, Ass, 8 décembre 1978, *GISTI, CFDT et CGT*, n° 10097, 10677, 10679, Rec p 493.

75 Cons const, décision n° 86-216 DC du 3 septembre 1986, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*, cons 18. For an analysis of the Council of State's influence, see Kissangoula (n 3) 200-205.

76 This includes six instances in which no explicit mention was made of *conciliation*, but where public order considerations were clearly invoked (sometimes through other notions such as public interest or administrative police powers) to restrict constitutional rights. Cons const, décision n° 93-325 DC (n 54) cons 25, 60, 87; Cons const, décision n° 97-389 DC (n 59) cons 24, 52; Cons const, décision n° 2003-485 DC du 4 décembre 2003, *Loi modifiant la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile*, cons 56.

77 Cons const, décision n° 86-216 DC (n 75) cons 18; Cons const, décision n° 93-325 DC (n 54) cons 19-22, 25, 56, 60, 63, 87; Cons const, décision n° 97-389 DC (n 59) cons 10-14, 21, 24, 36, 71-72; Cons const, décision n° 2003-467 DC (n 59) cons 110; Cons const, décision n° 2003-484 DC (n 59) cons 23, 38-39, 57; Cons const, décision n° 2003-485 DC (n 76) cons 56; Cons const, décision n° 2005-528 DC (n 59) cons 14, 16; Cons const, décision n° 2006-539 DC (n 59) cons 13-14; Cons const, décision n° 2007-557 DC du 15 novembre 2007, *Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, cons 11; Cons const, décision n° 2011-631 DC (n 59) cons 72, 78-79; Cons const, décision n° 2016-580 QPC du 5 octobre 2016, *M. Nabil F.*, cons 12; Cons const, décision n° 2018-762 DC (n 59) cons 9-16; Cons const, décision n° 2018-770 DC (n 59) cons 63, 92, 99; Cons const, décision n° 2019-797 QPC du 26 juillet 2019, *Unicef France et autres*, cons 11.

78 Cons const, décision n° 97-389 DC (n 59) cons 52; Cons const, décision n° 2017-674 QPC (n 59) cons 11-12; Cons const, décision n° 2018-770 DC (n 59) cons 76.

two were struck down.[79] Over the course of these decisions, the Council has favored public order over the right to a normal family life, the best interests of the child, the right to private life, freedom of movement (within France), the right to individual liberty (including freedom from arbitrary detention), the right to an effective remedy and the right to asylum. Though expressed through the technical language of constitutional reasoning, this configuration is not the result of a purely mechanical operation dictated by strict rationality. Rather, it appears to express a relatively stable axiological hierarchy – i.e. a hierarchy of values – according to which public order almost always prevails over foreigners' rights.[80]

The concept of public order has remained quite vague throughout the Council's case law. Despite its weak textual basis,[81] it is never clearly defined and appears to cover a wide range of considerations. At times, one wonders how a specific measure under review effectively contributes to the preservation of public order. For instance, in a 2006 decision, the Council ruled, without any explanation, that the decision to extend the minimum length of time a foreigner needed to reside in France before she could bring her family over gave rise to public order considerations that trumped her right to a normal family life.[82]

Furthermore, the Council has widened the concept of public order in some respects over the past two decades. Since 2003, the concept includes the 'fight against irregular migration'.[83] This expansion seems to have been a reaction to the increasing importance of this goal in the legislator's and the Government's respective immigration policies. It also seems to have been a direct response to arguments raised by the Government in its observations

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79 Cons const, décision n° 97-389 DC (n 59) cons 43-45; Cons const, décision n° 2017-674 QPC (n 59) cons 10.

80 On axiological hierarchies, see Véronique Champeil-Desplats, *Théorie générale des droits et libertés. Perspective analytique* (Dalloz 2019) 305-330; Riccardo Guastini, *Teoría analítica del derecho* (Zela 2017) 119-122.

81 For instance, the Council has relied on article 34 of the Constitution, which makes no explicit reference to public order.

82 Cons const, décision n° 2006-539 DC (n 59) cons 11-14.

83 Cons const, décision n° 2003-484 DC (n 59) cons 23; Cons const, décision n° 2011-631 DC (n 59) cons 64; Cons const, décision n° 2018-717/718 QPC (n 59) cons 9; Cons const, décision n° 2019-797 QPC (n 77) (my translation).

before the Council, which already in 1997 presented the 'fight against irregular migration' as a significant public order issue.[84] There is, however, a paradox in the postures adopted by the legislator and the Government. While they claim to 'fight against irregular migration', their reforms have actually tended to 'produce' more and more foreigners in an irregular situation.[85] This contradiction was indeed pointed out by members of Parliament in their brief to the Council regarding the same 1997 case.[86] Nevertheless, it has not prevented the 'fight against irregular migration' from becoming a recurrent argument of the Government in its observations before the Council in defense of provisions of legislative reforms. In turn, the Council appears increasingly willing to rely on this policy objective, which it has thereby translated into a fully-fledged constitutional concept.

Beyond the vague nature and broad scope of the concept of public order, concrete justifications as to why it should prevail over rights are often very limited. As is the case for much of the Constitution Council's reasoning, which is typically formalistic and somewhat opaque,[87] explanations provided are cursory and at times incomplete from a logical standpoint. After asserting that it will resort to balancing to decide on the validity of a provision, the Council sometimes immediately jumps to its conclusion or simply reformulates the content of the provision.[88] It is also not always clear whether the balancing exercise is supposed to be performed by the legislator or by the Council. The degree of review thus varies from one decision to another.[89]

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84 See the Government's observations lodged before the Council in Cons const, decision n° 97-389 DC (n 59) (my translation).

85 Nathalie Ferré, 'La production de l'irrégularité', in Fassin, Morice and Quiminal (n 13), 47-64 (my translation).

86 Brief of MPs lodged before the Constitutional Council on 27 March 1997.

87 Arthur Dyevre, 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017), 323-355.

88 See e.g. Cons const, décision n° 2011-631 DC (n 59) cons 79.

89 See inter alia Cons const, décision n° 2018-762 DC (n 59) cons 9-16; Cons const, décision n° 2018-770 DC (n 59) cons 70-76; Cons const, décision n° 2011-631 DC (n 59) cons 66, 72. Although in recent years, the Council has begun employing proportionality tests, it typically fails to follow rigorously the three-step process to determine whether a measure is adequate, necessary and proportionate. See

2. Exercising Traditional Self-Restraint

French legal culture has traditionally been hostile to judicial power. Even with the expansion of its role, the Council has remained careful to appear deferential to Parliament so as to preserve its institutional legitimacy. This is true even when it comes to the protection of fundamental rights, an area in which the Constitutional Council's case law has not escaped criticism.[90] Indeed, the Council has demonstrated self-restraint in most areas of law. Since 1975, it has stated many times that the Constitution 'does not grant the Constitutional Council a general power of appreciation and decision identical to that of Parliament, it merely gives it competence to review the conformity of challenged laws to the Constitution'.[91]

Quite significantly, this very statement has been invoked by the Constitutional Council to uphold diametrically opposed laws one after the other. In 2011, the Council confirmed the constitutionality of a set of provisions interpreted as restricting marriage to heterosexual couples.[92] Only two years later, the Council reviewed a legal reform opening marriage to same-sex couples and found it constitutional on the very same grounds.[93] In both cases, Councillors wrote that it was for the legislator, not the Council, to decide what sort of "different situation" could justify "different treatment" without violating the principle of equality. This allowed the Council to avoid any discussion of the substance of the matter. Decisions reviewing immigration laws tend to follow a similar approach. In fact, the Council has

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Michael Koskas, 'Le dynamisme de la proportionnalité : enjeux de la fragmentation tripartite du principe dans le processus juridictionnel' (2019) 15 Revue des Droits de l'Homme s 42.

90 For a critical assessment, see Danièle Lochak, 'Le Conseil constitutionnel, protecteur des libertés ?' (1991) 13 Pouvoirs 41; Véronique Champeil-Desplats, 'Le Conseil constitutionnel, protecteur des droits et libertés ?' (2011) 9 Cahiers de la recherche sur les droits fondamentaux 11.

91 Cons const, décision n° 74-54 DC du 15 janvier 1975, *Loi relative à l'interruption volontaire de la grossesse*, cons 1 (my translation). See footnotes immediately below for references of subsequent cases relying on the same statement.

92 Cons const, décision n° 2010-92 QPC du 28 janvier 2011, *Mme Corinne C. et autre*, cons 5, 9.

93 Cons const, décision n° 2013-669 DC du 17 mai 2013, *Loi ouvrant le mariage aux couples de même sexe*, cons 14, 22.

made the very same statement regarding its limited competence in several decisions reviewing immigration laws.[94] With the notable exception of a 1989 decision in which the Council confirmed the constitutionality of provisions that guaranteed foreigners' rights,[95] this position has mostly led the Council to refrain from striking down provisions which could be considered detrimental to foreigners' rights.

The Council has also manifested self-restraint in granting the legislator free rein to diminish fundamental guarantees it had previously adopted to ensure respect for constitutional rights. For a time, this seemed to contradict the Council's case law in other areas. Over the course of the last two decades of the 20th century, the Council issued several decisions that appeared to impose an '*effet cliquet*' ('ratchet theory') whereby Parliament could only strengthen the legal guarantees of fundamental constitutional.[96] This case law had serious limitations, though, as it applied only to 'fundamental rights' (as determined by the Council itself) and it still allowed the legislator to balance these rights against principles of constitutional value. The theory was applied sporadically and eventually abandoned.[97] In any case, when it comes to reviewing immigration laws, the Council has always appeared willing to accept the placement of restrictions upon even the most fundamental

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94 Cons const, décision n° 89-261 DC (n 22) cons 15; Cons const, décision n° 2011-217 of 3 février 2012, *M. Mohammed Akli B.*, cons 4; Cons const, décision n° 2015-501 QPC du 27 novembre 2015, *M. Anis T.*, cons 8; Cons const, décision n° 2017-674 QPC (n 59) cons 25; Cons const, décision n° 2018-717/718 QPC (n 59) cons 18.

95 Cons const, décision n° 89-261 DC (n 22).

96 Cons const, décision n° 83-165 DC du 20 janvier 1984, *Loi relative à l'enseignement supérieur*, cons 42; Cons const, décision n° 84-181 DC du 11 octobre 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, cons 37; Cons const, décision n° 93-325 DC (n 54) cons 81; Cons const, décision n° 94-345 DC du 29 juillet 1994, *Loi relative à l'emploi de la langue française*, cons 5.

97 Cons const, décision n° 2002-461 DC du 29 août 2002, *Loi d'orientation et de programmation pour la justice*, cons 67; Const. const., décision n° 86-210 DC du 29 juillet 1986, *Loi portant réforme du régime juridique de la presse*, cons 2. For developments on how the 'ratchet theory' was abandoned, see Véronique Champeil-Desplats, 'Le Conseil constitutionnel a-t-il une conception des libertés publiques ?' (2012) 7 Jus Politicum 15-17.

constitutional rights.[98]. As early as 1986, the Council was keen to observe that its review did not consist in comparing provisions of consecutive laws, but solely in comparing the law in question with constitutional requirements.[99] This position has been reiterated in various decisions reviewing immigration laws.[100]

Since 1975, the Council has also refused to examine the conformity of laws with international conventions, following a strict interpretation of articles 55 and 61 of the Constitution.[101] This position has likewise been reiterated in several decisions reviewing immigration laws,[102] and indeed has significant consequences in this area of law, where international treaties can at times provide more protective guarantees than the domestic normative framework. For instance, the Council has refused to review the conformity of immigration laws with the 1951 Geneva Convention Relating to the Status of Refugees[103] and the 1950 European Convention on Human Rights.[104] While the Council has indirectly recognized some international norms through its interpretation of related constitutional norms (e.g. right to asylum, best interests of the child, respect for family life), it has nonetheless

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98 One minor exception is the right to asylum, which was considered a fundamental right in a 1993 decision under the short-lived ratchet theory (Cons const, décision n° 93-325 DC (n 54) cons 81). However, this was not reiterated in later decisions and the Council has since confirmed the constitutionality of various legal provisions restricting the right to asylum.

99 Cons const, décision n° 86-216 DC (n 75) cons 14.

100 Cons const, décision n° 89-261 DC (n 22) cons 15; Cons const, décision n° 93-325 DC (n 54) cons 2; Cons const, décision n° 2011-631 DC (n 59) cons 67 ; Cons const, décision n° 2018-770 DC (n 59) cons 71.

101 Cons const, décision n° 74-54 DC (n 91) cons 1-7. Article 55 of the Constitution provides that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. Given that article 61 provides that the Constitutional Council 'shall rule on [the] conformity of [referred bills] to the Constitution', one could argue that the Council should review the conformity of referred laws to international treaties so as to ensure respect for article 55 of the Constitution.

102 Cons const, décision n° 93-325 DC (n 54) cons 2; Cons const, décision n° 97-389 DC (n 59) cons 13.

103 Cons const, décision n° 98-399 DC (n 65) cons 11-12.

104 Cons const, décision n° 2018-770 DC (n 59) cons 54.

sustained autonomous interpretations of these norms that do not necessarily conform to those of supra-national bodies such as the European Court of Human Rights.[105]

The Council has also limited its review of laws not yet promulgated by examining only the provisions specifically referred to it by political authorities. From its very first decisions, the Council has recognized its own competence to review all provisions of a deferred bill, beyond the specific issues raised by political authorities.[106] Yet, in most decisions reviewing immigration laws, the Council examines only those norms specifically at issue and leaves aside important questions regarding other norms.[107] Exceptions are rare.[108] While this problem is not specific to immigration laws, it is particularly problematic in this area of law because it involves fundamental rights issues. Until 2010, when the QPC preliminary ruling procedure was finally implemented, any provision not reviewed before its promulgation became exceedingly difficult to challenge later on. Many provisions that were problematic from a fundamental rights perspective were thereby permitted to evade scrutiny. Although the Council decided in a 1985 case (unrelated to immigration) that it could examine already promulgated provisions if they

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105 Ibid.

106 Cons const, décision n° 60-8 DC du 11 août 1960, *Loi de finances rectificative pour 1960*, cons 5. This position was explicitly confirmed in a case regarding an immigration law in 1992. Cons const, décision n° 92-307 DC du 25 février 1992, *Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 1.

107 Cons const, décision n° 79-109 DC (n 67); Cons const, décision n° 89-261 DC (n 22) cons 32; Cons const, décision n° 89-266 DC (n 55) cons 9; Cons const, décision n° 93-325 DC (n 54) cons 134; Cons const, décision n° 97-389 DC (n 59) cons 77; Cons const, décision n° 98-399 DC (n 65) cons 21; Cons const, décision n° 2003-485 DC (n 76) cons 65; Cons const, décision n° 2006-539 DC (n 59) 30; Cons const, décision n° 2007-557 DC (n 77) cons 30; Cons const, décision n° 2011-631 DC (n 59) cons 96; Cons const, décision n° 2016-728 DC du 3 mars 2016, *Loi relative au droit des étrangers en France*, cons 7; Cons const, décision n° 2018-762 DC (n 59) cons 24.

108 But see Cons const, décision n° 86-216 DC (n 75) cons 21-22; Cons const, décision n° 92-307 DC (n 106) cons 35-37; Cons const, décision n° 2003-484 DC (n 59) cons 98-101; Cons const, décision n° 2018-770 DC (n 59) cons 115-118.

were modified, completed or affected by a new law,[109] it does not seem to have made much use of this power in decisions reviewing immigration laws.[110]

Lastly, the Council has attenuated the impact of its decisions in two ways. The first is the aforementioned '*réserves d'interprétation*', which allow the Council to maintain deference to the legislator by upholding questionable provisions under particular interpretations that the Council provides. This approach has clear limitations. First, when dealing with laws that are not yet promulgated, the Council may encounter difficulties in anticipating how a provision will be enforced.[111] Second, the Council's interpretations are sometimes quite vague, leaving plenty of room for subsequent interpretations by the administration and judges.[112] Furthermore, some of the Council's interpretations appear to afford rather weak protection against potential violations of foreigners' rights.[113] Lastly, there is no direct mechanism ensuring that the Council's interpretations will be faithfully applied by the administration and judges.

The second way in which the Council has attenuated the impact of its decisions – specifically preliminary rulings under the QPC procedure – is through *modulation des effets dans le temps* (postponing their effectiveness to a later date). By such means, the Council can strike down a provision but specify a grace period of several months before the censored provision will actually be abrogated. The rationale for this remedy is that immediate abrogation would in some cases have 'manifestly excessive consequences'.[114]

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109 Cons const, décision n° 85-187 DC du 25 janvier 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*, cons 10. The exception did not apply to new provisions which merely implemented older provisions. This shielded a number of provisions from being challenged.

110 In a 2018 decision, the Council refused to examine provisions of an older law since they were left unmodified by the law under review. Cons const, décision n° 2018-770 DC (n 59) cons 64.

111 Genevois (n 3), 254.

112 See e.g. Cons const, décision n° 2003-467 DC (n 59) cons 86; Cons const, décision n° 2018-717/718 QPC (n 59) cons 14.

113 See e.g. Cons const, décision n° 92-307 DC (n 106) cons 33; Cons const, décision n° 93-325 DC (n 54) cons 16; Cons const, décision n° 2003-484 DC (n 59) cons 66.

114 Cons const, décision n° 2017-674 QPC (n 59) cons 25; Cons const, décision n° 2018-717/718 QPC (n 59) cons 23; Cons const, décision n° 2019-799/800 QPC du 6

Of course, these consequences invariably relate to public order considerations (i.e. maintaining immigration control measures), which are invoked to justify the continued violation of constitutional rights for several additional months.

IV. Loosening Protection: The Example of Immigration Detention

According to professor Serge Slama, the Constitutional Council's case law on immigration matters can be described as a belt loosened at every weight gain.[115] This is particularly true for immigration detention regimes, which have become an increasingly significant tool in French immigration policy over the past few decades. As the analysis in this Part IV will show, after an initial period of vigilance, during which the Council rejected longer detention periods, the Council gradually weakened its standards and began to accept longer detention periods, from seven days initially to three months today. It has become quite clear that the Council is no longer inclined to hinder in any way the legislator's policy priority of 'fighting against irregular migration'. The example of immigration detention thus demonstrates the Council's willingness to reinforce stricter policy preferences by translating them into constitutional language. In particular, this analysis will show that policy considerations, while not explicitly acknowledged in the Council's reasoning, played an overwhelming role in the Council's decision to overturn its own case law.

1. Initial Vigilance: Rejecting Longer Detention

In its early decisions regarding immigration laws, the Council was particularly vigilant when it came to immigration detention regimes. Article 66 of the 1958 Constitution asserts the right to be free from arbitrary detention and

septembre 2019, *Mme Alaitz A. et autre*, cons 11 (my translation). But see Cons const, décision n° 2018-709 QPC du 1 juin 2018, *Section française de l'observatoire international des prisons et autres*, cons 12.

115 Serge Slama, 'La rétention des « Dublinables » : le Conseil Constitutionnel admet une rétention préventive sans perspective immédiate d'éloignement' (2018) Lexbase, La lettre juridique n° 739 <https://www.lexbase.fr/revues-juridiques/45196432- document-elastique> accessed 3 September 2021.

entrusts the judiciary authority with protecting individual liberty. While the Council always accepted in principle the possibility of administrative detention to enforce deportation measures,[116] it was initially determined to enforce relatively strict criteria for judicial review and limits on duration. The Council did not hesitate to strike down provisions on these grounds in four different decisions between 1980 and 1993.

In a 1980 decision, the Council first established that *juge judiciaire* (judicial branch as opposed to administrative judges) must intervene as early as possible to review any decision imposing *retention administrative* (administrative detention) or extending its duration for an additional period.[117] The Council accepted one detention regime that provided for judicial intervention after forty-eight hours of administrative detention, but rejected another regime in which such intervention was not envisaged for more than seven days (either automatically or upon the detainee's request).[118] In a 1986 decision, the Council examined and struck down a detention provision on its own initiative, even though members of Parliament had not criticized it in their brief to the Council. The relevant law provided the possibility of a six-day extension of detention, followed by a second extension of three additional days, should the administration demonstrate that it encountered 'particular difficulties hindering the detainee's deportation'.[119] The Council deemed that the second extension, bringing the total duration of detention to ten days, could only be granted in cases of 'absolute emergency and particularly serious threats to public order'.[120] It deemed the law in question too broad to satisfy these constitutional requirements, as it was not limited to such exceptional cases.

In a 1992 decision, the Council rejected a provision establishing transit zones for foreigners whose entry in France was refused and for those requesting asylum at the border. It first confirmed that detaining foreigners at the border was a lesser restriction of individual liberty than detaining individuals

116 Cons const, décision n° 79-109 (n 67).

117 Ibid cons 4.

118 Ibid cons 3-4.

119 Cons const, décision n° 86-216 DC (n 75) cons 21 (my translation).

120 Ibid cons 22 (my translation).

already on French soil.[121] Although the Council did not explicitly justify this position, it seems to have been swayed by the fact that the law allowed foreigners detained at the border to leave the transit zone at any time by leaving France for a foreign destination where they could be admitted.[122] Nonetheless, given the degree of constraint and the duration of the measure, the Council still insisted that review by a *juge judiciaire* must be made available as early as possible, and that in any case the maximum duration of the measure had to be 'reasonable'.[123] The Council deemed that these constitutional requirements were not respected under the transit zone regime, which authorized the detention of foreigners for up to twenty days without any judicial review, subject to extension for an additional ten days by ruling of an administrative judge (not a *juge judiciaire*).

Finally, in the notable August 1993 decision cited multiple times above, the Council reiterated the rule it had established in 1986. The legislator had again attempted to authorize a second extension of administrative detention, for a cumulative total of ten days, in cases where 'the foreigner did not provide the competent authority with a travel document enabling the execution of a [deportation measure]'. The Council struck down the provision, maintaining its position that a second extension of the detention measure could only be allowed in exceptional cases of absolute emergency and particularly serious threats to public order.[124]

2. Later Shift: Accepting Longer Detention

A shift started to occur in the late 1990s, as the legislator and the administration continued to harshen their immigration policies. In 1997 and 1998, the Council failed to examine provisions extending the scope of cases in which a second extension of a term of detention could be granted beyond seven days. In 1997, a law was brought before the Council that maintained measures originally taken in a December 1993 law that was not referred to the

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121 Cons const, décision n° 92-307 DC (n 106) cons 13-14.

122 This point was explicitly debated during the deliberation session. See minutes of the Council's deliberation session of 24 and 25 February 1992.

123 Cons const, décision n° 92-307 DC (n 106) cons 16 (my translation).

124 Cons const, décision n° 93-325 DC (n 54) cons 100 (my translation).

Council.[125] These measures violated the limits set by the Council in its 1986 and 1993 decisions, but the Council nevertheless declined to consider the relevant provisions.[126] In 1998, another law came before the Council that increased the length of the second extension to five days, thus bringing the total duration of detention to twelve days. It also extended again the scope of cases where a second extension could be requested. Yet the Council did not react,[127] signaling what would later be deemed tacit approval.[128]

Then, in a 2003 decision, the Council explicitly abandoned its earlier case law. It accepted a total duration of thirty-two days of detention, with two extensions of fifteen days after an initial forty-eight hours. The Council also relaxed the restrictions on cases in which a second extension could be granted. Indeed, the Council accepted the new regime wholesale, subject to the *réserve d'interprétation* that the *juge judiciaire* may interrupt detention at any time, either on its own initiative or upon the detainee's request.[129] The Council's ruling lifted virtually all of the previously applicable restrictions and essentially afforded the legislator the opportunity to extend the maximum length of immigration detention at will.

Indeed, in 2011, the Council authorized an extension of the maximum term of detention to forty-five days, referring explicitly to the objective of fighting irregular migration as part of the safeguarding of public order, a recognized *objectif à valeur constitutionnelle*. Its approval was subject to the same *réserve d'interprétation* it had formulated in 2003,[130] but this time the *juge judiciaire* was not required to intervene until five days into the term of detention (or, in cases where a foreigner was placed in custody prior to an order of administrative detention, up to seven).[131] The Council deemed that the legislator's decision that an administrative judge should intervene prior to the *juge judiciaire* served the interests of the good administration of justice, which

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125 Constitutional Council, 'Commentaire de la décision n° 2003-484 DC du 20 novembre 2003' (2004) 16 Cahiers du Conseil constitutionnel.

126 Cons const, décision n° 97-389 DC (n 59).

127 Cons const, décision n° 98-399 DC (n 65).

128 Constitutional Council (n 125).

129 Cons const, décision n° 2003-484 DC (n 59) cons 66.

130 Cons const, décision n° 2011-631 DC (n 59) cons 75.

131 Ibid cons 73.

has also been recognized as an *objectif à valeur constitutionnelle*.[132] One begins to wonder how this respects the Council's own requirement, established in 1980, that the *juge judiciare* must intervene *as early as possible*.[133]

Finally, in 2018, the Council accepted a maximum length of detention of ninety days, under the same reasoning and subject to the same *réserve d'interprétation* as in 2003 and 2011.[134] Although the Council pronounced the measure 'adequate, necessary and proportionate', its reasoning in reaching this conclusion remained superficial and abstract. It failed to respond to concrete arguments set forth by civil society, national human rights institutions and members of Parliament as to the inefficiency of long-term detention and its negative psychological impact on detainees.[135] Unfortunately, some of these concerns have materialized since the law entered into force.[136]

The dramatic shift in the Council's case law from 2003 onwards was clearly a deliberate effort to provide a wider margin of action for the legislator in the 'fight against irregular migration'. Although the 2003 decision itself offers only limited and formalistic reasons as to why the Council departed from its

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132 Ibid cons 72.

133 Admittedly, the Council did push back on part of the legislator's harsh immigration control agenda in its 2011 decision, striking down part of a provision authorizing the long-term detention of foreigners subject to an *interdiction du territoire* (re-entry ban) for terrorist acts or *expulsion* for behavior linked to terrorist activities. The Council found that this regime violated the right to individual liberty by allowing a twelve-month extension after an initial six-month period of detention. However, in doing so, it implicitly confirmed the constitutionality of the initial six-month period. Ibid cons 76.

134 Cons const, décision n° 2018-770 DC (n 59) cons 76 (my translation).

135 Assfam-groupe SOS Solidarités and others, 'Centres et locaux de rétention administrative. Rapport 2017' (2018) 15 <https://www.lacimade.org/wp-content/uploads/2018/07/La_Cimade_Rapport_Retention_2017.pdf> accessed 3 September 2021; Commission nationale consultative des droits de l'homme, 'Avis sur le projet de loi « pour une immigration maîtrisée et un droit d'asile effectif »', (2018) 38-41 <https://www.cncdh.fr/sites/default/files/180502_avis_pjl_asile_et_immigration.pdf> accessed 3 September 2021.

136 See e.g. Assfam-groupe SOS Solidarités and others, 'Centres et locaux de rétention administrative. Rapport 2019' (2020) 24 <https://www.france-terre-asile.org/images/RA_CRA_2019_web.pdf> accessed 3 September 2021.

previous decisions, the official commentary of the decision published on the institution's website explicitly acknowledges this reversal, essentially relying on the arguments presented by the Government in its written observations.[137] A communication from former President of the Constitutional Council Pierre Mazeaud in 2005 also offers precious insights. He himself labels the 2003 decision a '*revirement de jurisprudence*' (reversal of case law) grounded on 'considerations of a non-legal nature'.[138] Mazeaud explains:

> A 13 August 1993 decision deemed that, except in cases of particularly serious threats to public order, the Constitution prohibited the detention of foreigners targeted by deportation measures for more than a week.
>
> A decision of 20 November 2003 nevertheless validated provisions which, to provide the administration with sufficient time to enforce deportation measures in an efficient manner, increased the maximum duration of detention to thirty-two days. Realism played an important role in this decision. The fact that almost all European countries implemented a higher maximum duration could only influence the Council and push for a reversal. Another determinant factor was the legislator's will to solve a situation where only a low proportion of deportation measures were enforced, which public opinion struggled to accept.[139]

It is striking to observe how much the language of 'realism' used by the former President of the Council resonates with the Government's observations in the proceedings leading to an April 1997 decision reviewing an immigration law.[140] It is, of course, not so surprising if one considers the lengthy political career Mazeaud enjoyed before becoming a member of the Council. Many other members of the Council have had similar career paths, which helps

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137 Constitutional Council (n 125).

138 Pierre Mazeaud, 'La place des considérations extra-juridiques dans l'exercice du contrôle de constitutionnalité. EREVAN : 29 septembre – 2 octobre 2005' (Conseil constitutionnel, 2005) <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/pdf/Conseil/20051001erevan.pdf> accessed 15 January 2021, 13-14 (my translation).

139 Ibid 14 (my translation).

140 Government's observations before the Council in Cons const, décision n° 97-389 DC (n 59).

explain the institution's deferential approach vis-à-vis the legislator, as well as its shared policy perspectives.[141]

The Council's endorsement of stricter migration policies can be observed in several other recent decisions, which have confirmed the expanded use of immigration detention. In a June 2011 decision, the Council approved the creation of temporary border detention sites (outside of border crossing points) that do not offer the same guarantees as *zones d'attente* (waiting zones).[142] In a March 2018 decision, the Council also refused to strike down a provision which authorized the preventive detention of asylum seekers who are likely to be transferred to another member state of the European Union under the Dublin Regulation.[143] Last, but not least, in a September 2018 decision, the Council deemed constitutional the detention of children 'accompanying' adults targeted by deportation measures.[144]

V. Concluding Remarks

For the most part, the French Constitutional Council has endorsed the immigration policy preferences of the legislator and the Government by translating them into constitutional language. This article has shown that the Council's seemingly neutral methods of reasoning are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences. The Council enjoys a rather wide margin of action on immigration matters, as it is not substantially constrained by the Constitution itself in this area. Nonetheless, it has exercised considerable self-restraint on such questions, employing permissive methods of reasoning

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141 This is particularly manifest in the minutes of deliberation sessions of the Council, which are published twenty-five years after the publication of the decision itself.

142 Cons const, décision n° 2011-631 DC (n 59) cons 19-22.

143 Cons const, décision n° 2018-762 DC (n 59) cons 16. The measure was unprecedented, as immigration detention had always been used to enforce a deportation measure already taken by the administration in cases where there was a reasonable perspective that the foreigner would effectively be deported.

144 Cons const, décision n° 2018-770 DC (n 59) cons 64 (my translation). The Council considered that it was in the child's interest not to be separated from the adult she 'accompanied' and that her interest in not being detained could be balanced against public order considerations favoring the adult's effective deportation.

observed in many other areas of law. In so doing, it has recognized extensive police powers for the legislator, setting aside criminal law guarantees and favoring public order considerations over rights. Taking the example of immigration detention, after an initial period of vigilance during which the Council rejected longer detention periods, the Council gradually weakened its standards and allowed the legislator to lengthen terms from an initial seven days to three months today. The analysis in this article highlighted the Council's willingness and ability to adapt its case-law to support more restrictive policy preferences. It also demonstrated that policy considerations, while not explicitly acknowledged as such in the Council's case law, played an overwhelming role in the Council's decision to depart from its own established case law.

Overall, over the past few decades, the French Constitutional Council has remained faithful to the immigration policy preferences pursued by the legislator and the Government. The Council's most recent case law is particularly striking in this regard. As the 'fight against irregular migration' became an overarching goal of French and European immigration policies, the Council translated this aim into constitutional terms by linking it to the safeguard of public order, a recognized *objectif à valeur constitutionnelle* against which foreigners' rights – even the most fundamental – are often unfavorably balanced. The Council has thus deliberately abandoned a rights-based approach to immigration matters to facilitate stricter immigration control.

A Shortfall of Rights and Justice: Judicial Review of Immigration Detention in Greece

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This article critically examines the judicial review of immigration detention in Greece. Specifically, it analyzes the inconsistencies in domestic court rulings, particularly in differentiating between asylum and pre-removal detention, as well as between restrictions on and deprivation of liberty. On the basis of an extended review of decisions by Greece's first instance courts and the Council of State, this article argues that the above-described deficiencies in domestic judicial control must be attributed to the system's institutional design. Greece's lower administrative courts are tasked with reviewing the lawfulness of detention orders and their rulings are not subject to appeal. Although this system ensures speediness, it has also allowed the development of an inconsistent and often unpredictable jurisprudence, to the detriment of the effectiveness required by European norms. The article calls for an institutional reform that would allow for higher administrative courts, such as the Council of State, to act as appellate courts and review the constitutionality of detention orders. This would strengthen the ability of national judges to resolve long-standing normative questions about the law. It would ultimately lead to a kind of judicial control that is more coherent and more conducive to human rights protection.

Keywords: immigration detention, judicial review, irregular migration, asylum, EU Directives

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I. INTRODUCTION

Immigration detention is routinely used by states to control the entry and stay of non-nationals and to facilitate their removal.[1] In Europe, its generalized use as a migration management tool has reportedly been on the rise.[2] This use has grown in the context of increased migration flows and against the backdrop of public perceptions of immigrants as a threat to security and public order. Europe, however, is also home to a dense international and supranational framework of substantive and procedural norms that establish limits on state authorities' power to resort to the internment of migrants[3] – a practice that, is in principle, at odds with the fundamental liberty of the individual. The European Convention of Human Rights (ECHR), as interpreted in the rich case-law of the European Court of Human Rights (ECtHR), has laid down standards for assessing the lawful and non-arbitrary character of migrant detention.[4] The European Union (EU)

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1 Justine Stefanelli, *Judicial Review of Immigration Detention* (Hart Publishing 2020) 1-2.

2 Evangelia (Lilian) Tsourdi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in a Heterarchy' in Madalina Moraru, GN Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 167.

3 "Migrants" is used in the broadest sense to refer to all individuals entering the territory of a state other than their own, be it as refugees, asylum-seekers, stateless persons or irregular or regular migrants.

4 Article 5(1)(f) ECHR allows detention to prevent an unauthorized entry or with a view to deportation. However, detention must be in accordance with national law, implemented in good faith and connected to the stated purpose and must

has also established a detailed legislative framework that regulates immigration detention to prevent arbitrary deprivation of liberty in violation of the Charter of Fundamental Rights of the EU (CFR).[5]

This article explores the crucial role that national courts play in protecting migrants' right to liberty against arbitrary detention policies. States' power to apply immigration detention is bound up with migrants' right to have the legality of the detention order reviewed by a judicial authority.[6] Domestic courts must examine whether national legislation and administrative action in individual cases meet the basic standards of lawfulness and non-arbitrariness embedded in the dense framework of supranational and international norms applicable in Europe. They must also assess whether overarching goals such as maintaining public order and national security are sufficient to justify restrictions. Judicial control must be comprehensive, rigorous and effective according to the high-quality standards established by both EU law and the ECHR.[7]

The European framework on immigration detention has arguably enhanced the constitutional and judicial protection of immigrant detainees in certain Member States. In the Netherlands, for instance, domestic judges' strict

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take place in appropriate conditions and be of a reasonable duration. *Saadi v the United Kingdom* ECHR 2008-VII 31, paras 61-80.

5 Tsourdi (n 2) 189. Directive 2008/115 of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member states for returning illegally staying third-country nationals [2008] OJ L348/98 (Return Directive), arts 15-17; Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down common standards for the reception of applicants for international protection [2013] OJ L180/96 (Recast Reception Conditions Directive), recital 15 and arts 8-11; Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 (Recast Asylum Procedures Directive) art 26.

6 Convention for the Protection on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR), art 5(4); Recast Reception Conditions Directive (n 5) art 9; Return Directive (n 5) art 15.

7 *Khlaifia and others v Italy* App no 16483/12 (ECtHR, 15 December 2016) paras 128-131; Return Directive (n 5) art 15; Recast Reception Conditions Directive (n 5) art 9.

scrutiny of detention orders guided by European norms has reportedly led to administrative caution in the use of immigration detention and a gradual reduction in the number of migrants in custody.[8] The effects of the European rights framework, however, have not been uniform. There are wide disparities in judicial levels of migrants' protection across Member States.[9] Differences in the domestic judicial review systems of Member States can produce disparate outcomes in levels of rights protection, to such a degree that migrants and asylum-seekers in the EU may be seen to face a 'detention roulette'.[10] In Greece, for instance, national legislation has undergone a series of amendments in an effort to align detention policy with migrants' human rights guarantees.[11] Nonetheless, over the past decade Greece has been repeatedly condemned by the ECtHR on account of its failure to ensure migrants effective judicial protection against arbitrary detention orders.[12]

Focusing on the case of Greece, this article shows that the design of judicial review of immigration detention at the national level, which is left to the discretion of Member States, can profoundly shape the extent to which states uphold migrants' right to liberty in line with EU and ECHR standards. Due to its geographical location, Greece has served as a main entry and transit

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8 Galina Cornelisse, 'The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights' (2016) Global Detention Project Working Paper 15 <https://www.globaldetentionproject.org/wp-content/uploads/2016/12/cornelisse-gdp-paper.pdf> accessed 5 January 2022, 8-9.

9 Adam Blisa and David Kosa, 'Scope and Intensity of Judicial Review: Which Power for Judges within the Control of Immigration Detention?' in Moraru, Cornelisse and De Bruycker (eds) (n 2).

10 Ibid 192.

11 Eleni Koutsouraki, 'The Indefinite Detention of Undesirable and Unreturnable Third-Country Nationals in Greece' (2017) 36 Refugee Survey Quarterly 85, 86

12 *SD v Greece* App no 53541/07 (ECtHR, 11 September 2009); *Tabesh v Greece*, App no 8256/07 (ECtHR, 26 November 2009); *AA v Greece* App no 12186/08 (ECtHR, 22 July 2010); *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011); *RU v Greece* App no 2237/08 (ECtHR, 7 September 2011); *Mahmundi and others v Greece* App no 14902/10 (ECtHR, 31 July 2012); *Herman and Serazadishvili v Greece* App nos 26418/11 and 45884/11 (ECtHR, 24 April 2014); *SZ v Greece* App no 66702/13 (ECtHR, 21 June 2018); *OSA and others v Greece*, App no 39065/16 (ECtHR, 21 March 2019); *Kaak and others v Greece* App no 34215/16 (ECtHR, 3 October 2019).

point for large numbers of undocumented migrants seeking to cross into Europe. The Greek authorities have widely and increasingly resorted to detention to manage the flows, especially from 2012 onwards.[13] The dramatic increase of irregular arrivals in 2015, the EU-Turkey statement in March 2016 (aimed at ending irregular migration from Turkey to the Greek islands), and the outbreak of the pandemic in 2020 further exacerbated a longstanding policy of generalized immigration detention.[14]

In reviewing court decisions on immigration detention, this article brings to light deficiencies in the institutional design of the judicial review process in Greece. It argues that the allocation of the judicial control to lower administrative courts, without the possibility of appeal, has enabled the development of a heterogeneous and unpredictable body of case-law. Judges all too often focus on the facts of individual cases and offer conflicting answers to the same questions of law. This is most notably evidenced in their inconsistent approach regarding the distinction between asylum detention and pre-removal detention, as well as the difference between restriction and deprivation of liberty. Drawing on judicial precedents set by the Council of State (CoS), Greece's supreme administrative court, we suggest a reform of the judicial review system to allow for a right to appeal. This would strengthen domestic judges' capacity to review the constitutionality of detention measures and offer the kind of judicial review conducive to rights as required by EU law and the ECHR.

This article contributes to existing scholarship on migrants' rights in detention and the role of the judiciary in enforcing rights guarantees by advancing knowledge on a subject that has generally attracted scant attention. Although Greece's immigration detention laws and practices have

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13 Koutsouraki (n 11) 86.

14 European Committee for the Prevention of Torture (CPT), 'Report to the Greek Government on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020' CPT/Inf (2020) 35 <https://rm.coe.int/1680a06a86> accessed 5 January 2022; CPT, 'Report to the Greek Government on the Visits to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 13 to 18 April and 19 to 25 July 2016' CPT/Inf (2017) 25 <https://rm.coe.int/pdf/168074f85d> accessed 5 January 2022.

been the subject of several studies,[15] far less has been written on the judicial review process itself. To some extent, this may be attributable to the fact that the decisions of the lower administrative courts generally are not published, with the exception of some selected significant judgments.[16] Recent studies have provided an overview of the national case-law,[17] identified pertinent controversial issues and inconsistencies[18] and highlighted the contribution of the Greek judiciary in protecting migrants' rights to liberty against arbitrary detention policies.[19] Case notes and other studies have critically reviewed the decisions of Greek judges on the arbitrariness of specific administrative

15 Koutsouraki (n 11); Ilias Kouvaras, 'Η μεταβατική νομιμότητα: αντιρρήσεις κατά της κράτησης αλλοδαπού και εναλλακτικά μέτρα' ['Transitory Legality: Objections Against Alien Detention and Alternative Measures'], (ΕΑΝΔΑ conference Επικαιρα ζητήματα μεταναστευτικού [Contemporary Issues of Migration], 20 October 2017) <https://www.eanda.gr/sites/default/files/EANDA%20EISIGISI%20KOUVARAS.pdf> accessed 2 December 2020; Anna Triandafyllidou, Danai Angeli and Angeliki Dimitriadi, 'Detention as Punishment' (2014) ELIAMEP Midas Policy Brief <http://www.eliamep.gr/wp-content/uploads/2014/04/Polic-brief-Detention-in-Greece-1.pdf> accessed 2 December 2020. All square-bracketed translations in citations are provided by the authors of this article.

16 Administrative court judgments reviewing the lawfulness of immigration detention are rarely published in law journals and legal databases.

17 Maria-Aspasia Simou, 'Αντιρρήσεις κατά της κράτησης υπηκόων τρίτων χώρων που υπόκεινται σε διαδικασίες επιστροφής. Το ειδικότερο ζήτημα της κράτησης των αιτούντων διεθνή προστασία υπό το πρίσμα της νομολογιακής πρακτικής' ['Objections Against Detention by TCNs Subject to Return Procedures: The Specific Issue of the Detention of Applicants for International Protection through the Lens of Judicial Practice'] (Union of Administrative Judges Conference, 7-8 October 2016) <https://www.edd.gr/images/conferences/amsimou.pdf> accessed 5 January 2022; Kouvaras (n 15).

18 Angeliki Papapanagiotou-Leza and Stergios Kofinis, 'Can the Return Directive Contribute to Protection for Rejected Asylum Seekers and Irregular Migrants in Detention? The Case of Greece' in Moraru, Cornelisse and De Bruycker (eds) (n 2) 281.

19 Vasilis Faitas, 'Πτυχές του Μεταναστευτικού Ζητήματος. 18μηνη κράτηση μεταναστών και προσφύγων και αντιρρήσεις κατά της κράτησης' ['Aspects of Immigration. 18-Month Detention of Migrants and Refugees and Objections Against Detention'] (2005) 2-3 Επιθεώρηση Μεταναστευτικού Δικαίου [Migration Law Review] 129.

detention practices.[20] Finally, a recent contribution by Panagiotopoulou-Leza and Kofinis attributes Greek judges' reluctance to interact with the Court of Justice of the European Union (CJEU) to constraints inherent in the procedure itself, including the absence of an appeal remedy.[21]

The present study specifically focuses on the institutional design of domestic judicial review in Greece. It provides and analyzes up-to-date case-law, implementing the latest legislative amendment effective 12 May 2020.[22] The analysis also examines relevant decisions of the CoS, which have thus far evaded scholarly attention, the main reason being that the CoS is not in principle responsible for reviewing immigration detention judgments. Nonetheless, there is a limited body of important judicial precedents. Our focus on the implementation of supranational norms within the Greek context makes our findings relevant also for studies on the ECHR system and on the EU judiciary and policymakers.[23]

We consulted a total of 105 judgments issued by Greece's lower instance administrative courts and the CoS mainly between 2016-2020, a period of profound changes in Greece's detention practices and laws. For the purposes of our analysis, we also refer to earlier judgments where needed. To ensure geographical representation, we collected court judgments issued in different

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20 Vasileios Papadopoulos, 'Σχόλιο επί της υπ΄ αριθμ. ΑΡ414/2019 απόφασης της Προέδρου του Διοικητικού Πειραιά επί αντιρρήσεων κατά κράτησης αλλοδαπού' ['Commentary on Decision 414/2019 of the President of the Administrative Court of Piraeus on Objections Against Aliens Detention'] (2020) 2 Διοικητική Δίκη [Administrative Litigation] 332; Greek Refugee Council, 'Administrative Detention in Greece: Observations from the Field' (2018) <https://www.gcr.gr/media/k2/attachments/GCR_Ekthesi_Dioikitik_Kratisi_2019.pdf> accessed 2 December 2020.

21 Papapanagiotou-Leza and Kofinis (n 18).

22 Law 4636/2019, 'On International Protection and Other Provisions' (GG A' 169/01.11.2019); Law 4686/2020 'Improvement of Immigration Legislation, Amendment of 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and Other Provisions' (Government Gazette [GG] A' 96/12.05.2020).

23 There are two ongoing developments of direct relevance: the recasting of the Return Directive (n 5) and the preliminary questions raised before the CJEU in Case C-704/17 *DH v Ministerstvo vnitra* (subsequently withdrawn) on the scope of the right to judicial review under Articles 8 and 9 of the Recast Reception Conditions Directive (n 5), including the right to appeal.

regions, including the mainland (Athens, Nafplio, Komotini, Lamia, Larisa, Trikala, Corinthus, Patra, Kavala, Athens, Piraeus) and the islands (Rhodos, Lesvos). We do not aim to provide an exhaustive analysis of the Greek jurisprudence, but to illustrate, through a representative sample, the depth of normative divisions on some of the most basic concepts of detention.[24]

The rest of this article is organized as follows. Section 2 provides an overview of national law and policy on immigration detention in Greece. Section 3 describes the specific characteristics of domestic judicial review of immigration detention and the institutional role of the CoS. Sections 4 and 5 examine the judicial shortcomings of this system, taking as examples two basic normative questions that have divided Greek judges: (1) the scope and (2) the definition of immigration detention. Section 6 explores the judicial precedents produced by the CoS and their impact. Section 7 concludes by suggesting an institutional reform that would allow for a right to appeal. This would strengthen the capacity of domestic courts to perform the kind of judicial review required by the right to liberty.

II. Immigration Detention in Greek Law and Practice

The Greek legal order recognizes two types of immigration detention: pre-removal detention and asylum detention – a distinction that is aligned with EU standards. Pre-removal detention concerns undocumented third country nationals (TCNs) seeking entry into the country or already present therein, who may be subject to administrative detention with a view to expulsion or return, respectively.[25] Both detention and removal orders are issued by the Hellenic Police rather than the courts. The power of administrative authorities, such as the Hellenic Police, to impose detention has in itself been

[24] The case-law collected for this article is the product of extensive desk-based research. Requests were also sent to legal representatives and the judiciary to obtain copies of specific judgments.

[25] Art 30(1) of Law 3907/2011 'Establishment of an Asylum Service and a First Reception Service, Transposition into Greek Legislation of Directive 2008/115/EC and Other Provisions' (GG A' 7/26.01.2011) as amended; Law 3386/2005 'Entry, Residence and Social Integration of TCNs on Greek Territory' (GG A' 212/23.08.2005) as amended, art 76(3).

the subject of debate in Greek scholarship, and its constitutionality has been questioned.[26]

Detention with a view to deportation is permissible on one or more of the following grounds: when there is a risk of absconding; when the TCN hampers the removal process; and when justified by reasons of national security or public order.[27] Before the latest legislative reform (effective 12 May 2020),[28] detention could be prescribed only as a last resort if there were no less coercive alternatives available. This requirement was consistent with EU law, which requires the use of detention to be limited and subject to the principle of proportionality.[29] The latest legislative amendment has altered this requirement, providing for migrants awaiting removal to be placed in detention unless the conditions for less coercive alternatives are met.[30] The new wording seems to suggest that pre-removal detention is generally allowed, unless the principles of necessity and proportionality would require otherwise.[31] Such a wide use of detention raises issues with the letter and spirit of the EU Return Directive.[32]

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26 Georgios Dafnis, 'Δικαίωμα στην Ελευθερία. Περιορισμοί των Περιορισμών του Δικαιώματος' ['Right to Liberty: Restrictions on Restrictions on the Right'] [2016-2017] Επετηρίδα Δικαίου Προσφύγων και Αλλοδαπών [Yearbook of Refugee and Aliens Law] 501, 502.

27 Law 3386/2005 (n 25) art 76(1) also allows the detention of TCNs for the protection of public health. Several contributions highlight that by including national security/public order the Greek law expands the list of grounds foreseen in the Return Directive (n 5) and violates EU law. E.g. Koutsouraki (n 11) 90.

28 Law 4686/2020 (n 22) art 51 (amending Law 3907/2011 (n 25) art 30).

29 Return Directive (n 5) recital 16.

30 The conditions are as follows: the police authorities must deem the use of alternatives to be effective and there must be no risk of absconding, no obstructions to the return procedure and no national security concerns.

31 Άρθρο 52 Τροποποίηση άρθρου 30 του ν. 3907/2011 [Article 52 Amendment of Article 30 of Law 3907/2011] (Μετανάστευσης και Ασύλου Δικτυακός Τόπος Διαβουλεύσεων [Ministry of Migration and Asylum Consultation Website]) <http://www.opengov.gr/immigration/?p=1371#comments> accessed 2 December 2020 (comments on draft legislation).

32 '[...] The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation ... which goes from the measure which allows the person concerned the most liberty ... to measures

In terms of administrative practice, neither the old nor the new wording has had a particular impact on Greece's pre-removal detention policies. Already under the previous legislative framework alternative measures were rarely considered by the Hellenic Police in issuing detention orders. Moreover, judicial practice on the necessity of pre-removal detention and the use of alternatives has been highly inconsistent. In some cases, when alternatives did exist, challenges to pre-removal detention before courts were successful.[33] However, the judges in these cases often failed to adequately explain the purpose of the measures they ordered in lieu of detention. Having first established that there were no legitimate grounds for detaining the TCNs, they then imposed alternatives instead of ordering the TCNs' unconditional release as foreseen by Greek law.[34] Even more concerningly, other courts upheld the detention orders and summarily dismissed the existence of alternatives without a substantive examination.[35] The new wording of the law (as mentioned earlier), which appears to deviate from EU standards, is unlikely to result in a more coherent jurisprudence. Some early judgments appear to suggest that it has had little impact on resolving long-standing ambiguities.[36]

The second form of administrative detention provided for in Greek law is asylum detention, which, as the name suggests, applies only to asylum-seekers. The requirements for this measure in Greek law vary from those for pre-removal detention, affording, in principle, higher levels of protection to

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which restrict that liberty the most, namely detention in a specialized facility'. Case C-61/11 PPU, *Hassen el Dridi alias Soufi Karim* EU:C:2011:268, para 41.

33 Koutsouraki (n 11) 89.

34 Papapanagiotou-Leza and Kofinis (n 18) 281. Under Greek law, restrictions of movement can be imposed as 'alternatives to detention' only if there are legitimate grounds for detaining the TCN in the first place. Law 3907/2011 (n 25) art 30; Law 4686/2020 (n 22) art 51. In the absence such grounds, alternatives to detention are no longer justified. While restrictions of movement may still be imposed on a different legal basis, this requires a different justification, which Greek judgments often fail to provide. For more, see s V.

35 Papapanagiotou-Leza and Kofinis (n 18) 281.

36 E.g. Administrative Court of Thessaloniki, Decisions 116/2020 and 139/2020 and Administrative Court of Athens, Decision 1091/2020 and 1089/2020, all of which considered detention to be necessary, summarily dismissing the availability of alternatives.

the migrant. Asylum detention can only 'exceptionally' be imposed, if necessary, following an individual assessment and as a last resort if there are no effective alternatives. Notably, judges' appraisal of the availability of less coercive measures has been highly inconsistent also in this context.[37] The law further sets forth an exhaustive list of grounds justifying asylum-seekers' detention, largely drawn from EU law: to determine the person's identity or nationality; to verify the asylum claims, especially if there is a risk of absconding; if the asylum seeker seeks to obstruct a pending return procedure; to decide on the person's admission into the territory; and for reasons of national security or public order.[38]

Asylum detention has been widely used in administrative practice. Persons seeking international protection have routinely been arrested before being able to submit their application due to the obstacles in accessing the asylum procedure.[39] Asylum-seekers whose applications get registered, and who are thus lawfully present in the country, are also often placed in detention or continue to be detained, on varying grounds, if already in pre-removal detention.[40]

Before the latest legislative reform of 2020, Greek courts were divided on whether asylum detention could be applied solely to TCNs who were submitting asylum claims *while already in detention* or to all asylum-seekers, including those who had applied for asylum in liberty, prior to any arrest.[41]

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37 Law 4636/2019 (n 22) art 46. Compare Administrative Court of Rhodes, Decision 580/2020, upholding the detention order despite a contrary recommendation by the Asylum Service and the applicant's suggestion to stay in a shelter; Administrative Court of Mytilene, Decision 44/2020 and Administrative Court of Athens, Decision 882/2020, striking down the detention order but nonetheless ordering the applicant to reside at a specific address and report regularly to the police; Administrative Court of Athens, Decision 1003/2020, not examining the availability of alternatives at all.

38 Ibid; Recast Reception Conditions Directive (n 5) art 8. The Greek law foresees detention also during the Dublin procedure if there is a considerable risk of absconding. The Greek jurisprudence on this matter is, however, scant.

39 Koutsouraki (n 11) 91-93.

40 Faitas (n 19) 129; Papadopoulos, 'Commentary on Decision 414/2019' (n 20) 332; Greek Refugee Council (n 20).

41 Papadopoulos, 'Commentary on Decision 414/2019' (n 20).

The most recent legislative reform resolves the issue, upholding the latter view: asylum-seekers can be detained independently of whether they applied for asylum in detention or in liberty. Although this position does not necessarily contradict EU law,[42] it is more restrictive to asylum-seekers' liberty than older laws.[43]

For the purposes of the present analysis, what is important to retain is that ambiguities and controversies in the Greek law of immigration detention all too often are not resolved through domestic judicial channels. In effect, they are indirectly deferred to the executive instead. This is not only inefficient, but also insulates the government and the legislature from the kind of judicial review that would limit their powers and promote rights protection. Indeed, practices of indiscriminate and systematic detention hold a central place in Greece's migration management policy, often in defiance of supranational and even national legal safeguards.[44]

Throughout the 2000s, Greek police authorities widely detained undocumented migrants with a view to their deportation, or as a means of preventive control, with the justification that they posed a threat to public order or were at risk of absconding.[45] This generalized detention policy all too often interfered with TCNs' access to the asylum procedure (already difficult due to the lack of a proper asylum service up until 2013). The Greek

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42 Recast Reception Conditions Directive (n 5) arts 8-9.

43 Law 4636/2019 (n 22) art 46(2)-(3). See also 'Άρθρο 46 (Άρθρα 8 και 9 Οδηγίας 2013/33/ΕΕ) Κράτηση των αιτούντων' ['Article 46 (Articles 8 and 9 of Directive 2013/33/EU} Detention of Asylum-Seekers'] (Υπουργείο Προστασίας του Πολίτη Δικτυακός Τόπος Διαβουλεύσεων [Ministry for Citizen Protection Consultation Website] <http://www.opengov.gr/yptp/?p=2188#comments> accessed 2 December 2020 (comments on draft legislation submitted for public consultation).

44 Ministry of Public Order and Citizen Protection 'Greek Action Plan on Asylum and Migration Management. Executive Summary' (European Parliament, December 2012) Chapter 4 <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_exec_summary_/p4_exec_summary_en.pdf> accessed 22 January 2022; Υπουργείο Μετανάστευσης και Ασύλου [Ministry for Migration and Asylum], 'Ετήσιο Σχέδιο Δράσης 2021 [Annual Action Plan 2021]' (2021) Objective 4 <https://www.government.gov.gr/wp-content/uploads/2021/03/Υπουργείο-Μετανάστευσης-και-Ασύλου.pdf> accessed 22 January 2022.

45 Koutsouraki (n 11) 96

Ombudsman reported in 2013 that the Hellenic Police routinely failed to distinguish the different categories of TCNs and the varying provisions applying to each.[46] Instead, it subsumed all TCNs into one all-encompassing group and employed an expanded conception of danger to public order to justify their detention.[47] In 2014, the police authorities pursued a controversial policy of indefinite detention, exceeding the maximum time limits laid down by EU law and Greek law itself. Notably, Greece's legal advisory body, the Legal Council of the State, issued a highly criticized advisory opinion in support of this policy.[48]

The coming to power of a left-dominated government in 2015 signaled a partial, albeit short-lived, shift in state policy and practice. The newly installed government initially announced measures that sought to drastically reduce the use and duration of immigration detention.[49] In the course of the same year, however, a sharp increase of irregular arrivals from Syria and other war-torn countries,[50] the subsequent closure of the 'Balkan corridor' in early

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46 Συνήγορος του Πολίτη [Greek Ombudsman], 'Αυτοψίες στα κέντρα κράτησης αλλοδαπών Αμυγδαλέζας και Κορίνθου και στους χώρους κράτησης της Δ/νσης Αλλοδαπών Αττικής στην οδό Πέτρου Ράλλη. Προβλήματα και προτάσεις.' ['Inspection of Amygdaleza and Corinth Detention Centres and of Attica Aliens Directorate Holding Facilities at Petrou Ralli Street. Problems and Recommendations.'] (2013) <https://www.synigoros.gr/resources/diapistwseis-stp-29-05-2013--2.pdf> accessed 21 January 2022.

47 Koutsouraki (n 11) 100; Danai Angeli and Anna Triandafyllidou, 'Is the Indiscriminate Detention of Irregular Migrants a Cost-Effective Policy Tool? The Case Study of Amygdaleza Pre-Removal Center' (2014) ELIAMEP Midas Policy Brief <http://www.eliamep.gr/wp-content/uploads/2014/05/Policy-brief_the-case-study-of-Amygdaleza-1.pdf> accessed 2 December 2020.

48 Legal Council of the State, Advisory Opinion 44/2014, published on 24 February 2014; Triandafyllidou, Angeli and Dimitriadi (n 15).

49 Koutsouraki (n 11) 97.

50 Ελληνική Αστυνομία [Hellenic Police], 'Statistics on Illegal Migration' ['Στατιστικά στοιχεία παράνομης μετανάστευσης 2015'] (2015) <http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=50610&Itemid=1240&lang=> accessed 22 January 2022.

2016,[51] the entry into force of the EU-Turkey statement in March 2016,[52] and pressures from the EU for quick and effective deportations,[53] placed renewed emphasis on detention.

Shifts in administrative detention practices came with changes in a 2016 law that paved the way for the implementation of the EU-Turkey statement. The new law permitted the potentially continuous detention of TCNs from the initial stage of reception, identification and processing of an asylum application to the pre-removal phase.[54] It also sought to enhance detainees' procedural safeguards applicable to immigration detention, in line with EU standards.[55] Among the most important provisions was the establishment of *ex officio* periodic review of the legality of detention order by the Greek courts. Nonetheless, the contribution of this *ex officio* judicial control in restraining arbitrary detention practices was arguably limited.[56]

With the coming to power of the center-right government of New Democracy in 2019, a shift to a 'closed-centers' policy formed the basis for more revisions of the law of immigration detention in a rights-restrictive

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51 Between 2015 and 2016, more than 1,1 million TCNs crossed from Turkey into Greece though the Eastern Aegean islands. The vast majority continued to the mainland and through the so-called Balkan corridor (North Macedonia, Bulgaria and Serbia) to central and northern European countries. This lasted until March 2016, when many of those countries closed their borders.

52 'EU-Turkey statement, 18 March 2016' (European Council, 18 March 2016), <https://europa.eu/!Uk83Xp> accessed 2 December 2020 (press release).

53 European Commission, 'Communication from the Commission to the European Parliament and to the Council: EU Action Plan on Return' (9 September 2015) COM/2015/0453 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0453> accessed 2 December 2020.

54 Law 4375/2016 'Organization and Operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, Establishment of the General Secretariat for Reception, Transposition into Greek Legislation of Directive 2013/32/EC' (A' 117/22.06.2016) arts 14, 36 and 46; Koutsouraki (n 11) 98; Angeliki Dimitriadi, 'Governing Irregular Migration at the Margins of Europe – The Case of Hotspots on the Greek Islands' (2017) 1 Etnografia e Ricerca Qualitativa 75.

55 Law 4375/2016 (n 54) art 46, transposing Recast Asylum Procedures Directive (n 5) art 26 and Recast Reception Conditions Directive (n 5) arts 8-11.

56 Koutsouraki (n 11) 93.

direction.[57] These expanded the grounds and duration of detention and extended the maximum time-period during which TCNs could be held in immigration detention (asylum and pre-removal detention) to 36 months.[58] Crucially, it also abolished the *ex officio* judicial review of initial detention orders. The centrality of detention in Greece's migration management, often in defiance of legal norms, renders all the more important the judicial review of detention orders.[59] In practice, though, the judiciary has played a relatively limited role in restraining arbitrary detention practices.

III. Judicial Control of Immigration Detention in the Greek Context

Greece has a diffused system of judicial review that in principle allows all courts to engage in constitutional review of fundamental rights. In practice, Greece's lower courts, lacking the necessary authority and possibly the necessary capacity, follow the decisions of the higher courts. The result has been the *de facto* concentration of judicial review in the CoS and the Supreme Court of Greece (*Areios Pagos*), Greece's highest courts on administrative and criminal matters, respectively.[60] The CoS is the highest appeal court that also engages in incidental constitutional review *in concreto*: it reviews statutory provisions in the context of deciding a specific case.[61] It stands at the apex of a unified structure of administrative justice that comprises nine appeals courts (*Efeteia*) and 30 first instance courts (*Protodikeia*). Given the absence of a constitutional court in Greece, petitioners can challenge before the CoS the constitutionality of the administrative acts that are issued to implement the

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57 Law 4636/2019 (n 22); Law 4686/2020 (n 22).

58 Law 4636/2019 (n 22) art 46.

59 Minos Mouzourakis, 'All but Last Resort: The Last Reform of Detention of Asylum Seekers in Greece' (EU Immigration and Asylum Law and Policy, 18 November 2019) <http://eumigrationlawblog.eu/all-but-last-resort-the-last-reform-of-detention-of-asylum-seekers-in-greece/> accessed 2 December 2020.

60 Julia Iliopoulos-Strangas and Stylianos-Ioannis G Koutnatzis, 'Greece', in Allan R Brewer-Carias (ed), *Constitutional Courts as Positive Legislators* (Cambridge University Press 2011) 546.

61 Epaminondas Spiliotopoulos, 'Judicial Review of Legislative Acts in Greece' (1983) 56 *Temple Law Quarterly* 463.

laws passed in Parliament.[62] The constitutional evolution of the post-1974 Greek polity (established after a seven-year long dictatorship), alongside the influence of European Community (EC) law (Greece joined the EC in 1981) and the European Convention of Human Rights (ECHR), contributed to the empowerment of the CoS to engage in judicial review, including rights-based review.

The judicial review of immigration detention, however, markedly deviates from the overall structure of judicial review of administrative acts as described above. The judicial control of immigration detention is assigned to first instance administrative courts (*Protodikeia*), and their decisions are final. TCNs held in administrative detention have the right to challenge the legality of the detention order only before the local first-instance administrative court. The remedy is known in the Greek legal order as "objections against detention" (hereafter "objections") and is available under the same terms both to asylum-seekers and irregular migrants awaiting removal;[63] it applies both to the initial detention order and any subsequent orders extending the detention.[64] The judicial procedure is governed by the rules of interim measures. Objections can be filed at any time during the duration of the detention.[65] The application cannot be abstract; it must invoke concrete reasons for which the detention is not lawful, in written form or orally, and all supporting evidence needs to be submitted immediately.[66] Given the disadvantageous position in which detainees find themselves, judges have the flexibility to accept evidence otherwise not admissible. This has led to inconsistent practices of evaluation of evidence.[67] A single judge,

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62 Nikos Alivizatos, Το σύνταγμα και οι εχθροί του στη νεοελληνική ιστορία: 1800-2010 ['The Constitution and its Enemies in Modern Greek History 1800-2010'] (Ekdoseis Polis 2011) 541.

63 Law 3386/2005 (n 25) art 76(4)-(5), referenced in Law 3907/2011 (n 25) art 30(2) and Law 4636/2019 (n 22) art 46(6).

64 Law 2690/1999 'Code of Administrative Procedure' (GG A' 45/09.03.1999) as amended, arts 27(2)(c) and 204(1). Faitas (n 19).

65 Faitas argues that objections should be possible from the moment of actual detention, even before a detention order has been issued. Faitas (n 19).

66 Ibid.

67 There is wide divergence regarding the admissibility of signed declarations as proof of residence. Compare Administrative Court of Athens, Decision 882/2020 and Administrative Court of Nafplio, Decision 23/2017, accepting such evidence,

the president of the local court, examines the application and issues a decision immediately.[68] If the judge decides that the detention is unlawful, the applicant must be immediately released.

Greek law expressly stipulates that the decision of the first instance court is not subject to any kind of appeal. In case of a negative outcome, the only option available to the detainee is an application with the same first instance court to have the decision revoked on the basis of fresh evidence.[69] While it remains subject to debate, seeking asylum or submitting a new asylum application generally counts as fresh evidence.[70] However, this procedure is not considered a true appeal remedy, because it does now allow a re-examination of the same matter and possible correction of errors of fact or law.[71] Furthermore, this limited judicial review only covers detention issues. Restrictions of movement falling short of deprivation of liberty, such as assigned residence or geographical limitations (like those imposed on the Greek islands since the 2016 EU-Turkey statement), can only be challenged through the regular administrative procedure.[72]

Since 2010, the CoS has the authority to issue so-called pilot judgments. It can issue such judgments by assuming the examination of any application, appeal or other remedy pending before any administrative court that involves a matter of general interest and that may have legal consequences for a wide range of individuals.[73] The CoS may initiate this pilot judgment procedure in response to a request either by one of the applicants or by the general

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with Administrative Court of Thessaloniki, Decision 467/2014, declaring such evidence inadmissible.

68 Law 2690/1999 (n 64) art 205(5); Law 3386/2005 (n 25) art 76(4)-(5).

69 On the debate over what counts as fresh evidence, see Simou (n 17) 35.

70 Administrative Court of Athens, Decision 599/20.

71 *HA v Greece*, App no 58387/11 (ECtHR, 21 January 2016); Papadopoulos, 'Commentary on Decision 414/2019' (n 20).

72 Law 4636/2019 (n 22) art 112. Law 4636/2019, art 39(4) provides a right of objection against restrictions imposed in the context of reception. It is debated whether these restrictions amount to *de facto* detention. In practice, there is no known case-law on this issue. Dafnis (n 26).

73 Law 3900/2010 'Rationalization and Acceleration of Proceedings before Administrative Courts and Other Provisions' (GG A'Government Gazette A' 213/17.12.2010) as amended, art 1.

commissioner of the administrative courts. This judicial avenue, at least in principle, makes it possible for the CoS to pronounce on the legality of detention orders. To this day however, no request for a pilot judgment has been made regarding either asylum or pre-removal detention. The reasons remain unclear but can be partially attributed to legal representatives' concerns that an unfavorable ruling might be issued, with potentially wide-ranging and adverse implications for migrants' rights.[74]

The overall institutional design and in particular the lack of a right of appeal do not bring the Greek judicial review system into direct conflict with international and EU legal standards. In laying down the right to judicial protection against arbitrary detention, neither EU law nor the ECHR prescribe a specific court system; nor do they require a second level of jurisdiction.[75] However, both EU law and the ECHR require courts to perform their supervisory role effectively. The judicial control of detention needs to meet certain quality standards, such as speediness,[76] accessibility, effectiveness and procedural fairness.[77] National provisions precluding the courts from exercising their supervisory function are incompatible with these standards.[78]

In Greece, the allocation of judicial review of immigration detention to a single lower-court judge, who must issue a final decision immediately, ensures speed and flexibility. Yet, at the same time, it undermines the principle of fairness and the quality of judicial control necessary to ensure that any

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74 In 2013, the CoS struck down as unconstitutional a law allowing second generation migrants to apply for Greek nationality. CoS, Decision 460/2013. For more on this, see Section V.

75 See, however, Case C-704/17 *DH v Ministerstvo vnitra* EU:C:2019:85, Opinion of AG Sharpston, para 64.

76 Return Directive (n 5) art 15; Recast Reception Conditions Directive (n 5) art 9.

77 *A and others v the United Kingdom* [GC] App no 3455/05 (ECtHR, 19 February 2009) paras 202-204; Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v the Director of the Directorate for Migration at the Ministry of Interior* EU:C:2014:1320; *Khlaifia and others v Italy* [GC] App no 16483/12 (ECtHR, 15 December 2016) paras 131-132; *OSA and others v Greece* App no 39065/16 (ECtHR, 21March 2019) para. 52 *Al Husin v Bosnia-Herzegovina (2)* App no_10112/16 (ECtHR, 25 June 2019) paras 114-115.

78 *DH*, Opinion of AG Sharpston (n 75) para.70.

deprivation of liberty is lawfully imposed. The accelerated examination procedure prevents TCNs from effectively presenting their case and judges from conducting a comprehensive review.[79] The overly expedited nature of the remedy, alongside the summary reasoning provided in many decisions, all too often results in a kind of judicial review that lacks the comprehensiveness and consistency suitable for safeguarding the fundamental right to liberty.

Taking into account the institutional design of domestic judicial review of immigration detention described above, the existence of an appeal remedy should be essential. Its absence in Greece is thoroughly detrimental to the integrity of judicial control over the use of immigration detention, undermining legal certainty and the possibility of remedying any errors in fact or law. Legislative ambiguities do not get resolved through a higher court ruling. Instead, they are addressed separately by each individual judge on a case-by-case basis. While this has on occasion led to a dynamic jurisprudence, it has also led to disparities in legal reasoning, at times wide enough to generate inconsistent and unpredictable legal outcomes. The lack of a domestic appeal remedy has rendered recourse to the ECtHR or other international human rights mechanisms the only available legal avenue. Unsurprisingly, Greece has one of the highest numbers of ECtHR judgments finding violations connected to the nature of the domestic judicial review of immigration detention.[80] They expose the practical difficulties that TCNs face in seizing domestic courts and in explaining their situation, the lack of adequate justification for judgments and the failure of the judges to review all relevant grounds. Repeated recourse to the ECtHR, though, is not only inefficient, but also contradicts the fundamentally subsidiary role of international courts.

The interpretative disparities in the Greek jurisprudence are epitomized by the divergence of judges on two fundamental questions: first, the legal nature of detention and in particular the distinction between asylum and pre-removal detention; and second, the definition of detention as reflected in the distinction between deprivation of liberty and restrictions of liberty. The next two sections of this article present and analyze these normative and

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79 Ibid.

80 See cases cited in n 12.

analytical inconsistencies in the Greek jurisprudence on immigration detention.

IV. Asylum Detention or Pre-Removal Detention?

Greek law, as noted earlier, distinguishes between asylum- and pre-removal detention and lays down stricter requirements for asylum detention.[81] This basic distinction, which is aligned with EU law, is generally endorsed by the first instance administrative courts. Depending on the legal status of a TCN as an asylum seeker or an irregular migrant awaiting deportation, the Greek judges assess the legality of the detention order in light of the conditions attached to the respective type of detention. However, first instance administrative courts have struggled to maintain a consistent approach in cases where a TCN gains or loses the asylum seeker status whilst already in detention – in other words, where the TCN alternates between the two regimes.

It is important to note here that the interpretative discrepancies regarding the nature of the detention – as asylum- or pre-removal detention – are not just of theoretical interest. They have far-reaching legal and practical consequences, as the applicable rules and parameters of judicial control differ significantly. Early case-law of Greece's administrative courts failed to distinguish clearly between the two legal regimes, accepting that a TCN who applies for asylum whilst in detention could continue to be held in detention with a view to deportation.[82] The issue was resolved through ECtHR rulings.[83] It is now generally accepted that when a TCN applies for asylum while in detention, his or her legal status changes – from irregular migrant to asylum seeker – and any further deprivation of liberty needs to be justified in

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81 Papadopoulos argues that this distinction is reflected in the ECtHR case-law. Papadopoulos, 'Commentary on Decision 414/2019' (n 20).

82 Administrative Court of Alexandroupoli, Decision 75/2007; Administrative Court of Alexandroupoli, Decision 76/2007; Aministrative Court of Kommotini, A160/2009.

83 *SD v Greece* App no 53541/07 (ECtHR 11 September 2009); *RU v Greece* App no 2237/08 (ECtHR, 7 June 2011).

accordance with asylum law. Continued detention based on the initial pre-removal detention order is generally considered unlawful.[84]

Nonetheless, two fundamental issues remain unresolved to date and have resulted in conflicting judicial outcomes: (a) when does asylum seeker status start and (b) when does asylum seeker status cease? The first issue concerns a disagreement about the exact moment in which asylum seeker status is acquired and the rules of asylum detention start to apply. Is it only when the asylum application has been fully registered, or already when the TCN first indicates, orally or in writing, their intention to apply for asylum? Both approaches can be found within the Greek jurisprudence.

Until at least 2016, the prevalent opinion was that the mere expression of the intention to seek asylum was not sufficient and a completed registration of the application was required.[85] In one such case, a detainee notified the police authorities in writing that he wished to apply for asylum, but they only registered his intention a month later, after he had also submitted his passport. During that period, the applicant remained in pre-removal detention, which the reviewing judge found to have been lawful. According to the judge, the mere expression of intention did not change the applicant's irregular status, which also required the applicant's collaboration to help verify his identity. Thus, his detention from the moment he expressed his intention until the moment his identity was verified constituted pre-removal detention and its legality had to be assessed on that basis.[86]

This line of interpretation, however, is at odds with the ECtHR case-law, according to which TCNs should not be deprived of the guarantees afforded to asylum-seekers for the mere fact that they have been unable to have their

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84 Administrative Court of Trikala, Decision 17/2016; Administrative Court of Larissa, Decision 148/2018; Administrative Court of Kavala, Decision 407/2018. See, however, Administrative Court of Rhodes, Decision 580/2020, mentioning that the existence of a pending asylum application does not preclude a TCN's detention with a view to deportation, since the asylum claim may eventually be rejected.

85 Simou (n 17).

86 Administrative Court of Thessaloniki, Decision 467/2014; Administrative Court of Kommotini, Decision 5/2015.

asylum application registered.[87] It also raises issues with EU asylum law, according to which a TCN who expresses the intention to apply for asylum falls outside the scope of the Return Directive.[88] In the absence of an appeal procedure in the Greek system, TCNs in that situation had no domestic remedy available to challenge these decisions.

Legislative amendments since 2016 expressly state that persons who declare their intention to submit an asylum application are asylum-seekers, seemingly resolving this issue.[89] Nonetheless, some legal ambiguity has remained, as the law provides elsewhere that an asylum application is considered completed only after it has been registered by the asylum authorities.[90] In response to these amendments, several lower administrative court judgments have since held that the asylum seeker status is acquired when TCNs declare their intention to apply for asylum and that, from that moment on, any detention must conform with asylum law.[91] Nonetheless, even amongst those judgments, the legal reasoning remains ambivalent and inconsistent. Some judgments, for instance, note that the intention to apply for asylum is not equivalent to a completed asylum application, but nonetheless apply asylum law to examine the legality of the detention.[92] Many

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87 *AEA v Greece* App no 39034/12 (ECtHR, 15 March 2018) para 85; Klondine Prountzou, 'Ο χρόνος απόκτησης της ιδιότητας του αιτούντος άσυλο και ανάληψης ευθύνης από το κράτος υποδοχής' ['The Time of Acquisition of Asylum Seeker Status and of Assumption of Responsibility by the Country of Reception'] (2020) 2 Διοικητική Δίκη [Administrative Litigation] 249.

88 Case C-329/11 *Alexandre Achughbabian v V Préfet du Val-de-Marne* EU:C:2011:807, para 29; Prountzou (n 87) 249-250. Papapanagiotou-Leza and Kofinis (n 18) 289 argue that the domestic judge misread the CJEU ruling in the *Achughbabian* case.

89 Law 4375/2016 (n 54) subsequently replaced by Law 4636/2019 (n 22).

90 Law 4375/2016 (n 54) art 36 para 3; Law 4636/2019 (n 22) art 65 para 8; Law 4686/2020 (n 22) art 6 para 4.

91 Administrative Court of Trikala, Decision 17/2016; Administrative Court of Komotini, Decision 349/2017; Administrative Court of Larisa, Decision 148/2018; Administrative Court of Kavala, Decision 17/2018; Administrative Court of Athens, Decision 599/2020.

92 Administrative Court of Corfu, Decision 57/2020, para 6, mentioning that the intent to seek asylum is a mere expression of a wish and not a fully registered asylum application. See also Administrative Court of Komotini, Decision 241/2018.

other judgments disagree with this reasoning altogether. They consider that a TCN can continue to be lawfully held in pre-removal detention even after declaring an intention to seek asylum. It is only after a full asylum application has been submitted that the detention must conform with asylum law.[93] To this day, notwithstanding its fundamental importance and the large number of people affected, TCNs' legal representatives have yet to request a pilot judgment from the CoS on this matter.

Disagreements also appear at the other end of the line, namely when asylum detention ends and the conditions for pre-removal detention can be applied. Most first instance administrative judges consider that asylum status ends at the moment that the asylum application gets rejected at second instance, after which any continued detention of the TCN counts as pre-removal detention. A very different interpretation, though, was brought forward in a recent case involving an unsuccessful asylum seeker from Syria. Following the rejection of his asylum application at second instance, he was placed in pre-removal detention with a view to his readmission to Turkey. The ruling judge found the detention unlawful on grounds that the applicant continued to be an asylum seeker even after the second-instance rejection (until the expiration of the deadline to lodge an annulment application before the higher court 60 days later). Consequently, his detention during that period had to conform with Greek asylum law.[94] While this judgment represents a minority view within the Greek jurisprudence, it nonetheless reflects the extent of divergence in the case-law.

To this day, Greece's judicial review system has been unable to resolve the above normative disagreements in determining the legality of detention. These are more than mere variations in the application of certain laws in different factual circumstances. Rather, they raise the fundamental issue of what legal rules should apply in the first place: should it be those of asylum detention or pre-removal detention? The result is a thoroughly heterogenous jurisprudence, where similar facts are reviewed under different laws and principles – where the outcomes become unpredictable and the law risks losing its essential foreseeability. In the absence of a domestic appeals

93 Administrative Court of Athens, 450/2017; Administrative Court of Corfu, Decision 52/2020.

94 Administrative Court of Mytilini, Decision 227/2017.

procedure or higher court ruling, it appears that the only judicial avenues left to resolve these questions are recourse to international courts or deference to the executive.

V. Restrictions of Movement or Deprivation of Liberty?

Another fundamental area of inconsistency in the Greek jurisprudence concerns the distinction between restrictions of movement and detention. In the Greek context, TCNs are often exposed to other forms of physical restrictions, besides strict confinement, including the requirement to reside at a particular address or in a certain region. Such measures may be imposed either as alternatives to detention or as reception arrangements to protect public order or a general interest or to ensure the speedy examination of asylum claims.[95] These measures do not, in principle, constitute detention, since they merely restrict the personal liberty of TCNs rather than deprive them of it. In the Greek jurisprudence, they are therefore commonly referred to as *restrictions* of liberty. Their lawfulness is assessed against the general principles of necessity and proportionality following an individual assessment.[96] In the aftermath of the EU-Turkey deal, a general order made it possible under Greek law for the administration to order such measures not only on an individual basis, but also on a mass scale.[97]

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95 Law 3907/2011 (n 25) art 22; Law 4636/2019 (n 22) arts 39 and 45. In practice, judges frequently order such restrictions after having lifted the asylum or pre-removal detention without further justification. This judicial practice has been criticized on grounds that alternatives cannot be imposed if there is no need for detention in the first place. Vasileios Papadopoulos, 'Νόμιμοι περιορισμοί ελευθερίας αιτούντων άσυλο πέραν της κράτησης' ['Lawful Restrictions on Asylum-seekers' Liberty Other Than Detention '] (Συνέδριο του προγράμματος «Θεμελιώδη Δικαιώματα του Ανθρώπου και η εφαρμογή τους» [Workshop 'Fundamental Human Rights and Their Implementation'], Athens, 15 January 2018) <https://www.gcr.gr/en/news/events/item/776-eisigisi-tou-syntonisti-tis-n-y-tou-esp-sto-synedrio-tou-programmatos-themeliodi-dikaiomata-tou-anthropou-kai-i-efarmogi-tous> accessed 2 December 2020; Tsourdi (n 2).

96 Dafnis (n 26); Papadopoulos, 'Lawful Restrictions on Asylum-seekers' (n 95).

97 Law 4375/2016 (n 54) art 41 (1)(cc), succeeded by Law 4636/2019 (n 22) art 45.

Although, in principle, mere restrictions of liberty differ from deprivation of liberty, they may nonetheless amount to *de facto* detention.[98] The situation on the ground in Greece is such that the dividing line between detention and other restrictions of movement often becomes blurred in practice. For one thing, the conditions in many semi-open camps and facilities are quite restrictive and arguably qualify as detention. Meanwhile, the authorities have at times sought to justify certain measures as restrictions of liberty, whereas in fact they were detention.[99] Both the CJEU and the ECtHR have developed criteria to assess the legal nature of the physical restrictions imposed.[100] They take into consideration both objective criteria, such as the intensity the measure imposed, and subjective elements, like the consent of the individual to the impugned measure. On several occasions, both courts have concluded that a measure described as restriction in the national order was equivalent to detention under European standards.[101]

The conceptual distinction between detention and other restrictions of movement is not systematically addressed in the Greek jurisprudence. In the few cases in which Greek administrative courts have considered this distinction, they have not taken a consistent normative approach. The depth of their disagreement came to the fore in 2014, when the police authorities adopted a new administrative practice in respect of pre-removal detention. TCNs who had been detained for the maximum allowed duration of 18 months were not released as required by Greek and EU law. Instead, they were ordered to continue "residing" in the same pre-removal center until their return could be effectuated. The measure was labelled as 'mandatory residence' and aimed to ensure that the removal would eventually be carried out.[102] The state's legal advisor found the practice to be lawful. [103] Despite the

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98 *Guzzardi v Italy* (1980) 3 EHRR 333; Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* EU:C:2020:367.

99 Dafnis (n 26); Papadopoulos, 'Lawful Restrictions on Asylum-seekers' (n 95).

100 See cases cited in Dafnis (n 26) and Papadopoulos, 'Lawful Restrictions on Asylum-seekers' (n 95).

101 Ibid.

102 Triandafyllidou, Angeli and Dimitriadi (n 15).

102 Law 3907/2011 (n 25) art 22.

103 Advisory Opinion 44/2014 (n 48).

public controversy, TNCs' legal representatives did not request a pilot judgment from the CoS, probably out of concern about the possibility of an unfavorable outcome.[104]

Instead, a number of TCNs filed objections before the first instance administrative courts claiming that the measure amounted to *de facto* detention. These first instance courts issued contradictory decisions. Some courts found the mandatory residence in a closed pre-removal center to amount to unlawful detention. One highly publicized case concerned an irregular migrant from Afghanistan, who was ordered to continue "residing" in Amygdaleza detention center after having completed 18 months of detention. The judge found the measure to be unlawful detention. In his reasoning, the judge noted that the applicant's living conditions inside the center were *de facto* identical to and, therefore, just as grave as those during his detention. The judgement highlighted that the administration could not prolong a TCN's detention beyond the 18-month rule.[105] Other first instance administrative courts, though, ruled that assigned residence in a closed pre-removal center did not amount to detention. Notably, in those cases the judges did not undertake an assessment of the *de facto* situation of the TCNs' situation, but rather accepted the *de jure* classification of the measure as 'mandatory residence'. The complaints were rejected as inadmissible, either on the grounds that the measure was justified and proportional or that mere restrictions of movement fell outside the scope of 'objections against detention'.[106]

According to international standards, detention is a factual situation and any measure resulting in intense physical restriction may amount to unlawful detention given the particular circumstances of the case. Yet, Greek court

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104 It had only been a year before that the CoS had struck down as unconstitutional a law allowing the naturalization of second-generation migrants. Decision 460/2013 (n 74).

105 Administrative Court of Athens, Decision 2258/2014. See also *Achughbabian* (n 88).

106 Administrative Court of Komotini, Decision 22/2014; Administrative Court of Athens, Decision 3551/2014. See also the first instance administrative decisions at issue in the communicated cases *Fallak v Greece* App no 62504/14 (ECtHR, 29 January 2015) and *Lohar/(Esepiel) v Greece* App no 67357/14 (ECtHR, 29 January 2015) <https://hudoc.echr.coe.int/eng?i=001-152529> accessed 22 January 2022.

decisions that applied this normative definition had a limited legal impact, issued as they were by a lower court that only addressed the facts of one or more specific cases. In seeking to understand the reluctance of Greek lower court judges to take a consistent approach in line with international standards, the politically laden context of immigration cannot be overlooked. Decisions that challenged the lawfulness of assigned residence as *de facto* detention received a high degree of publicity, as they were at odds with the policy of the Greek government. Higher courts are often in a better position to examine sensitive and controversial matters and to face the political repercussions of their judgments, compared to lower courts, which may lack the necessary authority and experience.

Given the lack of an appeals mechanism within the Greek legal system, several TCNs who had unsuccessfully challenged geographical restrictions before administrative courts of first instance sought redress before the ECtHR.[107] Eventually, the issue was resolved by the executive in 2015, when the new left-dominated government abandoned the practice of keeping TCNs in closed pre-removal centers beyond the maximum 18-month limit. This also meant, however, that the legal issue remained unresolved.

VI. Drawing Common Normative Threads: the Council of State Interventions

Over the years, the CoS has, in a few cases, engaged with the vexed distinctions between asylum and pre-removal detention and between deprivation and restriction of liberty, albeit in a peripheral or indirect manner. This section presents the relevant CoS rulings. Notwithstanding their limited scope, they constitute important and potentially influential judicial precedents regarding the scope and importance of the right to liberty in the migration context.

While the CoS does not have the competence to review immigration detention as an appellate court, it has, in a few cases, addressed legal issues pertaining to the right to liberty and freedom of movement in the migration context. The relevant CoS rulings have had limited impact on the jurisprudence of the lower administrative courts, probably because of the

107 Ibid.

incidental manner in which immigration detention was addressed. Nonetheless, they are important in that they draw some basic normative lines regarding the extent of allowed restrictions and reflect the potential of the CoS in settling legal controversies. Notably, some of those rulings were issued in a particularly charged political context.

1. Asylum and Pre-removal Detention

The CoS has on two occasions underlined the fundamental importance of the right to liberty and the need to limit the use of immigration detention. The first was in the context of an early and little known 2001 judgment concerning a Nigerian national whose deportation could not be carried out for logistical reasons. The applicant, who was in pre-removal detention in a police station, filed an annulment application against the deportation order before the CoS and a separate request to suspend its implementation until the hearing. While the CoS rejected the applicant's request to suspend the order, it also seized the opportunity to address the applicant's detention. The CoS noted that the applicant's continued detention 'causes him harm, which cannot be reversed in the event that his pending annulment application succeeds'.[108] It ordered the applicant's immediate release and required him to report on a weekly basis to the local police station instead.

The legal significance of the above judgment lies in the CoS's recognition that immigration detention is inherently traumatic in itself, independently of the appropriateness of the detention conditions (which were not examined in the specific judgment). Notably, the CoS described the harm caused by immigration detention as 'irreparable', thus suggesting that it should be imposed with utmost caution. It is in recognition of this that the CoS ordered the applicant's release and required the use of less restrictive alternatives instead. Its approach in this regard is aligned with contemporary EU standards on the use of immigration detention as a last resort measure, subject to the principles of necessity and proportionality. The emphasis on the gravity of detention stands in juxtaposition to the ease with which some Greek courts uphold immigration detention without an in-depth examination of its necessity and the use of alternative measures.

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[108] CoS (Suspension Committee), Decision 103/2001 [authors' translation].

Almost two decades later, in 2018, the CoS reviewed the issue of immigration detention in a case of profound political salience for Greek-Turkish relations. Following the 2016 failed coup attempt in Turkey, eight high-ranking military officers, who were accused of having been involved in the coup, sought asylum in Greece, where they were placed in detention. One of the officers was recognized as a refugee at second instance, received his refugee card and was released from detention.[109] The Greek Ministry of Interior, though, appealed the asylum decision and obtained a provisional order suspending its implementation, following which the applicant was again placed in asylum detention. The administrative court of Athens found this second detention lawful on grounds that the applicant had lost his refugee status and regressed to asylum seeker status.[110] The applicant subsequently applied to the CoS. Due to the significance of the case, the pilot judgment procedure was enacted.

While the CoS was asked whether it was legal to suspend the applicant's refugee status, it also took the opportunity to address on its own initiative the legal nature of detention when there is a change in the applicant's legal status – in this case, from asylum seeker to refugee. The CoS clarified that, although it was in principle possible to suspend the implementation of a decision granting refugee status,[111] such suspension could not justify further asylum detention. From the moment a TCN was recognized as a refugee, s/he could no longer be detained, even where there was a pending annulment application before the courts.[112] The CoS highlighted that asylum detention could be imposed only on TCNs who had not yet been granted international protection and, even then, only under specific circumstances. In respect of recognized refugees, where an annulment application was pending, authorities seeking to protect the general interests at stake were limited to less coercive restrictions. To this effect, the CoS lifted the officer's detention and ordered a list of non-coercive, albeit stringent, measures to be applied

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109 CoS (Suspension Committee), Decision 97/2018.

110 Administrative Court of Athens, Decision 71/2018.

111 CoS, Decision 97/2018, paras 17, 20, pending an annulment application and in the presence of compelling general interests.

112 Ibid para 21.

instead – possibly to mitigate the impact of the ruling and appease any public concerns.[113]

Although immigration detention was not the primary subject matter of the proceedings, the CoS' decision significantly contributed to the development of domestic standards in this area. It set an important judicial precedent in so far as it circumscribed the temporal scope of asylum detention. Even more importantly, it declared unlawful the detention of beneficiaries of international protection, even in cases where an asylum decision was being challenged through an annulment application. The opposite interpretation – the one suggested by the first instance administrative court – would have raised issues with the fundamentally declaratory nature of refugee status in international refugee law.[114] Any remaining legal ambiguities have since been dispelled through the latest legislative reform. Greek law now expressly states that the final decision on the asylum application is the one issued at second instance.

The above CoS ruling is also important for highlighting the use of less coercive measures to implement migration management policies. In the cautious wording of the CoS, asylum detention should only be implemented under particular circumstances. Most importantly, the CoS found that less coercive measures were sufficient to protect the general interests at stake, differentiating itself from the Athens administrative court that had earlier approved the applicant's detention as essential for this purpose. What is particularly noteworthy in this case is the gravity of the interests at stake: national security and public order (given the applicant's military profile and the impact on Greece's external relations with Turkey), as well as concerns for the applicant's own safety. If less coercive measures ought to be used in such a politically loaded case, they should also be appropriate and effective in addressing the far less severe risks commonly encountered within the Greek jurisprudence.

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113 Ibid. The applicant was not issued a refugee card and he had to reside in a specific undisclosed address and report daily to the local police station. The authorities were authorized to impose additional measures if these were necessary and not equivalent to detention.

114 Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra and Commissaire général aux réfugiés et aux apatrides* EU:C:2019:403.

2. Restrictions Falling Short of Detention

In other rulings, the CoS has also addressed restrictions of liberty falling short of detention, highlighting the judicial scrutiny required even against milder physical restrictions. One such strand of cases concerned police notes requiring individual asylum-seekers to reside in a specific open reception facility pending the examination of their asylum application. In the event of non-compliance, the examination of the relevant asylum application would be discontinued. Before the CoS, the authorities retrospectively justified the measure either as necessary to ensure the petitioning TCNs' welfare, or on grounds that the asylum applications in these cases were 'abusive'. [115] Neither argument proved convincing. According to the CoS, to be lawful, limitations regarding the place of residence had to be individually justified in a timely manner and strictly comply with domestic law. By contrast, in the cases under consideration, the authorities had not invoked any compelling public interest or other basis expressly foreseen in domestic law, such as the need to process quickly and effectively an asylum claim, to justify why any particular TCN had to reside at a specific address. In its reasoning, the CoS did not discuss the distinction between detention and other restrictions of liberty. The judgment, however, is significant in acknowledging that even relatively mild restrictions of liberty, such as the duty to reside in an open-door facility, must be properly justified and consistent with the principles of necessity and proportionality.

Probably the most highly publicized intervention of the CoS regarding restrictions of movement was its ruling on the legality of the geographical limitations imposed on TCNs in the aftermath of the EU-Turkey deal. In 2017, the Greek Asylum Service decided that all asylum-seekers who had entered Greece after 20 March 2016 via the Eastern Aegean islands were obliged to remain within the geographical boundaries of those islands.[116] The decision itself did not provide any justification other than generally referring to the legal provision empowering the Asylum Service to impose such restrictions.[117]

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115 CoS, Decision 629/2007; CoS, Decision 685/2007; CoS, Decision 1201/2011.

116 Greek Asylum Service Decision 10464/31-5-2017.

117 CoS, Decision 805/2018; CoS, Decision 806/2018.

The CoS annulled the order. In its reasoning, the CoS accepted that restricting the movement of asylum-seekers was in principle allowed under both Greek and EU law, as well as the 1951 Refugee Convention. Yet, such restrictions had to serve purposes of public interest and satisfy the principle of proportionality. In this case, the CoS deemed that these requirements had not been met. Although the limitations only applied to asylum-seekers entering after 20 March 2016, the CoS concluded that it was not clear that they stemmed from the EU-Turkey deal, which was nowhere cited in the order. The administration had also not made it clear whether they had ordered those measures on their own initiative or had been obliged to do so under the deal. A subsequent document prepared by the Ministry to justify the measures failed to remedy the relevant omissions. Consequently, in the absence of an adequate legal justification, the CoS annulled the order. Two judges dissented, arguing that the ministerial document sufficiently explained the necessity of the geographical restrictions for the purposes of migration management and the implementation of the EU-Turkey deal.

The above CoS decision is significant not only because it highlighted the procedural safeguards that need to accompany even restrictions of physical liberty milder than detention, but also because it emphasized the importance of institutional design. The judgment stirred strong political reactions and became widely known in the Greek context for the direct challenge it posed to the implementation of the EU-Turkey deal. However, the CoS' willingness to apply a high level of scrutiny proved half-hearted. It sought to counterbalance the legal and political repercussions by ordering that the results of the annulment take effect only from the date of publication of the judgment and have no retrospective effect. Furthermore, in the end the CoS decision proved toothless, as it had no effect on the government's policy. A new decision was immediately issued by the Asylum Service ordering the same measure, this time by expressly citing the EU-Turkey deal as justification. Subsequent administrative decisions upheld the imposition of the geographical limitations,[118] though as of this writing an annulment application against these decisions is still pending before the CoS.

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[118] Greek Asylum Service Decision 8269/20.4.2018 (issued immediately after the CoS Decision); Greek Asylum Service Decision 18984/2.10.2018; Ministerial Decision

Notwithstanding their narrow scope and, at times, limited impact on the ground, the interventions of the CoS seen in their entirety are important. They advance a basic unifying normative approach on the fundamental value of the right to liberty, broadly understood. This approach requires any deprivation and any restrictions, no matter how stringent they are, to be subjected to strict scrutiny, regardless of the political repercussions. These core principles contrast the ease with which the lower administrative courts all too often accept the use of immigration detention or other restrictions without a substantial examination of their constitutionality. Nonetheless, the CoS decisions only provide fragments of a theory of the right to liberty in the asylum- and migration context. A comprehensive theory is still missing, and long-standing questions dividing the lower administrative courts still wait to be resolved.

VII. Concluding Remarks

Immigration detention has grave and long-lasting consequences on a person's mental and physical health and well-being and is at odds with the fundamental liberty of the person. EU law and the ECtHR have established norms and principles to circumscribe its use by governments in particular conditions and under specific standards of legality and fairness. In Greece, however, the institutional design of domestic judicial review of immigration detention, described in the preceding sections, significantly undermines the ability of Greek judges to uphold such standards. They have examined and decided claims regarding the lawfulness of detention of TCNs in a highly inconsistent manner with diverging outcomes. The result is a heterogeneous case-law that is unpredictable and lacks common normative directions.

The fundamental shortcoming of the domestic structure of judicial review is the allocation of responsibility to lower administrative courts without a second instance jurisdiction before which TCNs could appeal their decisions on immigration detention. Lower courts generally limit their review to the examination of the facts in each case and refrain from engaging in constitutionality review, even if they are empowered by domestic law to

13411/10.6.2019 (2399/B/19.6.2019); Ministerial Decision 1140/19.6.2019 (4736/B/20.12.2019).

conduct such a review. While the allocation of judicial control over immigration detention to first instance courts allows for the speedy examination of individual complaints, it reinforces legal ambiguity and inconsistency. In the end, this system effectively insulates the government and the legislature from the kind of judicial review that would be in accordance with the rights protections embedded in the ECHR and EU law. With no right to appeal, the only judicial channel left to TCNs is to resort to international courts, especially the ECtHR, which explains the very large number of related claims (and resulting judgments) against Greece. This system, though, is both unsustainable and counter-productive.

The CoS' incidental review of the right to liberty in the immigration context has somewhat corrected the haphazard nature of domestic jurisprudence, but it has far from established a unified legal approach. In a small number of cases, the CoS has advanced a basic, albeit thoroughly incomplete, thread of common norms and safeguards regarding the fundamental right of liberty in the asylum and migration context. These recognize immigration detention as inherently harmful to the person and require any State restrictions on the right to liberty to be thoroughly justified and proportional. It requires any deprivation of liberty and any restrictions, whether stringent or lenient, to be subjected to judicial scrutiny, regardless of the political repercussions. While the CoS standards are far from challenging systematic immigration detention policies and practices, they do define certain limits to executive action and provide a degree of protection – albeit incomplete and tentative – to asylum-seekers.

Reforming the institutional structure of domestic judicial review of immigration detention so as to give TCNs the right to appeal decisions of first instance courts would promote a unifying approach, improve the quality of judicial review, and bolster rights protection. Assigning a role to the CoS to review appeals, even if selectively, would have a crucial impact in all these regards. It would also create the legal pre-conditions for promoting judicial dialogue, including through preliminary references to the CJEU, which have so far have not been used.[119] Above all, extending responsibility to the CoS to review immigration detention decisions of lower courts would strengthen its position and possibly embolden its approach vis-à-vis the executive when

[119] Papapanagiotou-Leza and Kofinis (n 18) 298.

deciding highly sensitive and politically charged issues related to immigration.

QUESTIONING THE FRONTIERS OF RIGHTS: THE CASE LAW OF THE ITALIAN CONSTITUTIONAL COURT ON NON-EUROPEAN UNION CITIZENS' SOCIAL RIGHTS

Paola Pannia*

The issue of foreigners' entitlement to social rights evokes deep constitutional tensions. On the one hand, there is the egalitarian spirit of constitutions. On the other hand, there are legal systems in which paradigms such as citizenship, legal status or prolonged residence still represent the main criteria for accessing rights. How does the Italian Constitutional Court respond to this tension in adjudicating the welfare claims of migrants? Does it broaden non-nationals' access to social rights and, if so, what reasoning does it rely on? By analysing the constitutional jurisprudence on non-European Union citizens' social rights, this article aims to show the peculiar role of the Italian Court, its involvement in the governance of migration, its participation in reshaping the boundaries of the Italian community in the face of government decisions and the limitations of its intervention in this regard. This article will show how the Italian Constitutional Court has attempted to fulfil two intertwining mandates: to rule on issues which are key to migrants' rights and to define the relationship between the foreigner and the community in a more constitutionally oriented way.

Keywords: comparative legal studies, constitutional courts, immigration and asylum, solidarity, social rights

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I. MIGRANTS, SOCIAL RIGHTS AND COURTS: A CONSTITUTIONAL CONUNDRUM

There is a silent, overlooked, yet evident contradiction in European democracies between the very essence of constitutionalism (and its profound universalistic and egalitarian impetus) and the legislative frameworks regulating the legal status of foreigners, where paradigms such as citizenship, legal status or prolonged residence still represent the main criteria for accessing rights. The ample protection of fundamental rights preached by constitutions clashes with a legal approach that transforms territorial frontiers into rights frontiers. The contradiction becomes even more blatant when foreigners' entitlement to social rights is at stake. After the Second World War, it appeared necessary to expand the understanding of constitutionalism beyond a mere system of guarantees, towards a system of principles aimed at guiding and orienting people and public authorities alike.[1]

[1] The spread of judicial review across the world is somehow paradigmatic of this shift, as acutely by Mauro Cappelletti: 'When the Nazi Fascist era shook this faith in the legislature, people began to consider the judiciary as a check against

Within this system, social rights were meant to promote and realize a new social order informed by the principles of equality and social justice. However, more and more restrictive social policies seem to have betrayed their original promise and mission (to reduce inequalities and favour integration) and become an extension of migration control and a means of social engineering.

In Europe, welfare systems are often constructed around a central cleavage: citizens and non-citizens. Further fragmentations resulting from the proliferation of foreigners' legal statuses have created 'civic stratification': a hierarchy among migrants.[2] Political decisions about how to distribute available resources end up reflecting and consolidating choices and perceptions about 'wanted' and 'unwanted' migrants, which are mostly based on their supposed ability to contribute to the national welfare system (or, seen from another perspective, not being a burden on the state).[3] In this regard, the structure and organisation of welfare systems in European Union (EU) countries may be seen as a powerful tool of post-entry, internal 'migration control'.[4]

Regulating access to social rights also means determining who is part of the 'distributive community' and who is not.[5] This action enmeshes authorities in a dense web of interaction with concepts such as "belonging", "solidarity" and "social inclusion". Entitlement to social rights reflects and secures

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legislative disregard of principles once considered immutable. They began, in a sense, to "positivize" these principles, to put them in written form and to provide legal barriers against their violation'. Mauro Cappelletti, 'Judicial Review in Comparative Perspective' (1970) 5 California Law Review 1017, 1018.

2 Lydia Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (2003) 37 The International Migration Review 74.

3 Andrew Geddes, 'Migration and the Welfare State in Europe' (2003) 74 The Political Quarterly 150.

4 Ilker Ataç and Sinenglinde Rosenberger, 'Social Policies as a Tool of Migration Control' (2019) 17 Journal of Immigrant & Refugee Studies 1.

5 For the concept of human society as a 'distributive community', see Michael Walzer, *Sphere of Justice: A Defence of Pluralism and Equality* (Basic Books Inc. 1983), which is mentioned in Francesca Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza. La Condizione Giuridica dello Straniero tra Ordinamento Italiano e Prospettive Sovranazionali* (Giappichelli 2013) 2.

membership in the community. It also proves a person's belonging to the community and guarantees that person's "social identity" – society being one of the main channels and sites of self-expression. In contrast, a trend towards 'categorisation' (the fragmentation and parcellation of foreigners' legal status) and 'selectivity' (where social rights are restricted to 'economically desirable' foreigners) can be observed across the variety of welfare systems in Europe.[6]

Despite being threatened by these processes and obscured by further trends towards privatisation of public services and increasing social isolation, social rights still occupy a central role within the framework of constitutional protection. This may explain why European societies and legal systems are witnessing a countermovement that aims to promote a different understanding of social rights and the requirements for accessing them, based on a more egalitarian and constitutional approach. Among the actors at the vanguard of this movement are the courts, especially constitutional courts, who are more and more frequently being asked to issue rulings on political choices about resource redistribution embedded in national or regional laws.[7] Excluded from democratic processes, immigrant newcomers turn to the courts as the only channel for their welfare claims. In responding to these demands, constitutional courts face not only the pressures of tackling such delicate issues as the availability of resources for regulating migratory flows, but also those of challenging the priorities of political leaders. This means they must manage to 'speak to the political sphere with the language of judges'[8] and address established distributive arrangements without invading the purview of political power by interfering with the competence of the executive or the legislative.

Court assessments of migrants' welfare claims evoke deep constitutional tensions (including, to mention one, the separation of powers), which will be

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6 Geddes (n 3) 152ff.

7 On this subject, see, among others, Virginie Guiraudon 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping' (2000) 38 Journal of Common Market Studies 251; Christina Boswell 'Theorizing Migration Policy: Is there a Third Way?' (2007) 41 International Migration Review 75.

8 Enzo Cheli, *Il Giudice delle Leggi* (Il Mulino 1999) 31, quoted by Silvana Sciarra, 'Prove di Solidarietà in alcune Sentenze della Corte Costituzionale' (2019) 2 Rivista del Diritto della Sicurezza Sociale 265.

explored here in the specific context of the constitutional jurisprudence of Italy. How does the Italian Constitutional Court respond to these tensions when adjudicating the welfare claims of migrants? Does it broaden access to social rights for non-nationals and, if so, what reasoning does it rely on? What are, if any, the limitations of the Court's decision-making?

By addressing these questions, this analysis aims to explore the close ties between the legal impact and social saliency of the Court's decisions, that is, their effects on the shape of the community and social relations of individuals inhabiting it. This dual focus, combining legal analysis with social science discourses, represents the main contribution of this article to the existing literature on courts and access to social rights for non-nationals. Too often, legal scholars refrain from engaging with a more interdisciplinary approach and turn a blind eye to the performative role that legal structures play on conditioning individuals, their understandings of social relations, and their views and behaviours. Paradigms surrounding normative provisions and judicial discourse end up influencing the 'social meaning of goods', which are no longer perceived as sources of rights and obligations, but rather as 'property assets placed at the mercy of free trade'.[9] This also applies to the realm of social rights and their access for non-nationals. Interestingly, though, the social effects of legal structures not only affects foreigners but inevitably have a cascade effect on all the members of the community. Instead, the case law analysis herein is enriched with debates emerging from both the legal studies and social sciences literatures. The illustration of the main lines of argumentation of the Court's jurisprudence is supplemented with an inquiry into the peculiar role of the Italian Court, and its involvement in the governance of migration, its participation in reshaping the boundaries of the Italian community in the face of government decisions, as well as its

[9] Giorgio Resta, 'Gratuità e solidarietà: fondamenti emotivi e "irrazionali"' (2014) Rivista critica del diritto privato 25, 61 (my translations). Adopting a rich interdisciplinary, the author highlights the mutual relations between law and society: the former is influenced by social values and, at the same time, it can be considered a 'technique to structure the society' both on a practical and ideological level. Therefore, the legal system should promote a logic of solidarity, which is embedded in the constitutional values. Ibid 59.

role in promoting a paradigm of solidarity rather than contractual logic in social relations and the limitations of its interventions in this regard.

Two main circumstances make Italy an interesting case study. First, it is a country affected by fierce pressures to govern the effects of both the economic crisis and an increasing presence of foreigners.[10] Furthermore, the Italian Constitutional Court has intervened on the issue many times, often by securing spaces of legal protection in favour of foreigners (at the expense of the state's discretionary power). As such, on the slippery and contested terrain of access to social rights, the Italian Constitutional Court has performed a 'counter-majoritarian' role.[11]

Given the unique status bestowed upon EU citizens, this article deals with non-EU citizens only.[12] Within the wider universe of social rights, it focuses on the specific areas of education, housing, health care and financial allowances. This is not only because these issues are addressed in the Constitutional Court's most significant rulings on social rights,[13] but also because they account for the most common claims raised by foreigners before

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10 According to the Italian National Institute of Statistics (Istat), the labour market in Italy is still below the pre-crisis level. Meanwhile, Istat has documented a growing presence of foreigners: 8.7 % in 2019 versus 5.2% in 2008. Istat, *Rapporto Annuale 2019: La Situazione del Paese* (Istat 2019) 26ff. and 116ff.

11 This expression is taken from Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) 254ff, which makes reference to a 'counter-majoritarian difficulty' with respect to guarantees that judicial decisions provide for minorities' rights, even when this goes against what the majority has stipulated through the political process.

12 Unlike other EU Member States, the Italian legal system enables EU citizens with more than three months of residence in Italy to have the same access to social rights as Italian citizens (without additional restrictions based on the length of residence, family status or economic condition). See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, art 24(2).

13 See e.g. Corte cost 22 marzo 2001, n 105; Corte cost 28 novembre 2005, n 432; Corte cost 30 luglio 2008, n 306; Corte cost 26 maggio 2010, n 187; Corte cost 5 luglio 2010, n 249; Corte cost 11 marzo 2013, n 40; Corte cost 11 novembre 2015, n 230.

the Constitutional Court in the broader area of social rights.[14] Thus, the case law on these matters is ideal for exposing the duelling legal, political and social tensions on display in such a delicate domain as social rights. In addition, recent developments make the selected group of social rights extremely crucial from another perspective: as will be illustrated later, it is the field which has given rise to the most comprehensive dialogue between the Italian Constitutional Court and the Court of Justice of the EU (CJEU).[15]

This article is structured as follows. After section 2 provides some basic context on the role of the Constitutional Court, its composition and the Italian system of constitutional adjudication, section 3 is devoted to the review and analysis of the case law of the Italian Constitutional Court on foreigners' social rights. While acknowledging the complexity and fragmentation of the constitutional jurisprudence in this specific field, this article identifies some main lines of argumentation. Specifically, it demonstrates that, apart from a few decisions, the Italian Constitutional Court has promoted an inclusive approach in cases concerning foreigners' social rights, often relying on the principle of social solidarity enshrined in Article 2 of the Italian Constitution, which explicitly speaks of a duty of solidarity.[16]

Indeed, dealing with key constitutional concepts, such as "inviolable rights", "solidarity" and "residence", the Italian Constitutional Court has attempted to fulfil two intertwining mandates: to rule on issues which are key to migrants' rights and to define the relationship between the foreigner and the community in a constitutionally oriented way. In doing so, the Court has sometimes ended up providing new, revolutionary paradigms, which further develop this relationship in a spirit of solidarity and interdependence. Thus,

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14 Concerning the saliency of the above-mentioned issues within the constitutional jurisprudence on foreigners' social rights, see Claudio Panzera and Alessio Rauti (eds), *Dizionario dei Diritti degli Stranieri* (Editoriale Scientifica, 2020).

15 However, this article only peripherally addresses the specific and ample issue concerning the multilevel protection of rights and the dialogue between the Constitutional Court and the CJEU. See n 45.

16 This principle is explicitly mentioned in the following decisions of the Italian Constitutional Court aimed at securing foreigners' access to social rights. Corte cost 2005, n 432 (n 13); Corte cost 12 dicembre 2011, n 329; Corte cost 2013, n 40 (n 13); Corte cost 27 gennaio 2015, n 22; Corte cost 2015, n 230 (n 13).

drawing upon some of the Court's decisions, this article concludes by questioning whether the paradigms of citizenship, foreigners' legal status and territoriality are adequate foundations on which to build a system of social rights. Meanwhile, this article engages in broader reflection on the possibility of rebuilding welfare systems (as well as migration governance) around a non-contractual and solidarity-based logic, reframing the traditional understanding of the very concepts of citizenship and belonging to a community.

II. Some Preliminary Remarks on the Italian Constitutional Court and its Role in Determining Foreigners' Social Rights

Some background information about the Italian Constitution and the Italian Constitutional Court is necessary to better understand the role played by this institution. The Italian Constitution establishes the Constitutional Court and sets forth its basic functions and composition and the effects of its decisions.[17] The Court is composed of 15 judges, one-third of whom are appointed by the Parliament (in a joint session), the President of the Republic, and the ordinary and administrative supreme Courts, respectively. Members are appointed to nine-year non-renewable terms. Candidates are chosen among long-established lawyers, full professors of law and judges from the higher courts.

The Constitutional Court has jurisdiction over, among other things, jurisdictional disputes over the allocation of powers between the state and the regions.[18] Such cases arise when a state (or a region) requests the Court to protect its sphere of competence as guaranteed under the Constitution against infringements committed by a region (or by the state or another region). The Constitutional Court is also empowered to adjudicate on the

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17 The Constitution of the Italian Republic, arts 134-36 (Constitution). For the official English-language version, see 'Constitution of the Italian Republic' (Senato della Repubblica) <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 18 February 2022.

18 Ibid art 134.

constitutionality of laws and acts having force of law.[19] Access to the Court in such matters is reserved to judges, who can raise a question as to a law's constitutionality during the course of a trial that requires the application of that law. Court decisions declaring a law to be unconstitutional render it null and void from the day of publication, with an *erga omnes* effect.

The Italian legal context offers a peculiar realm of analysis with regard to the constitutionality of legal provisions on foreigners' rights. Indeed, although the Constitution provides few rules directly addressing asylum, migration and the legal status of foreigners,[20] other pivotal constitutional provisions operate to raise the national standards of foreigners' rights. These are: Article 117, through which the EU legislation and international treaties signed by Italy acquire 'constitutional relevance';[21] the so-called "personalist" principle of Article 2, which guarantees the full and effective respect of human rights and proclaims the duty of social solidarity;[22] and the equality clause of Article 3, which forbids unfair discrimination and guarantees substantial equality.[23]

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19 Ibid. For a complete overview of the proceedings which may take place before the Constitutional Court, see 'Decisioni' (Corte Costituzionale) <https://www.cortecostituzionale.it/actionPronuncia.do> accessed 27 March 2022.

20 But see Constitution (n 17) art 10, which states that '(2) legal regulation of the status of foreigners conforms to international rules and treaties; [and] (3) foreigners who are, in their own country, denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law'; ibid art 117, distributing legislative powers in Italy between the state and the regions, which provides that legislation on immigration, right of asylum and legal status of non-EU citizens is subjected to the exclusive legislative competence of the state. Meanwhile, other policy areas affecting the management of migration and the legal status of foreigners, such as housing, healthcare, and education, are assigned to the concurrent or exclusive regional legislative competence. Ibid art 117(3).

21 Ibid art 117(1), which proclaims that '[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

22 Ibid art 2, according to which 'the Republic recognises and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity'.

23 Ibid art 3, which states that '(1) [a]ll citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political

Beyond the constitutional framework, Italian legislation on foreigners' social rights presents a complex and confusing maze of normative provisions, which are the product of repeated and inconsistent interventions. Article 2(5) of the Italian Consolidated Law on Immigration (the 'Consolidated Law'), which is the framework law in the field, provides foreigners with the same access to public services as Italian citizens 'within the limits and in the manner proscribed by law'.[24] In the same vein, article 41(1) of the Consolidated Law states that foreigners holding an EU long-term residence permit or a regular residence permit valid for at least one year should enjoy services and benefits of social assistance on an equal footing with Italian citizens.[25] However, for financial reasons, the egalitarian spirit of the legal framework has subsequently been compromised by Article 80(19) of Law 388/2000, an ambiguous and obscure law that severely restricted foreigners' access to social rights, providing that only EU long-term residence permit holders are entitled to the so called *assegno sociale* and other 'financial allowances constituting subjective rights under the law on social service'.[26] As will be illustrated below, the constitutional legitimacy of this latter normative provision has been called into question many times before the Constitutional Court.

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opinions, and personal or social conditions' and '(2) [i]t is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organisation of the country'. As explored in more detail in the following paragraphs, despite the fact that Article 3 makes reference only to citizens, the Italian Constitutional Court, adopting a constitutionally oriented interpretation, has clarified that the equality principle also applies to non-citizens. Corte cost 23 novembre 1967, n 120; Corte cost 19 giugno 1969, n 104; Corte cost 10 febbraio 1997, n 46.

24 DL 25 luglio 1998, n 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, art 2(5) (Consolidated Law on Immigration).

25 Ibid art 41. This normative provision has been recently modified. See n 44 for further details.

26 L 23 dicembre 2000, n 388, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001), art 80(19) (Budgetary Law 2001). See also n 43.

Indeed, against this backdrop of multiple fragmentary (and frequently inconsistent) normative stratifications, the Court has often found itself invested with the task of balancing fundamental rights against budgetary constraints, concerns about peaceful coexistence, the scarcity of financial resources and the margin for political choices regarding the allocation of these resources.[27] In some cases, the Italian Constitutional Court has intervened to redefine these competing interests for the parliament or the government, which has contributed, on a case-by-case basis, to the establishment of criteria for the distribution of welfare benefits and the recognition of social rights. Can the state introduce limitations concerning the content of social rights and the beneficiaries to whom they can be attributed? On which grounds can these limitations be considered constitutionally lawful? By answering these questions, constitutional case law has ended up defining the boundaries of a distributive community.

However, as further illustrated below, these borders are extremely variable and mobile. Indeed, the main argumentative tool used by the Italian Constitutional Court to approach the legislative balancing exercise is a reasonableness test.[28] Through this technique, the Court assesses whether the legislative exclusion of foreigners from social welfare can be justified (1) in the light of the principle of non-discrimination (i.e. treating like cases alike) and/or (2) from the standpoint of the coherence of the entire legal order, based on its intrinsic logic, appropriateness and proportionality. The reasonableness test does not provide a definitive formula for measuring

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27 Marta Cartabia, 'Gli «immigrati» nella giurisprudenza costituzionale: titolari di diritti e protagonisti della solidarietà', in Claudio Panzera, Alessio Rauti, Carmela Salazar and Antonino Spadaro (eds), *Quattro lezioni sugli stranieri: atti della Giornata di studi* (Jovene 2016).

28 On the reasonableness test in the case law of the Italian Constitutional Court, its function and its link to the principle of equality, see Gino Scaccia, *Gli "Strumenti" della Ragionevolezza nel Giudizio Costituzionale* (Giuffrè 2000); Andrea Morrone, *Il "Custode" della Ragionevolezza* (Giuffrè 2001); Luigi D'Andrea, *Ragionevolezza e Legittimazione di Sistema* (Giuffrè 2005). With specific reference to foreigners and the right to non-discrimination, see Maria Chiara Locchi, 'Facta Sunt Servanda: per un Diritto di Realtà in Tema di Uguaglianza degli Stranieri' (2010) 3 Quaderni Costituzionali 571.

competing interests against each other and determining which carries the most weight.

The flexibility of this hermeneutic technique allows for an adequate response to the peculiarity of each case. However, at the same time, it generates an equilibrium that relates only to the normative and factual elements of the case in hand. Thus, the Italian Constitutional Court's jurisprudence risks resembling a plethora of operations of "microsurgery" that fail to provide holistic and thorough protection. Furthermore, the Court's decisions in jurisdictional disputes over the allocations of powers between the state and the regions may result in significant variations between regions in the attribution of social rights to foreigners. Nonetheless, as will be discussed later, these limitations in the Court's reasoning must be understood also as part of its constitutional function. The Court performs a politically relevant role (securing rights under the aegis of the Constitution against the abuse of public authorities) while maintaining his independence and being careful to not invade the political sphere.

III. Who Belongs to the Distributive Community? The Case Law of the Italian Constitutional Court on Foreigners' Entitlement to Social Rights

This section is devoted to identifying the main lines of argumentation that the Italian Constitutional Court has relied upon in adjudicating the social rights of migrants.

1. Solidarity with Whom? Foreigners Cannot Be Excluded from Social Rights on the Sole Grounds of (Non-)Citizenship

The first main outcome of the constitutional case law is the elimination of citizenship as a criterion for identifying the beneficiaries of social rights. As the Court has clarified, the boundaries of solidarity – of the distributive community – do not coincide with the boundaries of citizenship. Despite the growing support for the "Italians first" slogan,[29] the Constitutional Court has

[29] It is interesting to assess the link between immigration, the rise of right-wing populism and anti-immigrant sentiments. For an analysis of the "Salvini era" and his strategies, see Dylan Patrick Mcginnis, 'Anti-Immigrant Populism in Italy: An

maintained that citizenship cannot be considered by the legislator as a valid and reasonable requirement upon which to condition entitlement to social rights.

This view is consistent with the constitutional text. Indeed, there is no reference to *citizenship* in the sections of the Italian Constitution devoted to 'ethical and social relations' and to 'economic relations'.[30] The only provision of the Constitution that mentions the term 'citizen' is Article 38, concerning social assistance and support to be guaranteed to citizens who are unable to work and do not have sufficient economic resources. However, here the term must be read through a teleological interpretative lens: the intention of the Constitutional Assembly was to ensure social security rights, traditionally associated with the labouring condition, to all citizens (and not just to the working class). The possibility of applying Article 38 of the Constitution to non-citizens as well, which meant ensuring access to social rights regardless of citizenship status, was first affirmed by the Constitutional Court in judgment No. 454/1998. Here, the Court stated that the right to vocational training guaranteed by Article 38(3) of the Constitution also applies to foreigners.[31] Therefore, foreign workers suffering injury or invalidity have the right to be enrolled in the public unemployment register.

However, it was not until the landmark judgment No. 53 of 2005 that the Court explicitly eradicated the traditional distinction between citizens and non-citizens, though it still permeates the constitutional case law on foreigners' rights to liberty.[32] In this case, the Court was called on to determine the constitutional legitimacy of Art. 8 (2) of Law No. 1/2001 of the Lombardy Region, which excluded foreigners with a 100% disability rating

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Analysis of Matteo Salvini's Strategy to Push Italy's Immigration Policy to the Far Right' [2021] The Yale Review of International Studies <http://yris.yira.org/winter-issue/4659> accessed 27 March 2022.

30 Constitution (n 17) ss II-III; see Cecilia Corsi, *Lo Stato e lo Straniero* (Cedam 2001) 101ff; Cecilia Corsi, 'Prestazioni Assistenziali e Cittadinanza' [2009] (2) Diritto Immigrazione e Cittadinanza 34.

31 Constitution (n 17), art 38(3), which reads: 'Disabled persons are entitled to receive education and vocational training'.

32 See, among others, Corte cost 2005, n 432 (n 13). See also, more broadly, Mario Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori* (Giuffrè 2012).

(and their caregivers) from the right to free public transport.[33] The Court's reasoning points to the social aims and solidarity values underlying this measure. Indeed, disabled people have very limited access to economic resources and experience difficulties in participating in the social life of the community. A law that distinguishes between disabled citizens and disabled foreigners introduces arbitrariness into the legal order, since there is no reasonable correlation between citizenship status, on the one hand, and the functions and grounds underlying the social right on the other hand. Without a reasonable justification for the differential treatment of foreigners, the citizenship requirement violates the principle of equality enshrined in Article 3 of the Italian Constitution.[34]

The Court's clear pronouncement that citizenship is *not* a lawful criterion for selecting who is entitled to social rights raises other question that have yet to be fully resolved. Can we conclude that *all* foreigners are entitled to social rights, regardless of the specific residence permit or status they have been granted? Or are there other, additional requirements that can legitimately be imposed by legislation on foreigners as a condition for the enjoyment of social rights?

A partial answer to the first question comes from European legislation, which has enacted an "equivalence" clause with reference to foreigners holding specific types of residence permit. For instance, obligations to grant foreigners the same rights as Italian citizens are laid down by (1) Article 29 of

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33 LR 15 gennaio 2001, n 1 (Disciplina dei mutamenti di destinazione d'uso di immobili e norme per la dotazione di aree per attrezzature pubbliche e di uso pubblico), art 8(2), as amended by LR 9 dicembre 2003, n 25, Interventi in materia di trasporto pubblico locale e di viabilità, art 5(7).

34 As has been highlighted by scholars, the claimant was a refugee. See Graziella Romeo, 'Il cosmopolitismo pragmatico della Corte Costituzionale tra radicamento territoriale e solidarietà' (2018) 1 Rivista AIC 13, citing Gianluca Bascherini, *Immigrazione e diritto fondamentali. L'esperienza italiana tra storia costituzionale e prospettive europee* (Jovene 2007) 392-93. Hence, the Court could have solved the case just by relying on the provisions of EU law prohibiting any discrimination between refugees and nationals in terms of entitlement to social rights. For other decisions by the Court replicating this reasoning, see Corte cost 29 luglio 2008, n 306 (n 13); Corte cost 14 gennaio 2009, n 11. But see, for a partial reversal, Corte cost 15 marzo 2019, n 50.

Directive 2011/95, which applies to beneficiaries of international protection,[35] (2) Article 11 (1) and (4) of Directive 2003/109 concerning foreigners with an EU long-term residence permit and (3) Article 12 of Directive 2011/98 on third-country nationals residing and working in a Member State.[36] These provisions notwithstanding, the Constitutional Court recently had to intervene to strike down regional and national

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[35] For CJEU case on this subject, see in particular Joined Cases C-443/14 and C-444/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* EU:C:2016:127; Case C-713/17 *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land* EU:C:2018:929.

[36] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337, art 29; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16, arts 11(1) and (4) (Long-Term Residents Directive); Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343, art 12 (Single Permit Directive). For a complete overview of these obligations, see Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), *Stranieri e accesso alle prestazioni sociali* (Alberto Guariso (ed), 2018) <https://www.cgil.lombardia.it/wp-content/uploads/2018/02/Stranieri-e-accesso-alle-prestazioni-sociali-gennaio-2018-guariso.pdf> accessed 4 June 2021. In particular, the equality provision of the Single Permit Directive is limited to measures of social security, whereas measures of social assistance are excluded from the scope of the Directive. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166, art 3(5). According to the case law of the CJEU, the latter are social measures, which depend 'on an individual assessment of the claimant's personal needs'. Social security measures, by contrast, are characterised by the fact that 'the criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances does not depend from the state discretionary choices, but from the fulfilment of specific, predetermined conditions'. Case C-449/16 *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova* EU:C:2017:485.

provisions excluding foreigners holding applicable permits from access to important housing support allowances.[37]

2. Solidarity to What Extent? Foreigners Cannot be Excluded from Social Measures Aimed at Responding to Primary Needs.

This section will address the second question raised towards the end of the last section, inquiring into legitimate limits to the scope of social rights accorded to foreigners. The Constitutional Court has clearly acknowledged that, in principle, the different legal status of foreigners may justify a different legal treatment.[38] However, it has also found that this reasoning does not apply when the social measure in question aims to protect fundamental rights. This means that, although different treatment may be justified (in view of the principles of reasonableness and proportionality), no limitation of fundamental rights may be deemed legitimate.

To this end, the Constitutional Court, when called upon to determine the constitutional legitimacy of article 80(19) of Law No. 388/2000, which reserved access to social welfare allowances solely to EU long-term residence permit holders, found that non-EU citizens were entitled to all such 'essential social benefits', including disability benefits for mobility needs, blindness and deafness, regardless of the typology of residence permit owned by the foreigner.[39] Indeed, such limitations have been declared unreasonable by the Constitutional Court several times.[40] In this regard, the Court has observed that obtaining the status of EU long-term resident requires proving the availability of financial resources and the possession of a regular permit to

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37 Corte cost 24 maggio 2018, n 106; Corte cost 20 luglio 2018, n 166. For further details, see s IV below.

38 See Corte cost 1969, n 104 (n 23); Corte cost 24 febbraio 1994, n 62.

39 Corte cost 2008, n 306 (n 13) (on the disability allowance); Corte cost 2015, n 22 (n 16) (concerning the pension for blind people); Corte cost 2015, n 230 (n 13) (on the civil disability pension for deaf people).

40 In addition to the above-mentioned judgments, see also Corte cost 2009, n 11 (n 34) (on the disability pension); Corte cost 2010, n 187 (n 13) (on the monthly disability allowance); Corte cost 2011, n 329 (n 16) (on the allowance for disabled minors to facilitate access to school); Corte cost 2013, n 40 (n 13) (with reference again to the disability allowance and to the disability pension).

stay in Italy for at least five years.[41] However, foreigners who apply for these social benefits are often poor or experiencing a situation of economic hardship and in need of urgent assistance and care. Specific social benefits, constituting 'a remedy for satisfying the primary needs for the protection of the human person', must be considered 'fundamental rights because they represent a guarantee for the person's survival'.[42] Therefore, these social benefits must be guaranteed to all in order to assure compliance with the principle of equality and with the constitutional mandate to protect fundamental rights such as the right to health and education.[43] In such cases, the only requirement is a regular and stable presence in the territory of the state.

However, consistent with the interlocutory nature of the constitutional review process, the Court never invalidated the entire law, but each time censored only that part of it which excluded foreigners without an EU long-term permit from enjoying the particular social benefit aimed at guaranteeing the primary needs at stake in the specific case. Some recent legislative amendments notwithstanding,[44] the national legal framework continues to lack coherent, sound rules, raising concerns about compliance with the non-discrimination principle enshrined in the Italian Constitution, the Charter

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41 Consolidated Law on Immigration (n 24) art 9.

42 Corte cost 2010, n 187 (n 13). See also Corte cost 2011, n 329 (n 16); Corte cost 2013, n 40 (n 13); Corte cost 2015, n 22 (n 16); Corte cost 2015, n 230 (n 13). All quotes from cases are my own translations.

43 Corte cost 2011, n 329 (n 16).

44 The legal framework has been recently modified by L 23 dicembre 2021, n 238, Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2019-2020, art 3(1)(a). The law implicitly abrogates Article 80(19) of the Budgetary Law 2001 (n 26) and modifies Article 41 of the Consolidated Law on Immigration (n 24). According to the new Article 41, foreigners holding a residence permit of at least one year enjoy the same access to social benefits as Italian citizens. Different requirements are introduced concerning those social benefits constituting a right. Foreigners with a single permit issued under the Single Permit Directive (n 36) have access to non-family allowances only if they have worked in Italy for more than six months and to family allowances only if they have a residence permit allowing them to work for more than six months. Consolidated Law on Immigration (n 24) art 41.

of Fundamental Rights of the EU (CFR) and European Court of Human Rights (ECtHR) case law.[45]

[45] See e.g. DL 21 dicembre 2021, n 230 Istituzione dell'assegno unico e universale per i figli a carico, in attuazione della delega conferita al Governo ai sensi della legge 1° aprile 2021, n 46, which discriminates against some foreigners benefitting of a national form of protection (such as those with residence permits under DL 286/1998 (n 24) for 'social protection' (e.g. victims of trafficking (art 18)) or the assistance of minors (art 31)) with regard to access to the new single universal child benefit (*assegno unico universale*). Furthermore, on 8 July 2020, the Italian Constitutional Court considered a referral from the Court of Cassation questioning the constitutionality of the rule making the eligibility of third-country nationals for the childbirth allowance and the maternity allowance conditional upon holding an EU long-term residence permit. The Court decided to refer the question to the CJEU for a preliminary ruling concerning the direct applicability of Article 12 of the Single Permit Directive. Corte cost 8 luglio 2020, n 182 (English translation available at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf>) accessed 18 February 2022. With its judgment of 2 September 2021, the Court of Justice ruled that third-country nationals who hold a single work permit obtained pursuant to the Italian legislation transposing the Single Permit Directive are entitled to a childbirth allowance and a maternity allowance as provided for by the Italian legislation. Case C-350/20 *OD and Others v Istituto nazionale della previdenza sociale (INPS)* EU:C:2021:659. With Decision No. 54/2022, the Italian Constitutional Court declared the constitutional illegitimacy of the normative provisions that excluded foreigners allowed to work with a residence permit of more than six months from childbirth allowance and maternity allowance. According to the Court, these provisions violated Articles 3 and 31 of Constitution and Article 4 of the CFR. Recently, in a judgment rendered on 28 October 2021, the CJEU intervened again on an Italian legislative provision that excluded third country nationals from eligibility for the so called 'family card', a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the Italian government. The CJEU ruled that this exclusion 'constitutes unequal treatment contrary to Article 11(1)(f) of Directive 2003/109, Article 12(1)(g) of Directive 2011/98 and Article 14(1)(g) of Directive 2009/50'. Case C-462/20 *Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) and Others v Presidenza del Consiglio dei Ministri – Dipartimento per le politiche della famiglia and Ministero dell'Economia e delle Finanze* EU:C:2021:894. In a subsequent judgment of 11 March 2022, declaring the inadmissibility of certain questions referred by the Court of Cassation, the Italian Constitutional Court stipulated that third country

Furthermore, many scholars have criticised the flaws of the pattern of argumentation regarding 'primary needs'. First, it has been argued that the Court has failed to apply its approach in a coherent and consistent way.[46] There have been controversial decisions in which the Court did not consider certain rights, such as the right to access to the universal basic income (*reddito di cittadinanza*), as serving primary needs.[47] On this basis, regional laws requiring foreigners to have been legal residents for a certain amount of time in order to access such rights were deemed constitutionally legitimate by the Court. Second, it has been observed that social measures are sometimes

citizens with a single permit or an EU long-term permit should have access to the family unit allowance on an equal footing with Italian citizens, even if some members of the family are residing temporarily in their country of origin. The Court also took the opportunity to reaffirm the primacy of EU law, the binding nature of the CJEU's decisions and their contributions to enhancing the protection of rights. Corte Cost 11 marzo 2022, n 67. On the broader subject of foreigners' access to social rights, see also Cecilia Corsi, 'L'Accesso degli Stranieri ai Diritti Sociali' in Antonio Bartolini e Alessandra Pioggia (eds), Cittadinanze amministrative (Firenze University Press 2016); Maria Dolores Ferrara, 'Status degli stranieri e questioni di welfare tra diritti e inclusione sociale' (2017) 2 Rivista del Diritto della Sicurezza Sociale 265; Sciarra 'Prove di Solidarietà in alcune Sentenze della Corte Costituzionale' (n 8).

46 See e.g. Paola Chiarella, *Solidarietà e diritto sociali. Aspetti di filosofia del diritto e prassi normative* (Cedam 2017); Cecilia Corsi, 'La Trilogia della Corte Costituzionale: ancora sui Requisiti di Lungo-residenza per l'Accesso alle Prestazioni Sociali' (2018) 6 Le Regioni 1170.

47 See e.g. Corte cost 11 febbraio 2008, n 32. See also Chiarella (n 46); Corsi, 'La Trilogia della Corte Costituzionale' (n 46). See further Corte cost 25 gennaio 2022, n 19, in which the Court confirmed the constitutionality of the rule making the eligibility of third-country nationals for the universal basic income conditional upon holding an EU long-term residence permit. According to the controversial decision of the Court, the so called *reddito di cittadinanza* is a measure with composite contents and objectives: it is not only a measure of social assistance, aimed at responding to primary needs of individuals, but also an active labour market measure. Furthermore, according to the Court's reasoning, this measure involves a job placement process, hence a long period of time, which is why the requirement of the EU long-term residence permit cannot be considered unreasonable.

intended to fulfil multiple aims (so-called 'multifunctional measures').[48] How should the legislator (and the interpreter of the law) approach these measures? Should the aim to satisfy 'primary needs' prevail, hence making these measures applicable to everyone? Or should prevalence be given to the function related to 'non-essential needs', such that these measures can be made subject to given conditions?

Notwithstanding these criticisms, the role of the Constitutional Court in promoting the legal entitlements of foreigners and preventing the downgrading of foreigners' rights cannot be underestimated. As illustrated by the brief overview above, the Court is involved in the difficult task of balancing among competing interests which drive the political choices tied to the allocation of economic resources, on the one hand, and the preservation of the principle of non-discrimination, on the other hand. In these cases, the solidarity principle enters into the equation and tips the scales in favour of the non-discrimination principle, guiding the outcome of the Constitutional Court's decisions.

3. A Universal Form of Solidarity: All Foreigners are Entitled to Inviolable Rights

The Court takes the reasoning explored above even further when the protection of inviolable rights is at stake. Hence, in these cases, the legal status of foreign nationals is not even taken into account. Even undocumented foreigners are entitled to enjoy social rights when these are strictly related to inviolable rights, i.e. rights belonging 'to individuals not as members of a political community but as human beings as such'.[49] Embracing this line of argumentation, the Constitutional Court, as reflected in its well-established case law analysed below, has upheld foreigners' entitlement to social rights which are directly related to the right to health and healthcare services. According to the Court, there is an 'inalienable core of the right to health' guaranteed by the Constitution as an 'inviolable part of the human dignity', and any failure to prevent a lack of protection amounts to violations of this constitutional right.[50]

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48 Francesca Biondi dal Monte, 'Radicamento Territoriale e Accesso dei Minori agli Asili Nido' (2019) 4 Studium iuris 441

49 Corte cost 2010, n 249 (n 13). See also e.g. Corte cost 2001, n 105 (n 13).

50 Corte cost 5 luglio 2001, n 252; Corte cost 22 luglio 2010, n 269.

This reasoning runs through several decisions in which the Constitutional Court has been called upon to verify the competence of regional authorities to extend the scope of the legal protections in areas of social assistance and public services provided at the national level to undocumented foreigners. Law No. 29/2009 of the Region of Tuscany is emblematic in this regard. Under this law, all migrants in Tuscany were entitled to benefit from 'urgent and non-delayable social welfare measures, which are necessary to ensure respect for fundamental rights'.[51] The Italian government claimed that all of these measures exceeded regional legislative power, were in conflict with national legislation and infringed the state's exclusive competence in matters related to migration.[52] However, as already mentioned, the Constitutional Court ruled that these regional provisions were legitimate, highlighting that migrants are entitled to a core set of inviolable fundamental rights regardless of their status.[53]

Tuscany was not an isolated case. Similar provisions were approved, for instance, in Apulia, where Regional Law No. 32/2009 established that undocumented migrants would be granted access to a number of medical treatments, including mental health services, pharmaceutical assistance, gynaecological care and abortions,[54] and in Campania, where the right to

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51 LR 8 giugno 2009, n 29, Norme per l'accoglienza, l'integrazione partecipe e la tutela dei cittadini stranieri nella Regione Toscana, art 6(35).

52 For relevant constitutional provisions, see n 15 above.

53 Corte cost 2010, n 269 (n 50). The recognition of a 'hard core' of fundamental and inviolable rights, regardless of citizenship and legal status, led the Constitutional Court to rule that expulsion cannot be enforced if an undocumented migrant is undergoing an essential therapeutic treatment. Corte cost 2001, n 252 (n 50). Similar reasoning underpins the affirmation of a foreigner's rights to legal defence, even in case of undocumented foreigners. Indeed, the Constitutional Court has clarified that the effective exercise of the right of defence 'implies that the addressee of a measure restricting the freedom of self-determination must be enabled to understand its content and meaning'. Corte cost 8 giugno 2000, n 198. As a consequence, 'in the case of non-culpable ignorance of an expulsion order - in particular due to non-compliance with the obligation to translate legal documents - the deadline for submitting an appeal should not be considered'. Ibid.

54 LR 4 dicembre 2009, n 32, Norme per l'accoglienza, la convivenza civile e l'integrazione degli immigrati in Puglia, art 10(5) (Apulia Immigration Law). This

social housing was guaranteed to all foreigners regardless of their status.[55] In both cases, the Court ruled in favour of the regional legislation, ascertaining that they did not infringe upon the state's exclusive legislative competence as guaranteed by the Constitution. These decisions were also grounded on the universal and inviolable nature of the rights recognised by the regional provisions in question.[56]

Within the realm of inviolable rights, the Court seems to conceptualise a universal solidarity where the welfare system applies to all, regardless of status and legal conditions. Some outcomes, particularly involving undocumented foreigners, have called into question the state's discretionary power to decide who is entitled to enter and stay in the national territory. Indeed, as some authors have highlighted, it appears that the state's exclusive power to plan and control migration is being hollowed out by progressive constitutional protection of the foreigner as 'human being'.[57]

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provision extends the scope of the right to healthcare as compared to national legislation, which guarantees only urgent and essential healthcare services to undocumented foreigners. Consolidated Law on Immigration (n 24) art 35(3).

55 LR 8 febbraio 2010, n 6, Norme per l'inclusione sociale, economica e culturale delle persone straniere presenti in Campania, art 16 (Campania Immigration Law). This law guaranteed the right to social housing to all foreigners, regardless of their status. Ibid arts 17(2) and (5). In contrast with this regional legislative provision, Article 40 of the Consolidated Law on Immigration (n 24) only provides for accommodation centres and access to social housing to long-term resident migrants who are temporarily unable to provide on their own for their basic living and subsistence needs. Furthermore, Article 18(1) of the regional law provides that all foreigners who are present in the region are entitled to the same healthcare services as Italian citizens.

56 Corte cost 22 ottobre 2010, n 299, concerning the Apulia Immigration Law (n 54); Corte cost 21 febbraio 2011, n 61, concerning the Campania Immigration Law (n 55).

57 Donatella Morana, *La Salute come Diritto Costituzionale* (Giappichelli 2013) 130. These decisions of the Constitutional Court have also received some criticism for having failed to respect state competence on immigration issues, as established by Article 117 of the Constitution (n 17). Scholars elaborated a distinction between 'immigration policies' and 'immigrant policies'. See Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Avebury 1990); Tiziana Caponio, 'Governo Locale e Immigrazione in Italia. Tra Welfare e Politiche di Sviluppo' (2004) 5 Le

This approach of universal solidarity is built upon two main normative bases: (1) the principle of non-discrimination, proclaimed by Article 3 of the Italian Constitution and Article 14 of the European Convention on Human Rights;[58] and (2) the principle of social solidarity, whose constitutional basis as a binding duty is to be found in Article 2 of the Italian Constitution. These are 'super-personal social rights',[59] which, according to the reasoning of the

istituzioni del federalismo 789, 805; Marco Benvenuti, 'Dieci Anni di Giurisprudenza Costituzionale in materia di Immigrazione e di Diritto di Asilo e Condizione Giuridica dei Cittadini di Stati Non Appartenenti all'Unione Europea' (2014) 3 Questione giustizia 82. The former, which fall within the exclusive jurisdiction of the state, embrace all the measures establishing the conditions for the legal entry and stay of foreigners in Italian territory, whereas the latter, over which regions have concurrent or even exclusive legislative competence, refer to issues such as social assistance, education, health, housing and public interventions to promote migrant integration. For relevant decisions of the Constitutional Court, see Corte cost 2011, n 61 (n 56); Corte cost 27 gennaio 2010, n 30; Corte cost 27 febbraio 2008, n 50. However, the Court has also established that public intervention in the field of migration cannot be limited to control of the entry and stay of foreigners, but that it also involves other fields, such as public assistance, education, healthcare or housing, where 'national and regional competences are intertwined, as established by the Constitution'. Corte cost 7 luglio 2005, n 300. In other words, asylum and migration are necessarily the subject of both central and regional intervention and the picture is more complicated than the strict distribution of powers provided by Article 117 of the Constitution (n 17). Furthermore, while the Constitutional Court traditionally displays centralising tendencies when resolving jurisdictional conflicts between the state and regions, when immigration issues are at stake, it leans in favour of the competence of regions. Some authors suggest a possible explanation for this trend, highlighting the correlation between Constitutional Court decisions and particularly restrictive policies on immigration adopted during the timeframes 2005-06 and 2010-11. See e.g. Benvenuti (n 57) 104-05.

[58] To this end, see ASGI (n 36). For relevant ECtHR case law cited in the ASGI report, see *Gaygusuz v Austria* (1996) 23 EHRR 364; *Niedzwiecki v Germany* (2006) 42 EHRR; *Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010) (finding that the objective of tackling the demographic decline in the national population does not constitute a reasonable basis for restricting social support to large families with Greek citizenship); *Dhabbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) (concerning an Italian social allowance for large families).

[59] Barbara Pezzini alks about *'diritti sociali personalissimi'*, such as where the hard core of the right to health care and the minors' rights are at stake. Barbara Pezzini,

Court, should not be conceptualised as a social right under Article 38 of the Constitution, but should rather be included among the provisions in Article 2 aimed at safeguarding persons' inviolable rights.

IV. Testing the Limits of Exclusion under the "Territorial Paradigm"

Through the case law illustrated thus far, the Constitutional Court has traced the ultimate boundaries of social rights that cannot be overruled by the legislator's discretionary power. This section will attempt to broaden the picture by further exploring the reasoning of the Italian Constitutional Court in respect of foreigners' social rights in cases involving provisions that are not meant to address primary needs or secure inviolable rights.

1. A Conditioned Form of Solidarity: Residence-Based Access to Social Rights

Except for the cases discussed above where a universal form of solidarity steps in to address severe or urgent needs, the Constitutional Court clearly maintains that the legislator can legitimately condition the entitlement of social rights on the fulfilment of specific requirements. The legislative framework on social protection measures offers a vast spectrum of such requirements, ranging from EU long-term residency status to mere presence in the territory.[60] In which instances can the legislator lawfully restrict access to social rights without being censured by the Constitutional Court? As will be illustrated below, the response offered by the constitutional case law is a 'gradation of legal protection'.[61]

'Una questione che interroga l'uguaglianza: i diritti sociali del noncittadino', in Associazione italiana dei costituzionalisti, *Lo statuto costituzionale del non cittadino. Atti del Convegno annuale dell'Associazione italiana dei costituzionalisti, Cagliari, 16-17 ottobre 2009* (Jovene 2010).

60 Cecilia Corsi, 'Stranieri, Diritti Sociali e Principio di Eguaglianza nella Giurisprudenza della Corte Costituzionale' (2014) Federalismi Focus Human Rights No 3/2014, 9-10, 28 <https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=27711&dpath=document&dfile=22102014151431.pdf> accessed 18 February 2022.

61 Romeo (n 34) 21.

Here, the case law seems to reflect a conditioned form of solidarity and it is possible to witness a decisive shift in the arguments. Indeed, since 2013, when the criterion of citizenship was declared unconstitutional on grounds of unreasonableness, a different approach has taken its place: the so-called 'territorial paradigm'.[62] According to this paradigm, legislative provisions differentiating access to social rights based on the "duration of stay" have been considered constitutionally legitimate on several occasions. In Decision No. 222/2013, concerning access to social measures beyond essential services, regions were allowed to favour foreigners who were long-term residents with prolonged residence in their territory in view of their 'contribution to the moral and material progress of the community'.[63] The Court concluded that it is not unreasonable to give priority to supporting families who have resided in the territory for a long time in order to promote the most 'active' and 'vital components of the community'.[64] Similarly, in Decision No. 141/2014, the Constitutional Court upheld Regional Law No. 141/2014 of Campania, which restricted childbirth allowances to foreigners who had resided in the regional territory for at least two years. The choice of making childbirth support conditional on 'a stable presence in the territory' passed the reasonableness test.[65]

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62 See Mario Savino, 'Lo Straniero nella Giurisprudenza Costituzionale: tra Cittadinanza e Territorialità' (2017) 1 Quaderni costituzionali 41. This shift was also aided by the fact that in 2013 the EU Commission launched an infringement procedure (No n 2013/4009) against the Italian government for non-compliance with the legal obligations stipulated by the Long-Term Residents Directive (n 36). Subsequently, legislative provisions attributing social rights only to Italian and EU citizens were changed accordingly to extend access to social rights to foreigners holding an EU long-term residence permit.

63 Corte cost 16 luglio 2013, n 222. The challenged law granted access to social measures (provision of rent allowances, financial support to family income and tax reduction through the so-called 'Carta famiglia', or family charter) only to foreigners who had resided in the regional territory for at least 2 years and in the national territory for at least 5 years. LR 30 novembre 2011, n 16, Disposizioni di modifica della normativa regionale in materia di accesso alle prestazioni sociali e di personale.

64 Corte cost 2013, n 222 (n 63).

65 Corte cost 28 maggio 2014, n 141.

In line with this trend, except where fundamental rights are at stake, the Court allows the national and regional legislator to select the beneficiaries of social measures based on their social embeddedness. Thus, the enjoyment of forms of social solidarity can be lawfully made subject to the demonstration of a strong relationship with the community. This criterion does not coincide with a mere legal presence in the territory, but rather requires a non-occasional, non-short term stay in the territory of the region,[66] 'participation in the political, economic and social organisation of the Republic',[67] a requirement which, according to the Court, is fulfilled through the demonstration of long-term residence.

However, the 'duration of stay' criterion has likewise encountered some limitations and adjustments. As explained above, differentiation introduced by national or regional laws can only be considered constitutionally legitimate as long as the legislative provision, and the balance among the competing interests underlying it, conform to principles of reasonableness and proportionality.[68] This reasoning led the Constitutional Court to declare the unconstitutionality of a regional legislative provision and a national law, each of which made access to housing benefits conditional on ten-year residency in the national territory.[69] The Court ruled that these provisions

66 See, among other decisions of the Constitutional Court, Corte cost 2008, n 306 (n 13); Corte cost 2010, n 187 (n 13).

67 Corte cost 2013, n 222 (n 63).

68 See, among others, Corte cost 2005, n 432 (n 13), requiring that, when the law introduces a differentiation between citizens and foreigners, there should not be an arbitrary or irrational 'normative reason'.

69 LR 7 giugno 2017, n 13, Modifiche alla legge regionale 29 giugno 2004, n 10 (Norme per l'assegnazione e la gestione del patrimonio di edilizia residenziale pubblica e modifiche alla legge regionale 12 marzo 1998, n 9 (Nuovo ordinamento degli enti operanti nel settore dell'edilizia pubblica e riordino delle attività di servizio all'edilizia residenziale ed ai lavori pubblici)) e alla legge regionale 3 dicembre 2007, n 38 (Organizzazione dell'intervento regionale nel settore abitativo); DL 24 giugno 2008, n 112, Disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione Tributaria, art 11(13), converted into L 6 agosto 2008, n 133, Conversione in legge, con modificazioni, del decreto-legge 25 giugno 2008, n. 112, recante disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione

violate European law, which puts foreigners holding an EU long-term residence permit on an equal footing with nationals in respect of the enjoyment of social rights,[70] and that they were unreasonable and disproportionate because there is no connection between a ten-year 'duration of stay' and 'access to a measure aimed at satisfying a primary housing need'.[71]

In other cases the Court has denied the possibility that cost-saving considerations could override the reasonableness principle.[72] However, in Decision No. 50/2019 the Court seemed to maintain the legitimacy of a link between the payment of taxes and access to social services, in line with some judgments of the ECtHR.[73] The case concerns access to a welfare benefit (the so-called *assegno sociale*), which Article 80(19) of Law No. 388/2000 restricts

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tributaria, under which foreigners who wished to access the national fund for housing rent allowances were required to certify ten-year residency in the national territory or five-year residency in the same regional territory.

70 Long-Term Residents Directive (n 36) art 11(f).

71 Corte cost 2018, n 106 (n 37); Corte cost 2018, n 166 (n 37).

72 See Corte cost 14 gennaio 2013, n 2, in which the Court specifies that seeking a balance between the broadest possible extension of social rights and the scarcity of financial resources could not take precedence over the reasonableness principle.

73 Valentina Zonca, *Cittadinanza Sociale e Diritto degli Stranieri. Profili Comparatistici* (Cedam 2016) 120. On this subject, see *Dhabbi* (n 58) para 52, where the Court maintained that, since the claimant had been paying contributions in the same way and on the same basis as EU workers, he consequently did not belong to the category of individuals who had failed to contribute to the funding of public services and about whom a State could have legitimate reasons for restricting recourse to expensive public services. In the same vein, see also *Ponomaryovi v Bulgaria* ECHR 2011-III 365, para 54, where the Court observes that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union [...] – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship'.

to foreigners with an EU long-term residence permit. The Court determined that this legal requirement was legitimate: given the scarcity of economic resources, when inviolable rights are not at stake, the legislator may legitimately introduce restrictive criteria or even exclude foreigners from the enjoyment of social services.

These measures of social protection become the instruments through which the legislator acknowledges and rewards the foreigner's participation in the life of the community over a certain period of time.[74] Following the Court's reasoning, unlike mere legal residence, the possession of an EU long-term residence permit may prove such participation. Indeed, the requirements for obtaining this specific status (holding of a regular permit to stay for a minimum of five years, possessing sufficient financial resources and passing an Italian language test) are such as to certify foreigners' social and legal integration into the national context. Therefore, making access to this welfare benefit subject to possession of an EU long-term residence permit is neither discriminatory nor unreasonable, since this social measure should be interpreted as a form of 'solidarity-based compensation' provided to persons over 65, after their retirement, 'for the contribution they have offered to the moral and material progress of the society.'[75] By rooting the territorial paradigm in the foreigner's economic contribution to the community, this judgment ties the conditional form of solidarity, tempered by the reasonableness principle, to a stronger commutative logic.

The above-described developments within constitutional case law show all the contradictions underlying the so-called territorial paradigm. In line with a broader trend, citizenship has been progressively substituted by long-term residence (so-called 'denizenship') as the main anchor for welfare entitlements.[76] Nonetheless, whereas in some cases (for instance, with EU long-term residency status) the links between access to social rights and the duration of stay (as a demonstration of *radicamento* (social embeddedness)) have ended up placing foreigners and citizens on equal footing, this criterion

74 Corte cost 2019, n 50 (n 34), para 7.

75 Ibid.

76 For more on the concept of denizenship, see Hammar (n 57).

has more often been invoked to further exclude foreigners from legal protection.

Indeed, based on the territorial paradigm, laws regulating access to social rights often require demonstration of *radicamento*, of social and economic integration, which can be substantiated only by what can be termed as a "qualified presence" in the territory. To this end, a foreigner's legal presence in the territory, even for a long time, is not enough. Nor is the possession of a permit to stay. In order to prove this "qualified presence" in the territory, the law requires foreigners to meet specific legal requirements, such as a continuous residence, or in the case of the EU long-term residence, the continuous possession, over time, of a short-term permit and a given income, among other things. However, the territorial paradigm, together with requirements of a "qualified presence", can hardly provide a reasonable or efficient indicator of whether a foreigner has formed a social bond with the host community, which is the rationale to which the Court often refers in its decisions. For instance, in a static and rigid immigration system like Italy's, where there is no possibility of regularising the condition of 'being undocumented', the legal system denies social rights to foreigners who may have arrived undocumented, but have since regularly resided in Italy for a long time, have kept working and have cultivated meaningful relationships with the community.[77] In addition to this, practical difficulties of obtaining a residence may also exclude foreigners with a regular permit to stay from access to welfare services.[78]

In this vein, some authors have aptly observed that policies affecting residence can be regarded as instruments that 'allow reallocating public resources unequally'.[79] Requirements such as long-term residency in the

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77 Locchi (n 28) 585.

78 For reporting on these difficulties, see UNHCR, Focus Group on Integration. Final Report (UNCHR 2017) 24-25. <https://www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/Focus-group-on-integration.pdf> accessed 19 February 2022.

79 Enrico Gargiulo, *L'inclusione esclusiva. Sociologia della cittadinanza sociale* (Franco Angeli 2008). See also Andrea Guazzarotti, 'Lo Straniero, i Diritti, l'Eguaglianza' [2009] (1) Questione Giustizia 87; Enrico Gargiulo, 'Le Politiche di Residenza in Italia: Inclusione ed Esclusione nelle Nuove Cittadinanze Locali', in Emanuele

regional or national territory or the possession of an EU long-term residence permit reflect the same logic: limiting the beneficiaries of the welfare system to those who are deemed 'more desirable' because they are less likely to weigh on national public resources.[80] Therefore, the shift toward the territorial paradigm, as conceptualised above, generates a multiplicity of 'small and exclusive' communities defined by a multiplicity of social statuses,[81] which is also the result of the (again global) tendency to decentralise the regulation and provision of social services.[82]

2. A Forward-Looking Non-Contractual Solidarity: Assessing the Boundaries of the Social Community

Like the citizenship paradigm, the territorial paradigm – as conceptualised by the Constitutional Court and the legislature, thus not coinciding with the mere presence of a person in a given territory[83] – cannot be considered an adequate foundation on which to build a system of social rights. Indeed, the reciprocal view of solidarity promoted by the Court risks triggering a 'resurgence of the rhetoric of contract',[84] which is exacerbated in times of economic crisis, which challenge solidarity. Besides its exclusionary consequences, residence-based access to social rights generates logical and legal short circuit.

The territorial paradigm creates a sort of legal presumption against the foreigner, who is considered outside the social community. A foreigner can

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Rossi, Francesca Biondi dal Monte and Massimiliano Vrenna (eds), *La Governance dell'Immigrazione. Diritti, Politiche e Competenze* (Il Mulino 2013).

80 Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza* (n 4).

81 Luca Montanari, 'La Giurisprudenza Costituzionale in materia di Diritti degli Stranieri' [2019] (2) Federalismi <https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=38274&dpath=document&dfile=25032019222142.pdf> accessed 19 February 2022.

82 Geddes (n 3).

83 On this different understanding of the territorial paradigm (called 'ethical territoriality'), see Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 Theoretical Inquiries in Law 389.

84 Nancy Fraser and Linda Gordon, 'Civil Citizenship Against Social Citizenship? On the Ideology of Contract-Versus-Charity' in Bart van Steenbergen (ed), *The Condition of Citizenship* (Sage 1994) 104.

only overcome this presumption and demonstrate his or her ability to contribute to the material and spiritual progress of the society by fulfilling a fixed list of legal requirements such as long-term residence (complemented by a regular residence permit), sufficient income, and/or the possession of a long-term residence permit. Only then can the foreigner be considered part of the social community and given access to social rights. However, a warped logic underlies this mechanism: the required elements are usually the final steps in a process of social inclusion, not the preconditions to undertake it.[85]

Thus, the contractual and contribution-based notion of solidarity underlying the territorial paradigm contradicts the very aim of social rights because it risks excluding from the community those potential members most in need of support. At the same time, it seems perfectly aligned with the logics surrounding migration control, where rights attribution (and social belonging) depends on a distinction between "wanted" and "unwanted" migrants. Similarly, the reasoning referring to *radicamento* is biased because it ties the attribution of social rights to the permanence of individuals in a given territory rather than to their necessities, giving unjustified preference to the 'sedentary indigent' over the 'mobile one'.[86]

There is also a legal contradiction. The Italian Constitution of 1948, with its list of fundamental rights, aims to place value on the individual within his or her whole network of social relationships. This was a revolutionary shift away from an old legal system that, drawing upon a logic of individualism,

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85 Foreigners are required somehow to provide "diabolical proof": they can officially access the community (and become entitled to social rights) only if and when they demonstrate that they possess requirements only obtainable when they are already part of the community.

86 ASGI (n 36) 23. The report observes that those more in need of support are more prone to move in search for better opportunities. Furthermore, the flexibility of the production process should also be taken into account. Indeed, corporate policies that rely on little production planning to easily and quickly respond to the evolution of market demands, along with state policies that encourage these trends in order to promote economic growth, exacerbate tendencies for the most vulnerable groups of migrants to be highly mobile. This evolving reality creates tension in the application of rigid existing legal categories and shows the difficulties of laws to capture and regulate dynamic and ever-changing phenomena.

countenanced only the hierarchical relationship between the authorities and the individual or private business agreements, neglecting important aspects of community life, which is imbued with the logic of 'the gift, the symbolic exchange, non-synallagmatic reciprocity'.[87] Residence-based access to social rights, as conceptualised above, endangers the solidarity enshrined in Article 2 of the Constitution, which puts forward a different idea of 'membership of the community' that transcends requirements of citizenship, legal status or prolonged residence.

On the basis of solidarity – on social ties and connections among persons who share the same territory and are bound by the same rights and duties – it is possible to advance an alternative approach to delineating the boundaries of 'social citizenship' and determine the attribution of social rights.[88] This conceptual shift is closely linked to a different understanding of the very concept of citizenship, which should be regarded not solely as a legal category – as a legal construction or legal status – but also as a process and 'a form of identification'.[89]

Some seeds that can blossom into new concepts of social belonging and solidarity-based access to social rights can be gathered from the case law of

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87 Felice Giuffrè, 'I Doveri di Solidarietà Sociale' in Renato Balduzzi and others (eds), *I Doveri Costituzionali e la Prospettiva del Giudice delle Leggi. Atti del Convegno Annuale del Gruppo di Pisa. Acqui Terme 9-10 giugno 2006* (Giappichelli 2007) 37.

88 In this respect, the concept of "border" shows its close relationship with the concept of citizenship and social belonging, being positioned 'at the core of the polis, not at its extremes'. Furthermore, 'Borders play an essential role within the process of citizenship construction (to be understood as a mix of social practices and subjective behaviours, not just as a formal concept) which is at the centre of the process of construction of the public sphere'. Monica Pasquino, 'Confine' in Caterina Botti (ed), *Le Etiche della Diversità Culturale* (Le lettere 2013) 247. See also Enrica Rigo, *Europa di Confine. Trasformazioni della Cittadinanza nell'Unione Allargata* (Booklet 2007).

89 Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza* (n 4) 282, citing Sandro Mezzadra, *Diritto di Fuga. Migrazioni, Cittadinanza, Globalizzazione* (Ombre Corte 2006) 78, which in turn cites Chantal Mouffe, 'Democratic Citizenship and the Political Community' in Chantal Mouffe (ed), *Dimension of Racial Democracy, Pluralism, Citizenship, Community* (Verso 1992). For critiques of the concept of 'citizenship' regarded solely as a legal category, see Locchi (n 28) 574; Clelia Bartoli, *Razzisti per Legge* (Laterza 2012).

the Constitutional Court. The first reference point is Decision No. 107/2018, in which Regional law No. 6/2017 of the Veneto Region was contested by the state before the Constitutional Court. The regional law provided for preferential admission to nursery school for children of parents who had resided or worked in Veneto for 15 years, even on a non-continuous basis. The Court highlighted the multiple functions of nursery schools, which not only serve the purpose of educating children, but also play a social role in supporting low-income parents and especially working mothers. Drawing upon these considerations, the Court determined that the requirement of long-term residence was constitutionally illegitimate, as it is inconsistent with the 'social vocation' of nursery schools, which target all children, regardless of their parents' duration of stay, and all families, regardless of their economic situation.[90]

The Veneto Region's defence objected that the provision gave priority to those who had contributed most to the progress of the local community. However, against this argument, the Court replied that it was unreasonable to apply this criterion to select the beneficiaries of social rights and social protection measures, since it would end up limiting the access of those who were most in need of support, thus undermining the principle of substantial equality and solidarity. Indeed, making access to social protection measures conditional on the duration of stay and the economic contributions (in particular tax payments) made to the community created an unreasonable risk of excluding, for instance, those who had already contributed in another region or could not make a material contribution because they were unemployed.[91]

This line of argumentation, by severing all ties between social benefits and *past* contribution to the community, paves the way for another possible interpretative approach – one which places value on the foreigner's *future* contribution. To put it another way, the social belonging of foreigners to the community – and, therefore, their access to social rights – should be assessed not according to requirements that lay emphasis on the past (such as duration of residence), but rather according to criteria that can be predictive of a stable future link with the community. Such criteria could include employment

[90] Corte cost 10 aprile 2018, n 107.

[91] Ibid para 3.3.

contracts, the number of children attending school, attendance of a language course or a training course, participation in social activities, membership in associations, and so on.[92]

Similar suggestions can also be derived from another recent judgment in which the Constitutional Court struck down Regional Law No. 16/2016 of Lombardy, which granted foreigners access to public housing only if they had been residing or employed in the region for at least 5 years.[93] Departing from its own earlier decisions,[94] the Court reasoned that long-term residence is a 'condition pertaining to the past', which cannot guarantee the future stability of the beneficiary. Rather, value should be attributed to factors that are indicative of a foreigner's wish to settle in a given community.[95] Furthermore, there is no reasonable connection between the demonstration of 'local roots' and the right to housing, which belongs to the 'essential requirements' whose fulfilment is necessary to ensure human dignity in both its individual and social expressions, as protected by the Constitution.[96]

Finally, another decision of the Constitutional Court points towards a possible redefinition of the concepts of citizenship and belonging. In Decision No. 119/2015, the Constitutional Court declared the unconstitutionality of Article 3 of Legislative Decree No. 77/2002, which establishes Italian citizenship as a requirement for entry into voluntary civil service. The Court stresses that 'the exclusion of foreigners from the

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92 See Biondi dal Monte, 'Radicamento Territoriale e Accesso dei Minori agli Asili Nido' (n 48). See also Corte cost 2013, n 222 (n 63) para 6, which acknowledges the right of protection due to any foreigner who has 'legitimately built a strong relationship with the community where s/he lives and belongs, having established a stable working, family and private life there' (author's translation).

93 Corte cost 28 gennaio 2020, n 44.

94 In particular, Corte cost 2008, n 32 (n 47).

95 Corte cost 2020, n 44 (n 93) para 3. Concerning this point, the decision mentions some data reported by ISTAT (National Institute of Statistics), according to which one-third of foreign families living in Italy cannot afford to buy a home, because they live below the poverty line. This inevitably increases mobility. Ibid para 2.

96 Ibid para 3. See also ibid para 3.1, where the Constitutional court points out that the requirement of prolonged residence can be an element to be assessed when creating a waiting list, but it cannot give rise to a blanket denial of access to housing. Indeed, this would run contrary to the social function of public housing.

possibility of entering voluntary civil service, preventing them from engaging in projects of social utility and, consequently, from serving the common good, unjustifiably limits the full development of the human person and integration into the host community'.[97] The decision also stresses the close relationship between rights and duties, both of which lend substance to a 'second citizenship' that extends beyond the boundaries of formal citizenship, embracing all those who live in and share a certain territory.[98] This second citizenship gives rise both to rights, such as the right to receive social assistance,[99] and to duties, such as the duties of solidarity.[100]

V. Concluding Remarks

As illustrated above, the Italian Constitutional Court has proven to be crucial in securing foreigners' social rights against restrictive legal provisions approved by the regional or national legislator. Its decisions have mostly been driven by the principles of non-discrimination and solidarity, which were given priority over other considerations such as budget constraints and political choices tied to the allocation of economic resources. However, in performing this 'counter-majoritarian role',[101] the Court has also exposed itself to criticism. Indeed, its reasoning does not always appear straightforward and coherent, especially when social rights do not serve "primary needs" or are not related to "fundamental inviolable rights". Outside of this realm, there is a grey area where the Court still deems the territorial paradigm a lawful criterion for selecting the beneficiaries of social measures. Hence, in some cases, foreigners' access to social rights remains anchored to requirements such EU long-term residency status.

Difficulties in determining foreigners' access to social rights in a permanent and clear-cut way can be attributed to the jurisprudential case-by-case approach, as well as the main argumentative pattern exhibited by the Court

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97 Corte cost 13 maggio 2015, n 119, para 2.4.1.

98 Corte cost 10 maggio 1999, n 172.

99 Constitution, art 38 (n 17).

100 Ibid art 2; Giuffrè (n 87) 25. The correspondence between rights and duties is also enshrined in Article 2 of the Consolidated Law on Immigration (n 24), entitled 'Rights and Duties of Foreigners'.

101 Bickel (n 11).

– namely, the reasonableness test, with its intrinsically flexible and dynamic character. Thus, while there is no doubt as to the Court's crucial role in securing foreigners' access to social rights, in all but a few decisions it has failed to offer the conceptual and interpretative tools that would enable us to identify once and for all who can benefit from which social rights. This makes it difficult to extract a coherent, definitive and all-encompassing picture from the jurisprudence, which has sometimes given rise to fragmented, sector-specific protection.

The complexity of this framework has been further exacerbated by some decisions of the Constitutional Court concerning jurisdictional disputes between the state and the regions. Here, regional provisions aimed at enhancing foreigners' social rights have been questioned by the state on the grounds of a lack of regional competence to regulate the matter. As discussed above, the Court has often ruled in favour of the regions, considering their regulations on foreigners' social rights to be constitutionally legitimate. However, in doing so, it has produced different standards of protection for third-country nationals across the country.[102]

These loopholes notwithstanding, the contribution of the Court in defining and redefining the community and the role of the foreigner within it should not be underestimated. For one thing, when looking at this fragmented picture, it is also important to consider the specific *constitutional* role of the Court and its limited scope. Indeed, as highlighted by one constitutional judge, the role performed by the Court on the question of foreigners' social

[102] Carmela Salazar, 'Leggi regionali sui 'diritti degli immigrati', Corte costituzionale e 'vertigine della lista': considerazioni su alcune recenti questioni di costituzionalità proposte dal Governo in via principale' in Silvio Gambino and Guerino D'Ignazio (eds), *Immigrazione e diritti fondamentali* (Giuffrè 2010); Nicola Delvino and Sarah Spencer, *Irregular Migrants in Italy: Law and Policy on Entitlements to Services* (ESRC Centre on Migration, Policy and Society (COMPAS) University of Oxford 2014) <https://www.compas.ox.ac.uk/wp-content/uploads/PR-2014-Irregular_Migrants_Italy.pdf> accessed 19 February 2022.

rights is to 'add pieces to a mosaic which cannot – and maybe must not – be completed by the Court on its own'.[103]

Furthermore, some of the Courts' decisions seem to offer an alternative logic to the citizenship or territorial paradigms. First, by embracing a forward-looking perspective, the Court's reasoning rejects the exclusionary approach of a welfare system that espouses the logic of migration control. Second, the decisions of the Constitutional Court also contribute to the debate on the exchange-versus-charity dichotomy that dominates current political choices on the access to social rights.[104] Indeed, these judgments seem to recognise the complexities of human relations, characterised by a dense interweaving of social ties. In this context, the participation of foreigners cannot be measured according to their status or, under a contractual-like logic, to the material contribution they make. In contrast to this logic, the "second citizenship" paradigm promoted by the Constitutional Court presupposes a coexistence between rights and duties as two sides of the same coin, which does not allow for the former to be subordinated to the latter.[105] With the focus on participation, this reasoning acknowledges the entire range of contributions a foreigner may offer to the community, including future and non-material contributions.[106]

The urgent challenge facing modern democracies is to identify strategies, interpretative tools and a strong normative basis for linking social

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103 Silvana Sciarra, '"Migranti" e "Persone" al centro di alcune Pronunce della Corte Costituzionale sull'Accesso alle Prestazioni Sociali' (Consiglio di Stato, Rome, 26 May 2017) <https://www.cortecostituzionale.it/documenti/interventi_presidente/Sciarra%20CdS%2026%20maggio%202017.pdf> accessed 4 June 2021. Indeed, after a long constitutional dispute, which required seven decisions striking down the same legislative provision, the Court asked the legislator to review the legislation in an organic and coherent fashion in order to prevent multiple declarations of unconstitutionality from undermining the principle of substantive equality. Corte cost 2015, n 230 (n 13).

104 Fraser and Gordon (n 84).

105 Erik Longo, 'Le relazioni come fattore costitutivo dei diritti sociali' [2014] (1) Diritto e società 71; Maurizio Fioravanti, *Art. 2 Costituzione Italiana* (Carocci 2017) 6-7.

106 Following the reasoning of the Constitutional Court, giving birth can be considered a contribution to the community.

participation and entitlement to civil, social and political rights based on a language of 'solidarity, non-contractual reciprocity and interdependence'.[107] The Italian Constitutional Court seems to offer valuable suggestions on how to address this complex puzzle and constitutional conundrum – a conundrum which, needless to say, also concerns borders themselves.[108]

[107] Fraser and Gordon (n 84) 105. See also Seyla Benhabib, *I Diritti degli Altri. Stranieri, Residenti, Cittadini* (Raffaello Cortina 2006) 38.

[108] On the strict link between the rights attributed to migrants already in the country and those who attempt to enter it, see the brilliant observations of Bosniak (n 83) which show the illusion of the distinction between 'border and interior' that dominates the liberal debate on immigration law.

THE UNDERMINED ROLE OF (DOMESTIC) CASE LAW IN SHAPING THE PRACTICE OF ADMITTING ASYLUM SEEKERS IN POLAND

Monika Szulecka*

The aim of this paper is to explain the observably weak role of domestic case law in shaping access to the asylum procedure at Poland's eastern border. It also addresses the lack of influence of the European Court of Human Rights in safeguarding forced migrants' right to apply for asylum in Poland. The assessment of how the case law impacts the complex reality of asylum seekers trying to enter Polish territory multiple times and apply for international protection is based on analyses of both legal sources (court rulings and relevant legislation) and sociological material (experts' opinions and statistical data). The conclusions drawn from this study indicate that the administrative body responsible for border checks and receiving asylum applications does not comply with domestic and international case law. Moreover, this takes place with governmental support and acceptance. Non-compliance stems from anti-refugee sentiments that spread through public debate in a post-2015 migratory context in Poland, portraying forced migrants as a threat to security and social cohesion. This coincided with the progressive crisis of the rule of law in Poland, which has affected the way administrative bodies supported by the government respond to and interpret administrative judgments.

Keywords: Poland, access to the asylum procedure, refusal of entry, administrative jurisprudence, human rights

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I. INTRODUCTION

In recent years, public discourse in Poland has contributed to perceptions of forced migrants as 'unwanted' and irregular, challenging public order both in Poland and in other countries of the European Union (EU). In particular, the conservative government that was elected to power in Poland in late 2015 has depicted the vast majority of asylum seekers not only as abusers of the asylum system, but also as a threat to security. Whereas the former narrative was not novel,[1] the latter was born from the refugee crisis of 2015-16, which the ruling politicians linked to increased terrorist threats. As well as a menace to security, asylum seekers were seen as a potential burden to social cohesion due to their 'cultural' or – more specifically – 'religious' distance from the host society.[2] Such perceptions became common in public debate despite the

[1] Already in 2015, abuses of the asylum procedure were indicated by the public administration responsible for migration control as one of the main forms of irregular migration in the Polish context. See Monika Szulecka, 'Przejawy nielegalnej migracji w Polsce' [2016] Archiwum Kryminologii 191, 228-45.

[2] Witold Klaus, 'Security First: The New Right-Wing Government in Poland and its Policy towards Immigrants and Refugees' (2017) 15 Surveillance & Society 523; Piotr Cap, '"We Don't Want Any Immigrants or Terrorists Here": The Linguistic Manufacturing of Xenophobia in the Post-2015 Poland' (2018) 29 Discourse & Society 380; Elżbieta M Goździak and Péter Marton, 'Where the Wild Things Are: Fear of Islam and the Anti-Refugee Rhetoric in Hungary and in Poland' (2018) 7 Central and Eastern European Migration Review 125.

fact that asylum applicants and recognised refugees constituted a minority of immigrants to Poland.[3]

Governmental resistance towards admitting asylum seekers to Poland has been expressed, among other methods, by supporting administrative practices denying access to the asylum procedure at border checkpoints, especially since mid-2015.[4] In formal terms, foreigners presenting at the border were refused entry due to the lack of required documents, such as visas. However, the fact that such refusals of entry were issued and executed immediately by the Border Guard towards persons declaring their will to apply for international protection raised doubts regarding the legality of this practice. This, in turn, led to a number of interventions by human rights defenders, including soft measures such as campaigns to raise awareness, monitoring visits, and formal letters from the Commissioner for Human Rights to the relevant ministry. These initiatives, however, did not result in any changes.

In this circumstance, human rights campaigners turned to 'hard' measures, i.e. bringing cases before the courts on behalf of individuals denied access to the asylum procedure. They expected that court verdicts would provide a conclusive interpretation of the law and international commitments. This, in turn, would offer forced migrants effective access to the asylum procedure at the border, regardless of whether or not they held documents allowing them to cross the border. This would also guarantee respect for the non-refoulement principle. When assessing administrative conduct at the border checkpoints, the domestic courts indicated a need to change the way the Border Guard dealt with potential asylum applicants. However, the practice

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3 See s I for more statistical context. For more on common beliefs, see Bartłomiej Walczak and Nikolaos Lampas, 'Beliefs on Refugees as a Terrorist Threat. The Social Determinants of Refugee-Related Stereotypes' (2020) 46(2) Studia Migracyjne - Przegląd Polonijny 53.

4 Witold Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland' (2017) 15 Rocznik Instytutu Europy Środkowo-Wschodniej 11; Marta Szczepanik, 'Border Politics and Practices of Resistance on the Eastern Side of "Fortress Europe": The Case of Chechen Asylum Seekers at the Belarusian–Polish Border' (2018) 7 Central and Eastern European Migration Review 69.

of repeated refusal to formally receive asylum application and admit asylum seekers into Poland continued.

The issue was also brought before judges in international courts, who issued rulings regarding rights of forced migrants who had been denied entry to EU territories to apply for asylum (often with multiple attempts).[5] However, these rulings did not seem to influence the administrative conduct at the border checkpoints that had been contested since at least 2016.[6] They also appeared meaningless to the Border Guard and the Polish authorities supervising, who from August 2021 onwards started reporting an increased number of migrants (including asylum seekers) from the Middle East attempting to cross unlawfully the border between Belarus and Poland.[7]

The above-mentioned facts raise the question of why case law has had a limited impact on governance of forced migration in the context of border control in Poland. Bringing this question to the forefront of the analysis, the objective of this article is to explain the allegedly weak role of the domestic

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5 In particular, *MA and Others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018), *MK and Others v Poland* App nos 40503/17, 42902/17, 43643/17 (ECtHR, 23 July 2020).

6 Jacek Białas, Marta Górczyńska and Daniel Witko, *Access to Asylum Procedure at Poland's External Borders. Current Situation and Challenges for the Future* (Helsinki Foundation for Human Rights 2019) <https://www.hfhr.pl/wp-content/uploads/2019/06/0207_report-HFHR-en.pdf> accessed 6 July 2020; Commissioner for Human Rights, 'Input of the Commissioner for Human Rights of the Republic of Poland for the Special Rapporteur's on the Human Rights of Migrants Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (2021) <https://bip.brpo.gov.pl/sites/default/files/Input_of_the_CHR_for_the_Special_Rapporteur_28.01.2021.pdf> accessed 6 July 2021.

7 Witold Klaus (ed), *Humanitarian Crisis at the Polish-Belarusian Border. Report by Grupa Granica* (Grupa Granica 2021) <https://grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf> accessed 8 February 2022. The analysis on which this article is based was completed in November 2021, before the Russian invasion of Ukraine in February 2022 that immediately resulted in the arrival of hundreds of thousands of asylum seekers from Ukraine, whose entrance to Poland through the existing border crossing points was facilitated by Polish authorities. Therefore, the arguments presented in this article do not apply to border control practices at the border with Ukraine from 24 February 2022 onwards.

courts in shaping the daily administrative practices involving asylum seekers. It also aims to discuss the unfulfilled expectations of human rights campaigners around legal intervention before international bodies, in particular the European Court of Human Rights (ECtHR). The most probable explanation for the neglect of case law pertains to the crisis of the rule of law[8] combined with the spread of anti-immigrant and anti-refugee sentiments in Poland, which has been encouraged by the government's portrayal of asylum seekers first and foremost as a threat to social cohesion and security. These processes began in late 2015, when a new right-wing government came to power and enacted policies aimed at reforming various public spheres, including migration and asylum policies and the system of justice.

In a nutshell, the main claim of this article is that, if the authorities see forced migrants only as a burden, then we can expect the government to endorse and even encourage the questionably legal practices performed by front-line officers to prevent the arrival of forced migrants. Moreover, even if such practices are determined to be unlawful by the courts, administrative bodies may downplay such verdicts and perceive them as applying to incidents rather than broader practices. Such a scenario becomes more probable in the context of persistent threats to the rule of law, which undermine the role of courts and the hierarchy of law.

This article analyses both legal and sociological data to investigate the impact of court decisions on the state's practices in dealing with forced migrants. The legal data referred to in this article consists of selected provisions of the two main acts on which migration governance in Poland is based: the Law on Foreigners of 2013 (the 'Law on Foreigners')[9] and the Law on Granting Protection to Foreigners on the Territory of Poland of 2003 (the 'Law on

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8 See 'Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control' (European Commission, 3 April 2019) <https://ec.europa.eu/commission/presscorner/detail/pt/IP_19_1957> accessed 12 November 2020.

9 Ustawa z dnia 12 grudnia 2013 r o cudzoziemcach (tj DzU z 2021 r poz 2354) [Law on Foreigners].

Protection').[10] Other legal sources analysed here include two types of court verdicts. The first are crucial cases adjudicated by the ECtHR and directly related to the situation of asylum seekers 'pushed back' at the eastern border of Poland. The second are administrative court verdicts concerning appealed decisions of refusal of entry issued to potential asylum applicants. The database of domestic rulings includes 39 cases concluded by the first-instance court and 28 cases adjudicated by the second-instance court, in each case issued between January 2015 and November 2020.[11]

The analysis in this article also relies on conclusions from a sociological study of forced migration governance. These consist of in-depth interviews conducted between November 2018 and February 2019 with the following migration experts: three employees of public institutions dealing with migration governance; four representatives of social organisations providing legal advice to forced migrants; and 18 participants of a group discussion focused on the institutional aspects of border management.[12] This article also refers to official statistics produced by Polish administration and relevant

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[10] Ustawa z dnia 13 czerwca 2003 r o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (tj DzU z 2021 r poz 1108) [Law on Protection].

[11] The verdicts come from the official database of administrative courts decisions. 'Centralna Baza Orzeczeń Sądów Administracyjnych' (Naczelny Sąd Administracyjny) <http://orzeczenia.nsa.gov.pl/cbo/query> accessed 4 December 2020. I selected them through the search engine available on the website of the database, using 'Border Guard' and 'refusal of entry' as search terms.

[12] The expert opinions referred to in this article were collected as part of the international project '*RESPOND – Multilevel Governance of Migration and Beyond*'. This project received funding from the European Research Council (ERC) under the EU's Horizon 2020 research and innovation programme (grant agreement No 770564). For more information about the project, see 'Respond in a Nutshell' (Respond Migration) <https://www.respondmigration.com/> accessed 7 July 2020. I participated in conducting these interviews as a team member of the Centre of Migration Research, University of Warsaw – the Polish partner within the project. Participants in the group discussion included representatives of the Office of the Commissioner for Human Rights, the Office for Foreigners, the Border Guard, governmental and local institutions involved in integration programmes, NGOs and international organisations, local authorities, and academia.

reports published by non-governmental organisations (NGOs) or public institutions.

This article uses an interdisciplinary approach to contribute to the existing literature on forced migrants' access to asylum procedures in the EU and offer an in-depth analysis of the tensions between Polish authorities and human rights campaigners over the 'closed doors' approach towards asylum seekers at the eastern border, paying special attention to the role of courts in this respect.[13] Denial of access to the asylum procedure in Poland has already been documented by NGOs involved in supporting migrants.[14] It has also been referred to in a number of academic works within broader studies devoted to asylum policy or the post-2015 approach towards (forced) migrants approaching Poland.[15] Simultaneously, rulings on appeal from

[13] Significant contributions to the existing literature include Magdalena Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality' (2015) 21 Social Identities 395; Goździak and Marton (n 2); Sergio Carrera and Marco Stefan, *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020).

[14] Aleksandra Chrzanowska and others, 'At the Border. Report on Monitoring of Access to the Procedure for Granting International Protection at Border Crossings in Terespol, Medyka, and Warszawa-Okęcie Airport' (2016) Association for Legal Intervention Analyses, Reports, Evaluations No 2/2016 <https://interwencjaprawna.pl/wp-content/uploads/2020/04/at-the-border.pdf> accessed 11 February 2022; Marta Górczyńska and Marta Szczepanik, 'A Road to Nowhere. The Account of a Monitoring Visit at the Brześć-Terespol Border Crossing between Poland and Belarus' (Helsińska Fundacja Praw Człowieka 2016); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6); 'Overview of the Situation with Transit Refugees in Brest (September – December 2018)' (Human Constanta, 26 February 2019) <https://humanconstanta.org/wp-content/uploads/2019/02/Overview-of-the-situation-with-%E2%80%9Ctransit-refugees%E2%80%9D-sep-dec.pdf> accessed 6 July 2020.

[15] See e.g. Klaus, 'Closing Gates to Refugees' (n 4); Szczepanik, 'Border Politics' (n 4); Karolina Follis, 'Rejecting Refugees in Illiberal Poland: The Response from Civil Society' (2019) 15 Journal of Civil Society 307; Sławomir Łodziński, 'Uchodźcy jako „podejrzana społeczność" (Suspect Community)' (2019) 1(10) Studia Socjologiczno-Polityczne. Seria Nowa 31; Marcin Górski, 'Granica praw człowieka. Czy Polska dopuszcza się strukturalnego naruszenia EKPC w sprawach azylowych?' (2021) 47(2) Studia Migracyjne – Przegląd Polonijny 41.

refusals of entry have become topics of legal commentaries interpreting the courts' assessment.[16] Combining legal, political, and sociological perspectives, this article analyses the impact of case law on the phenomenon of 'pushbacks', which have become an integral feature of forced migration governance since late 2015 in Poland.

This analysis can be also seen as an introduction to future studies focused on the Polish approach towards migrants appearing at the eastern border in the summer and autumn of 2021. During that time, 'pushbacks' became common practice with respect to foreigners crossing (or attempting to cross) the border illegally, regardless of their humanitarian needs and declarations about seeking asylum. They also became an element of official policy, based on newly enacted provisions,[17] amid numerous concerns about their relation (or non-compliance) with international law and human rights standards.[18] The conclusions presented in this article seem the inevitable starting point for analysis of Poland's policy towards forced migrants in 2021 and onwards.

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16 E.g. Wojciech Chróścielewski, Roman Hauser and Jacek Chlebny, 'Realizacja prawa do wszczęcia postępowania w sprawie o udzielenie ochrony międzynarodowej podczas przekraczania granicy' in Jerzy Korczak and Krzysztof Sobieralski (eds), *Jednostka wobec władczej ingerencji organów administracji publicznej. Księga Jubileuszowa dedykowana Profesor Barbarze Adamiak* (Presscom 2019); Paweł Dąbrowski, 'Niedopuszczalność odmowy wjazdu cudzoziemca na terytorium RP bez wyjaśnienia, czy cudzoziemiec deklaruje wolę ubiegania się o ochronę międzynarodową. Glosa do wyroku NSA z dnia 20 września 2018 r., II OSK 1025/18' (2019) 3 Orzecznictwo Sądów Polskich 125; Jacek Chlebny, 'Przekroczenie granicy przez cudzoziemca zamierzającego złożyć wniosek o udzielenie ochrony międzynarodowej. Glosa do wyroku ETPC z 23 Lipca 2020 r., sprawy połączone 40503/17, 42902/17 i 43643/17' (2020) 12 Europejski Przegląd Sądowy 47; Jacek Chlebny, 'Rozdział 2. Postępowanie w sprawach udzielania ochrony międzynarodowej oraz pozbawiania statusu uchodźcy lub ochrony uzupełniającej' in Jacek Chlebny (ed), *Prawo o cudzoziemcach. Komentarz* (Wydawnictwo CH Beck 2020).

17 Ustawa z dnia 14 października 2021 r o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw (Dz U poz 1918); Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 r zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych (Dz U poz 1536).

18 See e.g. Grażyna Baranowska, 'The Deadly Woods' (Verfassungsblog, 29 October 2021) <https://verfassungsblog.de/the-deadly-woods/> accessed 29 October 2021.

In order to develop its main claim, this article is structured into five parts. The first part reflects on Poland's general posture with respect to asylum seekers, weighed against other immigration-related phenomena. The second part describes the Border Guard's practices of restricting access to the asylum procedure and relates it to the competence of this public institution within the migration governance framework. The third part analyses the interventions by human rights campaigners that preceded judicial litigation, as well as expectations as to the outcome of litigation within the context of the rule of law crisis. The fourth part devotes attention to domestic court rulings on refusals of entry to asylum seekers. This part is followed by reflections concerning the impact of ECtHR decisions on administrative practices involving asylum seekers at the eastern border. The last two sections and the conclusion address the question of whether and how the domestic courts and the ECtHR have influenced administrative conduct at border checkpoints and, in consequence, access to the asylum procedure.

II. Poland's Approach Towards Admitting Asylum Seekers

In terms of movements into and within the EU, the territory of Poland constitutes a source, a destination, and a transit country. Since 2015, however, its role as a host for immigrants and asylum seekers has drawn the attention of both Polish society and its government. In a relatively short period, Poland has become a leader in admitting migrant workers.[19] At the same time, though, it has been branded as a country that refuses to accept forced migrants. Poland did not directly experience the intensified inflow of asylum seekers during the refugee crisis of 2015-16 because the country was not situated along one of the main routes used by forced migrants from the Middle East and Africa to reach Europe. However, debates on international and state levels around a possible response to the migration/refugee crisis contributed to significant changes in Poland's approach towards admitting foreign nationals. According to declarations from the then new government that assumed political power at the end of 2015, the preferred source of

[19] OECD, *International Migration Outlook 2020* (OECD Publishing 2020).

immigration to Poland would be 'culturally close' Eastern Europe, as well as regions with a Polish diaspora and ethnic Poles.[20]

In opposition to the openness towards economic migrants from Eastern Europe, asylum seekers – especially those associated with Muslim areas – were treated as a potential burden for the Polish state, among other reasons, due to their 'cultural distance'[21] from Polish society.[22] One of the strategies deployed to prevent their arrival in Poland were repeated refusals of entry issued at the eastern border to persons declaring their intention to apply for asylum. The very low rate of positive decisions in asylum procedures implies that this is another strategy employed by the authorities.[23]

The rate of positive decisions in the asylum procedures (concerning 7,700 applicants) issued by Polish authorities in 2021 amounted to 46%, which was three times higher than in previous years. Such a high recognition rate of asylum applications was linked by the authorities with a change in the demographics of asylum applicants in 2021.[24] For the previous two decades,

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20 See e.g. Sławomir Łodziński and Marek Szonert, '„Niepolityczna polityka"? Kształtowanie się polityki migracyjnej w Polsce w latach 1989-2016' (2017) 43 Studia Migracyjne - Przegląd Polonijny 39, 6; Kancelaria Prezesa Rady Ministrów, 'Strategia na rzecz Odpowiedzialnego Rozwoju' (2017) 150–151 <https://www.mr.gov.pl/media/36848/SOR_2017_maly_internet_03_2017_aa.pdf> accessed 20 May 2017; Ministerstwo Infrastruktury i Rozwoju, 'Nowe priorytety rządowej polityki migracyjnej' (29 March 2018) <https://www.miir.gov.pl/strony/aktualnosci/nowe-priorytety-rzadowej-polityki-migracyjnej/> accessed 7 January 2019; 5; Joanna Książek, 'Wspólnota losu czy wspólnota tożsamości? Uchodźcy kontra repatrianci' (2019) 45 Studia Migracyjne - Przegląd Polonijny 237, 246–47.

21 Cultural distance refers mostly to the religious identity of the newcomers. Especially since 2015, one can notice the growth of perceived threat linked to followers of Islam coming to Poland, with their norms conflicting with the Christian ones dominant in Poland. See e.g. Katarzyna Górak-Sosnowska, 'Islamophobia without Muslims? The Case of Poland' (2016) 5 Journal of Muslims in Europe 190.

22 See e.g. Klaus, 'Security First' (n 2).

23 Witold Klaus, 'Between Closing Borders to Refugees and Welcoming Ukrainian Workers: Polish Migration Law at the Crossroads' in Elżbieta M Goździak, Izabela Main and Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (1st edn, Routledge 2020).

24 Urząd do Spraw Cudzoziemców, 'Napływ cudzoziemców do Polski w latach 2014-2021 (stan na 1 stycznia 2022 r)' (unpublished report disseminated via e-mail

the majority of asylum seekers coming to Poland or trespassing on its territory had originated from the Caucasus region, possessed Russian citizenship, and declared Chechen nationality. Between 2007 and 2018, only 6% per cent of asylum (re)applications resulted in either refugee status or subsidiary protection, while 80% of asylum applicants had their asylum procedures discontinued, usually due to their alleged absence from the territory of Poland.[25]

In 2015, the year that brought a significant change in the public discourse about asylum and migration, there were 12,325 asylum applicants registered in Poland. Despite political concerns about a growing number of asylum seekers reaching Poland or an uncontrolled influx of irregular migrants due to the situation of other EU countries,[26] the number of asylum claims submitted in Poland did not increase. In 2016 there were 12,319 asylum applicants. While the trend changed in 2017, it did so in a direction that did not reflect the expected 'surge'. Rather, the number of people requesting asylum that year (5,078) was less than 50% of the total in each of the two previous years. Over the following years, it decreased further – to 4,135 in 2018 and 4,096 in 2019. The number dropped significantly in 2020, to 2,803 persons, though the statistics for that year must be considered with caution due to the various travel restrictions linked to the pandemic, which also affected the possibility of crossing the border. Indeed, data from 2021 makes 2020 look like an aberration: last year, the number of asylum applicants registered in Poland reached 7,700.[27]

For about two decades, the main entry point for asylum seekers in Poland (mostly Chechens) was the railway border checkpoint in Brest-Terespol, on the border with Belarus.[28] Since 2015, the role played by this outpost has been

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within the Migration Analytical Centre coordinated by the Office for Foreigners, 4 February 2022).

25 'Statystyki' (Urząd do Spraw Cudzoziemców) <https://www.gov.pl/web/udsc/statystyki> accessed 28 February 2022.

26 See e.g. Patrycja Sasnal (ed), *Niekontrolowane migracje do Unii Europejskiej – Implikacje dla Polski* (Polski Instytut Spraw Międzynarodowych 2015).

27 'Statystyki' (n 25).

28 This can be seen in the statistics of the Border Guard and the Office for Foreigners, as well as in the majority of reports focused on admitting asylum seekers to Poland. See e.g. Norbert Rafalik, 'Cudzoziemcy ubiegający się o

significantly reduced due to the administrative practices applied towards asylum seekers there, more recently coupled with border crossing restrictions imposed in response to the Covid-19 pandemic. Despite these practices and restrictions, Belarusian citizens seeking asylum enjoyed a more welcoming approach than citizens of other countries when they came to checkpoints on the border with Belarus.[29]

The increased visibility of Ukrainians among asylum applicants since 2014, as a consequence of the military conflict with Russia affecting the eastern part of Ukraine, meant the emergence of 'new' entry points for asylum seekers into Poland along the border with Ukraine, mainly the border checkpoint in Medyka-Shegynie. The role of international airports, especially the one in Warsaw, as entry points for asylum applicants became crucial only in summer 2021 due to evacuation of Afghan nationals from their home country. With the exception of Ukrainian and Belarussian citizens, the possibility for asylum seekers to apply for international protection at land border checkpoints remains extremely limited. This is reflected by the marked decrease in the number of asylum applicants observed in Poland between 2016 and 2020.

This decrease does not mean that the situation in the home countries of the asylum applicants has improved.[30] Instead, it stemmed to a large extent from the practice of refusing entry to potential asylum applicants at the eastern border. In 2015, 53,146 decisions refusing entry were issued, 35.5% of which concerned Russian citizens. In 2016, this percentage reached 64% and a total of 118,060 migrants were denied entry. That year, the vast majority (74,061 out of 75,886) of decisions refusing entry issued to citizens of Russia (the most common citizenship of asylum applicants in Poland) concerned the border

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nadanie statusu uchodźcy w Polsce – teoria a rzeczywistość (praktyka) (stan prawny na dzień 31 grudnia 2011 r)' (2012) University of Warsaw Centre of Migration Research Working Paper 55/113, 14, 21 <http://www.migracje.uw.edu.pl/wp-content/uploads/2016/10/WP_55_113__2.pdf> accessed 27 July 2020; Szczepanik, 'Border Politics' (n 4) 77.

29 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19' (2021) 10 Social Sciences 435.

30 See e.g. Marta Szczepanik, *Republika strachu. Prawa człowieka we współczesnej Czeczenii* (Helsińska Fundacja Praw Człowieka 2019).

checkpoint in Terespol.[31] Such statistics are not surprising in light of the complaints from asylum seekers, received and reported by human rights campaigners in Poland and Belarus, indicating multiple failed attempts to exercise their right to seek asylum.[32]

Indeed, 2016 became a symbolic year for the initiation of a deterrence policy towards asylum seekers. Denial of access to the territory was presented by the authorities as a necessary step to prevent abuses of the asylum procedure and block an emerging route of irregular migration to the EU that could be used for terrorist purposes.[33] The state's resistance towards asylum seekers was also reflected in the Polish position on the influx of asylum applicants to southern EU countries in 2015 and the challenges of responding to high migration pressure there. For reasons of public order and security, the Polish government declined to participate in the emergency relocation scheme established in 2015.[34]

Poland also failed to fulfil binding obligations under the EU Council Decisions establishing provisional measures regarding international protection for the benefit of Italy and Greece.[35] This failure led the European

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31 'Statystyki SG' (Komenda Główna Straży Granicznej) <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> accessed 15 September 2020.

32 Some individuals were barred from entering Poland and submitting an asylum application as many as 20-40 times. 'Overview of the Situation with Transit Refugees in Brest (September – December 2018)' (n 14); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6).

33 'Czeczeni koczowali na granicy. Szef MSWiA: Rząd PiS nie narazi Polski na zagrożenie terrorystyczne' (TVN24.pl, 31 August 2016) <https://tvn24.pl/polska/czeczeni-koczowali-na-granicy-szef-mswia-rzad-pis-nie-narazi-polski-na-zagrozenie-terrorystyczne-ra672450> accessed 23 July 2019.

34 'Komunikat Centrum Informacyjnego Rządu w związku z wyrokiem TSUE w sprawie relokacji uchodźców' (Kancelaria Prezesa Rady Ministrów, 2 April 2020) <https://www.gov.pl/web/premier/komunikat-centrum-informacyjnego-rzadu-w-zwiazku-z-wyrokiem-tsue-w-sprawie-relokacji-uchodzcow> accessed 27 June 2021.

35 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (2015) OJ L 239; Council Decision (EU) 2015/1601 of 22 September 2015

Commission to start infringement procedures against Poland. Ultimately, in April 2020, Poland and two other Central Eastern European (CEE) states, Czechia and Hungary, were found to have infringed EU law due to failure to relocate asylum seekers from the southern part of the EU.[36] Since the Court of Justice of the EU (CJEU) judgment was delivered more than two years after the expiry of the Relocation Decisions, the Polish government published a statement pointing to the judgment's lack of practical significance. Additionally, the government pointed to the role that Poland and the other two CEE countries played in changing the EU's approach towards migratory pressures and asylum seekers, i.e. in convincing other EU countries that mandatory relocation was not a solution. The statement further identified inconsistent treatment of different EU states – whereas most countries did not comply with their obligations under the relocation mechanism, only three were eventually subjects of judgment by the CJEU.[37]

The summer and autumn of 2021 brought more evidence of the state's resistance towards asylum seekers. In response to increased migration pressure at the border with Belarus, the government proposed and was able to pass provisions legalising 'pushbacks' of asylum seekers detected immediately after unauthorised border crossings.[38] The practice of 'pushbacks' to Belarus was presented by the authorities as preventing 'push-ins', i.e. unauthorised arrivals of economic migrants disguised as tourists inspired and supported by Belarusian authorities.[39] Indeed, most of the illegal

establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248.

36 Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* EU:C:2020:257.

37 'Komunikat Centrum Informacyjnego Rządu w związku z wyrokiem TSUE w sprawie relokacji uchodźców' (n 34). For an analysis of the joined cases C-715/17, C-718/17 and C-719/17 and other CJEU judgments with regard to EU states' post-2015 practices in the area of forced migration governance in the border context, see Frederique Berrod, 'The Schengen Crisis and the EU's Internal and External Borders: A Step Backwards for Security-Oriented Migration Policy?' (2020) 1(2) Borders in Globalization Review 53.

38 Ustawa z dnia 14 października 2021 (n 17); Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 (n 17).

39 See e.g. the opinions expressed by Polish MEPs Beata Kempa and Joachim Brudziński during the debate on pushbacks at external EU borders held at

border crossings were supported by the Belarusian border services or even triggered by the use of force towards migrants, previously lured to Belarus with an (expensive) offer of 'easy' access to EU territories. [40] The increased migration pressure at the EU's eastern external border in 2021 has been recognised by Poland and other EU states as an element of 'hybrid war', including 'instrumentalisation of human beings for political purposes', initiated by the Belarusian president as a response to EU sanctions imposed against the Belarusian authorities.[41]

These circumstances, however, have not convinced Polish authorities to offer humanitarian aid for migrants stuck at the border, even despite the interim measures imposed by ECtHR indicating the need for such assistance.[42] Instead, the government introduced a state of emergency in the border region and denied access to persons other than residents and law enforcement.[43] Journalists, professional lawyers supporting migrants, and activists offering humanitarian and medical aid were 'pushed out' from the border area. Thus, the Polish authorities contributed to the vulnerable position of foreign nationals and infringements of crucial principles, such as the right to life and safety of all those remaining under the authority of the Polish state, as well as the right to asylum and freedom from inhumane treatment. The ease with which the government promoted 'pushbacks' and investments in building fences at the border, disregarding humanitarian

European Parliament on 20 October 2021. European Parliament, 'Verbatim Report of Proceedings' (20 October 2021) 155, 160 <https://www.europarl.europa.eu/doceo/document/CRE-9-2021-10-20_EN.pdf> accessed 26 October 2021.

40 See e.g. Baranowska (n 18); Klaus (ed), 'Humanitarian Crisis at the Polish-Belarusian Border' (n 7).

41 These sanctions were imposed after false presidential elections in Belarus in August 2020 and the application of repressive measures against the Belarusian opposition. For more, see European Parliament Resolution of 7 October 2021 on the situation in Belarus after one year of protests and their violent repression (2021) 2021/2881(RSP) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0420_EN.html> accessed 11 February 2022.

42 *RA and Others v Poland* App no 42120/21 (ECtHR, 25 August 2021).

43 Rozporządzenie Rady Ministrów z dnia 2 września 2021 r w sprawie ograniczeń wolności i praw w związku z obowiązywaniem stanu wyjątkowego (Dz U poz 1613 z późn zm).

issues related to this problem, may be rooted in the government's aims to reduce access to asylum procedures at border checkpoints.

III. The Border Guard's Practices Restricting Access to Asylum: Abuse of Competences?

The hardening attitude towards forced migrants, taking the form of 'pushbacks' and refusing entry to asylum seekers, has attracted the attention of social activists and legal professionals offering support to migrants,[44] public bodies involved in protection of human rights,[45] and eventually also international bodies such as the ECtHR. Any initiative aimed at investigating (from any angle – legal, sociological, and political)[46] the source and consequences of denied access to the asylum procedure in Poland requires an assessment of the Border Guard's role in this context.[47] This public institution is subject to the Ministry of the Interior. Its name could be taken to indicate a narrow scope of competences. In fact, however, the Border Guard's role is extensive, and includes giving (or denying) permission to cross the border, detecting immigration law- and border-related infringements (both at the border and within the territory), conducting return procedures, and – in certain circumstances – granting permits for stay. Such a broad scope of competencies, including the Commander-in-Chief of the Border Guard's

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44 Chrzanowska and others (n 14); Górczyńska and Szczepanik (n 14).

45 'Wystąpienie do Komendanta Głównego Straży Granicznej w sprawie praktyk stosowanych wobec cudzoziemców na przejściach granicznych w Terespolu i w Medyce' (Rzecznik Praw Obywatelskich, 7 April 2017) <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Komendanta%20G%C5%82%C3%B3wnego%20Stra%C5%BCy%20Granicznej%20w%20sprawie%20praktyk%20stosowanych%20wobec%20cudzoziemc%C3%B3w%20na%20przej%C5%9Bciach%20granicznych%20w%20Terespolu%20i%20w%20Medyce.pdf> accessed 19 August 2020.

46 Klaus, 'Closing Gates to Refugees' (n 4); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6); Follis (n 15).

47 For more, see Maja Łysienia, 'Access to Effective Remedies for Foreigners Affected by Decisions, Actions, and Inactions of the Polish Border Guard' in Sergio Carrera and Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020).

role as appeal body, raises questions about the availability of effective remedies for foreigners affected by decisions issued by this institution.[48]

As regards the subject of this article, the crucial competencies of the Border Guard are the tasks performed at the external border and, in particular, at border checkpoints.[49] There, Border Guard officers conduct a check of persons and the documents they possess. When conditions for entering Poland are not fulfilled, e.g. due to lack of valid documents, they issue an administrative decision on refusal of entry. The Law on Foreigners envisages several prerequisites for issuing such a decision. An expression of intent to submit an asylum application or an already submitted asylum application is expressly mentioned as pre-empting the issuance of a refusal of entry.[50] When persons appearing at the border declare their intention to apply for international protection during a border check, the Border Guard is supposed to receive the asylum application and immediately pass it along to the Head of the Office for Foreigners, an administrative central body supervised by the minister of internal affairs.[51] Therefore, the statutory task of the Border Guard makes it a sort of intermediary between the Office for Foreigners and the asylum applicant as far as submitting applications is concerned. This task does not include considering whether the application is justified or not.[52]

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48 See Ustawa z dnia 12 października 1990 r o Straży Granicznej, tj Dz U z 2019 r poz 147 z późn zm) art 1 sub-s 2, setting forth all tasks of the Border Guard.

49 The current conduct towards persons apprehended outside border crossing points and denied the right to ask for asylum is a very recent phenomenon that appeared in mid-2021. It involves procedures other than the refusals of entry at border checkpoints analysed in this article.

50 See Law on Foreigners (n 9) art 28, specifying the circumstances in which the decision on refusal of entry should be made and when it is excluded.

51 See.e.g. Chlebny, 'Rozdział 2. Postępowanie w sprawach udzielania ochrony międzynarodowej oraz pozbawiania statusu uchodźcy lub ochrony uzupełniającej' (n 16) 1024–26. The Head of the Office for Foreigners is responsible for assessing the merits of the application and issuing a decision, i.e. granting or denying international protection. Law on Protection (n 10) arts 23-24.

52 For commentary on article 28 of the Law on Foreigners (n 9) and the role of the Border Guard in determining the positive and negative premises of issuing a refusal of entry, see Chróścielewski, Hauser and Chlebny (n 16); Rafał Rogala,

Refusals of entry are issued by the head of the Border Guard outpost and may be appealed to the Commander-in-Chief of the Border Guard.[53] The initial decision is executed immediately and appeal has no suspensive effect. A further appeal against Commander-in-Chief's decision can be brought before an administrative court, which checks whether the Border Guard acted in compliance with the law in force and within the framework of its statutory competences.[54] It seems that, despite the Border Guard's lack of competencies, assessing who was (and who was not) eligible to submit an asylum claim during border checks became a common practice after 2015. The reasons behind this can be attributed to beliefs held by border guards and supported by the authorities, as suggested by one representative of the public institution charged with implementing the migration and asylum law:

> I really don't like that every time I speak to the officers there is a belief that the asylum procedure is abused. Of course, it is, we all know that it is. [...] However, such a belief that every foreigner [abuses the procedure] when they enter and even say that something happened in their country, is so strong among the officers conducting the [preliminary] interview that it interrupts fair performance of the duties. If this is added to the lack of any documentation of the course of such an interview, then we have the effect discussed here: these people who theoretically should be admitted, they do not enter Poland.[55]

The fact that migrants were being refused entry despite declaring an intention to apply for asylum led to questions being raised by human rights campaigners (chiefly NGOs and the Commissioner for Human Rights) about the feasibility of exercising the right to asylum at the eastern border of Poland. It also led to discussions about the limits of the Border Guard's competencies and the legal restraints on the administrative procedures they

'Dział III. Przekraczanie granicy' in Jacek Chlebny (ed), *Prawo o cudzoziemcach. Komentarz* (Wydawnictwo CH Beck 2020) 130–132.

53 Law on Foreigners (n 9) art 33.

54 See s IV for more details about administrative courts and appellate procedures.

55 Group Discussion (Warsaw, Poland, 10 December 2018).

conduct.[56] Since these concerns pertain to implementation of law, addressing them required legal intervention and judicial assessment of the practices.

IV. Involving the Courts as a Strategy to Unblock Access to the Asylum Procedure

The evidence gathered by human rights campaigners at border checkpoints during monitoring visits confirmed that oral declarations of intent to apply for asylum were either ignored or misinterpreted by the border guards during border checks.[57] Reporting the problem to the government and publishing accounts, however, did not bring any change to the practices identified as infringing both domestic administrative law and international commitments related to asylum.[58] This is due to the fact that public officials, at all levels of the public administration responsible for migration control, perceived the Border Guard's practices as fully proper and compliant with the law in force.[59]

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[56] Monika Szulecka, 'Border Management and Migration Controls in Poland' (2019) 2019/24 54 <http://www.diva-portal.org/smash/ record.jsf?pid=diva2%3A1348294 &dswid=-7631> accessed 20 November 2019; Łysienia (n 47).

[57] See e.g. Chrzanowska and others (n 14); Górczyńska and Szczepanik (n 14); 'The Commissioner's Inquiry to the Border Guard and the Ministry of Foreign Affairs Regarding the Foreigner Who Was Refused Entry to Poland' (Rzecznik Praw Obywatelskich, 13 June 2017) <https://bip.brpo.gov.pl/pl/content/rzecznik-pyta-stra%C5%BC-graniczn%C4%85-i-msz-o-odmow%C4%99-prawa-wjazdu-cudzoziemcowi> accessed 11 February 2022.

[58] See e.g. the response of the Ministry of Administration to the Commissioner for Human Rights' enquiry related to refusals of entry issued to asylum seekers at the border. 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane. Odpowiedź MSWiA dla Rzecznika' (Rzecznik Praw Obywatelskich, 9 November 2018) <https://www.rpo.gov.pl/pl/content/rozmowy-strazy-granicznej-z-cudzoziemcami-na-granicy-nie-b%C4%99d%C4%85-protokolowane-odpowied%C5%BA-mswia-dla-RPO> accessed 26 November 2020.

[59] This assessment was also shared by the judges who adjudicated 13 of the cases analysed in the first instance. For more, see s 4. See also 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane' (n 58); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6) 12-13.

Efforts by human rights campaigners to raise awareness among the general public did not influence the disputed border practices. In light of this, NGO representatives began to perceive the courts as the necessary last resort for dealing with the alleged unlawful conduct of the administrative bodies responsible for migration control. In an effort to build cases to bring before the courts, lawyers working for NGOs involved in providing legal aid to migrants, together with representatives of the Warsaw Bar Association, decided to intervene directly at the border checkpoint in Terespol.[60] On 17 March 2017, 14 attorneys authorised to represent 26 asylum seekers travelled to the checkpoint in Terespol and attempted to draw the attention of the Border Guard to their clients' declarations of intent to apply for asylum. Even the presence of attorneys on the spot did not influence the Border Guard's conduct; the attorneys were refused contact with their clients and the asylum seekers were refused entry.

The lawyers who participated in the intervention then appealed these refusals of entry before the competent court, expecting that the resulting rulings could influence the disputed practices or legal framework. Indeed, these actions initiated the development of domestic case law addressing, directly, the insufficient documentation of activities preceding the refusal of entry and, indirectly, restrictions on access to the asylum procedure as encountered at the eastern border of Poland. At the same time, however, the lawyers realised that, behind those cases, there were people waiting for immediate solutions to their problems who were not interested in mere symbolic recognition of the unjust treatment they faced. Eventual judgments were not a satisfactory solution for the individuals concerned, since the

60 The initiative of the Warsaw Bar Association was supported by two leading NGOs in the area of legal aid provided to migrants: the Helsinki Foundation for Human Rights and the Association for Legal Intervention. For more information, see 'At the Border. Attorneys from Warsaw Bar, HFHR and ALI Help Asylum Seekers in Terespol' (Helsińska Fundacja Praw Człowieka, 17 March 2017) <http://www. hfhr.pl/en/at-the-border-attorneys-from-warsaw-bar-hfhr-and-ali-help-asylum-seekers-in-terespol/> accessed 14 May 2019; Jacek Białas, Marta Górczyńska and Daniel Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski. Stan obecny i wyzwania na przyszłość* (Helsińska Fundacja Praw Człowieka 2019) 11 <http://www.hfhr.pl/wp-content/uploads/2019/04/Dost%C4%99p-do-procedury-azylowej-v2.pdf> accessed 27 April 2019.

decision refusing entry was executed immediately and appeals had no suspensive effect.

The limitations of the legal action taken by human rights campaigners reflect the narrow scope of judicial review in the area of asylum, including access to the asylum procedure. This sphere is subject to the competence of administrative courts, i.e. the regional courts and the Supreme Administrative Court (SAC). While these courts are part of the judicial system in Poland, alongside the Supreme Court, common courts, and military courts,[61] the role of the administrative court is limited to assessing the legality of administrative conduct (here: issuing refusals of entry), not the substance of the case (here: access to the asylum procedure from a human rights perspective).[62] This, however, does not diminish the role of these courts in disciplining public entities.[63]

Interventions aimed at unblocking access to the asylum procedure took place in challenging circumstances, at a time when the authorities lacked respect for the separation of powers and the Constitution, as claimed by many legal experts.[64] While the Polish Constitution guarantees the judiciary's independence from any other power, regardless of the type of court, and envisages that judges shall be impartial, independent (in performing their duties) and subject only to the Constitution and statutes,[65] these and other constitutional guarantees attached to the judicial office (as well as respect for

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61 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r (DzU 1997 nr 78 poz 483) art 175 [Constitution of Poland].

62 Chróścielewski, Hauser and Chlebny (n 16); Dąbrowski (n 16). For a comment on the role of domestic courts and the ECtHR in adjudicating asylum-related cases, see also Thomas Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 International Journal of Refugee Law 48, 52.

63 See Przemysław Szustakiewicz, 'The Division of Competences between Administrative Courts and Common Courts in Poland' (2020) 58 Studia Politologiczne 49.

64 See e.g. Adam Bodnar, 'Protection of Human Rights after the Constitutional Crisis in Poland' (2018) 66 Jahrbuch des öffentlichen Rechts der Gegenwart 639, 640; Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417.

65 Constitution of Poland (n 61) arts 173, 178.

the Constitution) have been significantly threatened by the introduction of a number of reforms since late 2015. These directly affected the common courts and the Supreme Court, as well as the National Council of Judiciary, leading to a perceived increase in the political subordination of judges, undermining the pillars of the judiciary and decreasing the status of the profession. Reforms in the system of justice turned out to be one of the most visible facets of a broader rule of law crisis in Poland, infringing the rule of tripartite division of powers in Poland.[66] Another important facet of this crisis is a lack of respect for the hierarchy of law (or a selective approach to this, e.g. respecting EU law when it serves the objectives of the government and ignoring it when it contradicts the applied policy).[67] Despite these circumstances, human rights campaigners had little choice but to rely upon the judicial system when other approaches (e.g. inquiries and raising awareness) failed.

V. Domestic Courts Ruling on Administrative Practices at Border Checkpoints

The judgments released by the SAC mostly address problems envisaged in the Law on Foreigners and the Administrative Procedure Code,[68] as well as the

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66 See e.g. 'Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control' (n 8); European Commission, '2020 Rule of Law Report: Country Chapter on the Rule of Law in Poland' (Commission Staff Working Document, 30 September 2020) SWD(2020) 320 Final <https://ec.europa.eu/info/sites/default/files/pl_rol_country_chapter.pdf> accessed 11 February 2022. See also Bodnar (n 64); Wyrzykowski (n 64); Małgorzata Gersdorf and Mateusz Pilich, 'Judges and Representatives of the People: A Polish Perspective' (2020) 16 European Constitutional Law Review 345.

67 Stanisław Biernat and Ewa Łętowska, 'This Was Not Just Another Ultra Vires Judgment!' (Verfassungsblog, 27 October 2021) <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/> accessed 31 October 2021. See also the debate at the European Parliament on the rule of law crisis in Poland and the primacy of EU law. European Parliament, 'Verbatim Report of Proceedings' (19 October 2021) 27-90 <https://www.europarl.europa.eu/doceo/document/CRE-9-2021-10-19_EN.pdf> accessed 26 October 2021. For more on the selective application of EU law, see s V.

68 Ustawa z dnia 14 czerwca 1960 r Kodeks postępowania administracyjnego (tj Dz U z 2020 r poz 256 z późn zm).

Schengen Borders Code.[69] Even if the cases relate to the constitutional right to asylum,[70] seeking asylum is analysed merely as one of the negative prerequisites for issuing a refusal of entry. Therefore, while these decisions refer to denial of access to the asylum procedure, their content focuses on how the Border Guard conducted the first and second line border checks, as well as how it justified the refusal of entry. The administrative court proceedings are not recorded in any direct way (e.g. video, audio, detailed transcription, or even detailed description). This means that subsequent courts must rely solely on statements delivered by the parties. Indeed, the lack of proper documentation of the preliminary interview at the border (conducted during the second line check) has given rise to disagreement between human rights campaigners and the Border Guard and has been repeatedly addressed by first- and second-instance courts.

The Warsaw Regional Administrative Court (WRAC) has issued at least 39 judgments in cases concerning persons refused entry and pointing to the intent of applying for asylum at the border.[71] The WRAC is one of 16 Regional Administrative Courts in Poland, corresponding to the administrative division of Polish territory into 16 voivodeships. Complaints against administrative bodies are submitted to the Regional Administrative Court located not in the voivodeship where the underlying conduct giving rise to the dispute took place, but rather where the relevant administrative body has its seat. Therefore, in the first instance, only the WRAC processes complaints against refusals of entry issued by the Border Guard. Although the judgments of the WRAC are not final – they can be appealed before the SAC – they take on importance in explaining the disagreement over the legality of the disputed practices at the border.

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69 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

70 The right to seek asylum is enshrined in article 56 of the Constitution of Poland of 1997.

71 This number does not represent all refusals of entry appealed before the administrative court.

In 26 of the 39 cases considered, the WRAC found the foreigners' complaints justified and revoked the Border Guard's decisions.[72] In the remaining 13, the WRAC upheld the decision of the Border Guard and dismissed the complaint. However, nine of these decisions were appealed before the SAC, which in two instances found improper conduct by the administrative body and revoked the decisions of Border Guard and the first-instance administrative court. The Border Guard submitted a cassation appeal in all but seven of the mentioned 26 cases, but each of these appeals was rejected.[73]

The SAC's first important rulings on the issue, released in 2018, did not exactly "open" access to the asylum procedure at the border. However, they did confirm that the administrative body had not sufficiently detailed their decisions refusing entry, in particular in cases raising doubts regarding the reasons for arrival. The Court found that the Border Guard provided insufficient documentation of the preliminary interview and failed to explain how it selected the documents it held as evidence for the refusal of entry.[74] The SAC commented on the official notes prepared by the Border Guard refusing entry in the following way:

> The content of the prepared note [...] contains very laconic information as to the circumstances that could be significant for the determination that the foreign woman may not be refused entry [...]. On the basis of this ambiguous content of the note, it is not possible to assess that there are no obstacles to issuing a decision refusing entry to the territory [...]. The questions she was asked are unknown. It is not known whether the note reflects the applicant's

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72 In 15 of these cases, the Court also ruled on the discontinuance of the administrative procedure. Such decisions have been questioned by legal experts, who indicated that judicial control over the administrative conduct becomes a façade when the court proceeding is discontinued only because the foreigner refused entry is no longer present on the territory of Poland. Chróścielewski, Hauser and Chlebny (n 16) 75.

73 The comprehensive study completed in April 2019 by the Helsinki Foundation for Human Rights, which referred to 37 cases adjudicated by the first-instance court, found a similar percentage of court decisions upholding and revoking decisions of the Border Guard. Białas, Górczyńska and Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski* (n 60) 31–32.

74 See e.g. SAC judgment no II OSK 345/18 (20.09.2018); SAC judgment II OSK 1713/18 (02.10.2018); SAC judgment II OSK 2270/18 (11.01.2019).

> entire statement or is only a brief summary of the officer's reception, i.e. the officer's understanding of the information provided.[75]

The two last sentences of the quoted excerpt are crucial to understand the tensions at the border. Official notes did not reflect the full content of the preliminary interview; they included only the reasons justifying the refusal of entry. Without being able to compare these notes with detailed transcripts or recordings, it is impossible to know what else the foreigner might have said during the border control. According to the administrative rulings, asylum seekers do not damage their asylum claims by declaring reasons for entry that are distinct from seeking protection from persecution (such as visiting families).[76] However, officials might have mentioned only these reasons in the official notes and intentionally omitted reasons linked to seeking asylum, leading to the issuance of the refusal of entry.

The SAC assessed the value of official notes as low. Nonetheless, it admitted official notes as evidence, provided that they did not raise doubts about whether the indicated reasons clearly justified the decision issued. As one commentator has argued, if – despite being in a position to draw up a detailed report – 'the administrative body reduces its obligations to drawing official notes, it unwillingly begs the question about the real intents of the administrative body and generates the risk of neglecting the course of the events that was recorded only in that way'.[77] This opinion is echoed by other voices calling for transparency in border control procedures and, in particular, for better documentation of administrative conduct with (potential) asylum applicants.[78]

Although the domestic courts found the prevailing mode of documenting border checks insufficient to comply with the Polish administrative code in

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75 SAC judgment no II OSK 414/19 (18.07.2019).

76 SAC judgment no II OSK 345/18 (n 74); SAC judgment no II OSK 830/18 (20.09.2028); SAC judgment no II OSK 1674/18 (20.09.2018); SAC judgment no II OSK 890/18 (20.09.2018). See also Rogala (n 52) 131–32.

77 Dąbrowski (n 16). Dąbrowski's analysis relates to a case concerning a refusal of entry issued to a person whose reason for entry was not sufficiently determined.

78 'Wystąpienie do Komendanta Głównego Straży Granicznej w sprawie praktyk stosowanych wobec cudzoziemców na przejściach granicznych w Terespolu i w Medyce' (n 45); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6).

any cases raising doubts regarding the reasons of entry, the Border Guard saw these rulings as pertaining only to the cases specifically appealed. While they *recognised* the negative assessment of the way they issued decisions refusing entry to individual potential asylum applicants, recognition is not the same as acceptance, as demonstrated by the persistence of the criticised practices. The border guards, with the support of the Ministry of Interior, deemed that the case law was not applicable to daily practices involving hundreds or thousands of foreigners appearing at the border checkpoints. According to one interviewed representative of the Border Guard, the rulings issued up to the end of 2018 included ambivalent statements, not consistent case law:

> Many cases related to the refusals of entry were concluded by the voivodship court or the Supreme Administrative Court [...]. We lost 20 and something cases. However, there were 19 or 18 verdicts in favour of the Border Guard. And this shows that the case law for the courts is not obvious. There were some recommendations after the visits of the Commissioner (for Human Rights) and when we found them appropriate, we implemented them. There might happen that the officer interpreted something improperly, but we supervise it [...]. It is also not simple for the front-line officer to interpret certain things on spot.[79]

For the Border Guard, the incoherence of the first instance rulings of the WRAC became an important argument to defend its practices at the border. Indeed, in 13 sentences judges found no irregularities in the conduct at the border. Following arguments presented by the Border Guard, the court pointed to the specificity of the border check (the need for efficiency foreclosing the possibility of giving access to third parties at every stage of border check) and the Border Guard's focus on preventing entry of persons not meeting the requirements posed by the law in force.[80] Moreover, in the verdicts dismissing appeals against administrative decisions by the Border Guard upholding refusals of entry, the WRAC questioned the results of the monitoring initiatives referred to by the complainants. They found them to be subjective assessments of the situation at the border, made by visitors not

79 Interview (Warsaw, Poland, 21 December 2018).

80 WRAC judgment no IV SA/Wa 2264/17 (20.02.2018).

familiar with daily practices of border control who paid attention to isolated incidents rather than common practices.[81]

The SAC, by contrast, gave credence to requests directed by the Commissioner for Human Rights to the Border Guard and the Ministry of Interior to guarantee access to the asylum procedure, based on findings from monitoring visits at the eastern border.[82] Additionally, the SAC indicated that improper conduct by administrative bodies, such as paying insufficient attention to the legal prerequisites for issuing a decision refusing entry, undermines trust towards public administration. Last, but not least, the SAC noted that lack of respect for the non-refoulement rule could be perceived as a threat to human rights protection.[83] However, this lack of respect was characterized as a consequence of 'misinterpretation' of declarations given by asylum seekers at the border. Indeed, if this issue does not appear spontaneously, officers are not obliged to verify whether or not the person undergoing border check wants to apply for international protection, as was confirmed in some judgments of the WRAC.[84] While the officers *are* obliged to clarify any stated reasons for entry that could potentially be linked to asylum seeking, the lack of evidence available to the courts usually left them no basis on which to decide whether the declarations given by foreigners were sufficiently clear.

Not all border checkpoints suffered from the same procedural deficiencies. For instance, in Medyka, at the border with Ukraine, the Border Guard routinely prepared detailed written reports in connection with its decisions on refusal of entry.[85] However, in Terespol, the most popular entry point for asylum seekers at the Belarusian-Polish border, only official notes were taken, sometimes in circumstances that did not allow for privacy and individual treatment of foreigners explaining their reasons for entering Poland despite lacking documents authorising them to do so.[86] Several

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81 WRAC judgment no IV SA/Wa 2005/17 (23.11.2017); WRAC judgment no IV SA/Wa 1044/18 (02.07.2018).

82 SAC judgment no II OSK 1062/18 (20.09.2018).

83 SAC judgment no II OSK 1752/18 (26.07.2018).

84 WRAC judgment no IV SA/Wa 1847/17 (17.10.2017); WRAC judgment no IV SA/Wa 1829/17 (21.11.2017).

85 Chrzanowska and others (n 14).

86 Ibid; Górczyńska and Szczepanik (n 14).

requests were directed to the Border Guard to unify the practices and introduce an obligation to prepare written reports before refusing entry. In response, the Border Guard found that such detailed reports were not required by Polish law and instead issued instructions for its officers to draw up official notes including only a summary of declarations given by foreigners at the border, an approach it claimed was compliant with the Schengen Borders Code.[87] In this way, the Border Guard addressed the requests in a direction that went against the purposes these requests sought to achieve.[88] This only deepened the problem described in an interview by a legal expert representing a public institution dealing with challenges faced by asylum seekers:

> The problem is that what the border guards do is completely beyond any form of documentation. [...] [A]nything can happen there and no one really has any control over what was going on between an officer and a foreigner. [...] As the Border Guard rightly points out [...] as a rule, there is no clear provision stating that the conversation conducted within second line check is to be recorded. But in our opinion, it should be. Moreover, there should be a question as to whether someone is not afraid of returning to their country of origin due to ongoing persecution. [...] The problem is that there is absolutely no political will to introduce such a change. [...] We are not talking in terms of good or bad practice here, we are talking about a fundamental violation of the law at this point. It is not a good practice when we simply want to lead to the situation in which a foreigner is able to actually exercise their rights.[89]

The Border Guard has always emphasised its independence in conducting border checks and competency to assess whether the conditions of entry are

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87 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane. Odpowiedź MSWiA dla Rzecznika' (n 58).

88 Referring to practices observed in the Polish context, legal experts noticed that an exceptional mode of conduct became the rule – Border Guards deciding on the refusal of entry often checked what documents foreigners did or did not possess. Such a practice should be an exception, reserved for cases that do not give rise to any doubt (when reasons potentially related to seeking protection are not presented). In all other cases, Border Guard should clarify whether or not the person may be let in and provide detailed documentation determining the reasons for entry. Chróścielewski, Hauser and Chlebny (n 16) 72.

89 Group Discussion (Warsaw, Poland, 10 December 2018).

fulfilled. It has also stressed the impossibility of third party presence (such as legal representatives) during border checks.[90] The courts expressed other views on this issue, but they were inconsistent with one another. In one of the SAC verdicts, the Court stated that, if a legal representative is present at the border and was formally authorised to represent the foreigner before they came to the border, this representative should be allowed to be present during the second-line check.[91] This is because this part of the border check could have important administrative consequences for the foreigner.[92] However, in another SAC judgment, the Court emphasised that, where a legal representative 'overtakes' the role of a foreigner undergoing a border check and interrupt's the foreigner's declaration of intent to apply for asylum, then the preliminary interview should be continued without their presence.[93] Such inconsistency in the judicial approach towards this issue could work in favour of the administrative body. Indeed, the Border Guard took advantage of all arguments made available by the courts in justifying its refusal to allow the presence of legal representatives during border checks.

VI. (Lack of) Influence of European Court of Human Rights Judgments

In light of the Border Guard's disregard of the domestic case law – case law which, with time, became more extensive and coherent[94] – human rights

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90 See e.g. the Border Guard's press release concerning the intervention undertaken by professional lawyers at the border checkpoint in Terespol in March 2017: 'Komunikat dotyczący sytuacji na przejściu granicznym w Terespolu' (Komenda Główna Straży Granicznej, 17 March 2017) <https://strazgraniczna.pl/pl/aktualnosci/4674,Komunikat-dotyczacy-sytuacji-na-przejsciu-granicznym-w-Terespolu.html> accessed 23 November 2020. For the SAC's assessment of arguments given by the Border Guard in the appeal procedures before the court, see e.g. SAC judgment no II OSK 445/18 (20.09.2018); SAC judgment no II OSK 2868/18 (11.01.2019).

91 SAC judgment no II OSK 2109/18 (20.11.2018).

92 Chróścielewski, Hauser and Chlebny (n 16).

93 SAC judgment no II OSK 2700/18 (11.01.2019).

94 In particular, SAC judgments became very consistent in requiring the Border Guard to prepare written detailed reports based on its interviews with migrants prior to refusing entry in cases giving rise to doubts about the declared reasons of

campaigners involved in asylum-related cases came to believe that it was necessary to submit complaints to the European Court of Human Rights (ECtHR). Domestic courts could only address the problem faced by asylum seekers at the checkpoints at the eastern border of Poland from the perspective of administrative conduct. Initiating proceedings before ECtHR aimed instead at obtaining a judicial assessment of access to the asylum procedure from a human rights perspective.[95] The first key ruling, *M.K. and Others v Poland*, based on three cases of Chechen nationals refused entry into Poland on multiple occasions,[96] was released on 23 July 2020. The judgment was long-awaited among human rights campaigners in Poland since it related directly to the situation at the Polish border. An earlier verdict on similar issues, *M.A. and Others v Lithuania*,[97] had failed to produce a direct impact on administrative practices towards asylum seekers at the Polish eastern border. Persons willing to apply for international protection were still refused entry at border checkpoints and sent back to Belarus, which was indicated in *M.A. and Others v Lithuania* as an unsafe country for Chechen nationals.[98]

The case *M.K. and Others v Poland* represented the joint adjudication of three complaints submitted by a total of 13 Chechens (including eight minors) who were refused entry and denied access to the asylum procedure in Poland multiple times. It provided a number of detailed descriptions of how declarations given by foreigners were treated by the Border Guard and what role could have been played by detailed written reports, if they had been obligatory. The judgment also sheds light on the arguments presented by both parties in the appeal procedures. Therefore, the judgment serves as a useful summary of the numerous accounts and statements given by both

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entry. See SAC judgment no II OSK 829/18 (20.09.2018); SAC judgment no II OSK 414/19 (n 75).

95 In CEE countries, the ECtHR may be treated as a *de facto* asylum court. Michał Kowalski, 'International Refugee Law and Judicial Dialogue from the Polish Perspective' in Anna Wyrozumska (ed), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe* (Wydawnictwo Uniwersytetu Łódzkiego 2017).

96 *MK and Others v Poland* (n 5).

97 *MA and Others v Lithuania* (n 5).

98 Białas, Górczyńska and Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski* (n 60) 21. See also Szulecka, 'Border Management and Migration Controls in Poland' (n 56).

human rights campaigners and the administration responsible for migration control in this context.

The experiences of a Chechen couple with minor children attempting to enter Poland and apply for asylum, referred to in the judgment, constitutes just one of many accounts pointing to quite clearly stated, but 'unheard' wish to ask for protection:

> The applicants presented to the border guards documents confirming that, as torture victims, they had developed post-traumatic stress disorder. [...] On each occasion that the applicants presented themselves at the border crossing at Terespol, administrative decisions were issued turning them away from the Polish border [...]. The official notes prepared by the officers of the Border Guard reported that the applicants had indicated (as reasons of entry), *inter alia*, their lack of money, together with their wish to: live in Poland, receive financial support, seek a better life in Europe, travel to Austria to join a family member residing there, settle and work in Germany, and educate their children in Europe.[99]

The ECtHR confirmed that the Border Guard's conduct violated article 3 of the European Convention on Human Rights (ECHR). The court found that, by repeatedly refusing to receive asylum applications at the border, Polish authorities exposed asylum seekers to risks of experiencing torture or inhumane or degrading treatment in Belarus or Russia.[100] Administrative practices at the border were also found to violate article 13 of the ECHR, since decisions refusing entry were executed immediately, regardless of any pending appeal, depriving asylum seekers of an effective remedy with suspensive effect.[101] The ECtHR construed individual refusals of entry issued to asylum applicants as part of a wider policy aimed at denying entry to foreigners coming from Belarusian territory, which amounted to collective expulsions prohibited under article 4 of Protocol No 4 of the ECHR.[102] The ECtHR also found that the way in which Polish authorities neglected the

99 *MK and Others v Poland* (n 5) paras 55-56.

100 Ibid paras 174-86.

101 Ibid paras 219-20.

102 Ibid paras 204-11.

ECtHR interim measures prohibiting sending asylum seekers to Belarus violated article 34 of the ECHR.[103]

The crucial outcome of this ruling, however, is that the Court found in the experiences of complainants refused entry a 'systemic practice of misrepresenting statements given by asylum seekers'.[104] Thus, it assessed the accounts of human rights campaigners (including public institutions, such as the Commissioner for Human Rights or Commissioner of Children's Rights, and the NGOs) more reliable than the explanation provided by the government, which claimed that no declarations of the will to apply for asylum were given by foreigners at the border and that the persons concerned migrated solely for economic reasons.

The ECtHR judgment also provided a reflection on how Polish authorities neglected interim measures that it had issued upon request of lawyers supporting asylum seekers. Based on convincing evidence that applicants could not feel safe in Chechnya and that the territory of Belarus did not offer them freedom from persecution, the ECtHR received submissions under Rule 39 of the Rules of Court[105] asking it to issue a decision requesting Polish authorities not to return a particular family to Belarus. The Court received similar requests with regard to three other Chechen nationals and one citizen of Syria (whose case was adjudicated within the joined case *D.A. and Others v Poland*).

The interim measures issued by the ECtHR in response to these requests were ignored at the border checkpoint – asylum seekers covered by these decisions were refused entry to Poland on several occasions. The Polish government argued that there was no real risk of irreparable harm from sending the asylum applicants back to Belarus, as they had already stayed there for a few months.[106] The government also stated that the interim measures were not applicable because the persons concerned were not allowed to enter Poland. In consequence, they could not be removed since they were not under the authority of Poland. In this respect, the

103 Ibid paras 235-38.

104 Ibid paras 178.

105 ECtHR, 'Rules of Court' (1 January 2020) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 25 November 2020.

106 *MA and Others v Lithuania* (n 5) para 226.

government's argument ignored the reasoning advanced by the ECtHR in support of the interim measures, according to which persons subjected to controls by the Polish border service on Polish territory fall under the authority of Poland.[107]

The Polish government used a similar strategy – based on denying its own authority to act – to avoid ECtHR interim measures in another case involving a group of 32 Afghani nationals stranded at the Belarusian-Polish border for several weeks.[108] Polish authorities denied them entry into the territory of Poland and ignored their declarations of intent to apply for asylum (expressed verbally, in the presence of Polish border services, human rights campaigners, and the media). To prevent inhumane and degrading treatment and secure their right to life, the ECtHR imposed interim measures ordering the Polish authorities to provide the asylum seekers with food, clothes, necessary medical aid and – if possible – shelter.[109] At the same time, however, the ECtHR emphasised the authority of the states to control the border and decide who is allowed to enter or not. This became the Polish authorities' key argument in refusing to provide asylum seekers with any support, since their physical presence on Belarusian territory meant that helping them would violate the territorial integrity of another country.[110]

In their response to the ECtHR, Polish authorities suggested that the optimal solution for asylum seekers would be to approach the closest border crossing and apply for international protection there.[111] The authorities emphasised that the Belarusian border services were not interesting in allowing migrants to return to Belarus because they were profiting from 'pushing in' migrants to EU territory. This solution was proposed by the same

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107 Ibid para 236.

108 *RA and Others v Poland* (n 42).

109 These interim measures were also imposed on authorities in Latvia with respect to 41 Iraqi nationals stuck at that country's border with Belarus. *Ahmed and Others v Latvia* App no 42165/21 (ECtHR, 25 August 2021).

110 'Poland Provided the ECHR with Its Position on the Order for Interim Measures' (Ministry of the Interior and Administration, 30 September 2021) <https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures> accessed 27 October 2021.

111 Ibid. The asylum seekers were staying approximately 30 kilometres from the closest border crossing point.

Polish authorities that for multiple years had been reducing access to the asylum procedure at border crossing points and disregarded domestic and ECtHR law in this respect. The governmental approach to the interim measures raised concerns around whether ECtHR judgments would have any impact on policies towards asylum seekers at the border. Such concerns appeared substantiated – regardless of the rank and the character of court delivering the judgment in favour of asylum seekers, the arguments given by the courts were interpreted as pertaining only to specific incidents.

Assessing the impact of the judgment in *M.K. and Others v Poland* became challenging due to restrictions on border crossings introduced by state actors during the COVID-19 pandemic in 2020-21. In theory, this should not have affected forced migrants' access to asylum procedures at the border. In practice, however, such access was precluded by the closure of border checkpoints and the suspension of cross-border train connections. People seeking asylum were not included in the list of categories of persons authorised to cross the border and enter Polish territory during the time when the provisions restricting cross-border mobility were in force.[112] In response to the increasing number of arrivals through the 'green border' in August 2021, pandemic-related provisions were changed to stipulate the immediate return of any persons detected after crossing the border in an unauthorised manner (through a closed checkpoint or outside of checkpoints), effectively excluding the possibility of applying for asylum in such circumstances. Though as a mere ministerial decree this provision did not supersede the right to submit an asylum application, in practice it provided a legal basis for unlawful pushbacks.

The years 2020 and 2021 raised further questions about the state's approach towards asylum seekers, in particular its double standards in this respect. After August 2020, asylum seekers originating from Belarus enjoyed a

[112] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych (Dz U poz 435 z późn zm). See also 'Koronawirus a prawa cudzoziemców szukających ochrony przed prześladowaniami. RPO pyta Straż Graniczną o obecne procedury na granicy wschodniej' (Rzecznik Praw Obywatelskich, 2 April 2020) <https://bip.brpo.gov.pl/pl/content/koronawirus-granice-ochrona-miedzynarodowa-w-Polsce> accessed 29 July 2021.

welcoming approach at the border and, later on, support in economic adjustment. To some extent, this welcoming approach was applied also to Afghani nationals evacuated directly from their country of origin. Despite declaring readiness to issue only 45 humanitarian visas,[113] Polish authorities ultimately offered approximately one thousand Afghani citizens the chance to reach a safe place in Poland and submit asylum applications.[114] In general, however, non-Belarusian citizens seeking asylum faced a continuation of the deterrence policy, unchanged by the ECtHR judgment of July 2020. Almost one year later, on 8 July 2021, another ECtHR judgment was announced, in the case *D.A. and Others v Poland*.[115] It referred to the contested administrative practices at the border checkpoint in Terespol – this time towards asylum seekers from Syria previously living in Belarus. The Court in this case essentially repeated the conclusions from its judgment in *M.K and Others v Poland*. The Court noted that decisions refusing entry violated not only the provisions of the ECHR, but also domestic law, and were not compliant with 'judgments of the domestic administrative courts that held that the officers of the Border Guard had not conducted sufficient evidentiary proceedings in the applicants' cases'.[116]

The unchanged situation one year after the key ruling in *M.K. and Others v Poland*, the filing of additional ECtHR cases (e.g. *D.A. and Others v Poland* and *Sherov v Poland*),[117] and other facets of the state's incomprehension of EU values and international law,[118] do not encourage faith in case law as a factor

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113 'Ważne jest zaangażowanie polskich władz w sytuację w Afganistanie. Rzecznik pisze do MSZ' (Rzecznik Praw Obywatelskich, 18 August 2021) <https://bip.brpo.gov.pl/pl/content/wazne-jest-zaangazowanie-polskich-wladz-w-sytuacje-w-afganistanie-rzecznik-pisze-do-msz> accessed 2 November 2021.

114 'Statystyki' (n 25).

115 *DA and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021).

116 Ibid para 60.

117 *Sherov v Poland and 3 Other Applications* App no 54029/17 (ECtHR, 11 January 2021).

118 Apart from the already mentioned threats to the rule of law, this includes, for instance, discrimination against minority groups, such as the LGBT+ community. See e.g. Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 German Law Journal 1140; Zofia Kinowska-Mazaraki, 'The Polish Paradox: From a Fight for Democracy to the Political Radicalization and Social Exclusion' (2021) 10 Social Sciences 112.

shaping governance of forced migration in Poland. The same claim can be made about the state's response to the increased number of arrivals of migrants from states in crisis in Asia and Africa entering Poland through the territory of Belarus. Blocking the possibility to provide humanitarian aid in the border area,[119] ignoring requests for asylum from migrants crossing the 'green border', and the continued and increasingly legalised practice of pushbacks,[120] do not create expectations that the authorities will comply with the case law discussed above on access to the asylum procedure at the border. It is, however, probable that, while ignoring the case law in favour of the asylum seekers, the authorities will emphasise the role of judgments in favour of practices aimed at returning migrants who crossed the border in an unauthorised manner.[121] This, in turn, may further substantially reduce access to the asylum procedure in Poland.

VII. Concluding Remarks

The analysis presented in this article was inspired by the growing number of accounts pointing to ignored declarations of intent to apply for asylum at checkpoints along the eastern border of Poland, in the context of developing

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119 Or refusing to provide aid as ordered by the ECtHR in interim measures. See *RA and Others v Poland* (n 42).

120 Provisions authorising pushbacks have been introduced in the legislation despite their non-compliance with the 1951 Geneva Convention and EU directives regarding asylum. See e.g. Convention Relating to the Status of Refugees (adopted 28 July 1951 and entered into force 22 April 1954) 189 UNTS 150, art 33(1); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337, art 21(1); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180, arts 8-9.

121 E.g. *ND and NT v Spain* App nos 8675/15 and 8697/17 (ECtHR, 13 February 2020). For concerns regarding the possible impact of this judgment on justifying pushbacks at the EU external borders, see Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (EU Immigration and Asylum Law and Policy, 1 April 2020) <https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/> accessed 2 November 2021.

domestic and international case law in this respect. Disputed practices at the border involving asylum seekers have been assessed by two types of courts: domestic administrative courts and the ECtHR. The domestic courts decided on the legality of activities undertaken by Border Guard without investigating the facts. In other words, administrative courts did not verify whether complainants were asking for asylum at the border or not; they merely assessed whether the administrative decision refusing them entry was taken in a just manner. The ECtHR, for its part, assessed the reported cases from the perspective of human rights infringements. Regardless of the different scope of the assessment of the complaints, both the Polish SAC and the ECtHR found the administrative practice of refusing entry to persons declaring their will to apply for international protection improper, infringing either on the provisions of administrative proceedings or on the migrants' human rights.

In its rulings, the SAC included guidance for how the Border Guard should conduct themselves when they take a decision on refusal of entry, reminding them that such a decision is precluded by a migrant's expression of an intent to apply for asylum. The ECtHR, adjudicating complaints from asylum seekers repeatedly sent back from the Polish border to Belarus or Ukraine without the possibility to file asylum applications, found violations of a number of articles of the ECHR. However, as of this writing, neither the rulings at the domestic nor the international level have changed the administrative practices involving asylum seekers at the border, a facet of the Polish administration's broader deterrence policy. This fact confirms the weak role of courts in shaping forced migration governance in the area of access to the asylum procedure at the Polish border.

Responding to the domestic and international courts' assessments, both the Border Guard and the government stressed that, while malpractices could happen incidentally, they represented isolated incidents. This has become the main argument for downplaying the court decisions and neglecting the changes emerging in the developing case law. Over time, the case law has become coherent and clear about the conduct of the administrative body at the border checkpoints. The ECtHR has concluded that the administrative practices at the border were not incidental, but instead constituted an element of broader state policy, a 'systemic practice of misrepresenting

statements given by asylum-seekers'[122], and a 'wider state policy refusing entry to foreigners coming from Belarus'.[123] The government saw such a conclusion as unjust and incompatible with its vision for forced migration management, which provided the authorities with sufficient reason to undermine court guidelines.

The Polish authorities' continued efforts to deter asylum seekers and refusal to comply with domestic and ECtHR case law is part of a broader policy towards forced migrants. In particular, since political debates on the threats posed by cross border mobility intensified in 2015, the Polish government has perceived a conflict between respect for the rights of individuals and the security of the state. There has been no 'golden mean' on the horizon. Disregard for case law seems to reflect the readiness of the authorities to break the rules, if only to deliver on their promise of preventing the arrival of 'undesirable' migrants, among whom asylum seekers constitute a visible group. The situation at the Polish-Belarusian border since August 2021 confirms this approach. The rules being infringed this time, however, include not only the right to asylum, but also the rights to life, safety, and freedom from inhumane treatment. The objective of protecting the external border has become paramount, justifying all actions deployed by the authorities against people seen as a 'weapon' in the hands of the Belarusian dictatorship.[124]

Anti-refugee or anti-immigrant sentiments, together with prioritising state security over human rights, do not sufficiently explain the weak influence of both domestic and international courts on government policy. Another factor is the ambiguous relationship between the judiciary and the executive in Poland. Also of importance is a current of disregard for international commitments and decisions issued by international judicial bodies. Altogether, these problems may be framed as a crisis of the rule of law,

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122 *MK and Others v Poland* (n 5) para 174.

123 Ibid para 208.

124 For comments on mobility across Polish-Belarusian in the context of a planned border fence, see Jan Grzymski, Marta Jaroszewicz and Mateusz Krępa, 'Walling the EU Borders: Past Experiences and (In)Effectiveness. The Context for the Fence at the Polish-Belarusian Border' [2021] (9) CMR Spotlight. Centre of Migration Research Newsletter <http://www.migracje.uw.edu.pl/wp-content/uploads/2021/10/Spotlight-SEPTEMBER-2021.pdf> accessed 27 October 2021.

characterized by an apparent disrespect for the hierarchy of law, the undermining of judicial assessments, and a decreased emphasis on values such as respect for human rights. In these circumstances, the main principle of both domestic and international legal systems, i.e. that the law 'must bind not only the ruled, but also – and primarily – those who hold the power',[125] is neglected.

Verdicts issued by domestic and international courts are released months or years after the events under question – in other words, long past the time of refusal of entry. For legal professionals and the administration, these verdicts are simply case law to be taken into account (or ignored). For the individuals whose experiences become the subject of court assessment, they may constitute delayed reactions to infringements of their fundamental rights. Although these reactions do not solve these problems when they appear, they may compensate for harm experienced.[126] However, taking into account the thousands of forced migrants who were denied possibility to apply for asylum at the border, recognition of harms and awards of monetary compensation in just a few exemplar cases does not remedy the situation. The crucial thing is that, despite case law and clear guidelines on how domestic and international law should be implemented, for forced migrants, being permitted entry into Poland to exercise the right to seek asylum is not the rule, but the exception.

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125 Gersdorf and Pilich (n 66) 350.

126 In its judgment in *MK and Others v Poland* (n 5), the ECtHR ordered Poland to pay EUR 34,000 to compensate the non-pecuniary damage of the applicants in each of the three adjudicated cases (40503/17, 42902/17, and 43643/17).