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.