EDITORIAL

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

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"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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§ 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".