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SCOPE AND INTENSITY OF JUDICIAL REVIEW: WHICH POWER FOR JUDGES WITHIN THE CONTROL OF IMMIGRATION DETENTION?

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Abstract
This chapter analyses EU Member States‘ models of judicial control of detention of third-country nationals for the purpose of their return and tries to answer the question which model is better and whether an ideal, universal model of judicial control of detention exists and wheter it should be adopted in all of the EU Member States.

Keywords

immigration, detention, judicial control, judicial dialogue, European Union Member States, third-country nationals, irregular migrants, Return Directive

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SCOPE AND INTENSITY OF JUDICIAL REVIEW: WHICH POWER FOR JUDGES WITHIN THE CONTROL OF IMMIGRATION DETENTION?

Adam Blisa & David Kosař[1]

I. Introduction

When the Court of Justice rendered its landmark *Mahdi* judgment,[2] it caused a big splash. By unequivocally stipulating that domestic judges deciding on the extension of detention of TCN under the Return Directive[3] enjoy full judicial review and may substitute the decision of administrative authorities with their own decisions,[4] the Court of Justice caught several EU Member States off-guard. The *Mahdi* judgment has, all of a sudden, made some of the domestic models of judicial review of immigration detention incompatible with EU law. As a

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[2] Case C-146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1320.

[3] Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

[4] See n 1 above, § 62.

result, not only Bulgaria,[5] from which the preliminary reference in *Mahdi* originally came from, but also in other EU Member States amended their laws.[6]

The *Mahdi* judgment also revealed that there is a huge diversity among EU Member States regarding the domestic judicial design of review of immigration detention, which may hamper judicial dialogue between the Court of Justice and national courts as well among the national courts in the European legal space.[7]

The legal rules covered by the European asylum and migration acquis are among the best candidates for a fruitful judicial dialogue. Domestic courts in virtually all EU Member States have engaged with the very same definition of a refugee in the 1951 Refugee Convention for decades and the Qualification Directive[8] made the potential for convergence even greater. Related asylum and migration directives have witnessed a similar development.

However, there are also significant limits to the dialogue. The existing empirical studies show that even nations with many institutional, cultural, geographical, and political similarities reach strikingly different results in refugee status determination.[9] What is striking, this 'refugee roulette' may exist even within the same country.[10] The empirical research on TCN detention within the EU,[11] coupled with the fact that the institutional diversity of deciding on TCN detention among EU Member States is even greater[12] than in refugee status determination, suggest that it is highly likely that TCNs in the EU face a 'detention roulette' as well.

One solution how to remedy this problem is to unify the rules governing the detention of TCNs as well as the judicial review,[13] which is exactly what Return Directive does. However,

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[5] See Art. 44(8) of the Law on Foreign Nationals in the Republic of Bulgaria, available at https://lex.bg/mobile/ldoc/2134455296

[6] See eg Article 79a of the Aliens Act of 11 April 2014 (Slovenia); and (the relevant Dutch amendment to be added by Galina).

[7] For the relevant literature on judicial dialogue, see the introductory chapter in this book.

[8] European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9.

[9] See R Hamlin, 'International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia' (2012) 37 *Law & Social Inquiry* 933; and R Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (New York, NY, Oxford University Press, 2014).

[10] See J Ramji-Nogales, AI Schoenholtz and PG Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2010) 60 *Stanford Law Review* 295; and J Ramji-Nogales, AI Schoenholtzand and PG Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York, NY, New York University Press, 2009). See also SH Legomsky, 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' (2007) 60 *Stanford Law Review* 413.

[11] See eg the Global Detention Project data, available at www.globaldetentionproject.org; and the CONTENTION project, available at https://contention.eu

[12] See Section III of this chapter.

[13] In fact, independent appellate review is one of the solution to the refugee roulette suggested by Ramji-Nogales et al., Refugee Roulette (n 7).

this chapter argues that this is not enough. Our argument is two-fold. First, based on the good practices among the EU Member States, we identified five factors that may contribute to well-functioning model of pre-removal detention control: (1) early review of lawfulness of detention; (2) the need to increase expertise of detention judges; (3) the availability of appeal against the judicial decision on TCN detention; (4) automatic and periodic review of detention; and (5) quality legal representation for TCNs, including legal aid and good interpreters. Second, we argue that these five factors can reduce the detention roulette only up to a certain point and a uniform model of judicial review of TCN detention is not a solution either. Instead we propose a comprehensive training of detention judges and other reforms that would further professionalize the national adjudication systems in this area.

This chapter proceeds as follows. Section II sets the stage and sketches the broader context of diversity of domestic judicial design within the EU. Section III explores various models of judicial review of detention with a specific focus on four issues: whether domestic judges decide on detention or merely review of the detention decision of an administrative authority, who is the 'detention judge' on domestic level, differences between judicial control of detention and judicial control of return, availability of appeal against judicial decision. In doing so, we build heavily on the chapters in this part of the book which address judicial control of detention in a specific EU Member State. Section IV discusses whether a uniform model of judicial review of detention of TCNs for the purpose of their return could be a solution to the existing problems. Section V concludes.

II. Broader Context: Institutional Diversity

To examine which institutional setup is the most appropriate for the proper (or ideal) functioning of the mechanism of detaining TCNs and returning them to the country of origin, it is necessary to provide the reader with a broader context on the institutional diversity of judiciaries in the EU Member States. The EU Member States have distinctive institutional frameworks, and these frameworks can in turn produce significantly different outcomes even when addressing the same issue such as detention of TCNs for the purpose of their return. Different legal systems have undeniably a lot in common due to shared legal origins, but their structure and functioning can and do change over time.[14] The resulting differences, idiosyncrasies and institutional choices matter in judicial control of detention.

Legal systems can be differentiated and categorized by various means. One of the most common ways is distinguishing between the civil and common law systems that differ, most notably, in the sources of law that are used and the organization of judiciary. While common law systems have 'recognition judiciaries' where lawyers become judges later in their careers and their selection is merit-based,[15] civil law systems judiciary is career-based, as lawyers

[14] T Ginsburg and N Garoupa, *Judicial Reputation: A Comparative Theory* (Chicago, University of Chicago Press, 2015) 18.

[15] This system of recruitment is sometimes also called 'lateral'; see D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (New York, Cambridge University Press, 2016) 114.

become judges at a relatively young age and shortly after finishing law school, and then gradually progress in the judicial hierarchy, spending very little time outside courtroom and usually remaining in the judiciary until retirement.[16] The most important difference in this regard is that judges in the career judiciaries who start at the bottom, at the courts of first instance, are to a certain degree 'rookies', while the judges in recognition judiciaries tend to be more experienced. Thus, judges in career judiciaries in general require more oversight, often in the form of *de novo* review on appeal, which in turn necessitates more judges in the judiciary than in the recognition judiciaries.[17] We can find significant variations and differences even within the civil or common law systems.[18] For example, the Czech judiciary is divided into civil, criminal and administrative branches, with the Supreme Court and Supreme Administrative Court at the top and with the Constitutional Court looming aside and above all.[19] In France, on the other hand, there are general as well as specialist civil courts (labour courts and elected commercial courts), criminal courts divided into three levels according to the seriousness of the offence with a special court for minors, as well as administrative courts with the Conseil d'Etat at the top.[20] Look at any other judiciary, and you will find inspirations, transplants, attempts to copy, but never a perfect, complete twin – not even in Czechia and Slovakia, countries that existed within the same state for the most of the 20th century.

The fact that judiciaries in different countries look different is hardly surprising. What is important, however, is that the lack of convergence on separation of powers issues and institutional design[21] is caused by the fact that institutional design, and constitutional law in general, are often deeply rooted in the historical and cultural background of the respective countries.[22] Take France as an example again, where the separation of powers is informed by distrust towards courts which were during the French Revolution viewed as institutions of

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[16] See ibid, 113–14; for further details on the traditional features of the career model, see JH Merryman and R Perez-Perdomo, *The Civil Law Tradition? An Introduction to the Legal Systems of Europe and Latin America*, 3rd edn (Stanford, Stanford University Press, 2007) 34–8; DS Clark, 'The Organization of Lawyers and Judges' in M Capelletti (ed), *International Encyclopedia of Comparative Law, Volume XVI: Civil Procedure* (Tübingen, Mohr Siebeck, 2002) 164–86; or C Guarnieri, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self- Government' (2004) 24 *Legal Studies* 169, 169–73.

[17] Kosař (n 11) 114–15. Ginsburg and Garoupa also claim that hierarchical (eg career) judiciaries dominate in systems that emphasize social control, serving as a part of the state's apparatus governing civilians, while non-hierarchical judiciaries (eg recognition ones) serve as law-making bodies and require individual accountability; see Ginsburg and Garoupa (n10) 18, 29–30.

[18] Note that career judiciaries can include some aspects of the recognition ones and vice versa. These 'pockets of exception' may include eg constitutional courts in civil law systems, to which justices are appointed on the basis of merit; see ibid 50–8.

[19] See Kosař (n 11) 433–4.

[20] J Bell, *Judiciaries Within Europe: A Comparative Review* (Cambridge, Cambridge University Press, 2006) 45–9.

[21] See eg Ch Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford, Oxford University Press, 2013) 17–37, who examines the different approaches to the separation of powers in the United States of America, France, United Kingdom and Germany and eventually concludes that *trias politica* in its pure form probably never really existed.

[22] ibid. Note on the other hand that in many respects, states succumb to pressure from supranational institutions to reform their institutions; see eg D Kosař and L Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713.

the *Ancien Régime* that stood in the way of equality between citizens,[23] while in Germany, distrust is directed rather at the legislature and the democratic process whose failure led to the WWII, thus providing conditions for establishing a strong constitutional court with the task of guarding the fundamental rights and principles.[24] Translated into practice, the French Conseil d'Etat, originally set up by Napoleon, is not only a judicial body, but also an advisor to the government, thus being a blend of both executive and judicial branches.[25] Similarly, the Conseil Constitutionnel, although it is much more of a constitutional court nowadays, reviewing legislative acts and even hearing individual complaints, was originally designed as a council, not a court, for resolving disputes between the legislative and executive branches with former presidents of the republic as members.[26] In contrast with France, a full-fledged Kelsenian Constitutional Court (*Bundesverfassungsgericht*)[27] and a Federal Administrative Court (*Bundesverwaltungsgericht*) sit at the top of the German judiciary, both completely separated from the executive. Therefore, if we look at the institutional setup through the lens of historical roots, it may very well happen that what is uncontroversial in a certain EU Member State may be entirely unthinkable in the neighbouring one.[28]

Several implications arise from this brief overview. First, judicial review of detention in the EU Member States is shaped by the respective state's institutional framework. Thus, we can find the review being delegated to civil, administrative or criminal judges, or even justices of peace. Moreover, while judges in some countries are only controlling the lawfulness detention, meaning that they review the decisions made by the administrative organs, in other countries it is judges who decide on detention by themselves. Second, the different institutional setups have substantial impact on the functioning of the control of detention and may in turn produce significantly different outputs, be it with regards of standard of protection, quality of decisions, or engagement in judicial dialogue within the countries and the EU. Finally, the roots and nature of these differences will influence the search for possible solutions, because they cannot be easily overcome or simply replaced with some universal 'off-the-rack' solution. We explore these implications in the following sections.

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[23] Möllers (n 17) 22–6.

[24] ibid 32–7.

[25] Bell (n 16) 48–9. For a telling example of differences between jurisdictions, see the *Sacilor-Lormines v France* ECHR 2006-XIII 123, where the Strasbourg Court accepted the blend of consultative and judicial functions of Conseil d'Etat, while the three dissenters from the CEE countries insisted on complete separation of these functions by creation of supreme administrative court.

[26] Bell (n 16) 49–50; for the judicial review procedure, *question prioritaire de constitutionnalité*, see Art. 61-1 of the Constitution of 4 October 1958.

[27] ibid 158–68.

[28] Yet another (German) example, the democratic principle that requires the so-called legitimacy chain (*Legitimationskette*) connecting the people with their representatives, and thus renders inadmissible for example the co-option of judges, because it breaks the chain of democratic legitimacy. In other countries, the notion that there needs to be a democratic link in the judiciary may seem outrageous. See eg EW Böckenförde, *Verfassungsfragen der Richterwahl. Dargestellt anhand der Gesetzentwürfe zur Einführung der Richterwahl in Nordrhein-Westfalen* (Berlin, Duncker & Humblot, 1998) 75; and A Tschentscher, *Demokratische Legitimation der dritten Gewalt* (Tübingen, Mohr Siebeck, 2006) 178.

III. Models of Judicial Control of Detention

In this Section we build on the chapters in this volume as well as on additional sources of information on EU Member States' institutional configuration and provide an overview of the institutional convergences and differences among the EU Member States with regards to issuing pre-removal detention orders and their subsequent judicial review. Consequently, we sum up the advantages and disadvantages of the various systems and attempt to answer a question whether there is or should be any ideal model that should be pursued.

a. Who Decides? Judge Controlling v. Judge Deciding

The Return Directive[29] sets out rather vague and not very stringent requirements for the institutional framework with regard to detention orders. It leaves up to the EU Member States to choose whether to entrust judicial or administrative authorities with deciding about detention. If EU Member States opt for the latter, the Return Directive requires that the lawfulness of such decision is either reviewed as speedily as possible by court ex officio or that the third-country national is provided with the possibility to initiate the proceedings. The last institutional requirement is that the detention should be reviewed at reasonable intervals of time, again either ex officio or upon application of the detainee; should the detention periods be prolonged, such reviews are to be subject to further control by judicial authority.

The EU Member States thus have a choice, and their solutions are not uniform. Most of the EU Member States opted to put a judge in the controlling position and entrusted the administrative organs with issuing the decision on pre-removal detention,[30] but we can find significant variations in the procedure following the decision of the administrative organ. In Czechia, for example, the administrative organ orders the detention as well as its prolongation,[31] and any of these decisions are subject to judicial review only upon a suit lodged by the TCN. In Italy, on the other hand, administrative organ orders detention and within 48 hours must submit the detention order for a review by the justice of peace.[32]

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[29] Article 15(2) and (3) of the Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

[30] This is the case of Czechia, Slovakia, Slovenia, Bulgaria, Belgium, Austria or Netherlands, see, on Belgium, S Sarolea, 'The Criminal Judge in Migration: a Lewis Caroll World' in this book; on the other jurisdictions, see D Kosař, 'National Synthesis Report Czechia'; M Skamla, 'National Synthesis Report Slovakia'; S Zagorc, 'National Synthesis Report Slovenia'; V Ilareva, 'National Synthesis Report Bulgaria'; U Brandl, 'National Synthesis Report Austria'; G Cornelisse, 'National Synthesis Report Netherlands'; all of the reports, including those cited subsequently, were compiled under the auspices of the REDIAL project and are available at: euredial.eu/publications/national-synthesis-reports; see also M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention' (2016) European University Institute, 27–8, available at: euredial.eu. We are aware that the cited reports may not be completely up-to date and refer to them therefore only in cases we do not have more recent sources of information.

[31] Art. 124(1), (7) and Art. 125 of the Act No. 326/1999 Coll., Aliens Act.

[32] A Di Pascale, 'Can a Justice of Peace be a Good Detention Judge? The Case of Italy' in this book.

The 'deciding' judge solution exists in Germany, where it is a judge who orders even the initial detention. The institutional setup is a projection of a constitutional tradition,[33] as Germany opted for it to safeguard the constitutionally guaranteed right to personal liberty.[34] Similarly, only a judge of instruction can order detention in Spain.[35] However, for example in Lithuania, Estonia, or Italy, although it is an administrative organ that can detain a TCN, it can do so only for 48 hours. Only a court can order further detention after the initial 48 hours.[36] This solution in effect puts the judge in the 'deciding' position, as the 48 hours of detention by administrative organ can be understood as a time that is necessary for submitting the case to a court and the court deciding about 'proper' detention.

b. Detention Judge

While the Return Directive stipulates that detention may be either ordered or reviewed by judicial authority, it remains silent on the attributes of the judicial authority. We also lack case law that would define the attributes of a judicial authority according to the Art. 15(2) of the Return Directive, or at least according to the Art. 47 of the Charter of Fundamental Rights of the European Union. It could be thus said that it is largely up to the EU Member States what kind of judge they entrust with deciding about detention. For this reason, this is where the idiosyncrasies 'kick in' and we encounter significant variations among the EU Member States.

Charging the administrative judges with reviewing detention orders appears to be the most practical, and therefore also prevailing solution.[37] The purpose of administrative judiciary in general is to review various (vertical) acts of the administrative organs that are directed at individual. Administrative courts therefore usually decide also issues related to immigration and asylum, including both return decisions and detention orders of TCNs. A peculiar institutional choice exists in Germany, where, according to the constitution, only a judge can decide to deprive an individual of personal liberty.[38] Although Germany does have a system of administrative courts which usually decide matters of immigration and asylum, it is civil judges who are tasked with ordering pre-removal detention. The rationale rests in historical development of the German judiciary, because the administrative courts, established in 19th

[33] For the other Member States, the reasons for choosing one or the other solution are not as clear cut. In many cases, it may have been guided simply by a mere expediency.

[34] H Dörig, 'The Civil Judge as Administrator of Detention: The Case of Germany' in this book; see also Moraru and Renaudiere (n 26) 27–8.

[35] CJ Gortázar Rotaeche, 'National Synthesis Report Spain' REDIAL.

[36] I Jarukaitis and A Kalinauskaitė, 'Administrative Judge as a Detention Judge: The Case of Lithuania' in this book; Di Pascale (n 28); and Villem Lapimaa, 'National Synthesis Report Estonia', REDIAL.

[37] This is the case in Netherlands, Czechia, Slovakia, Austria, Slovenia, Bulgaria, Estonia, Lithuania, and Sweden. See the relevant REDIAL reports (nn 26 and 32); Jarukaitis and Kalinauskaitė (n 32); and T Quintel, 'National Synthesis Report Sweden', REDIAL.

[38] However, see also the difference between deprivation and restriction of personal liberty, as only in the former case a decision issued by a court is required; Dörig (n 30).

century, were originally part of public administration.[39] Similarly interesting is giving the power to order detention to the justice of peace (*giudice di pace*) in Italy. Justices of peace are non-professional, honorary judges without specialization who resolve minor disputes across jurisdictions.[40] A major disadvantage of this solution is the fact that justices of peace are not professionals, have no special knowledge related to immigration law, and were, until 2017, paid by case, which raises doubts they meet criteria prescribed by the Art. 47 of the Charter of Fundamental Rights of EU, especially those of impartiality and independence.[41] Since 2017, they are no longer paid only by the number of cases decided[42] and the quality of their decisions is scrutinized, but the concerns over their independence were not dispelled.[43]

Another institutional choice is to let criminal judges order pre-removal detention.[44] At the first sight, this seems to be a quite practical solution. After all, criminal judges most often decide about deprivation of personal liberty, be it in the form of pre-trial detention or sentencing to prison. Furthermore, the availability of criminal judges may be much better: there may be more criminal than administrative judges, they may be on-duty and ready to issue a timely decision, and they may be closer to detention centres compared to, say, administrative courts, which may be further and less numerous.[45] On the other hand, criminal judges are not specialists in immigration or asylum law, which can result in unwanted consequences. Consider the example of Spain, where only judges of instruction belonging to the criminal division of the judiciary have the power to order detention, but due to the lack of knowledge in this area, they tend to decide in line with the request of the administration and even 'copy-paste' reasoning from the request.[46] Belgium and Lithuania opted for this scheme as well.[47] Furthermore, criminal judges may not have the power to review the return decision as well and may even have problem accessing it.[48] Finally, a hybrid model existed in France, where *juge judiciaire* (*juge des libertés et de la detention*) decided about prolongation of pre-removal detention, but a complaint against a detention order issued by administrative organ (up to 48 hours) was heard by the administrative court; due to the deficits of this solution,[49] however, it is nowadays solely *juge judiciaire* who reviews the detention order and decides upon prolongation of detention.[50]

An important aspect of attributing the power to order detention is whether the judge competent for ordering detention or reviewing the order is a specialist or a generalist.

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[39] K Hailbronner and D Thym, 'National Synthesis Report Germany', REDIAL.

[40] Di Pascale (n 28).

[41] ibid.

[42] Part of their salary is still based on the productivity criteria set out by court presidents, see ibid.

[43] ibid.

[44] eg Belgium, Sarolea (n 26).

[45] Jarukaitis and Kalinauskaitė (n 32).

[46] Gortázar Rotaeche (n 31).

[47] Sarolea (n 26).

[48] See Section III.C. below.

[49] *A. M. v France*, App no 56324/13 (ECHR, 12 July 2016).

[50] S Slama, 'Duality of Jurisdiction in the Control of Immigration Detention: The Case of France', in this book.

Generalist judges usually decide criminal, civil and even administrative law cases. This institutional framework is quite typical for the common law jurisdictions.[51] In the civil law jurisdictions, on the other hand, judges usually deal with either civil law cases, or criminal law ones, and, in some cases, a special branch of dealing with administrative law is established as well.[52] Generalists, understandably, do not have specialization. Even within the jurisdictions where civil, criminal and administrative jurisdiction are separated, we usually do not find judges who decide about detention to be narrowly specialized in immigration or asylum law. The implications are clear. The administrative organs that deal solely with immigration benefit from information asymmetry.[53] Due to this fact, a judge may be required to put in an extra work and time, which she may not have, to appropriately review detention order issued by the administrative organs. Or, the judge may simply give in and rule 'in favour' of the administrative organ, as it supposedly happens in Spain.[54] There are exceptions, of course. In Netherlands, detention orders are reviewed by specialized chambers for immigration law at district courts.[55] In the UK, a bail judge specialized in immigration law oversees the cases,[56] and in Bulgaria, there is de facto specialization at the Supreme Administrative Court.[57] Furthermore, even those judges that are de jure generalists (even within the administrative jurisdiction), often have one area that they know better than the other, be it tax law, patents or immigration and asylum law.[58]

Which solution is better? The main advantage of having specialist judges is that the quality of decisions should be much higher: not only the judges have much more knowledge of the issue, they should have also more time for handling the cases, as they do not have to spend it on deciding about issues they understand much less (and have to, as a result, put in much more time to study all relevant facts, jurisprudence and case law). Furthermore, specialist judges may be much more receptive to the trends in foreign case law, which is especially relevant with respect to the harmonized pre-removal detention, and thus also much more likely to engage in both horizontal and vertical judicial dialogue. On the other hand, there is a danger as well, because when only a few judges control case law, they may as well turn blind eye to the recent foreign/supranational case law development with no other judges available to 'rectify' it. They can thus hinder evolution or responsiveness of the national case law, which may be detrimental to the TCNs' rights. Finally, having only few judges deciding one type of cases may also pose a threat to judicial independence and impartiality, because

[51] eg Bell (n 16) 305.

[52] ibid 45, 110.

[53] On information asymmetry, see K Binmore, *Game Theory: A Very Short Introduction* (New York, Oxford University Press, 2007) 102–3.

[54] Gortázar Rotaeche (n 31).

[55] Cornelisse (n 26).

[56] The Immigration and Asylum Chamber of the First-tier Tribunal.

[57] Ilareva (n 26).

[58] This is the case of Czechia, where the number of administrative judges is substantially smaller than the number of civil/criminal judges, and some of the administrative judges specialize in immigration and asylum law, even though they have to deal with cases falling into other areas as well.

prior knowledge which judge will probably decide the case beforehand renders her susceptible to pressure from various interest groups.[59]

c. Control of Detention vs. Control of Return

Closely related to the discussion of the influence of specialist or generalist judges on the quality of detention order or review of such order is the question whether the same judge reviews both the detention order and the return decision. There are several reasons to give both powers to one judge. First of all, the facts relevant to asserting legality of both decisions may not be entirely same, but they are usually to a certain degree interconnected. If review of both decisions is executed by the same judge, she does not have to do the same work twice. The second reason is that legality of both decisions is closely linked: if the return decision is illegal, so is the detention order. This problem, however, could be solved by establishing a rule that if the return decision is overturned, the detention order is automatically voided as well. Furthermore, there is a danger that the same legal terms may be interpreted in different ways by different judges.[60]

Yet another issue, which manifests for example in Belgium,[61] and arises when the return decision and the detention order are reviewed on different tracks, is that they may miss each other completely, and while one court examines the legality of detention, the other court may have already finished the proceedings and the responsible authorities may have already executed the removal. It may seem irrelevant for the TCN because she is out of the detention anyways, but the review of legality of detention order may have implication at least for claiming damages for wrongful conduct.[62] That being said, in most EU Member States, the judge who examines the legality of detention does not examine the return measure beyond acknowledging its existence.[63] Interestingly, this is so even if the judge in charge of reviewing return decision belongs to the same court.[64] In some cases, however, judges, when reviewing detention order, are required to at least examine whether the return decision is not manifestly unlawful.[65] Such solution respects the fact that return orders and detention orders may be issued at different times, but it does not preclude the possibility of different decisions about the same issue.

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[59] Note however that immigration and asylum law is not an area of law where 'stakes are high', this danger is much more present in, for example, bankruptcy or election law; see eg A Blisa, T Papoušková and M Urbániková, 'Judicial Self-Government in Czechia: Europe's Black Sheep?' (2018) 19 *German Law Journal* 1951, 1964–65.

[60] A case law split exists for example in Greece, see A Papapanagiotou-Leza and S Kofinis, 'Can the Return Directive Contribute to Protection for Rejected Asylum Seekers and irregular migrants in Detention? The Case of Greece' in this book.

[61] Sarolea (n 26). Note also that this problem is further amplified by uncertainty as to the scope of review.

[62] It sometimes happens in Czechia, especially in asylum law cases, that the Supreme Administrative Court reviews decisions relating to TCNs who are apparently already long gone.

[63] This is the case of eg Germany, Czechia, Slovakia, Bulgaria or Belgium; see Dörig (n 30), Kosař (n 26), Skamla (n 26), Ilareva (n 26), and Sarolea (n 26).

[64] Brandl (n 26).

[65] Eg Italy, see Di Pascale (n 28).

d. Is Appeal against a Judicial Decision Available?

Although the Return Directive requires judicial review of the detention order if it is issued by an administrative authority, it does not include a requirement of an appeal *against the subsequent judicial decision reviewing such order*, or against a judicial decision ordering detention. The EU Member States thus have full discretion whether the TCN will have only one or multiple-tiered judicial review, and, consequently, there is a great diversity in their institutional choices. The EU Member States' approach varies in all three principal aspects: how many appeals can be lodged, which court deals with the appeal, as well as in what can be challenged in the appeal.

The number of appeals available to TCNs range from no appeal to as many as two of them. Slovenia, Hungary and Greece, for example, provide TCNs with no possibility of appeal.[66] One appeal against a judicial decision seems to be the most prevalent option,[67] while Germany and Belgium provide for two appeals.[68] The most obvious downside of providing no possibility of appeal against judicial decision is the danger of a split in case law. Greece can serve as a good example: before the transposition of the Return Directive, the courts there disagreed about whether they have the power of a full review of detention order or not; courts disagree also about how to handle detained TCNs who expressed the intention to lodge an asylum application and have not been transferred to the Reception and Identification Centre yet;[69] a split exists on the question of detaining TCNs after the 18 months period provided for by the Return Directive, or on the question of admissibility of objections against the conditions of detention and on who carries the burden of proof.[70] Furthermore, providing for an appeal may also foster judicial dialogue, as the judges at high courts would engage with the most difficult legal issues and may be more receptive to the case law of international courts, provided that the appellate courts are not subject to stringent time limits for issuing a decision. On the other hand, the one obvious downside of appeal mechanism are increased costs and backlog by cases dealing with temporary decisions.[71]

The states differ also as to which court decides about the appeal. The institutional setup in this regard is completely dependent on the organization of judiciary in EU Member States. Therefore, where detention order is reviewed or issued in first instance by administrative court, it is usually the apex administrative court that hears the appeal, be it the Supreme Administrative Court in Czechia, the Supreme Court in Slovakia, or the Conseil d'Etat in

[66] Papapanagiotou-Leza and Kofinis (n 55), Zagorc (n 26), B Nagy, 'National Synthesis Report Hungary', REDIAL.

[67] Czechia, Slovakia, Bulgaria, Italy, Austria, Netherlands, see Kosař (n 26), Skamla (n 26), Ilareva (n 26), Di Pascale (n 28), Brandl (n 26), Cornelisse (n 26).

[68] Sarolea (n 26), Dörig (n 30).

[69] Some courts are of the opinion that such detention falls within the scope of the Return Directive, while other disagreed and reviewed it by analogic application of different law; Papapanagiotou-Leza and Kofinis (n 55).

[70] ibid.

[71] The latter problem could be solved by establishing a possibility of the appeal court to select for deciding only those cases that raise new or important questions.

France.[72] If the first-instance review is entrusted to the civil/criminal division of the judiciary, it is usually the apex civil/criminal court.[73] One of the exceptions is Lithuania, where general court decides in the first instance, and the Supreme Administrative Court decides about the appeal.[74] Finally, states differ also as to what can be challenged on appeal. There are basically two options: either the appeal court reviews only questions of law, or both questions of law and fact.[75] Understandably, these two options can be further modified to suit the idiosyncrasies of the respective systems. The advantages and disadvantages of both options follow from what has been said above on the question of introducing the possibility of appeal. If the aim is to safeguard the unity of case law and fostering judicial dialogue, the appeal courts would do best with only power to review questions of law, as they would not have to bother with factual questions. Giving the appeal courts also the power to review questions of facts may, on the other hand, boost the protection of rights of the TCNs but, at the same time, it can prove too burdensome to engage in judicial dialogue. A compromise between these two options can be achieved by giving the appeal courts the power to annul first-instance decision for procedural flaws and returning the proceedings before the court of first instance for completing the evidence.

e. The Ideal Model: Context Matters

In the previous sections of this chapter, we have shown that there is a significant diversity in the institutional choices made by the EU Member States when implementing the Return Directive and its Article 15 dealing with pre-removal detention. This diversity is a result of the significant leeway EU Member States are given by the Return Directive and procedural autonomy,[76] combined with the differences between judicial systems across European Union with roots in the EU Member States' history and cultures. We have already hinted at some of the attributes above, and, in this Section, we summarize them. This summary should help us, then, to elaborate on whether some of the institutional configurations are better than others, and if there is a uniform model that would be worthy of pursuit, ie whether there should be more convergence on the institutional matters in the European Union.

Administrative judges usually have the power to review the detention order. We have already said that where an administrative branch of judiciary exists, this is a rational choice, because the usual task of administrative judiciary is to scrutinise the acts of state directed at individuals. Therefore, even if there are no specialists dealing only with the narrow area of immigration and asylum law, administrative judges are still the ones who are, in contrast to civil, criminal or other judges, the most specialized. There are, however, some setbacks.

[72] Kosař (n 26), Skamla (n 26), Slama (n 45).

[73] Dörig (n 30), Sarolea (n 26), Di Pascale (n 28).

[74] Jarukaitis and Kalinauskaitė (n 32).

[75] The Italian Court of Cassation can only review questions of law, while the appellate procedure in Germany includes new factual assessment; see Di Pascale (n 28), and Dörig (n 30).

[76] See, eg, case C-33/76 *Rewe-Zentralfinanz eG and Rewe Zentral AG v Landwirtchaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188, and below (n 86).

Quite often, the administrative courts only review questions of law, and questions of fact are left out. If the goal to be achieved is proper safeguard of the rights of TCNs, who are especially vulnerable due to the lack of knowledge of the language and the law, and sometimes even lack of proper legal assistance, a detention order should be reviewed on the basis of both law and facts at least in the first instance, and ideally on the appellate level as well. But, if we want to foster judicial dialogue, it might be preferable to task appellate courts with only reviewing questions of law, as we may assume the court would be less burdened and could use the extra resources to engage in judicial dialogue instead. Another setback, as the case of Netherlands shows, is that the administrative courts may prove to be too deferent towards the administrative organs and may even lack the necessary speed,[77] but, as is shown below, this issue is not limited to administrative courts.

As for the other institutional choices, ie having civil or criminal judges or justices of peace issue or review detention order, the principal disadvantage appears to be the lack of specialization, which is even greater than in the case of administrative judges. The most extreme manifestation of such a lack are the incidents described in relation to Spain, where some judges simply copy-paste the arguments of the administrative organs without truly reviewing them. Further problematic aspects include high costs and lack of speed when it comes to civil judge as detention judge,[78] or the fact that judges may consider control of immigration detention to be a field of secondary importance.[79] The issue with the peculiar case of entrusting justices of peace with controlling pre-removal detention has been mentioned above; namely the fact that these judges lack expertise and that they have a motivation to decide as many cases as possible. For the concerns over their independence and impartiality, the Italian justices of peace are far from being a candidate for an 'ideal' model.

We can therefore say with some confidence that no currently existing model can be considered ideal. None of them can be said to be outright bad, either.[80] Each and every solution has, understandably, its advantages and disadvantages, and the underlying question thus is whether there is such a thing as an ideal model. We believe that context matters, and that the answer depends on the lens through which we examine the models. Do we want to achieve the best possible protection of third-country nationals' rights, or do we rather prefer uniform case law? By best possible protection, do we mean the speediness of the judicial review, or do we mean thoroughness of it? Achieving any of these (or other) goals might require different institutional arrangements, sometimes even contradictory ones. Many jurisdictions, however, exhibit good practices with respect to the mentioned goals. We

[77] Cornelisse (n 26).

[78] We assume that not all of the TCNs challenge detention order before courts if it is issued by administrative authority.

[79] See the case of Spain above (n 46).

[80] The model that raises the most questions is the Italian one, see Di Pascale (n 28). This is not to say, however, that it is deficient or that it may not be functioning.

identified five factors that may contribute to well-functioning model of pre-removal detention control.

First, *time matters*. Detention constitutes an interference with personal liberty guaranteed on the international level,[81] as well as on the national/constitutional one. Therefore, the sooner it is possible to establish that detention is (un)lawful, the better. The optimal solution in this regard is, of course, to let courts, and not the administration, decide on the detention. If it is the administrative that decides, the easiest way to guarantee a speedy review is to entrench a time limit within which the court has to decide. Nevertheless, it may not be enough to give courts a deadline if they are permanently overburdened; achieving swift delivery of judgments is therefore a matter of complex institutional fine-tuning. Time matters not only for the third-country national, but for the judges as well speedy decision-making may not come at the expense of quality of review and reasoning.

Second, the quality of decisions is influenced by the *expert knowledge* as well. The less experienced detention judges are in the area of immigration and asylum law, the less thorough the review of detention order; this may not be rectified even by giving the power to review detention order to criminal judges, who deal with criminal detention cases on daily basis. Moreover, if the detention judges lack sufficient expertise in immigration law, they may be reluctant to engage in vertical judicial dialogue with the CJEU and pose preliminary questions.[82] As a result, the case law may be systematically out of tune with the EU law and the practice in other countries.

Third, even courts need *oversight*. The possibility of appeal against judicial decision reviewing detention order is crucial for securing a unified case law and approach to the relevant issues. Providing an appeal and letting the second- or third-instance court to decide with no deadline and the need to review the questions of fact may also foster judicial dialogue, both vertical and horizontal.

Fourth, *automatic and periodic review of detention* may be the best way to safeguard the rights of TCNs. Reviewing detention only upon an action lodged by the detainee may on the one hand unburden the courts to a certain degree, but facing the complex legal procedure coupled with lack of knowledge of the relevant language, the third-country nationals may be effectively discouraged to defend their rights before courts.

Finally, *quality legal representation* matters. Even the most fine-tuned institutional framework is useless if the third-country nationals cannot reach it, it is thus essential that

[81] Eg Article 5 of the European Convention on Human Rights, and Article 6 of the Charter of Fundamental Rights of the EU.

[82] See eg the historically first preliminary reference by a Hungarian court that was rejected due to lack of jurisdiction of the CJEU (6 October 2005, Case C-328/04, *Attila Vajnai* [2005] ECLI:EU:C:2005:596). Note, however, that this issue may apply to all the EU Member States.

they are provided with sufficient access to legal aid[83] and interpreters. In Italy, for example, it may prove difficult to find a senior lawyer to challenge decision of justice of peace before the Court of Cassation.[84] In such a situation, TCNs are left in a difficult situation, even though the relevant legal rules might look great on paper.

The list of factors above does not include *judicial dialogue*, because it is not an institutional feature per se that could be entrenched by a legal act or a change of policy. It is only possible to set up a proper framework and create environment that would enable, foster and encourage it. What is more, judicial dialogue can be to a certain degree 'self-enhancing' – introducing some institutional features may stimulate engagement in judicial dialogue, and at the same time, judicial dialogue can have direct effect on the same and other institutional features, as well as on the output of the system, safeguarding and improving them. Thus, if we, for example, unburden and educate judges, they may engage more in judicial dialogue. Judicial dialogue, especially the vertical one, can then be used as a powerful defence tool against attempts to curb powers of courts.[85] Even though the institutional features with a potential of fostering judicial dialogue do not necessarily exclude other goals, they may involve some trade-offs – unburdening of appellate judges may for example mean not having them review questions of facts, which may decrease the standard of protection afforded to individual TCNs, while possibly improving the level of protection in general.

To be sure, numerous other contextual factors, such as the relationship between judges and the administration, or even the state of public debate about immigration, may significantly influence the outcomes of the system of judicial review of TCN detention. However, we will discuss these broader issues in the next Section.

IV. More Institutional Tweaks: Towards a Uniform model of Judicial Review of Detention of TCNs for the Purpose of their Return?

In the previous Section we exposed the broad institutional diversity in judicial review of pre-removal detention within the EU and identified five factors that improved the judicial decision-making process in this area. But these five factors, however promising, can only reduce the detention roulette. This Section explores whether more unification in this area, namely the adoption of a uniform model of judicial review of TCN detention could further ameliorate the problem of the lack of consistency in adjudication in this area.

For now, we leave aside the constitutional limits of designing domestic judiciaries by the EU authorities. It suffices to note here that, until recently, EU options how to influence the structure of domestic court systems were very limited. Moreover, the EU authorities have

[83] In Greece, no legal aid is provided in administrative cases, while in Lithuania, TCNs are provided with free legal aid and the decision must be announced to her in a language she understands; see Papapanagiotou-Leza and Kofinis (n 55) and Jarukaitis and Kalinauskaitė (n 32).

[84] Di Pascale (n 28).

[85] See especially the failed attempt of Czech government to limit judicial review of TCN detention, below (n 99).

respected the principle of procedural autonomy of the EU Member States.[86] That has changed with the rule of law crisis in Poland and Hungary which triggered novel avenues of engaging with domestic judicial design. Most importantly, the CJEU's judgment in *Associação Sindical dos Juízes Portugueses*[87] (hereinafter only "ASJP") brought domestic judicial design under its purview. The CJEU opened the door to scrutiny of domestic judicial design by creative construction of the scope of EU law, of the principle of effective judicial protection and of judicial independence as an EU law obligation.[88] While the application of the *ASJP* principles to the standard cases (that is not to the rule-of-law-crisis cases[89]) is still unclear, this judgment made clear that EU has competence over domestic judicial design, which may have significant spill-over effects also in the area of judicial review of TCN detention. The recent Opinion of AG Bobek in C-556/17 *Torubarov*,[90] which addresses the removal of decision-making powers of Hungarian administrative courts in international protection cases, shows that this is not a hypothetical scenario anymore. To the contrary, the same arguments can be used, mutatis mutandis, in order to challenge the jurisdiction stripping or limiting judicial review in the area of TCN detention.[91] Furthermore, we do not have the ambition here to determine what are the best *substantive* criteria, according to which we should select the template for the uniform model of judicial review of TCN detention. These criteria may derive both from EU law as well as from domestic interests and may vary widely. They may include, among other things, the number of returns, compliance with fundamental rights, speediness, or efficiency. What we perceive as a key criterion in this chapter is the consistency in adjudication on TCN detention.[92] That implies the classic formula, treating the like cases alike, and different cases differently. To put it bluntly, no detention roulette.

Hence, the question whether the uniform model of judicial review of TCN detention would bring about positive results, that is whether it would further reduce the detention roulette, assumes that the EU has competence in domestic judicial design[93] and that the key interim goal is to achieve consistency in judicial decision-making on TCN detention. In short, our answer is that it is highly unlikely. In the paragraphs that follow we explain why.

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[86] See eg HW Micklitz and B De Wiite (eds.), *The European Court of Justice and the Autonomy of the Member States* (Cambridge, Intersentia, 2012). But see M Bobek, 'Why There is no Principle of 'Procedural Autonomy' of the Member States' in HW Micklitz and B De Wiite (eds.), *The European Court of Justice and the Autonomy of the Member States* (Cambridge, Intersentia, 2012) 305–322.

[87] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.

[88] M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 *European Constitutional Law Review* 622.

[89] Note that the CJEU was very careful with application of the *ASJP* principles even in the *Celmer/LM* case (C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586). See the symposium on the *Celmer/LM* case, available at: https://verfassungsblog.de/category/focus/after-celmer-focus/.

[90] Opinion of AG Bobek in Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*.

[91] See also notes 99 and 107 below.

[92] This, of course, implies proper judicial reasoning that respects the accepted modalities of judicial interpretation.

[93] By doing so we also brush aside the principle of procedural autonomy. See above (n 79).

First, a uniform model of judicial review of detention of TCNs may actually yield different results in EU Member States. Consider for instance the transplantation of the German model[94] of immigration detention to other EU Member States. Even assuming that this model works well in Germany does not mean it would work the same way elsewhere. Introducing it, for instance, in Czechia would actually have deleterious effects, as the expertise in immigration law lies with Czech administrative judges who are specialized in this area, have received a specific training over several years and have been far more exposed (and open) to EU law. Moreover, the Czech civil law judiciary is topped by the Supreme Court, which is the only apex court[95] that has not undergone a significant transformation after the Velvet Revolution. In such situation, transplanting the German model of judicial review of detention in Czechia would yield significantly different results than in Germany. And this is, of course, just one example. In sum, each judiciary is deeply embedded in its historical, political and legal context, and any institutional transplant has to be carefully tailored to environment in the 'receiving' country.

Second, adoption of the uniform model might face constitutional obstacles on the domestic level.[96] Many EU Member States have strong views regarding their separation of powers and may consider certain aspects of it even a part of their constitutional identity. It is also a common knowledge that there is far less convergence on separation of powers issues than on human rights issues among the EU Member States.[97] Third, changing the institutional setup does not suffice and informal rules matter too. There is a growing research that shows informal rules affect the functioning of the judiciary.[98] These 'informal rules of the game' are equally relevant in asylum and immigration adjudication, which is particularly prone to be affected by informal practices.

Fourth, risk of politicization of courts looms large in the background. In the era of populism, immigration detention has become a politically salient issue. So far judges at least in those countries where they review the detention decision of the administrative authority with lesser or greater degree of deference have been shielded from the popular backlash.[99]

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[94] This does not imply that the German model is the best. It is used merely as an example of potential pitfalls of legal transplants.

[95] In contrast to the Czech Constitutional Court and the Czech Supreme Administrative Court, that were established as brand new courts after the Velvet Revolution.

[96] Regarding the constitutional obstacles on the EU level see n 79–82 above.

[97] For a more detailed discussion of a limited convergence in separation of powers issues, see V Jackson, *Constitutional Engagement in a Transnational Era* (New York, Oxford University Press, 2013), Chapter 8 (see also pp. 53 and 67).

[98] See eg G Helmke and S Levitsky (eds.), *Informal Institutions and Democracy: Lessons from Latin America* (Baltimore, The Johns Hopkins University Press, 2006); T Ginsburg and J Melton, 'Does De Jure Judicial Indepdence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 2 *Journal of Law & Courts* 187; B Dressel, RS Uribarri and A Stoh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 *Annual Review of Law and Social Science* 413; and S Horak, F Afiouni, Y Bian, A Ledeneva and M Muratbekova-Touron, 'Special Issue Social Networks The Dark and Bright Sides of Informal Neworks' (2018) 14 *Management and Organization Review* 439.

[99] Note, however, that courts in some countries have started to feel the backlash; among the less fortunate courts are the Hungarian, Italian or Czech ones. On Hungary, see the Opinion of AG Bobek in Case C-556/17

Granting judges the full judicial review in immigration detention cases (or turning them into primary decision-makers in these cases) may reduce the political slack[100] and drag them in the forefront of political arena. Judges in many EU Member States are acutely aware of this threat and feel uneasy about this development.

Moreover, by trying to fix the problems exclusively on the level of courts, we might miss something. By focusing on just one institutional player (courts), comparative studies run the risk of assuming that courts play equally important role in the TCN detention regime of each state. This assumption does not work even for the refugee status determination,[101] where convergence is much greater than in the law of TCN detention. As we have shown above, there is a huge institutional diversity in judicial review of TCN detention among the EU Member States.[102] Most importantly, in some countries the administrative authorities decide on the detention of TCN and a judge 'merely' review their decisions, whereas in other countries judges decide on detention without prior involvement of administrative agencies. Therefore, we cannot focus just on courts, as they are only a part of 'detention equation'. Looking at the administrative decision-making authorities is equally important.[103] One may even wonder whether the judge is better placed to decide on the immigration detention than the administrative organ and whether she has the necessary tools.

All of these reasons counsel against expectations of high gains brought about by the unification of the judicial review of TCN detention. Of course, the CJEU might think otherwise and may expand[104] the *ASJP* principles[105] not only to the rule-of-law crises, but also to the standard fundamental rights cases,[106] such as cases concerning the TCN

Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal; on Italy and the "Minniti law", see eg 'Building fortress Italia by introducing "a wall of laws"?' (*ECRE*, 14 April 2017) <https://www.ecre.org/building-fortress-italia-by-introducing-a-wall-of-laws/> accessed 30 May 2019. In Czechia, the government attempted to limit the possibility of judicial review of detention order (and subsequent appeal against the first instance court ruling) only to those applicants who were still in detention; the first instance courts, however, refused to apply the law due to its unconstitutionality, and their position was later confirmed by the Constitutional Court that abolished the law even before the CJEU could have a say in the matter. See the judgment of the Czech Constitutional Court, no. Pl. ÚS 41/17, and the preliminary question by the Supreme Administrative Court, case C-704/17 *D. H. v Ministerstvo vnitra*, which was taken back by the Supreme Administrative Court after the Constitutional Court abolished the law, but in which AG Sharpston delivered an opinion.

[100] 'Slack', as defined by the economic theory of regulation, is the effect of information and monitoring costs that shield the actions of a regulator (in this case courts) from observation by a rational electorate. The term 'slack' was first introduced into the political economy literature by Kalt and Zupan in J Kalt and M Zupan, 'Capture and Ideology in the Economic Theory of Politics' (1984) 74 *Am. Econ. Rev.* 279.

[101] See Hamlin, *Let Me Be a Refugee* (n 6) 15.

[102] See Section III.

[103] See *mutatis mutandis* Hamlin, International Law (n 6).

[104] In fact, the major rationale of the CJEU's creative construction of EU law in the *ASJP* case is to expand its power in order to have a say in debates that were out of its reach beforehand. See Bonelli and Claes (n 81). This is actually a common motivation of all supranational courts who have started to engage in domestic judicial design; see Kosař and Lixinski (n 18).

[105] See above.

[106] Note that the CJEU based its reasoning in *ASJP* exclusively on Article 19 TEU, not on Article 47 of the Charter. See *ASJP*, § 28; and Bonelli and Claes (n 81) 630-1.

detention. This may, in turn, push for uniform judicial review of detention in EU.[107] However, we think it is unlikely in near future. It is one thing to say that independence of Polish courts was endangered by abruptly reducing the compulsory retirement age of judges, by packing the Supreme Court and the National Council of the Judiciary, and dismissing court presidents, and another thing to hold that detention judges are not independent, because some of them simply copy-paste the arguments of the administrative organs without truly reviewing them[108] or they in general defer to the administrative authorities.[109]

That said, we believe that there are other avenues how to reduce the detention roulette that we find more fruitful than the institutional unification discussed above. More specifically, we propose a comprehensive training of detention judges and other reforms that would further professionalize the national adjudication systems in this area.[110] Both of these steps have at the same time a potential to improve judicial dialogue which could then have positive 'ripple-effect' throughout the system in the sense discussed above.[111]

As to the training, in many EU Member States immigration detention judges receive less training than judges deciding on international protection. We believe this should be changed and immigration detention judges should receive the same amount of training with particular attention to exercises and lessons that will properly promote greater consistency. Importantly, this training should include not only substantive law, but also units on interviewing techniques and intercultural communication as well as units on judicial temperament.[112] Ideally, within each immigration court, adjudicators with particularly high and particularly low grant rates should also confer with each other and try to ascertain the cause of this phenomenon.

As to the professionalization more broadly, it is important to ensure at the domestic level that immigration detention is not perceived as a field of secondary importance.[113] In some countries there are even informal quotas how many such cases judges must decide per month[114] and if such quotas are set too high (especially in comparison with other types of cases), the inevitable consequence is the reduced time and resources devoted to

[107] This might happen in the judicial review of international protection, if the CJEU follows the Opinion of AG Bobek in Case C-556/17 *Torubarov*. As we showed above, the same arguments can be transplanted to the TCN return detention (see notes 90-91 above).

[108] See the case of Spain discussed above (n 46).

[109] See the situation in the Netherlands, described by Cornelisse (n 26). This is an issue also in Austria, where administrative judges are under significant political pressure.

[110] Here we rely heavily on policy recommendations aimed at reducing the refugee roulette in the United States (see Ramji-Nogales et al., Refugee Roulette (n 7) 378–89) which we adjust to the judicial review of immigration detention within the EU.

[111] See Section III.E.

[112] Nevertheless, a question arises who should provide such training (EASO, national agencies responsible for training of judges, judges themselves), and it is also not unthinkable that some government would, for various political reasons, try to prevent the training to be provided to judges.

[113] See above (n 79).

[114] This is the case, for instance, in Czechia.

immigration detention cases. Similarly, if immigration detention judges do not have comparable resources to their colleagues deciding on other disputes,[115] it inevitably decreases quality of their judicial reasoning. More boldly, the EU Member States where administrative courts or justices of peace decide on or review immigration detention should ensure that administrative judges and justices of peace enjoy the same level of judicial independence as the general judiciary, which is not always the case these days.[116]

V. Conclusion

This chapter exposed a significant institutional diversity of domestic design of judicial review of TCN detention among the EU Member States, which may lead to a detention roulette. Subsequently, it identified five factors that may contribute to a well-functioning model of pre-removal detention control and, thus, reduce the detention roulette. First, review of lawfulness of detention must be conducted as soon as possible. Second, the higher expertise of detention judges, irrespective of the specificities of domestic judicial design, improves detention decision-making. Third, the availability of appeal against the judicial decision on TCN detention increases the quality of the first-instance judges' decisions as well as the overall quality of judicial review. Fourth, automatic and periodic review of detention contributes to the appropriate length of TCN detention. Fifth, the quality legal representation for TCNs, including legal aid and good interpreters, makes sure that TCNs not only have access to judicial review of their detention, but also enjoy *effective* access to this protection.

Judicial dialogue, like a thread creating a positive ripple-effect, can play a crucial role. Some of the features mentioned above can have positive influence on judicial dialogue, providing necessary conditions or facilitating it. Vice versa, judicial dialogue can boost and improve any of these and number of other features, as well as the output, of judicial review of TCN detention. Although facilitating judicial dialogue may involve some trade-offs and hypothetically lower the standard of protection form the point of view of TCNs, it is important both for the judiciaries themselves, who may use it as a shield against curbing of their powers, and for the TCNs whose rights would, if the judiciaries were to suffer, necessarily suffer as well.

That said, this chapter takes a sober view of the current situation on the ground and argues that the abovementioned five factors cannot eradicate the detention roulette. It may only reduce it. Any other institutional tweak, such as uniform model of judicial review of TCN detention, is also unlikely to help. Instead this chapter proposes other solutions such as a

[115] This may include, among other things, individual law clerks, enough support staff as well as quality interpreters.

[116] See eg Office for Democratic Institutions and Human Rights, 'Handbook for Monitoring Administrative Justice' (2013), available at: https://www.osce.org/office-for-democratic-institutions-and-human-rights/105271?download=true; see also above the recent attempts to curb competences of courts dealing with immigration issues (n 99); and the Opinion of the CCJE Bureau, CCJE-BU(2019)3, addressing concerns about the position of the president of the Administrative Court of Vienna.

comprehensive training of detention judges and other reforms that would further professionalize the national adjudication systems in this area. Only then the TCN detention will be considered as important field of law in the eyes of domestic judges and attract the appropriate attention, care and resources.

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2017/7: Ivana Kudláčková_Autonomní zbraně - Pandořina skříňka?

Year 2016

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2016/4: Ondřej Kadlec_Jan Petrov_Rozšířený senát NSS: Judikatura ESLP jako zákaz vjezdu na křižovatce právních názorů
2016/5: David Kosař_Ladislav Vyhnánek_Senát a výběr soudců Ústavního soudu
2016/6: Vojtěch Šimíček_Výběr kandidátů na soudce Ústavního soudu a jejich schvalování Senátem
2016/7: Jan Petrov_Senátoři a iniciace ústavního přezkumu zákonů.doc
2016/8: Adam Herma_Podjatost soudce v judikatuře Ústavního soudu

Year 2015

2015/1: Štěpán Výborný_Ústavní soudy zemí Visegrádské čtyřky a koncept bránící se demokracie
2015/2: Martin Bobák_Michal Hájek_Nepřijatelnost dle § 104a s. ř. s._smysluplný krok nebo kanón na vrabce
2015/3: Martin Hapla_Dělba moci a legitimita soudcovské tvorby práva
2015/4: Petr Coufalík_Soudcovské dotváření procesního práva

2015/5: Martin Loučka_Specifika vývoje počítačových programů a jejich autorskoprávní konsekvence
2015/6: Rostislav Vrzal_Rozhlas a televízia Slovenska_inspirace pro Českou republiku
2015/7: Martina Baráková_Stanoviska nejvyšších soudů_efektivní prostředek sjednocování judikatury nebo přežitek socialistické justice
2015/8: Ondřej Málek_Vybrané důsledky jednání v rozporu s péčí řádného hospodáře a jejich komparace

Year 2014
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2014/2: Luboš Brim_Ustanovení zástupce dle OSR II
2014/3: Ladislav Vyhnánek_Proporcionálně či jinak_Problém ústavního přezkumu zásahů do sociálních práv
2014/4: Tomáš Sobek_Právní welfarizmus
2014/5: Jan Neckář_Sleva na dani u pracujících starobních důchodců z pohledu zneužití práva
2014/6: Alžbeta Rosinová_Úprava ústavní stížnosti v státech V4
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2014/8: Libor Kyncl_Zneužívání veřejných výdajů a svévole v právu veřejných výdajů