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**THE BAN ON COLLECTIVE EXPULSIONS AND THE
BETRAYAL OF THE UNION'S LEGAL SYSTEM AT
ITS EXTERNAL BORDERS**

BERNARDO CORTESE

Full Professor at University of Padova

SERVICIO DE
PUBLICACIONES
UMU

TEULP 



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Abstract

The paper looks into the current state of health of the European Union's legal order, using as a litmus test the functioning of the system of judicial protection in a specific area of the area of freedom, security and justice: the control of the Union's external borders. In this perspective, the paper explores why the prohibition of collective expulsions enunciated in Article 19 § 1 of the Charter does not seem to play any role in the case law of the Court of Justice, despite the increasingly worrying practice of informal pushbacks by Member States and the consequent development of significant case law of the European Court of Human Rights on the corresponding prohibition in Article 4 of Protocol No. 4 to the European Convention. Through the analysis of those phenomena, the study highlights a heavy contradiction of the fundamental equations on which the Union's order is or ought to be based, finally suggesting some possible reform.

Palabras clave: *collective expulsions; external borders; AFSJ; effective judicial protection; Charter of Fundamental Rights of the European Union;*

“La prohibición de las expulsiones colectivas y la corrupción del ordenamiento jurídico de la Unión en sus fronteras exteriores”

Resumen

El estudio cuestiona la salud del ordenamiento jurídico de la Unión Europea, utilizando como tornasol el funcionamiento del sistema de tutela judicial en un ámbito específico del espacio de libertad, seguridad y justicia: el control de las fronteras exteriores de la Unión. En este contexto, el trabajo indaga por qué la prohibición de las expulsiones colectivas enunciada en el artículo 19 § 1 de la Carta no parece desempeñar ningún papel en la jurisprudencia del Tribunal de Justicia, a pesar de la práctica cada vez más preocupante de las expulsiones informales por parte de los Estados miembros y del consiguiente desarrollo de una importante jurisprudencia del Tribunal Europeo de Derechos Humanos sobre la prohibición correspondiente del artículo 4 del Protocolo nº 4 del Convenio Europeo. A través del análisis de estos fenómenos, el estudio pone de manifiesto una fuerte contradicción de las ecuaciones fundamentales en las que se basa o debería basarse el ordenamiento de la Unión, sugiriendo finalmente algunas posibles reformas.

Palabras clave: *expulsiones colectivas; tutela judicial efectiva; ELSJ; fronteras exteriores; Carta de los Derechos Fundamentales de la Unión Europea*

SUMMARY¹: I. FOREWORD. II. SETTING OUT THE CARTESIAN COORDINATES: THE EFFECTIVENESS OF THE EU LEGAL ORDER AS AN INTER-INDIVIDUAL ORDER CAPABLE OF GUARANTEEING FUNDAMENTAL RIGHTS 1. Three Fundamental Equations Defining the EU Legal System as an Interindividual Legal Order. 2. A Fourth Equation: Ensuring the Effectiveness of the System through an External Guarantee. III. THE EU'S EXTERNAL BORDER: AN AREA ... WITHOUT JUSTICE? 1. The Practice of the Member States: Pushbacks, Fences, State of Emergency. 2. The Case Law of the European Court of Human Rights on Violations of Article 4 Protocol 4 by EU Member States. 3. The Absence of Article 19 § 1 Charter from the ECJ Case Law. 4. The Breach of the Fundamental Equations. III. PROPOSALS FOR REFORM. 1. A Special Direct Action to be Introduced in the Treaties. 2. Attributing Strong Decision-Making Powers to FRA. 3. De-Politicising the Infringement Procedure through a Modification of Organisational Practices and of the Rules of the Commission.

I. FOREWORD

In this paper I will develop some thoughts on the state of health of the European Union's legal system, using as a litmus test the functioning of the system of judicial protection in a specific field of the area of freedom, security and justice: the control of the Union's external borders.

I will try to understand why the prohibition of collective expulsions enshrined in Article 19 § 1 of the Charter does not seem to play any role in the case-law of the Court of Justice, despite the increasingly worrying practice of informal *pushbacks* by Member States and the development of a significant body of case-law by the European Court of Human Rights on the corresponding prohibition laid down in Article 4 of Protocol No. 4 to the European Convention. As a result, I will point to a major flaw in the fundamental equations on which the Union's legal system rests, and finally suggest some possible reforms.

II. SETTING OUT THE CARTESIAN COORDINATES: THE EFFECTIVENESS OF THE EU LEGAL ORDER AS AN INTER-INDIVIDUAL ORDER CAPABLE OF GUARANTEEING FUNDAMENTAL RIGHTS

Let us begin, then, by setting out some basic features that are capable of sketching out the essence of the European Union legal system as an *interindividual* order – namely that

¹ This article has been realized on the context of the Jean Monnet Chair on The Transformative Power of European Union Law (TEULP), research funded by the European Commission (Project: 101047458 - TEULP - ERASMUS-JMO-2021-HEI-TCH-RSCH) and led by Juan Jorge Piernas López, Professor at the Faculty of Law of the University of Murcia.

kind of “new legal order [...] for the benefit of which the States have limited their sovereign rights”, and “the subjects of which comprise not only Member States but also their nationals”, according to the well-known formula used by the Court in *van Gend en Loos*².

Now, the very existence and, ultimately, the effectiveness³ of such a legal order are based on a series of fundamental legal equations. These are both structural, because they relate to the structure of that system and its mechanics, and substantive, because they relate to the quality of the law forming it or, rather, of the individual rights that can be enjoyed within that system.

1. Three Fundamental Equations Defining the EU Legal System as an Interindividual Legal Order.

According to the first of these basic equations, the obligations assumed by the Member States as a result of their participation in the Union are matched by corresponding rights of individuals, which can be enforced even against conflicting national provisions, in so far as the conditions for the direct effect of the relevant rules are satisfied⁴

A second consequential equation follows, whereby the effectiveness of that new legal system rests in large part on the national courts’ role as ordinary courts of EU law, which is secured by the interaction between them and the Court of Justice through the preliminary ruling procedure⁵.

So far, we are referring to structural features of the legal order, all of which bear no relation to the quality of the rights guaranteed to individuals within that system of law.

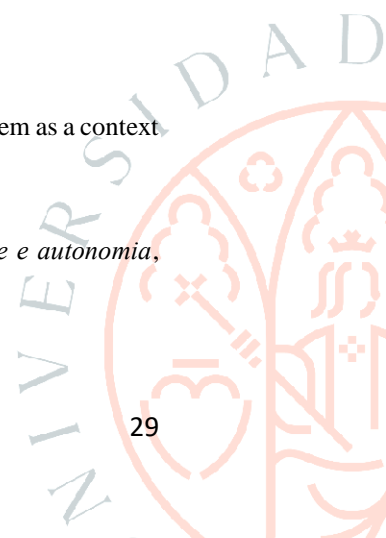
A third fundamental equation exists, though, which is first and foremost substantive, since it concerns the quality of the relevant individual rights, but it is as much a structural one. It consists in the EU legal system's ability to protect the fundamental rights of the

² Case 26/62, *van Gend en Loos*, ECR 1963, p. 12.

³ Understood as a factual outcome: namely, the effective affirmation of the Union's legal system as a context of supranational form of government.

⁴ Case 26/62, *van Gend en Loos*, cit., and case 6/64, *Costa v. ENEL*, ECR 1964, p. 593 f.

⁵ CORTESE, B., *L'ordinamento dell'Unione europea tra autocostruzione, collaborazione e autonomia*, Turin, 2018, p. 91 ff., 167 ff.



individual - which are guaranteed in the first place as general principles of EU law, and codified in the Charter⁶ - and to do so by providing the conditions for effective access to justice, in a multi-layered system of judicial guarantees. Such a system provides the individual with a remedy, albeit at different levels, against violations committed both by EU institutions and Member States. In particular, the judicial control over violations by Member States committed within the “shadow” of Union law⁷ is performed within a decentralised judicial system, with the courts of the Member States as key players, coordinated by the Court of Justice through the preliminary reference. The unity of that system of protection, and its crucial role in the overall design of the Union's legal order, lead the Court to affirm its necessary autonomy from competing systems of protection in the same spatial and personal scope⁸. This character is of such fundamental importance to the Court that it has generated, as is well known, a stalemate in the process of the Union's accession to the European Convention on Human Rights and, consequently, in the relations between the two European systems of protection of fundamental rights and, consequently, in the relations between the two European systems of fundamental rights protection⁹.

The joint operation of these fundamental equations - the first two consisting of a series of structural, or formal assumptions, the third jointly substantial and formal - leads to a picture in which, at least in principle, the European Union's interindividual legal order is established as a *unicum*, in which individual rights of EU origin, and in particular

⁶ Cf. CORTESE, B., “Carta, CEDU e Costituzioni nazionali: un processo di codificazione tra autonomia, autoipotesi e international collaborative law”, in ANNONI, A., FORLATI, S., SALERNO, F., eds., *La codificazione nell'ordinamento internazionale e dell'Unione europea*, Naples, 2019, pp. 457-506; in that same volume ADINOLFI, A., “La Corte di giustizia dell'Unione europea dinanzi ai principi generali codificati”, *ibid.*, pp. 553-589.

⁷ LENAERTS, K., “The EU Charter of Fundamental Rights: Scope of Application and Methods of Interpretation”, in KRONENBERGER, V., D'ALESSIO, M.T., PLACCO, V., eds., *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Hommage en l'honneur de P. Mengozzi*, Brussels, 2013, pp. 107-143, p. 117.

⁸ See LENAERTS, K., “The Autonomy of European Union Law”, *Il diritto dell'Unione europea*, No. 4, 2018, pp. 617-632, p. 620 f.

⁹ On the rearrangement of those relations cf. again CORTESE, B., “Carta, CEDU e Costituzioni nazionali...”, *cit.*, esp. p. 473 ff., 482 ff., 490 ff.

fundamental rights, are effectively (as they are immediately and directly) protected in a supra-national dimension¹⁰ .

2. A Fourth Equation: Ensuring the Effectiveness of the System through an External Guarantee.

Precisely because the legal integration in the European Union takes place within a framework that is based upon its Member States' maintaining their sovereignty, there is also a residual need for an external guarantee of compliance by Member States with their EU law obligations which at the same time ensures, indirectly, the corresponding rights of individuals¹¹ . The prevalent - though not exclusive and sometimes not sufficient - expression of such an external guarantee is the infringement procedure. This is a tool that is based on the international law dimension of the European process, because it is put in place at a level that does not directly involve the individual, but merely the international subjects framing the Union's domain, namely, the Union itself, with its separate subjectivity, and its Member States.

Lately, the importance of that external guarantee seems to have grown at a time when the values on which the Union is founded are put to a test. This has been the case in the face of the rule of law crisis experienced in some new Member States - and indeed with the open challenge raised in some of them to the very idea of a common inter-individual order capable of prevailing over the national ones. The sharpness of the infringement procedure became tangible when it was linked to the Court's (revolutionary)¹² power to pronounce *astreintes*¹³. The coupling of those two instruments, which were roundly used to contrast

¹⁰ QUADRI, R., "Intervento al Convegno di Studi sulla Politica Sociale della Comunità Economica Europea", *Diritto Internazionale*, 1959, now in QUADRI, R., *Scritti giuridici*, Milan, 1988, vol. III, pp. 13-19, p. 18.

¹¹ The coexistence and interrelationship of the two dimensions of European Union law, the interindividual and the international, are at the heart of Advocate General Tesouro's Opinion of November 28, 1995, Joined Cases C- 46/93 and C-48/97, *Brasserie du Pêcheur* and *Factortame*, esp. points 26 and 39: cf. EDWARDS, D., "The Contractual Foundation of Member States' Obligations to the Individual: Advocate General Tesouro's Opinion in *Brasserie du Pêcheur* and *Factortame*", in *Scritti in onore di Giuseppe Tesouro*, Naples, 2014, vol. II, pp. 993-1003.

¹² Cf. PRETE, L., SMOULDERS, B., "The Age of Maturity of Infringement Proceedings", *Common Market Law Review*, vol. 58, 2021, pp. 285-332, p. 313.

¹³ Inaugurated by ECJ, Order of the Court (Grand Chamber), November 20, 2017, C-441/17 R, *Commission v. Poland (Białowieża Forest)*.

the Polish “reforms” of the judiciary¹⁴, clearly expresses the Union's strong reaction to the challenging of the first of the fundamental equations of the Union's legal system evoked above.

Moreover, the Commission’s decision to invoke violations of the Charter¹⁵, as an additional characterization of the seriousness of measures that already in themselves constitute violations of Treaty rules or secondary legislation, has recently become quite clear. This happened first of all in the infringement procedures related to the rule of law crisis. There, we witnessed a significant change in practice between the action against Hungary for the *ad personam* constitutional reform removing the President of the Constitutional Court, which had been based on secondary law alone¹⁶, and those against Poland, in which Article 47 of the Charter becomes central, along with Article 19 TEU. Further, that choice has resurfaced in infringement proceedings against Hungary both in the area of asylum, where the relationship between secondary law and Article 18 of the Charter is direct and obvious¹⁷, as well as in other areas where the relationship between the national measure and the rights guaranteed by the Charter is at first sight less striking, and yet emerges because of the seriousness of the overall regression of the features of the domestic constitutional system¹⁸.

In so doing, the substantive dimension that lies at the heart of the third fundamental equation of the legal system is reinforced, too.

Taken as a whole, therefore, the infringement procedure has helped to reinforce from outside the EU’s system of inter-individual law, not allowing the fundamental equations

¹⁴ See ECJ, Order of the Vice President of the Court, October 27, 2021, Case C-204/21 R, *Commission v. Poland (disciplinary regime of judges)*.

¹⁵ See MORI, P., “L’uso della procedura d’infrazione a fronte di violazioni dei diritti fondamentali”, *Il diritto dell’Unione europea*, No. 2, 2018, pp. 363-376.

¹⁶ Judgment of the Court, Nov. 6, 2012, Case C286/12-, *Commission v. Hungary*.

¹⁷ ECJ (Grand Chamber), December 17, 2020, Case C-808/18, *Commission v. Hungary (Rösztke and Tompa transit zones)*, esp. para. 102; also ECJ (Grand Chamber), November 16, 2021, Case C-821/19, *Commission v. Hungary (incrimination of aid to asylum seekers)*, para. 132.

¹⁸ ECJ (Grand Chamber), June 18, 2020, Case C-78/18, *Commission v. Hungary (financial support to associations)*; ECJ (Grand Chamber), October 6, 2020, Case C-66/18, *Commission v. Hungary (higher education services)*.

on which it is based to be emptied of practical meaning by national drifts that are both authoritarian and chauvinistic.

It can then be said that the possibility for the Commission to bring infringement actions to counter, on the substantive side, the violation of the fundamental principles of the Union and profiting from the availability, on the procedural side, of instruments of great effectiveness and immediate impact on the choices of the domestic legislator such as injunctions and *astreintes*, constitutes a fourth fundamental equation of EU law. It is one that is external to the system of interindividual law, but can be used to secure the effectiveness of that system, as designed by the first three equations mentioned above.

That equation, however, depends on a significant variable. The Commission has full control of that procedure, and it uses it according to its own priorities - with varying degrees of intensity also as to the request or otherwise of interim measures and *astreintes* - as part of a discretionary exercise of its power of control over Member States.

This is not a perfect system. Yet the set of internal and external safeguards of the Union's interindividual order, expressed in the equations outlined above, nevertheless enables it to function at an adequate level, both in terms of its effectiveness and the substance of the guarantees it offers individuals.

III. THE EU'S EXTERNAL BORDER: AN AREA ... WITHOUT JUSTICE?

However, when one turns to the external borders of the Union and its area of freedom, security and justice, certainties seem to waver. Indeed, hastily glancing at the wording of Article 3(2) of the Treaty on European Union, we are left with a doubt: if the objective is to establish an “area of freedom, security and justice without *internal* frontiers” does that perhaps mean that freedom, security and justice ... end at the external borders?

It is obvious that from the point of view of legal hermeneutics this is just a *ballon d'essai*, since neither a textual nor a systematic reading of that provision would allow such a statement to be justified. It is obvious, in particular, that the prohibition of collective expulsions laid down in Article 19 § 1 of the Charter, and the protection in the event of removal, expulsion and extradition provided for in Article 19 § 2 must be regarded as an integral part of that freedom, security and justice at the *external* borders.

However, the basic approach adopted here is not that of understanding law as an abstract system. The attempt is rather to try and understand how law operates in its effectiveness, because effectiveness is at the very basis of the interindividual legal order we deal with. Unfortunately, in that dimension my intellectual provocation might no longer be one.

In fact, if we apply the fundamental equations that characterize its essence, whether or not the EU interindividual legal order extends to the external border of the Union as well depends on the existence of an effective judicial protection for individuals' rights proclaimed by the relevant legal provisions. Where this capacity weakens for structural reasons, an incisive reaction is needed to reinforce the effectiveness of the system from the outside, through a strict and forceful use of the infringement procedure.

Now, the practice of recent years sends worrying signals, highlighting a context in which, on the one hand, compliance with the prohibition of collective expulsions seems to be the least of Member States' concerns and, on the other hand, there's neither an effective judicial protection of individual guarantees nor any effective external reinforcement to thwart systematic violations thereof.

1. The Practice of the Member States: Pushbacks, Fences, State of Emergency.

Let us start, then, from the practice of the Member States, to see that the external borders of the Union are the scene of an increasingly rigid closure, in the form of mass pushbacks, militarization, construction of walls and other similar barriers, and criminalization of humanitarian activity carried out by civil society.

Mass pushbacks at land and sea borders are sadly topical at the external borders in Greece¹⁹, Croatia²⁰, Hungary²¹, Poland²² and other states²³. Those pushbacks have also been practiced in the past by Italy, with the measures that led to the well-known judgment

¹⁹ UN Special Rapporteur on the Human Rights of Migrants, *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*, UN doc. A/HRC/47/30 (2021), § 55.

²⁰ *Ibid.*, § 56.

²¹ *Ibid.*, § 80.

²² *Ibid.*, § 61.

²³ Which led to an official position statement by the United Nations High Commissioner for Refugees: *UNHCR Warns Asylum under Attack at Europe's Borders, Urges End to Pushbacks and Violence Against Refugees* (2021), accessible at <https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html>.

of the European Court of Human Rights in the 2012 *Hirsi and Jamaa* case concerning interception on the high seas and mass pushbacks to Libya²⁴, and with those earlier addressed by the Court in the *Sharifi* case, consisting in automatic return to Greece of irregular immigrants, handed over to ferry captains with no guarantees whatsoever upon disembarkation at Adriatic ports²⁵.

“Anti-migrant” walls and barriers have long been a feature of the Spanish *enclaves* of Ceuta and Melilla in Africa. More recently, walls and barriers of that kind have come up in Hungary, on the border with Serbia, and in Poland, Latvia and Lithuania on the border with Belarus.

In both Hungary and Poland, moreover, we are witnessing widespread militarisation of part of the territory and a worrying tendency to criminalise those who assist migrants once they have entered that territory. And indeed, as for the criminalisation of humanitarian activity, besides the distinctive harshness of Hungarian and Polish authorities' actions, the trend is almost ubiquitous²⁶.

The internal borders themselves are in some cases managed as if they were... mere extensions of the external borders. Informal chain pushbacks are carried out from one internal border to the next, and finally lead to unchecked deportation beyond the external border. To the indifference of the mainstream media and public opinion, this is what is happening all the time at the eastern Italian border with Slovenia, as well as at the Austrian-Slovenian border, and onwards at the Slovenian-Croatian border, until the final pushback beyond the territory of the Union, in Bosnia-Herzegovina²⁷.

²⁴ See *infra*, note 28 and corresponding text.

²⁵ See *infra*, note 29 and corresponding text.

²⁶ See the summary contained in BAYER, J. BÁRD, P., VOSYLIUTE, L., LUK, N. C., *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union, A Comparative Study*, 2021, p. 52 f. The study, funded by the European Commission, is accessible on various platforms, including [ssrn.com](http://dx.doi.org/10.2139/ssrn.4092013) (<http://dx.doi.org/10.2139/ssrn.4092013>). See also UN Special Rapporteur on the Situation of Human Rights Defenders, *Report - Refusing to Turn Away: Human Rights Defenders Working on the Rights of Refugees, Migrants and Asylum-Seekers*, UN doc. A/77/178, § 42 (2022).

²⁷ See the June 19, 2020 joint statement UN Special Rapporteur on Human Rights of Migrants, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Croatia: Police Brutality in Migrant Pushback Operations Must Be Investigated and Sanctioned*, available at <https://www.ohchr.org/en/news/2020/06/croatia-police-brutality-migrant-pushback-operations-must-be-investigated-and>; see also the aforementioned UN SR HRM *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea* (2021), § 56.

2. The Case Law of the European Court of Human Rights on Violations of Article 4 Protocol 4 by EU Member States.

This practice of the Member States of the Union, featuring a hermetic closure of the external borders, ineluctably leads to violations of the prohibition of collective expulsions. This emerges, as a matter of fact, in the macroscopic increase in the number of cases in which the European Court of Human Rights has found a violation of Article 4 of Protocol No. 4 by EU Member States.

This damning record starts with the finding against Italy for the violations of Article 4 of Protocol No. 4 committed on the high seas or at its ports, with the aforementioned *Hirsi and Jamaa* judgments of 2012²⁸ followed by *Sharifi* in 2014²⁹. It then picks up more recently with the judgment against Lithuania in the *M.A.* case, in 2018,³⁰ and with that against Poland in the *M.K.* case³¹: both cases of collective expulsions of ethnic Chechen Russians at the Belarusian border. The list continues with the July 2021 judgment in *Shahzad v. Hungary*³², condemning the collective expulsions at the border with Serbia, in the strip where a fence is built and the transit zones of Röszke and Tompa are established. Further down the 'Balkan route', mention must be made of the *M.H. v. Croatia* judgment of November 2021³³, concerning a tragic episode of pushback from Croatia to Serbia, in which an Afghan mother and her minor children were forced to walk away along the railway tracks at night, leading to the death of one of the girls, Madina, aged six, who was run over and killed by a train.

Finally, since August 2021, in several dozen complaints, the ECtHR has ordered the Polish, Latvian and Lithuanian governments to adopt interim measures to protect

²⁸ ECtHR (Grand Chamber), February 23, 2012, *Hirsi Jamaa and Others v. Italy*, Application 27765/09.

²⁹ ECtHR, October 21, 2014, *Sharifi et autres v. Italie et Grèce*, Appeal 16643/09 (parts are cited in French, as the judgment is not published in English).

³⁰ ECtHR, December 11, 2018, *M.A. and others v. Lithuania*, Application 59793/17.

³¹ ECtHR July 23, 2020, *M.K. and others v. Poland*, Applications 40503/17, 42902/17 and 43643/17.

³² ECtHR July 8, 2021, *Shahzad v. Hungary*, Application 12625/17.

³³ ECtHR November 18, 2021, *M.H. and Others v. Croatia*, Applications 15670/18, 43115/18.

applicants stranded or rejected in the 'no man's land' between Belarus and Poland and, in smaller numbers, Latvia and Lithuania³⁴.

3. The Absence of Article 19 § 1 Charter from the ECJ Case Law.

If one turns to the EU system of protection and looks at its effectiveness, two converging and extremely worrying facts jump to the eye. First, no preliminary question has been submitted in relation to the prohibition of collective expulsions provided for in Article 19 § 1 of the Charter. Second, no action for infringement has been introduced by the Commission to question the violation of that prohibition by Member States. Finally, as a necessary consequence of the above, no provisional measures have been ordered by the Court.

A veritable jurisdictional black hole seems to have swallowed up Article 19 § 1 of the Charter.

Even where the Court of Justice's jurisprudence seems to hint at a closer scrutiny of measures put in place by states to “seal” their external borders if compared with two recent non-violation judgments issued by the ECtHR and based on the *own culpable conduct of the migrants* criterion³⁵, still the fundamental rights profile, and in particular the prohibition of collective expulsions, has no place in the ECJ reasoning.

It is worth mentioning in this regard the *M.A.* preliminary ruling of June 2022³⁶. In it, the Court of Justice is confronted with a Lithuanian measure that, having declared a state of emergency in the face of the situation of refugees crowded on the Belarusian border, restricts the possibility of filing an application for international protection to border crossings only, thereby establishing the inadmissibility of applications for protection filed

³⁴ See ECtHR Communiqué 051 (2022), February 21, 2022, *Update on Interim Decisions Concerning Member States' Borders with Belarus*, also for the numbers, which are truly impressive. See then in particular the case, pending before the ECtHR, *R.A. and others v. Poland*, Application 42120/21. In that case the interim measures ordered by the European Court first enjoined Poland to provide the applicants with food, water, clothing, care and temporary shelter; later those measures extended to an injunction to allow the applicants' lawyers to make necessary contacts with those and an order not to return the applicants to Belarus.

³⁵ These are the ruling of the ECtHR (Grand Chamber), February 13, 2020, *N.D. and N.T. v. Spain*, Applications 8675/15 and 8697/15, and ECtHR, July 5, 2022, *A.A. and Others v. North Macedonia*, Application 55798/16.

³⁶ ECJ June 30, 2022, Case C-72/22 PPU, *M.A.*

elsewhere, and leading to an automatic expulsion, after administrative detention, of such applicants.

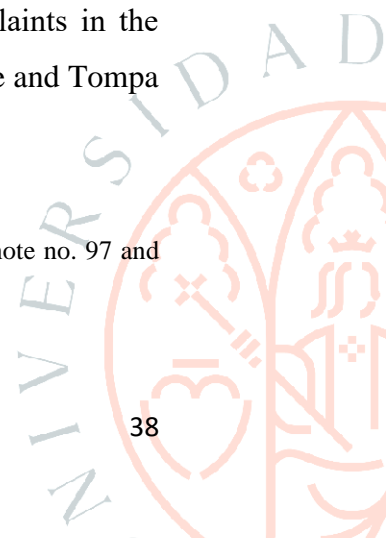
The Court of Justice, while *de facto* censuring the Lithuanian emergency measure, does not, however, rely on an autonomous interpretation of the prohibition of collective expulsions, that would lead to a higher standard of the Charter compared with the minimum standard guaranteed by the ECHR. Rather, the Court simply applies, with its usual rigour, the proportionality test, essentially finding no evidence of any adequacy, proportionality and necessity of the relevant national measures as applied to the actual facts of the case, in light of the need to maintain public order or to safeguard internal security. No mention is made of the possible violation of Article 19 § 1 of the Charter, despite the fact that Advocate General Emiliou's Opinion had addressed the issue³⁷.

Of course, it is perfectly normal that the Court does not enunciate, in the operative part of its judgment, a principle of law on the scope and content of the prohibition of collective expulsions in the Charter. Indeed, the Court was issuing a preliminary ruling in a case where the referring court had not formulated any specific question in this regard, and, above all, the actual situation involved a person in administrative detention pending determination of his status, so that one could hardly expect a reformulation of the question to include Article 19 § 1.

Nonetheless, it remains true that a reference to that provision of the Charter, even if limited to an *obiter dictum* in the statement of reasons, would have been an important signal in the overall context from which that case emerges. Lacking that reference, the unfortunate impression remains that in the *M.A.* judgment the criticism of hasty emergency solutions by Member States is only a (positive) side effect: what really seems to matter is the structural datum of the supremacy of common rules laid down by EU legislation over divergent national measures.

That said, much more worrying is the fact that the Commission's complaints in the infringement proceedings it brought against Hungary concerning the Röszer and Tompa

³⁷ Opinion of Advocate General Emiliou of June 2, 2022, Case C-72/22 PPU, *M.A.*, footnote no. 97 and para. 143 of the text.



transit zones, adjudged by the Grand Chamber in December 2020, do not include a breach of Article 19 § 1 of the Charter³⁸.

In fact, pushback measures involving a large number of persons, put in place without any assessment of their individual position, without any formal measures and without any procedural guarantees, unquestionably emerge from that procedure. In short, a case of egregious violation of the prohibition of collective expulsions, as attested by the violation ruling that the European Court of Human Rights would later adopt in the parallel *Shahzad* case, based on those same Hungarian measures.

The Commission's silence on that violation is all the more significant because the application in the *Shahzad* case had been communicated by the European Court to Hungary as early as November 13, 2017. From that date, therefore, the content of the application was public, and with it the tenor of the two specific questions formulated by the Court with the clear aim of focusing its examination on the violation of the ban on collective expulsions³⁹. It is therefore difficult to understand for what reasons the European Commission decided - at a time when the pre-litigation proceedings were still open⁴⁰ - not to broaden the complaint against Hungary to include Article 19 § 1 of the Charter as well, consequently depriving the Court of Justice of the possibility of ruling on that provision for the first time.

4. The Breach of the Fundamental Equations

Within the perspective of this paper, however, what plays a key role is the more general fact that, in the face of a practice of refolement by the Member States that has become more and more grave and generalised, the Court of Justice has not been presented with any cases relating to the prohibition of collective expulsions.

There seem to be at least two explanations for such a worrying non-appearance of Article 19 § 1 on the ECJ's jurisprudence radar.

³⁸ Case C-808/18, cit.

³⁹ See its contents at <https://hudoc.echr.coe.int/eng?i=001-179367>.

⁴⁰ That pre-litigation proceeding had, it is true, been open since 2015, but it is equally true that just a few weeks earlier, in May 2017, the Commission had sent Hungary a supplementary letter of formal notice, extending its complaint to, among other things, the violation of Articles 6, 18 and 47 of the Charter. See paragraph 63 of the Court's judgment in Case C-808/18, cited above.

First, there is a blatant neglect by the European Commission of the pursuit of those violations committed by the Member States. This is quite consistent, alas, with the Commission's policy priorities, which seem rather to encourage States in the muscular management of the external border. We can see that rather clearly from the proposals it introduced in December 2021 to deal with what is labelled there as a hybrid attack on the Union by the Belarusian regime through the instrumentalization of migrants⁴¹. Furthermore, all this is in line with the approach set out more generally in the programme of legislative initiatives called the *New Pact on Migration and Asylum*⁴². While those proposals claim to uphold the continued observance of fundamental rights, they basically advocate the generalisation of border procedures, even in the face of evidence of a very significant risk of serious violations⁴³, evidenced by the many precautionary measures enjoined by the European Court of Human Rights in the Belarusian border cases.

Second, concerning migrants' fundamental rights at the external borders of the Union, practices such as those confronted in this study inevitably induce a drying up of the channel leading to the Court of justice questions for preliminary rulings⁴⁴. Indeed, we are dealing with informal pushbacks - very often not involving the adoption of any administrative measures - which are given immediate execution and are concatenated in a chain leading the individuals involved all the way to outside the territory of the Union. This is done against people who are, more often than not, deprived of any means, and

⁴¹ See COM/2021/752 fin., Dec. 1, 2021, proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland - based on Article 78 § 3 TFEU. See also related proposals COM/2021/891 fin., on amendments to the Schengen Borders Code, and COM(2021) 890 fin., aimed at establishing a general instrument to enable Member States to address "situations of instrumentalisation in the field of migration and asylum", both adopted on Dec. 14, 2021.

⁴² Within which stands out COM/2020/611 fin, September 23, 2020, Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. On the impact of this proposal and the overall approach underlying the *Pact* see DEN HEIJER, M., "The Pitfalls of Border Procedures", *Common Market Law Review*, vol. 59, 2022, pp. 641-672.

⁴³ See, for a critical analysis, PEERBOOM, F., "Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to 'Weaponized' Migration", *European Papers*, vol. 7, no. 2, 2022, pp. 583-600.

⁴⁴ Different is the case of detention orders, or formal expulsion orders, taken against third-country nationals, with respect to which the conditions of access to the Court continue, on the whole, to be guaranteed, even in the face of any opposite provisions of domestic law. See FAVI, A., "Protecting Asylum Seekers and Migrants in the Context of the Rule of Law Crisis in EU Member States: The Recent Approach of the Court of Justice of the EU through the Lens of the Global Compacts on Refugees and Migration", *Laws*, vol. 11, no. 3, 2022.

lack any awareness that they could challenge the measures to which they are subjected. Often, then, the very activity of support, including legal support, to those persons is concretely hindered by the authorities, so that neither can *legal mobilization* processes⁴⁵ play any significant role here in favouring the emergence of pilot cases.

Even when, exceptionally, cases reach national courts, no preliminary reference emerges. This is what happened in an Italian case where the *Tribunale di Roma* issued two contradicting orders in February⁴⁶ and April 2021⁴⁷. The same is true for a case decided by the Slovenian *Upravno sodišče* (Administrative Court) in December 2020⁴⁸, as well as for the one decided by the *Landesverwaltungsgericht Steiermark* (Higher Administrative Court of Styria, Austria) in July 2021⁴⁹.

Now, if in the Italian case, which was decided at the interim protection order stage, one can understand the restraint of the judge to stay the proceedings in order to submit a preliminary question to the ECJ, the choice of the Slovenian and Austrian courts of not referring any question to the ECJ, and, in the Austrian case, of not even citing the Charter, is an epiphany of the ineffectiveness of the Union system in this specific area.

Put another way: why on earth would a court submit a request for preliminary on Article 19 § 1 of the Charter, if the European Commission has never challenged Member States for violating the prohibition on collective expulsions enshrined in that provision, not even

⁴⁵ See PASSALACQUA, V., “Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights”, *Common Market Law Review*, vol. 58, 2021, pp. 751-776.

⁴⁶ See interim order January 18, 2021 of the *Tribunale di Roma*, in case R.G. 56420/2020, finding that the practice of informal application of Bilateral Agreement between the Government of the Republic of Italy and the Government of the Republic of Slovenia on the readmission of persons to the border, signed in Rome on September 3, 1996, is illegitimate.

⁴⁷ See order of the *Tribunale di Roma* April 27, 2021, in the case R.G. 56420/2020, quashing the Jan. 18 order, due to lack of locus standi of the applicant, in relation to the lack of proof of the relevant facts (border crossing and subsequent informal rejection outside it).

⁴⁸ Judgment of the *Upravno sodišče*, Slovenia, December 17, 2020, UPRS Sodba I U 1686/2020, available online at <http://sodnapraksa.si/>. In that decision the Slovenian court, applying for the first time in that State's jurisprudence Article 19 § 1 of the Charter (ibid., para. 245), affirmed the violation of the prohibition of collective expulsions in connection with the chain pushback and readmission from Slovenia to Croatia [and thence to Bosnia and Herzegovina] of an Iraqi citizen of Kurdish ethnicity and a Cameroonian citizen (see in particular paras. 249-273 of the grounds).

⁴⁹ Judgment of the *Landesverwaltungsgericht Steiermark*, July 1, 2021, LVwG 20.3-2725/2020, concerning a case of informal pushback from Austria to Slovenia and from there, in a chain, to Bosnia-Herzegovina.

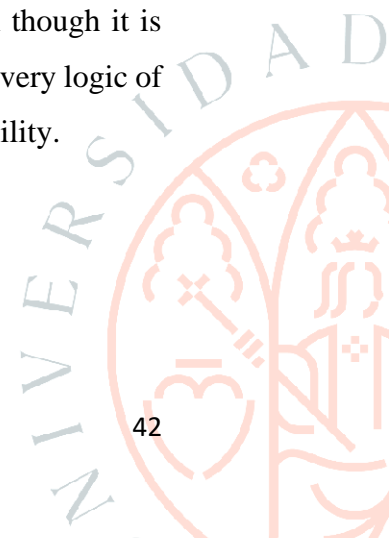
for those Member States who have been found to be in breach of Article 4 of Protocol No. 4 by the European Court of Human Rights?

All in all, we are left with the absence, at the present time, of any contribution of the preliminary ruling mechanism to uphold the prohibition of collective expulsions and the overall irrelevance of Article 19 § 1 of the Charter in the EU system of judicial protection.

The first two equations outlined at the opening of this paper then creak conspicuously, as an outcome of what appears to be a structural predisposition of the system not to guarantee real access to the Union's courts by individuals subject to informal pushbacks. The problem, however, is that even the external prop, constituted by the infringement procedure, does not operate in this area, since the variable present in the fourth equation - the Commission's political discretion - nullifies its potential. With which, however, the third fundamental equation, concerning the qualitative dimension of the Union's interindividual order, is also contradicted overall: in this area, is the serious observation, that legal order fails to ensure the effectiveness of a fundamental human right enshrined in its supreme sources.

If this is the case, it is then necessary to rewrite the fundamental equations on which the Union's interindividual legal order is based and venture the definition of an odious equation *ad excludendum*. Such an equation would lead to a new overall definition of that legal order that would sound, roughly, like this: it is a new kind of legal order, which recognises the full subjectivity of the individual and guarantees his fundamental rights, through mechanisms that ensure prompt and effective judicial protection, but which excludes from its subjects any third-country nationals who cross the external borders of the Union without a regular entry permit, or who are in any case apprehended by the police authorities of its Member States near those borders.

The problem is that the exclusion of those individuals (not from the territory of the Union, but rather) from the very possibility of asserting a fundamental right even though it is expressly enshrined in the Charter as a guarantee of their dignity, denies the very logic of the fundamental rights of the human person: that of their unity and indivisibility.



Wanting to use the metaphor of the state of health, we can therefore say that the Union system is an organism suffering from a serious disease. It is concentrated, it is true, on a limb, but it threatens to originate a gangrene that spreads to the whole organism.

Abandoning the metaphor, if it is true that the violation of the structural values of Art. 2 TEU by Member States is likely to have a knock-on effect on fundamental rights⁵⁰, it cannot be denied that a widespread violation by numerous Member States of one of the fundamental rights set forth in the Charter, without the Union's legal system putting in place a reaction capable of restoring their effectiveness, casts doubt on the very claim that the Union is founded on those principles and values, which are themselves intrinsically linked in a "constitutional" framework that, to be such, must necessarily reflect them⁵¹.

IV. PROPOSALS FOR REFORM

How to get out of this dead end?

It is clear that, if the situation is to be changed, the focus must be on guaranteeing the effectiveness of the prohibition of collective expulsions and, eventually, on ensuring effective judicial protection of individuals as regards external border management measures.

However, in the current scenario, given the actual causes that explain why references for preliminary rulings are so scarce, that reactivation of the effectiveness of judicial protection - and with it the effectiveness of the prohibition of collective expulsions - cannot probably start from the bottom, that is, from the integrated judicial system of the Union, made up of national judges acting in cooperation with the Court of Justice.

The only way to go forward is through a reform enabling a direct action that would allow the Court to rule on cases of violation of the prohibition of collective expulsions.

⁵⁰ See CANNIZZARO, E., "Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea", in *Liber Amicorum Antonio Tizzano*, Turin, 2018, pp. 158-169, p. 163.

⁵¹ See the remarks of LEVITS, E., "L'Union européenne en tant que communauté de valeurs partagées - les conséquences juridiques des articles 2 et 7 du traité sur l'Union européenne pour les États membres", in *Liber Amicorum Antonio Tizzano*, cit., pp. 509-522, p. 512 and 517.

While not easy in any case, reform in this area appears more or less realistically feasible depending on the ambition of the instrument envisaged and the level at which the innovation in the legal system should take place.

There could be three such reforms capable of reinforcing the effectiveness of the fundamental rights connected to the crossing, and more generally to the management, of the external borders.

1. A Special Direct Action to be Introduced in the Treaties.

The first, which would be straightforward and ambitious, but also less realistic to imagine, consists in an amendment to the Treaties establishing an autonomous direct action before the Court of Justice for violations by Member States of the fundamental rights guaranteed by the Charter. Such a remedy could be structured as exceptional, in that it could only be activated after a filtering judgement operated by the Court itself and concerning the ineffectiveness of the normal judicial remedies. In order to achieve results capable of affecting the deficiencies noted above, such a remedy ought to be open to individuals who allege a violation of their fundamental rights⁵² and, in addition, to an independent EU body: potentially, the European Union Agency for Fundamental Rights (FRA), after appropriate amendment of its founding regulation, based on Art. 352 TFEU. Its role could possibly be further complemented by national independent authorities (ombudsmen), constituting a European network on the subject, to be established through action also based on Art. 352 TFEU.

In the exercise of that competence, the Court could of course also make use of the interim measures already provided for by the Treaty.

Going down such a path, one would have an instrument of general application, capable of addressing effectiveness issues relating to any fundamental right provided for by the Charter. Yet that remedy would only be activated in the areas and instances where the effectiveness of protection is not guaranteed by the ordinary instruments - as is precisely the case with the prohibition of collective expulsions.

⁵² Along the lines of the *recurso de amparo constitucional* in the Spanish system, or the German federal *Verfassungsbeschwerde* or, again, the *Bescheidsbeschwerde* and *Individualbeschwerde* provided for in the Austrian constitutional system.

Clearly, however, this is an impassable path, since an amendment in the Treaties would be required for this purpose, and, in principle, that amendment would have to be introduced through an ordinary revision procedure. At most, it would be conceivable to have recourse to the simplified revision procedure by limiting that exceptional competence to the Area of Freedom, Security and Justice and thus introducing it as an innovation to Article 67 § 4 TFEU, as regards access to justice.

2. Attributing Strong Decision-Making Powers to FRA.

A second reform, achievable with less difficulty from the point of view of the applicable procedures, but still conditional on a substantial political agreement between the Member States, would consist in attributing a specific decision-making power in this matter to FRA. The Agency could base its decisions on evidentiary data collected on the ground by FRA itself, but also on reports from relevant international governmental institutions such as UNHCR, and on substantiated complaints filed by affected persons and nongovernmental organizations. It would then be possible to challenge such decisions before the General Court under Article 263 TFEU.

Such a reform would certainly require legislative action. As for the legal basis, there can be at least two alternatives.

The first is Article 352 TFEU, which would be necessary if the proposed reform were to be introduced by a corresponding amendment to the Agency's founding regulation, providing for the Agency's authority to be extended to any violation of fundamental rights by States within the scope of application of EU law. However, a reform of this magnitude would not even be necessary at present.

All that is required is a genuine reinforcement of the effectiveness of fundamental rights in a specific area. Namely, the area of freedom security and justice and, even more specifically, the management of external borders. With this in mind, the appropriate legal basis would then be Article 79(2)(a) and (c). The latter provision, in particular, provides for the adoption, by ordinary legislative procedure, of measures in the area of “illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation”.

This certainly lowers the procedural bar by shifting from a unanimous decision in the Council to a qualified majority. Even this goal, however, seems unrealistic at the present time.

3. De-politicising the Infringement Procedure through a Modification of Organisational Practices and of the Rules of the Commission

The third alternative for introducing a reform capable of remedying the current lack of effectiveness of Article 19 § 1 of the Charter lies within the Commission's current powers and could take the form of a simple modification of that institution's internal rules. Notably, it would mean envisaging the constitution, within the Commission, of a functionally autonomous structure⁵³, formally placed under the aegis of the Presidency, which would have the power to initiate and manage infringement procedures in relation to hypotheses of violation of human rights in the area of freedom, security and justice, without being subject to indications of political priorities by the College or its President.

This reform, moreover, could be the subject of an open debate on a truly European political platform, ahead of the next parliamentary term. Indeed, it is evident that, on the substantive side, the protection of fundamental rights constitutes a 'noble' and transversal political issue, on which it is well conceivable to record a convergence between different political groups, regardless, in particular, of the positions on the type of immigration policy one wishes to favour. On the procedural side, moreover, such a change in the Commission's internal practice and organisational arrangements could well be stipulated by the Parliament as a condition for the approval of a presidential candidate, without having to go through the approval (unanimous or even only by a majority) of the subjects that should thus be subjected to a more incisive scrutiny: the Member States.

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⁵³ Which can be done by simple decision of the President of the Commission, already under the current wording of Article 22 of the Commission's Rules of Procedure, according to which “In special cases the President may set up specific functions or structures to deal with particular matters and shall determine their responsibilities and method of operation”.

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