ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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JUDICIAL INTERACTIONS ON THE EUROPEAN RETURN DIRECTIVE: SHIFTING BORDERS AND THE CONSTITUTIONALISATION OF IRREGULAR MIGRATION GOVERNANCE

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ABSTRACT: This *Article* examines the dynamics between shifting borders – the border as a legal construct instead of a geographical barrier – and law by analysing the role of courts and judicial interactions in the implementation of the Return Directive in Europe. We argue that legislation that states may have introduced primarily to shift and reinvigorate their borders nevertheless holds a promise of opening

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The text between reversed commas featuring in the titles of section II, II, IV and V is quoted from different sources, namely: "Immigration courts as border zones" (section II) is a quotation of AC Kocher, *Notice to Appear: Immigration Courts and the Legal Production of Illegalized Immigrants* (PhD Thesis The Ohio State University 2017) OhioLINK Electronic Theses and Dissertations Center rave.ohiolink.edu. The question "[i]s it a crime to be a foreigner?" (section III) is a quotation from case C-290/14 *Celaj* ECLI:EU:C:2015:285, opinion of AG Szpunar: "Is it a crime to be a foreigner? We do not think so" para.1; it is also the closing sentence of the ECtHR *Saadi v The United Kingdom* [GC] App n. 13229/03 [29 January 2008] joint partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä para. 65. The sentence "reconfigure and relocate national borders" (section IV) is a quotation of A Mountz and others, 'Conceptualizing Detention: Mobility, Containment, Bordering, and Exclusion' (2013) Progress in Human Geography 522. Finally, "[s]peaking rights to power" is a quotation from A Brysk, *Speaking Rights to Power: Constructing Political Will* (Oxford University Press 2013).

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up more, instead of less, space for legal claims for migrant justice, especially if such legislation is applied by judges across different legal orders. We look at the impact of judicial interactions by European and domestic courts on the Return Directive in three areas in which states have attempted to shift their borders for maintaining irregular migration within exclusive domestic competences: the merging of criminal justice and immigration policing; detention as immigration enforcement; and the legal and social exclusion of irregular migrants. We show that in all these fields, judicial interactions have set into motion a process of incremental constitutionalisation of irregular migration in Europe in two ways. First, such interactions have resulted in extended judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control. Secondly, they have allowed irregularly staying migrants, as a group largely excluded from the legal and political processes that characterise modern constitutionalism, to have their *interests* translated into *rights* that can be litigated and enforced. By focusing on judicial interactions regarding immigration *enforcement*, this *Article* fills a gap in contemporary research on the role of courts in immigration policy which has so far predominantly analysed adjudication of immigration *status*.

KEYWORDS: Return directive – judicial interaction – borders – national courts– Court of Justice of the European Union – European Court of Human Rights.

I. INTRODUCTION

The reform of the EU's return policy has been one of the EU's main policy responses to the so-called refugee crisis of 2015. As a consequence, irregular immigration has monopolised not only the discussion on the EU's return policy, but also the EU's future strategy for asylum management. The foregrounding of return policies in the migration-asylum continuum is a development which has been strengthened by the New Pact on Migration and Asylum, presented by the European Commission in September 2020:[1] return related provisions are inserted in all the proposals regarding asylum, most pertinently visible in the so-called border return procedure in the amended proposal for an Asylum Procedures Regulation.[2]

The growing interlinkages between asylum and return policies are not only indicative of a more restrictive approach to immigration policies in the political arena, but on a conceptual level, it is argued that they exemplify the idea of *shifting borders*: borders which are not fixed in time and space but consist of legal barriers, often linked to the individual migrant instead of merely to a clearly demarcated and static territory. Legal practices by states in order to pre-empt legal entry or stay for migrants exemplify this idea of shifting borders. Against this conceptual background, Ayalet Shachar has recently written that "the European Union [has established] one of the world's most complex, inter-agency, multitiered visions of the shifting border, comprised of pre-entry controls at countries of

[1] See Communication COM(2020)609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum.

[2] Communication COM(2020) 611 final from the Commission of 23 September 2020 on an 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 the Directive 2013/32/EU.

origin and transit all the way through to removal of irregular migrants after they have reached EU territory".[3] According to Shachar, the removal procedure is "facilitated by the shared European Return Directive". Indeed, in a more general sense, she portrays the use of law and legal innovations as complicit in the aggrandizement of regulatory power over mobility and migration which is the rationale behind shifting borders, juxtaposing it with accounts that stress either the disappearance or stasis of borders.

In this *Article*, we draw on the idea of the *shifting border*, whilst simultaneously claiming that in the EU, the role of law in migration management is more complex than merely enabling the state to regulate mobility and transform its borders. In order to do justice to the contemporary dynamics of the relationship between law and shifting borders, it is necessary to acknowledge the multilevel application of the law, in particular by courts. In this *Article*, we focus on the role of courts and judicial interactions in the implementation of the Return Directive,[4] in order to argue that the Return Directive has set into motion a process of incremental constitutionalisation of irregular migration in Europe. Such constitutionalisation has occurred in two related ways. First, the adoption of the Return Directive has extended judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control. Second, it has allowed irregularly staying migrants, as a group largely excluded from the legal and political processes that characterise modern constitutionalism, to have their *interests* translated into *rights* that can be litigated and enforced.

We will show how such constitutionalisation has been gradually constructed through judicial interactions, with a particular focus on the large role played therein by domestic judges acting as natural judges for the implementation and application of the Return Directive. Our core claim is that even legislation that states may have introduced to "reinvigorate their borders"[5] holds a promise of opening up more, instead of less, space for legal claims for migrant justice. In order to make this argument, we will first zoom in on existing research on the role of courts in immigration policy (section II). We claim that there is a gap in such research with respect to judicial interactions regarding immigration enforcement, a shortcoming that can be remedied by looking at judicial interactions on the Return Directive in Europe. The next three sections then deal with three exemplary case studies of states' attempts to shift *geographical, temporal, and legal borders* and the accompanying "legal transformation of immigration controls" which we are witnessing today: between criminal justice and immigration policing (section III); immigration enforcement resulting in detention (section IV); and the legal and social exclusion of irregular migrants (section V). For each of these case studies, we will look at the way in which the outcomes of judicial interactions

[3] A Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020) 55; A Burridge and others, 'Polymorphic Borders' (2017) Territory, Politics, Governance 239.

[4] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[5] A Shachar, *The Shifting Border* cit. 14.

on the interpretation and application of the Return Directive have restrained arbitrary executive control over immigration and enhanced the protection of individual rights. In our conclusions, we will look at current developments which are illustrative of political and legislative attempts to curb the powers of courts in this area (with governments at times even holding courts responsible for the inefficiency of return policy),[6] arguing that the political negotiations on the EU return policy as formulated in the proposal for a recast of the Return Directive,[7] and more generally in the New Pact, need to be mindful of the outcomes of earlier judicial interactions on the directive across the Member States.

II. "Immigration courts as border zones": courts and judicial interactions in the field of irregular migration

Over the last few decades, an abundant body of scholarship has addressed the role of courts in immigration governance, at times resulting in conflicting outcomes regarding the impact of courts with regard to securing checks and balances, protecting immigrants' fundamental rights and ultimately safeguarding the rule of law in this policy domain. On the one hand, there is research that emphasises the shifts brought about by courts in this policy field by challenging policy choices and expanding immigrants' rights, even culminating in what has been labelled post-national citizenship.[8] At the same time, scholars studying the "judicialization of politics",[9] have argued that the role of courts in immigration governance has been overestimated because relatively few immigrants actually reach courts, and as such the significance of immigration jurisprudence is often amplified given the number of cases that never reach courts.[10]

Also, it has been argued that the expansion of judicial power in immigration cases is an elite-driven process in which politicians control immigrants' access to courts, or even

[6] See European Migration Network (EMN) Synthesis Report, 'The Effectiveness of Return in the EU Member States' (2017) 3.

[7] Communication COM(2018) 634 final from the Commission 12 September 2018 on a Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast).

[8] A Geddes and P Scholten, *The Politics of Migration and Immigration in Europe* (Sage 2016); S Bonjour, 'Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany: Bonjour Speaking of Rights' (2016) Law & Policy 328; C Joppke and E Marzal, 'Courts, the New Constitutionalism and Immigrant Rights: The Case of the French *Conseil Constitutionnel*' (2004) EurJPolRes 823; V Guiraudon and G Lahav, 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' (2000) Comparative Political Studies 163.

[9] T Vallinder, *The Judicialization of Politics. A World-Wide Phenomenon: Introduction* (Sage Publications 1994); R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2009); A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); S M Sterett, 'Legal Mobilization and Juridification: Migration as a Central Case' (2016) Law & Policy 273.

[10] B Ní Ghráinne, 'Safe Zones and the Internal Protection Alternative' (2020) ICLQ 335.

manipulate judicial review powers ultimately for their own self-interested purposes.[11] Moreover, the judicial philosophies of some domestic courts have been regarded as conservative and aligned with the central powers of the state in several jurisdictions.[12] An altogether different dynamic has been highlighted as well by scholars who have shown that every cycle of judicial empowerment is followed by a reactionary cycle curbing the newly gained judicial review powers by the executive, which in turn actually re-empowers judiciaries.[13] While the findings are thus far from one-dimensional, the attention on courts in current research fits with novel ways of theorising the border as a phenomenon that is dispersed across space, and where courts can be seen as "border zones where immigration status is contested and determined".[14]

This *Article* builds on existing scholarship on courts in immigration governance by analysing the role of courts and judicial interactions in adjudicating immigration *enforcement,* an aspect of immigration governance that has been neglected by the scholarship on the role of courts in this area, being predominantly focused on immigration status. Our focus on adjudication concerning a particular instrument of enforcement – the Return Directive, designed to facilitate the return of irregular migrants – is instructive because much of the previous research on courts in this field has concentrated on the direct contestation of the boundary between legal/illegal and inclusion/exclusion, as for example in asylum or family migration litigation. As a result, the way in which the judicialization of *enforcement* affects immigration governance has remained relatively undertheorized. While the transnational nature of immigrants' claims for justice generally stands in the way of full constitutional protection of their interests, this is exacerbated with respect to irregular immigrants – persons whose entry and stay is not authorised by the state and therefore considered unlawful.[15] Interestingly, the Return Directive, an instrument that started out as a "Directive of Shame" because it was seen as diluting human rights standards and procedural guarantees,[16] has since become a positive normative example for

[11] R Hirschl, *Towards Juristocracy* cit.

[12] M Sterett, 'Legal Mobilization and Juridification' cit.; I Cohen, *Israeli Judges in a Jewish State and the Decline of Refugee Protection* (PhD Thesis European University Institute 2015) hdl.handle.net; C Demetriou and N Trimikliniotis, 'Cypriot Courts, the Return Directive and Fundamental Rights: Challenges and Failures' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020).

[13] M Marmo and M Giannacopoulos, 'Cycles of Judicial and Executive Power in Irregular Migration' (2017) Comparative Migration Studies 149.

[14] A C Kocher, 'Notice to Appear' cit.

[15] See V Federico, M Moraru and P Pannia, 'Migrants and the Law. What European Courts Say' (2022 forthcoming) European Journal of Legal Studies 1.

[16] Or "a draconian policy towards migrants", see V Mitsilegas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive' in N J Guia, R Koulish and V Mitsilegas (eds), *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Springer 2016) 27.

legal orders around the globe due to its unexpected protective effect for irregular immigrants in practice.[17] The Directive is a typical instrument of enforcement as it does not determine the conditions under which the stay of a third-country national becomes unlawful, but instead merely refers to the criteria for lawful entry and stay in the Schengen Borders Code or national law.[18] As soon as the stay of an irregular migrant is unlawful, they become subject to the system of enforcement (return) established by the Directive. This entails the taking of a return decision, in which the stay is declared to be unlawful and an obligation to return is established.[19] In case that this obligation is not discharged during the period for voluntary departure or if there is a risk of absconding, Member States may use detention and deportation (forcible removal) to effectuate return.[20] In this *Article*, we trace the way in which this legal instrument has set into motion a process of incremental constitutionalisation of irregular migration in Europe, through courts and judicial interactions across intersecting legal orders.[21]

Using the concept of *judicial interactions* in order to analyse changes in the governance of irregular migration in Europe and the implications of such regulation for individual rights and checks and balances is helpful for a number of reasons. The specific characteristics of EU law, such as the decentralised system of implementation relying on national courts (and individuals claiming their rights) for the enforcement of EU law,[22] the obligation of uniform application of EU law, and differences between the judicial roles of the Court of Justice of the European Union (CJEU) and domestic courts, mean that an analysis of the role of courts in implementing and applying the Return Directive needs to be mindful of the wider legal and institutional framework in which that judicial role is carried out. Judicial interaction is a necessity in the EU, due to the decentralized and non-hierarchical nature of EU law which may lead to inconsistent international legal norms if there would be no transnational judicial interaction.[23] More specifically with regard to the way in which the characteristics of EU law could affect the balance of powers in the area of immigration law enforcement, it is significant that the preliminary reference procedure may provide domestic courts with opportunities to circumvent domestic courts' hierarchy, as *every* court in the EU may refer questions to the CJEU.[24]

[17] MJ Flynn, 'Conclusion: The Many Sides to Challenging Immigration Detention' in M J Flynn and M B Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Elgar 2017).

[18] Arts 3(1) and (2) of the Directive 2008/115/EC cit.

[19] *Ibid*. art. 6 and case C-38/14 *Zaizoune* ECLI:EU:C:2015:260.

[20] Arts 8 and 15 of the Directive 2008/115/EC cit.

[21] On the overall role of European and domestic courts in the implementation of the Return Directive, see M Moraru, G Cornelisse and P de Bruyckere, *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 1.

[22] JHH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) ICON 94.

[23] M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) LJIL 553.

[24] Art. 267 TFEU. See case C-173/09 *Elchinov* EU:C:2010:581 para. 26; and case C-104/10 *Kelly* EU:C:2011:506 para. 61.

Moreover, judges adjudicating the Return Directive act in an area that is increasingly regulated by a multiplicity of legal orders, including the European Convention of Human Rights (ECHR) and global legal norms. Norms emanating from these orders may at times be complementary or mutually reinforcing, or they may be in tension or even in conflict with each other. In a legal landscape that is typified by ever denser transnational regulation, such as EU law, the ECHR and domestic constitutional law, a focus on judicial interactions is especially warranted as immigration adjudication in this legal constellation may subject executive decision-making to forces of accountability that have hitherto been absent from this area of law. Accordingly, if we want to know more about the judicial role in adjudicating irregular migration and its effects on individual rights and executive power, we need to pay close attention to the ways in which judges from different legal orders interact with each other when dealing with complementarity or conflict.[25] In the Sections below, we will show how judicial interactions on the Return Directive between the CJEU and domestic courts (vertical) and between domestic courts from different Member States or between the CJEU and the European Court of Human Rights (ECtHR) (transnational) have resulted in increased protection of the rights of irregular migrants and the introduction of hitherto unseen checks and balances on the executive-driven model of migration governance.

III. "Is it a crime to be a foreigner?": courts reconfiguring the borders between criminal law and the Return Directive

The intermingling of criminal justice and immigration policing has been argued to exemplify current transformations of border control.[26] In this section, we show that courts and judicial interactions have ensured the Return Directive as leading policy on irregular migration by reconfiguring the executive's "shifting borders" approach on the basis of the principles of effectiveness, sincere cooperation and proportionality.

[25] Although "judicial dialogue" has been the leading metaphor used by scholars to refer to the use of foreign jurisprudence by courts, in recent years it has been increasingly criticised as incorrect or inapt for describing the actual practice of national courts' engagement with foreign jurisprudence, whether in the EU or outside. See AT Pérez, 'Judicial Dialogue and Fundamental Rights in the European Union: A Quest for Legitimacy' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018) 104-105; DS Law and WC Chang, 'The Limits of Global Judicial Dialogue' (2011) WashLRev 523. Given the narrow scope of "judicial dialogue", this *Article* uses the term "judicial interaction" as the use of judicial reasoning from one court by another court, for the purpose of constructing a better interpretation of a legal norm, without necessarily involving reciprocity or continuity over time.

[26] A Kraler, M Hendow and F Pastore, 'Introduction: Multiplication and Multiplicity – Transformations of Border Control' (2016) Journal of Borderlands Studies 145.

For decades, several Member States have utilised criminal law for irregular migration management.[27] However, since the entry into force of the Return Directive, systemic reforms have been required in some Member States to amend their expulsion procedures.[28] As soon as the stay of an irregular migrant is unlawful, they become subject to the system of enforcement established by the Directive. Member States are obliged to apply the provisions of the Return Directive to *all* third-country nationals illegally staying on their territory, which entails the application of a gliding scale of measures, ranging from the least constraining in the form of voluntary departure to the most coercive such as removal and detention.[29]

This gradual model of immigration enforcement established by the Return Directive stands in stark contrast with the use of criminal law to sanction breaches of immigration law. Nonetheless, the "crimmigration" phenomenon[30] did not immediately disappear with the entry into force of the Return Directive. Especially those Member States with a long history of crimmigration[31] or populist fuelled crimmigration[32] have stalled the implementation of the Return Directive, and turned to protean and complex crimmigration policies based on an ill-conceived understanding of the *legal* and *temporal* borders between domestic criminal law and the Return Directive.[33] As we shall see below, the partial decriminalisation of irregular entry and stay in Europe has been the gradual result of vertical judicial interactions between Italian, French and Dutch courts and the CJEU.

One of the strategies used by Member States to preserve the use of crimmigration was to expand the *legal borders* of criminal law under a derogation allowed by art. 2(2)(b) of the Return Directive. This provision stipulates that third-country nationals who are subject to a return as a criminal law sanction or as a consequence of a criminal law sanction can be exempted from the application of the Directive. This derogation was broadly

[27] In France, the use of crimmigration to manage irregular migration was confirmed by the very Constitutional Court (*e.g.* French Conseil Constitutionnel of 16 July 1996 decision n. 96-377 *DC*; French Conseil Constitutionnel of 5 May 1998 decision n. 98-399 *DC*. More generally, see C Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' in M Guia, R Koulish and V Mitsilegas (eds), *Immigration Detention, Risk and Human Rights* cit. 93.

[28] See Communication COM(2014) 199 from the European Commission of 23 March 2014 on EU return policy.

[29] Recitals 10 and 13, arts 3(1) and (2), 6 and 8 of the Directive 2008/115/EC cit.; and *Zaizoune* cit.

[30] For a definition of this term, see I Majcher, '"Crimmigration" in the European Union Through the Lens of Immigration Detention' (Global Detention Project Working Paper 6/2013).

[31] L Imbert, 'Endorsing Immigration Policies in Constitutional Terms: The Case of the French Constitutional Council' in *Migrants and the Law. What European Courts Say on Migrants' Rights* (2022) European Journal of Legal Studies.

[32] V Passalacqua, 'El Dridi Upside Down: A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy' (2016) Tijdschrift voor bestuurswetenschappen en publiekrecht 215.

[33] On Italy, see A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge? The Case of Italy' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

interpreted by several Member States, allowing them to continue using criminal law sanctions in response to irregular migration. However, vertical judicial interactions between Italian and French courts and the CJEU have clarified the legal border between the domestic criminal competences and the scope of the Return Directive.[34]

The CJEU consistently held in a number of cases referred by these courts, such as *El Dridi*, *Achughbabian* and *Sagor*, that, even though criminal competences in this area remain a Member State competence and the Return Directive as such does not prohibit the use of criminal law for sanctioning illegal immigration, the exercise of criminal competences should not deprive the Directive of its effectiveness.[35] The CJEU precluded the use of criminal sanctions such as imprisonment for mere illegal entry of stay on the basis of the principle of effective application of the Return Directive, finding that such a measure does not contribute to the removal of an irregularly staying third-country national. It can therefore not be understood as a "measure" that Member States are required to take in order to enforce the return decision.[36] Home arrest is also precluded, if the national legislation does not provide for the immediate release of the third-country national as soon as the physical transportation (return) becomes possible.[37] A proportionate fine, as a criminal penalty, is acceptable only if it is not used as an alternative to removal and it does not impede return.[38] Judicial interactions thus established the legal limits to "crimmigration" as a derogation from the Return Directive, with the Italian courts' reference to the "principle of sincere cooperation laid down in Article 4(3) TEU and the objective of ensuring the effectiveness of EU law",[39] reverberating in the rulings by the CJEU.

However, in the meantime Member States found a second strategy to enable the continued use of criminal law to manage irregular migration, by shifting the *temporal borders* between criminal law and the measures taken on the basis of the Return Directive. They employed criminal law sanctions (*e.g.* fines or imprisonment) for irregular entry or stay without having passed through all the procedural steps set out by the Directive. For instance, in Italy, criminal detention was adopted, without having resorted to voluntary departure, removal or pre-removal detention under the scope of the Return Directive.[40]

[34] Case C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268; case C-329/11 *Achugbabian* ECLI:EU:C:2011:807; case C-430/11 *Sagor* ECLI:EU:C:2012:777. For an in-depth interpretation of this judgments, see G Cornelisse, 'The Scope of the Return Directive: How Much Space is left for National (Criminal) Procedural Law on Irregular Migration?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 41.

[35] See in particular *Achughbabian* cit. para. 33.

[36] Art. 8 of the Directive 2008/115/EC cit. See for example *Sagor* cit. para. 44; and *Achughbabian* cit. para. 37.

[37] See *Sagor* cit.

[38] See *Zaizoune* cit. and *Sagor* cit.

[39] *El Dridi* cit. para. 30.

[40] A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit. 301.

Vertical judicial interaction between Italian and Dutch courts and the CJEU however, reconfigured the temporal borders between criminal law and the Return Directive.[41] The CJEU formulated the general rule that the Return Directive establishes a complete system of return measures which must be applied in a precise and mandatory temporal order starting from the less restrictive measure – voluntary departure – to the most restrictive one – pre-removal detention.[42] In *Celaj*, a case referred by the Tribunal of Florence, the Court of Justice refined this rule by allowing for the imposition of a criminal sanction for illegal stay where the return procedure has been applied and the person concerned re-enters the territory of that Member State in breach of an entry ban.[43] *Ouhrami* gave further impetus to the clarification of the temporal border between criminal law and the measures from the Return Directive, albeit implicitly, as the CJEU ruled that an entry ban starts to produce effects only after a third-country national has left the territory of the EU. This raised questions regarding the conformity with EU law of national laws criminalising irregular stay in cases where an entry ban had been issued, with criminal prosecutions being carried out also with regard to third-country nationals who had not left the territory.[44] The ensuing preliminary reference by the Dutch Supreme Court resulted in transnational interaction between the CJEU and the ECtHR, and can be seen as a first step towards judicial review of the legality of "crimmigration" by the CJEU against human rights principles as developed by the European Court of Human Rights.[45] Indeed, the CJEU ruled that criminal law can be used for sanctioning mere illegal stay – of course after having exhausted the measures in the Return Directive – *only* if that criminal legislation is sufficiently accessible, precise and foreseeable in its application in order to avoid all risks of arbitrariness that would infringe the right to liberty.[46]

During the so-called refugee crisis, several Member States found another ingenious way to resort to "crimmigration" measures, namely by pushing inwards the external borders of the EU. In art. 2(2)(a), the Return Directive provides for the possibility for Member States to not apply the Directive to irregular immigrants apprehended at or near external borders, a derogation which affirms the continuing relevance of tangible, territorial borders. Not surprisingly, the extent to which the Directive should cover third-country nationals who are apprehended at or near Member States' borders was one of the most

[41] Case C-290/14 *Skerdjan Celaj* ECLI:EU:C:2015:640; case C-225/16 *Ouhrami* ECLI:EU:C:2017:590; case C-806/18 *JZ* ECLI:EU:C:2020:724.

[42] See *Celaj* cit. and *El Dridi* cit.

[43] *Celaj* cit.

[44] Dutch Supreme Court of 27 November 2018 ECLI:NL:HR:2018:2192 and Court of Appeal Amsterdam of 24 May 2019 ECLI:NL:GHAMS:2019:1736.

[45] ECtHR *Del Río Prada v Spain* App n. 52750/09 [21 October 2013].

[46] See *JZ* cit. para. 41.

controversial issues during the negotiation of the Directive between the European Parliament and the Council.[47] According to the French government, the temporary reintroduction of internal borders within the Schengen area turned internal borders in external borders, allowing it to impose criminal law sanctions on those migrants crossing these borders without having to first apply the Return Directive. In *Affum* and *Arib*, the CJEU rejected the shifting of external borders inward, at least to the extent that this was done for the purposes of governing irregular migration.[48] It held that the border control exception in the Return Directive relates exclusively to the crossing of a Member State's *external* border, as defined in art. 2(2) of the Schengen Borders Code.[49] Therefore, Member States cannot exclude from the scope of the Directive persons crossing *internal* borders, even when border controls have been reintroduced. The Court then logically ruled that these persons could not be imprisoned on the basis of national criminal law merely on account of irregular entry across an internal border, if the return procedure had not been applied.[50]

Judicial interactions of various types have empowered domestic courts to extend judicial review of crimmigration measures on the basis of their conformity with the Return Directive and the principle of proportionality. In addition to the use of the preliminary reference procedure, domestic courts have resorted to consistent interpretation of domestic laws with EU law as interpreted by the CJEU. For instance, when the CJEU delivered its judgment in the Celaj case, Dutch and Czech Supreme Courts had already decided that criminal sentences for mere irregular entry and stay could only be applied when all the steps of the return procedure had been applied without leading to actual return.[51] Nevertheless, in some jurisdictions, the direct effect of CJEU rulings initially remained limited and the intervention of domestic supreme courts has been necessary to ensure conformity with the Return Directive. Thus, in Italy, the Sagor and Achughbabian rulings did not restrain the use of criminal law sanctions for irregular stay until after the intervention of the Supreme Court (i.e. Court of Cassation).[52] Citing Achughbabian, the Italian Court of Cassation held that home confinement could be an option as long as it does not contravene the Directive's

[47] F Lutz, S Mananashvili and M Moraru, 'Return Directive 2008/115/EC' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* (Nomos 2022) 692.

[48] Case C-47/15 *Affum* ECLI:EU:C:2016:408; case C-444/17 *Arib and Others* ECLI:EU:C:2019:220. Furthermore, the Court held that the exception in art. 2(2)(a) of the Return Directive does not apply to persons that seek to leave. See *Affum* cit. paras 71-72, 78.

[49] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[50] *Affum* cit. para. 93.

[51] See the Dutch Council of State of 05/2013 judgment n. 11/0307; and Czech Supreme Court of May 2014 judgment 7 Tdo 500/2014 *Nejvyšší soud*.

[52] See A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit.

objectives and the enforcement of the third-country national's return.[53] Moreover, while the majority of domestic courts have seized on the effet utile of the Return Directive in order to strike down criminal law measures in this area, in other jurisdictions the spill-over effect of judicial interactions has remained more marginal. Thus, in Cyprus, domestic courts continued to endorse criminalisation as a key pillar of domestic migration governance and allowed immigration authorities a "very wide" scope for the use of discretionary powers.[54] Only after the European Commission's express recommendation in 2013, some two years after the first CJEU cases on the matter, did Cyprus cease to use criminal law sanctions such as imprisonment for mere illegal entry or stay.

In reaction to the Member States' shifting of legal, geographical and legal borders in an attempt to maintain irregular migration under the exclusive realm of domestic criminal law, judicial interactions have ensured a directly effective EU right for irregular migrants of not being subject to criminal penalties for mere irregular entry or stay, with exceptions in clearly defined and limited circumstances.

IV. Detention as a tool to "reconfigure and relocate national borders": judicial interactions turning the liberty of irregular migrants into a human right

It has been argued that immigration detention is "a powerful, physical manifestation of exclusionary state practice", which works not only to contain mobility, but also to "reconfigure and relocate national borders".[55] Indeed, as an institution and legal practice, immigration detention shows that borders are widely diffused *within* the State, most acutely visible in the crucial differences between the way in which the liberty of citizens and immigrants is protected. Such differences have come to the fore in the case law of the ECtHR, which has afforded states significant leeway in detaining migrants under art. 5 ECHR, most notably due to the general absence of a necessity requirement when depriving immigrants of their liberty.[56] The acquiescence by a human rights court to *unnecessary* limitations to the human rights of immigrants raises the question of whether these rights can actually be seen as *human* rights. In this section, we set out how judicial interactions between the CJEU and domestic courts on art. 15 of the Return Directive, the provision

[53] Italian Court of Cassation judgment of Corte di Cassazione of 23 April 2013 n. 35587/2013. On the slow process of interpretative convergence that started to develop following the Supreme Court judgment see A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit.

[54] See for instance, Cyprus Administrative Court of 24 February 2016 n. 5984/2013 *Kiriak Leonov v Republic of Cyprus*. In Greek the word used is "ευρύτατες". See, C Demetriou and N Trimikliniotis, 'Cypriot Courts, the Return Directive and Fundamental Rights' cit.

[55] *Ibid*.

[56] ECtHR *Chahal v UK* App n. 22414/93 [15 November 1996], for an early critique, see G Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) European Journal of Migration and Law 6 and 93.

regulating the use of detention in return procedures, have resulted in a crucial shift in the legal paradigm that regulates immigration detention in the Member States, traditionally characterized by administrative discretion and deferential judicial review.[57] We will see that such interactions have led to increased protection of the rights of detained irregular immigrants, for example through a stronger insistence on the principle of proportionality and the use of alternative measures, elements that are absent from the case law of the ECtHR. Moreover, judicial interactions between the CJEU and domestic courts on the scope of judicial review under art. 15 of the Return Directive has empowered (and required) courts in the Member States to extend their powers significantly *vis-a-vis* the executive in a manner that the ECtHR has not been able to do.[58]

Although harshly criticised,[59] the Directive's provisions on pre-removal detention aimed to harmonise inconsistent domestic practices, and limit systematic and long detention of irregular migrants.[60] For this purpose, chapter IV of the Return Directive confines the detention powers of the Member States to clear requirements that were previously absent not only from the domestic legal frameworks, but also more widely from the European human rights instruments.[61] Under art. 15 of the Return Directive, Member States are authorised to detain a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, unless "other sufficient but less coercive measures can be applied effectively in a specific case". Detention can be applied in particular if there is a risk of absconding, or when the third-country national avoids or hampers return or removal.[62] EU law thus requires that detention in the immigration context is a proportionate and necessary measure;[63] conditions that are also reflected in other requirements of art. 15, for example that detention

[57] G Cornelisse and M Moraru, 'Judicial Dialogue on the Return Directive: Catalyst for Changing Migration Governance?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 17-37.

[58] The ECtHR caselaw on immigration detention is an example of narrow protection of individual liberties and judicial isolationism from the CJEU and domestic courts. Due to reasons of scope we will not address the pertinent case law here. For more see LR Helfer and E Voeten, 'Walking Back Human Rights in Europe?' (2020) EJIL 797.

[59] See V Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and Rule of Law* (Springer 2016); ML Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) European Journal of Migration and Law 17 and 104; See D Acosta, '"The Good, the Bad and the Ugly in EU Migration Law": Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)' (2009) European Journal of Migration and Law 19.

[60] See F Lutz, 'Prologue: The Genesis of the EU's Return Policy' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

[61] Such as the ECHR, and globally, see Australia and US, which have an unlimited immigration detention policy, see MJ Flynn, 'Conclusion: The Many Sides to Challenging Immigration Detention' in MJ Flynn and MB Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Elgar 2017).

[62] See also recital n. 13 art.15 of the Directive 2008/115/EC cit.

[63] G Cornelisse, 'Detention and Transnational Law in the Eurepean Union: Constitutional Protection between Complementarity and Inconsistency' in M Flynn (ed.), *Challenging Immigration Detention* cit.

"shall last for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence". Art. 15 also limits the absolute duration of the detention to a maximum period of six months, which can be extended for a further 12 months only under certain conditions.[64] Moreover, detention can no longer be justified and the third-country national should be released immediately, if there is no reasonable prospect of removal,[65] or if the other conditions in art. 15 are no longer met.

As we saw, in *El Dridi*, the CJEU underlined that the system of enforcement that the Directive establishes is based on a step-by-step approach, in which "Member States must carry out the removal using the least coercive measures possible".[66] The gradualism required by the Return Directive has not only had implications for crimmigration measures as discussed above, but it has also significantly affected the use of administrative detention in return procedures. Thus, in *El Dridi*, the CJEU clarified that detention may only be resorted to if it appears, after an individual assessment, that "the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned".[67] The requirement of an individual assessment and the principle of proportionality was underlined again in preliminary references brought by courts from the Czech Republic and Bulgaria (*i.e*. *Arslan*[68] and *Mahdi*). These judgments diverge significantly from the ECtHR approach, by requiring detention to be imposed only when necessary, and by considering it lawful only when less coercive measures would not suffice. As such, they have had a significant influence on domestic rulings on immigration detention. For example, some four years after the entry into force of the Directive, the Slovenian Administrative Court issued a landmark judgment in which it referred to *Arslan* and *Mahdi*, clearly stating the obligation of the administration to consider alternative measures, thereby giving precedence to the Return Directive over incompatible national provisions. It imposed an obligation upon the police to verify whether alternatives to detention could be carried out. The Court described in detail a checklist on how administrative authorities should proceed in imposing restrictive measures.[69] Belgian courts as well, have declared detention measures unlawful on the basis of art. 15 Return Directive because authorities had not considered alternative measures.[70]

Measures of detention based on art. 15 shall be subject to judicial review if these have been ordered by administrative authorities, either *ex officio* or upon the request of

[64] See art. 15(5) and (6) of the Directive 2008/115/EC cit.

[65] Case C-357/09 PPU *Kadzoev* ECLI:EU:C:2009:741 para. 68.

[66] *El Dridi* cit. para. 37.

[67] *Ibid*. paras 39-41. See also case C-146/14 *Mahdi* ECLI:EU:C:2014:1320 para. 70.

[68] Case C-534/11 *Arslan* ECLI:EU:C:2013:343.

[69] Slovenian Administrative Court judgment of 6 March 2015 n. IU 392/2015.

[70] See S Sarolea, 'Le Rappel du Principe de Subsidiarité. Note sous Bruxelles, Ch. mis. en acc., 1er juillet 2016' (2016) Newsletter EDEM. See Belgian Court of Cassation judgment of 14 October 2016 n. 176363.

the third-country national concerned.[71] If the detention is found to be unlawful, the third-country national has to be released immediately.[72] When it comes to judicial review of detention in the Member States, the different configurations thereof can be compared to a *mille-feuille*, the French patisserie composed of multiple layers of puff pastry. Indeed, the metaphor seems to work when considering the variety of institutional and procedural layers which domestic judicial systems in Europe display, portraying a sharp institutional heterogeneity.[73] The multiple layers of limitations that judges face, risks crumbling the effectiveness and uniformity of the procedural guarantee of judicial review of detention, just as when one bites from a *mille-feuille* patisserie.[74] Judicial interactions between domestic courts and the CJEU on the Return Directive however, have led to an extension of the scope and intensity of judicial review in most Member States, providing courts with the competence to assess elements of the lawfulness of detention which they could not assess before the entry into force of the Directive, such as all aspects of facts and law, proportionality, necessity and the existence of alternative measures.

The landmark case on review powers of national courts in pre-removal detention is *Mahdi*, in which the CJEU provided the reviewing courts with the competence to review *all* relevant elements of the lawfulness of detention on the basis of art. 15 of the Return Directive. In *FMS and Others*, issued some six years later, it reaffirmed the wide scope of the required review, recalling that "the national court must be able to substitute its own decision for that of the administrative authority that ordered the detention and to order either an alternative measure to detention or the release of the person concerned".[75] It also held that in the absence of domestic law providing for judicial review of detention, the principle of primacy of EU law and the right to effective judicial protection, guaranteed by art. 47 of the Charter, provide a basis for review.[76]

After the *Mahdi* ruling, courts in many Member States left behind their limited understanding of their review powers. French courts for example expanded their control to "errors of appreciation" committed by the administration, whereas before they dealt only with manifest errors committed by the administration or even endorsed the reasoning

[71] Art. 15(2) of the Directive 2008/115/EC cit.; *Mahdi* cit.

[72] *Ibid*. See also joined cases C-924/19 PPU and C-925/19 *PPU FMS and Others* ECLI:EU:C:2020:367 para. 292.

[73] A Blisa and D Kosař, 'Scope and Intensity of Judicial Review: which Power for Judges Within the Control of Immigration Detention?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 191.

[74] This argument is valid with regard to return more generally, seeing that judicial heterogeneity and a particular division of competences between different branches of the judiciary within a single Member State can negatively impact the effective implementation of the Return Directive, even if formally speaking judicial organisation falls within national procedural autonomy. See case C-233/19 *B v CPAS de Liège* ECLI:EU:C:2020:397, opinion of AG Szpunar.

[75] *FMS* cit. para. 293.

[76] *Ibid*. para. 291.

of the administration automatically.[77] On the basis of the *Mahdi* preliminary ruling, the Bulgarian judiciary disapplied the domestic law which provided that judicial renewal of detention following the lapse of the first six months, takes place in a closed hearing without the participation of the third-country national.[78] In the Netherlands, before the entry into force of the Return Directive, courts were extremely deferential in their review of the question whether less coercive measures could have been applied, as this fell within the discretion of the administration.[79] While the entry into force of the Return Directive already changed their approach marginally,[80] the *Mahdi* judgment brought substantial changes: according to the Dutch Council of State, the judiciary is now obliged to carry out a full review of whether the administration has correctly decided not to use alternatives to detention.[81] And the saga still continues; recently the Council of State referred a preliminary question to the CJEU asking for clarification on whether art. 15 requires *ex officio* judicial review of all elements of the detention measure.[82]

In conclusion, the robust guarantee of judicial control of detention in the Return Directive has been bolstered by vertical judicial interactions, and the resulting expansion of the review powers of domestic courts stands in stark contrast with the traditional executive-driven model of irregular migration governance. It has brought about a new role for immigration courts when intervening in administrative decision-making, enabling them to balance effective returns with effective judicial protection and the protection of the rights to personal liberty. That, together with judicial interactions on the applicability of the proportionality principle when the executive decides on detention, has resulted in a crucial shift in the legal paradigm that regulates detention in the immigration context.

V. "Speaking rights to power": judicial interactions on the legal and social exclusion of irregular immigrants

In this section, we show how a triangular interaction between domestic courts, the CJEU, and the ECtHR has filled legislative gaps in the Return Directive, thereby reshaping Member States' borders, here understood as "polysemic entities" that differentiate between

[77] See for instance, Court of Appeal of Nancy judgment of 18 February 2013. For a full list of cases, see M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Re-Removal Detention' (Working Paper REDIAL Research Report 05/2016).

[78] Supreme Administrative Court of Bulgaria judgment of 6 June 2014 n. 1535/2014. For a commentary see M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' (Working Paper REDIAL Research Report 03/2016).

[79] Dutch Council of State of 16 August 2005 n. 200505443/1 and of 11 January 2008 n. 200708177/1.

[80] Dutch Council of State of 28 April 2011 n. 201100194/1/V3.

[81] Dutch Council of State cof 23 January 2015 n. 201408655/1/V3.

[82] Joined cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid* (pending). See also G Cornelisse, 'Van de Magna Carta tot Mahdi: Reikwijdte en intensiteit van de rechterlijke toetsing van vreemdelingendetentie' (2015) Asiel en Migrantenrecht.

people already present within national territory in terms of their legal and social rights.[83] Through judicial interactions, courts have created space for the recognition of new rights, remedies and principles reflecting the realities of returns and Member States' obligations under international human rights instruments.[84] The judicial interactions that we discuss below show that the legislation which Member States have primarily adopted in order to strengthen their borders as devices of exclusion has opened up more, instead of less, space for the "differential inclusion" of irregular immigrants.[85]

In the political negotiations on the Return Directive, effectiveness of returns was the primary driver for legislation on this matter. As a result, procedural safeguards are not elaborate and individual rights at stake in the removal process are protected in rather general terms. Thus, art. 5 requires Member States to take "due account of the best interests of the child, family life and the state of health of the third-country national concerned' when implementing the Directive, as well as 'to respect the principle of *non-refoulement*". Art. 9 obliges Member States to postpone removal if that would violate the principle of *non-refoulement*. The Directive protects core procedural safeguards as well, such as the duty to state reasons and to provide a translation of a return related measure as well as the right to a remedy.[86] Saliently, in the negotiations on the Return Directive, Member States insisted on a large margin of discretion when it came to procedural safeguards, and without it the Directive would not have passed the Council's approval vote.[87] As a consequence, procedural rights such as the right to be heard and obligatory judicial review of all return related measures were not included in the Directive.[88]

The omission from the Return Directive of the right to be heard is an acrid illustration of the typical status of irregular migrants in the law. Indeed, when Member States are provided with far-reaching and even mandatory powers of exclusion, as is done in the Return Directive, and there is no corresponding obligation to hear those who are affected, the law fails to make space for their interests in the most literal sense possible. However, the exclusion of the right to be heard from the Directive was remedied by judicial interactions between French and Dutch courts and the CJEU.[89] On the basis of the EU general principle

[83] É Balibar, 'What Is a Border?' (2002) Politics and the Other Scene 75.

[84] Such as the EU Charter, ECHR, UN Convention on the Rights of Children.

[85] Differential inclusion denotes "the selective inclusion of migrants within the sphere of rights in the receiving society in contrast to the idea of borders as devices of exclusion or inclusion". See J Könönen, 'Differential Inclusion of Non-citizens in a Universalistic Welfare State' (2018) Citizenship Studies 53-69.

[86] Arts 12 and 13 of the Directive 2008/115/EC cit.

[87] F Lutz, S Mananashvili and M Moraru, 'Return Directive 2008/115/EC' cit.

[88] See, in contrast, arts 14-18 and 46(5) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[89] Case C-166/13 *Mukarubega* EU:C:2014:2336; case C-249/13 *Boudjlida* ECLI:EU:C:2014:2431; case C-383/13 PPU *G&R* ECLI:EU:C:2013:533.]

of the right of defence, the CJEU deduced a right to be heard for returnees before the administrative authorities can adopt a decision negatively affecting them.[90] At the same time, the CJEU underlined the objective of effective returns, most notably through the rule that even if the right to be heard had been breached, it would render a return-related decision invalid, "only insofar as the outcome of the procedure would have been different if the right was respected".[91] Domestic courts in Belgium,[92] Greece,[93] Lithuania[94] and the Netherlands[95] have subsequently used the French-originating preliminary rulings to require, as a rule, an administrative hearing in relation to each of the return-related decisions the administration adopts, with significant effects on administrative practice in this regard. For instance, in Belgium, the Aliens Office started sending formal letters, inviting foreign nationals to express their views before withdrawing their right to stay.[96]

A comparable dynamic took place with regard to the ambiguously formulated remedy prescribed by art. 13 of the Directive. Judicial interactions between Belgian labour courts and the CJEU over more than six years have clarified the nature of the appeal that should be available against return related measures, and the suspensive effect thereof, thereby carving out a space between asylum law and irregular migration. In *Abdida*, the CJEU first ruled that the remedy provided must be determined in a manner that is consistent with art. 47 of the Charter, which recognises a right to an effective judicial remedy.[97] Secondly, referring to case law of the ECtHR and art. 47 of the Charter, the CJEU

[90] *Mukarubega* cit. para. 44; *Boudjlida* cit. para. 32-33.

[91] *G&R* cit.; the CJEU thus affords returnees a lower level of protection of the right to be heard compared to other fields, see case C-517/17 *Addis* ECLI:EU:C:2020:579 and case C-417/11 P *Council v Bamba* ECLI:EU:C:2012:718 para. 51. M Moraru and M Clement, 'Judicial Interactions Upholding the Right to be Heard of Asylum Seekers, Returnees and Immigrants: The Symbiotic Protection of the EU Charter and General Principles of EU law' in F Casarosa and M Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights - The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022) 264.

[92] Belgian Council of Alien Law Litigation (CALL) judgment of 25 June 2014 n. 126.219 and later judgment of 24 February 2015 n. 230.293; CALL judgment of 24 February 2015 n. 230.293; judgment of 15 December 2015 n. 233.257. These cases are summarised in M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' cit.

[93] See, for instance, Thessaloniki Administrative Court judgment of 27 April 2015 n. 717/2015.

[94] Supreme Administrative Court of Lithuania of 7 July 2015 n. eA-2266-858/2015 *SAA v Migration Department under the Ministry of the Interior*. See I Jarukaitis and A Kalinauskaitė, 'The Administrative Judge as a Detention Judge: The Case of Lithuania' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 237-257.

[95] See M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' cit. 11-13.

[96] *Ibid*.

[97] See case C-562/13 *Abdida* ECLI:EU:C:2014:2453 para. 45. In later cases the CJEU further clarified that a domestic court must recognise the suspensive effect of an appeal against a return decision, even if it does not fall within its power according to the domestic procedural law, if the enforcement of that decision may expose that national to a real risk of being subjected to treatment contrary to art. 19(2) of the Charter.

held that the remedy must have automatic suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a risk of refoulement. However, the CJEU went much further than the ECtHR in clarifying the relationship between non-refoulement and "removing a migrant suffering from a serious illness to a country in which appropriate treatment is not available".[98] Indeed, the case law of the ECtHR regarding so-called medical cases had been criticised for protecting against removal only those who are (almost) dying.[99] Relying on the Charter, the CJEU ruled that such removal would violate the principle of *non-refoulement* where there is a serious risk of grave and irreversible deterioration in the state of health of the third-country national concerned.[100] This has resulted in the ECtHR adapting its case law accordingly in the *Paposhvili* case, aligning its approach with that of the CJEU.[101]

These judicial interactions have resonated in the administrative and legislative practices of the Member States. Thus, in reaction to the Belgian preliminary rulings, the Belgian Constitutional Court explicitly requested the legislator to codify the suspensive effect of remedies in legislative provisions. Interestingly, some domestic courts went further than the minimum requirements established by the CJEU. For instance, the Supreme Court of Estonia held that the right to respect for family life could also suspend the return procedure, if removal would entail a disproportionate restriction amounting to an almost absolute denial of the right to family life protected by the ECHR.[102] Another example is provided by the Austrian High Administrative Court, which ruled that art. 47 of the Charter requires legal aid to be provided in the return procedure even if it is not foreseen by secondary European legislation.[103]

The way in which judicial interactions have filled legislative gaps in the Return Directive and therewith turned returnees' interests into justiciable rights, is most conspicuous with regard to the rights of (unaccompanied) children in return procedures. In art. 10 of the Return Directive, the interests of unaccompanied children are acknowledged, albeit somewhat differently depending on whether it concerns the taking of a return decision or their

See case C-402/19 *LM v CPAS de Seraig* ECLI:EU:C:2020:759; *B v CPAS de Liège* cit. See also the ruling in case C-924/20 *FMS and Others* ECLI:EU:C:2020:367.

[98] *Abdida* cit. paras 33 and 48.

[99] JB Farcy, 'Unremovability under the Return Directive: An Empty Protection?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.; and MB Dembour, *When Humans Become Migrants* (Oxford University Press 2015).

[100] See *Abdida* cit. 437. The CJEU also ruled that Member States are obliged to make provision, in so far as possible, for the basic needs of a third-country national suffering from a serious illness where such a person lacks the means to make such provision for himself. Due to reasons of scope we do not address this aspect of "differential inclusion" in the case law of the CJEU.

[101] ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016].

[102] M Moraru, G Renaudiere and P de Bruycker, 'Electronic Journal on Judicial Interaction and the EU Return Policy, Second Edition: Articles 12 to 14 of the Return Directive 2008/115' (Working Paper REDIAL Research Report 04/2016) 15.

[103] Austrian Administrative High Court (VWGH) judgment of 3 September 2015 n. 2015/21/0032.

actual removal. Thus, before Member States decide to issue a *return decision*, assistance by appropriate bodies other than the authorities enforcing return shall be granted, with due consideration being given to the best interests of the child.[104] As for *removal*, Member States need to be satisfied that the minor will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.[105]

This legislative set-up however, causes an obvious protection gap between the taking of a return decision and actual removal. The consequences of such a gap were clearly visible in the Netherlands, where unaccompanied children over the age of fifteen would be issued with return decisions without a prior assessment of whether there was adequate reception in the country of return. As such, their stay was considered unlawful and they were under a legal obligation to return. In many cases, however, these children would not return, and their stay would merely be "tolerated" until they reached eighteen years of age. In *TQ*, a Dutch court asked the CJEU to clarify whether an administrative practice which only investigates the availability of adequate reception *after* a return decision has been taken is in accordance with the Return Directive and with the rights of the child as protected in art. 24 of the Charter.[106]

In *TQ*, the CJEU considered that a Member State must assess the best interests of the child at all stages of the return procedure of an unaccompanied minor. In order to determine what is in the best interests of the child, a "general and thorough assessment" of the situation of the unaccompanied minor must take place, including "the age, gender, special vulnerability, physical and mental health, stay with a foster family, level of education and social environment". It ruled that *before* issuing a return decision in respect of an unaccompanied minor, a Member State must verify that adequate reception facilities are available for the minor in the State of return. If that is not the case, the child cannot be the subject of a return decision. Moreover, if adequate reception facilities are no longer guaranteed at the time of removal, the Member State will not be able to enforce the return decision. According to the Court, the age of the child may play a role, but it is not the only factor in the investigation of whether adequate care is available after return; this should be based on a case-by-case assessment of the situation rather than an automatic assessment based on the sole criterion of age, which it considered national "administrative practice [that] seems arbitrary".[107] Underlining the principle of effectiveness, the Court also held that Member States cannot refrain from enforcing a return decision which has been taken after it has been established that adequate reception is available. It therewith essentially precluded the grey status of "tolerated stay" of unaccompanied minors.

Interestingly, *TQ* brought about changes in Dutch administrative practice, although initially superficial. Explicitly referring to the judgment of the CJEU, the administration

[104] Art. 10(1) of the Directive 2008/115/EC cit.
[105] *Ibid*. art. 10(2).
[106] Case C-441/19 *TQ Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2021:9.
[107] *Ibid*. para. 67.

abstained from taking return decisions in cases where they previously would have done so. Nonetheless, even if return decisions were no longer taken in instances where adequate reception was not available, this did not mean that the status of the unaccompanied minor, for example after the rejection of an asylum claim, became lawful. This policy led to fierce litigation in the Netherlands, culminating in a recent judgment by a lower court declaring this practice in obvious violation of EU law. In the eyes of the court, precluding the grey status of tolerated stay as the CJEU had done meant that these children should be accorded lawful stay.[108]

In a later case, the CJEU explicitly engaged with the Convention on the Rights of the Child and the UN Committee on the Rights of the Child.[109] This case had been referred by a Belgian court, which doubted the conformity with EU law of the view by the *Conseil du Contentieux des Étrangers*, that the best interests of the child must be taken into account only if return related decisions expressly refer to that child. According to the CJEU, Member States are "required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father".[110] In this way, the CJEU used both the Charter and international human rights law to acknowledge the social realities of return, thereby deconstructing the legal borders that all too often fail to acknowledge the continuum between those that it includes (in this case the child) and excludes (the father).

VI. Conclusion: future challenges to judicial interactions

Immigration enforcement *vis-à-vis* irregular immigrants has traditionally been considered an exceptional branch of law under the purview of executive control with limited possibilities for judicial review, a constellation which was legitimised by the State's sovereign power over its territorial borders. Irregular immigrants are perceived to have trespassed these borders without authorisation and as such, they have been largely excluded from the legal and political processes that characterise modern constitutionalism. We have shown in this *Article* how the Return Directive has provided opportunities for the development of an unprecedented degree of judicial control over immigration enforcement. This has converted the interests of persons who have traditionally been excluded from justice in the territorial state paradigm, into rights that can be litigated and enforced. Not unexpectedly, the paradigm shift that the Return Directive brought about was met with resistance by Member

[108] District Court of The Hague judgment of 15 February 2021 n. NL20.19498 ECLI:NL:RBDHA:2021:1103.

[109] Case C-112/20 *M.A. v État belge* ECLI:EU:C:2021:197. The CJEU referred to General Comment n. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration art. 3(1) CRC/C/GC/14 para. 19.

[110] *M.A.* cit.

States' executives, who subsequently developed ingenious strategies – exploiting the Directive's regulatory vagueness[111] – in order to preserve the *status quo* of immigration enforcement based on crimmigration policies and plenipotentiary powers of the executive.

They have done so in ways that are indicative of shifting borders, namely through using criminal law for immigration enforcement and shifting the substantive border between the Return Directive and criminal law, by pushing the external border inwards, by reconfiguring and relocating borders through the use of detention, and by establishing social borders by excluding irregular migrants from legal and social rights. In due time, however, vertical, horizontal, and transnational judicial interactions between domestic courts, CJEU and at times the ECtHR has forced adaptation of domestic laws to the Directive's underlying principles of primacy of voluntary departure, pre-removal detention as a measure of last resort, individual assessment, and respect of the principle of non-refoulement, the best interests of the child and family life. In this way, courts have clarified the legal vagueness and gaps in the Directive by formulating directly enforceable human rights' obligations and by reforming the executive model of irregular migration governance according to the tripartite state powers model, limiting the space for unchecked exercise of administrative powers. Regardless of the immense procedural diversity existent in return adjudication in the Member States, judicial interactions have thus served to create a common language and legal principles on returnees' rights throughout Europe, placing clear and transparent limits to the way in which states attempt to shift their borders for the purposes of exclusion. At this point it is important to emphasise that some jurisdictions have been conspicuously absent from the judicial interactions which we described in this article, in spite of a protracted compliance deficit. Research shows that institutional and informal practices at the domestic level, in addition to judicial management reasons, influence the occurrence or absence of vertical judicial interactions and ultimately the effective application of the Return Directive in a Member State.[112]

In any case, after a long-fought role of courts in ensuring checks and balances to the executive driven model of irregular migration governance in the Member States, the newly acquired forms of judicial review that we described in this article are under threat by the sense of crisis that pervades policy-making in this area. Thus, both the 2015 refugee crisis and the Covid-19 crisis have thrown back irregular migration management into a state of executive aggrandizement, where courts and judicial review are seen as endangering policy effectiveness.[113] In a reactionary game of mirrors, the Commission, in the

[111] See M Moraru, 'Judicial Dialogue in Action: Making Sense of the Risk of Absconding in the Return Proceedings' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 125-149.

[112] M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

[113] J Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) The Theory and Practice of Legislation 71-92.

2020 Pact on Asylum and Migration and its proposal for the recast of the Return Directive, proposes limitations to the scope of judicial review powers by introducing a new border management procedure.[114] The proposed return border procedure will limit not only the substantive, but also the temporal and territorial scope of judicial review. Thus, only courts close to the border centres will be competent to adjudicate in the border procedure; there is limited time to bring and adjudicate appeals and a smaller number of appeals is allowed. The return border procedure, which is linked to the other pre-entry procedures that occupy a central place in the Pact, provides yet another instance of the shifting border, in that an increased number of immigrants present on European soil will be seen as never having crossed the external borders of the EU.[115] Yet another illustration of shifting borders is the Pact's introduction of border checks deep *within* the Member States' territory by obliging Member States to screen "third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner."[116] It is worth highlighting that this provision would essentially bring under the scope of EU law powers of enforcement that were previously purely national.[117] Also here then, it remains to be seen whether the Europeanisation of instruments that are proposed in order to reinvigorate the borders of exclusion could eventually open up space for addressing – before and by courts and by means of judicial interactions – the fundamental rights concerns raised by Member States attempts to draw lines around the mutable and constantly changing geometry of the community.

[114] See in particular art. 40 of the Proposal for a Regulation of the European Parliament and the Council on establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final; and art. 22 of the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018/0329(COD). For a detailed analysis of the border management procedure, see M Moraru, 'The Future Architecture of the EU's Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 187-208 and G Cornelisse, 'Border Control and the Right to Liberty in the Pact: A False Promise of "Certainty, Clarity and Decent Conditions"?' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* cit. 61-81.

[115] G Cornelisse and M Reneman, 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?' (2021) ELJ 181.

[116] Art. 5 of the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final.

[117] In *Achughbabian*, the CJEU established that that the conditions for the *initial* arrest of irregular migrants "remain governed by national law". See *Achughbabian* cit. para. 30.