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The Spheres of EU Migration Management: A Challenge to the Rule of Law?

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1. Introduction

How the EU and the Member States have managed migration flows since 2015/2016 has given rise not only to violations of fundamental rights, as discussed in other contributions to this symposium, but also to concerns over European integration as such. The reason is the perceived dominance of Member States over EU institutions or, in technical terms, of intergovernmental politics over the EU legal order. To illustrate, since Italy closed its ports for ships carrying migrants, Member States have negotiated about disembarkation and relocation on an ad hoc basis, contrary to the rules of the Common European Asylum System (CEAS). At the same time, the Member States (qua Council) are unable to reach agreement on a comprehensive reform of the CEAS, while advancing cooperation with third countries. From a normative perspective, these shifting patterns of migration management have triggered a sense of disunity or even disintegration.

Political calls for European unity have a legal dimension as well. The rule of law has, apart from the requirement to comply with fundamental rights, a structural function. It is a systemic principle serving the functioning of the EU legal order ("EU rule of law"). In this respect, two aspects stand out: first, the principle of legality because it constrains the exercise of public authority (a Union governed by law); second, the principle of coherence because it structures the relations between the EU and the Member States according to law as opposed to power politics (a Union of law). The EU rule of law is considered a cornerstone of an inherently fragile political construction. Since the migration crisis, it has therefore often been invoked, explicitly or implicitly, to criticise Member States for acting unilaterally or among themselves. In this way, the political desirability of European unity turns into a legal imperative to act within the EU legal order.

This contribution challenges the inside/outside divide by approaching the EU legal order from the perspective of legal pluralism. On this view, the relationship between the EU and the Member States is, in principle, non-hierarchical and open to extra-legal considerations. Depending on the case, the EU may be superior to the Member States, while in other respects it must give way to the authority of the Member States. This is a sensible approach in migration management given the balance that need to be struck between collective action on the one hand, and sovereignty concerns on the other. Since the EU legal order is not a rigid system of rules, its organising principles are more flexible as well. One of them is the dynamic rule of law, rooted in Article 2 of the Treaty on European Union (TEU). Whereas the EU rule of law has a centralising tendency, the dynamic variant governs the exercise of public authority in various legal and political contexts, in and outside the EU legal order. Normatively, it requires Member States to cooperate and to subject their cooperation to common objectives and rules, for European unity does not necessarily amount to joint action within the EU legal order.

Based on theoretical insights from EU legal pluralism and governance, the next section will outline four functions of the dynamic rule of law, exemplified by occasional references to the (infamous) EU-Turkey Statement. The latter is used as an example because the Member States adopted it informally outside the EU legal order. It will be remembered that the Statement aims at reducing the number of arrivals in Europe, including through accelerated returns from the Greek islands and financial assistance to Turkey. To clarify, this contribution will neither present a fully developed theory of the dynamic rule of law, nor will it engage into a detailed legal analysis of the EU-Turkey Statement. What it does offer is an alternative approach to think about the future of migration management in a heterogeneous Union.

The four functions of the dynamic rule of law in a plural EU legal order

In the first place, the dynamic rule of law protects healthy democracies at national level. Views from other Member States cannot be taken into account if they have not been formulated in a democratic process. Similarly, a more flexible EU legal order implies greater reliance on mutual trust, which is dependent on national institutions conforming to standards of the rule of law. The concept of the dynamic rule of law, as defended here, is

rooted in the EU legal order but at the same time, it goes beyond it. Indeed, the scope of Article 2 TEU extends to national competences as well, as demonstrated by the rule of law dialogues under Article 7 TEU and the judgment in Associação Sindical dos Juízes Portugueses. In respect of the latter, Advocate General Tanchev recently argued that the Court was right to interfere with national justice systems to ensure the functioning of the EU legal order (Commission v Poland, para. 59). By contrast, this contribution submits that EU control over national institutions serves the realisation of common objectives.

Putting greater emphasis on common objectives than on the functional necessities of European integration is the second function of the dynamic rule of law. The functional imperatives of internal free movement (the Schengen regime) have determined the evolution of EU asylum and migration policies from the outset. In other words, policy-making focussed on measures necessary to contain the effects of open borders rather than on political debates about the meaning and direction of "migration management". From a pluralist perspective, it is worth drawing an analogy with the pillar structure under the Maastricht Treaty. Considering asylum and migration policies as matters of "common interest" (Article K.1 of the Maastricht Treaty), Member States coordinated their policies across the former First and Third Pillar, facilitated by the single institutional framework. This analogy is not to suggest a return to the pillar structure. But it does indicate the potential for EU migration management in a more flexible legal order.

The dynamic rule of law prohibits Member States from abusing their political leeway. According to its third function, it requires Member States to cooperate in- or outside the EU legal order. More precisely, "outside" refers to the fringes of the EU legal order rather than to the realm of international law. Although the distinction may be hard to make in practice, one can think of institutional and normative links to the EU legal order. Examples are the use of EU institutions outside the Treaty framework and soft law that is integrated into legally binding instruments. The purpose is to make sure that the rule of law does not fall prey to political opportunism; at the same time, this "in-between" is a way to reinvigorate the fact of voluntary membership in the Union. Under a common framework, Member States should thus have the chance to act on behalf of Europe.

The EU-Turkey Statement helps to illustrate this point. Not a single instrument, it is rather a cooperative governance framework bringing together EU legal authority and the political authority of the Member States. On the one hand, returns from Greece to Turkey are subject to compliance with the EU asylum acquis and monitoring by the Commission. On the other hand, certain Member States have voluntarily resettled Syrian refugees from Turkey. A voluntary approach directly benefits from the political authority of the Member States. This is pertinent in view of the lack of EU legislation, and the fact that resettled refugees are likely to stay in the destination country on a long-term basis. Finally, it is worth noting that the said measures are inextricably linked (1:1-mechanism). They are, just as the EU-Turkey Statement as a whole, a package deal. Hence, one would not be feasible without the other, both politically and practically. In general, a deal is not necessarily "dirty" but an opportunity to combine legal and political authority, thereby contributing to the effectiveness of the commitments.

Finally, the dynamic rule of law provides a safety net. Apart from the said duty of cooperation, which excludes unilateral action for purely national interests, Member States may stretch the common rules without violating them. This calls for a less formalistic interpretation of the rules, certainly in the area of EU asylum law where many draw a particularly sharp distinction between legal/illegal. Moreover, when acting outside the EU legal order, Member States should have a duty to justify how their acting together contributes to the common objectives while not infringing the acquis.

Again, the EU-Turkey Statement serves to illustrate this fourth and final element of the dynamic rule of law. The said returns from Greece are premised on the assumption that Turkey is a safe third country within the meaning of the Asylum Procedures Directive. It requires, amongst others, protection "in accordance with the Geneva Convention" (Article 38(1)(e)). Critics doubt whether this requirement is fulfilled because Turkey maintains a geographical restriction, limiting the scope of the Geneva Convention to Europeans. Following the dynamic rule of law, however, it could be argued that Turkey must offer, in law and practice, equivalent protection to the Geneva Convention (to non-Europeans). Regarding the duty of justification, the EU and the Member States emphasised the problem-solving capacity of the EU-Turkey Statement, without feeling the need to justify the institutional form. This makes it difficult to hold the actors to account, and – on a positive note – to praise them for acting on behalf of Europe.

Conclusion

This contribution made a distinction between the EU rule of law and a dynamic rule of law, each being connected to a particular understanding of the EU legal order. The former governs a unitary system of rules, hierarchically organised and driven by the process of creating an ever-closer union. It was, for a long time, instrumental to the goal of internal free movement, which in turn stimulated the development of EU asylum and migration policies.

The dynamic rule of law, by contrast, governs a plural legal order where political disagreement plays a greater role than functional necessities. It is dynamic in the sense of governing cooperation across legal and political orders, not within a unitary system. This implies that Member States may act among themselves, outside the formal legal framework, on behalf of the Union. The dynamic rule of law, as advocated here, is meant to provide normative order, albeit in a "thin" sense because it demands interactive, cooperative relationships, while leaving substantive policy choices to the Member States individually and collectively.

However, this contribution did not advocate re-establishing the rule of law at the international level; on the contrary, it favours a pluralist interpretation of the EU legal order itself. By outlining four functions of the dynamic rule of law, this contribution demonstrated that such a re-interpretation is possible in the specific context of migration management. This is not only of theoretical relevance. Migration governance requires the authority of EU law because it can mitigate the adverse effects of unilateral behaviour in a closely integrated order. At the same time, relocation, resettlement and relations with third countries are political issues that cannot be governed by legal authority alone. Therefore, this contribution

suggests finding ways to combine EU legal authority with the political authority of the Member States. This hints at a future flexible division of tasks between the EU and the Member States, governed by the dynamic rule of law. Navigating between those who want to hollow out the rule of law for political motives, and those who postulate excessive legalism, the dynamic rule of law may be a sensible common ground to overcome the current impasse.