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ANALISI & OPINIONI

The Respect of the Rule of Law in the EU Member States' Legislation on Asylum: Which Role for the EU?

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Introduction

This post aims to introduce a reflection on two different but strictly connected topics on asylum law and Rule of Law. Accordingly, the post is structured in two main parts. The first aims to show that a systemic violation of EU Asylum law by a Member State (MS, afterward) should be considered not "only" a mere violation of EU law but it should be treated as a violation of the core value of the EU legal order, namely, the Rule of law. Once established that a systemic violation of EU asylum law constitutes a breach of this value, the second part tries to identify workable instruments of reaction that could be developed and applied by the EU institutions against this kind of infringements able to affect the EU legal system of integration.

The Systemic Violation of the EU Law on Asylum as an Infringement of the Rule of Law

According with art. 2 Treaty EU, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Importantly, the second paragraph of this article underlines that these values are common to all Member States of the EU. Starting from the 2014 Commission Communication on "A new framework for the safeguard of the Rule of Law", the respect of this value gained a growing central relevance among the other values. The EU Commission, appropriately, describes it as the prerequisite for the protection of the other fundamental values, but also for upholding all rights and obligations coming from the Treaties and the EU Charter of Fundamental Rights as well. In particular, it results intrinsically linked to the respect for both democracy and fundamental rights. More precisely, there can be no respect for these last, without respect of the Rule of Law and *vice versa*.

The EU Treaties and the EU Charter, although recalling the concept of Rule of Law more than once, do not clarify its content. However, in the EU legal order, the Court of justice shed some lights on its fundamental elements through a well-established case law. According with it, the Rule of Law contains both substantial and procedural elements (Case 294/83; Case C-50/00 P; Cases C-402/05 P and C-415/05 P). It includes legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for human rights and equality before the law.

Having said that, the question is, what is the connection between the Rule of Law and the asylum law in the EU legal order? The right to asylum is guaranteed by art. 18 of the EU Charter. Based on the EU Treaties, the EU develops a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. For these purposes, the EU institutions adopted a set of legislative acts to create a common European asylum system (CEAS, afterword). Looking at the content of these acts, all the recalled elements composing the concept of Rule of Law are relevant in order to secure the effectiveness of the right to asylum. Essentially, it can be affirmed that the Rule of Law has two different but connected roles in the framework of the CEAS. First, its respect by all the MSs is a pre-condition to ensure the effectiveness of the right to asylum; second, it works as a kind of *operational tool* to guarantee the functioning of the cooperation between the MSs in the field of the CEAS.

If this assumption is correct, a systemic violation of the EU law on asylum by a Member State should be considered also a serious violation of the Rule of Law or, at least, a concrete risk of violation of this last, able to constitute a threat to the functioning of the CEAS and, more generally, of the EU system of integration as well.

Certainly, not any occasional breach of a single norm on asylum law could be taken as a serious violation of the Rule of Law, neither as a risk of its violation. In order to integrate one of these situations the conduct of a MS should reach a certain gravity threshold. Therefore, a kind of test to understand the seriousness of the violation committed by a MS in the field of

asylum would be necessary. The already recalled 2014 EU Commission Communication states that "where the mechanism established at national level to secure the Rule of Law cease to operate effectively, there is a systemic threat to the Rule of Law and, hence, to the functioning of the EU as an area of Freedom, Security and Justice without internal frontiers". The 2018 proposal for a Regulation on the protection of the EU's budget in case of generalised deficiencies as regards the Rule of Law in the MSs clarifies in its art. 2(b) that a "widespread or recurrent practice or omission, or measure by public authorities which affects the Rule of Law" constitutes a "generalised deficiency" as regards the Rule of Law.

In the light of these assumptions, without doubts, the adoption of legislations or measures in contrast with the provisions contained in one or more of CEAS' acts, followed by their systemic application, likewise a recurrent practice in contrast with the EU law, constitute a deliberate unwillingness to comply with the EU law that may determine a violation of the Rule of Law.

A concrete example could be helpful. The new adopted Hungarian legislation on asylum admits that the asylum seekers may be subject to arbitrary deprivation of liberty, inhuman and degrading treatments, intentionally deny of meals and lack of effective jurisdictional remedies. All these conducts prescribed by law and regularly perpetrated by the Hungarian national bodies constitute at least a risk of violation of Rule of Law, of which at art. 2 EU Treaty. Not only the Hungarian law, which criminalizes lawyers and activists who help asylum seekers, confirms the crisis of the Rule of Law in the Hungarian State and, specifically, the impossibility of fulfilling the role of pre-requisite to ensure the respect of the EU law on asylum.

As a consequence, the asylum procedure and reception conditions for asylum applicants in that MS will go through a systemic flaw, likely resulting in inhuman or degrading treatment of asylum seekers. In this situation, the Rule of Law will cease to work as an operational tool to secure the cooperation between the MSs in the Area of Freedom, Security and Justice. Acting in this way, the MS in question would violate also the principle of sincere cooperation towards the EU and the other MSs, as well as the principles of mutual trust and recognition, that links it with the other MSs, potentially damaging even the process of integration itself.

The Instruments of the EU to face situations of persistent and systemic violation of EU Law on Asylum which constitute (a threat of, or) a violation of the Rule of Law

Accepting that a systemic violation of the EU asylum law by a MS constitutes a serious risk of violation or a violation of the value of the Rule of Law, *ex* art. 2 EU Treaty, the means of reaction actionable in the EU legal order would be both political and legal. First, the political instruments of which at art. 7 EU Treaty, likewise the procedure "pre-article 7" introduced by the EU Commission in 2014, would be all activate since the systemic violation of the EU asylum law may integrate a risk of violation or a violation of the Rule of Law as such. Alternatively, or simultaneously the more "traditional" instrument of EU control on the MS, namely, the infringement procedure, could be also activated. This last, of course, has been more effective of the political procedures and it could be even more effective developing its "un-expressed" potential.

As known, according with art. 258 FEU Treaty, an infringement procedure may be activated by the EU Commission when a MS failed to fulfil an obligation under the EU law. The ECJ (GC), in its decision on *Irish Waste* (case C-494/01), followed the legal reasoning proposed by the EU Commission, that requested the ECJ to find that a deficiency in the application of the Directive in question by the MS involved were of "general and persistent nature". In the same vein, the ECJ, in *Commission* v. *Germany* (Case C-387/99), confirmed that an administrative practice can be the subject-matter of an infringement procedure when it is, to some degree, of a consistent and general nature. According with this case-law, a systemic and persistent violation of the EU asylum law may be an admissible object of an infringement procedure.

The extension of what that can be named a "systemic infringement procedure" (SIP, below) in cases of systemic violation of the EU asylum law would bring several advantages compared with the "normal" infringement procedure.

As the ECJ established in the *Irish Waste* decision, during a SIP, the EU Commission could produce additional evidences to support its initial grounds of complaint without alter the subject-matter of the dispute. The EU Commission, therefore, would bring further elements that show the voluntary failure to comply with the EU asylum law by a MS of general and systemic nature. A second important advantage regards the inversion of the burden of proof. During a SIP, indeed, it is incumbent on the MS to contest specifically the facts alleged in the complaints. Moreover, the ECJ may adopt interim measures during the SIP, based on art. 279 FEU Treaty. Although their activation has been rare until now, in case of persistent violation of EU asylum law, their use could be necessary in order to guarantee the effective application of the EU law. Not only, as the ECJ (GC) prescribes in the decision *Białowieża Forest* (Case C-441/17 R), the failure to comply with provisional interim measures may justify the imposition of a periodic penalty payment with the necessity to protect the Rule of Law. Finally, according with art. 133 to 136 of Rules of Procedures of the ECJ, a situation of systemic violation of EU law may be threated through an accelerated procedure before the ECJ. In case of systemic violation of EU asylum law, the adoption of *interim* measures and the activation of accelerated procedure would be particularly helpful in order to safeguard the weak position of the asylum seekers. Eventually, based on art. 260 FUE Treaty, if the EU Commission would find that the MS has failed to fulfil its obligation under the EU Treaties - namely, to execute the ECJ decision at the end of a SIP - the ECJ would impose severe financial sanctions to the MS in question.

All considered, the activation of a SIP against a MS which voluntary creates a legal and practical situation of systemic violation of the asylum procedure and reception conditions for asylum applicants in its territory could be a more effective tool to face this kind of situation which also entail a violation of the Rule of Law, undermining the pursuing of the EU law goals.

Conclusion

In this brief post, I tried to show that the SIP could be an effective tool to face a situation of systemic violation of the EU asylum law. Moreover, it could be also a forceful instrument to contrast the infringement of the Rule of Law and human rights by the MS involved.

Currently, the EU is facing serious situation of Rule of Law violations committed by some of its MSs. This unpredictable situation has demonstrated all the limits of the EU instruments to contrast the violations of its common values, showing a real risk for the development of the Area of Freedom, Security and Justice based on mutual trust and recognition between the MSs. As seen, the systemic violation of the asylum law may constitute itself a violation (or a risk of violation) of the Rule of Law.

Assuming the direct applicability of art. 2 EU Treaty, the SIP could be used even in other cases of threat of systemic breach or breach of the common values of which at art. 2 EU Treaty where there is no other direct connection with the EU law. The ECJ, in its recent decision on *ASJP* and *LM*, seems going to admit an autonomous "*jurisdictionalisation*" of art. 2 EU Treaty, the SIP could be a proper judicial mean in order to do so.