

Strategies of Divergence: Local Authorities, Law, and Discretionary Spaces in Migration Governance

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This article classifies and theorizes the strategies of divergence that local authorities employ when confronting the discretionary spaces offered by domestic migration law. We propose a distinction between strategies that are either within or outside the perceived boundaries of the law and those that adopt an explicit or an implicit approach to positioning, thus harnessing or downplaying the communicative potential of the law. Based thereon, we introduce a fourfold typology of strategies of divergences that include defiance, dodging, deviation, and dilution. This typology was developed and refined based on field research in local authorities in Greece, Turkey, Italy, and The Netherlands. The case material also leads us into a preliminary exploration of which types of cities and conditions may lead to the adoption of one strategy over another. As such, this article draws attention to the relevance of law within multi-level migration governance and to the meaning of legal ambiguity and discretion as shaped by law and legal interpretation. The strategies of divergence that mould discretionary spaces, in turn, either mitigate or exacerbate legal uncertainty and should be considered a significant factor to account for change in migration governance.

Keywords: discretion, migration, local authorities, legal certainty, strategies of divergence

Introduction

As essentialist narratives of uncertainty are increasingly coming under theoretical scrutiny in migration studies (Schiltz *et al.* 2019), helpful insights may be gained from legal scholarship. Probably more than in any other discipline, lawyers have long been deliberating the value of certainty, and more specifically legal certainty, in shaping the relations between institutions, people, and other legal entities. Variably defined as predictability, consistency, accessibility, and intelligibility of law (or a complex combination thereof), most if not all accounts affirm the principle's status as a 'central rule of law value' that has 'structured normative debates in political and legal modernity' (Fenwick *et al.* 2017, p. 17). Moreover, when looking at the domain of migration, questions of legal certainty should be of interest not only for legal scholars and professionals. The less certain domestic laws and legislation are, the larger will be the room for manoeuvre for other actors such as local authorities (Motomura 2016). These 'discretionary spaces', as we will refer to them in this article, are created and inhabited in different ways, with often profound consequences for the situation on the ground. On the one hand, high degrees of discretion can reinforce legal uncertainty and confusion regarding responsibilities and 'divisions of labour' among policy actors, especially in perceived crisis situations such as the one in Europe in 2015 (Fontanari and Ambrosini 2018). On the other hand, discretionary spaces also create possibilities for local authorities including 'street-level bureaucrats' to influence reception and integration policies according to their preferences, particularly when they act in a strategic manner (Fassin 2013). Adding an extra dimension to this, local authorities may openly challenge domestic laws based most notably on international human rights norms (Baumgärtel and Oomen 2019), with judicial confrontations holding the potential to decrease legal uncertainty in the longer term.

This article aims to foreground and classify the strategies that local authorities adopt to make use of and enlarge the discretionary spaces that are offered (or indeed foreclosed) by domestic law. Given the seemingly contradictory effects of such strategies of divergence on legal certainty, it further proposes contextual explanations for their adoption based on illustrative examples. Contrary to conceptualizations of discretion that are limited to legally permissible conduct (Hawkins 1992), we consider it relevant for the migration domain specifically to distinguish between strategies that are either within or outside the perceived boundaries of domestic law. Furthermore, we take into account those that are taking an explicit or an implicit approach to positioning, thus harnessing or downplaying the communicative potential of the law. As a result, we define four 'Weberian' ideal types of divergence (see Table 1): *defiance* (explicit and extra-legal), *dodging* (implicit and extra-legal), *deviation* (explicit and within the law), as well as *dilution* (implicit and within the law).

The theorization of discretionary spaces and their strategic use by local authorities is important for several reasons. As already suggested, it ought to be an essential component of any theory that seeks to explain how instances of legal uncertainty (as a structural type of uncertainty) in the migration field comes to

Table 1.

Strategies of divergence		
	Extra-legal	Legal
Explicit	Defiance	Deviation
Implicit	Dodging	Dilution

differ in form and significance depending on the local context. Relatedly, it can account for some of the differences in the framing and the formulation of policy goals and choices, both of which have already been linked to forms of multi-level governance (Spencer 2018; Spencer and Delvino 2019). Better understanding may also draw our attention to the variable and movable legal scaffolding of multi-level governance, where the levels are all too often, and mistakenly, assumed to be relatively static. In short, we suggest that strategies of divergence mould discretionary spaces (and with them, degrees and expressions of legal uncertainty), which is in turn an important factor to account for change in multi-level migration governance.

Methodologically, the typology was developed in an iterative manner pursuing a grounded theory approach (Charmaz 2006). We started this research with a theorization of the possible role of the law in processes of ‘decoupling’ as set out most notably by Scholten (2015) and Filomeno (2016). This theorization forms part of a wider project on ‘Cities of Refuge’: (see www.citiesofrefuge.eu), which began in September 2017, investigating the relevance of international human rights, as law, praxis, and discourse, to how local governments in Europe welcome and integrate refugees. Subsequently, field research was conducted in local authorities in Turkey, Greece, Italy, and The Netherlands. These four countries were selected based on their divergence in constitutional systems and, in particular, the degree of decentralization. Whereas Turkey and Greece are strongly centralist, and Italy much more decentralized, the Netherlands can be positioned in between. In addition, highly relevant for the purpose of this article, the four countries display differing degrees of legal ambiguity in the field of migration and integration in general. For the purpose of the research, local authorities of different sizes within countries were selected that all diverged from national norms on the role of local authorities in the reception and integration of refugees. Fieldwork was conducted in the period between August 2018 and early March 2020 with a wide range of data gathered on the basis of interviews, participant observation, analysis of local government proceedings, regulations, and (social) media amongst others. For the purpose of this article, interviews with local government officials and representatives of civil society were particularly pertinent to obtain insights on local activities that are seemingly outside of the law as well as the motivations behind them. In addition, the focus on not only legal, but also

discursive strategies of divergence made it important to closely read texts produced and analyse them, making use of QSR NVivo. Throughout this process, we iteratively and reflexively engaged with the theoretical notions, in the ‘dialogue between data and theory mediated by the researcher’ that is common to abductive research (Blaikie 2010, p. 156). In addition, we conducted ‘theoretical sampling’ within our database of local authorities, which is understood as the method of sampling data and cases that further develop and saturate the theoretical categories that emerge from data (Charmaz 2006, p. 96). The main purpose of our theoretical sampling was the development, elaboration, and refining of the typology at hand.

Before we turn to the typology and the empirical findings that informed it, the following section discusses why divergence is a legal question that has become salient following widespread processes of devolution and decentralization (Lahav 1998; Provine and Varsanyi 2012). Particular attention will be paid to the relevance of law within multi-level migration governance as well as to the meaning of legal ambiguity and discretion as shaped by law and legal interpretation. We will then move on to explore the discursive dimension of the law and, relatedly, the framing and intended audience of strategies of legal divergence. The subsequent four sections are each dedicated to one such strategy—defiance, dodging, deviation, and dilution—as we encountered them during our research in the European context. Based on these observations, we will formulate several hypotheses regarding the types of cities and conditions that are likely to lead to the adoption of a specific strategy and the possible implications for legal uncertainty. The article will conclude with a reflection of the relevance of law and legal and discursive strategies within multi-level migration governance and offer suggestions of how future research can build on the typology provided here.

The Legal Dimension of Divergence

The possibility of divergence between local and national migration policies and the potential for the development of migration governance that this holds have by now been widely recognized. Writing on immigrant integration, Poppelaars and Scholten (2008) found such a discrepancy in the Netherlands already more than a decade ago and ascribed it to the ‘divergent institutional logic’ of the two government levels. Since then, theory has further developed to identify conditions of ‘multilevel governance’ where ‘large cities in particular, are becoming increasingly entrepreneurial in developing their own integration philosophies and policies’, leading to ‘markedly different approaches... even within the same countries’ (Scholten and Penninx 2016, p. 91). The same line of scholarship has even taken a declared ‘local turn’ that has encompassed a horizontal and a vertical dimension, the latter designating research on ‘the implications of local governance for the interactions with higher levels of government, such as the national and increasingly also European institutions’ (Zapata-Barrero *et al.* 2017, p. 243–244). Critics have not been far, arguing that a focus on the local level risks losing sight of ‘broader processes of regulation’ beyond the local context (Filomeno 2016, p. 8).

Situated in the political and related social sciences, this literature remains focused on explaining the political and historical factors underlying the rise of multi-level governance and on describing how these new contexts impact diversity in and beyond cities (see most recently [Caponio et al. 2019](#)). An important part of the puzzle that is in our view missing is an appreciation of the instrumental role of the law as the scaffolding of multi-level migration governance so defined. This oversight is curious given the inherently legal character of processes of devolution and decentralization, which can amount to tectonic constitutional shifts, and which have partially been the drivers of the turn to the local level. To be sure, lawyers have documented the rise of cities as legal transformations within the global order and their relation to principles such as subsidiarity or good governance ([Blank 2006](#); [Frug and Barron 2006](#)). Still, these analyses have mostly been focused on domains such as climate policy and international development and have not therefore found much consideration in migration literature. The disconnect is equally visible in scholarship dealing with border control and ‘crimmigration’, which has paid significant attention to legal processes (including discretion) but mostly with a view to specific jurisdiction such as the United States or the European Union (e.g. [Stumpf 2006](#); [Van der Woude and van der Leun 2017](#)).

So, what exactly is at stake when we talk about the legal dimensions of multi-level migration governance? To start with, the law can be considered as one of the factors that structure the field of governance by enabling or restricting divergence between the various levels involved. This exogenous character of the law becomes immediately clear when considering the vast differences that exist between the constitutional systems, legal cultures and traditions, as well as regulatory agencies and competency allocations in various countries. Within the countries discussed, for instance, municipalities in Turkey have generally fewer formal competencies (and hardly any related to migration specifically) whereas local authorities in the Netherlands are responsible for housing individuals with refugee status, for civic integration, and for access to work. To make things even more complicated, legal issues can play out very differently even within the same country depending on the domain of migration governance ranging from citizenship policies to housing, freedom of movement, education, work, health care, civic integration, and many more. Finally, local laws can be directed at widely diverging groups of individuals from irregular migrants to those seeking asylum and receiving refugee status or other forms of international protection to labour migrants and students. While all these aspects are obviously also shaped by political factors and policy choices, they remain situated in a legal context: if politics is the language of multi-level migration governance, then we can consider law to constitute its grammar.

One of the many legal elements shaping policy outcomes most visibly is discretion, which has long preoccupied both legal scholars and social scientists. Bringing both of the fields into conversation, [Hawkins \(1992\)](#) thus defines discretion ‘as the space... between legal rules in which legal actors may exercise choice’ and that ‘may be formally granted... or it may be assumed’ (11). Importantly, discretion is to be regarded as a relative concept that is created by and through legal rules, thus representing ‘an area left open by a surrounding belt of restriction’ (Dworkin in

Hawkins 1992, p. 14). The behaviour of actors is therefore in principle circumscribed by the discretionary space that the law offers. This holds true as much for migration policy as for any other instance of multi-level governance that, like any other structured system of governance, can be conceptualized as a hierarchy of legal norms (Kelsen 1945). In other words, following classical legal theory, we would assume that local authorities will look ‘up’ to the higher levels (or at the least look ‘around’, for guidance, to other governing entities at the same level) to gauge their discretionary space before deciding on a course of action. Where such discretion cannot be found, municipal action would then, according to theory, not be possible.

In reality, the story is of course a more complicated one. Not only are discretionary spaces also governed by organizational, social, and political rules (Hawkins 1992) but it would also be wrong to consider their boundaries fixed rather than dynamic, contested, and changing. Firstly, national legislatures and courts can extend or diminish the discretion available to actors (Resnik 2007). In the European context, migration governance has changed considerably in recent years through the introduction and subsequent revision of the Common European Asylum System, a complex field of EU law that harmonized some of the applicable rules on, amongst others, refugee qualification and asylum procedures (Chetail *et al.* 2016). This ‘Europeanization’ has reinforced the condition of multi-level governance described above (Scholten and Penninx 2016).

Even more crucially from the perspective of local authorities, legal provisions, including any norm regarding discretion, are very much subject to interpretation. Law, as is well-known, is a ‘double-edged sword’ that can empower actors as much as it can curtail their spaces for action (Abel 1995). Interpretive struggles over this space can be particularly fruitful where norms are ambiguous and, therefore, legal uncertainty reigns (Edelman 1992). Such legal ambiguity comes in many forms. For one, ‘open’ terms that leave room for interpretation are part and parcel of any legal system. The broadness of legal concepts like ‘equity’, ‘reasonableness’, or ‘public order’ thus serve to accommodate complexity and discretionary action (Von Benda Beckmann 2018, p. 86). Another factor that reinforces legal ambiguity, particularly so in migration governance, is the plurality of legal regimes. Local decisions regarding migration will not only be based upon national laws—themselves often ambiguous—but also on the abovementioned EU regulations and directives, international and European human rights law, and international treaties, such as the 1951 UN Refugee Convention. These legal instruments are the product of multilateral negotiations, where deliberately vague provisions open to multiple forms of interpretation are often used to ‘paper over unresolved disagreements or uncertainties’ (Franck 1990, p. 52). As a result, each of these legal frameworks comes with its own interpretations of the concepts at hand, which can be invoked or side-stepped.

Arguably a key feature of many fields of law, legal ambiguity is a hallmark of the deeply politicized and multi-level field of migration law that has also been described as ‘messy’ and ‘often unreadable’ by some (Eule *et al.* 2018), which in turn reinforces legal uncertainty. Nonetheless, as will become clear in the

following sections, since ambiguity creates more spaces for divergence, invoking and strengthening it is often a purposeful act geared towards expanding the space of discretion either through the amendment of national and regional legislation or through the acquiescence of ‘superordinate’ authorities.

All of this suggests, in our view, that it is critical to study the discretionary spaces that are being defined and contested through the law. This implies, next, that we must account for the strategic moves made by legal actors including local governments to understand how the dynamic multi-level system is evolving. It is for this reason that we bring in ‘extra-legal’ approaches as relevant to the production of discretionary spaces. As will become clear, our taxonomy (as described below) distinguishes between ‘legal’ and ‘extra-legal’ divergence strategies in full awareness that there is much in between these two poles that is up to legal interpretation. In fact, contesting legality is often at the core of strategies of divergence, which is why it is equally important to investigate their discursive dimension.

The Discursive Dimension of Divergence

Apart from being legal or extra-legal, local strategies of divergence can also differ in terms of their discursive character and intended audience. After all, law is not only a formal means of regulation that demands compliance, but it can also ‘send a message’ and represent an act of communication. This discursive aspect of divergence, as enacted in and through engagement with the law, informs the second axis of our typology.

The fact that law forms a means of communication that can convey meaning forms a staple insight in legal sociology. For instance, ‘negative’ symbolic legislation can serve to underline the norms held by a particular social group, display vigour on the part of the authorities or mediate conflicts between groups of unequal societal status (Van Klink 2014, p. 9; Van Klink 2016). As such, one can distinguish between status laws (that seek to give a certain group an elevated position), compromise laws (that seemingly resolve two fundamentally conflicting viewpoints) and illusionary laws (that serve to project control when, in fact, there is none) (Kindermann 1988; Van Klink 2014, p. 9). One prototype of an illusionary law was the criminalization of ‘illegality’ in the Netherlands: in advancing the legislation, the national government already knew that it was violating international human rights law (De Roos 2013 as cited in Van Klink 2014, p. 5). Discussing exclusionary local by-laws in Italy, Ambrosini (2013) distinguishes likewise between situational ordinances aimed at restoring safety, behavioural ordinances, and ordinances that reinforce existing legislation but target specific groups, like street vendors (142). Symbolic legislation can, however, also convey a ‘positive’ message where it seeks to persuade the norm addressee into compliance as opposed to enforcing it, a practice that has been referred to as ‘communicative legislation’ (Witteveen and Van Klink 1999). At ‘higher’ levels of legal orders, constitutional discourse as channelled through the text of the constitution has in various countries proven to be of significance for the construction of national identities (Rosenfeld 2009).

Whether local authorities pass an ordinance, set aside national policy, invoke international law, or start legal proceedings against the national government, all these acts can potentially be as much about discourse as they are about the law. They therefore also contain an element of ‘framing’ understood as a process in which grievances are constructed, disseminated, and contested in a certain manner (Snow *et al.* 2014, p. 30; Spencer and Delvino 2019). When local authorities require asylum seekers to perform community service whilst waiting for a status decision, it can be assumed that the frame is one of the ‘undeserving’ migrants. When another local authority adopts municipal IDs that give all urban residents including asylum seekers certain rights, it is not unlikely that the framing revolves around human rights (De Graauw 2014). When a mayor, in contrast, restricts the movement of asylum seekers, we may be confronted with a frame of securitization and ‘crimmigration’ (Van der Woude *et al.* 2014).

Legal aspects pertaining, for instance, to the interpretation of law or a positioning outside the legal framework by a local authority can therefore often be understood in line with the types of frames that are used in relation to migration including security, humanitarian, human rights, deservingness, socioeconomic and efficiency frames (e.g. Caponio 2014; Spencer and Delvino 2019). At the same time, there can be more at stake, for example, when a city such as Barcelona demarcates its autonomy vis-à-vis the nation state or when a locality seeks to underline and strengthen local identity. Acknowledging this discursive aspect of local legal action in Europe is overdue: looking beyond Europe to the United States, it is very much recognized that debates surrounding ‘sanctuary cities’ are imbued with legal rationales concerning, most notably, the autonomy of local and state vis-à-vis federal law (Lasch *et al.* 2018). It is therefore necessary to analyse the engagement of authorities with the law not only through doctrinal analysis but, just like with other frames, by looking at a wider array of sources including (social) media, policy documents, and artwork. Here, it is also important to understand how acts are ‘ideologically shaped by relations of power and struggles over power’, and thus whom they seek to address and why (Fairclough 1995, p. 132). If legal acts are understood to also represent discursive acts, the intended audience can vary from local voters to the national government and international stakeholders. At the same time, local authorities will sometimes and for different reasons opt to stay ‘under the radar’ by deliberately not communicating their acts of divergence. While seemingly simple, the latter choice is indeed an essential one in the highly politicized and volatile domain of migration policy but can, at times, also reinforce legal uncertainty. The interplay between legal and extra-legal acts and between using law to also discursively ‘decouple’ local from national policies, as well as the potential downplaying of this role of the law, will be illustrated in the following section by means of examples.

Strategies of Divergence: A Typology

In seeking to understand how local authorities engage with the law in strategies of divergence, our simple taxonomy distinguishes between four ‘Weberian’ ideal

types based on whether they are situated within or outside established frameworks of national law as well as their explicit or implicit quality, i.e. the degree to which discourse is a relevant factor in the strategies concerned. As ideal types, they inevitably gloss over a great deal of the complexities, such as the degree to which different actors within a local authority, both individual and institutional, can promote or hamper specific strategies (Oomen and Durmus 2019). We also will not discuss the domains in which divergence is most frequent, such as health care, housing, education, and transport (Oomen 2020). This section, instead, introduces each type in reference to selected examples from the Netherlands, Turkey, Greece and Italy. Moreover, it reflects on the possible reasons for certain cities to adopt one strategy as opposed to another, and to move between strategies and on potential consequences for legal certainty.

Divergence as ‘Defiance’

The first and most ‘spectacular’ strategy of divergence is defiance. Here, a local government decides to oppose national migration policies explicitly and, in many cases, vocally whilst also contesting its legal obligations under national law. Defiance is most likely to be expressed through public actions such as open and often mediated displays of disobedience including the introduction of local ordinances or the continuation of existing policy where national governments are seeking to assert their authority. Highly confrontational by intent and design, such defiance is at times a form of ‘lawfare’ and is likely to meet fierce opposition by the national authorities, which may worry that their policies have been rendered ineffective and that their legitimacy is under assault (Handmaker 2019). As such, it often is not only about migration but also about demarcating local autonomy, foregrounding a political ideology that opposes national government, as well as expressing and strengthening local identity.

In Italy, for instance, one can find a number of cities and their mayors taking a defiant stance against the restrictive policies instituted by Matteo Salvini, then Minister of the Interior. The cities of Palermo and Naples, with their widely known and popular mayors Leoluca Orlando and Luigi de Magistris, have been at the forefront of this movement. Responding to the Security Decree passed by Salvini and the new national government in 2018, both cities disobeyed a clause that prohibited asylum seekers to register locally and by extension access municipal services. Refusing to apply the new provision and symbolically pushing through four asylum seekers’ applications for local registration, Mayor Orlando expected ‘to invite a legal challenge by the government that he can take all the way to Italy’s highest court’ (Horowitz 2019). A law professor by profession, Orlando’s challenge was based on the conviction that the Security Decree was essentially unconstitutional as it violated the human rights of the migrants in question. In a similar vein, Mayor de Magistris signed a directive allowing asylum seekers to register locally as temporary residents, claiming that apart from violating the constitutional principle of equality, the Security Decree was also ‘in clear breach of the jurisprudence of the European Court of Justice’ (*Comune di Napoli*,

2019). A senior member of his administration that we interviewed described this decision of the Mayor as a ‘courageous act’. The standoff between the national authorities and defiant cities such as Palermo and Naples has also extended to other issues such as whether the cities are allowed to open their ports in contravention of national governmental policy. Here, however, human rights, EU, and international maritime law seem to provide less legal ammunition for localities opposing the national governments (Cusumano and Gombeer 2018), thus rendering defiance a somewhat less attractive option.

Another example of defiance that has been mediatized more locally concerns the municipality of Gazipaşa in the province of Antalya in Turkey. A popular holiday destination for tourists, the city council passed a motion that would ban Syrians in the municipality from entering the beaches “so that they would not disturb the people” (Bulut 2019). It is interesting to note that this instance of direct discrimination, a clear violation of both domestic and international law, was adopted by parties that constitute the opposition at the national level and that often invoke democracy, pluralism and rights-based discourses. Importantly, they are opposed to the policies of the national government led by the AKP and its President Recep Tayyip Erdoğan, which have adopted a more open attitude towards refugees from Syria (as also reflected in the 2016 EU-Turkey Agreement). The mayor abstained from the vote, stating later that he did not agree with the decision due to considerations of non-discrimination and human rights, which he claimed to be particularly important for the tourist destination. The unprecedented ban was later vetoed by the Mayor and pulled back by the municipal council, and as such never entered into force. An instance of extra-legal and regressive divergence that made national and even international news (*Al Bawaba* 2019), the ban in Gazipaşa was intended to resonate with a large part of the Turkish public, which has grown increasingly critical of the welcoming policies of the national government. It therefore serves as an illustration of the fact that acts of defiance (or, for that matter, divergence in general) do not always have to be favouring migrants.

Defiance, as the examples make clear, is a confrontational and thus controversial and rather risky strategy. While it is available also to smaller municipalities such as Gazipaşa, we expect it to be more attractive to larger and resourceful localities that are also able to point to the interests of their large constituencies. ‘Global cities’ with their high political and economic capital (Acuto 2013) are presumably particularly well-placed to take such an approach, also having much to gain in presenting themselves as cosmopolitan and welcoming. Furthermore, our examples seem to indicate that the political dimension of defiance is crucial. It is plausible, therefore, that a defiant approach will be taken by mayors and city councils that represent either independent local political formations or opposition parties at the national level. A charismatic mayor such as Palermo’s Leoluca Orlando, particularly when already in office for a longer period, will feel greater confidence to pursue this path as opposed to somebody politically fragile. It is also worth reiterating that defiance, whilst an apparent challenge to national law on the outset, can ultimately lead to a change in the law, which means that it is a

strategy that can produce large-scale results. In this process, reference to European or international law that support the local position can form part of the strategy of defiance. For instance, as we have argued elsewhere, it was the opposition of Utrecht and other Dutch cities to the conditional and insufficient emergency reception foreseen by the Dutch government for failed asylum seekers that put the item on the public agenda (Baumgärtel and Oomen 2019). Once the case had reached the European Committee of Social Rights, the national government felt a pressure to react and offer more meaningful reception conditions. Even if the issue remains problematic to date, this example from the Netherlands illustrates that the legal uncertainty created by strategies of defiance in the short term can initiate a dynamic that could eventually yield way to more legal certainty in the longer term.

Divergence as ‘Dodging’

The second category of strategies of divergence also concerns approaches and practices that constitute a challenge to national laws and norms pertaining to local migration governance in the country. However, in contrast to defiance, local authorities do not flag their opposition to national policies but rather ‘dodge’ attempts of the central government to assert their authority over local situations. Examples of such discreet initiatives include all kinds of informal practices, for instance as regards the implementation of national policies or the provision of services, that are difficult to trace but nonetheless significant in their local impact. As opposed to ‘dilution’ (described below), ‘dodging’ is characterized by a conscious choice on the part of the local government to over- or sidestep its legal mandate even if this is not openly flagged. As such, it can, once exposed, still, be controversial and a source of conflict between the different tiers of government, though arguably less so than the overt provocation that comes with defiance.

A number of municipalities in Greece that host asylum seekers and refugees provide a good example of ‘dodging’. After the administrative reform known as *Kallikratis* (Law No. 3852/2010), Greek local governments took advantage of their extended social welfare mandate to develop social kitchens, shops, medical centres, and pharmacies in an effort to support the local residents suffering from the consequences of the severe economic crisis that hit the country (Anagnostou *et al.* 2016). Access to these newly established and locally run facilities was based on a number of socio-economic criteria, which apparently the newly arrived asylum seekers and refugees could not cover, primarily because of the lack of documents demonstrating their financial situation (e.g. tax declarations). Despite these circumstances, some municipalities started using these facilities to complement the insufficient state-provided services that locally residing asylum seekers and refugees were benefiting from, though mainly on the basis of ‘off the record’ practice. For instance, social kitchens and shops shared food and clothing with beneficiaries without requesting any type of identification, well-aware that the new customers they had seen arriving at their doorsteps were often irregular migrants, especially in the country’s large urban centres (Delvino 2017). Our interviews revealed that local social workers involved in the reception of asylum seekers

and refugees also used informal arrangements to provide access to the newly arrived migrants to some primary healthcare services run by the municipalities. While such support can be viewed as limited to covering primary needs only, it should not be underestimated. For certain vulnerable migrants such as homeless and undocumented persons, including families, turning a blind eye in this way was the only safety net left. In yet other instances, this ‘dodging’ strategy allowed social workers to place migrant women who were victims of domestic violence into specially designed shelters. While arguably violating the national regulations of that time concerning access to these facilities, this decision was according to a local deputy mayor ‘a political choice’ based on the conviction that the social services offered by the municipality ‘are for everyone, regardless of where they come from’.

Another example of a dodging local strategy can be found in the Sultanbeyli Municipality, an area on the outskirts of Istanbul with overwhelmingly low-income families and high levels of informal housing and employment. Sultanbeyli has also enjoyed a high popularity among Syrian refugees coming to settle in the metropole due to the availability of cheap housing and employment with low bureaucratic thresholds. The municipality was among the first in Turkey to take proactive steps towards service provision for and integration of refugees in what can be regarded a textbook example of dodging. More specifically, Sultanbeyli established an NGO under the name ‘Association for Refugees’ (*Mülteciler Derneği*) to sidestep two specific complications (Coşkun and Uçar 2018). First, the national law on the temporary protection regime for Syrians (Law No. 6458) does not make any reference to local governments’ involvement. There has also been uncertainty concerning the question whether local governments are legally obliged or even permitted to provide services for non-nationals according to the Law on Municipalities (Law No. 5393). Second, municipalities in Turkey receive state funding based on the number of registered citizens in the city and no funding for refugees (Erdoğan 2017). According to interviews with local officials from Sultanbeyli, under the institutional guise of the Association for Refugees, the municipality could apply for funding from international organizations, such as the UNHCR, the IOM, and the EU as well as foreign NGOs and charities, which had previously hesitated to provide direct funding to a Turkish state organ. They also pointed out that the Association has received praise from both national and international actors and provides healthcare, education, vocational training, psychological support, legal aid and translation services in multiple large centres throughout the locality, thereby attracting refugees from all over Istanbul. Whilst not extra-legal strictly speaking, establishing a camouflage NGO to provide local services is neither a measure foreseen in Turkish domestic law nor common practice in the country. It clearly combines the intention to diverge from both to provide services with an aim to avoid conflicts of legal or political nature, bringing an aspect of implicitness to it that characterizes efforts in dodging.

Both examples show that dodging is an effective strategy of divergence where municipalities’ primary consideration is to improve the local conditions on the ground and to not politicize such actions. One consideration can be humanitarian,

with the local actors not wanting to draw national attention to their welcoming stance. More specifically, it provides a relatively easy and quick way of remedying the shortcomings of national policies, especially in the short term. This may be of particular interest for small towns and other localities not interested in directly confronting the national government, for example where these are a part of the same political or coalescing political parties. This type of low-key action, stripped of any kind of symbolic dimension, means that central governments will feel less challenged by dodging than by defiance. In fact, it seems plausible that even known dodging strategies may sometimes be tolerated, for instance where they moderate the negative effects of government policies that are being challenged at the national level or by international actors (Beckmann 2011). At the same time, it can also be complicated to garner sustained support among international partners and donors, which are likely to become increasingly worried about the extra-legal nature as time passes. Finally, dodging strategies can also be about not leaving paper trails to ensure that migrants cannot build up any legal claims, thereby maintaining discretion for instance over providing basic services. All these practices exacerbate conditions of legal uncertainty for the various actors that are involved as they covertly undermine established legal frameworks while simultaneously running the risk of being discovered and put to an abrupt end.

Divergence as 'Deviation'

Our third category—deviation—describes discretionary strategies that are legal as well as explicit. Whilst deviation is commonly understood as involving a departure from accepted standards or norms of behaviour, our conception of deviation is somewhat more specific and therefore in need of clarification. First, we consider it to be a type of divergence that does not, as such, challenge legal norms but rather pertains to instances where local authorities act intentionally within the perceived boundaries of their legally defined space of discretion. To be sure, there can be instances of serious legal uncertainty where due to different interpretations of the same law, the line between legality and extra-legality are exceedingly thin and contested. Our point, however, is that as opposed to defiance and dodging, deviation is less disruptive of established (legal) hierarchies: it accepts and engages with them. In fact, such divergence may have been foreseen by the legal system as a predefined exception to a general rule or, as one municipal official from Turkey observed, it may become the new norm if not challenged. At the same time, deviation is a deliberate course of actions that allows localities to pursue their own strategic goals, which are likely to be different from national policies even if they do not constitute legal challenges.

A second quality of deviating cities is that they are, by our definition, explicit (or at least not secretive) about their decision to diverge, which is therefore more likely to be met with a response by higher authorities than dilution (as discussed below). This, as we will see, is once again often intentional. Through playing on the communicative character of the legal actions, local authorities can present alternatives and seek to persuade others, including the national government, to adopt

certain interpretations of the law or even to change legislation and policies. Due to its combined legal and explicit character, deviation is thus the least controversial strategy of divergence.

The approaches developed by some local authorities in the Netherlands can be classified as a form of deviation. The municipality of Tilburg, for example, stresses that its local approach to integration has been developed against the backdrop of the discretionary space that is offered by various existing legal frameworks. As a senior policy advisor and municipal executive in Tilburg explained, the municipality struggled with the fact that the Integration Act did not provide a clear legal mandate for local authorities to be involved in (civic) integration policies. They therefore decided to use the discretionary space offered by their minor competency in this field flowing from the nationwide ‘participation declaration program’ (*participatieverklaringstraject*). In their view, whilst the Integration Act only requires a minimal effort from Dutch municipalities in the form of a one day workshop, the municipality of Tilburg strategically developed its own fully fledged integration program consisting of multiple courses spanning several weeks. The city presents this approach as divergent from these national guidelines but also as ‘exemplary’ in the sense of both being anticipative of, and stimulating amendments in national law, and therefore already in line with the future national policy framework for civic integration (*Gemeente Tilburg 2019*). In fact, it constitutes an effort to persuade the national government to enhance the role of municipalities in (civic) integration: as one senior policy advisor in Tilburg concluded, ‘we observe that the national government listens to us when it comes to the challenges we face regarding the legal framework and regulations, such as the Integration Act, and that they will now review this regulation.’ The deviation is justified as merely ‘anticipating’ legal amendments even if there is a clear intention to influence such amendments—an approach that illustrates the often conciliatory and even dialectic logic that undergirds this strategy.

In Greece, where a nationally designed plan for the reception and integration of refugees was still missing long after the increased migrant arrivals of 2015 (*Greek Ombudsman 2017*), some municipalities likewise followed a strategy of deviation. Here, local authorities have a rather limited competency in integration: Art. 75 of the Code for Municipalities and Communities (3463/2006) gives them the ability to design and implement only supplementary interventions for the social, cultural and economic integration of vulnerable social groups such as immigrants and refugees. However, no funds were allocated from the national to the local level for the implementation of such interventions. Still, based on the supplementary competency provided by this provision, some municipalities have developed local initiatives in recent years while others have argued that they have no competency in this area to design or implement any measures. A good example of the more proactive deviating approach is the local provision of Greek language classes to asylum seekers and refugees. It is noteworthy that there is still no coherent framework or program covering this important aspect of integration at the national level. At the same time, interviews with municipal representatives and employees engaged in some of local projects revealed that a number of municipalities have

initiated their own classes and courses for asylum seekers and refugees. Some of them, like the municipality of Neapoli-Sykies, have tapped on their own resources employing local teachers and covering all costs with their own budget, while others, such as the municipality of Karditsa, have relied on the support of volunteers. Yet other municipalities have developed their initiatives with the support of local NGOs and international organizations.

These examples illustrate that deviation is valuable strategy for local authorities that are trying to pursue their agendas without causing too much of a rift or that seek to influence national policy-making in a less confrontational manner. As such, it can be reflective of ‘coordinated multilevel governance’ characterized by ‘interaction and joint coordination’ between the different levels (Scholten and Penninx 2016, p. 94). These interactions may even go beyond (static) competency allocation when, like in the case of Tilburg, cities manage to use them to develop innovative and ambitious policies, for example in the domain of integration. Strategies of deviation can also represent exercises in forming, expressing and strengthening local identities. As with defiance, larger and more resourceful cities are arguably at an advantage when it comes to identifying and explicitly exploiting such legal discretion that is offered in national law (Oomen and Leenders 2020). However, the example of the Greek cities proves that this is not necessarily the case. Ingenious localities, including smaller ones, may indeed be able to mobilize civil society and international organizations to implement such solutions.

Divergence as ‘Dilution’

Where strategies of divergence combine a legal and an implicit approach, we propose to speak of dilution. The term describes any deliberate divergence on the part of local authorities from national policies that seeks to remain under the radar of the central government but that would not, if legally probed, challenge any existing norms. In contrast to dodging, dilution thus does not actually imply an evasion or a skirting of formal obligations or competencies. However, there is an engagement with such norms in the sense that the strategy usually involves an interpretative exercise based on which a local decision-maker opted for a legally acceptable policy that nonetheless diverged from national norms on local migration governance. Dilution can therefore be described as a pragmatic approach that aims to achieve modest but nonetheless tangible results on the ground while minimizing the risks of exposure and sanctions. It is different from deviation also in being less likely to inform any systemic changes, although one should not dismiss the possibility of incremental evolutions where a multitude of actors continue to ‘muddle through’ (Lindblom 1959).

Examples of dilution can be found in the Netherlands, again by looking at how certain municipalities offer shelter and support to irregular migrants such as refused asylum seekers. Some of the larger Dutch cities operate so-called ‘bed, bath and bread’ emergency shelters for refused asylum seekers and have openly criticized national policies. By contrast, other Dutch municipalities opt for implicit strategies and a more subtle use of discretion that does not challenge national

norms or overstepping the boundaries of municipal competencies. In one medium-sized city, the municipal executive board, in a letter to the council, stated that the municipality does not offer an emergency shelter for refused asylum seekers as it considers this to be the exclusive responsibility of the central government. Instead, it provides ad-hoc and more tailored measures. However, interviews with municipal councillors, executives and civil servants point to a more complex reality on the ground. One councillor spoke of a ‘backstage approach’ by the municipality, which has been setting aside an annual emergency fund of approximately 30,000 euros for refugees since the early 2000s. This emergency budget covers these tailored measures for refused asylum seekers and other expenses that cannot be accounted for through the funds designated for social support to recognized refugees. As there is little insight into how this emergency fund is spent and because it is allocated each year following a vote in the municipal council, the same councillor attempted to formalize this initiative. She soon found out that she would not be able to gather enough support in the council, particularly if she were to include explicit references to ‘bed, bath and bread shelters’. She also noted that although municipal officials recognize the divergence from the national policy framework, they prefer not to publicly pronounce it. Although she considered this covert strategy to be problematic in terms of transparency, she explained that it has worked well over the years as there have been ‘no complaints from The Hague’. To sum up, dilution is a strategy that provides local authorities with a possibility to give their own and often quite divergent ‘spin’ to national policies whilst avoiding a political or a legal challenge to the superordinate level.

‘Street-level bureaucrats’ can play a key role in shaping such strategies (Lipsky 1980). Zeytinburnu (in Istanbul, Turkey), for example, established an “Integration to the Town” office within their community centre even before the arrival of Syrian refugees. The vulnerable group of refugees or migrants were not included into the name of this pre-existing centre, which goes under “Centre for the Support of the Family, Women and the Disabled” (whereas disabled people, also a later addition, had been added). However, the services provided such as day-care, psychological support, gender equality courses, vocational training were now available also to non-citizens who had applied to the “Integration to the Town” office. In addition, these applicants receive free language courses and are not required to show documentation to be eligible for any of the services. The officials who we interviewed considered the provision of services to refugees and undocumented migrants a necessity of the public character of the municipality. They also interpreted the Law on Municipalities to allow or even require municipalities to enable access to services for all persons living in the city is possible. However, service provision to undocumented migrants remains a divergence from the national norm as the Law is ambiguous and most local governments remain hesitant to provide services even to registered Syrian refugees. Zeytinburnu does not necessarily showcase or advertise this progressive policy that might bring about a controversy if publicized, but continues to mainstream available services to all vulnerable groups.

Finally, it is important to understand that the line between deviation and dilution is often a fine one, as illustrated by another example from the Netherlands: a change in the Dutch Housing Act of 2017 that removed recognized refugees from being an obligatory priority group for social housing led certain municipalities such as Amsterdam, Arnhem and Nissewaard to openly chastise the national government's turn to 'symbolic politics' while others (e.g. Middelburg and Leeuwarden) chose, more implicitly, to (not) use their new legal discretion and simply continue established practice of considering refugees in the process. This example also illustrates how dilution can be a strategic response to a shift towards more restrictive national immigration and integration policies. In addition, even where localities are trying to be implicit about their local approach, they may be required to share it, for example to reach target groups (such as refugees with an interest in studying) or because they are formally required. Based on this insight, we may also hypothesize that dilution is a strategy less suitable for bigger cities, which will often be forced to explicate their local policies in response to their comparably larger civil societies and richer media landscapes. The implicit quality of dilution may also reinforce legal uncertainty especially where migrants rely on the divergent interpretations of local authorities, for example in accessing social services and other rights.

Concluding Remarks

The goal of this article has been to classify and theorize the strategies of divergence that local authorities use when confronting national migration policies in a context of multi-level governance and to theorize their impact on legal uncertainty, which is a structural type of uncertainty. While much can be said about such strategies, we have described them as shaped fundamentally by the law and by discourse, as well as impacting upon them. On the one hand, local divergence from the policies and priorities of national governments is always influenced by the discretionary spaces that municipalities enjoy from a legal point of view and that can differ as per constitutional setting and policy domain. Yet, local authorities are also actively shaping the legal landscape, for instance in making use of ambiguous provisions. As a result, the relationship between discretion and strategies of divergence is a co-constitutive one and the strengthening of legal uncertainty may actually be a part of such strategies as well as one outcome. On the other hand, there is a significant difference between types of explicit and implicit approaches: the prior is supposed to send a message to the central government and perhaps, in doing so, to strengthen local identity.

Intersecting these two axes of divergence, we have proposed a typology of four strategies, which all arise out of different local rationales. The first, defiance, combines an explicit and an extra-legal approach as it seeks a confrontation with the national level and possibly systemic change. Inherently controversial, it is more likely to be used by economically and/or politically resourceful localities including larger cities such as Palermo and Naples that are able to defy the national government by playing on the multi-level context, not infrequently for

political reasons. It is a high-stakes game that arguably tends to (re-)establish legal certainty in the longer term, though with rather uncertain outcomes regarding who will come out on top and what this means for the actors involved. Dodging as the second strategy is also extra-legal, though implicitly so. Here, divergence from the law, its dominant interpretation, and perceived restraints is more results-oriented rather than communicative as it targets the conditions at the local level. Examples for this strategy can be found in localities that are less resourceful, such as Sultanbeyli in Turkey, where enabled the municipality to obtain foreign funds for providing better refugee reception. Dodging can also be an expected practice in places where open confrontation of the national government is less politically salient, or where this is deemed to be in the interest of the migrants concerned. However, favourable outcomes for migrants in the short term may well come at the cost of a lack of legal certainty in the long run. The third approach described here is deviation, which we understand to be divergence that is explicit but also adherent to existing national law and national norms on local governance. Like defiance, deviation is an attractive option for cities that feel that they have a stake in shaping national policies but do so in a more conciliatory manner as illustrated by the approach taken by Tilburg to the participation declaration policy. In this context, the positive communicative value of the law is harnessed not as 'lawfare' but more as a means of persuasion, for instance because the local and the national authority share the same political colour. Local divergence in this form can, in a cooperative manner, strengthen long-term legal certainty. Dilution, finally, fuses a legal and an implicit approach to create a low-key strategy that, like dodging, prioritizes outcomes at the local level, though without seeking any open conversation regarding the content and boundaries of the law. This also allows legal uncertainty to persist, the likely outcome being disparate effects on different (groups of) persons. For instance, while refugees and undocumented migrants in Zeytinburnu enjoy services that go unnoticed by the larger public and the national government, their counterparts in other localities will not draw any benefits from this divergence, be it in practical or political terms.

Put together, our discussion of strategies of divergence proves that law in its indeterminate, constitutive, communicative and often fragmented form plays a key role in the efforts of local authorities to shape migration policies. It is, in turn, also shaped by their actions. To be sure, our inquiry can only be the starting point as more research is needed to confirm and further unpack why certain strategies are being used in specific contexts. We hereby expect critical contributions to come from comparative studies, be they legal or social scientific (or combined) in nature, mapping the differences at the various levels of migration governance. However, it will also be relevant to understand how different strategies of divergence may be employed by the same locality at the same time, for example vis-à-vis different status holders, and how these develop over time. This suggests that there is a need for single case studies that can provide thicker descriptions of specific localities. Finally, we expect strategies of divergence possibly to play different roles in various domains of migration governance. While this article looked at diverse issues ranging from emergency reception to civic integration, its typological focus on the

meaning of law and discourse did not permit for a separate analysis of this important factor. In conclusion, there is a need for more grounded and explicit consideration of the role that the law plays in a multilevel context and across domains in shaping the way that migrants, in the end, experience (un)certainly, legal or otherwise.

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