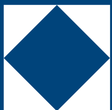
Natalia Kohtamäki | Enrico Peuker | Natascha Zaun (Eds.)

Innovative Public Governance in Times of Crisis



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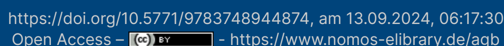

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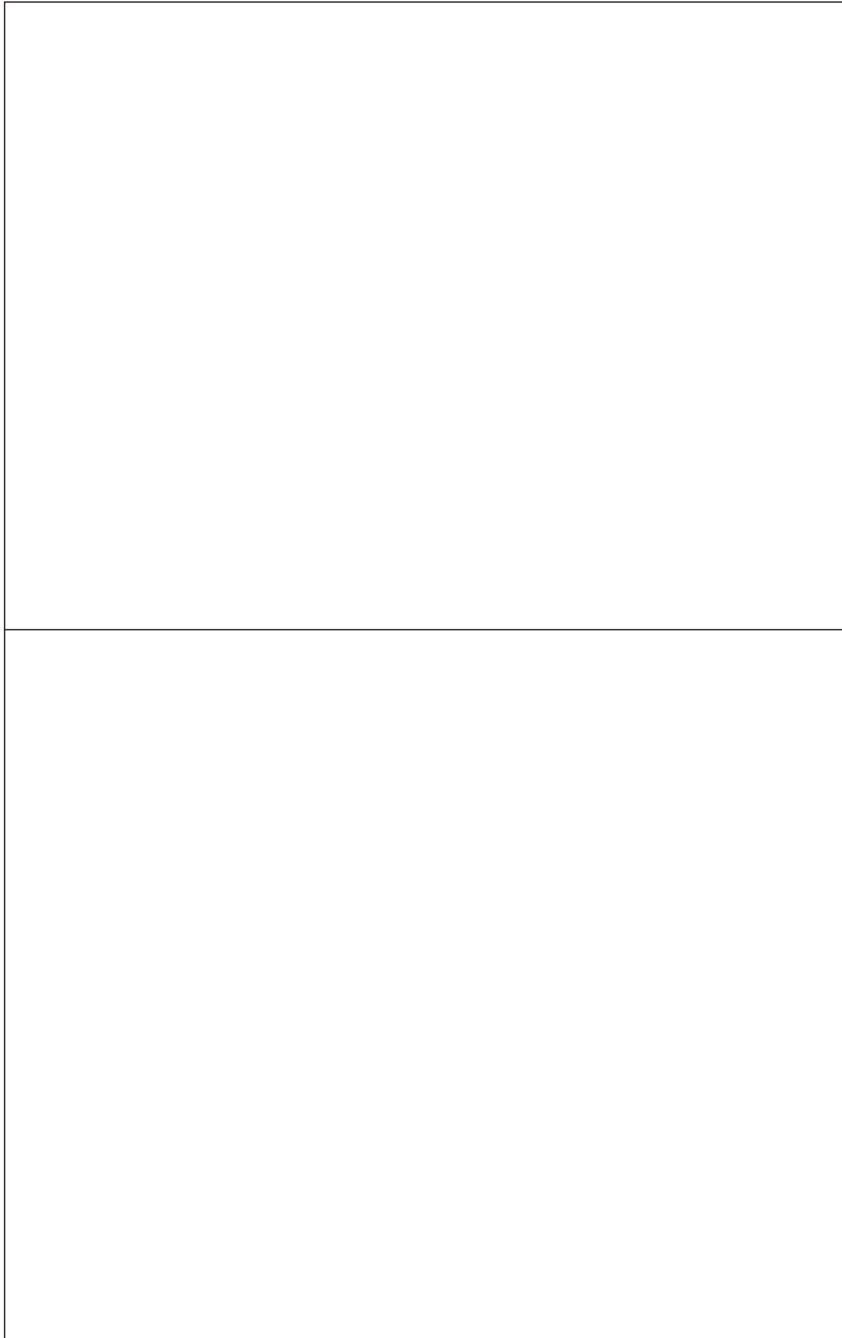

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Contents

Natalia Kohtamäki, Enrico Peuker, Natascha Zaun
Introduction: In Search of a New Understanding of Innovation in Public Governance. Facing the Crisis Challenges 7

I. Financial Crisis

Artur Nowak-Far
Innovation in Global Governance of Crises of Transnational Magnitude 21

Jakob Schemmel
Innovative Public Governance in Times of Crisis – The European Financial Crises 39

Dimitrios Kivotidis
Retrogression Disguised as 'Innovation': The Case of the 'Executive State' in Greece 65

II. Migration Crisis

Stephen Phillips, Magdalena Kmak
Deterrence as Legal Innovation: Management of Unwanted Mobilities and the Future of Refugee Protection 89

Łukasz Łotocki
Innovations in Public Governance in Response to the Migration Crisis from the EU Perspective. Institutional and Normative Solutions 111

https://doi.org/10.5771/9783748944874, am 13.09.2024, 06:17:30
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Johannes Eichenhofer
Between Innovation and Preservation. How German Migration and Asylum Governance Managed the 2015/16 'Refugee Crisis' 141

III. Pandemic Crisis

Robert Frau
Innovations in International Public Governance in Response to the Covid-19 Pandemic 167

Sebastian Sikorski, Michał Florczak
Applications of Artificial Intelligence in Healthcare as an Example of Innovative Public Governance after the Pandemic Crisis: Regulatory Solutions in the European Union's Integrated Structures 181

Maija Dahlberg, Laura Kihlström, Eeva Nykänen, Liina-Kaisa Tynkkynen
Innovative Governance – or Just Muddling Through? Covid-19 Pandemic and Finland 201

Index 223

Contributors 227

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Introduction: In Search of a New Understanding of Innovation in Public Governance. Facing the Crisis Challenges

Natalia Kohtamäki, Enrico Peuker, Natascha Zaun

I. The phenomenon of crises in troubled times

Crises are a phenomenon inextricably linked to human development. The Enlightenment belief in the continuous development of humanity is based on the foundation of progress, which most frequently takes place as a result of turbulence of various kinds. Development is the result of rational decisions made by people to solve specific social problems. It is about mastering a crisis situation, getting out of an impasse through consistent, logical actions, which can take the form of institutional or normative solutions. In both cases, there can be talk of different variants of the formalization of these solutions. Normative actions can be more or less formalized. Also, the degree of institutionalization of actions taken to contain, manage or restore a stable situation can vary.

Crises are currently of an international or, even more broadly, global nature. They extend beyond the borders of individual states, but also of entire regions. They spread at a rapid pace, forcing states and other entities to cooperate in the search for rational solutions. This rationality in choosing effective crisis management instruments is assumed by traditional theoretical trends analysing international reality, such as realism or liberalism.[1] Increasingly, however, other theoretical research directions, such as constructivism, critical theory, postmodernism, environmentalism or postcolonialism are also targeted at analysing social turbulences and methods for overcoming them in different contexts. Such approaches move away from analysing the rationality of the choices of individual players in crisis management processes to a broader examination of the social background, nature and causes of the various risks and problem situations. Studies are being developed, which draw on different disciplines – law, philosophy, sociology, political science, or psychology – and examine the

1 See Scott Burchill and others, *Theories of International Relations* (Palgrave Macmillan 2005).

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crisis as a situation that deviates from stability, normality. The term crisis often has a negative connotation, namely a breakdown, disequilibrium, and destabilization. However, it can also mean a 'new opening', the creation of opportunities for change that would not be accepted in a stable situation.[2]

The term 'theory' in social sciences, in terms of its linguistic interpretation, does not have a single definition. It can be understood, for example, in a descriptive context as 'a text [anchored] around content about the object under examination.'[3] In the case of law in general, not just international law or, more broadly, public law, there is no single coherent theoretical concept. There is no definition of what could be referred to as a general or universal theory. The researcher needs to deal with phenomena of a high degree of complexity. The various theories within public law will therefore address particular areas of research. A theory cannot be developed to address all characteristics of legal systems in their complex interactions between national, European and, more broadly, international levels. A similar conclusion can also be drawn in the case of theoretical assumptions about the appearance of crises and methods of countering them. Theoretical considerations in this respect will focus on the different dimensions of crises (for example, systemic, economic, institutional, social, technological, etc. dimensions) in relation to the current state of affairs.[4]

The Greek etymology of the term does not suggest a negative context. The verb *krinein* means 'to settle', 'to decide', 'to judge', 'to separate', 'to sift'. The noun *krisis*, meaning 'choice', 'settlement' stems from it. In legal science and political science, the understanding of crisis is often referred to precisely with reference to the original root of the word in Greek. This means that a situation of imbalance, danger, appearance of certain problems in a high degree of intensity forces making a choice and many complex decisions.[5] These phenomena are of a procedural nature – as a rule, they involve a number of actions, which show greater or lesser rationality, conditioned by the dynamics of the crisis situation itself. Sudden

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2 Cf Michele-Lee Moore and others, 'Disrupting the Opportunity Narrative: Navigating Transformation in Times of Uncertainty and Crisis' (2023) 18 Sustainability Science 1650–1653.

3 Zbigniew Blok, *Czym jest teoria w politologii?* (referaty Ogólnopolskiej Konferencji Naukowej UAM 'Czym jest teoria w politologii?', 12 May 2010), 4.

4 Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford UP 2016) 15 ff.

5 Leszek Gawor, 'Kryzys jako atrybut świata społecznego człowieka – jego obszary i waloryzacje' (2012) 12 ΣΟΦΙΑ. Pismo Filozofów Krajów Słowiańskich 35–47.

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highly dramatic events can lead to spontaneous solutions which can be modified as the crisis situation evolves. Their initial innovativeness – that is, their novelty in relation to previously used instruments – may be subject to revision.

In line with the French international relations theorist Thierry de Montbrial, it can be assumed that theoretical considerations must presuppose the adoption of a certain approximation and generalization. Their predictive nature is severely limited by the need to consider various scenarios in relation to specific conditions and the chosen area of interest within the social activity of the various players. According to de Montbrial, the impossibility of creating a general theory does not preclude the possibility of creating adequate specific theories that are applicable to selected situations. Detailed theories can compose themselves into a system of related concepts forming kinds of interpretative models or so-called paradigms.[6]

Edmund Husserl's approach is prominent among the paradigms regarding crises. He identified crisis with a lack of sufficient reflexivity. In this context, difficulties of a social, political, and economic nature are derived from a doubt about the meaning of modern science and what it means for human existence. Crisis is a historical phenomenon; it therefore stems from a specific context and is subject to social construction. In a broader perspective, it is a result of an insufficient awareness of the role that science and scientific progress play in culture and therefore in the civilizational development of humanity. Husserl identified crisis with regression. In the case of the search for new normative and institutional solutions referred to in this book, such a reflection can be transferred to the interference in the breakdown of legal culture. The science of law – that is, the doctrine – the legal view does not fulfil its role in such a situation. There is a distinction between practice and interpretation of the law.[7]

A historical paradigm of crisis can also be created based on Hannah Arendt's concept of crisis. She rejected historical determinism, which assumed the linearity of historical events, meaning the logical succession of specific situations, including those of a crisis nature. Regarding the evolu-

6 See Thierry de Montbrial, *L'action et le systeme du monde* (PUF 2011) 213 ff. For a comprehensive overview of philosophical paradigms on crises in legal terms see Paweł Skuczyński, 'Pojęcie kryzysu w filozofii i naukach społecznych a kryzysy prawne' (2018) 7(1) Filozofia Publiczna i Edukacja Demokratyczna 254–273.

7 Cf Edmund Husserl, *Die Krisis der europäischen Wissenschaften* und *die transzendentale Phänomenologie* (introduced and provided with registers by Elisabeth Ströker, Meiner 2012) 3–10.

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tion of political systems, she rejected a simple chain causality of events, as this would directly imply small causality of the individual, which, in a crisis situation, could prove decisive. According to Arendt, historical processes are subject to so-called crystallization, i.e., they lead to the appearance of factors that could favour the appearance of crises. However, there is no simple predictability or systematicity in this. These factors can become the impetus for the appearance of negative developments of an economic nature, which, for example, can lead to a greater collapse in the long run, i.e., a crisis. A crisis 'crystallizes' from past events and, as it were, 'fragments' historical development, causing a break in historical continuity (separation from the past). From this perspective, we can identify the crisis with a breakthrough or a 'new opening', i.e., every end conceals a new beginning. The crisis depreciates previous traditions, habits, or actions, because, in Arendt's terms, they formed the 'seedbed' of problems or threats that had a destabilizing character. However, in the processes of overcoming crises, this perspective of fragmenting the past makes it possible to select only those solutions from the past that did not contribute to the crisis. And this is not a necessity, but neither is it accidental. Hence, it is possible to observe the premises that trigger it before it occurs. An interesting observation in this context might be that, in the case of most contemporary crises, there were indeed hints of a crisis in the making, yet, these were often ignored.[8]

A third paradigm worth mentioning in the introduction is Niklas Luhman's concept of crisis as an alternative to theory. The term crisis itself is associated with the assumption that alarming events have taken place, which force extraordinary measures to be taken. The notion of crisis has a negative connotation. It boils down to the statement that it is a state that deviates from ordinary circumstances. When a crisis situation arises, there is no immediate theoretical framework to explain it properly and fully. These usually only emerge *ex post* and – from a certain distance – make it possible to understand what really happened during the crisis. This understanding is derived from constructivist assumptions that separate facts from their description. Reality is socially constructed, so we only give meaning to the crisis within the framework of social interaction.[9]

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8 Cf Hannah Arendt, *The Human Condition* (with an introduction by Margaret Canovan, 2nd ed, The University of Chicago Press 1998) 68–73; 181 ff.

9 Cf Niklas Luhmann, 'The Self-Description of Society: Crisis Fashion and Sociological Theory' (1984) 25(1–2) International Journal of Comparative Sociology 59 f.; 68–71.

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Following these paradigms, it can be said that solutions developed in the face of crisis are often the result of a much earlier conceptualization of mechanisms and measures of a normative and organizational nature. The innovative nature of the solutions adopted implies that they are groundbreaking in relation to the *status quo*, even though in most cases, as this volume will illustrate using national, European and international examples, they are the result of pre-crisis considerations. An innovative or, by definition, novel response to a crisis is based on a specific interpretation of it. That means it is born in the processes of constructing meanings of specific social events. A crisis is most often identified with a negative scenario. Hence, emergence from such a situation by seeking innovation in the new shaping of social reality is assumed to be at least a positive response to what has hitherto been and is not quite functioning well.

II. Scope and content

This book combines two important trends in the current evolution of public administration and administrative law (at the national, European and international levels):

(1) the search for innovation in the institutional, regulatory and administrative sphere,[10] and
(2) crisis management.[11]

---

10 Comprehensive literature is available on innovation in public governance, especially in political science, public management and public administration. A significant contribution has been made by researchers in the Nordic countries, where the problem of finding new (innovative) solutions in public administration has been an important research subject since the 1990s. See, eg the Finnish study by Ari-Veikko Anttiroiko, Stephen J Bailey and Pekka Valkama (eds), *Innovations in Public Governance* (IOS Press 2011) or the Danish study by Jacob Torfing and Peter Triantafillou (eds), *Enhancing Public Innovation by Transforming Public Governance* (Cambridge UP 2016).

11 Studies in economics prevail in the context of crisis management. A crisis is also often seen in the framework of political or sociological studies. There are relatively few studies addressing the legal perspective. However, particularly extensive and rapidly expanding literature on crisis management in international organizations is available: see, eg Mladen Pecujlija and Djordje Cosic, *Crisis Management: Introducing Companies Organizational Reactivity and Flexibility* (Nova 2019); Sarah Kovoor-Misra, *Crisis Management: Resilience and Change* (Sage 2020). There has been no comprehensive analysis of various crises in the context of legal anti-crisis solutions. There have been studies on selected anti-crisis instruments, especially regarding the finan-

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The three most recent major crises, i.e., the financial crisis, the migration crisis and the pandemic crisis, each specific in their own way, have given rise to a number of new solutions which are institutional (creating new bodies of public administration and reforming existing ones) or normative (amending existing normative acts, introducing new legislative solutions to the national and international order). These solutions have directly affected many aspects of life in society, including the rights and obligations of citizens (e.g. restrictions of freedom of assembly during the pandemic or modifications of supervisory practices with respect to financial institutions operating on a cross-border basis).[12]

In many cases, such solutions are considered innovative, especially as they are novel: they introduce ideas that had not previously existed in regulatory or institutional form. Innovation usually has a positive connotation. What is new should be better than what is old. But does this really have to be so? Does a crisis, which is a special situation, not provoke solutions that are weaker than the existing ones just to resolve the problem quickly?

The *OECD Frascati Manual* defines innovation as phenomena that are novel, creative, uncertain, systematic and reproducible, and includes law (as a subcategory of innovation research in social sciences) among those disciplines on the basis of which innovation in research and development (R&D) should be studied.[13] Hence, the research conducted for the purposes of this book is also dominated by a legal perspective, related to the analysis of international and national innovations from the point of view of normative solutions – adopted both in national legislation and in acts of European law, but also in a number of so-called 'soft' acts of international law, acting as instruments coordinating the actions of states in a crisis situation.

The starting point for conducting the research at the international, European and national levels was the perception of three basic regularities:

(1) all turbulences that take place in national and international governance structures give rise to remedial measures, which are most often inten-

cial crisis: see, eg Friedl Weiss and Armin J Kammel (eds), *The Changing Landscape of Global Financial Governance and the Role of Soft Law* (Brill 2015).

12 See Antoine Buyse, 'Pandemic Protests: Creatively Using the Freedom of Assembly during COVID-19' (2021) 39 Netherlands Quarterly of Human Rights 265–267; Madalina Busuioc, 'Rule-making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 European Law Journal 111–125.

13 OECD, 'Frascati Manual 2015: Guidelines for Collecting and Reporting Data on Research and Experimental Development', 64–76 <www.oecd.org/publications/frascati-manual-2015-9789264239012-en.htm> accessed 6 May 2024.

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ded to be precisely innovative; for this reason, it is worth considering what the element of novelty consists of in the context of the legitimacy of individual solutions;

(2) according to the European Enlightenment perception of what is new, innovation should mean solutions of a modern nature, better than the existing ones. As mentioned above, the baggage of the Enlightenment brings a rational belief in progress into European legal culture. Subsequent solutions are supposed to become increasingly perfect in a logical sequence, but is this indeed the case? The individual chapters show that the originally rational assumptions (especially at national level, for instance in Greece, Germany, and Finland) do not necessarily lead to more efficient management, greater transparency or greater effectiveness in practice. The chosen solutions often do not represent progress with respect to pre-existing mechanisms; so are they not innovative? This is a debatable question, which individual authors try to analyse critically, taking into account not only the steps actually taken by the decision-makers, but also the real possibilities in complex crisis situations. These are particularly limited in international structures (see the chapters on international innovation in financial, migration and pandemic crises).

(3) the complexity of existing definitions and viewpoints provokes a reordering of the conceptual grid. Innovation and crisis are terms that have come into very frequent use in the social sciences in recent years.[14] It is worth reflecting on the evolution of the meaning of these terms within the analysis of specific public management instruments. The authors of the book offer an extended perspective, drawing on experience from various administrative cultures.

Innovation most often appears in the plural – as a system of interrelated regulatory and institutional arrangements. Within the framework of a simplified definition, innovations are those actions that reform the status quo, that is, they have practical consequences. They can be socially desirable or

14 See eg Pekka Valkama, Stephen J Bailey and Ari-Veikko Anttiroiko (eds), *Organizational Innovation in Public Services: Forms and Governance* (Palgrave Macmillan 2013); Piret Tõnurist and Angela Hanson, 'Anticipatory Innovation Governance: Shaping the Future through Proactive Policy Making' (2020) OECD Working papers on public Governance No. 44, 143 <www.oecd-ilibrary.org/docserver/cce14d80-en.pdf?expires=1715004834&id=id&accname=oid021421&checksum=83BF35A80BE9CD792090913E9F35172C> accessed 6 May 2024.

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undesirable. Innovations are socially perceived positively, most often when it comes to new products, processes, or institutions, which in a difficult situation are expected to bring solutions to specific problems.[15]

Innovation in relation to selected institutional and normative solutions will be examined in an analysis of various national and international examples. In this context, innovative solutions in times of crisis do not necessarily have to be positive or associated with development and progress. The focus is on the research perspective through which the law is understood as an instrument that changes social reality. In this sense, legal innovations arise in the everyday reality of the lawmakers and implementers. This includes both legislative and judicial activity, as well as administrative practice. Defined in this way, innovation in law finds its expression in the creation and implementation of specific normative solutions, and in the establishment of institutions that create and implement laws.[16]

III. Structure of the book

This book examines the above issues from three perspectives: international, European and national. It is an interdisciplinary contribution to the study of the development of innovative public governance.

The authors of the individual chapters – experts in law, public governance, and political science – examine solutions that have been put in place at different levels of public governance during the last three crises. This includes case studies of Greece, Germany, and Finland, focusing on the solutions to their financial, migration and pandemic crises, respectively. These national examples indicate the variance of success by what were originally considered innovative solutions.

The selection of national case studies was conditioned by the originality and indeed success of the solutions applied in those countries or rather their perception by the public. The public perceived those solutions as being unsuccessful (the financial crisis – Greece), moderately successful (the migration crisis – Germany), or successful or worthy of imitation

15 Innovation has become a key word when considering the development of law: see, eg recent publications in this area: Antonie Masson and Gavin Robinson (eds), *Mapping Legal Innovation: Trends and Perspectives* (Springer 2021); Wolfgang Hoffmann-Riem, *Innovation und Recht – Recht und Innovation* (Mohr Siebeck 2016).

16 For more on this topic see, eg Haim Sandberg, 'What is Legal Innovation?' (2021) University of Illinois Law Review Online 63–76.

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(the pandemic crisis – Finland). The individual analyses are intended to show that a generalization does not always correspond to the actual state of affairs. Time is also important, as it makes it possible to analyse solutions, especially those that significantly modify the existing legal order, in a neutral manner, devoid of the emotions that so often accompany the introduction of reforms in times of crisis.

In parallel, those three crises will also be examined from a European and international perspective. To what extent do international solutions modify the innovativeness of national mechanisms? Can integrated structures based on the interdependence of many players be innovative?[17]

Crisis often plays a legitimizing function.[18] This means that, in the axiological layer, solutions that would not be accepted in a stable situation may be accepted in crisis situations. Innovation is often used as a slogan, supposedly to restore stability and ensure it is maintained in the future, when in fact it acts as a smokescreen for the current intentions of policymakers. It is important to consider how new solutions are legitimized through concrete changes in public management. Legitimacy theories, such as those developed by Fritz Scharpf in the 1990s, have been relativized and redefined in times of recurring global crises.[19]

In each chapter, the legitimacy of specific solutions will be viewed from different perspectives, namely input, output, throughput legitimacy,

17 Especially in the context of the integrated structures of the European Union, one may wonder about the effectiveness of crisis management in the context of legal and institutional solutions. There are studies on this topic in legal theory and political theory (without reference to concrete practical examples). See Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis* (Cambridge UP 2014); Christian Joerges and Christian Kreuder-Sonnen, 'European Studies and European Crisis: Legal and Political Science between Critique and Complacency' (2017) 23 European Law Journal 118–139; Christoph Möllers, 'Krisenzurechnung und Legitimationsproblematik in der Europäischen Union' (2015) 43 Leviathan 339–364. In the recent academic debate, many studies have appeared that question the effectiveness of crisis management in the structures of the European Union: see Perry Anderson, *Ever Closer Union? Europe in the West* (Verso 2021).

18 See, with many references, Clement Fatovic and Benjamin A Kleinerman (eds), *Extra-legal Power and Legitimacy: Perspectives on Prerogative* (Oxford UP 2013); Dominique Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford UP 2016).

19 Eg Amendine Crespy, 'Can Scharpf be Proved Wrong? Modelling the EU into a Competitive Social Market Economy for the Next Generation' (2020) 26 European Law Journal 319–330.

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as will be concepts of normative or technocratic legitimacy.[20] The look at output legitimacy in the context of solutions for the application of artificial intelligence in the health sector in connection with European Union harmonization efforts, among others, is noteworthy. Does a crisis, for example a crisis as large as a pandemic, legitimize the introduction of technological solutions? What risks might they present? A crisis often gives rise to the assumption of functional legitimacy, in which case the law can be instrumentalized. Concrete normative solutions serve selected political aims. Therefore, a number of questions arise in the context of the legitimacy of decision-making processes in the face of a crisis:

(1) Are we dealing only with normative legitimization (concrete acts of law legitimizing certain instruments of governance)?
(2) Does a crisis condition the mechanisms of social, axiological, and reputational legitimacy?
(3) What are those mechanisms, and how do they function in network structures?

The basic foci of consideration are therefore examples of administrative solutions that constitute innovative ways of dealing with various crises. These solutions are examined for mechanisms legitimizing their introduction. The originality of the analysis also lies in its comparison between such solutions at three levels of their functioning – national, European, and international.

A basic point must be noted – the book is not about crisis analysis itself or public management in general. Extensive literature on these subjects is already available.[21] It is an analysis of practical solutions employed by the lawmakers and institutions of public administration in three different crisis situations – one financial, one related to migration and one related to health services and other public institutions during a pandemic.

20 Such a search for diverse forms of legitimacy is in line with the existing scientific debate after the pandemic crisis. See: Tina Benzen and Jacob Torfing, 'COVID-19-induced Governance Transformation: How External Shocks May Spur Cross-organizational Collaboration and Trust-based Management' (2022) 101 Public Administration 1–18.

21 See eg publications of Arjen Boin, Edoardo Ongaro, Geert Bouckaert, Sabine Kuhlmann, Ellen Wayenberg and Andreas Ladner.

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The publication is conceived as part of a broad debate on growing regulatory problems.[22] The authors of the individual chapters are interested in solutions from the area of national, European and international public law. This should be also one of the book's main advantages. Normative solutions are most often analysed in their national or international dimensions. The book presents different solutions from national as well as European and international law in the context of their relationships and mutual influence (e.g. in relation to the ongoing cosmopolitanization of the law).

***

The editors would like to thank all the dedicated authors from various university centres in Germany, Poland, the UK and Finland who have made an effort to provide an interdisciplinary analysis of the institutional and regulatory arrangements made by policymakers at various levels of administration. The analysis of such instruments required a broader critical view of the public management process in terms of a dynamically changing social reality, in which crisis situations are becoming a kind of 'norm' due to their recurrence.

The editors would also like to thank the Polish National Science Centre for funding the project 'The Legal Challenges of Innovative Public Governance', which enabled the publication of this monograph, as well as the Nomos Publishing House, which made the effort to publish this monograph with great commitment, and Mrs Schirin Hafezi Rachti for her editorial work.

22 For more about the need for and problems associated with this interdisciplinary debate, see the interview with Carlo Caduff, 'Crisis and Critique: On Preparedness, Authoritarianism and Regulatory State' (2021) 2 Political Anthropological Research on International Social Sciences 5–15.

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I. Financial Crisis

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Innovation in Global Governance of Crises of Transnational Magnitude

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Abstract: This chapter discusses special features of public governance and public goods in the international dimension (i.e. global governance): a distinctive model of identification of relevant demand for them and a distinctive model of their provision. Based on this analysis, the chapter argues that that model is far from being coordinated internationally. Worthwhile coordination takes place in the area of financial regulation regarding the important elements of a safety net (which is rather limited in scope). In the case of health protection and other public policy areas, coordination is largely coincidental and/or based on mimicry. Consequentially, the international community has not yet developed 'a system' which would be appropriate for a bringing together all the currently dispersed activities of its incumbent parts into a foreseeable and coordinated global action. As for internationally emerging, widespread crises, the level of organization and coordination of the action of states is indeed relatively low as, internationally, the states do not wish to limit their Westphalian prerogatives by constraining them at the international level. More systemic coordination takes place in areas of regional integration (such as the European Union) and specific, rather narrowly defined, regulatory impact areas of public policy (such as prudential aspects of financial markets). There is not just one factor which could be used to explain the persistence of non-coordination. Yet, the explanatory model certainly refers to the Westphalian paradigm within which the states operate, to the logic of dependence on the path they follow, and to the subsidiarity analysis they apply.

I. Introduction

Global governance is a network of legal and institutional arrangements adopted – in various settings depending on their context, content and the procedure envisaged for their application – by states around the world, as well as by international organizations established by them to bring about, nurture and increase welfare with respect to respective groups of people. As a continuously emergent phenomenon, welfare is construed by the incumbent states and/or organizations as a multifaceted concept encompassing economic, social and political, as well as any other socially valuable elements.

The advancement of globalization processes (regardless of the fact that it is currently fragmented) makes it evident that welfare construed in this way

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is determined not only by any comparative or competitive advantages that each state has, but also by any significant international contingencies which are likely to emerge under increasing (fragmented) globalization and, in fact, to define the said advantages for open or relatively open economies. Under such conditions, even (self-imposed or/and induced by others) autarchy has its (quite high) opportunity costs, as countries pursuing this type of economic and social policy desperately fail to optimize their production and trade patterns.

With globalization, various determinants of welfare are inextricably interwoven. Therefore, they cannot be assessed and addressed separately, but rather need to be considered holistically. This implies that causal relations among these determinants, as well as their impact on the economic and social life of respective states and regions should be identified in order to adequately address emerging problems pertaining to their intrinsic coordination, which is needed to make the model of provision sustainable, effective and efficient.

The present model of global governance is a product and a special representation of the Westphalian structure of relations among states and international organizations (created by these states). This implies that the basic platforms for formulating and implementing public policies intended to address global-scale challenges are also the states. They are considered to be (collective) 'owners of their international treaties'. Consequentially, they decide on the powers of international organizations created by such treaties; they also decide on the form of coordination of collective action in the international realm, including coordination between international organizations or formal or informal fora which can be used for such policy-making. It should be noted that coordination requires that simultaneously:[1]

(a) relevant plans are developed to address emerging challenges;
(b) standards of reaction to the emerging problems of structural nature are set forth;
(c) there is a system of exchange or all relevant information in the set of coordinated units.

The Westphalian model of international relations does not serve the coordination well, as its priority is to enable respective states to pursue their own national interests (with all the means and measures they can

1 James D Thompson, *Organisations in Action: Social Science Bases of Administrative Theory* (McGraw-Hill 1967) 55–56.

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activate without breaching internationally recognized rules deemed to be fundamental, such as rules pertaining to non-aggression) and to achieve the compromises needed to contain emerging conflicts. As a result, the emerging arrangements are most often distant from the equilibria needed for 'complete' coordination.

Nowadays, many believe that the Westphalian model of international cooperation indeed transformed into a somewhat distinctive model of multi-centred and multi-layer governance.[2] Yet, with the exception of:

(a) the European Union (with regard to matters falling within the ambit of its powers – exclusive or shared with its Member States);
(b) the safety net of the financial and money market;

– the arrangements adopted by the states have fallen short of establishing sustainable, effective, and efficient patterns of cooperation between them. This implies that (with the exceptions identified above) international organizations have not been vested with powers extensive enough to coordinate their own actions or the actions of the incumbent states. This also means that the arrangements adopted by the states fall short of a full-scale coordination because, most often, they simply represent the lowest possible denominators, i.e. arrangements which sometimes reflect meagre national aspirations to cooperate and, simultaneously, relatively strong reliance of the states on their own resources to respond to even significant challenges.[3]

These notorious factors are quite conducive for producing some worthwhile hypotheses regarding the emergence or its lack with respect to organized action intended to provide responses to global scale crises. The following hypotheses will be verified in this chapter:

H1: With regard to significant challenges of a transnational nature, the terms 'multi-layer governance' or 'polycentric governance' obscures the real situation, which is very much short of 'governance' (implying a sufficiently high degree of organization and co-ordination) altogether.

2 See eg Terrence E Paupp, 'Conclusion: The Birth of a Multicentric World Order' in Paupp (ed), *The Future of Global Relations: Crumbling Walls, Rising Regions* (Palgrave Macmillan 2009) 231–239; Paul D Aligica and Vlad Tarko 'Policentricity: From Polanyi to Ostrom, and Beyond' (2012) 25 Governance 237; Paul Cairney, Tanya Heikkila and Matthew Wood, *Making Policy in a Complex World* (Cambridge UP 2019) 3–27.

3 See, eg Daniel Wolfish and Gordon Smith, 'Governance and Policy in a Multicentric World' (2000) 26 Canadian Public Policy-Analyse de Politiques, Supplement: The Trends Project 51.

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H2: Activities intended to address wide-scale transnational challenges (politically considered to be crises) are included in systemic (i.e. foreseeable and coordinated) action. Consequently, they represent a reflection of a rational, endogenous model of public policy response, conceived as a result of an internationally accepted compromise; since this compromise involves many stakeholders of diversified interests, it represents a set of relatively low-quality common denominators, i.e. solutions which are not very apt to fully, effectively and efficiently address the emerging challenges;

H3: States operate in a model of reaction that represents a relatively low level of organization and coordination at the international level; therefore, more worthwhile coordination is achieved at the national level; the quality of coordination (measured in terms of quality of plans, common standards, and a systemic exchange of information) is much lower at the international level.

Verification of the three hypotheses can help identify and understand the nature of the contemporary 'practice of sovereignty' in international relations. Major challenges of significant global gravity can – at least potentially – incentivize respective states to limit their traditionally, 'Westphalian-construed' prerogatives to achieve greater effectiveness and efficiency in combating the negative effects of such challenges. In line with Cohen, evidently inspired by Kelsen[4] and Jellinek,[5] the 'Westphalian-construed' sovereignty should denote:

> a claim to supremacy of the authority and exclusive jurisdiction of the state within a territory and over a population, signifying the coherence, unity, and independence of a territorially based legal system and political community. The correlative of domestic supremacy is external independence, i.e. the political autonomy and self-determination of the domestic constitutional order and political regime *vis-à-vis* outsiders (foreign powers).[6]

4 Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation' (1944) 53 Yale Law Journal 207–220.

5 Georg Jellinek, *Allgemeine Staatslehre* (Verlag von O. Häring 1914) 435–504.

6 Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge UP 2012) 8.

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II. Specific features of global governance

II.1. Global governance as a means of providing public goods/services

Global governance, as any other type of governance, is meant to provide specific public goods or services to its stakeholders. Assuming rationality of international actors, global governance can be construed to be a result of their more or less spontaneous, yet somewhat (self-coordinated) behaviour induced by the results of their own calculation of subsidiarity promising better public value at the highest (i.e. international) level of policy-making. This calculation can also be construed as a cost-benefit analysis of different modes of provision of public goods/services at different levels of political polity organization to identify the best (effective and efficient) fit between the needs to be satisfied within that polity and the mode of provision of adequate goods/services. Therefore, if any innovation is sought to be identified in the global governance, it may emerge in the following realms:

(a) in the mode of identifying the needs of global actors, where needs are considered to emerge at both individual and collective level of the global polity organization;
(b) in the mode of internationally acknowledging these needs within a legitimized political system (therefore being appropriate to trigger collective action for the provision);
(c) in the mode of providing public goods/services which would satisfy these needs.

The specific mode of provision of public goods/services includes both the design of the goods/services (i.e. their conceptualization in a format that is suitable for public provision at a global level), investigation of the demand for the goods/services that are conceptualized and satisfying this demand at the international (or even global) level.

It is of utmost importance to note that global governance is to contribute to the welfare of the broadly understood 'international community', i.e. mostly the states and broad social groups which are recognized under international law. This contribution is one of the constitutional values of the UN Charter, especially its Article 55. According to this provision, states have the general obligation to cooperate to achieve economic and social welfare.

Any economic crisis is 'a crisis' because it undermines this constitutional value and makes the 'old' measures providing for welfare look inadequate to

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what is to be done in order to restore 'welfare' at a desired pre-crisis level. And it does so with such a pace that the emerging negative change takes place at a pace that makes any quick adjustment of the behaviour of the respective actors impossible or possible, but at an excessively high social cost.

II.2. The basic regulatory structures available to address global crises

The existing international system provides for some bottom line of assessment of whether anything which has emerged in the aftermath of global-scale crises (such as e.g. the 2008+ global financial crisis or the 2019–2021 Covid-19 health crises) could be considered 'innovation-inducing' or 'innovative' (with regard to responses). Anything they have represented and done should rather be referred to as 'bottom-line' as the 'regular' fulfilment of their institutional mandate cannot be deemed to fetch the added value expected of 'innovations'. Therefore, the term 'innovative' should refer to something which exceeds that bottom-line.

It is most important to note that the 'bottom-line' arrangements meant to trigger institutional reactions to any global-scale crisis include:

(a) the international trade system based on the standards agreed upon within the WTO regulatory framework (which include GATT regulations, as well as the regulations pertaining to somewhat narrowly defined aspects of trade, such as GATS, TBT or GPA);
(b) the regulatory arrangements pertaining to currency regimes, raising sovereign debt to domestic and international creditors and international capital movements;
(c) the international system of cooperation which is also envisaged to address global imbalances in migration, health protection and food security.

The most comprehensive legal basis for international cooperation in these areas is provided for in Articles 55–56 of the UN Charter. These provisions require that the UN, considering its goal of 'the creation of conditions of stability and well-being', promotes, *inter alia*:

(a) higher standards of living,
(b) conditions of economic and social progress and development;
(c) solutions of international economic, social, health and related problems;

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Article 56 UN Charter provides that:

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.[7]

Therefore, any global arrangements intended to address challenges of a significant scale and widespread scope, which can be referred to as 'global crises', should indeed represent the measures of economic and/or social policy which are appropriate for promoting economic, internationally-conceived welfare and are to be achieved by international cooperation, including cooperation within the UN. The international cooperation of this type has a multifaceted format and encompasses various forms of international coordination of policy action.

This chapter considers two major areas of public policy: that concerned with the financial 'safety net' and that concerned with the protection of health.

Financial 'safety net' became an especially important area of public policy coordination during the 2008+ global financial crisis; coordination in the area of health had gained paramount importance during the 2020–2021 Covid-19 pandemic crisis. Both crises had potentially significant negative economic consequences, which had to be averted, or at least mitigated, by deliberate policy actions. Because of their global nature, at least some of these actions were to be coordinated at the international level to achieve a better fit between the public policy measures and the nature of the challenges to be addressed by them. The core question, however, is not about the fulfilment of their mandate but rather about how innovative the response was.

II.3. The financial realm of the coordination of international public policy

The present monetary (and currency) system is based on the Westphalian concept of the state relations within which it is up to respective individual states to decide on their own currency regimes in their territories.[8] In Simmelian terms, the states decide on the nature and features of the most

7 Art 56 of the United Nations Charter.

8 See: Benn Steil and Manuel Hinds, *Money, Markets, and Sovereignty* (Yale UP 2009) 67–106.

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fundamental economic link of an obligatory nature between themselves and the people over whom they exert their power: the money they issue.[9] Consequently, any choice of monetary (and therefore currency) regime (which itself can be interpreted as a choice pertaining to various modes of coordination of monetary policy) represents an arbitrary decision on the choice of the intrinsic value of money and on any procedure of its possible modification. This clearly does not imply that the international monetary system is 'petrified', as convincingly argued by e.g. Zimmermann.[10]

The issuance of sovereign debt by states is also associated with the Westphalian concept of the state prerogatives – both internationally and domestically. In both realms, sovereign debt is subject to the obligation to repay all the money due (i.e. the capital and the interest promised). Yet, the Westphalian concept of the state also implies that the state can unilaterally default on its sovereign debt, as very convincingly indicated, for instance, by Reinhart and Rogoff.[11] With regard to the state creditor, default can be construed as an act of opening an international dispute. Under the rules of the UN Charter (Article 2(3)), such a dispute (as any other dispute) shall be settled 'by peaceful means in such a manner that international peace and security, and justice, are not endangered'. For private creditors, however, the most relevant set of rules for solving the problem of a sovereign default are the legal instruments of the country which defaulted. No firm and widely respected rules exist which would apply in such circumstances and would place the position of private creditors on par with the defaulting state, so there would be some balance of weapons between them.[12]

The international financial order rests on a handful of extensive legal rules (of diversified binding power) meant to provide for what is referred to as a 'safety net' (or Global Financial Safety Net, GFSN) of financial markets and on institutional arrangements which have sedimented over

9 Georg Simmel, *Philosophie des Geldes* (Duncker & Humblot 1922) 62–99.

10 Claus D Zimmermann, *A Contemporary Concept of Monetary Sovereignty* (Oxford UP 2013) 229–233.

11 Carmen M Reinhart and Kenneth S Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton UP 2009) 275–292.

12 See, eg Karsten Nawrot, *Normative Ordnungsstruktur und private Wirkungsmacht: Konsequenzen der Beteiligung transnationaler Unternehmen an den Rechtssetzungsprozessen im internationalen Wirtschaftssystem* (Berliner Wissenschafts-Verlag 2006) 347–350.

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decades to address the need for international policy cooperation and/or coordination.[13]

The GFSN is based on safety net rules which are meant to:

(a) promote sound macroeconomic policies;
(b) prevent a wider scale crisis in the respective financial markets;
(c) provide liquidity when crises hit.

The GFSN includes legal arrangements for providing adequate financial information to existing or prospective investors (like those produced with recourse to the Generally Accepted Accounting Practices, GAAP), and to ensure that misconduct of the market participants is limited to minimum. At a more general level, the GFSN has rules adopted under Article III-5 of the Agreement establishing the World Trade Organization (WTO) requiring that, in order to promote international trade, the WTO shall cooperate, 'as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies' (i.e. with the World Bank and its constitutive organizations). This includes, *inter alia*, cooperation to prevent 'currency manipulation' which can be pursued by respective states to substitute for tariff manipulation to an extent that is prohibited under WTO rules.

The World Bank (encompassing the already mentioned International Bank for Reconstruction and Development and the International Development Association) is essentially an international development institution. In the realm of international financial matters, it provides loans and grants to governments of low and middle-income countries which are intended to produce significant multiplier effects or increase the general welfare of their population.

The original Bretton Woods arrangement paved the way for investing with the IMF in the power to control capital transfers. Yet the exact provision of Article VI (Section 3) of the IMF Agreement only opened that opportunity without, indeed, making it happen, as the realm of regulation of financial markets was left to the sovereign discretion of the states. For a relatively long time, this made financial markets largely subject to national rather than international legislation. Consequently, financial markets were inhabited by the so-called multi-domestic industries, i.e. industries which

13 See, eg Christian Tietje, 'The Role of Law in Monetary Affairs: Taking Stock' in Thomas Cottier and others (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge UP 2014) 11.

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develop their competitive advantage separately on each and every national market, as opposed to global industries, i.e. where competitive advantage could have been developed on a global scale with no significant regard to the specificities of the respective national markets.[14] In other words, the legal structure of the international financial and monetary order has been decentralized and domestically embedded.[15] In other words, the IMF's original mission focused more on the stabilization of currency systems with a view of the foreseen ever-increasing liberalization of trade in goods and services. Nowadays, the IMF is less focused on supervising the international currency system, but rather on providing relevant intellectual and material support for national economic policies pursuing a macroeconomic balance. The IMF does this by supporting economic policies that promote financial stability and monetary cooperation through policy advice, appropriate loans given on a conditionality basis and the administrative capacity development needed to implement the economic policies promoted.

In a more general sense, GFSN includes all the arrangements encompassed by the so-called New International Financial Architecture (NIFA). Therefore, it also applies to economic and monetary policy standards intended to enable the incumbent states to insure themselves against external shocks using their foreign reserves or fiscal surpluses accumulated before the shocks, bilateral swap lines concluded between countries to enable them to undertake adequate foreign exchange intervention and the use of the IMF's financial assistance to restore macroeconomic balances. Most importantly, in the general sense, GFSN, not only includes the 'focused' international institutional arrangements (such as the IMF, or the Financial Stability Board, FSB), but also institutionalized forms of cooperation having a more general mission, such as G-8 or G-20 meetings. Quite interestingly, G-8 and G-20 (argued to be 'a self-appointed steering board of the international financial architecture' at the time of the financial crisis[16] are both fora which easily transfer their focus to ever-changing challenges of international significance, which are predominant in a given period. This implies that, during the crises referred to in this chapter, both groupings focused on, respectively, the global financial crisis and the Covid-19 crisis.

14 Michael E Porter, 'Changing Patterns of International Competition' (1986) 28(2) California Management Review 9.
15 Tietje (n 13) 37–38.
16 Zimmermann (n 10) 193–201.

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Overall, the 2008+ financial crisis did not trigger much significant change to the institutional arrangements which could be used to address global-scale economic, and especially financial, turmoil. In their vast majority, such arrangements responded to the challenges they faced in a manner largely prescribed by their existing missions; the new ones (such as FSB) were vested with relatively soft advisory and monitoring powers).

Notwithstanding the above, because of the peculiar mission enabling a fairly flexible response to these challenges, the Basel Committee on Banking Supervision (BCBS) came up with a set of arrangements which can be considered innovative. Its regulatory reaction was quite important, as it set out new standards for the banking sector, which had contributed largely to the outbreak of the crisis, having been plagued with excess liquidity, resulting in insufficient liquidity buffers and the consequential creation of excessive credit under weak credit underwriting standards. The rules of that time were insufficient not only to address these weaknesses but also inadequate to avoid negative externalities (i.e. the situation where the counterparties, not having a direct interest in the respective banks, would have to bear the cost of bailing them out). The problem was only exacerbated by the relative international consolidation of the banking sector which gave rise to a risk that systemic failures in one national banking sector would permeate internationally.

A definitely innovative response to these challenges was the adoption of the Basel III accord by the BCBS. The reform represented by the accord included:

(a) increasing the quality and transparency of the equity component of the capital of the banks and making it the major loss-absorber;
(b) strengthening the capital requirements for counterparty credit risks (measured under stress conditions), introducing self-enforcement mechanisms pertaining to the capital requirements;
(c) improving the coverage of risks pertinent to the credit activity, especially related to capital markets activities so that (a) the most prevalent or/and atypical exposures would be subject to a stressed value at risk requirement, and (b) transactions giving rise to increased risks be balanced by an increased level of capital;
(d) introducing a global liquidity standard to supplement the capital requirements by requiring that the exposed banks be able to withstand a 30-day system-wide liquidity shock;

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(e) introducing stronger supervision, risk management and disclosure standards for credit institutions;
(f) reviewing standards pertaining to external ratings in the regulatory capital framework, so that they would be worked out and applied in a more transparent mode.

Despite its international reach, the Basel III accord does not represent a directly applicable set of rules but rather an instrument which has to be implemented in a respective national or regional setting.

II.4. The health realm of the international public policy consideration

The extent and the nature of Covid-19 pandemic was a surprise to all governments in the world. None of them was prepared for this highly disturbing heterogeneous phenomenon. The global extent and magnitude of this pandemic was first identified as such at international level, by the World Health Organization (WHO). The WHO was therefore able to trigger UN-coordinated activities intended to help countries with underdeveloped healthcare capacities to cope with the health and economic challenges they were facing with the pandemic. The WHO was able to serve as an important monitoring platform and an advisory facility which is able to gather information about the national practices used to cope with Covid-19 pandemic. The WHO also appeared as a promotor of a quite complex set of activities intended to make appropriate vaccines available to the countries which were unable to develop their own technological and/or financial capacities to ensure adequate supplies.

The WTO acknowledgement that the Covid-19 pandemic was a high global health emergency incentivized the respective countries and international organizations to react in a way which took a global view and recognized that the trade and the movement of people across national borders might represent a health and economic concern. Their policy approach was relatively uniform at the very beginning as most countries of the world introduced lockdown measures. These measures were intended to radically restrict physical contact between people in order to reduce the possibility of contagion (such as a ban on movement, closure of establishments that bring people together and severe limits on social and economic activities to those deemed necessary to ensure order and security). Nevertheless, lockdown only extended to border closures in a few countries. Although the lockdown regime and other measures to limit the spread of the Covid-19

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virus have been applied quite universally as a result of a great deal of mimicry, the respective governments had public policies with regard to health. At this stage, health concerns were of the utmost importance with the result that information collected by the World Health Organization and the recommendations issued by this UN specialized organization were considered of utmost importance and followed by the UN member states. The primary motive for these measures was to protect national health systems from becoming overloaded and to provide an adequate health service to the people infected by the virus.

Yet, with time, economic issues started to dominate the public policy agenda. This shift of focus was induced by the fact that lockdown restrictions within and among respective countries were (rightly) foreseen to have a dramatic impact on the economic activity or, at that time, already had the adverse economic consequences foreseen by, for example, Brahmbhatt and Dutta.[17] As a result, economic policies had to be adjusted to these developments which, in turn, contributed to the consequential diversion of any new public policy measures adopted in the respective countries. Therefore, at the international level, the economic and social situation became very complex because of:

(a) increasing policy diversity among the respective countries of the world;
(b) a consequential increase in asymmetry of responses of respective economies to all internal and external stimuli arising from that ever-more-complicated setting.

The said asymmetry of responses arose not so much from subjective reasons (i.e. from the domestic political dynamics and from the original level of openness of respective economies) as rather from one objective reason, namely from differences in the economic power of the respective countries. More affluent countries were able to introduce costly intervention programmes and be the first to be served in their public procurement for necessary medical supplies (especially supplies of vaccines) and other healthcare resources. Because of their relatively better administrative capacity, they also were first in detecting and adequately addressing pandemic

17 Milan Brahmbhatt and Arindam Dutta, 'On SARS type economic effects during infectious disease outbreaks' (2008) World Bank Policy Research Paper No 4466 <http://documents.worldbank.org/curated/en/101511468028867410/On-SARS-type-economic-effects-during-infectious-disease-outbreaks> accessed 22 March 2024.

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phenomena or pandemic-related economic phenomena taking place within their jurisdiction.

All international organizations, including the WHO, responded to these challenges in a rather conventional way. For instance, the IMF offered loans and other financial aid to countries in need; it also offered advisory services to them, especially in the area of management of macroeconomic balances. Within its own realm, the WTO offered an attractive platform for adjusting global arrangements for trade in medical products which would make it easier for less economically powerful countries to access the resources needed to provide healthcare for the population affected by Covid-19 and, most importantly, to perform vaccinations on time. The WTO-promoted arrangements included an adequate adjustment of mutual recognition and certification practices within the Technical Barriers to Trade Agreement (TBT Agreement). Yet, this adjustment did not go beyond the mere procedure, reflecting an increase in pressure on the WTO to speed up notifications of extraordinary and temporary national measures (meant to relax, streamline or simplify procedures of conformity assessment) which were adopted as a response to the public health emergencies brought on by the pandemic. It should not come as a surprise that the notifications mainly applied to BTB-concerned exemptions pertaining to medical or other health-significant supplies, such as supplies of food. The notifications were then handled in the manner prescribed in the internal regulations of the respective international organizations. Interestingly, even quite far-reaching proposals (such as a rejected proposal for a waiver of protection of IP rights on medical products that are essential for combating Covid-19) were handled that way.[18]

These initiatives indeed failed to initiate concerted international action. Instead, the policy response to the pandemic was largely differentiated and – as a result – fragmented. This differentiation (and the resulting fragmentation) appeared in the following arrangements:

(a) in the differentiation of both material and procedural lockdown measures adopted by individual countries

18 See: Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa' World Trade Organization IP/C/W/669 (2 October 2020) paras 12, 13 <https://t1p.de/qpopx> accessed 23 March 2024.

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(b) in the diversity of impact that relatively identical lockdown measures had on respective economies because of the structure of these economies; the impact of these measures was also largely asymmetric in large territorial states with complex regional economic structures.

In addition, it should be noted that an important determinant of the vulnerability of the economies to what we can generally call 'pandemic impact' is their openness (regional and especially international) and their integration into international production and exchange networks. This is clearly shown by the example of Sweden (an significant exporter of goods and services), where the applied policy mix was geared towards the least possible disruption to society (and therefore to the economy), but which did not avoid a negative (largely exogenous) demand shock because of the reduction of trade with Sweden by other countries.

The adopted lockdown measures also show significant dynamics of change.[19] In other words, in the first phase of the pandemic (or, more strictly, in the first phase of the public policy reaction to the pandemic), respective countries adopted a relatively uniform policy mix based on simple forms of lockdown and some economic support to the business entities most obviously affected by that lockdown. Soon, however, the variation in the intensity and content of the measures adopted in response to the Covid-19 pandemic became diverse. That diversion was largely a consequence of the scale of infections, the recorded number of deaths and the observation by the authorities of the cross-border and inter-regional spread of the Covid-19 virus, as well as the assessment by the authorities of the potential of national healthcare to cope with larger scale pressures. Therefore, for example, within the group of the EU Member States, Italy had the broadest range of lockdown measures, with the highest relative intensity; whereas the catalogue of measures in Sweden was the least extensive and the measures themselves were of low intensity. There were no major problems in Sweden particularly because of the efficiency of the health service – but with the important exception that the Swedish authorities failed to stop a significant number of deaths among the elderly.

19 Artur Nowak-Far, 'SARS-CoV-2 Pandemic: An Economic Analysis of Regulatory Intervention' in Jolanta Itrich-Drabarek (ed), *Contemporary States and the Pandemic* (Routledge 2023) 69–88.

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III. Conclusions

Hypothesis H1 regarding the mode of governance adopted to address the challenges of the global-scale crises have been verified positively. Indeed, the conventional wisdom should be accepted to interpret the reality in such a way that the international layer of such governance is somewhat logically related to (territorially) lower layers of governance; therefore, it should be considered an integral part of 'a multicentric system' in which respective levels of governance are coordinated with one another, either by force of an explicit legal arrangement or by a rational force of some objective necessities. Yet, such a conclusion cannot be considered as reflecting reality. It is true only with regard to such regional communities (such as for instance, the European Union) organized by virtue of an extensive body of binding law applying to its counterparties. Yet, with larger communities of states which are not prone to waive their prerogatives, consideration of the situation in terms of 'multi-layer' governance obscures the real issue of mere coordination between the incumbent stakeholders needed to address large-scale crises. Such coordination indeed represents a 'governance', yet what counts is its effectiveness and efficacy, which can only result from meeting requirements that make up coordination, i.e. the requirement of common action planning, standard-setting and a systemic exchange of information which is relevant for that planning and standard-setting. as for what we can refer to as 'the global governance', such an intentional coordination is scarce. It only takes place in an area of financial regulation (Basel III accord) regarding essential elements of a safety net which is rather limited in scope. Even so, this regulation is as effective as the national enforcement arrangements allow. As for other areas, especially, the area of health protection, coordination is largely coincidental, as it is a result of a great deal of mimicry taking place in policy-making practices of respective states. Therefore, the system works in line with (very) bound rationality.

Consequentially, the second hypothesis (H2) regarding the systemic nature of public policymaking with respect to wide-scale transnational challenges (politically considered to be crises) has been disproved. The international community has not yet developed 'a system' which would be appropriate for gathering all the currently dispersed activities of its incumbent parts into foreseeable and coordinated global action. Consequently, at the international level, these activities do not represent a reflection of any rational, endogenous model of public policy response, but rather result

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from a somewhat chaotic, exogenous reaction, in which mimicry in selecting policy responses plays a significant role.

The third hypothesis (H3) regarding the model of reaction to global-scale challenges posed by the larger gravity crises should be considered to have been proven, but only in general terms. With regard to such challenges, the level of organization and coordination of the action of states is indeed relatively low as, internationally, the states do not wish to limit their Westphalian prerogatives by constraining them at the international level. As has already been stated, more systemic coordination results in areas of regional integration (such as the European Union) and specific, rather narrowly defined, regulatory areas (such as prudential aspects of financial markets). Astonishingly, much of the coordination results from mimicry among states.

The results of the verification of the respective hypothesis makes it pertinent to answer the obvious question of why the existing arrangements are so persistent at the international level that even large-scale crises do not make their stakeholders change it. There is not just one factor which could be used to propose an answer to this question. One argument which should be used to do that has already been formulated: the states operating under the Westphalian paradigm are not prone to adjust the international arrangements to a sometimes unique nature of the said challenges because such a change would have to result in some limitation of their powers which they would find unacceptable. Another argument follows the logic of path dependence and holds that the foreseen benefits from more coordination (and therefore the greater self-limitation of powers) is subject to some cost-benefit assessments which – even under the strains of the recent crises – opposed any more significant change (at least at the international level). This argument reveals even more important logic, that respective states apply some (more or less intuitive) subsidiarity analysis here, which suggests that global scale challenges could be more effectively and – as should be emphasized – efficiently addressed at lower levels of governance, most significantly at the state level. Most likely, in this intuitive cost-benefit assessment, the unavoidable cost of international-level coordination and its expected lowest-possible-denominator outcomes are the most important negative drivers which support refraining from any major change.

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Innovative Public Governance in Times of Crisis – The European Financial Crises

Jakob Schemmel

Abstract: The European economic and financial crisis emerged from the global financial market crisis (2007–2009) and evolved into the European fiscal crisis (2010–2014). It comprised two crises folded into one. The diverse challenges posed by it resulted in ample legal changes to the regulatory and institutional core of the European economic structure. Certain reforms resulted in long-anticipated shifts of public policy. This chapter will analyse what constitutes Innovative Public Governance (IPG) in the regulation of financial markets and outline its prominent examples: it will discuss how IPG led to shifts in political influence during the crisis and how it changed regulatory and institutional law. It will then show how IPG led to severe legitimacy frictions. It will also demonstrate that IPG in the regulation of financial markets has proved to be a pacemaker of regulatory and institutional development.

I. Innovation as institutional change

In determining what constitutes IPG during the European economic and financial crisis, a distinction needs to be made between 'innovative change' and mere changes of the regulatory law. From a legal perspective, however, the scope of changes is naturally limited to changes in the formal law.[1] A legal analysis can be complemented by governance aspects to include matters of regulatory style, institutionalized influence and participatory legitimacy. Even from such an amended legal perspective 'governance innovation' at the European level cannot sufficiently be captured, since European legal structures might draw from the traditions of Member States and European experience, but seldomly possess a clearcut pattern. Therefore, every change in European law is, to a certain degree, innovative. This analysis will consider the political theory of institutional change before developing a standard for innovative change in financial markets law.

1 A discussion on legal institutions in Pierre Schammo, 'Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism' (2021) 40 Yearbook of European Law 265, 269.

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I.1. Theory of Institutional Change

Historical Institutionalism (HI) is a historical and comparative approach to the study of institutional change.[2] It can be applied to both formal and informal rules and analyses why and how institutional changes take place. In recent decades, HI has shifted from detailed evaluations of policy changes to more abstract questions of how these changes occur. Two models of change have been identified: changes can develop endogenously, resulting in modest path-dependent modifications (evolutionary model).[3] Changes can also be restricted to certain events and arise exogenously ('punctuated equilibrium').[4] These 'critical junctures' in institutional development lift the usual political constraints on change.[5] This clear-cut distinction, however, must be understood as an ideal type rather than a conclusive study of reality. Researchers emphasize that change is a matter of degree and its respective models must be interpreted as such.[6] The observations on HI aptly illustrate how changes take place in European financial markets law. They capture both the slow and grinding process of changing financial markets mostly headed by the commission,[7] as well as the rapid and extensive reforms due to the Commission's initiatives with the support of the Member States[8] or during and after an economic or financial crisis.

One branch of HI focusses on the institutional form that such changes take. In their study of gradual institutional change, Mahoney and Thelen conceptualize a 'power-distributional approach to institutions',[9] outlining

2 Sven Steinmo, 'Historical institutionalism' in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences* (Cambridge UP 2012) ch 7, 118–121.

3 John L Campbell, *Institutional Change and Globalization* (Princeton UP 2004) 172 ff.

4 Kathleen Thelen and Sven Steinmo, 'Historical institutionalism in comparative politics', in Steinmo, Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge UP 2008) 1–32.

5 Giovanni Capoccia and Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341–369.

6 Campbell (n 3) 58; Wolfgang Streeck and Kathleen Thelen, 'Introduction: institutional change in advanced political economies' in Streeck and Thelen (eds), *Beyond Continuity—Institutional Change in Advanced Political Economies* (Oxford UP 2005).

7 See eg the reforms following the General Programs [1962] OJ 32/62 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:P:1962:002:TOC> accessed 17 March 2024.

8 Cf eg reforms following the Commissions white book 'Completing the Internal Market' COM(85) 310 final.

9 Streeck and Thelen (n 6) 4.

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four modal types of institutional change: *displacement* (removal of existing rules and introduction of new rules), *layering* (introduction of new rules complementing existing ones), *drift* (changing the impact of existing rules because of shifts in the environment) and *conversion* (changing existing rules because of their strategic redeployment).[10] These models show that abstract observations of the institutional form can be used to characterize IPG and its degree.

I.2. Identifying Institutional Change in Financial Markets Law

Drawing from both theories, a standard for innovative change according to the legal and governance approaches can be configured. When assessing the quality of legal transformations, a legal perspective can relate to the nature and degree of a reform. Innovativeness in this regard means original or 'salient'[11] solutions to issues either highlighted or aggravated by the crisis. However, a governance view on changes incites contemplation on power structures, processes and accountability. For the purpose of this chapter, IPG will be defined as changes in the law, players or practices resulting in a paradigm shift in the financial markets regulatory environment. IPG therefore has at least one of the following characteristics:

- it changes the regulatory approach towards a certain policy area;
- it introduces original legal institutions or techniques;
- it transfers regulatory and supervisory powers;
- it shifts accountability.

The European economic and financial crisis and the ensuing general overhaul of financial markets regulation resulted in a wide variety of IPG. This chapter will focus on the most salient and consequential examples of these changes.

II. Players

The power structure of the regulation of financial markets shifted during the financial crisis. Member States were greatly affected by the crisis and

10 ibid 16.
11 Campbell (n 3) 37 ff.

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used the European level as a coordination vehicle thereby changing the impact of existing rules. Although, crisis regulation and the need for persistent coordination resulted in Member States transferring more powers to the European level, European players were cut out of central decision-making powers. While the European Central Bank (ECB) gained more competences, other European institutions took a back seat.

II.1. The European Council and the Member States

At the beginning of the financial markets crisis, European institutions and national governments reacted rather autonomously to the consequences of the U.S. sub-prime mortgage crisis. Early on, three of the biggest Member States, Germany, France and Great Britain, each had to bail out major credit institutions to prevent contagion effects as liquidity shortages brought even the main institutions to their knees. During the course of 2008, it became obvious that increasingly more credit intuitions needed state money to survive. In the highly integrated European banking market, Member States in certain instances had to work together to save cross-border banking groups.[12] In this turmoil, Member States hurried to allay depositors with a state backed guarantee of their savings to prevent bank runs, thereby creating adverse incentives to relocate deposits to Member States with broader guarantees.

After operating as first responders, the Member States entered into the political coordination phase re-including European institutions. The eurozone Member States met with the UK in an emergency summit and agreed on a common bank rescue plan[13] that was later adopted by the European Council (EC).[14] The EC also met to find a common 'language' for the G20

12 See Lucia Quaglia, Robert Eastwood and Peter Holmes, 'The Financial Turmoil and EU Policy Co-operation' (2009) 47 Journal of Common Market Studies Annual Review 63.

13 Euro Area Countries, 'Declaration on a concerted action plan of the euro area countries' (12 October 2008) <https://ec.europa.eu/economy_finance/publications/pages/publication13260_en.pdf> accessed 17 March 2024.

14 Council of the European Union, 'Presidency Conclusions' (16 October 2008) 14368/08 CONCL 4 <https://data.consilium.europa.eu/doc/document/ST-14368-2008-INIT/en/pdf> accessed 17 March 2024.

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summit in London.[15] In accordance with the agreement, the G20-member states, France, Germany, Italy and the United Kingdom took the lead and committed to tougher financial regulation, the extension of financial supervision, as well as the reform of the Basel II accords.

The general overhaul of financial regulations started in 2009. Yet, the persistent involvement of Member States indicated a functional change of the EC: it developed from a big-picture institution to a stringent monitoring one, which was not above intervening in quite specific questions of European law. It took a leading role in shaping the European regulatory and supervisory institutions[16] and ensured that Member States had influence over their governance, while leaving the substantive law to the more specialized Economic and Financial Affairs Council (EcoFin) constituting of the ministers of finance and economy of the Member States. The Member States seized control of the EU. Nonetheless, the crisis led to a level of integration that just several years earlier seemed impossible to achieve. The Member States agreed on institutions which operated close to the limits of the newly adopted Treaty of Lisbon. This momentum led to the establishment of the European banking union during the second wave of the supervisory reforms. However, at that time the reservations of some Member States, especially Germany, already indicated a slowly fading momentum.

The fiscal crisis brought about another change to the approach of the eurozone Member States: it utilized international law when setting up the central fiscal mechanisms to prevent failure of the eurozone Member States and save the euro. This design had a number of advantages but was mainly chosen to rule out European influence over the decision on fiscal assistance. Even though this arrangement secured the Commission a spot in the 'troika' (Commission, ECB and IMF) since it could now act as a proxy of the eurozone Member States, it resulted in a considerable weakening of the Commission. At the same time, the crisis led to a power shift inside the group of Member States. Since fiscally strong states such as Germany and France were not dependent on pooled assistance, they could enforce their

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15 Council of the European Union, 'Presidency Conclusions Annex I' (29 April 2009) 7880/1/09 REV 1 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/106809.pdf> accessed 17 March 2024.

16 Especially regarding the decision-making powers of the European Supervisory Authorities, see Council of the European Union, 'Presidency Conclusions' (10 July 2009) 11225/2/09 REV 2 and the Single Supervisory Mechanism, see European Council, 'Presidency Conclusions' (14 December 2012) EUCO 205/12.

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demands on the other eurozone Member States. As the biggest contributor to the fiscal mechanisms, Germany gained a very strong position which it leveraged to enforce strict austerity and privatization on fiscally weak eurozone states.[17] Additionally, high level of domestic politicization enhanced bargaining complications between the Member States.[18]

II.2. The European Central Bank

The ECB experienced an unparalleled ascent in power during the financial crisis. In the years 2007–2009, it initiated its own measures to support the financial markets by cutting its base rate to 1.0 % and providing liquidity for a freezing and liquidity hoarding banking sector.[19] Its overwhelming role, however, encountered scepticism from non-eurozone Member States that vetoed the establishment of the European Systemic Risk Board (ESRB) as part of the ECB.[20] While the ECB could still secure an influential role in the ESRB, the board's competences remained quite limited.

However, after the first wave of reforms, the ECB became one of the most influential European institutions. As eurozone states drifted apart during the European debt crisis, Member States leaned heavily on the ECB.[21] Seeking to utilize its expertise, independence and status as a European treaty institution, they installed the ECB as the pivotal authority of the banking union of 2014. At the same time and as part of the 'troika', the ECB served as a watchdog of fiscal discipline, strengthening its reputation as an expert institution. The most consequential change, however, is the ECB's asset and bonds purchase programme. The programme had a huge impact on the financial markets and became one of the most discussed instruments of the debt crisis (see III.3.).

17 Ulrike Liebert, 'TINA' Revisited: Why Alternative Narratives of the Eurozone Crisis Matter', in Pablo Iglesias-Rodriguez, Anna Triandafyllidou and Ruby Gropas (eds), *After the Financial Crisis* (Palgrave Macmillan 2016), 303.

18 Philipp Genschel and Markus Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) 56 Journal of Common Market Studies 187.

19 Jean-Claude Trichet, 'State of the Union: The Financial Crisis and the ECB's Response between 2007 and 2009' (2010) 48 Journal of Common Market Studies 7.

20 See High-Level Group of Financial Supervision, 'Report' (Brussels, 25 February 2009) 46, <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 21 March 2024.

21 Genschel and Jachtenfuchs (n 18).

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II.3. The Commission and the European Parliament

The Commission took a back seat during the financial crisis. Its agenda-setting powers were undermined by the Member States. National interests shaped the institutional design of the established governance structures, whereas the Commission, as one of the most powerful European players, was excluded from the new structures. This, however, did not make the Commission obsolete in combatting the crisis. On the contrary, it negotiated and monitored the mechanisms of fiscal assistance and expedited the reform of substantive law.[22] Still, the rise of highly federalized institutions, such as regulatory agencies or the SSM reduced the Commission's traditionally strong position. Its role shifted from engineering legal change to executing Member State plans. As a counterstrategy, the Commission emphasized the nature of newly founded institutions as expert committees. Through this commitment to expertise rather than national interest, the Commission and European legislator sought to establish allegiance of the national representatives to the EU.[23]

The role of the European Parliament (EP) did not significantly change during the debt crisis. Although the EP was involved in almost all legislative procedures, it did not gain a dominant role during the crisis.[24] The nature of economic legislation as a field of expert regulation might have contributed to that.[25]

III. Innovation in regulatory and institutional law

Public governance concentrated on regulatory law and can be interpreted as both a struggle for control of the financial markets and of the enforcement practices of the Member States. It focused its efforts on the substantive and institutional law of the European economic and financial system.

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22 Michael W Bauer and Stefan Becker, 'Debate: From the front line to the back stage – how the financial crisis has quietly strengthened the European Commission' (2014) 34 Public Money & Management 161.

23 See only Art 41 Regulations (EU) No 1093/2010, 1094/2010, 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESAs Regulation).

24 Nathalie Brack and Olivier Costa, 'Introduction: the European Parliament at a crossroads' (2018) 24 The Journal of Legislative Studies 1.

25 Edoardo Bressanelli and Nicola Chelotti, 'The European Parliament and economic governance: explaining a case of limited influence' (2018) 24 The Journal of Legislative Studies 72.

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These measures were complemented by fiscal mechanisms during the European debt crisis.

III.1. Substantive law: Control through uniformity and knowledge

III.1.1. Building uniformity and gathering information

a. Pre-crisis financial markets regulation was based on seemingly uniform European acts. In stark contrast to this, European markets still displayed a highly diverse regulatory landscape. This has been identified as one of the main reasons of the financial markets crisis: certain Member States had 'gold-plated' their transformation acts[26] and – citing the specific development of their financial markets as a reason[27] – established stricter requirements than the European legislation. Other Member States did not fully enforce European law to protect national depositors and credit institutions.[28] As a first order of business, regulators therefore sought to establish a 'level playing field'.[29] At the heart of this effort lies the idea of a *single rule book* containing all the relevant regulations of each sector. This approach is one of the most consequential instances of IPG in regulatory law.

   Just a few years later, all European financial markets law had been overhauled. Regulatory acts are now designed to form a more tight-knit substantive law in order to ensure uniformity. Provisions are more detailed and finer-grained than before. Simultaneously, in many instances, directives, which are only legally binding with regard to their aim (Article 288(3) TFEU), have been replaced or complemented by regulations that are legally binding in their entirety (Article 288(2) TFEU). This applies

26 Discussing the practice Larisa Dragomir, *European Prudential Banking Regulation and Supervision* (Taylor & Francis 2010) 153 ff.

27 See for a post-crisis instance: 'The post-crisis EU financial regulatory framework: do the pieces fit?, 5th Report of Session 2014–15', UK House of Lords, HL Paper 103 2 February 2015 mn 239 <https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/103/103.pdf> accessed 17 March 2024.

28 Andrea Enria and Pedro Gustavo Teixeira, 'A new institutional framework for financial regulation and supervision' in Francesco Cannata and Mario Quagliariello (eds), *Basel III and beyond: A Guide to Banking Regulation after the Crisis* (Risk Books 2011) 421 ff.

29 Council of the European Union, 'Presidency Conclusions' (10 July 2009) (n 16) mn 16.

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in particular to the capital markets[30] and banking law. At the same time, most of the legal acts are subject to maximum harmonization:[31] the regulators of the Member States are forbidden to deviate from the requirements – even if they intend to gold-plate them. In addition, the use of soft law instruments for crucial details has been replaced by either binding forms of legislation or by guidelines of the European Supervisory Agencies (ESAs)[32] that have a *de facto* binding effect on market participants.[33]

In addition to material requirements, public governance focused intensively on the 'soft' factors of uniform enforcement. From early on, regulators sought to establish a common supervisory culture through the ESAs.[34] The realization that supervisory approaches influence enforcement just as deeply as substantive law led to efforts to strengthen a European understanding of the supervision of financial markets: joint training, reciprocal secondments, secondments to the European agencies and Commission, as well as peer review of supervisory practices were created for further communication and understanding among the markets administrators.[35] The European Central Bank and European System of Central Banks (ECSB) followed closely behind.[36] However, a complete change of administrative cultures was always viewed as a lengthy if not

30 Rüdiger Veil, 'Legislative powers for regulation financial markets', in Veil (ed), *European Capital Markets* (2nd edn, Hart Publishing 2017) § 3 36–52.

31 Thomas Möllers, 'Capital markets law in Europe – Too many rules too quick and complicated?' [2016] Osservatorio Del Diritto Cicile e Commercial 597.

32 European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities Markets Authority (ESMA).

33 Miriam Hartlapp and Emilia Korkea-aho, 'Whatever Law' and Teenage Member States?: The National Reception of EU Soft Law and how to Study it' in Mariolina Eliantonio, Emilia Korkea-aho and Oana Ştefan (eds), *EU Soft Law in the Member States* (Hart Publishing 2021) 68 ff.; Jakob Schemmel, *Europäische Finanzmarktverwaltung* (Mohr Siebeck 2018) 109 ff.

34 See eg Art 29 ESAs Regulation; for a result see European Insurance and Occupational Pensions Authority (EIOPA) 'A Common Supervisory Culture' (2017) <www.eiopa.europa.eu/document/download/9b2d986a-0093-4a99-8e8b-630a256c7114_en?filename=A%20Common%20Supervisory%20Culture%3A%20Booklet> accessed 17 March 2024.

35 For an overview see Ann-Katrin Wolff, *Cooperation Mechanisms Within the Administrative Framework of European Financial Supervision* (Nomos 2019) 109 ff.

36 European Central Bank, 'Guide to banking supervision' (November 2014) <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf> accessed 17 March 2024.

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unmanageable project.[37] Therefore, the focus of regulators shifted during the crisis from supervisory culture to supervisory institutions. The banking union had already complemented common supervisory standards by centralized supervision. This step towards an integrated supervisory approach has had a significant levelling effect on national supervisory practice.[38]

b. A second lesson of the European economic crises is that information is key when containing a financial crisis. Vital knowledge and information about certain institutions and the financial system either did not exist, were incomputable or were unavailable to national authorities during the early stages of the crisis. Additionally, national authorities were hesitant to share fundamental information to protect either the institutions or their own supervisory approach. The European legislator attempted to mend these deficiencies by establishing numerous data sharing obligations between the national authorities and their European counterparts. Secondary law lays down detailed responsibilities for supervisory bodies when dealing with relevant data. Article 35 of the ESAs Regulation[39], for example, grants ESAs the power to request information and regular reports of the competent authorities but also gives national authorities the opportunity to request information from the European authorities. According to its supervisory powers, the ECB is authorized to gather information directly from the institutions supervised and their employees (Article 10 of the SSM Regulation[40]) and can share this information with national authorities for the purpose of supervising institutions (Article 27(2) of the SSM Regulation). Information type and range is further specified by tertiary law and guidelines that specify what information must be shared in certain supervisory contexts to defeat any protectionist

37 Niamh Moloney, 'Supervision in the wake of the financial crisis: achieving effective 'law in action' : a challenge for the EU' in Eddy Wymeersch, Klaus Hopt and Guido Ferrarini (eds), *Financial Regulation* (Oxford UP 2012) mn 4.65 ff; for an overview of national supervisory cultures and their differences: Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn Oxford UP 2014) 1004 ff.

38 Angelika Sporenberg, 'Joint Supervisory Teams: European cooperation within the SSM in practice' (*BaFin*, 17 October 2018 <www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2018/fa_bj_1809_aufsichtsteams_JSTs_en.html> accessed 17 March 2024.

39 Regulations (EU) No 1093/2010, 1094/2010, 1095/2010 of the European Parliament and of the Council of 11/24/2010 (ESAs Regulation).

40 Council Regulation (EU) No 1024/2013 of 15 October 2013 (SSM-Regulation).

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reservations.[41] European and national authorities are also legally obliged to ensure data quality.[42]

However, the authorities not only collect information, but also provide new information sources. Periodic stress testing has proved to be one of the most consequential methods of information sourcing. During stress tests, selected characteristics of financial institutions are confronted with deteriorating market scenarios to assess the ability of the institutions to cope with financial and economic shocks. Initially, stress testing was used to address the prevailing uncertainty about the quality of balance sheets of most credit institutions, but it has recently developed into an integral part of the European supervision.[43] One of the most prominent stress tests is the Supervisory Review and Evaluation Process (SREP) through which the ECB, the European Systemic Risk Board and the European Banking Authority (EBA) annually assesses the resilience of 'significant' credit institutions of the eurozone.[44]

III.1.2. Ensuring uniformity by enforcement

A more consistent and informed approach, however, did not constitute a sufficient response to the financial crisis. Further changes in law-making (a.) and enforcement (b.) were designed to further improve the ponderous and inadequate regulatory style of the European financial markets.

a. Law-making had been identified as being too slow and inappropriate for the fast and challenging regulatory environment of the financial markets. Therefore, the European legislator developed 'technical standards' to complement the slow legislative process. Technical standards are based on Articles 290 and 291 TFEU and assume the form of delegated and implementing acts. They can be issued by the Commission if the legislat-

41 See eg Commission delegated regulation (EU) No 524/2014, 12/3/2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information that competent authorities of home and host Member States supply to one another.

42 See eg Art 4(1) of Decision ECB/2014/29 of 2 July 2014, as amended by Decision ECB/2017/23 of 3 August 2017.

43 Elizabeth McCaul, 'The evolution of stress testing in banking supervision' (Speech, 10 December 2021) <www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp211210~333effaef3.en.html> accessed 17 March 2024.

44 Art 4(1)(f) Regulation (EU) No 1024/2013 of the Council of 15 October 2013 (SSM Regulation).

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or has included a mandate for technical standards in the secondary law. However, the Commission is *de facto* limited to rubber stamp technical standards drafted by the ESAs.

The authorities (the ESAs) draft the technical standards. These drafts must be adopted by the commission without any changes. Although the Commission can object to draft technical standards, such an objection is only justified 'if [the standards] were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market' (Article 14 of the ESAs Regulation). Even if this threshold is met, the Commission can only amend the draft in close coordination with the respective ESA. The intricate design of the technical standards is due to European constitutional law that prohibits agency law-making and is testament to the intention of the legislators: in utilizing the ESAs, the legislator does not only eliminate the laborious European legislative procedure, but also activates the expertise of the national authorities, since their main governance body – the Board of Supervisors – consists of the 27 heads of the national authorities supervising the relevant financial sectors.

With the founding of the banking union, the ECB was also given even greater legislative powers under the same rationale: the ECB can adopt 'regulations' under the SSM Regulation. The scope of this power is strictly limited 'to the extent necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by' the SSM Regulation (Article 4(3) of the SSM Regulation). The provisions of the ECB Regulation are directly applicable and legally binding.[45]

In addition to these binding instruments, the post-crisis law allows for a great deal of soft law. The ESA Guidelines constitute the most remarkable example of this trend. Although the ESA Guidelines are not legally binding, they are designed to ensure compliance: non-compliant national authorities must notify the ESA, justify their deviation and their non-compliance can be published (Article 16 of the ESAs Regulation). The regime is also applicable to market participants. Other soft law instruments include the ECB guidelines, ECB recommendations and ESA recommendations.

45 Lena Boucon and Daniela Jaros, 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration' (2018) 10 European Journal of Legal Studies 155, 168.

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b. In order to ensure compliance with the overhauled law, the legislator paid close attention to enforcement. A Member State potentially stepping out of line was a dominating concern. Such violations are usually subject to the treaty infringement procedures (Articles 258, 259 TFEU). However, the procedures were considered too slow and ineffective to bring about relief during a potential future crisis. Therefore, two alternative enforcement models were put into place for the financial markets: supervising the supervisors and European supervision.
   1. The ESAs are deployed to supervise the national supervisors.[46] Their powers are divided into three subcategories (Article 17 of the ESAs Regulation: Breach of Union Law; Article 18 of the ESA Regulation: Action in emergency situations; Article 19 of the ESAs Regulation: Settlement of disagreements between competent authorities in cross-border situations). The power to avert a breach of EU law is the most important competence of the ESAs. According to Article 17(6) of the ESAs Regulation the authorities can adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law. This power constituted a significant departure from European constitutional law that had been limiting most substantive decisions to European institutions. To allay concerns about its constitutionality the procedure is multi-layered and involves the Commission as a European institution. It resembles a reduced infringement procedure that includes a number of information duties. However, since the procedure is specifically tailored so as to not pose risks to its constitutionality, its application is rather limited. Accordingly, to this day, the procedure has never been used. Only the emergency competences of the ESAs are deemed highly effective, since they do not possess noteworthy requirements except for the statement regarding an emergency situation by the EcoFin (Article 18(2) of the ESAs Regulation). However, the competence to determine the existence of an emergency situation is also limited to a breach of Union law.

46 Only exception to this rule is the direct supervision of Credit Rating Agencies, cf Regulation (EC) No 1060/2009 of the European Parliament and the Council of 16 September 2009 on credit rating agencies. Instructive Gudula Deipenbrock, ‘Direct Supervisory Powers of the European Securities and Markets Authority (ESMA) in the Realm of Credit Rating Agencies – Some Critical Observations in a Broader Context’ (2018) 29 European Business Law Review 169.

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2. In contrast to this rather timid approach, the ECB has been equipped with the power to supervise financial institutions. During the first wave of institutional reforms, the European legislator still shied away from direct European supervision of credit institutions. However, during the fiscal crisis the hazardous link between public finance and failing credit institutions became one of the major problems in stabilizing the economies of the Member States. European supervision also addressed the need of major credit institutions for more consistent supervision in various Member States. The SSM was installed to realize a truly European approach towards banking supervision in the eurozone. It applies to 'significant' credit institutions that either exceed a certain asset value, are of economic importance to a member state or the EU economy as a whole or engage in above-average cross border activities. Additionally, if a credit institution requests direct public financial assistance, the SSM Regulation applies to it. This stern Europeanization of supervision has been complemented with a variety of member state involvement. Ongoing supervision is conducted by Joint Supervisory Teams (JSTs) for every credit institution with ECB staff and staff members of the relevant national authorities of those countries in which the respective institution has established subsidiaries.[47] JSTs organize and exercise day-to-day supervision and coordinate their efforts with the respective national authorities. Decisions of the ECB are drafted by each JST, approved by the ECB Supervisory Board and adopted by the ECB Governing Council under the non-objection procedure (Article 26(8) of the SSM Regulation). Both are composed of ECB representatives and representatives of the national authorities.

   The coordinated supervision is complemented by one of the most extensive instances of IGP: According to Article 4(3) of the SSM Regulation, the ECB, in its supervisory role, applies Union law and, where Union law is composed of Directives, the national legislation transposing those Directives. An application of national law by European

47 Instructive Christos Gortsos, *European Central Banking Law: The Role of the European Central Bank and National Central Banks under European Law* (Palgrave Macmillan 2020) 331 ff.

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institutions provides a 'genuine novelty' under European law.[48] The problems that arise from this arrangement have been discussed extensively in the academic literature.[49] The main focus of the discussion is, on the one hand, on how the ECB should proceed in the case of an inadequate transposition of a directive. Most scholars agree that this does not lead to the direct applicability of the directive and even inadequately transposed national law must be applied by the ECB if it cannot be corrected through interpretation.[50] On the other hand, scholars have questioned the democratic legitimacy of the SSM Regulation. The independence of the ECB that also applies to its supervisory mandate has been identified as one of the main legitimacy problems. However, this deficit is compensated by certain institutional arrangements that ensure overall sufficient democratic legitimacy.[51]

III.2. Institutional law: Control through supervision

The institutional law of financial markets regulation and supervision underwent significant change during the financial crisis. National and European players sought to establish more centralized institutions. The efforts aimed to create a regulatory environment in which legislation would be perpetually formed and reconsidered by administrative bodies. The *Lamfalussy*

48 See Andreas Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law' (2014) 21 Maastricht Journal of European and Comparative Law 89, 109.

49 Cf Fabian Amtenbrink, The Application of National Law by the European Central Bank: Challenging European Legal Doctrine?', in European Central Bank (ed) *Building bridges: central banking law in an interconnected world. ECB Legal Conference 2019* (ECB 2019) 136; Boucon and Jaros (n 45) 155; Andrea Biondi and Alessandro Spano, 'The ECB and the Application of National Law in the SSM: New Yet Old…' (2020) 31 European Business Law Review 1023; Enrico Peuker, 'Die Anwendung nationaler Rechtsvorschriften durch Unionsorgane – ein Konstruktionsfehler der europäischen Bankenaufsicht' (2014) 69 JuristenZeitung 764; Gianni Lo Schiavo, 'The ECB and its application of national law in the SSM', in Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 177.

50 Amtenbrink (n 49) 108–109; Alexander Kornezov, 'The application of national law by the ECB – a maze of (un)answered questions' in European Central Bank (ed), *ESCB Legal Conference 2016* (ECB 2016) 279.

51 Cf German Federal Constitutional Court, BVerfGE 151, 202 mn 208–230.

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process of 2002 was a first step in this direction.[52] However, the financial crisis had shown that a more integrated institutional system was needed. Over the course of five years the legislator created new agencies (III.2.1) and the banking union (III.2.2). Eurozone states, in an attempt to strengthen the European banking system, also entered into intergovernmental treaties.

III.2.1. European agencies

The ESAs were established in 2011. They are, to this day, the most integrated and powerful regulatory agencies of the European Union. Even though the ESAs Regulations are worded equally, their development has taken quite different routes over the last ten years:[53] the ESMA has become a highly influential regulator and determines the supervisory approach across the financial markets, whereas the EBA had to face the ECB as an influential competitor from an early stage. The EIOPA's influence remains limited to the capital requirements of insurance providers (Solvency II Regulation).

As independent European agencies the ESAs employ staff, have their own budget and are headed by a chair. As hybrid agencies, however, their main governance body (the board of supervisors) consists of Member State representatives. Their federalized structure is a manifestation of the federalized approach to crisis management in the EU. It ensures a strong national influence on the operations of the ESAs, which Member States defended against the review recommendations of the Commission that would have given more independent decision powers to the staff of the ESAs.[54]

III.2.2. The Banking Union

a. As discussed, the SSM Regulation assigned the ECB the task to supervise 'significant' credit institutions in the eurozone as the first pillar of the banking union. By vesting the ECB with microprudential competence, the legislator broke with the tradition of Member State supervision in the

52 Instructive Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford UP 2011) 273 ff.
53 Kostas Botopoulos, 'The European Supervisory Authorities: role-models or in need of re-modelling?' (2020) 21 ERA Forum 177, 180–182.
54 Pierre Schamo, 'Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism' (2021) 40 Yearbook of European Law 265, 286 ff.

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financial markets – one of the most consequential instances of IPG. As a result, the question was raised as to whether Article 127(6) TFEU could be a sufficient treaty basis for such an arrangement.[55] Additionally, the scope of the ECB's competence is viewed as obstructive to a consistent approach towards European banking supervision.[56] This 'incomplete' banking union is a direct result of the political and economic interests of fiscally strong nations, such as Germany and France. Germany, especially, was pushing for supervisory competence to be limited to 'significant' credit institutions to protect its differentiated banking market. As a compromise, the ECB was granted the final responsibility to assume direct supervision over credit institutions that have requested direct public assistance of the European Stability Mechanism (ESM) or the European Financial Stability Facility (EFSF). The SSM institutionalizes hybrid banking supervision. However, the composition of the Supervisory Board – the main governing body of the SSM (Article 26 of the SSM Regulation) – strengthens the European influence in comparison to the Board of Supervisors of the ESAs.[57] It consists of the eurozone national banking supervisors, four ECB representatives, as well as the Chair and the Vice-Chair as appointed members.

b. The second pillar of the banking union is the Single Resolution Mechanism (SRM). It complements the SSM and was introduced to tackle the issue of struggling credit institutions which are so closely intertwined with the financial system that their failure could destabilize the economy of a member state ('too big to fail'). The objective of the SRM was to break the connection between a fragile banking sector and the finances of the Member States by preventing public bail-outs.[58] To that end, the SRM established the Single Resolution Board (SRB), which mirrors the

55 See eg Takis Tridimas, 'The constitutional dimension of Banking Union', in Stefan Grundmann and Hans-W Micklitz (eds), *The European Banking Union and Constitution* (Hart Publishing 2019) 25–48, 36–38; Alberto de Gregorio Merino, 'The Banking Union in EU law: an EU institutional law perspective', in Gianni Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 29–48.

56 Marius Skuodis, 'Playing the creation of the European banking union: what union for which Member States?' (2018) 40 Journal of European Integration 99; Lucia Quaglia, 'The politics of an 'incomplete' Banking Union and its 'asymmetric' effects' (2019) 41 Journal of European Integration 955.

57 Schamo (n 54) 285–287.

58 For further details see Agnieszka Smoleńska, 'Multilevel cooperation in the EU resolution of cross-border bank groups: lessons from the non-euro area Member

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SSM's supervisory board in composition. The SRB adopts a resolution scheme when a credit institution is failing or likely to fail (Article 18 SRM Regulation[59]). EcoFin and the Commission can veto the scheme within 24 hours. A resolution scheme involves the measures the SRB will be deploying to dissolve or rescue the failing credit institution.[60] These measures correspond with the instruments of the BRRD[61] which harmonized resolution tools across the Member States. The SRM is complemented by the Single Resolution Fund (SRF) that is owned by the board. It consists of the contributions of the eurozone credit institutions and has a target of one percent of the amount of covered deposits of all credit institutions (approximately 55 billion euros). The fund cannot be used to absorb losses of a failing institution but is designed to support the resolution measures.

III.3. Fiscal mechanisms: Control through monetary assistance

III.3.1. The EFSF and ESM

In spring 2010, Greece's ability to roll over its debts was tarnished by its high debt positions. A possible Greek default threatened the whole of the eurozone because of its integrated banking market. European credit institutions held a substantial share of the exposure of Greece's government bonds. After two liquidity injections by the eurozone states, the International Monetary Fund (IMF) and the Commission did not calm the markets and the Member States resorted to shock and awe tactics. As inter-banking lending froze, EcoFin announced the European Financial Stability Facility as a part of a 750 billion euro bail-out package. It was structured as an intergovernmental Special Purpose Vehicle (SPV) that should sell bonds backed by guarantees of Member States resulting in an effective capacity

States joining the Single Resolution Mechanism (SRM)' (2022) 23 Journal of Banking Regulation 43–44.

59 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (SRM-R).

60 See Art 8–12 SRM-R.

61 Directive 2014/59/EU of the European Parliament and of the Council of 5 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD).

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of 440 billion euros.[62] The guarantees were distributed among the Member States according to a contribution key, with Germany taking up over a quarter of that amount. The SPV was created as a corporation under the law of Luxembourg. This structure ensured absolute member state control, allowed for greater efficiency than assigning a relief fund to the European Commission[63] and aimed at averting constitutional frictions with Article 123 and 125 TFEU.[64]

The EFSF, as an intergovernmental instrument, however, still relied on the European institutions for technical and distribution support: loan packages were negotiated by the 'troika' that focused on reducing the debt ratio of applying countries which led to wide-ranging effects on the national economy. The final decision on EFSF deployment were made during the sessions of EcoFin, which changed its function to an international law body when discussing the EFSF: economically strong states acted as *de facto* veto powers. In the two and a half years of its existence, the EFSF has supported three states: Greece, Ireland and Portugal. The debt crisis, however, proved resistant to short-term solutions.

The Member States therefore phased the limited EFSF into a permanent facility: the European Stability Mechanism (ESM).[65] Before this, after consulting the European Parliament and the Commission, the EC changed Article 136 TFEU according to Article 48 of the Treaty on European Union (TEU) to include authorization for the eurozone Member States to establish a stability mechanism.[66] The objective was to eliminate the remaining frictions between the facility and the European treaties. The ESM has an effective capacity of around 780 billion euros and supported Cyprus, Greece, Ireland, Portugal and Spain. Even though the mechanism proved effective in preventing defaults of Member States, it has given rise to criticism over

62 See EFSF Framework Agreement, <www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 17 March 2024.
63 Ledina Gocaj and Sophie Meunier, 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis' (2013) 35 Journal of European Integration 239, 245.
64 See Jean-Victor Louis, 'The No-Bailout Clause and Rescue Packages' (2010) 47 Common Market Law Review 971.
65 ESM-Treaty, T/ESM 2012-HR/en (2 February 2012) <www.esm.europa.eu/system/files/document/2023-10/05-TESM2-HR1.en12.pdf> accessed 17 March 2024.
66 Council Decision 2011/199/EU of 25 March 2011 amending Art 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

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its mutualization effects on the finances of the Member States.[67] Therefore, the EFSF and ESM became subject to constitutional contestation before the German Federal Constitutional Court (FCC) which, however, rejected the complaints.[68]

III.3.2. OMT and PSPP

The ECB initiated its second market sovereign bond purchase programmes in parallel with the fiscal efforts of the eurozone Member States. The Outright Monetary Transactions (OMT) programme was introduced in 2010 after a statement of the former ECB president, Mario Draghi, that the bank would do 'whatever it takes' to save the euro. The OMT was aimed at countries that had regained access to private lending after receiving monetary support from the EFSF or ESM. If these conditions were met and the ECB found that the interest rate values of sovereign bonds were 'distressed', the bank would buy government bonds that matured in 1 to 3 years. Even though no bonds of any countries were ever eligible for the programme, the OMT had a calming effect on the bond market by reducing bond yields by up to two percentage points.[69]

As a part of the ECB's efforts to increase money supply and support consumption and investment spending, it initiated the Public Sector Purchase Programme (PSPP) in 2015. This programme is aimed at bonds issued by public authorities (eurozone Member States, European institutions and municipalities). The ECB and National Central Banks buy public bonds according to a purchase key up to a certain percentage and thereby reduce long term interest rates. This has led to a massive change in ownership of public sector bonds and has reduced interest rates to historical lows.[70]

The measures received fierce criticism, especially from Germany. OMT was identified as an economic and not so much as a monetary measure

67 See eg Dirk Meyer, 'Kosten des Europäischen Finanzstabilisierungsmechanismus (EFSM) aus deutscher Sicht' (2011) 231 Jahrbücher für Nationalökonomie und Statistik 288.

68 BVerfGE 129, 124 (EFSF); BVerfGE 132, 195 (ESM).

69 Carlo Altavilla, Domenico Giannone and Michele Lenza, 'The Financial and Macroeconomic Effects of OMT Announcements' (2014) European Central Bank Working Paper Series No 1707 <www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1707.pdf> accessed 17 March 2024.

70 See Harmen Lehment, 'Fiscal implications of the ECB's Public Sector Purchase Programme' (2019) 162 Dans Revue de l'OFCE 89.

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and therefore as a breach of the ECB's mandate (Articles 119 and 127 TFEU). The OMT was challenged before the German Federal Constitutional Court, which requested a preliminary ruling of the Court of Justice of the European Union (CJEU).[71] The CJEU, however, declared OMT as constitutionally sound because of the programme's requirements.[72] The German Federal Constitutional Court followed the ruling and did not invoke its identity and *ultra vires* jurisdiction.[73] However, the review of the PSPP took a different route: after the CJEU had again confirmed that the ECB was within its monetary mandate in buying from the bond market,[74] the German Federal Constitutional Court ruled for the first time in its history that both the ECB and CJEU were *ultra vires* in affirming the constitutionality of the ECB's measures, i.e. they had acted outside of their jurisdiction.[75] The Federal Constitutional Court held that the ECB had not publicly outlined the reason for and proportionality of the PSPP and that the CJEU had failed to properly review the action of the ECB. The judgment generated severe tensions between the Germany and the EU and resulted in the initiation of a treaty infringement procedure by the Commission against Germany.

IV. Legitimacy

The IPG of European institutions naturally leads to legitimacy frictions as the powers of the EU are narrowly limited by the European Treaties.

IV.1. Constitutional resilience and evolution

Most of the institutional and competency changes resulted in questions as to whether they are compatible with the European Treaties (ESAs,[76] SSM,[77]

71 BVerfGE 142, 123.
72 Case C-62/14 *Gauweiler and others v Germany* EU:C:2015:400.
73 BVerfGE 142, 123.
74 Case C-493/17 *Weiss and others* EU:C:2018:1000.
75 BVerfGE 154, 17.
76 Pieter van Cleynenbreuge, 'Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies' (2014) 21 Maastricht Journal of European and Comparative Law 64.
77 Niamh Moloney, 'European Banking Union: Assessing its risks and resilience' (2014) 51 Common Market Law Review 1609, 1657 ff.

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SRM,[78] ESM[79]). The challenges applied to the constitutional basis of these changes in the Treaties and the respective competences of the newly found institutions.

In the case of the ESAs, this resulted in a seminal decision of the CJEU. The UK had brought an action for annulment before the CJEU against the European Securities and Markets Authority's power to ban short selling.[80] In its decision, the Court updated the Meroni-doctrine[81] that had until then proscribed the delegation of discretionary to non-treaty bodies and seemed to stand at odds with the decision powers of the ESAs. The Court, however, stated that the devolution to a non-treaty institution (such as an agency) was deemed lawful if the power transferred was 'technical' in nature, i.e. limited the institution's discretion by conditions or criteria.[82] Additionally, the court ruled that the ESA's technical standards were compatible with European law: Articles 290 and 291 TFEU do not prevent the European legislator from establishing other rule-making powers if these powers do not undermine the rules governing the delegation of powers laid down in Articles 290 and 291 TFEU. The decision was a constitutional breakthrough and put genuine agency rule-making within reach.

However, the evolution of European Treaty law has encountered suspicion at the national level. The contestation of institutional reforms and the fiscal support mechanism before the German Federal Constitutional Court was a reoccurring theme of the European crisis. The CJEU proved to be unresponsive to the German concern that the reforms were overstretching European competences.

78 Edoardo Chiti and Pedro Gustavo Teixeira, The constitutional implications of the European responses to the financial and public debt crisis (2013) 50 Common Market Law Review 683, 694 ff.

79 See Case C-370/12 *Pringle* EU:C:2012:756.

80 Case C-270/12 *UK and others EU*:C:2014:18.

81 Case 9/56 *Meroni v ECSC* [1958] ECR 133, EU:C:1958:7.

82 For details see Jakob Schemmel, 'Regulating European financial markets between crisis and Brexit' (2020) 28 Journal of Financial Regulation and Compliance 503.

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IV.2. Expert governance and national sovereignty

The European approach to the financial and economic crisis resulted in grave concerns about its democratic legitimacy.[83] Of the many questions, this chapter only addresses two:

a. Troika and fiscal programmes: during the fiscal crisis, the strong fiscal nations, as well as ECB and IWF imposed strict fiscal and privatization rules on Member States that were applying for financial assistance.[84] The wide-ranging cuts in the public sector and the sale of state infrastructure to pay off debts that had been amassed over decades contributed to an economic depression that lasted over ten years. As the Greek economic and social systems collapsed, almost a third of Greece's population was living below the poverty line and youth unemployment reached record highs.[85] Whether the economic decisions imposed on Greece were necessary or not, they resulted in a loss of democratic accountability both at the European and the national level: troika as an expert body drafted and executed its Economic Adjustment Programmes and the respective national governments and parliaments had to oblige to retain access to the relief funds.

b. The governance systems established during the crises are hybrid structures that transfer member state influence into European decision-making. This has led to fuzzy legitimacy patterns further confusing democratic accountability and increasing the potential for scapegoating Euro-

83 See only Bruno de Witte, Adrienne Héritier and Alexander Trechsel, *The Euro Crisis and the State of European Democracy* (European University Institute 2012) <https://eur-lex.europa.eu/resource.html?uri=cellar:16305f25-3d95-45ae-9637-9989463c1197.0001.01/DOC_1&format=PDF> accessed 17 March 2024; Ben Crum and Stefano Merlo, 'Democratic legitimacy in the post-crisis EMU' (2020) 42 Journal of European Integration 399; Anna-Lena Högenauer and David Howarth, 'The democratic deficit and European Central Bank crisis monetary policies' (2019) 26 Maastricht Journal of European and Comparative Law 26.

84 For an overview of Greece, Ireland and Portugal see Niamh Hardiman and others, 'The Troika's Variations on a Trio: Why the Loan Programmes Worked so Differently in Greece, Ireland, and Portugal' (2017) UCD Geary Institute for Public Policy Discussion Paper Series, Geary WP2017/11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3060346> accessed 17 March 2024.

85 Ioannis Bournakis and others, 'Introduction' in Bournakis and others (eds), *Political Economy Perspectives on the Greek Crisis* (Palgrave Macmillan 2017).

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pean institutions.[86] The European strategy to push for more expert solutions in order to neutralize member state influence does not redress the problem since the democratic legitimacy of such expert decisions is still a problem. Additionally, the CJEU broadened the power of executive decision-making by expert bodies which will further diminish democratic accountability. These problems result in a general impression that considers European governance fraught with democratic unresponsiveness. The German contestation of ECB measures can be read as an expression of these concerns (see III.3.2.).

V. Key findings

IPG was at the heart of combating the European financial and economic crisis. The European approach reveals different aspects of IPG that are closely related to the EU as an intragovernmental organization.

1. Striving for Uniformity. The post-crisis regulatory structure aims at a uniform regulatory environment for market participants. European regulatory law and institutions have been established to serve this purpose. This has led to a long-anticipated push towards a *single rule book* for European financial markets that reduces the regulatory leeway for Member States. ESAs were established to further unify supervision and have been granted quasi-legislative, as well as decision-making powers. Even the most integrated European regulatory agency, however, has been overshadowed by the institutional reforms of the ECB: 'significant' institutions are now supervised by the SSM, i.e. the ECB. The new mechanism has been complemented by the SRM so that banks supervised by ECB would not only operate but also fail on the European level.
2. Federalized authority. The crisis did not strengthen the European executive. Member states made most of the important political decisions using the EC as a deliberation forum, whereas European institutions were marginalized. The strong and persistent involvement arises from the high budgetary importance of the financial markets and fiscal matters. Due to the proximity of these questions to the sovereignty of the Member States, they are, in most cases, dealt with via intergovernmental negotiation.

86 Espen D H Olsen and Guri Rosén, 'The EU's Response to the Financial Crisis' in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2018) 381, 389–390.

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In certain cases, this has given politically and fiscally strong Member States, i.e. Germany, *de facto* veto powers over negotiations and hindered a further integrated European solution.

3. Federalized institutions. The federalized power fed into the newly-established institutions. Even though reforms transferred significant regulatory and supervisory power to the European level, they rarely increased the power of established European institutions as such, but rather established new structures and retained the most important decisions for the member state representatives by their federalized governance (ESAs, SSM, SRM). This approach of 'new intergovernmentalism'[87] found its most extreme manifestation in the fiscal mechanisms (EFSF, ESM) that were established outside of the EU as an international law instrument. Even though all member state representatives are required to perform their mandate independently, the federalized structures have led to hybrid institutions that resemble 'mini'-councils. However, it is likely that the new institutions will be depoliticized by distance as the political focus shifts away from financial and fiscal matters. The influence of the Member States has already declined but it can forcefully return when needed through the established governance structure.
4. Incremental change. Although, the changes that were implemented were wide-reaching, they did not result in a completely unified European financial markets law with its own supervisor and regulator. Even IPG mostly assumed the form of 'layering', building on already existing structures and improving mechanisms rather than exchanging them completely. There are two reasons for this: first, Member States were hesitant to share central competences in vital areas. The protection of their own financial markets constituted a strong interest that was only overcome in certain areas. Second, the European Treaties had a limiting effect at least on the institutional changes.
5. Drawing from Historical Institutionalism, it has been observed that EU governance reform is most productive during crises and falls into procrastination, i.e. small, incremental changes, in non-crisis circumstances.[88] Since crisis measures at the European level tend to result in

87 Christopher J Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 Journal of Common Market Studies 703.

88 Olsen and Rosén (n 86) 393; Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Penguin 2019).

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legitimacy issues, this effect can lead to institutional reforms suffering from legal or legitimacy shortcomings. However, this does not cause friction at the European level because the CJEU has yet to develop a doctrine to demarcate competence spheres of the EU and its Member States.[89] At national level, however, these developments paint a different picture. The market support programmes of the ECB have drawn severe criticism culminating in a clash between the CJEU and the German Federal Constitutional Court. If this development proves to be an expression of general discontent with European Governance, it will constitute a real challenge to European IPG during crises.

89 Christiaan Timmermans, 'ECJ Doctrines on Competences' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford UP 2014).

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Retrogression Disguised as ‘Innovation’: The Case of the ‘Executive State’ in Greece

Dimitrios Kivotidis

Abstract: It has been argued that the recently established model of the ‘Executive State’ in Greece has the potential to enhance the coordinated and effective action of the administration. The question is: to what end and for whose benefit? From Carl Schmitt’s call for a strong state to save the German economy in 1932 to New Public Management and the new Executive State, there is a thread that connects various theoretical views on the role of the state in dealing with crisis situations. This chapter will discuss elements of innovation in administration in the context of the last decade of socio-political developments in Greece: from the crisis legislation that has been introduced through the form of Memorandums of Understanding, to the legislative innovation of the ‘Executive State’ introduced with Act 4622/2019. These forms of policymaking will be approached in the light of the theoretical work on ‘authoritarian liberalism’. This concept denotes a critical view of the role of modern states in a capitalist economy, which requires a combination of strong central administrations, which are capable of facilitating conditions of profitability for private initiative, and depoliticized processes. Approaching law and administration together with issues of political economy necessitates a focus on the structural function of the administrative state in mediating the contradictions of a capitalist economy. The ‘Executive State’ will therefore be approached as an attempt to institutionalize the model of crisis law-making so as to accommodate the content of law-making, which continues the restriction of political and social rights.

I. Introduction

Whether one accepts that crisis situations, no matter how devastating, can also enhance innovative thinking and the application of innovative solutions to long-standing problems ultimately rests on what one understands by ‘crisis’ and ‘innovative solutions’. In the context of the Greek sovereign debt crisis, several ‘innovative solutions’ were introduced to deal with ‘long-standing problems’ of the economy and public administration.

This chapter critically assesses these solutions on the basis of a heterodox analysis and understanding of the crisis. It will focus on Act 4622/2019

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'on the Executive State',[1] which was enacted in July 2019 by the Hellenic Parliament and constituted the legislative measure that set the scene for the Kyriakos Mitsotakis administration. It could be argued that this reform was conducted after Greece exited the Memorandum programmes and therefore does not constitute an immediate result of the crisis. We believe differently. This paper will show the origins of this Act in Memorandum legislation. It will refer to respective reports produced during the crisis which called for administrative reform. But more importantly, it will assess this reform as an essential aspect of the authoritarian turn.

The evaluation of the Act's innovativeness relies on the interpretation of the crisis. As we shall shortly see, mainstream interpretations assess the Greek sovereign debt crisis as being caused by endogenous factors. On the contrary, heterodox interpretations, which are based on critical political economy, assess economic crises as structural characteristics of capitalist societies. 'Authoritarian statism'[2] and 'authoritarian liberalism'[3] are two of the terms that have been used to describe the authoritarian tendencies inherent in liberal institutional forms, which are awakened in the emergence of crisis situations. This chapter will address the literature addressing these terms in an attempt to trace the origins of the 'Executive State' in earlier historical attempts of administrative reform which followed an economic crisis.

We aim to focus on the issues of a concentration of power and depoliticization of public administration, understood in the context of such an authoritarian turn. From the ordoliberal models conceived in interwar Germany to deal with the consequences of the Great Depression, to the development of New Public Management in the aftermath of the first major capitalist crisis after World War II, authoritarian restructuring of institu-

1 We have decided to translate the word 'epitelikos' (επιτελικός) into 'executive', thereby using the term 'executive state' to convey the meaning of the term 'epiteliko kratos' (επιτελικό κράτος). The translation of this term is not a straightforward process as the term 'epitelikos' (as well as the term 'executive') can be used to describe functions of a strategic nature, as well as functions that execute policies developed and conceived by strategic institutions.

2 Nicos Poulantzas, *State, Power, Socialism* (Verso 2000) 219.

3 Indicatively see Agustín José Menéndez, 'Special Section: Herman Heller's Authoritarian Liberalism' (2015) 21 European Law Journal 285; Eva Nanopoulos and Fotis Vergis, *The Crisis behind the Euro-Crisis*: *The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge UP 2019); Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar Publishing 2019).

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tional forms, such as that introduced in Greece in 2019, has traditionally followed crisis situations. Such processes tend to involve the institutional concentration of power, as well as the depoliticization of policymaking; in other words the presentation of issues of high policy as technical and better resolved by experts rather than the people themselves. In this light, we shall argue that administrative reform in Greece can also be understood as the manifestation of this authoritarian tendency in administrative law and processes. A genealogy of the Executive State based on the concept of authoritarian liberalism will reveal this reform as an attempt to normalize the exceptional decision-making and regulatory processes that were used during the Greek sovereign debt crisis.

Based on the above, this chapter is structured as follows. The first section will compare two interpretation of the Greek sovereign debt crisis: a mainstream and a heterodox interpretation. If the dominant interpretation assesses the crisis as being caused by endemic factors and prescribed for solutions in the areas of labour and administrative policy, a heterodox interpretation challenges the technical assessment and solutions of the mainstream narrative and shows a more sinister and politically oriented content. The next section will analyse the main changes introduced with Act 4622/2019. It will examine its concentrationist structure and assess its main effects, focusing on the centralization of power and the depoliticization of the creation of public policy. The final section will complete the argument by setting out a genealogy of the Executive State. The aim is to present the recent administrative reform in Greece as a manifestation of a generalized tendency towards authoritarian solutions to crisis situations. Rather than innovative, the Act will be shown as being inspired by retrogressive aspects of authoritarian thought from the last century.

II. Competing interpretations of crisis

The diagnosis always determines what the remedy is for a disease. In the case of the Greek financial crisis, the form and content of the measures promoted to deal with it depended on the structure of the crisis itself. This section will compare the mainstream diagnosis, and the 'innovative' solutions it prescribes, to a heterodox diagnosis which challenges the innovativeness of such solutions.

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To begin with, mainstream public media, as well as academic literature, interpreted the crisis as a 'sovereign debt crisis'.[4] The Eurozone crisis in general, as manifested in the collapse of the economies of the European South, was attributed to the weaknesses in the governance of these specific countries. All these interpretations focused on reasons that are endogenous to specific Member States: administrative reasons (systems which foster political clientelism, and weak control of public expenditure) and economic reasons (low level of competitiveness, trade and investment imbalances and fiscal mismanagement). According to this narrative, Member States which had failed to implement measures to improve their competitiveness could not keep up with strong and growing economies and resorted to heavy borrowing, therefore increasing their sovereign debt.

Consequently, two levels of necessary reform were identified. On the one hand, the market, and more specifically the labour market, and on the other, the state and more specifically the body of administrative law. As for the former, the recipe to enhance the competitiveness of the Greek economy was found in the EU Commission's 1993 White Paper on 'Growth, Competitiveness, and Employment'.[5] The guiding principle that would restore its competitiveness and lead the Greek economy to growth was that of 'flexibility'. 'Flexibility' was supposed to counter unemployment, make the labour market accessible to several parts of the population and thereby drive down the cost of labour and enhance the competitiveness of the Greek economy. In turn, this would attract investment from national and transnational capital, thereby leading to growth.

The legal form for introducing this principle and affecting this radical change of coordinates of the Greek economy was commensurate to this goal. The necessary measures were introduced through the legal mechanism of Memorandums of Understanding. These have traditionally been integral to the IMF's structural adjustment programmes which have introduced aggressive neoliberal policies in several economies around the

4 Indicatively, see Kevin Featherstone, 'The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime' (2011) 49 Journal of Common Market Studies 193; George Kouretas and Prodromos Vlamis, 'The Greek Crisis: Causes and Implications' (2010) 57 Panoeconomicus 391; Nikolas Zahariadis, 'Greece's Debt Crisis: A National Tragedy of European Proportions' (2010) 21 Mediterranean Quarterly 38.

5 Commission, 'White paper on growth, competitiveness, and employment' COM (93) 700.

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world.[6] Such programmes were used in the context of the Eurozone crisis to introduce far-reaching reforms in several countries (Greece, Ireland, Spain, Cyprus, Portugal, etc.) as a necessary counterpart to their bail-out agreements.[7] The form of the Memorandum was crucial because it combined two elements which pushed with these unpopular measures irresistible force through the Greek legislature without substantive public discussion or popular contestation: i) the urgency of dealing with the crisis and avoiding default, and ii) the technical expertise required to deal with this.

The democratic processes were bypassed in this justification. Indeed, the Memorandums applied in Greece consist of lengthy documents which contain a list of measures aimed at radically reorienting the Greek economy and encompassing the whole spectrum of public policy-making: from fiscal policy and regulation of the financial sector, to privatizations, labour market reforms and reformation of the educational and judicial systems. Importantly, the Hellenic Parliament ratified all three Memorandums with the use of the emergency parliamentary procedure, which did not allow for substantive public consultation over the reforms.[8]

Yet, a key area of reform was not addressed through Memorandum legislation. Despite several mentions of its necessity in these documents and several draft bills and reports being produced during the crisis, the reform of public administration was conducted via an act of parliament several years after the final Memorandum was agreed. Nevertheless, administrative reform had emerged as one of the important requirements for dealing with the crisis by addressing its endemic causes since the beginning of the crisis. The solutions to the perennial problems of the Greek administration were drawn out in a report prepared by the Organization for Economic Cooperation and Development (OECD).

In a 2011 review of Greece's central administration, the OECD arrived at a series of general recommendations to address the weaknesses of Greek

6 Chelsea Brown, 'Democracy's Friend or Foe? The Effects of Recent IMF Conditional Lending in Latin America' (2009) 30 International Political Science Review 431.

7 Moisés J Schwartz and Shinji Takagi, *Background Papers on The IMF and the Crises in Greece, Ireland, and Portugal* (International Monetary Fund 2017).

8 Art 109 of the Standing Orders of the Greek Parliament provides that 'if a bill is characterized as urgent, it is processed and examined in one sitting', while 'the debate and passage of an urgent bill is concluded in one meeting which cannot last more than ten hours'. Furthermore, the process of ratifying an Act by the parliament is characterized as *interna corporis* and a therefore result is not subject to judicial review.

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administration which caused the crisis.[9] The main shortcomings of the Greek administrative system listed in the Report include: i) the lack of a strong and unified 'Governance Centre' equipped with the power to set 'strategic priorities', coordinate key ministries and ensure that government policies are effectively implemented;[10] ii) the lack of adequate structures for inter-ministerial policy coordination, management and supervision of public policies;[11] and iii) the exhaustive definition of administrative responsibilities by law or by executive decree, as a result of which the capacity of ministers to take undertake key initiatives is hindered.[12]

Administrative reform to create a 'steering state' therefore appeared as a necessity and the crisis provided an opportunity for this modernization process to take place. To address the above shortcomings, the OECD Report proceeded with a series of 'technical' recommendations, including: i) the reinforcement of an Executive Centre of governance responsible for the coordination and strategic planning of public policy; ii) the accountability of this Executive Governance Centre for progress in the unified-horizontal policies in all government sectors; iii) the creation of a stable structure, responsible for inter-ministerial coordination, as well as strategic units in each ministerial department; and iv) the strict separation between 'strategic' and 'executive' functions, the classification of the former into 'policy fields' in order to map the internal division of labour in the government, and the transfer of the latter to decentralized and self-governing bodies.[13]

The 'innovative' goal was to create a strong Executive Centre of coordination and implementation of public policy. Yet, there is another possible interpretation of this focus on administrative change; one that sees administrative reform as a necessity not in order to address the internal causes that led to the crisis but to ensure continuity of the implementation of political – rather than technical – measures that were introduced as a result of the

9 Organization for Economic Cooperation and Development (OECD), *OECD Public Governance Reviews – Greece: Review of the Central Administration* (OECD Publishing 2012).

10 ibid 78–80.

11 ibid 47, 96.

12 ibid 55.

13 ibid 96, 101, 107, 185. See also Papatolias, *Theory and Practice of the Executive State* (in Greek, Sakkoulas 2021) 127–129.

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crisis.[14] Such an interpretation assesses the process of administrative reform as part of a generalized strategy to enhance those characteristics of the state that would allow it to more effectively proceed with the implementation of unpopular measures and secure the reproduction of conditions which may be favourable for capitalist investment but are, consequently, devastating for the working and living conditions of the vast majority of the population. This interpretation of the remedy is based on a different diagnosis of the crisis altogether. From a heterodox perspective, the crisis may be understood as not something exceptional but as a structural characteristic of a capitalist society.

From the point of view of critical political economy, crises are cyclical in capitalism.[15] They provide evidence of the structural contradictions and unsustainability of the capitalist mode of production. A closer look into the economic laws of capitalism might provide us with an alternative interpretation of the measures introduced to reform the labour market, as well as the administrative state, in the context of the Greek crisis. Critical political economy emphasizes the law of the tendency of the rate of profit to fall as key to understanding the recurring nature of crises in capitalism.[16] According to this law, over time, the value of the means of production (machinery, offices and other equipment) will rise with respect to the value of labour (the cost of employing a labour force). However, since value (and profit) is only created by labour, then, over time, the value produced by labour will decline with respect to the cost of investing in means of production and labour. Consequently, the rate of profit will tend to fall.[17]

Nevertheless, this law appears as a tendency because of the operation of various countertendencies. These include the intensification of the exploitation of labour, the depression of wages below the value of labour, the reduction in the value of constant capital, foreign trade, etc.[18] The analytic-

14 Stella Ladi, 'Austerity Politics and Administrative Reform: The Eurozone Crisis and Its Impact upon Greek Public Administration' (2014) 12 Comparative European Politics 184.

15 See for instance Paul Mattick Jr, *Economic Crisis and Crisis Theory* (Routledge 1981) and Simon Clarke, *Marx's Theory of Crisis* (Palgrave Macmillan 1993).

16 Guglielmo Carchedi and Michael Roberts (eds), *World in Crisis: A Global Analysis of Marx's Law of Profitability* (Haymarket Books 2018).

17 See Michael Roberts, 'The Marxist theory of economic crises in capitalism – part one' (*Michael Roberts Blog*, 27 December 2015) >https://thenextrecession.wordpress.com/2015/12/27/the-marxist-theory-of-economic-crises-in-capitalism-part-one/> accessed 19 March 2024.

18 Karl Marx, *Capital: Volume 3* (Penguin 1992) 338–348.

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al value of this law in explaining the prescribed solutions in a capitalist crisis can easily be seen. If reluctance to invest is not a result of a lack of effective demand but of low expected profitability, then restoring conditions of profitability becomes a necessity. And if the latter can be done primarily through increasing the exploitation of labour, then the deregulation of the labour market and its reorganization based on the principle of flexibility assumes a prominent role in the list of measures to remedy the crisis.

Indeed, flexibility may be nominally targeted at countering unemployment, yet the objective of reducing unemployment in reality reflects the true goal of reducing labour costs through the intensified exploitation of a wider labour force.[19] Part-time, temporary relations (as well as the introduction of educational schemes for the unemployed) favour the inclusion of previously excluded elements in the workforce, so that the abundance of supply and the increase in the exploitation of workers reduce labour costs. Therefore, flexibility translates into measures which promote part-time and temporary contracts and performance-related pay, through the elimination of collective bargaining and the facilitation of dismissals during a period of recession.[20] Therefore, according to this interpretation, 'flexibility' stands for the deregulation of labour law and the consequent worsening of working and living conditions.

But what does the strong, 'steering', executive state stand for? The above heterodox approach to capitalist institutional structures recognizes the state's integral role in the process of capitalist production and reproduction. The state is conceived 'not as a neutral instrument but as a form-determined set of institutions within the world market' which 'by virtue of their structural separation from 'the economy' under capitalism, are integral

19 Byasdeb Dasgupta, 'Financialization, Labour Market Flexibility, Global Crisis and New Imperialism – A Marxist Perspective' (2013) Fondation Maison des sciences de l'homme Working Paper Series no 34 June 2013 <https://shs.hal.science/halshs-00840831/document> accessed 19 March 2024.

20 Apostolos Dedoussopoulos and others, 'Assessing the impact of the memoranda on Greek labour market and labour relations' (2013) International Labour Office: Working Paper n 53 <www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232796.pdf> accessed 19 March 2024; Aristea Koukiadaki and Damian Grimshaw, 'Evaluating the effects of the structural labour market reforms on collective bargaining in Greece'(2016) International Labour Office: Conditions of Work and Employment Series no 85 <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_538161.pdf> accessed 19 March 2024.

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to the crisis-ridden process of capital accumulation'.[21] Crudely put, the 'purpose of capital is to accumulate extracted surplus value, and the state is the political form of that purpose' as it ensures the cohesion, organization, integration and reproduction of the capitalist economy.[22]

The struggle of the toiling classes and popular strata for better working and living conditions, which has historically found its legal expression in labour law and welfare state provisions, contradicts the goal of creating conditions for the intensified exploitation of labour. Therefore, the goal of restoring conditions of profitability as a way out of the capitalist crisis translates into unpopular measures which repeal labour law provisions, deregulate the labour market and increase exploitation. This goal requires a process of focused legislative intervention with the aim of enhancing the state mechanism's resistance to popular pressure in order to ensure the effective and efficient implementation of the economic measures. In other words, the state must become impenetrable by popular forces to ensure continuity in the implementation of measures that are favourable to capital.

We argue that the administrative reform of 2019 in Greece, which assumed the form of an act of parliament on the 'Executive State', should be approached in this light as an attempt to institutionalize the model of crisis law-making so as to accommodate a content of law-making which continues the restriction of political and social rights. As such, there is hardly anything innovative about this reform, which is inspired by earlier historical attempts to depoliticize decision-making processes and policy creation. Before we develop this argument, let us take a closer look at the provisions of the Act.

21 Chris O'Kane, 'Towards a New State Theory Debate' (*Legal Form*, 24 May 2019) <https://legalform.blog/2019/05/24/towards-a-new-state-theory-debate-chris-okane/> accessed 19 March 2024.

22 Werner Bonefeld, *Critical Theory and the Critique of Political Economy: On Subversion and Negative Reason* (Bloomsbury 2011) 182, 168. According to these theories of the state, the crisis-ridden pattern of capital accumulation necessitates a constant reorganization of social relations of production and exchange. This process, in turn, gives rise to new functions and forms of the state. See Ben Fine and Laurence Harris, 'State Expenditure in Advanced Capitalism: A Critique' (1976) 98 New Left Review 97, 99; Simon Clarke, 'The State Debate' in Clarke (ed), *The State Debate* (Palgrave Macmillan 1991) 14.

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III. 'Innovative' administrative reform in Greece

Several symposiums, reports and even a bill for administrative reform were produced in Greece during the crisis.[23] These included an 'ambitious and far-reaching proposal to use European help to bring new forces, as well as the Greek diaspora into the reform process'.[24] Yet the actual legislative measure to introduce the reform came with the appointment of the New Democracy government, following the general election of 2019. The bill was one of the first that the new government introduced in parliament and fulfilled as one of the promises made in the party's manifesto to create a 'modern and effective state'.[25] According to the minister responsible for introducing the bill to parliament, Giorgos Gerapetritis,[26] this legislative measure is structured around five main thematic objectives: i) the organization of political normality, ii) the introduction of programmatic governance and monitoring of governmental work, iii) the distinction between political and service administration, iv) the assurance of wide-scale transparency, and v) adherence to the principles of 'regulatory governance' and 'good legislation'.[27]

The above may appear to be standard characteristics of modern states operating in the context of geopolitical and socio-economic uncertainty, but in the context of crisis-ridden Greece and its traditional problems of maladministration and clientelism, such a reform takes on an innovative nature. For reasons of brevity and analytical clarity, we shall focus on provisions concerning the three main changes introduced by the Act, namely the introduction of a new method of planning and monitoring governmental work, the establishment of the office of the Presidency of Government, and the distinction between political and service administration.

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23 See Papatolias (n 13) 152–196.

24 See the symposium organized by Armin von Bogdandy and Michael Ioannidis on 'New Forces for Greek State Reform'; Armin von Bogdandy and Michael Ioannidis, 'New Forces for Greek State Reform' (*Verfassungsblog*, 9 March 2017) <https://verfassungsblog.de/new-forces-for-greek-state-reform/> accessed 19 March 2024.

25 New Democracy, *Strong Development, Self-Reliant Greece: Our Plan*, Party Manifesto 2019 <https://nd.gr/sites/ndmain/files/docs/nd_programa_web.pdf> accessed 19 March 2024.

26 Gerapetritis, 'The main axes of the Bill on the Executive State'; see note n 5 above.

27 Notably, see Matthildi Chatzipanagiotou, The Executive State: Constitutional Arrangement and Consequences of Act 622/2019 (in Greek, Nomiki Vilviothiki 2021); Paraskevi Dramalioti, *The Executive State: Regulatory Coherence and Coordination in the Centre of Governance* (Papazisis 2021); Dimitris Ntzanatos, *Executive State: Prerequisite to Overcome Decay* (Kastaniotis 2020).

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The first innovative element applied to policy-making procedures. The new method of planning and monitoring of governmental work is based on a new top-down principle of public policy production. The strategic nature of this approach involves the production of a coherent operational plan for governmental policy-making, through the partnership of central structures of government and the ministries, which would then be implemented by individual ministries. The responsibility for the operation of this planning and monitoring system is assigned to a new office, the aforementioned Presidency of the Government, which subsumes all the different offices and secretariats which were previously directly subordinated to the prime minister.[28] Article 49 provides that the annual planning of governmental activity is reflected in the Consolidated Plan of Government Policy. This Plan is drawn up by the Presidency of the Government and reflects the government's priorities (goals, strategic options, policy axes, key actions), as well as the necessary legislative or regulatory measures for their actualization.[29]

We can already see that the Act addresses the demands for optimal, technocratic, and depoliticizing regulatory processes. The emphasis on the procedural and programmatic nature of the governmental function appears as the 'rational' and technocratic reaction to the general pathologies which affected the effectiveness of governmental work during the crisis.[30] The drafters of the bill systematically emphasized that, in modern parliamentary systems, it is important to evaluate the agreement of legislative initiatives with the governmental programme in a centralized manner at the highest

28 ibid 201.

29 As set out in Art 52, the process of planning the following year's governmental work starts every April, with the Council of Ministers defining the main government priorities by policy area. Ministries are notified by May to start drafting the necessary actions, which should be sent for approval by mid-July to the Presidency of the Government which then proceeds to check the compatibility of the Draft Action Plans with the government's priorities and fiscal goals and finalizes its assessments in the Consolidated Draft Government Policy. The Draft Action Plans and the Consolidated Draft Government Policy are submitted for approval to the Annual Planning Cabinet each September, whereas the Consolidated Plan of Government Policy and the final Action Plans are approved by the Council of Ministers by the end of December, when they are made public.

30 Giorgos Gerapetritis, 'The Economic Crisis as Deregulating Factor of the Legal Sources' Hierarchy' in Antonis Argyros (ed), *Studies on the Memorandum* (Athens Bar Association 2013) 130.

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possible level.[31] The prime minister himself emphasized the pursuit of the unified and coordinated implementation of public policies through a strong political centre, when, during the discussion on the bill in parliament, he spoke of the modern and progressive demand for a 'strong central authority' as opposed to a 'fragmented government which decides without acting'.[32] The ordoliberal connotations of this statement are undeniable.

As for the institutional forms of policy-making and coordination, the innovativeness of the Act primarily involves the establishment of a new office, namely the Presidency of the Government. This was designed to enhance coordination and cohesion, monitoring and continuity, as well as efficiency and effectiveness in implementing the government's programme. Understandably, the achievement of these goals involves a considerable amount of concentration and centralization of power. The Presidency of the Government, which reports directly to the prime minister, is the main pillar of coordination and strategic planning, i.e. the quintessence of the 'Executive State'. It is constituted as an Executive public office, with the task of continuously monitoring the progress of governmental work and evaluating effectiveness and efficiency regarding the goals set.[33]

The Presidency of the Government consists of five distinct secretariats: i) the General Secretariat of the Prime Minister, ii) the General Secretariat for Legal and Parliamentary Affairs iii) the General Secretariat for the Coordination of Internal Policies, iv) the General Secretariat for the Coordination of Economic and Developmental Policies, and v) the General Secretariat of Communication and Information.[34] With regard to enhancing the executive, i.e. strategic characteristics of public administration, our interest rests with the two General Secretariats of Coordination and primarily on the General Secretariat of Legal and Parliamentary Affairs, which, in particular, conducts the final processing of bills before they are submitted to the parliament.[35] Therefore, the General Secretariat of Legal and Parliamentary Affairs has the main responsibility of coordinating the law-making process.[36] Any arguments against the disproportionate concen-

31 Stylianos-Ioannis G Koutnatzis, 'How and Why we Legislate? Executive State in Action' *TA NEA* (in Greek, Athens, 8 February 2020).

32 Kyriakos Mitsotakis, *Parliamentary Debate of Tuesday 6 August 2019* (Hellenic Parliament 2019), 1845.

33 Art 22 Act 4622/2019.

34 Art 21 Act 4622/2019.

35 Papatolias (n 13) 208–210.

36 Koutnatzis (n 31).

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tration of powers within this body were countered by the minister though the invocation of the comparative context and the point that legislation in all advanced systems is produced by a central governmental unit and not by individual ministries.[37] Such governmental units have the capacity to utilize the findings of a very 'special science', i.e. the 'legal technique', which is necessary to combat poor legislative drafting.[38]

Another institutional innovation introduced with this Act was the establishment of two governmental councils. These councils are of a constant and permanent nature and have extensive powers which they exercise within the framework of the general guidelines of governmental policy.[39] The councils are staffed and presided over by the prime minister[40] and their scope covers two core functions of government: i) economic policy by the Governmental Council on Economic Policy and ii) national security by the Governmental Council on National Security. The latter has far-reaching powers, as it is responsible for the national security strategy, the structure of the armed forces, the assessment of critical situations, the deployment of armed forces in the context of international commitments, as well as for authorizing the prime minister to declare war. Meanwhile, the Governmental Council of Economic Policy is responsible for the formulation of inter-ministerial policies and decision-making on all matters relating to the country's economic and developmental policy (including fiscal issues, public and private investments, market regulation and control, competition issues, issues of public debt, financial affairs and participation in collective European and international relevant bodies). As such, it appears as a crucial institutional formation to ensure continuity in the implementation of measures in line with the Greek crisis legislation.

Last but not least, the Act introduced an absolute distinction for the first time between political administration and service administration (or *stricto sensu* the civil service), thereby enhancing the process of depoliticizing public policy production and implementation.[41] The biggest change to that direction was the introduction of the office of 'Service Secretary'. Article 36 provided for the establishment of permanent service secretaries, reporting

37 see (n 32).
38 Giorgos Gerapetritis, *Introduction to the Manual of Lawmaking Methodology* (Presidency of Government: General Secretariat for Legal and Parliamentary Affairs 2020).
39 Art 7(1) Act 4622/2019.
40 Art 7(2) and 7(3) Act 4622/2019.
41 Papatolias (n 13) 215.

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directly to ministers, in every department.[42] Service secretaries, as heads of all services tasked with the management of human and financial resources, are responsible for ensuring the smooth and efficient administrative and financial operation of their agencies. According to the Justification Report accompanying the bill, the main purpose of this measure was to achieve the 'actual departure of the ministries from administrative and economic functions', as well as the disentanglement of the political sphere from the administrative sphere in purely administrative matters.[43]

It is obvious that this measure, as well as the reasoning behind it, assumes a problematic clear-cut distinction between political and administrative matters. It is also clear that the process of departure is closely linked to and constitutes an essential aspect of the process of depoliticization. In that sense, it responds to the essential requirements of the Memorandum legislation. The explicit reference to the strategy of depoliticization in the Act which ratified the Third Memorandum (4336/2015) seems to support this alternative interpretation. Indeed, in a distinct subheading under the title 'For a Modern State and a Modern Public Administration', there is an extensive description of a programme of modernizing Greek administration in close collaboration with the European Commission, towards 'building its capacity' and 'depoliticizing' it. The key elements of this strategy include the reorganization of administrative structures, the rationalization of administrative processes, the optimization of human resources, and the strengthening of transparency and accountability.[44]

The special reference to the 'dissociation of technical implementation from political decisions', which constitutes the 'quintessence' of the depoliticization strategy, reveals the concern and strong demand of the lenders to transfer certain functions that are critical to the achievement of fiscal goals from the structures of central administration (ministry) to quasi-independent bodies, where they would not be subject to direct political control by the ministers.[45] In this light, the process of administrative reform in Greece can be understood as part of a generalized strategy to enhance those characteristics of the state that would allow it to more effectively proceed with the implementation of unpopular measures and secure the reproduction of conditions which may be favourable for capitalist investment but

42 Art 36 Act 4622/2019.
43 See Justification Report of Act 4622/2019.
44 See Art 3, part 5 of Act 4633/2015.
45 Papatolias (n 13) 134–135.

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are, consequently, simultaneously devastating for the working and living conditions of the vast majority of the population.

These measures may appear more or less rational, technical and non-controversial from a perspective that accepts the dominant interpretation of the crisis as arising for reasons that are endogenous to Greece. However, a more critical review of the reform and the context in which it took place reveals it as an attempt to normalize the form and content of crisis law-making. The introduction of concentrationist structures and the enhancement of the depoliticizing processes sought with this Act were meant to ensure the 'continuity of the state', as well as the unhindered promotion of a controversial legislative agenda, which took care not to jeopardize the structural reforms of the past decade and introduced a series of new unpopular measures.

A careful look at some of the Acts enacted by the Mitsotakis administration enhances this critical interpretation. Reference can be made, for instance, to Act 4808/2021 which essentially provided for the abolition of the eight-hour working day, the initiation of unpaid work and a fifty-hour working week, by introducing the tool of 'work time regulation' to enable employers to impose a ten-hour working-day through individual 'agreements'.[46] Further deregulation of labour relations was accompanied by measures that further restricted the political right to protest. Indeed, Act 4703/2020 enables the prohibition of a planned public assembly or procession if it poses a risk to public safety or serious disruption to the socio-economic life of a certain area.[47] The Act's provisions give the police an extremely broad amount of discretion to impose restrictions on protests and can effectively be used as legal basis for repressing social struggles. Furthermore, the Act brought back to legal reality the possibility of criminalizing the spread of radical ideas through the establishment of a 'Violence Prevention Directorate', thereby enhancing the coercive potential of the state apparatus in managing social unrest.[48]

IV. Innovative or retrogressive?

The characterization of the recent administrative reform in Greece as innovative ultimately depends on the interpretation of the crisis. If the dom-

46 Art 58 Act 4808/2021.
47 Art 7 Act 4703/2021.
48 Art 19 Act 4703/2021.

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inant interpretation of the crisis as being caused by endogenous factors, which, with regard to public administration, centre around the lack of mechanisms of coordination and monitoring of the production and effective implementation of public policy, is accepted, then the Act on the Executive State is a beacon of innovation. Yet, heterodox approaches to crises, which recognize them as structural, recurring phenomena of capitalist societies, point towards a genealogy of administrative reforms and state models that share several characteristics with the Greek Executive state, thereby revealing the latter as not necessarily innovative and quite possibly retrogressive. Let us elaborate.

A genealogy of the idea of the Executive state reveals a tendency towards authoritarian forms of state administration following crisis situations. The origins of the Executive state can be traced back to the last days of the Weimar Republic and the elaboration of ordoliberal ideas about the relationship between the state and the economy. Hit by the global capitalist crisis, the German economy had to revert to the extraction of absolute surplus value (i.e. the intensification of exploitation by increasing the number of working hours and reducing real wages) so as not to spiral downwards into an inescapable crisis. German capital needed to break out of the falling rate of profit by the only means in existence which depended neither on other capitalist powers nor on the world market, i.e. the forced increase in the rate of surplus value by slashing the workers' wages.[49]

But the aggressive policies needed to achieve this systematic reduction of wages involved a sustained attack on workers' rights which were safeguarded in the Weimar Constitution. The Weimar-welfare form could not accommodate the new conditions of intensified exploitation. New authoritarian and depoliticized processes of policymaking were necessary. An example of such authoritarian solutions was the one advocated by Carl Schmitt in his 1933 essay 'A Strong State and Sound Economics'.[50] There,

49 Alfred Sohn-Rehtel, *Economy and Class Structure of German Fascism* (Process Press 1987), 89.

50 This essay was based on a speech he presented to a prominent organization of German industrialists, the Langnamverein. See Carl Schmitt, 'Starker Staat und gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern' (1933) 14(2) Volk und Reich 89–90; Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Duncker & Humblot 1958) 'Machtpositionen des modernen Staates' (1933) 371. A translation is found in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Wales UP 1998) 212. According to Franz Neumann, a similar model was formulated by Vilfredo Pareto, who espoused political authoritarianism and economic liberalism and who

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he called for a 'rollback of the state [in the economy] to a natural and correct amount'.[51] Schmitt's theoretical model, which sought to redefine the relationship between the state and the economy, contained ideas that would be adopted by the ordoliberal tradition, the Nazi administration, as well as post-war neoliberal thought. In the final days of the Weimar Republic, Schmitt set out a concrete political programme which involved the strengthening of the state for the purpose of 'healing' the economy.

Schmitt's authoritarian model, captured in the concept of the 'qualitative total state', would ensure conditions for enhanced profitability of capital through intensified exploitation of labour and extraction of absolute surplus value,[52] by efficiently crushing the 'internal enemy', while leaving the planning of the economy to private interest. The 'qualitative total state' had to replace its 'quantitative' counterpart, a weak, social-democratic interventionist state. The capitalist economy should be 'depoliticized' and 'self-administered', meaning that 'economic leaders', owners and managers, had to be given substantial autonomy in their industries and factories, and they had to be freed from social-democratic forms of regulation. It is interesting to note that, among the elements that Schmitt counted as institutional preconditions for a strong state, we find a 'pure' administrative apparatus that is entirely independent of party politics – in other words, strict separation between political and service administration.[53]

This theoretical model, although hardly mainstream, was rather influential for mainstream neoliberal thinkers like Hayek.[54] A prominent neoliberal economist, Alexander Rüstow, did not hesitate to confirm the 'liberal ancestry' of Schmitt's conception of the 'qualitative total state'.[55] The term 'authoritarian liberalism' was introduced by Herman Heller in 1932 to describe the inherent authoritarian tendencies of the liberal forms and tradition.[56] In contrast with *laissez-faire* liberalism, authoritarian liberalism

influenced Mussolini's early economic policies. See Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Ivan R Dee 2009).

51 William E Scheuerman, *Carl Schmitt: The End of Law* (Rowman & Littlefield 1999) 103.

52 Alfred Sohn-Rethel, *Economy and Class Structure of German Fascism* (CSE Books 1987) 8.

53 Carl Schmitt, 'Strong State and Sound Economy: An Address to Business Leaders' in Cristi (n 50) 212–232.

54 A study on the ambiguous relationship between Carl Schmitt and Friedrich Hayek can be found in Cristi (n 50) 146–168.

55 Scheuerman (n 51) 31.

56 Herman Heller, 'Authoritarian Liberalism?' (2015) 21 European Law Journal 295.

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assigned the task of ensuring the constitution of economic freedom to the state. From this point of view, the premise of free economy is the 'strong state'.[57] The 'weak state' is considered the 'Achilles' heel' of free economy because it is unable to defend itself against the demands of the popular classes. It does not set limits to contesting social forces and fails to depoliticize the socio-economic relations on the basis of a rule-based system of market interaction.[58] Only a strong state can distinguish itself from society and prevent government from becoming 'prey' to powerful private interests and class-specific demands.[59]

It seems that there is a thread connecting ordoliberal thought and Schmitt's advocation for a 'strong State' to secure a 'sound Economy', with the 'new Executive State' which was born out of the theories of New Public Management. The so-called 'new Executive State' was born in the period of post-welfare administration and is based on a radically different view of the role of the state compared to its predecessor. This view reflects a lack of faith in the state's interventionist or guiding capacity, as well as in its ability to regulate all aspects of socio-economic reality. In other words, it reflects neoliberal ideas which have dominated public policy discourse since the first major crisis of capitalism after the end of World War II.[60]

The new challenges to the process of capital accumulation, manifested in the internationalization of production, the creation of global value chains[61] and the development of information technologies, which, in the decades that followed the war, gave rise to the phenomenon of globalization, directly affected attempts to reform the state and its role in mediating such complex and translational processes and correlations of forces. While, until the 1980s, the State seemed to count only on its own forces for designing and implementing policies and programmes, from then onwards there are signs of a transition to a new regulatory role of the State, more distanced from the everyday management of the economy and more oriented towards

57 Werner Bonefeld, 'European Economic Constitution and the Transformation of Democracy' (2015) 21 European Journal of International Relations 869.

58 ibid 873.

59 ibid 874.

60 Prabhat Patnaik, 'On the Economic Crisis of World Capitalism' (1982) 10(5) Socialist Scientist 19.

61 Intan Suwandi, *Value Chains: The New Economic Imperialism* (Monthly Review Press 2019).

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ensuring conditions for the efficient functioning of the market.[62] Simultaneously, a strong state was necessary to steer these different institutional forms and levels of decision-making, while maintaining a very minimal scope for popular participation in them.

The 'Executive State' thus emerged as a conscious and rational evolution, as well as organisational adaptation, of the 'Welfare State' to the new environment of a globalized economy. The State's 'retreat' to a role of strategic viewing is arguably identified with the dominance of neoliberal ideology. The idealized view of the market opens the field of public administration to private players, which, through their involvement in service or operational functions, ultimately end up 'colonizing' the entire administrative system.[63] Such views promote a rupture with the hierarchical form and centralization of public administration, while encouraging the development of a new relationship between the latter and economic players.[64] A market-friendly state was required to depoliticize the issue of economic administration and to be strong enough to resist popular pressure on economic policies. This new model of the state was hardly novel but constituted an updated version of the ordoliberal model of a 'strong state' which accompanies a 'sound economy'.

The emergence of the idea of the Executive State coincides with the spread and dominance of the New Public Management approach. The latter promotes reform of the administrative state along the following lines: i) functional specialization and simplification of administrative procedures, ii) introduction of commercial thinking and opening of public services to competition, iii) public-private sector cooperation, as well as iv) a 'customer-centred' orientation of administration.[65] New Public Management sought to redefine the state's capacities to guide, coordinate, control and monitor public policy. It proposed a radical restructuring of administrative hierarchy, through a fragmentation of vertical and hierarchical structures and the proliferation of autonomous administrative units, i.e. agencies. This process of 'agencification' takes the form of either functionally decentralized bodies (agencies) or other *sui generis* administrative bodies with

62 Sebastien Billows and Scott Viallet-Thévenin, 'La fin de l'État stratège: La concurrence dans les politiques économiques françaises (1945–2015)' (2016) 4(4) Gouvernement et action publique 9–22, 10–16.

63 Giorgos Sotirelis, *Constitution and Democracy in the Age of Globalisation* (in Greek, Sakkoulas 2000).

64 Apostolos Papatolias (n 13) 19.

65 Ewan Ferlie and others, *The New Public Management in Action* (Oxford UP 1996).

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a high degree of autonomy, which are organized around sectoral public policies.[66] In all its versions, the new Executive State concerns itself with the successful organization of the long-term 'partnership' between central government and other administrative bodies.[67]

The central institutional innovation of the new Executive State lies in the fragmentation of the hierarchically structured public administration and the creation of semi-autonomous 'executive agencies' in such a way that the ministries can emerge as strategic headquarters which can more effectively fulfil the strategic function of policy-making and planning. In this context, the process of 'agencification' involved the performance of executive functions of government by agencies within a policy and resources framework set by a department. This process would eventually result in the establishment of a 'twin-track' public administration: on the one hand the central administration units charged with the strategic task of developing and monitoring policy-making and on the other the units tasked with the implementation of such policies in conditions of relative autonomy.[68] Institutionally, this would also translate into an internal division of civil servants into two categories: *members of 'political administration'* – who can be relieved of their duties at any time – and *'career civil servants'*.

The demand for the technical, almost mechanical, implementation of legislation presupposes the sealing off of the administrative apparatus from the socio-political environment, as well as the political and party neutrality of the civil servants in the exercise of their duties. This institutional fragmentation between policy and administration seems to reflect the liberal perception, according to which political power and administration constitute distinct and unequal domains, with only the former deriving its authority from popular sovereignty. In that sense, and despite its apparent hostility to hierarchical organization, the new Executive State also seems to reproduce the Weberian approach to administration as 'instrumental' and

66 Benjamin Lemoine, 'L'État stratège pris dans les taux: L'invention d'une agence de la dette publique française' (2016) 66 Revue française de science politique 435–459, 437–445.

67 Christopher Pollitt, Johnston Birchall and Keith Putnam, *Decentralising Public Service Management* (Palgrave Macmillan 1998), 1–65, 162–179.

68 Christopher Pollitt and others, *Agencies: How Government do Things Through Semi-Autonomous Organizations* (Palgrave Macmillan 2004), 106; Roderick AW Rhodes, 'Reinventing Whitehall: 1979–1995' in Walter JM Kickert (ed), *Public Management and Administrative Reform in Western Europe* (Edward Elgar 1997) 42–46.

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dedicated to the execution of political decisions.[69] In the context of the new Executive state, administration is understood as a technical function.

V. Conclusions

Viewed in this light, the Executive State reform in Greece does not seem so innovative. Indeed, in reproducing common themes and principles of the authoritarian liberal tradition, it seems inspired by the most retrogressive models of public policymaking. These models combine authoritarian and concentrationist structures with depoliticizing processes and institutional forms intended to seal off policy production and implementation as far as possible from popular participation and contestation. Such institutional forms are essential to ensure the uninterrupted implementation of unpopular measures intended to create a friendly environment for capitalist investment which, alas, is simultaneously a hostile environment for the toiling classes and popular strata.

In the contemporary socio-economic and political context of 'permacrisis', characterized by the exacerbation of socio-economic antagonisms, electoral volatility and polarization, as well as asymmetric threats to representative institutional forms and the reproduction of capitalism, authoritarian and depoliticized forms of policymaking become essential aspects of the liberal democratic form. The preceding critical analysis of administrative reform in Greece is a case that illustrates and enhances the conclusion that the liberal democratic form includes its own negation. Yet, what would constitute, in dialectic terms, the negation of this negation and rejuvenate the democratic processes of the Western world remains to be seen.

69 Haldor Byrkjeflot, 'The Impact and Interpretation of Weber's Bureaucratic Ideal Type in Organisation Theory and Public Administration' in Byrkjeflot and Fredrick Engelstad, *Bureaucracy and Society in Transition: Comparative Perspectives* (Emerald Publishing 2018). Wolfgang Drechsler, 'Good Bureaucracy: Max Weber and Public Administration Today' (2020) 20 Max Weber Studies 219–224.

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II. Migration Crisis

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Deterrence as Legal Innovation: Management of Unwanted Mobilities and the Future of Refugee Protection

*Stephen Phillips, Magdalena Kmak**

Abstract: In this chapter, we focus on deterrence as a legal innovation intended to manage unwanted mobilities. Our starting point is the discrepancy between the global commitment to human rights and the practical implementation by states of refugee protection with respect to protection seekers from former colonial countries. In the first part of the chapter, we contextualize deterrence as legal innovation within the framework of the broader shift to restrictive deterrence policies by states of the Global North and argue that the division or difference in treatment of various groups of migrants that propels the adoption of externalization measures is an inherent feature of international law, revealing its deep colonial structure. We then analyse the different ways and methods of deterring asylum seekers that have been increasing in numbers in Australia, the U.S. and the European Union, and their justification of deterrence of asylum seekers in response to various ongoing 'crises'. In the second part of the chapter, we evaluate the various responses to these crises, and the role played by the law in guiding and restraining state responses. We conclude by showing how the law, when migrants are wanted, can be swiftly and effectively used as a protective tool, and how the true crisis of international human rights law actually applies to the international law of the Global North that has emphasized and protected its own interests through the increasing exclusion of unwanted protection seekers.

I. Introduction

In this chapter, we focus on deterrence measures affecting international refugee law and policy as innovations intended to limit the numbers of people seeking protection in the Global North. Our starting point is the human rights and humanitarian crisis enshrined in the discrepancy between the commitment of the states to international law on human rights and their practical implementation by states regarding refugee protection, in particular with respect to people from former colonial countries. We argue

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that recently, the crisis became particularly amplified by the increased use of deterrence measures by the states of the Global North.

We conceptualize the various deterrence measures as innovations adopted in response to certain events as markers of crises with the objective of externalizing refugee protection. We use the concept of migration crisis as a catalyst of innovations and creative legal thinking which, as a result of the flashpoints of these catalysts, such as the surge of Haitians towards the United States in the 1980s and 1990s, Australia's response to the Tampa Affair (enabled by 9/11) in 2001, and the European refugee crisis in 2015–16, contributed in turn to the crisis of human rights and refugee protection. We argue that these flashpoints enabled the development of these innovations and secured societal support for them. However, these would not have taken place without pre-existing ideas about who a genuine refugee is and who therefore deserves protection. In this context, we conceptualize deterrence measures as legal and policy innovations – creative solutions and strategies – intended to prevent certain unwanted groups of people from reaching jurisdictions of states of the Global North where state responsibility for the protection of their rights arises. In line with Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, we define legal innovation in the migration law of the Global North as 'creative legal thinking', where states operate on the fringe of international law. They write '[s]uch policies tend to work in between the normative structures established by international (…) treaties, exploiting interpretative uncertainties, overlapping legal regimes, reverting on soft law standards or establishing novel categories and concepts on the basis of domestic or other parts of international law.'[1] In such a manner, for instance, Ayelet Shachar uses the concept of legal innovation in international migration law when discussing the structure of a *shifting border* aimed at re-bordering mobility through extensive 'externalization strategies.'[2]

Our conceptualization of innovation in the context of the migration regime of the Global North is therefore an ambivalent or negative one. While legal innovations in the protection of rights and refugee protection exist (such as, for instance, the 1951 Refugee Convention and the refugee protection regime in general), they have often been trumped by new innovations

1 Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 2.

2 Ayelet Shachar, 'The Shifting Border: Legal Cartographies of Migration and Mobility' in Shachar and others (eds), *The Shifting Border* (Manchester UP 2020) 14–15.

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which significantly reduce access to asylum and protection by preventing people from arriving and preventing the formation of a jurisdictional link between the person and the country, which would mean the existence of the obligation of protection. To be sure, we recognize the existence of positive examples of humanitarian innovations, such as the response to the people from Ukraine seeking protection from Russia's aggression. The launch of a Temporary Protection regime in the EU can be considered a positive innovation in the form of a short-term solution in response to the mass arrivals. Overall, however, we can notice a more general trend in the law of moving outside the territorial jurisdiction of states, in order to diffuse or relieve the state of the legal liability and human rights obligations with respect to those seeking protection. In this chapter, therefore, we discuss the expanding deterrence paradigm and focus on deterrence through the externalization of migration control in the migration law of the Global North. We show that the most recent developments in the context of externalization of protection, such as the UK-Rwanda agreement, are the next steps in the ongoing expansion of the deterrence paradigm, the origins of which date back to at least the Haitian Refugee Crisis in the U.S. in the early 1980s.

We start with historical examples and show how these innovations, such as the U.S. response to Haitian refugees, have been creatively adopted in the case of other destinations, for instance Australia's Pacific Solution, the 2015 refugee crisis in Europe, or the most recent UK–Rwanda agreement. Below, we first define deterrence measures as simultaneously being innovations in response and catalysts of further crises, and identify events and measures aimed especially at the externalization of protection. We then trace the journey of these innovations from the 1980s to the 2020s by identifying concrete migratory events and concrete legal and policy responses. Overall, we show how refugee protection has been coupled in international law with measures aimed at limiting this protection in the law of the Global North over the years. We also focus on the international law of the Global North. Even though our task for this chapter was to focus on innovations at the level of international law, the exclusionary migration regime is the regime of the Global North representing its interests and aimed at benefitting the Global North itself.[3] We therefore focus on the deterrence paradigm not

3 Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing 2021), <www.elgaronline.com/edcollbook/ed-

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as a feature of international law as such, but rather as an innovation of international law of the Global North. We argue that the development of the deterrence paradigm is based on historical and ongoing imbalances in wealth, power and control and is firmly embedded in the development of the international protection regime designed by the countries of the Global North as a means of controlling refugees and in order to maintain their dominant position.[4]

II. The Crisis

II.1. What is a 'migration crisis'?

Traditionally, a crisis in the context of refugee protection is proclaimed as a result of a mass influx of people seeking protection, which significantly affects the administrative, logistical, or economic capacities of the host states and affects host societies in other significant ways. However, such proclamations of migration or refugee crises have often been criticized by migration scholars, pointing out that what is defined as a migration crisis is often a manifestation or a result of a combination of factors, including deeply embedded inequalities enshrined in the law or migration policies. As can be seen in the case of the most recent 'crises' in the EU, such as the so-called migration and refugee crisis of 2015 or the crisis at the Polish-Belarussian border, they have been rather conceptualized as solidarity[5] or humanitarian[6] crises accompanied by violations of human rights of migrants. These crises took place for various reasons, such as lack of preparedness, a lack of solidarity, but also as a result of the unequal treatment of different groups

coll/9781789902259/9781789902259.xml> accessed 14 March 2024; Achille Mbembe, 'The Idea of a Borderless World' (*Africa is a Country*, 11 November 2018) <https://africasacountry.com/2018/11/the-idea-of-a-borderless-world> accessed 14 March 2024.

4 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield Intl 2017); Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Routledge 2018); Spijkerboer, 'Geopolitics of Knowledge Production' (n 3).

5 Maarten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.

6 Grupa Granica, 'Humanitarian Crisis at the Polish-Belarusian Border' (2021) <https://konsorcjum.org.pl/storage/2023/10/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf> accessed 13 March 2024.

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of people seeking protection,[7] often due to policies and practices aimed at preventing the arrival of unwanted migrants. For instance, Thomas Spijkerboer diagnosed the 2015 situation as a perfect storm, an accumulation of a number of symptoms, situations and problems that, often known for a long time, when happening at the same time, created a crisis, including the refugee crisis arising from the war in Syria, major underfunding for hosting refugees in the region, minimal resettlement coupled with a prohibition to travel outside Syria, systematic underestimation of the conflict, failure of the Common European Asylum System and the exploitation of the conflict by politicians in the EU undermining support for people seeking protection.[8] Therefore, deterrence measures, such as the prohibition of arrivals, are among the contributors to such crises, even though they are often proclaimed as having been adopted in response to them. In particular, they contribute to the unequal treatment of asylum seekers and adversely affect the implementation of human rights protection standards. As we show in this chapter, these measures are often adopted to limit rather than improve the state's responsibilities or avoid such responsibilities altogether.

To be sure, a common response of states to people seeking access to their territories to gain protection is currently to devote significant resources to preventing and frustrating this access. In order to pursue this goal, states have developed a wide range of measures, often referred to as 'repulsion' or 'deterrence', appearing within the broadly described 'deterrence paradigm.'[9] Such a proliferation of deterrence measures often exists at the boundaries of, if not in direct violation of, international law, although in many cases commitment to international law is still present in the state's rhetoric even if not in the state's practice. The United States and Australia are particularly

7 Magdalena Kmak, 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality' (2015) 21 Social Identities 395.

8 Thomas Spijkerboer, 'Europe's Refugee Crisis: A Perfect Storm' (*Faculty of Law Blogs/ University of Oxford*, 10 February 2016) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/02/europe's-refugee> accessed 13 March 2024.

9 Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 53 Columbia Journal of Transnational Law 235; Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28; David S FitzGerald, *Refuge beyond Reach* (Oxford UP 2019).

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noteworthy for their respective offshore policies in the Caribbean and the Pacific.[10]

Thomas Gammeltoft-Hansen and Nikolas Tan group deterrence measures into five main categories: 1) non-admission policies limiting access to asylum procedures, 2) non-arrival measures preventing access to the territory of asylum states through migration control, 3) offshore asylum processing and relocation of refugees to third countries, 4) criminalization of irregular migration and human smuggling, and 5) indirect deterrence measures intended to make the asylum country less attractive.[11] In this chapter, we focus on how deterrence measures function within the ongoing externalization of migration control, 'the process of shifting functions normally undertaken by a State within its own territory, so they take place, in part or in whole, outside its territory.'[12]

According to Jeff Crisp, externalization encompasses 'measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees, asylum seekers and other migrants who do not have prior authorization to enter their intended country of destination.'[13] Further, as Inka Stock, Ayşen Üstübici, and Susanne Schultz show, imbalances in global power are central to policies of externalization, describing 'the extension of border and migration controls beyond the so-called 'migrant receiving nations' in the Global North and into neighbouring countries or sending states in the Global South.'[14] States in the Global North retain the right to admit those from the Global South that they consider needed or wanted, while repelling the unwanted remainder through increasingly sophisticated systems, which often rely on the active participation of Global South partner states.

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10 Daniel Ghezelbash, *Refuge Lost* (Cambridge UP 2018); FitzGerald (n 9).

11 Gammeltoft-Hansen and Tan (n 9) 34.

12 David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 International Journal of Refugee Law 120, 120.

13 Jeff Crisp, 'Externalization and the Erosion of Refugee Protection' (*The University of Melbourne*, 25 November 2019) <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/externalization-and-the-erosion-of-refugee-protection> accessed 13 March 2024.

14 Inka Stock, Ayşen Üstübici and Susanne U Schultz, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7 Comparative Migration Studies no 48, 1.

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II.2. Coloniality and the myth of difference

We argue that the division or discrepancy in the treatment of different groups of migrants that propels the adoption of externalization measures is an inherent feature of international law, revealing its deep colonial structure that manifests itself most strongly in the context of human mobility in general, and refugee protection in particular.[15] Initially, under modern refugee law, access to the territories of the Global North was limited in the 1951 Refugee Convention to refugees from Europe. As B.S. Chimni[16] and Lucy Mayblin[17] argue, through its original territorial limitation that has only been removed by the 1967 Protocol Relating to the Status of Refugees, the refugee regime has been designed to exclude those coming from present and former colonies from protection. The exclusion has been supported by the so-called *myth of difference* – building the notion of the ideal refugee as being a white male anti-Communist, and asylum seekers and refugees from the outside of Europe as ultimately different from that ideal refugee.[18] The 1967 Protocol removed the geographical limitation of the Refugee Convention, although the difference in treatment has remained and has been enshrined in the increased limitations of access to asylum for people arriving from the former colonies through various deterrence measures, including externalization. Thomas Spijkerboer describes this limitation in access to protection as being governed through the global mobility infrastructure and respective shadow mobility infrastructure. These infrastructures substantively reflect the exclusionary law of the Global North regulating mobility – there is one law for those who enjoy access to the global mobility infrastructure, and another kind of law for those who are denied such access.[19]

15 Spijkerboer, 'Geopolitics of Knowledge Production' (n 3); Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights' (2021) 39 Netherlands Quarterly of Human Rights 291; Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (John Wiley & Sons 2020); Mbembe (n 3); Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Duke UP 2015); Mayblin (n 4).

16 BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350.

17 Mayblin (n 4).

18 Chimni (n 16) 351.

19 Thomas Spijkerboer, 'Marathon Man and "Our European Way of Life"' (*openDemocracy*, 27 October 2020) <www.opendemocracy.net/en/can-europe-make-it/marath

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The myth of difference is played out in various state responses to refugee crises described in this chapter. For instance, in the U.S., refugees from Cuba in the 1960s were, in principle, accepted as refugees escaping Communism and therefore welcomed, while the refugees from Haiti in the 1980s were considered different, escaping generalized violence, and therefore not real refugees. Most recently, in the EU, the distinction between genuine and bogus asylum seekers has been played out, particularly in how stricter measures towards various groups of people seeking protection affected those differentiated on the basis of their citizenship or race.[20] In this context, the situation of pushbacks at the Polish–Belarusian border as a result of a migrant smuggling operation orchestrated by Belarus needs to be compared with the response to people from Ukraine seeking protection. For instance, while the Polish border has been almost completely closed to migrants and asylum seekers from the geographically, ethnically and religiously distant countries during the Covid-19 pandemic and later following the escalation of Russia's war against Ukraine, asylum seekers from neighbouring countries, such as Belarussians following the suppression of protests by Lukashenko's regime in 2020, as well as economic migrants and, later, people seeking protection from Ukraine were allowed to enter,[21] again referring to the protection policies as reproducing the myth of difference.

III. Crises causes and responses

In this section, we discuss three events we consider to be markers of crises or catalysts that followed with the introduction of *innovative* legal and policy measures enhancing deterrence: the Haitian refugee crisis, 9/11 and its impact on the Tampa Crisis, and the 2015–2016 so-called refugee crisis in the EU. We show how the responses to these crises – in the case of this chapter, the externalization of protection – have contributed to the spreading of deterrence policies throughout the Global North and affected the human rights of people seeking protection.

on-man-and-our-european-way-life/> accessed 13 March 2024; Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2020) 22 European Journal of Migration and Law 452.

20 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19' (2021) 10 Social Sciences 435, 435.

21 ibid.

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III.1. Haitian Refugee Crisis

Haitians started to migrate to the United States in large numbers in the early 1970s, many seeking asylum and fleeing authoritarian rule in their homeland. Despite evidence that rejected Haitian asylum seekers suffered persecution upon their return, the U.S. authorities upheld few asylum claims. The continuing influx of Haitians ultimately led to the U.S. Migrant Interdiction Program (MIP) in 1981, under which intercepted Haitians were typically returned to Haiti after summary screening. The U.S. Coast Guards intercepted approximately 38,000 Haitians at sea during the eight months following the military coup in Haiti in 1991.[22] The United States responded to the crisis by suspending screening procedures for Haitian asylum seekers, fearing a mass exodus from Haiti were it to bring interdicted Haitians to the United States.[23] Two major innovations allowed for increased deterrence and offshore processing throughout the whole period of the Haitian crisis, setting the stage for further developments in Australia and Europe. The first was offshore processing, first at sea and then at Guantanamo Bay, while the second was the judgment in the *Sale* case.

Initially all interdicted Haitians were held outside United States territorial waters on Coast Guard cutters, but, by late November 1991, the cutters had reached full capacity, holding 2,200 Haitians. With the Coast Guard cutters full, the United States resumed summary screening at sea. Those found to have no credible fear of protection were returned to Haiti,[24] although returns were briefly blocked by U.S. domestic courts. Caught between its determination not to admit Haitians to the U.S. and no return or other accommodation alternative, a swift decision was made to transfer the Haitians to the U.S.-controlled territory of Guantanamo Bay, Cuba,[25] an area under U.S. control since 1898.[26]

22 Arthur C Helton, 'The United States Government Program of Intercepting and Forcibly Returning HAmAN Boat People to Haiti: Policy Implications and Prospects' (1993) 10 NYLS Journal of Human Rights 325, 330.

23 Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (Cambridge UP 2015) 21.

24 Ghezelbash, *Refuge Lost* (n 10) 75.

25 ibid 76.

26 Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, 23 February 1903; Signed by the President of Cuba, 16 February 1903; Signed by the President of the United States, 23 February 1903, Arts 1 and 3; Treaty Between the United States of America and Cuba; 29 May 1934, Art 3.

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This decision was not planned; rather, it came as the result of a series of overlapping circumstances preventing the United States from pursuing its preferred course of action.[27] One unexpected development was that interviews held at Guantanamo Bay were more extensive that those held at sea,[28] where factors including overcrowding, sickness and fatigue affected the interview process,[29] which led to an increase in positive screening decisions at Guantanamo.[30] This increase was similarly unplanned, just an unintended result of an improved screening environment, and while the new procedure was an improvement on screening at sea it remained 'procedurally inferior to that available to persons seeking asylum within mainland America.'[31]

Some within the United States saw the camp at Guantanamo as a strong draw factor for asylum seekers, and indeed Haitian arrivals increased during the relatively brief period that the camp was operational. The camp quickly reached capacity, holding 12,500 migrants at its peak, and was closed in May 1992.[32] Many within the U.S. expressed concerns that southern Florida would be overwhelmed by Haitian migrant arrivals and that unseaworthy boats would sink *en route*, leading to a loss of life.[33] Some argued that to deter future arrivals, all Haitians to whom the United States did not owe protection should be returned.[34] Ultimately, under an Executive Order issued by President George Bush (Senior) on 24 May 1992, some 30,000 Haitians were forcibly returned, including over 5,000 whose claims for protection had not been examined.[35]

The second innovation was the judgment in the *Sale* case. Following President Bush's Executive Order, all Haitian vessels were interdicted and those aboard returned to Haiti without any opportunity to file a protection claim.[36] The Executive Order pointed to 'a serious problem of persons

27 Dastyari, *United States Migrant Interdiction* (n 23) 24.
28 Christopher Mitchell, 'U.S. Policy toward Haitian Boat People, 1972-93' (1994) 534 The ANNALS of the American Academy of Political and Social Science 69, 74.
29 Helton (n 22) 331.
30 Mitchell (n 28) 74.
31 Ghezelbash, *Refuge Lost* (n 10) 104.
32 Mitchell (n 28) 74.
33 Michael Wines, 'Switching Policy: U.S. Will Return Refugees to Haiti' (*The New York Times*, 25 May 1992) <www.nytimes.com/1992/05/25/world/switching-policy-us-will-return-refugees-to-haiti.html> accessed 15 March 2024.
34 Helton (n 22) 331.
35 ibid.
36 Mitchell (n 28) 69.

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attempting to come to the United States by sea without necessary documentation and otherwise illegally,' maintaining that U.S. international legal obligations 'do not extend to persons located outside the territory of the United States'.[37] The policy was upheld by the United States Supreme Court in 1993 in *Sale v Haitian Centers Council*.[38] The majority found that, because the prohibition of *refoulement* in Article 33 of the Refugees Convention 'cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.'[39] Many critics have pointed to the inadequacy of the judgment. Thomas Gammeltoft-Hansen, for example, argues that the decision 'builds on an erroneous and incomplete reading of both the Refugee Convention and extraterritorial jurisdictional principles,'[40] while Kenneth Regensburg similarly suggests that, as a result of the judgment, the U.S. 'lost any moral high ground it may have held in protesting the treatment of refugees by other governments.'[41] While the Inter-American Commission on Human Rights later rejected the majority's arguments in *Sale,* finding the U.S. to be in violation of the American Declaration on the Rights and Duties of Man,[42] David FitzGerald's contention that 'there is no supranational court that creates binding decisions on the U.S. government' remains true.[43]

The no-screening policy was later suspended by Clinton; however, the more open policy was short-lived. In July 1994, in fear of the high numbers of boat arrivals, the Clinton administration stopped undertaking status determinations, instead offering protection in 'safe havens' in third countries or Guantanamo Bay.[44] Panama offered to take 10,000 Haitians, and Honduras pledged to take 40,000 in exchange for U.S. aid. However, Panama

37 Executive Order 12807 of 24 May 1992: Interdiction of Illegal Aliens, 3 CFR, 1992 Comp, 303–304.

38 *Sale v Haitian Centers Council* 509 US 155 (1993).

39 ibid, para A.

40 Thomas Gammeltoft-Hansen, 'The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean' (2008) DIIS Danish Institute for International Studies 2008/6, 17.

41 Kenneth Regensburg, 'Refugee Law Reconsidered: Reconciling Humanitarian Objectives of Western Europe and the United States' (1996) 29 Cornell International Law Journal 225, 243.

42 *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997.

43 FitzGerald (n 9) 85.

44 Ghezelbash, *Refuge Lost* (n 10) 112.

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withdrew its offer under international pressure.[45] Following the failure of any effective regional resettlement or transfer arrangements, the Haitian leaders were removed through military intervention. These developments are still affecting the contemporary approach of the Biden administration, which is continuing the policies of expulsion and deterrence of arrivals, resulting in many deaths at sea.

III.2. 9/11 and the Tampa Crisis

The attacks of 11 September, the following multifaceted crisis and the war on terror affected the further spread of externalization policies and offshore processing.[46] In this section, we explain how crisis and political opportunity combined to produce otherwise unlikely policies affecting protection-seeking migrants. The shift in the security discourse in the USA (through the adoption of The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism – USA PATRIOT – Act of 2001, as well as the Homeland Security Act of 2002) and later globally, became a catalyst for the development of the Pacific Solution in Australia, which we consider a second major innovation in the context of the externalization of protection.

Increased global insecurity following the 9/11 attacks has played a key role in the justification of deterrence policies by many states. Australia, a global leader in modern deterrence policies, bases much of its response on unwanted migration in its response to perceived security threats. John Howard, the Australian Prime Minister at the time of the attacks, was on an official visit to Washington on 11 September 2001, and was quick to connect the attacks with threats to Australia's border by asylum seeker boats.[47] In August 2001, following a standoff between the captain of the Norwegian freighter, MV Tampa, and Australian officials, including the boarding of the vessel by troops from Australia's special forces, Howard's government

45 Dastyari, *United States Migrant Interdiction* (n 23) 35.

46 Stephen Phillips, 'Enhanced Vulnerability of Asylum Seekers in Times of Crisis' (2023) 24 Human Rights Review 241.

47 James Rose, 'From Tampa to now: how reporting on asylum seekers has been a triumph of spin over substance' (*The Conversation*, 14 October 2016) <https://theconversation.com/from-tampa-to-now-how-reporting-on-asylum-seekers-has-been-a-triumph-of-spin-over-substance-66638> accessed 15 March 2024.

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refused entry for 438 rescued asylum seekers.[48] The final outcome of the incident was Australia's now infamous Pacific Solution, which saw all unauthorized maritime asylum seeker arrivals transferred to processing facilities on Nauru and Manus Island (Papua New Guinea), instead of Australia. The core elements of the Pacific Solution were: 1) the excision of territory by the Australian government for immigration purposes; 2) the interdiction of asylum seekers travelling to Australia by boat; and 3) the establishment of offshore processing facilities in the Pacific region.[49] Howard justified his response in absolute terms: 'I believe it is in Australia's national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country.'[50] This perceived threat, coupled with the changed international security environment following the 11 September attacks, became embedded in Australian political debate on asylum seekers and unauthorized migration. The short-term impact of the measures was pronounced, seeing a decline in arrivals from 5,516 people (in 43 boats) in 2001 to one person in a single boat in 2002, followed by 53 people (one boat) in 2003, 15 people (one boat) in 2004, 11 people (4 boats) in 2005, and 60 people in 2006.[51]

This determination to prevent unwanted maritime arrivals, to 'stop the boats,' continues to drive the Australian response to asylum seekers, and is now replicated widely in Europe and the UK.[52] Greg Martin shows how campaigns aimed at deterring asylum seeker boat arrivals 'have all the hallmarks of a classic moral panic,' and succeed 'because they resonate with deep-rooted anxieties about Australia's national identity and way of life, relating, among other things, to fear of Asian 'invasion' and concern with multiculturalism.'[53] Moral panics over asylum seekers, Martin contends, are now 'relatively permanent,' and are 'largely a function of the inexorable 'war

48 David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin 2003).

49 Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press 2006) 115–124.

50 National Museum of Australia <https://digital-classroom.nma.gov.au/defining-moments/tampa-affair> accessed 15 March 2024.

51 Janet Phillips, 'Boat Arrivals in Australia: A Quick Guide to the Statistics' (2014) Australian Parliamentary Library Research Paper Series 2013–14 <www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1314/QG/BoatArrivals> accessed 15 March 2024.

52 See the film 'Stop the Boats' (2018) at <https://documentaryaustralia.com.au/project/stop-the-boats/> accessed 15 March 2024.

53 Greg Martin, 'Stop the Boats! Moral Panic in Australia over Asylum Seekers' (2015) 29 Continuum 304, 304.

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on terror' where the figure of the Muslim-terrorist-refugee is constructed as a transnational folk devil.'[54] In the Australian polity, boat arrivals and other less visible and quantifiable threats remain conflated and contrived, both linked to global insecurity, equally part of the foundations of the deterrence regime.

Perhaps the most notorious element of Australia's Pacific Solution was the transfer of intercepted boat arrivals to Nauru and Papua New Guinea, two of the poorest countries in the region, both dependent on Australian aid. Nauru was not a signatory to the 1951 Refugees Convention, and Papua New Guinea, while a signatory, lacked domestic legislation on refugees, had no system for processing applications for asylum, and maintained considerable reservations concerning its Convention obligations.[55] Susan Kneebone points out that, despite a lack of evidence of *refoulement* by either Papua New Guinea or Nauru, the legal status of the asylum seekers and the manner in which Australia had transferred its responsibility for the intercepted asylum seekers to the International Organization for Migration raised serious concerns. She states: 'Under Australian law, the asylum seekers were "offshore entry persons" and excluded from access to Australia's legal system. Yet they appeared to have few rights under the legal system of their "safe third country".'[56] Nauru, in particular, benefited from an aid package linked to its agreement with Australia, with the initial agreement between Australia and Nauru providing for AUD 26.5 million in development assistance.[57] The initial agreement with Papua New Guinea did not include development aid, although Australia did make investments in infrastructure on Manus Island, and the camp on Manus employed many local residents.[58]

Operation Sovereign Borders, in essence the present-day manifestation of the Pacific Solution, promises that no person arriving unlawfully in Aus-

54 ibid.

55 Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 International Journal of Refugee Law 696, 710.

56 ibid.

57 Commonwealth of Australia, Report of the Select Committee on a Certain Maritime Incident, *Chapter 10 – Pacific Solution: Negotiations and Agreements* (23 October 2002) ss 10.37, 10.38 <www.aph.gov.au/parliamentary_business/committees/senate/former_committees/maritimeincident/report/c10> accessed 15 March 2024.

58 ibid s 10.55.

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tralia will ever be settled there.[59] On the home page of Operation Sovereign Borders, would-be asylum seekers are told that they have 'Zero Chance,' that the only way to enter Australia is with a valid visa. Operation Sovereign Borders is described as 'a military-led border security operation' established to deliver on the commitment of 'protecting Australia's borders, combatting people smuggling in our region, and importantly, preventing people from risking their lives at sea.'[60]

The overall cost of the policy is difficult to quantify exactly because the costs are spread across various government departments and the Australian military, although a conservative estimate of the cost of Australia's offshore strategy has been around AUD 9 billion since the reinstatement of offshore processing in 2012.[61] The financial element of the policy has relatively little effect on the broader resistance to its ongoing implementation, and it is highly normalized within Australian politics and society.

Australia's offshore processing regime continues to the present day on Nauru, despite the centre there currently hosting very few asylum seekers because of a lack of recent arrivals.[62] However, there have been no further transfers to Manus Island following the 2016 ruling of the Supreme Court of Papua New Guinea in *Namah v Pato* which stated that the detention of asylum seekers was in breach of the right to personal liberty under the Papua New Guinean constitution.[63]

59 Peter Chambers, 'The Embrace of Border Security: Maritime Jurisdiction, National Sovereignty, and the Geopolitics of Operation Sovereign Borders' (2015) 20 Geopolitics 404; Joyce Chia, Jane McAdam and Kate Purcell, 'Asylum in Australia: "Operation Sovereign Borders" and International Law' (2014) 32 Australian Year Book of International Law 33.

60 Australian Government Department of Home Affairs <https://osb.homeaffairs.gov.au> accessed 15 March 2024.

61 Yearly breakdown: $AUD 721,016,000 in 2013–2014, $AUD 912,631,000 in 2014–2015, $AUD 1,078,064,000 in 2015–2016, $AUD 1,082,894,000 in 2016–2017, $AUD 1,481,985,000 in 2017–2018, $AUD 1,157,520,000 in 2018–2019, $AUD 961,680,000 in 2019–2020, $AUD 818,779,000 in 2020–2021, and $AUD 811,836,000 in 2021–2022 (estimated). 'Offshore Processing Statistics: Costs' (*Refugee Council of Australia*, 13 May 2021) <www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/7/> accessed 15 March 2024.

62 The most recent statistics from the Australian government report 13 people presently detained at the Regional Processing Centre on Nauru. Parliament of Australia, Legal and Constitutional Affairs Legislation, Senate committee, *Estimates* (23 October 2023) 50 <https://t1p.de/ikhzt> accessed 15 March 2024.

63 *Namah v Pato* (2016) PGSC 13; SC1497 (26 April 2016).

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III.3. The 2015 Refugee Crisis in the EU

The final crisis that we are analysing in this chapter, which has enhanced the spread of the externalization policy in the Global North is the so-called Migration and Refugee crisis in the EU in 2015–2016. The response of the EU and the Member States to this rapid surge in asylum seeker arrivals was largely a series of restrictive measures designed to prevent access to territory and to make the asylum-seeking experience so difficult that it would discourage those already present and deter those who might be thinking of coming. Before the crisis, in the face of far larger numbers of boat arrivals than either Australia or the United States, the EU resisted the urge to allow for the wholesale prevention of access to its territory. In addition, in *Hirsi Jamaa and Others v Italy*,[64] the European Court of Human Rights (the judgments of which are not binding on the EU but affect the human rights obligations of the EU Member States) clarified the prohibition of interception of migrants on the high seas and return without access to an asylum procedure and without ensuring that a safe return is possible. The 2015–2016 crisis changed that, with Member States and the EU employing a range of measures to deter potential arrivals. As innovations in this respect, we consider a number of measures, including non-admission policies, such as the EU-Turkey deal,[65] and other non-arrival measures, including carrier sanctions, visa regimes, and interdiction, designed to prevent access to the territory of asylum states.

Many European countries were not prepared for the mass influx of asylum seekers who came to Europe in 2015–2016. Their reception systems were not designed for such unprecedented numbers and, in many cases, were found to be inadequate.[66] In many countries, there were significant delays in accessing asylum procedures, while basic needs, such as housing, daily living needs and education were not provided for.[67] EU Member States showed varying levels of willingness to improve their systems to meet

64 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

65 European Council, 'EU-Turkey Statement' (2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 15 March 2024.

66 Birgit Glorius and others, 'Refugee Reception within a Common European Asylum System: Looking at Convergences and Divergences through a Local-to-Local Comparison' (2019) 73 Erdkunde 19.

67 Nikos Kourachanis, 'Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015-2017)' (2018) 19 Journal of International Migration and Integration 1153.

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the new reality, and the role of international law regarding asylum in the EU was tested in a manner and on a scale not seen before by a region confronting its largest mass movements of people since the Second World War.[68]

The EU–Turkey deal constituted one of the three responses to the increased number of asylum seekers arriving in the EU in 2015 alongside the hot-spot and burden-sharing approach contributing to the selective admittance of asylum seekers in the EU. We consider it to be another case of the externalization policy now firmly established in the Global North. The EU started to hold discussions with Turkey as early as in the autumn of 2015, with the EU–Turkey Action Plan signed in October 2015. Its aim was to 'address the current crisis situation in three ways: (a) by addressing the root causes leading to the massive influx of Syrians, (b) by supporting Syrians under temporary protection and their host communities in Turkey (Part I) and (c) by strengthening cooperation to prevent irregular migration flows to the EU (Part II).' Following that agreement, the EU–Turkey Statement was agreed on 18 March 2016. The main premise was to end irregular migration from Turkey to the EU by breaking up 'the business model of the smugglers and to offer migrants an alternative to putting their lives at risk' by ending 'the irregular migration from Turkey to the EU.' This has been implemented by (1) returning all irregular migrants crossing from Turkey into Greek islands; (2) resettling Syrians from Turkey to the EU taking into account the UN Vulnerability Criteria and prioritizing those migrants who had not previously entered or tried to enter the EU irregularly; and (3) preventing new sea or land routes for illegal migration opening from Turkey to the EU, including Turkey's collaboration with neighbouring states as well as the EU to this effect.

The EU response, when viewed alongside earlier examples from the United States and Australia, shows a repeated pattern of policy and rhetoric enacted within a deterrence framework, where unwanted asylum seeker arrivals provoke a decisive response centred on border protection and security. In all of the above examples, offshore asylum processing and relocation of refugees to third countries further created physical and legal barriers to asylum. For instance, a change was also made in the human rights standards in the Council of Europe, which is visible in such judgments as

68 Den Heijer, Rijpma and Spijkerboer, 'Coercion, Prohibition, and Great Expectations' (n 5).

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N.D. & N.T. v Spain[69] or *A.A. and Others v North Macedonia*[70] as a result of which the protection of rights became dependent on the conduct of asylum seekers themselves. In *N.D. & N.T.* the Court made an exception to the prohibition of collective expulsions contained in the ECHR by claiming that unlawful behaviour by migrants might disable Spain's liability for the collective nature of an expulsion. In addition, developments in the externalization of asylum were recently pursued during the Covid-19 pandemic,[71] as well as by Denmark[72] and the United Kingdom,[73] as they seek to emulate elements of Australia's offshore approach.

IV. Evaluating the crisis response

At the core of innovation is the notion or even the expectation of change, so if a law or policy response ensures change, can it be innovative without necessarily being new? In this chapter, we discussed the journey of the deterrence policy and its innovative adoption, first in the U.S., then in Australia, and most recently in the EU. Interestingly, what was already old in the 1990s after having been performed in the U.S. was innovative in the Australian context in 2001, just as European (UK and Danish) moves towards offshore processing are similarly innovative in the 2020s. Innovation, therefore, promises novelty, not necessarily originality, and can utilize earlier measures, sometimes with direct reference, regardless of their negative or harmful effects.[74]

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69 *ND and NT v Spain* App no 8675/15 and 8697/15 (ECtHR, 13 February 2020).

70 *AA and Others v North Macedonia* App no 55798/16 (ECtHR, 5 April 2022).

71 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) 32 International Journal of Refugee Law 668.

72 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' *BBC News* (London, 3 June 2021) <www.bbc.com/news/world-europe-57343572> accessed 15 March 2024; 'Press Statement On Denmark's Alien Act Provision to Externalize Asylum Procedures to Third Countries' *African Union* (Ethiopia, 2 August 2021) <https://au.int/en/pressreleases/20210802/press-statement-denmarks-alien-act-provision-externalize-asylum-procedures> accessed 15 March 2024.

73 Nadeem Badshah, 'Protesters across UK Decry "Heinous" Rwanda Deportation Plan' *The Guardian* (London, 16 July 2022) <www.theguardian.com/politics/2022/jul/16/protesters-across-uk-decry-heinous-rwanda-deportation-plan> accessed 15 March 2024.

74 Ben Doherty, '"Stop the boats": Sunak's anti-asylum slogan echoes Australia's harsh policy' *The Guardian* (London, 8 March 2023) <www.theguardian.com/uk-news/202

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These migration policy innovations, despite aiming for deterrence, are regularly presented with a humanitarian motivation – intercepting boats stops the loss of life at sea, and asylum seekers must be saved from villainous people smugglers (the lack of other options in the face of multi-pronged deterrence apparatus does not form part of the state-as-a-humanitarian narrative). These creative measures that we discussed in this chapter have, however, resulted in a series of apparent hypocrisies: resettlement programmes and generous donations to humanitarian organizations sit uncomfortably alongside border walls, interceptions and pushbacks, and humanitarian proclamations are accompanied by policies forcing migrants into dangerous, often fatal, journeys. A proposed deterrence measure need not even ever be implemented in practice to have the desired deterrent effect; sometimes the threat of a measure, such as British and Danish promises of processing in Rwanda, is a sufficient demonstration of policy orientation and intent. Conducted within the deterrence framework, both helpful and harmful innovations feed into this framework, sending a clear message of who is welcome, on what terms, and who controls their entry (states) – states can shift policy approaches rapidly to respond to a crisis (or otherwise) when there is sufficient political will – migrant-friendly innovation does not challenge the predominance of deterrence, it reinforces it, by showing very clearly who has control and who the targets of deterrence are. Certainly, not all migration is considered a problem by states in the Global North, not even rapid mass migration such as that caused by Russia's aggression on Ukraine – migration is only a problem for states when it challenges established social, political, and racial orders.[75]

To sum up, the centrality of deterrence in contemporary responses to unwanted migration to the Global North seems far more likely to solidify than diminish. Many of the present measures exist at least within the letter, if not the spirit, of international law, and in any case, there are limited means of enforcement with which to threaten deviant and recidivist states. In this chapter, we argue, however, that the law itself is often not a problem. To be sure, the letter of the law itself remains relevant. The crisis of

3/mar/08/stop-the-boats-sunaks-anti-asylum-slogan-echoes-australia-harsh-policy> accessed 15 March 2024.

75 See for instance Mayblin (n 4); Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility* (Duke UP 2015); Spijkerboer, 'The Global Mobility Infrastructure' (n 19); Ranabir Samaddar, *The Postcolonial Age of Migration* (Routledge, Taylor & Francis Group 2020).

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international human rights and refugee law lies in particular in how it has become irrelevant in the face of the extensive and ever-growing deterrence infrastructure. Therefore, the crisis of the international law of human rights described in this chapter concerns in particular the international law of the Global North that has emphasised and protected the interest of the Global North to increasingly exclude unwanted protection seekers from arriving within the scope of their jurisdiction. As the developments in Ukraine have demonstrated, the law can sufficiently protect a group of migrants that is wanted due to geographic, racial, or cultural proximity, or political utility. Exceptions can even be made, allowing persons fleeing Ukraine to enter the EU territory without valid international travel documents[76] or with domestic animals without necessary documentation,[77] while people from many other countries remain excluded from access to the EU.

The developments in the Global North discussed in this chapter are, however, criticized and averted by legal institutions outside the Global North. For instance, the Inter-American Commission on Human Rights rejected the majority's arguments in *Sale,* and found the U.S. to be in breach of the American Declaration on the Rights and Duties of Man.[78] Similarly, the Supreme Court of Papua New Guinea decided in 2016 that the practice of detention as such had been in breach of the right of the detainees to personal liberty under the Papua New Guinean constitution.[79] Even though some of the developments are not producing effects of stopping the spread of the policies, they are setting alternative standards that challenge the deterrence paradigm. Therefore, the international human rights and refugee law standards, as interpreted by the states of the Global North, including the legal innovations described in this chapter, need to be analysed not as

76 'Obywatele Ukrainy mogą wjechać do Polski bez paszportu zagranicznego' (Наш вибір: Gazeta dla Ukraińców w Polsce, 29 September 2023) <https://pl.naszwybir.pl/obywatele-ukrainy-moga-wjechac-do-polski-bez-paszportu-zagranicznego/> accessed 15 March 2024.

77 Gerardo Fortuna, 'EU Relaxes Entry Paperwork for Pets Travelling with Ukrainian Refugees' (*Euractive.com,* 27 February 2022) <www.euractiv.com/section/health-consumers/news/eu-relaxes-entry-paperwork-for-pets-travelling-with-ukrainian-refugees/> accessed 15 March 2024.

78 *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997.

79 Azadeh Dastyari and Maria O'Sullivan, 'The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)' (2016) 42 Monash University Law Review 308–38; For a discussion on the importance of the judgment see also Spijkerboer, 'Geopolitics of Knowledge Production' (n 3).

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international legal standards in general but as their regional interpretation that is specific to political realities in those countries where the deterrence approach has become normalized as a response to unwanted migration.

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Innovations in Public Governance in Response to the Migration Crisis from the EU Perspective. Institutional and Normative Solutions

Łukasz Łotocki

Abstract: The chapter will discuss the events making up the migration crisis in chronological order starting from 2015. The analysis will be conducted from a Public Governance perspective. The crisis will be understood not only as a humanitarian or social crisis, but primarily as a political crisis. Although the peak of the migration crisis took place in 2015–16, the crisis is actually continuing all the time, so the chapter covers events up to 2021–22.

I. Introduction – crisis as a category of analysis

Since at least the early 2010s, the European Union has been confronted with crisis situations related to the mass influx of migrants, including refugees. These situations have had various manifestations, intensities and conditions but, in the public discourse, they have been usually referred to by collective terms such as the 'migration crisis' or 'refugee crisis'. The main turning points of these crises include:

- 2014–2016 (especially 2015), i.e. the crisis situation caused by the increased influx of migrants from North Africa and Middle Eastern countries;
- 2021–2022, i.e. the period of deliberate promotion by the Belarusian authorities of a mass influx of migrants from Middle Eastern countries across the eastern border of the European Union (primarily the Belarusian–Polish border), intended to destabilize the socio-political situation in the EU;
- 2022, in which the Russian Federation attacked Ukraine triggering mass refugee flows to EU countries (primarily Poland, which borders with Ukraine).

All the situations mentioned had the features of a socio-political crisis. The term social crisis is understood here as 'a situation of accumulated

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social tensions and conflicts, [which] leads to a breakthrough and major changes, often of a systemic nature. A social crisis is usually accompanied by phenomena such as instability, weakening of interpersonal ties, disruption of the social order, weakening of institutions of social control, etc.'[1] From the perspective of political science, a crisis is 'a situation in which one can observe the phenomenon of the expression of social discontent on a massive scale, having its roots in serious economic problems of the state and/or in a significant and growing level of social unrest, which is also manifested in unconventional forms of civic participation and/or in threats to the security and integrity of the country. An obvious consequence of the occurrence of a state of crisis is the inability to continue with the hitherto prevailing policy direction or style of politics (...) one should perceive in it the potential to open the way towards innovative or reforming actions (...).'[2] In this way, a crisis can be a catalyst of new ideas or concepts.

The migration situation of Europe in the 2010s and early 2020s features:

- a breakthrough, a shift, a turnaround, which affects both the EU as a whole and Member States (MS);
- an increase in political and social tensions and conflicts caused by immigration (both within the societies of MS, between host societies and immigrant groups, as well as between individual MS);
- instability, disruption of the social order, disclosure of the inefficiency of institutions of social control, including public order institutions;
- mass social discontent and increased social unrest;
- increased security risks;
- the inability to continue with the current direction of policies with respect to immigration, and simultaneously the need for significant changes in these policies, and perhaps also in the paradigm of the immigration policy itself, which results in opening the path towards innovative action.[3]

It is therefore entirely reasonable to call it a crisis situation. This chapter analyses the main features of the crisis migration situation in the EU over the last seven years (with a breakdown into three main crisis points) and

1 Krzysztof Olechnicki and Paweł Załęcki, *Słownik socjologiczny* (Wydawnictwo Graffiti BC 2002) 104.
2 Andrzej Antoszewski and Ryszard Herbut (eds), *Leksykon Politologii* (Wydawnictwo Atla 2 2002) 197–198.
3 Łukasz Łotocki, *Kryzys imigracyjny w Europie w polskim dyskursie publicznym w latach 2015–2018* (Dom Wydawniczy Elipsa 2019) 119.

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selected innovative ways of dealing with this situation. The main research questions apply to the innovations used in dealing with the crisis situation and the extent to which these innovations have addressed the various dimensions of the crisis situation (see more below).

II. 2015–2022 migration crisis

II.1. Migration crisis in 2015

The migration crisis, which culminated in 2015, was a consequence of war and the destabilization of the socio-economic situation in Middle Eastern and North African countries, as well as, among others, the search for better living conditions by citizens of the Balkan countries. According to data from the International Organization for Migration (IOM), the number of migrants worldwide in 2015 was one billion (one person in seven was a migrant). The number of foreign migrants was 244 million (3.3 % of the world's population).[4] As for the latter figure, it represented an increase of 41 % compared to 2000. According to UNHCR data, at the end of 2015, the number of forced migrants worldwide was 65.3 million (the highest since the Second World War), including 21.3 million refugees.[5]

The main migratory routes of the crisis in 2015 leading to Europe were the Eastern Mediterranean route (from Turkey to Greece), the Western Balkan route (through the Balkans, into Croatia, Slovenia and Hungary) and the Central Mediterranean route (from Libya to Italy). Other, less important routes include the Western Mediterranean route, the Eastern European route, the West African route and the Black Sea route. The Eastern Mediterranean route was mainly used by Syrians, Afghans and Iraqis, the Western Balkan route by Syrians and Afghans, and the Central Mediterranean route by Eritreans and Nigerians. The changes in the migration flows along these routes between 2011 and 2015 are illustrated in the table below.

4 IOM's Global Migration Data Analysis Centre GMDAC, 'Global Migration Trends Factsheet 2015', 5 <https://publications.iom.int/system/files/pdf/global_migration_trends_2015_factsheet.pdf> accessed 16 March 2024.

5 UNCHR, 'Global Trends. Forced Displacement in 2015' (20 June 2016) 2 <http://www.unhcr.org/576408cd7.pdf> accessed 16 March 2024.

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Table 1. Illegal EU border crossings 2011–2015 (selected routes and total number)

Routes	2011	2012	2013	2014	2015
Eastern Mediterranean route	57,025	37,224	24,799	50,834	885,386
Western Balkan route	4,658	6,391	19,951	43,357	764,038
Central Mediterranean route	64,261	15,151	45,298	170,664	153,946
(…)					
Total	**141,051**	**72,437**	**107,365**	**282,962**	**1,822,337**

Source: *Risk Analysis for 2016*, Frontex, 2016, p 17: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf (accessed 16 March 2024).

As the data shows, the largest increase in the influx of illegal migrants crossing the border took place along the Eastern Mediterranean route leading to Greece (885,386 crossings, 49 % of the total in 2015; a change of 1,642 % compared to 2014) and the Western Balkan route (764,038 crossings, 42 % of the total in 2015; a change of 1,662 % compared to 2014). A large scale of inflows took place along the Central Mediterranean route leading to Italy, although the largest increase here was in 2014 compared to 2013 (170,664 crossings in 2014, 60 % of the total crossings in 2014; a 277 % change compared to 2013), whereas there was a slight decline to 153,946 crossings (-9.8 %) in 2015. It is worth noting at this point that the number of border crossings is not the same as the number of immigrants. Immigrants crossing the border on the Western Balkan route had previously arrived in Greece or Bulgaria, so they would actually be double-counted.

Among the countries of origin of all migrants crossing the EU borders illegally, the main countries in 2015 were Syria (594,059 illegal crossings, 33 % of the total), Afghanistan (267,485, 15 % of the total) and Iraq (101,285, 5.6 % of the total). The country of origin was not identified in 556,432 (31 %) cases.[6]

6 Frontex, 'Risk Analysis for 2016' (March 2016) 63, <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf> accessed 16 March 2024.

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According to the European Asylum Support Office (EASO),[7] there were 1,324,215 first-time asylum applicants in EU+[8] countries in 2015 (an increase of 122 % compared to 2014 and 355 % compared to 2011). Germany (where, according to EASO, 441,800 first-time applications were made in 2015), saw an increase of 155 % compared to 2014 and 867 % compared to 2011. Germany received 33 % of all EU+ first-time applications in 2015.[9] The largest national groups applying for asylum for the first time in 2015 in the EU+ countries were Syrians (377,960, increase of 203 % on 2014 and 5056 % on 2011; 29 % of total applicants), Afghans (192,940, increase of 393 % on 2014 and 696 % on 2011; 15 % of total applicants) and Iraqis (126,755, increase of 729 % on 2014 and 840 % on 2011; 10 % of total applicants).[10] With such a large scale of influx of migrants into the EU in 2015, it was difficult for state services to control the processes taking place.

II.2. EU-Belarusian border crisis in 2021

The EU-Belarusian border crisis was the result of deliberate action by the Belarusian authorities intended to destabilize the socio-political situation in the EU. After the 2020 presidential elections, President Lukashenko was accused of falsifying the results, while the security forces were accused of serious human rights violations. The European Union started to impose packages of sanctions on Belarus and in response to these sanctions, Lukashenko started an operation of bringing citizens from Asian and African countries to Belarus by attracting them with the promise of assistance in reaching Western Europe.[11] The main field of action was the Polish-Belarusian border. In 2021, 39,697 attempts to illegally cross the Polish-Belarusian border were recorded (more than three hundred times as many as in 2020, when there were 129 cases).[12] Attempts to cross the border were mainly

7 Currently: European Union Agency for Asylum (EUAA).

8 EU Member States plus Switzerland and Norway.

9 European Asylum Support Office, 'Annual Report on the Situation of Asylum in the European Union 2015' (2016) 128 <https://op.europa.eu/en/publication-detail/-/publication/d18854da-41a9-11e6-af30-01aa75ed71a1> accessed 16 March 2024.

10 ibid.

11 Andrzej Wawrzusiszyn, 'Kryzys migracyjny na granicy polsko-białoruskiej i jego wpływ na bezpieczeństwo Polski' [2022] Nowa Polityka Wschodnia no 2 (33) 49.

12 Ewelina Szczepańska, 'Nielegalne przekroczenia granicy z Białorusią w 2021 r.' (*Official Website of the Polish Border Guard*, 12 January 2022) <www.strazgraniczna.pl/pl/aktualnosci/11127,Na-granicy-polsko-bialoruskiej.html> accessed 16 March 2024.

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made by Iraqi nationals, followed by Afghan, Syrian, Somali, and Tajik nationals.[13] Migrants were often brought to the border by Belarusian border guards and pushed towards the Polish border. Their behaviour was often aggressive. Many migrants attempted to enter Western European countries – German police recorded 11,213 migrants entering Germany illegally from Belarus in 2021 (with only 21 from January to July).[14] Attempts to cross the Polish-Belarusian border were also made in the following months, but the Polish authorities took strong measures to limit the influx, including returning illegal migrants to Belarus and building a physical and electronic barrier at the border. These measures caused controversy, including accusations by some NGOs of pursuing a policy of so-called 'push-backs', which is prohibited by the Geneva Convention on Refugees. However, fewer attempts to illegally cross the border from Belarus into Poland were recorded in 2022 than in 2021, i.e. 15,497.[15]

The influx of migrants during the border crisis was not as massive on an EU-wide scale as it was in 2015, but 2021 was the first year that the intentional use of artificially stimulated migration flows as a tool for destabilization measures became so obvious. A thesis was formulated with regard to the 2015 crisis about the threat of the deliberate use of so-called 'D-weapons' (demographic weapons) to destabilize the situation in European countries. The crisis situation that started in 2021 became an overt example of the use of such means, which is related to the so-called asymmetric threat.[16] As Witold Repetowicz concludes: 'A different philosophy with regard to human life, allowing for its instrumental treatment, rejection of humanitarianism and lack of democratic control, introduces an element of asymmetry in relation to "Western" civilization.'[17] Western democracies become easy targets for blackmail under Coercive Engineered Migration, because they need to adhere to human rights and democratic principles.[18] In this way, a migration flow understood as a large, organized group of civilians attempting to illegally cross a country's borders becomes

13 Wawrzusiszyn (n 11) 52.
14 ibid 55.
15 Szczepańska (n 12).
16 For more on 'Coercive Engineered Migration', see Kelly M Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (Cornell UP 2010).
17 Witold Repetowicz, 'Broń 'D' jako zagrożenie asymetryczne' (2018) 262–263 Wiedza Obronna 109.
18 ibid 117–118.

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part of an operation by one state against another.[19] In other words, states outside the EU, for instance, can exert an artificial influence on an EU country (or the EU as a whole). When analysing this border crisis, account must therefore be taken of the fact that, as Anna M. Dyner wrote:

> 'The complexity of the border crisis shows that it cannot be reduced solely to the migration and humanitarian aspects, although this is one of its key elements. Due to the artificially induced migration pressure, the party conducting the activities – Belarus, in coordination and with the significant participation of Russia – tried and is still trying to test the resilience of the three countries on NATO's Eastern Flank in the political, military, economic, social, and information spheres, as well as to test their protection of critical infrastructure, including at the border.'[20]

II.3. Refugee crisis caused by the war in Ukraine in 2022

The Russian Federation conducted a military attack on Ukraine on 24 February 2022. As a result of the brutal hostilities in breach of international conventions, thousands of civilians were killed and mass refugee movements towards Central and Western Europe started. These movements far exceeded the scale of migration flows into Europe in 2015. According to UNHCR data as of 27 December 2022, there were 7,896,825 refugees from Ukraine in Europe and 4,885,650 cases of institutional international protection. Most refugees received protection in Poland (1,546,354) and Germany (1,021,667).[21] Among the refugees – unlike in previous crises – women and children predominated by far. In addition, refugees were arriving in the European Union directly from the country where the war was taking place, where their lives and health were directly threatened. In the case of the 2015 migration crisis, the influx was largely not direct. Migrants who arrived in Europe within the framework of the 2021 Polish-Belarusian border crisis did not come to Europe directly either, but travelled through Belarus.

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19 ibid 118.

20 Anna Maria Dyner, 'The Border Crisis as an Example of Hybrid Warfare' (*The Polish Institute of International Affairs (PISM),* 2 February 2022) <https://www.pism.pl/publications/the-border-crisis-as-an-example-of-hybrid-warfare> accessed 16 March 2024.

21 UNHCR, 'Ukraine Refugee Situation' <https ://data.unhcr.org/en/situations/ukraine> accessed 16 March 2024.

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Special legislative solutions were introduced in Poland, as the main host country, to ensure that Ukrainian refugees after 24/02/2022 – apart from access to work – have access to many of the universal and social benefits to which Polish citizens are entitled. In addition, there was a very spontaneous response from the Polish public, which welcomed hundreds of thousands of refugees from Ukraine into their homes. This became a phenomenon on a European, and perhaps even global, scale.[22] Both in the social and political perception, the influx of refugees from Ukraine to EU countries (especially Poland) was unanimously perceived as actual waves of refugees. Earlier waves (both in 2015 and 2021) had raised controversy and socio-political disputes as to their nature in their mass, which resulted in different political decisions.

III. Innovations in Public Governance in the context of the migration crisis

As stated by Ari-Veikko Anttiroiko, Stephen J. Bailey and Pekka Valkama 'public governance refers to a ruling system applied in the public sector.'[23] The contemporary understanding of the public governance process refers to the coordination of multi-sectoral activities in public policy-making, taking into account the participation of different players, such as public authorities, NGOs, and private companies. It requires a flexible approach (more or less formal) to public policy-making to achieve the best possible results (objectives). Recalling again the authors mentioned:

> 'Innovation in public governance is a new mechanism or institutional arrangement which is successfully implemented to solve governance problems or to gain better governance outcomes. The public sector is keen on innovations because of the endless need to improve productivity and effectiveness. Innovation represents novelty in public action and the art of doing things in a better way than before in public administration.'[24]

22 For details see: Grażyna Firlit-Fesnak and others, 'Inwazja Rosji na Ukrainę. Społeczeństwo i polityka wobec kryzysu uchodźczego w pierwszym miesiącu wojny' (2022) Wydział Nauk Politycznych i Studiów Międzynarodowych Uniwersytet Warszawski <https://wnpism.uw.edu.pl/wp-content/uploads/2022/04/Kryzys-uchodzczy-2022-raport-KPS.pdf> accessed 16 March 2024.

23 Ari-Veikko Anttiroiko, Stephen J Bailey and Pekka Valkama, 'Innovations in Public Governance in the Western World' in Anttiroiko, Bailey and Valkama (eds), *Innovations in Public Governance* (IOS Press BV 2011) 2.

24 ibid 3.

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This chapter uses a similar understanding of 'Innovations in Public Governance' but, to some extent, it differs from the perspective adopted by the cited authors, who assume that 'the second precognition of innovation is successful implementation.'[25] It is suggested that only the last condition mentioned by the category implementation is changed (without the adjective 'successful'), whereby implementation is also understood as an attempt at implementation without the need for full implementation of all the planned actions and without the need to obtain the expected positive effects of these actions. As can be seen from the above definitions of crisis, innovative measures are particularly desirable in crisis situations, in which existing ways of shaping public policy prove inadequate in the face of the problems that have arisen. In this context, the evaluation of innovative actions should be based on problem-solving criteria. As for the said crisis situations, there can be talk of at least several – simultaneously occurring – dimensions of crisis:

- a migration crisis associated with a lack of control over the huge migratory waves, which can trigger further waves;
- a humanitarian crisis associated with the difficulty of guaranteeing humanitarian conditions to migrants and refugees (including the situation in which they become victims of instrumentalization);
- a security crisis associated with both the threat of massive migratory waves and the need to integrate them, the creation of pull factors, the subsequent difficulties of integration and the threat of infiltration with migratory and refugee waves of individuals and groups that directly threaten internal security (e.g. terrorists, criminals etc.);
- a political crisis associated with a lack of consensus resulting in conflicts between different political, axiological and ideological orientations regarding an appropriate response to the crisis situation that has arisen;
- an interstate crisis caused by overt conflicts of interest between different nation states (groups of states), as was the case in the EU in 2015;
- an institutional crisis regarding the EU institutions, the actions of which have been criticized both by the conservative-right accusing them of being incapable of countering the asymmetric threat by being stuck in a reductionist 'humanitarian paradigm' attracting successive migratory waves, and by the liberal-left accusing them in turn of not taking suf-

25 ibid 4.

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ficient account of the need to respect the fundamental rights of immigrants (as was the case in the 2015 crisis).

The evaluation of innovative actions should take into account the responses to all these dimensions. In the migration dimension, the measures taken should, therefore, reduce the pull factors for migrants and improve the system to accurately identify refugees with respect to other types of migrants (which also applies to the internal security dimension) and to pursue a more selective immigration policy. In addition, they should provide solutions to deal flexibly with mass influxes of migrants in the short term. In the humanitarian dimension, they should contribute to reducing the negative humanitarian consequences of mass migration flows, especially in circumstances of restrictive refugee policies. In the security dimension, they should take into account the social and political risks associated with migration processes and counter them effectively (which can sometimes raise questions about the humanitarian dimension of the actions taken). Politically, they should foster an open political debate enabling an exchange of arguments and the non-reductionist consideration of the different dimensions of the crisis in the search for solutions. From an inter-state perspective, they should take into account the interests of the different states, seeking flexible solutions that are acceptable to these states (especially in situations of an apparent conflict of interests) without allowing the imposition of certain solutions against the interests of specific states. In the institutional dimension, they should contribute to building trust in the EU institutions in terms of pursuing effective policies that take account of the circumstances and create efficient response and decision-making systems that satisfy all players in the decision-making process. Action on all these dimensions should contribute to a reduction of political and social tensions and conflicts caused by immigration to the EU and to the restoration of balance and stability in relation to these dimensions. The proposed innovations can refer to formal regulations, informal normative frameworks, institutional structures, as well as institutional and discursive practices.

The following part of this chapter briefly discusses five selected types of EU actions which, according to the author, meet the criteria described above for innovative actions. They apply to the various aforementioned dimensions of crisis related to migration processes from 2015–2022.

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These actions are:

- the introduction of a hotspot approach during the 2015 crisis;
- the implementation of a relocation scheme and the suspension of the Dublin III Regulations following the 2015 crisis;
- arrangements with third countries to limit migration flows, including primarily Turkey and then Libya and other African countries;
- the shift to a more restrictive migration policy paradigm;
- the first ever implementation of the Temporary Protection Directive (to refugees from Ukraine in 2022).

An attempt was also made to evaluate each 'innovation' discussed.

IV. Introduction of a hotspot approach during the 2015 crisis

In 2015, the European Commission announced a document entitled 'European Agenda on Migration'. This document envisaged the establishment of so-called hotspots, i.e. places located in the EU countries of the first line of migration (Italy and Greece), to identify and register incoming migrants and fingerprint them.[26] The hotspots were to be staffed by EASO support teams, consisting of experts from the European Asylum Support Office, Frontex and Europol (the EU's police agency). Four hotspots were set up in Italy (in Lampedusa, Trapani, Pozzallo and Taranto) and five in Greece (on the islands of Lesbos, Chios, Samos, Leros and Kos).[27] The operation of the hotspots was already problematic from the moment they were established. Many migrants refused to actually reveal their identities. These people feared that, by revealing their identity, they would have to apply for asylum in the first country of immigration, making it difficult for them to travel to northern Europe. Some immigrants, hoping for better living conditions in Germany, Sweden or the UK, mutilated their fingertips to destroy their fingerprints so they could reapply for international protec-

26 Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration' COM (2015) 240 final, p 6 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240&from=EN> accessed 16 March 2024.

27 European Asylum Support Office, 'Annual Report on the Situation of Asylum in the European Union 2016' (2017) 80 <https://op.europa.eu/webpub/easo/annual-report-2016/en/> accessed 16 March 2024.

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tion in another country.[28] According to the European Commission, only 23 % of people irregularly crossing EU borders were fingerprinted.[29] The vast majority of migrants continued their journey to the north-west of Europe (mainly to Germany) and therefore formally ‘ceased to be’ refugees from the point of view of the next country of immigration. Indeed, the motivation for further migration was most often economic (even in the case of those who left their country because of persecution).

The idea of setting up the hotspots was, on the one hand, an attempt to control the mass influxes into Europe, including identifying the reasons for the migration of individuals before they migrated in an uncontrolled manner to other European countries, which they considered their destinations (such as Germany), and in this sense it should be assessed positively. On the other hand, the effectiveness of the hotspots proved to be rather low. There have been real difficulties in identifying migrants (including verifying the asylum criteria), and dangerous incidents have taken place in overcrowded camps, such as the fire at the Moria camp on the Greek island of Lesbos in 2020. In addition, the researchers note that the hotspot approach was not clear with regard to both its legal and operational frameworks.[30] However, the hotspot approach still appears to be relevant. In 2018, the European Council recognized, among other things, that a concept involving the creation of ‘regional disembarkation platforms’ should be explored in close cooperation with relevant third countries, as well as with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM). ‘Regional disembarkation platforms’ were to be located outside the EU, where migrants (rescued at sea) would await a decision on asylum.[31] However, a barrier here is the unwillingness of North African countries to set up such platforms. In turn, in the negotiated draft New Pact on Migration and Asylum

28 Patrycja Sasnal (ed), *Niekontrolowane migracje do Unii Europejskiej – implikacje dla Polski* (The Polish Institute of International Affairs 2015) 17 <https://pism.pl/upload/images/artykuly/legacy/files/20992.pdf> accessed 16 March 2024.

29 Janusz Balicki, ‘Unia Europejska jako podmiot polityki wobec uchodźców’ in Konstanty A Wojtaszczyk and Jolanta Szymańska (eds), *Uchodźcy w Europie* (ASPRA-JR 2017) 110, 121.

30 Karl Heyer, ‘Keeping migrants at the margins. Governing through ambiguity and the politics of discretion in the post-2015 European migration and border regime’ (2022) 97 Political Geography no 102643, 4.

31 European Council, ‘European Council Meeting (28 June 2018) – Conclusion’ EUCO 9/18 <https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf> accessed 16 March 2024.

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announced in September 2020, the European Commission made a proposal 'to establish a seamless procedure at the border applicable to all non-EU citizens crossing without authorization, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure,'[32] which also resembles a hotspot approach in its assumptions.

The effectiveness of the hotspot approach depends on the actual ability to verify the identity of migrants and the ability to efficiently and immediately return to countries of emigration those who clearly do not meet the criteria for asylum. It is worth noting that, in the situation of the more obvious refugee influx we faced in 2022 from Ukraine, the creation of hotspots was completely unnecessary despite the larger size of the influx. This shows clear differences between the 2015 and 2022 migration waves and suggests some uncertainty about the dominant nature and structure of migration from the Middle East and North Africa compared to refugee migration from Ukraine. The inflow in 2015 was much more diverse – both in terms of countries of origin, migration routes and the nature of the migration itself. In fact, the proportions between people seeking protection (refugees) and economic migrants were unknown. It was very difficult to reliably verify the real status of many newcomers. And even the establishment of hotspots could not guarantee that the problem would be resolved.

V. Implementation of a relocation scheme during the 2015 crisis

EU immigration policy has been developed since 1 May 1999, when the Treaty of Amsterdam entered into force.[33] The basis for EU action in the area of migration is currently the Treaty on the Functioning of the EU (Title V. Area of freedom, security and justice, Chapter 2. Policies on border checks, asylum and immigration, Articles 77–80). According to Article 78(1) of this Treaty:

32 Commission, 'Proposal for a Regulation Introducing a Screening of Third Country Nationals at the External Borders' COM (2020) 612 final; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM (2020) 609 final, p 4.

33 Justyna Godlewska-Szyrkowa, 'Unia Europejska wobec kryzysu uchodźczego' in Grażyna Firlit-Fesnak, Łukasz Łotocki, Piotr W Zawadzki (eds), *Europejskie polityki imigracyjne. Stare dylematy, nowe wyzwania* (ASPRA-JR 2016) 22.

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> ‘The Union shall develop 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. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’[34]

Paragraph 3 of the same article states that

> ‘In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the [EU] Council, on a proposal from the [European] Commission, may adopt provisional measures for the benefit of the Member State(s) concerned [whereby] the Council shall act after consulting the European Parliament.’[35]

According to Article 80, EU policies on border control, asylum and immigration and their implementation ‘shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.’[36] The latter provision served as a justification for the establishment of a relocation mechanism of migrants to EU countries proposed in September 2015.

In the context of the migration crisis, EP and EU Council Regulation No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[37] (the so-called Dublin III) is relevant. This regulation constitutes the basis for returning an applicant in another Member State to the State responsible for examining that applic-

34 Consolidated Version of The Treaty on the Functioning of The European Union [26 October 2012] OJ C326/49 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> accessed 17 March 2024.

35 ibid.

36 ibid.

37 Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L180/31 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=PL> accessed 17 March 2024.

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ation (most often, the first Member State on the territory of which the foreigner has crossed the EU border).[38] Faced with an influx of immigration in waves, this regulation has practically ceased to function, and it has become necessary to look for other, more flexible ways of dealing with the crisis situation.[39]

On 20 April 2015, the EU Member States adopted a Ten Point Action Plan on Migration[40] at a joint meeting of the Foreign Affairs Council and the Home Affairs Council in Luxembourg in response to the worsening immigration crisis. Among other things, the plan included the consideration of options for an emergency relocation mechanism. The 'European Agenda on Migration' of 13 May 2015 states that a temporary system and then a permanent system needs to be developed for sharing the responsibility for large numbers of refugees and asylum seekers among the Member States (so-called 'relocation'), in order 'to ensure a fair and balanced participation of all Member States to this common effort.'[41] The distribution key was based on criteria such as:[42]

- the size of the population (40 %);
- the GDP (40 %);
- the average number of spontaneous asylum applications and the number of resettled refugees per million inhabitants over the period 2010–2014 (10 %);
- unemployment rate (10 %).

In addition to the priority of developing a system for relocating people from the EU, a commitment was made to formulate a proposal for a resettlement programme from third countries encompassing 20,000 places. Furthermore, this Agenda mentions the use of a 'wide range of tools' and

38 Justyna Godlewska-Szyrkowa (n 33) 23.

39 See Micheline van Riemsdijk, Marianne H. Marchand and Volker M. Heins, 'New actors and contested architectures in global migration governance: continuity and change' (2021) 42 Third World Quarterly 1, 2.

40 Joint Foreign and Home Affairs Council, 'Ten point action plan on migration' (Luxembourg, 20 April 2015) <http://europa.eu/rapid/press-release_IP-15-4813_en.htm> accessed 17 March 2024.

41 Commission, 'European Agenda On Migration' (n 26), 4.

42 ibid 19.

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'all policies and tools at our disposal',[43] which goes beyond traditional legislation and is an excellent example of the practice of Public Governance.[44]

On 27 May 2015, the European Commission presented a proposal for relocating Syrian and Eritrean nationals in need of international protection from Italy and Greece. It was to apply to 40,000 people (over the next 2 years) who arrived in Italy or Greece after 15 April 2015 or were due to arrive there after the mechanism was activated. 24,000 people were to be relocated from Italy, while 16,000 were to be relocated from Greece.[45] These arrangements were confirmed by EU Council Decision 2015/1523 of 14 September 2015.[46] A resolution of the representatives of the governments of the Member States meeting in the Council of the EU of 20 July 2015 agreed on the relocation of 32,256 people in the first phase. In addition, an agreement was reached on the resettlement of 22,504 people.[47]

The document entitled 'Annexes accompanying the Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary' of 9 September 2015 envisages the relocation of 120,000 people (representing countries of origin with an EU average recognition rate of at least 75 %, i.e. Syria, Iraq and Eritrea, according to the date of adoption of the document), of whom 15,600 would be from Italy, 50,400 from Greece and 54,000 from Hungary.[48] As the Central and Eastern European countries disagreed with the quota allocation of the 120,000 migrants in question, the Luxembourg Presidency used a qualified majority mechanism to make the decision.[49] It

43 ibid 2.
44 Paul James Cardwell, Tackling Europe's Migration 'Crisis' through Law and 'New Governance' (2018) 9 Global Policy 67, 71.
45 Council of the European Union, 'Outcome of the Council meeting, 3405th Council meeting Justice and Home Affairs Brussels' (20 July 2015) 11097/15 (OR. En) Provisional Version Presse 49 PR CO 41, pp 3–8 <www.consilium.europa.eu/media/22985/st11097en15.pdf> accessed 17 March 2024.
46 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146.
47 Council of the European Union (n 45) 3–8.
48 Commission, 'Annexes accompanying the Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary' COM (2015) 451 final Annexes 1 to 4 <www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2015/0451/COM_COM(2015)0451(ANN)_EN.pdf> accessed 17 March 2024.
49 Balicki (n 29) 120.

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was possible to circumvent the unanimity rule of the Member States in the European Council by making a decision at the Home Affairs Council level.

In accordance with EU Council Decision 2015/1601 of 22 September 2015 establishing interim measures in the area of international protection in favour of Italy and Greece,[50] following Hungary's withdrawal from the relocation scheme, it was considered that 15,600 people were to be relocated from Italy and 50,400 from Greece. The number of people to be relocated under this decision was therefore to be 66,000. The 54,000 places originally envisaged for relocation from Hungary were changed in favour of relocation from Italy and Greece or from another country (if a justified need arose), with the exact relocation amounts within this figure to be determined in the future. In summary, of the 40,000 migrants agreed upon in May 2015, it was decided in July that 32,256 would be relocated, leaving 7,744 to be relocated. In September 2015, it was decided that 66,000 immigrants (50,400 from Greece and 15,600 from Italy) and a target of an additional 54 000 would be relocated. This amounts to a total of 160,000 immigrants planned for relocation, with specific commitments made up to that time for 98,256 people. A Member State was to receive €6,000 for each person relocated. A plan of the implementation of the relocation and resettlement quotas was set out for the coming two years. The decisions that were made had the effect of temporarily suspending the Dublin III Regulation.

The idea of relocation and the way it was adopted (by a qualified majority in the EU Council) resulted in a dispute within the EU. The V4 countries objected to the implementation of such a scheme and ultimately failed to meet the allocated quotas. There was an obvious conflict of interests between the states here. States that were not migration destinations (and often not even on migration routes) did not want to participate in the implementation of this mechanism. These states felt that this could expose them to the same large migration waves as those already faced by Western European states. In doing so, it was pointed out that countries such as those in the V4 group, were not ready to host as many non-European refugees as their Western counterparts did. As they criticized Germany for its 'open borders approach', which they believed had created a pull factor

50 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L238/80 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from> accessed 17 March 2024.

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for refugees, they were not ready to bear the consequences of what they considered to be 'misguided' policies by relocating refugees who had subsequently arrived in Europe. Finally, 34,710 people in need of international protection were relocated from Italy and Greece under the Relocation Scheme.[51]

EU decision-makers have been looking for very innovative, yet according to some Member States radical, ways of enforcing compliance with the relocation mechanism. An example is the draft EP and Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person provided for the introduction of an automatic mechanism for the redistribution of refugees between Member States – the so-called corrective allocation mechanism (Chapter VII 'Corrective allocation mechanism'), which would be triggered in situations of migratory pressure.[52] The mechanism would be triggered automatically in favour of a Member State when the number of applications for international protection for which that Member State is responsible exceeds a threshold of 150 % of the so-called 'reference number' (to be determined annually for each Member State [Article 34(3)]). This number would be based on two criteria: the population of the given Member State (50 % of the weight) and the total GDP of the given country (50 % of the weight). According to Article 37 of the proposed regulation, each Member State would have to pay a so-called solidarity contribution of EUR 250,000 per applicant who would have otherwise been allocated to that Member State during the respective twelve-month period. The proposal thus envisaged a permanent refugee distribution system that would be triggered automatically in a crisis situation. However, this idea was not supported by a sufficient majority of the Member States.

51 Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council Progress report on the Implementation of the European Agenda on Migration' COM (2019) 126 final, p 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0126&from=EN> accessed 16 March 2024.

52 Commission, 'Proposal for a Regulation of The European Parliament and of The Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270 final/2 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270(01)&from=EN> accessed 17 March 2024.

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On 28 June 2018, the European Council recognized, among other things, that future relocations and resettlements 'will be on a voluntary basis, without prejudice to the Dublin reform.'[53] However, in the negotiated New Pact on Migration and Asylum announced in September 2020, the European Commission has not given up on the idea of relocation as such. It was stated that 'Member States will have the flexibility to decide whether and to what extent to share their effort between persons to be relocated and those to whom return sponsorship would apply. There would also be the possibility to contribute through other forms of solidarity.'[54] However, the plan to make individual states responsible for the arrangement of the return of migrants (which is an extremely difficult issue) in practice could mean relocating people who do not meet the criteria for asylum. Therefore, it seems that, because of the controversy surrounding relocation, on the one hand, its optionality is being made manifest, while on the other attempts are being made to continue to introduce it as a permanent mechanism by the 'back door'.

The imposition of a relocation mechanism was problematic. The concept of relocation does not take into account the interests of the various MS and can create an additional pull factor for migrants. The point is that it may be interpreted as a declaration of acceptance of the further opening of Europe's borders to immigration (including irregular immigration) in a situation of massive increases in inflows. Furthermore, it does not give refugees any say in or choice as to where they will receive protection, which is likely to lead to dissatisfaction and subsequently secondary movements. Indeed, many migrants did not succumb to the relocation decision and left for their intended destination, which also calls into question the effectiveness of the mechanism as such.

It is also worth noting that Poland, the country that finally did not accept a single migrant under the 2015 relocation scheme, accepted more refugees from Ukraine in 2022 than the EU as a whole in 2015 of all the refugees, while consistently also remaining opposed to the relocation mechanism as such in this situation. Other solidarity measures, such as financial streams flowing to the countries most affected by the influx of refugees, would be more appropriate here, according to the Polish government. It is also worth mentioning that, in the circumstances of large migratory inflows in 2021 and 2022, the use of the Dublin procedures was intensified, with Western

53 European Council, 'Meeting (28 June 2018)' (n 31) 2.
54 Commission, 'New Pact on Migration and Asylum' (n 32) 5.

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European countries (mainly Germany) starting to send immigrants back to Poland (mainly from Iraq and Afghanistan) who had crossed the EU's eastern border.

As Natascha Zaun stated, the refugee crisis in 2015 had 'the potential to fundamentally harm the European integration project.'[55] However, the concept of relocation and the way it was pushed through proved to be particularly threatening in this context. Above all, this situation has highlighted overt conflicts of interest between states and the consequences of asymmetric treatment of these interests. Referring to negotiation theory, as the researcher mentioned above wrote regarding non-destination countries of incoming wave migration in 2015, 'having a better alternative to the negotiated agreement, these Member States blocked the introduction of a refugee quota system.'[56] This was an important case of a decision-making process in which the relatively new EU states, such as the V4 countries, played such a fundamental role.[57] It is worth noting at this point that the majority of EU countries ultimately failed to fulfil their relocation commitments.

The 2015 migration crisis highlighted that there was no shared European vision of a common migration policy and that decisions and reforms would be adopted in a reactive rather than proactive manner.

VI. Arrangements with third countries to reduce migration flows following the 2015 crisis

The EU–Turkey 'Statement' was announced on 18 March 2016 to reduce the numbers of immigrants coming to Europe. The most important provisions of this 'Statement' included:[58]

- all irregular migrants who cross the border from Turkey into Greece after 20 March 2016 will be returned to Turkey at the EU's expense;
- for every irregular Syrian migrant withdrawn, another Syrian national meeting the criteria to be granted international protection will be re-

55 Natascha Zaun, 'States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System' (2018) 56 Journal of Common Market Studies 44.
56 ibid 45.
57 ibid 58.
58 European Council, 'EU-Turkey statement' (18 March 2016) Press Release 144/16, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> accessed 17 March 2024.

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settled from Turkey to Greece (in the first instance, within the limit agreed upon at the EU Council meeting on 20 July 2015 – up to 18,000 people, and then based on an extension of resettlement on a similar basis for a further 54,000 people); the total number of people planned for resettlement from Turkey to the EU was 72,000;
- the EU will pay Turkey €3 billion in the first tranche and, once these resources are exhausted and Turkey fulfils its commitments, a further €3 billion in a second tranche payable by the end of 2018.

In the 'Statement', the EU made the commitment to open further chapters on accession negotiations with Turkey and to accelerate visa liberalization. In addition to closing the Western Balkan route, the 'Statement' has contributed to a significant reduction in the influx of migrants from Turkey (the so-called Eastern Mediterranean route). Two years after the agreement was signed, there was a 97 % reduction in irregular immigration along this route.[59]

In February 2017, at an informal EU summit in Malta, EU leaders agreed to adopt a package of measures to strengthen Libya so that the country ceases to be a gateway to Europe for migrants from Africa. These measures were to include, among other things, additional training and the transfer of equipment, which would support the Libyan coast guards. Cooperation with the Libyan border guards and the battle against smugglers was seen as a priority in reducing migration from Africa.[60] A decision was made in November 2017 at the European Union – African Union summit in Abidjan that the EU, the African Union, and the UN would set up a joint task force to protect the lives of migrants and refugees along migration routes, particularly in Libya. A plan for the voluntary evacuation of migrants from Libya to their countries of origin was also approved. The Libyan authorities agreed to allow UNHCR and IOM representatives access to the camps where migrants were staying.[61] A summit of seven southern European countries (Italy, Spain, France, Portugal, Malta, Greece, and Cyprus) was

59 Commission, 'Eu-Turkey Statement Two years on' (April 2018), p 1 <https://home-affairs.ec.europa.eu/system/files/2020-09/20180314_eu-turkey-two-years-on_en.pdf> accessed 17 March 2024.

60 European Council, 'Informal meeting of EU heads of state or government, Malta, 3 February 2017' <http://www.consilium.europa.eu/en/meetings/european-council/2017/02/03/> accessed 17 March 2024.

61 '5th African Union – EU Summit, 29–30 November 2017' <www.consilium.europa.eu/en/meetings/international-summit/2017/11/29-30/> accessed 17 March 2024.

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held in Rome on 10 January 2018. The participants of the summit argued in favour of a unified EU policy on migration. The resulting document states that the southern European countries 'are strongly committed to a common European migration policy, to prevent irregular flows and to address the root causes of mass migration in dialogue and cooperation with the countries of origin and transit' and they 'are determined to strengthen (…) partnerships with those countries, particularly in Africa'.[62]

Furthermore, the participants of the summit supported the full implementation of the EU-Turkey Statement. European and African countries signed the so-called Marrakesh Political Declaration on 2 May 2018 (as part of the so-called Rabat Process launched in 2006 for the European-African dialogue on migration and development). The declaration emphasized the benefits of legal immigration, including a particular desire to promote the mobility of specific groups of immigrants (e.g. professionals). At the same time, the promotion of legal immigration from Africa is to be accompanied by the prevention of irregular immigration. It was also declared, among other things, that the objective of strengthening the protection and integration of refugees and other forced migrants would be pursued.[63] The conclusions of the European Council meeting of 28 June 2018 stated that 'The European Council agrees on launching the second tranche of the Facility for Refugees in Turkey and at the same time on transferring 500 million euro (…) to the EU Trust Fund for Africa.'[64] It was explicitly acknowledged that 'tackling the migration problem at its core requires a partnership with Africa aiming at a substantial socio-economic transformation of the African continent building upon the principles and objectives (…) defined by the African countries (…).'[65]

Cooperation with third countries in reducing migration to Europe seems necessary. For example, the EU-Turkey Statement has clearly reduced the influx of migrants. The search for effective solutions on migration routes from Africa is much more difficult. However, there are some doubts about the measures in question. As far as the EU-Turkey Statement is concerned, there is a risk of an instrumental use of migrants by Turkey to achieve political aims. In addition, with regard to both Turkey and other partners (e.g., Libya), there are doubts about the conditions guaranteeing the rights

62 ibid.
63 See <www.rabat-process.org/en/> accessed 17 March 2024.
64 European Council, 'Meeting 28 June 2018' (n 31) 3.
65 ibid.

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of refugees residing there. It seems that the key in EU arrangements with third countries is to provide a quick fix and to show the EU is taking the concerns of Member States about migration seriously without considering the humanitarian implications of the implementation of the provisions. On the one hand, this raises objections from humanitarian organizations, while on the other, cooperation with third countries is widely perceived among Member States as a necessary tool for reducing future waves of migration to Europe. So it seems for now that there is no fully satisfactory solution.

In conclusion, it is worth mentioning that the formal and legal status of the agreement with Turkey remains unclear. The non-transparent formula of a 'statement' (rather than, for example, an agreement[66]) seems to be a model example of a flexible, less formalized, ad-hoc[67] tool for migration management typical of the 'innovative approach' in Public Governance. Furthermore, such a 'flexible' search for political solutions through negotiations and deliberation may be an example of the implementation of a kind of new intergovernmentalism in the European Union's activities.[68]

VII. Shift to a more restrictive migration policy paradigm

The migration crisis initiated a gradual shift by the EU to a paradigm of a more restrictive, controlled, and selective migration policy focusing on the protection of the EU's external borders. At the end of 2015, the EU tripled its spending on external border protection.[69] In 2016, the institutional manifestation of this trend was the EU Council decision on the Frontex Agency. The Agency was strengthened relatively quickly and transformed into the European Border and Coast Guard Agency. The Agency's most important new competence became the ability to intervene in a country experiencing an increased migratory influx and being unable to deal with the

66 See Cardwell (n 44) 72.

67 See Zeynep Sahin-Mencutek and others, 'A crisis mode in migration governance: comparative and analytical insights' (2022) Comparative Migration Studies no 12, 12.

68 About new intergovernmentalism, see more Christopher J Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2014) 53 Journal of Common Market Studies 703–722.

69 Bridget Anderson, 'Towards a new politics of migration?' (2017) 40 Ethnic and Racial Studies 1527, 1529.

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threats at the external border on its own.[70] The extension of the Agency's mandate and the increase in its resources were driven by the need for tighter controls and a more restrictive entry policy. It is worth noting that the extension of Frontex's remit applied to areas of activity reserved to date for nation states, and the trend towards further strengthening the Agency is continuing today. The potentially restrictive nature of the Agency's activity is also sometimes criticized. For example, in 2022, there were accusations of so-called 'push backs' on the Greek-Turkish border in the context of Frontex's activities.[71]

It is also worth noting that an EP and Council Regulation was adopted on 15 March 2017, according to which EU countries were obliged to conduct systematic checks on everyone crossing the external borders of the EU (including EU citizens).[72] Another example of radical moves to reduce uncontrolled migration was the temporary reintroduction of border controls and therefore the suspension of the Schengen regime taking place since September 2015. For example, Germany reintroduced border controls at its border with Austria, Austria at its borders with Slovenia, Italy, Hungary and Slovakia, and Hungary at its border with Slovenia. Temporary border controls have also been reintroduced by Norway and Denmark.[73] Control procedures were introduced at Danish ports with ferry crossings to Germany, at the land border between Germany and Denmark, at Swedish ports in the south-western region of the country and at the bridge over the Sund, as well as at Norwegian ports with sea crossings to Denmark, Germany and Sweden.[74] The migration crisis has undermined one of contemporary foundations of the EU, i.e. the free movement of persons and the abolition

70 Council of the European Union, 'European Border and Coast Guard: final approval, Press Release' (14 September 2016) <www.consilium.europa.eu/en/press/press-releases/2016/09/14/european-border-coast-guard/> accessed 17 March 2024.

71 See <https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/>; <https://frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy> both accessed 17 March 2024.

72 Regulation (EU) 2017/458 of The European Parliament and of The Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, Official Journal of the European Union [2017] OJ L74/1.

73 Frontex, 'Risk Analysis for 2016' (n 6), 33.

74 See Marta Pachocka, 'Uchodźcy a wybrane państwa Europy Zachodniej, Francja' in Konstanty A Wojtaszczyk and Jolanta Szymańska (eds), *Uchodźcy w Europie* (ASPRA-JR 2017).

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of internal borders, clearly demonstrating that even such a foundation can be suspended under crisis management.[75]

Awareness of the lack of control over migration flows has also contributed to the transformation of the European Asylum Support Office (EASO) into a strengthened, fully-fledged EU Asylum Agency in 2022. Among other things, the new regulation is to make it easier to send experts to Member States that have requested operational assistance. More support is also to be provided for cooperation between EU Member States and third countries.[76] Asymmetric hybrid threats (see earlier) also seem to be leading to a paradigm shift at a less formal level. For example, the EU-Belarusian border crisis was condemned by EU leaders in the context of 'any attempts by third countries to instrumentalize migrants for political purposes.'[77] In October 2021, these leaders stated that 'the EU will continue countering the ongoing hybrid attack launched by the Belarusian regime, including by adopting further restrictive measures against persons and legal entities, in line with its gradual approach, as a matter of urgency.'[78] In December 2021, Lithuania, Latvia and Poland were temporarily given the right to apply temporary measures significantly restricting the existing rights of refugees and migrants.[79] These included the possibility to:[80]

- identify registration points for applications for international protection close to the border;
- extend the deadline for registering applications for international protection to four weeks;

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75 Özer Binici, 'European integration theory in times of crises: Updating 'The Old Debate' with a morphogenetic approach' (2022) 16 Europolity no 1.

76 Council of the European Union, 'Migration and asylum pact: Council adopts EU asylum agency regulation, Press release' (9 December 2021) <www.consilium.europa.eu/en/press/press-releases/2021/12/09/migration-and-asylum-pact-council-adopts-eu-asylum-agency-regulation/> accessed 17 March 2024.

77 European Council, 'European Council Meeting (24 and 25 June 2021) – Conclusions' EUCO 7/21, p 3 <www.consilium.europa.eu/media/50763/2425-06-21-euco-conclusions-en.pdf> accessed 16 March 2024.

78 European Council, 'European Council Meeting (21 and 22 October 2021) – Conclusions' EUCO 17/21, p 6 <www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf>.

79 Wawrzusiszyn (n 11) 56–57.

80 Commission, 'Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland' COM(2021) 752 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0752&from=EN> accessed 17 March 2024.

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– apply an accelerated border procedure for all applications and extend the duration of the border procedure to sixteen weeks;
– make certain facilitations for deporting illegal migrants.

It seems that, since 2015, the main emphasis of the EU migration policy – despite clear declarations on the need to respect the fundamental rights of migrants – has increasingly shifted from humanitarian issues towards security issues. There has been a normalization of the securitization of migration in EU decision-making, which can also be regarded as something new.[81]

VIII. The first ever implementation of the Temporary Protection Directive

The Council of the EU unanimously adopted an implementing decision introducing temporary protection in connection with the massive influx of persons fleeing Ukraine as a result of the war on 4 March 2022 on the basis of Directive 2001/55/EC.[82] This was the first such decision made by the Council since the adoption of that Directive and thus represented a doubtless innovation.

As stated in the decision:

> 'Temporary protection is the most appropriate instrument in the current situation. Given the extraordinary and exceptional situation, including the military invasion of Ukraine by the Russian Federation and the scale of the mass influx of displaced persons, temporary protection should allow them to enjoy harmonised rights across the Union that offer an adequate level of protection. Introducing temporary protection is also expected to benefit the Member States, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus the risk of overwhelming their asylum

81 Moa Nalepa, 'EU migration policy changes in times of crisis' (2018) Malmö Institute for Studies of Migration, Diversity and Welfare (MIM) Malmö University, MIM Working Paper Series 18:4, 1.

82 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055&from=EN> accessed 17 March 2024.

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systems, as they reduce formalities to a minimum because of the urgency of the situation. Furthermore, Ukrainian nationals, as visa-free travellers, have the right to move freely within the Union after being admitted into the territory for a 90-day period. On this basis, they are able to choose the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union. This will in practice facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems'.[83]

The duration of temporary protection should be for an initial period of one year. If the conditions defined in the Directive are met 'that period should be extended automatically by six monthly periods for a maximum of one year.'[84] These harmonized rights apply to issues such as residence, access to the labour market and housing, medical assistance, and children's access to education. The award of temporary protection to refugees from Ukraine was a very good solution. With such a massive migratory flow in such a short time, the application of regular asylum procedures would have had to lead to inefficiencies in the national systems for receiving applications for international protection in the main destination countries of the refugees.

The implementation of Directive 2001/55/EC in the case of refugees from Ukraine again suggests the different nature of the current crisis compared to that in 2015. Refugee migration from Ukraine is perceived as more transparent about its causes and closer in both territorial and cultural terms. It does not raise as many doubts and concerns among state authorities and the EU public opinion as previous crisis waves. Immigrants from the Middle East and North Africa are perceived much more through the framework of insecurity and threats, and so the reactions to the 2015 crisis were also different. Undoubtedly, the implementation of the Directive with regard to refugees from Ukraine was also facilitated by the visa-free regime between the EU and Ukraine. Another facilitating factor was the positive perception of Ukrainian refugees by European societies. However, in view of the aforementioned differences, the Directive should not be expected

83 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/3 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D0382&from=EN> accessed 17 March 2024.

84 ibid L71/4.

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to become the basis for a new solidarity mechanism in the EU asylum policy.[85] Perhaps advantage will be taken of selected experiences from its application. Rather, it has become evidence of a selective and flexible tailoring of tools to address the mass migration crisis to specific circumstances. The more diverse and problematic nature of migration from African and Asian countries mentioned above seems to preclude the adoption of such 'automatic' solutions.

IX. Conclusions

Recent years have shown the difficulty of Europe's migration situation and the difficulty of finding a compromise on a common migration policy at the EU level. The crises discussed differed significantly from each other – both in terms of their factors, dynamics, shape, and effects, as well as the reactions and political decisions at various levels that they caused. They also affected different Member States to differing extents. For example, while Poland was neither a destination country of crisis migratory waves nor located on any significant migration route in 2015, in 2022, it became a major destination country for refugees, receiving more people seeking international protection than the whole of the European Union in 2015.

The turbulent, dynamic, and internally diverse but simultaneously equally challenging migration situation in Europe over the past seven years has given rise to the search for new solutions to respond to it. They have been selectively tailored and have sometimes found themselves outside the traditional formal and institutional framework. Some of these solutions have proved pertinent and effective (e.g. the application of the Temporary Protection Directive to refugees from Ukraine in 2022); others yielded some of the expected results but also had questionable human rights implications and made the EU dependent on cooperation with external partners and therefore susceptible to blackmail (the hotspot approach, EU arrangements with third countries, shift to a more restrictive migration policy paradigm); again others have definitely failed (such as top-down relocation with a quota mechanism that had a poor implementation record). Given the difficulty in finding a compromise between Member States on

85 Jolanta Szymańska, 'EU Weighs Lessons of the Temporary Protection Directive for the Future of Asylum Policy' (*The Polish Institute of International Affairs (PISM)*, 1 September 2022) <https://pism.pl/publications/eu-weighs-lessons-of-the-temporary-protection-directive-for-the-future-of-asylum-policy> accessed 16 March 2024.

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a common asylum and migration policy, including the fact that successive attempts to find solutions at the EU level do not satisfy all participants in the negotiation process, it will be all the more important to be ready to respond flexibly to crises based on the principles of public governance and taking into account the interests of various states and political players.

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Between Innovation and Preservation. How German Migration and Asylum Governance Managed the 2015/16 'Refugee Crisis'

Johannes Eichenhofer[*]

Abstract: This chapter examines how the German migration and asylum governance reacted to the so-called 'refugee' or 'migration crisis' in 2015 and 2016. To this end, it will first briefly discuss the extent to which the reception of around one million asylum seekers within a few months can be described as a 'crisis' at all (I.). An overview will then be given of the numerous actions taken to manage the crisis (II.1.) before examining the question of the extent to which these measures can be described as 'innovations' which may also be suitable for managing future crises (II.2.). It will be shown that the measures taken contained only selective innovations, while the basic structures have been preserved (III.2.). Finally, the text aims to examine what lessons can be learned from the 2015/16 crisis and to what extent the measures taken then are proving their value in the light of the migration of large numbers of people from Ukraine (III.).

I. Measuring the crisis

I.1. The 'refugee crisis' as a challenge for the German asylum and migration governance

If there is such a thing as 'a refugee crisis'[1] and one intends to examine how a national governance has reacted to it, then it is worth looking at the development that Germany experienced in the period from late summer 2015 to around spring 2016. Within the year of 2015 the number of people who had been forced to leave their homes increased from 59,5 million to over 65 million people worldwide.[2] The reasons for this drastic increase

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1 Geoff Gilbert is sceptical about the refugee crisis in 'Why Europe Does Not Have a Refugee Crisis' (2015) 27, International Journal of Refugee Law 531.

2 UNHCR, 'Global Trends Forced Displacement in 2015' (20 June 2016) <www.unhcr.org/media/unhcr-global-trends-2015> accessed 12 March 2024.

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are manifold.[3] For many people who had to flee their homeland at that time, Germany was one of the main destinations. And as is well known, the German authorities did, unlike other EU Member States, such as not simply forward the protection seekers to other EU Member States – because of a possible lack of responsibility under the Dublin III Regulation[4] – but took care of them. On the one hand, the German governance has since then been celebrated as a "front-runner' by many spectators abroad[5] – an impression that can be questioned because of the governance actually pursued during this period. On the other hand, inside Germany, already in September 2015, when the number of asylum applications in Germany suddenly increased to over 1 million,[6] the (social and 'traditional') media spoke of a 'refugee crisis' – a term, that soon spilled over into politics and even the academia.[7] The latter is particularly surprising as the term is obviously ambiguous and therefore rather inappropriate for academic use.

The term 'crisis' – derived from the ancient Greek term κρίσις ('*krisis*') – is generally understood as a turning point or a climax of a development that is perceived as dangerous.[8] In this sense, a 'crisis' is characterized by

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3 In the first place, there is the civil war in Syria, which has been smouldering since 2011 but suddenly became much more brutal around 2015. At the same time, the Islamic State (IS) continued to advance there and in Iraq, while in Afghanistan the resurgent Taliban gained influence and carried out repeated attacks. In addition, there were further humanitarian conflicts in Somalia, Sudan and South Sudan, in Nigeria, in Ukraine (as a result of the occupation of Crimea by troops of the Russian Federation) and, last but not least, high unemployment in the Western Balkans – see on this, Stefan Luft, *Die Flüchtlingskrise* (CH Beck 2017) 26–37.

4 See on this problem the join ECJ judgment from 26 July 2017 in the cases C-490/16 *A.S. v Slovenia* EU:C:2017:585 and C-646/16 *Jafari v Austria* EU:C:2017:586.

5 The fact that the German Chancellor at the time, Angela Merkel, made it onto the cover of Time magazine as 'Person of the Year' is probably particularly well remembered, see <https://time.com/time-person-of-the-year-2015-angela-merkel/> accessed 12 March 2024.

6 See the statistics of the German Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge BAMF), '2016/2017 Migration Report: Key Results' (2019) <www.bamf.de/SharedDocs/Anlagen/EN/Forschung/Migrationsberichte/migrationsbericht-2016-2017-zentrale-ergebnisse.pdf?__blob=publicationFile&v=13> accessed 12 March 2024.

7 See for instance Otto Depenheuer/Christoph Grabenwarther (eds), *Der Staat in der Flüchtlingskrise* (Schöningh 2016); Ulrich Becker and Jens Kersten, 'Demokratie als optimistische Staatsform' (2016) 35 Neue Zeitschrift für Verwaltungsrecht 580; Andreas Dietz, 'Reformvorschläge zum Asylprozessrecht im Kontext der Flüchtlingskrise' (2018) 37(15) Neue Zeitschrift für Verwaltungsrecht-Extra 1.

8 Kent S Miller and Ira Iscoe, 'The Concept of Crisis' (1963) 22 Human Organization 195.

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a – usually sudden – situation that requires rapid decision-making, which is typically accompanied by a certain degree of uncertainty about the consequences of the decision made.[9] Crises are, therefore, typically perceived as highly stressful and undesirable situations – especially from the point of view of the decision-makers, but also from the point of view of those who are affected by the decisions. From their viewpoints, crises need to be overcome as quickly as possible and should be prevented as far as possible ('crisis prevention'). At the same time – and this is also of primary interest in this chapter – as well as of this publication as a whole, it is a well-known fact that lessons can be learned from crises. They prove to be 'stress tests' and overcoming them can increase the 'resilience' of an individual or a political community, as they provide the opportunity for decision-makers to test new instruments and simultaneously tackle problems in the long term to prevent future crisis situations.

Reference to the reception of (forced) migrants as a 'crisis' articulates the concern that the impact of this political decision for the receiving country is unclear and potentially negative. The general scepticism towards the migrants seeking protection that has been generated as a result has brought much criticism to the term 'refugee crisis',[10] especially since it is emphasized that it is primarily the migrants who are going through a crisis because they have to leave their country and seek asylum elsewhere.[11] Therefore, in order not to stir up (unfounded) fears and encourage a general rejection of migration, it was suggested that the term 'authority crisis' should be used instead of 'refugee and migration crisis'.[12] This objection is valid in as far as it correctly names the decision-makers who are plunged into a crisis. These

9 Angela Schwerdtfeger, *Krisengesetzgebung* (Mohr Siebeck 2018) 7.

10 Geoff Gilbert is sceptical about the refugee crisis in 'Why Europe Does Not Have a Refugee Crisis' (2015) 27, International Journal of Refugee Law 531. Some have even argued, the term 'refugee crisis' should be awarded as the 'worst word of the year' – see <www.migazin.de/2015/12/18/petition-warum-fluechtlingskrise-ein-unwort-ist/> accessed 12 March 2024.

11 <https://geschichtedergegenwart.ch/fluechtlingskrise/> accessed 12 March 2024. For a more detailed analysis of the term, see: Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56 Journal of Common Market Studies 3; Natalie Welfens, 'Whose (In)Security Counts in Crisis?' (2022) 59 International Politics 505. Especially on the role of the European Parliament: Ariadna Ripoll Servent, 'Failing under the 'shadow of hierarchy': explaining the role of the European Parliament in the EU´s 'asylum crisis'' (2019) 41 Journal of European Integration 293.

12 <www.migazin.de/2015/12/18/petition-warum-fluechtlingskrise-ein-unwort-ist/> accessed 12 March 2024.

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are the people who had to manage the reception, assistance and potentially integration of an unprecedented number of asylum seekers within a short space of time. In this respect, the use of the term 'crisis' seems entirely appropriate and therefore unproblematic: in 2015 alone, the German Federal Office for Migration and Refugees (in German: *Bundesamt für Migration und Flüchtlinge – BAMF*) had to decide on almost 890,000 asylum applications. The applicants had to be registered, distributed among the competent authorities and accommodated during the asylum procedure, i.e. they had to be given accommodation immediately and their basic needs for food, medical care and hygiene had to be met.

Therefore, the term 'refugee crisis' is to be construed in the sense of an elementary challenge for the asylum and migration governance of the receiving state.[13] The term 'governance' is understood here in a dual sense: on the one hand, as an ensemble of (primarily state) players concerned with the management of tasks and, on the other, as a 'regulation' or 'regulatory structure'. This includes both legally binding measures of legislation and administrative law-making, as well as non-binding measures of procedural and organizational management, such as the improvement of information and communication structures in the public administration, as well as cooperation with private parties.[14]

I.2. Are insufficient governance structures the cause or at least the intensification of the crisis?

Accusations of an 'administrative chaos' were already spreading as early as in August 2015, when the first migrants reached Germany, especially the large cities, such as Berlin and Munich. The Berlin State Office for Health and Social Affairs[15] was emblematic of this, as it could not even begin to cope with the large number of people, meaning that there was no

13 On the challenges for the decision-makers at international level see the contributions to this book by Magdalena Kmak and Stephen Philips, 'Deterrence as Legal Innovation: Management of Unwanted Mobilities and the Future of Refugee Protection'. With regard to the EU level, see Łukasz Łotocki's contribution, 'Innovations in Public Governance in response to the migration crisis from the EU perspective. Institutional and normative solutions'.

14 In the same sense also for instance Gunnar F Schuppert, *Alles Governance oder was?* (Nomos 2011) 11.

15 In German: Landesamt für Gesundheit und Soziales (LaGeSo).

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contact at all between the authorities and many asylum seekers, who in their distress had to camp out in front of the office.[16] These impressions raise the fundamental question of the extent to which the onset of the governance crisis was 'home-made'. In order to examine this question in more detail, it will now be necessary to look more closely at the position in which the decision-makers found themselves in 2015 and 2016. To this end, why and how the German Asylum Governance had to take actions will first be outlined before taking a closer look at the structures of the German migration administration in which these actions must have had been taken.

I.2.1. The requirements of international, European, and German asylum, refugee and human rights protection as pressure for action

The key to answering the question of why and what measures German asylum governance had to take lies in International, European, and German Constitutional Law. Article 33 of the Geneva Refugee Convention,[17] Article 3 of the European Convention on Human Rights (ECHR), and Article 4 of the Charter of Fundamental Rights of the EU (CFR) prohibit turning people seeking protection away at the border (principle of 'non-refoulement'). Furthermore, they must be allowed entry and at least provisional stay in order to conduct the asylum procedure. In principle, this claim is directed against the state that has declared that it is responsible for taking in asylum seekers. In Europe, this will typically be Greece, Italy, Spain, or other states that have external borders of the 'area of free movement (Schengen area)'. With the abolition of internal border controls within the Schengen area, however, protection can in fact also be sought in all other Member States. The Dublin III Regulation[18] is intended to prohibit asylum seekers from freely choosing ('asylum shopping') a Member State where they want to undergo their asylum procedure, by standardizing certain criteria that can be used to establish exactly which state is responsible for handling the asylum procedure. However, if, as in 2015 and 2016, states

16 <www.spiegel.de/fotostrecke/fluechtlinge-in-berlin-2015-chaos-streit-ueberforderung-fotostrecke-151752.html> accessed 12 March 2024.

17 The Convention Relating to the Status of Refugees of 28 July 1951.

18 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

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that are actually responsible simply let the asylum seekers continue to migrate,[19] Article 17 of the Dublin III Regulation provides for a so-called self-entry clause, according to which the Member States can always declare themselves responsible, even if they are not actually responsible according to the other criteria. The German government made use of this possibility in September 2015 and declared itself the responsible Member State for several hundred thousand people.[20]

From the point of view of national asylum and migration governance, however, this clause is fraught with the risk of placing its administration into crisis mode. For example, they had to ensure compliance of the obligation to conduct asylum procedures in the case where an asylum application arises with, *inter alia*, Article 16a of the German Constitution ('Basic Law'[21]), but also, for instance, the EU Asylum Procedures Directive.[22] Furthermore, the time pressure on the obligation to provide accommodation and food, hygiene products and medical care to asylum seekers arises from human rights regulations – namely the prohibition of inhuman or degrading treatment (Article 3 ECHR,[23] Article 4 CFR[24]) and, in Germany, from the 'basic right to a dignified minimum standard of living'[25] – and the EU

19 See on this problem: join ECJ judgment from 26 July 2017 in the cases C-490/16 *A.S. v Slovenia* EU:C:2017:585 and C-646/16 *Jafari v Austria* EU:C:2017:586.

20 Mattias Wendel, 'Asylrechtlicher Selbsteintritt und Flüchtlingskrise' (2016) 71 JuristenZeitung 332.

21 In German: Grundgesetz (GG).

22 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. Arts 6–30 of this Directive require Member States to ensure that a third-country national who applies for 'international protection' is actually granted access to it. Arts 14–17 of the Directive require a personal interview before a decision is made on the application. The Asylum Procedures Directive does not specify a maximum duration for asylum procedures, but Art 31(8) provides for the possibility of an accelerated procedure.

23 See, among others, Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014).

24 See, among others, Case C-411/10 *N.S. v Secretary of the Home Department* EU:C:2011:865.

25 The German Constitutional Court (Bundesverfassungsgericht – BVerfG) has derived this right from the guarantee of human dignity (Art 1 (1)) in conjunction with the principle of the welfare state (Art 20 (1) GG) – BVerfGE 125, 175. According to BVerfGE 132, 134, asylum seekers can also invoke this right.

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Reception Conditions Directive[26] and the subsequent German legislation, which is laid out in the 'Asylum Seekers Benefits Act'.[27]

I.2.2. Complex structures and reform backlog within German asylum and migration governance as an obstacle

The pressure to act in the aforementioned way would probably lead all EU Member States into a crisis mode. However, it seems that there are other factors to the emergence of a crisis, which are rooted in German asylum and governance. First, the federal structure of the Federal Republic of Germany should be mentioned, which results in the independence of several administrative bodies (federal, state – *Länder* and municipality level – *Gemeinden*). Since asylum, migration and integration governance is a 'cross-sectional task', several different specialized administrations (such as asylum, general migration, labour market, social, education or security administrations) are affected, which, in turn, belong to different administrative bodies. This results, on the one hand, in the need for clearer delimitations of competences and, on the other, in the requirement for a large degree of cooperation and, above all, the exchange of information. And here lies a final problem, which is less rooted in the law than in the specific design of these legal framework conditions, namely that both the federal administration and many state and local administrations do not have sufficient human resources to cope even with a much smaller number of people. For example, the Federal Office for Migration and Refugees,[28] which is responsible for carrying out the asylum procedures, has since 2008 been processing fewer applications than the new ones it has been receiving. As a result, there was already a backlog of 169,166 unprocessed asylum applications in 2014.[29] In addition, the administrative structures have not been modernized for a long time: this is particularly evident in

26 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. In its Art 4, this establishes the principle of minimum standards, according to which the member states may go beyond the admission conditions standardized in Art 17ff but may never go below it.

27 In German: Asylbewerberleistungsgesetz (AsylbLG) in der Fassung der Bekanntmachung vom 5. August 1997 (BGBl I S 2022).

28 In German: Bundesamt für Migration und Flüchtlinge – BAMF.

29 Dietrich Thränhardt, 'Die Asylkrise 2015 als Verwaltungsproblem' (2020) 70(30–32) Aus Politik und Zeitgeschichte 37.

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the absolutely deficient IT infrastructure,[30] which will be discussed in more detail below. So far, however, it can be stated that there is a whole series of 'homemade' problems which needed to be analysed and the solutions of which required governance 'innovations'.

II. Reactions to the crisis

II.1. Overview of the various measures

The way in which the aforementioned challenges have been addressed by the German asylum and migration Governance in 2015 and 2016 are presented below. The various measures apply to the faster and 'better' registration of asylum seekers (II.1.1.), an improvement in information and communication management by expanding digital technology (II.1.2.), the acceleration of asylum procedures (II.I.3.) and the faster and 'better' integration of asylum seekers with 'good prospects of remaining,' as well as meeting housing needs (II.1.5.). And finally, some of the measures pursue the purpose of acting as a dissuasive factor for future asylum seekers.

II.1.1. Faster and 'better' registration

Of the almost 1 million people who entered the Federal Republic of Germany alone in 2015 to seek asylum and protection, only about 10 % were checked before entering the country.[31] This means German asylum and migration governance first had to register almost 900,000 people and record their personal data (e.g. name, age, nationality, marital status, etc.). Unless registration had already taken place in another EU Member State, which can be traced by means of a request in the EURODAC[32] database, German asylum and migration governance did not have any personal data on the

30 Jörg Bogumil, Jonas Hafner and Sabine Kuhlmann, 'Verwaltungshandeln in der Flüchtlingskrise' (2016) 49 Die Verwaltung 289, 296.

31 ibid 289, 291.

32 EURODAC (European Dactyloscopy) is a fingerprint-database, which aims to support the functioning of the Dublin III regulation by providing evidence on whether an asylum seeker has already trespassed into another EU Member State. Its legal basis is contained in Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013.

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asylum seekers or their migration route, which is important for establishing the Member State responsible for conducting the asylum procedure. This lack of information resulted in a massive knowledge deficit: as long as it was not clear who had entered Germany from which state or region and for what reasons, it was not possible to assess who was likely to remain permanently in the country and who would have to be turned away from Germany. This problem persisted in cases where people could not identify themselves with documents or otherwise prove their identity.

Under German law, responsibility for initial registration lies with the authority with which the asylum seeker first comes into contact. These are typically:

- the Federal Police, if asylum seekers are checked on their entry into the federal territory;
- the foreigner's municipal authorities, which are responsible, among other things, for issuing residence permits;
- the Federal Office for Migration and Refugees (BAMF), which, in addition to conducting asylum procedures,[33] is also responsible for several other migration and asylum governance tasks;[34]
- the initial reception centres operated by the federal states (*Länder*), where asylum seekers are accommodated and where they receive food and medical care.[35]

In order to ensure comprehensive registration and identification, but also to prevent repeated registrations and to ensure identification, the so-called 'Asylum Procedure Acceleration Act' of 20 October 2015[36] (also known as 'Asylum Package I'), introduced – among various others measures – the need for asylum seekers to hold a certificate of registration as an asylum seeker,[37] which, however, was only to be valid for a maximum of one month and which, according to unanimous opinion, did not have any legal effects.[38] With the so-called 'Data Exchange Improvement Act' of 2 February

33 See § 5 of the German Asylum Act (Asylgesetz – AsylG).
34 See § 75 of the German Residence Act (Aufenthaltsgesetz – AufenthG).
35 See for the details § 47 AsylG and the 'Asylum Seekers Benefits Act' (Asylbewerberleistungsgesetz – AsylbLG).
36 Asylverfahrensbeschleunigungsgesetz vom 20 Oktober 2015 (BGBl I 1722).
37 In German: Bescheinigung über die Meldung als Asylsuchender (BüMa).
38 See for instance Winfried Kluth, 'Das Asylverfahrensbeschleunigungsgesetz' (2015) 35 ZAR 337, 340.

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2016,[39] the previously introduced 'BüMa' certificate was replaced by the so-called 'proof of arrival',[40] a forfeit-proof and electronically readable 'certificate of registration as an asylum seeker' – to be issued either by the BAMF or the initial reception centres.[41] It is to be issued to foreign nationals who have already applied for asylum (cf. § 13 AsylG) but have not yet filed an asylum application (§ 14 AsylG). The technical characteristics and external design are regulated in more detail in a special regulation.[42] Furthermore, the 'Data Exchange Improvement Act' has introduced new possibilities of establishing identity (e.g. by means of identification services) § 48 para. 8 and 9 AufenthG and extended the possibilities for security checks (§ 73 AufenthG). A quick-matching fingerprint system called 'Fast-ID' has been developed to avoid re-registrations.[43] This system is operated by the Federal Criminal Police Office,[44] and such institutions as the BAMF (§ 16 AsylG) and the initial reception centres of the *Länder* (§ 11 para. 3a AsylbLG) have access to it.

II.1.2. Improving data exchange by expanding digital technology

Another difficulty in 2015 and 2016 was that the above authorities all had different databases, which – due to a lack of effective interface management – could only communicate with each other to a very limited extent. Consequently, multiple registrations and other administrative work had to be done, which was not very efficient.[45] Therefore, a 'core data system' has been established with the 'Data Exchange Amendment Act',[46] which is a special database within the so-called 'Central Register of Foreigners',[47] to

39 Gesetz zur Verbesserung der Registrierung und des Datenaustauschs zu aufenthalts- und asylrechtlichen Zwecken (Datenaustauschverbesserungsgesetz) vom 2 Februar 2016, BGBl I 130 ff.

40 In German: Ankunftsnachweis, § 63a AsylG.

41 See the Official explanatory memorandum of the law, BT-Drs 18/7043, p 3. In contrast, the BüMa certificate was issued by the police or the authorities of the foreigners.

42 Verordnung über die Bescheinigung über die Meldung als Asylsuchender (Auskunftsnachweisverordnung – AKNV) vom 5. Februar 2016, BGBl I 162 ff.

43 See for more details: BT-Drs 18/7043, p 3.

44 In German: Bundeskriminalamt (BKA).

45 Bogumil, Hafner and Kuhlmann (n 30) 296.

46 Gesetz zur Verbesserung der Registrierung und des Datenaustauschs zu aufenthalts- und asylrechtlichen Zwecken (Datenaustauschverbesserungsgesetz) vom 2. Februar 2016, BGBl I 130ff.

47 In German: Ausländerzentralregister (AZR).

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which all relevant authorities of asylum and migration governance had access and in which they could create entries as soon as an asylum seeker came into contact with them for the first time.[48] The data stored in this core data system included fingerprints, contact data, health data, and data on vocational training.[49] Since German nationals are not affected by comparable measures, this once again demonstrates a 'two-class system' within German data protection law.[50]

II.1.3. Acceleration of asylum procedures

In order to accelerate asylum procedures, not only was the Asylum Procedure Acceleration Act ('Asylum Package I') passed, but so was the Act on the Introduction of Accelerated Asylum Procedures,[51] which forms the core of 'Asylum Package II'. Therefore, various measures have been introduced which were intended to serve the objective of accelerating asylum procedures.[52] The central means of achieving this objective is the distinction between asylum seekers with 'good prospects' and those with 'poor prospects of remaining'. Even though neither of these terms is explicitly used in the law, the distinction is visible in numerous places. For example, 'Asylum Package I' declared Albania, Bosnia and Herzegovina, Ghana, Kosovo, Macedonia (former Republic of Yugoslavia), Montenegro, Senegal and Serbia as so-called 'safe countries of origin'.[53] In the case of these 'safe countries of origin', it is presumed under the first sentence of Article 16a (3) of the Basic Law that no political persecution[54] takes place there or that there is no threat of serious

48 BT-Drs 18/7943, p 3.

49 ibid.

50 On this Johannes Eichenhofer, 'Das Datenaustauschverbesserungsgesetz' (2016) 35 NVwZ 431ff.

51 In German: Gesetz zur Einführung beschleunigter Asylverfahren vom 11. März 2016, BGBl I 390; BT-Drs 18/7538.

52 This is not legally required, as neither international, European or German human rights law mandates such acceleration. Art 31 (8) of the Asylum Procedures Directive merely stipulates certain conditions under which the introduction of such accelerated procedures is permissible.

53 Cf the altered Annex II to Section 29a of the Asylum Act, BGBl. 2015 I 1722, 1725. The reason given for this classification is the low recognition rate of nationals of these states – see BT-Drs 18/6185, p 25.

54 This is the central requirement for recognition as a person entitled to asylum (§ 2 AsylG) or the award of refugee status (§ 3 AsylG), also under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the

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harm.[55] Therefore, the applications for asylum and international protection filed by nationals of these countries had to be 'rejected as manifestly unfounded' pursuant to the first sentence of section 29a (1) AsylG, unless the applicants succeeded exceptionally in substantiating the risk of political persecution or serious harm. This kind of fiction made the BAMF's work much easier but delegated the problem to the courts.

However, the same regulation technique was applied in 'Asylum Package II', specifically the 'Act on the Introduction of Accelerated Asylum Procedures'.[56] Among others, this law introduced the institution of accelerated asylum procedures (§ 30a AsylG). According to this, the BAMF had to decide on asylum applications with 'a lower probability of success' (cf. § 30a para. 1 AsylG[57]) within one week (cf. § 30a para. 2 phrase 1 AsylG) – and this usually means rejecting the applications. A further example of the acceleration of procedures by way of a fictitious effect is the provision on not pursuing the asylum procedure (§ 33 AsylG), which was also revised with 'Asylum Package II'. According to this provision, an asylum application is considered as having been withdrawn as soon as an applicant no longer pursues the procedure. This may, in turn, be presumed in the case of the failure to appear on the hearing date, absconsion or breaches of the so-called 'residence obligation' under § 56 AsylG. Critics of this rule[58] see it as a severe curtailment of procedural rights, if not a complete exclusion of those affected from their right to undergo an asylum procedure. Once the asylum application is rejected, the so-called residence permit (§ 55 AsylG) is no longer valid, and the people in question are obliged to leave the country (§ 50, para. 1 AufenthG). If they do not comply

qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

55 This is the central requirement for recognition as a person entitled to 'subsidiary protection status' (§ 4 AsylG) and Arts 15ff. Directive 2011/95/EU. Both, the subsidiary protection and the refugee status constitute the international protection status.

56 Gesetz zur Einführung beschleunigter Asylverfahren vom 11. März 2016, BGBl I 390; BT-Drs 18/7538.

57 Thereafter, a low probability of success is to be assumed in the case of nationals of safe countries of origin pursuant to section 29a of the Asylum Act (cf section 30a, para 1, no 1 of the Asylum Act), applicants who provide false information (no 2) or wilfully destroy their proof of identity (no 3), in the case of subsequent applicants (no 4), in the case of persons who have filed their application only to obstruct the execution of a deportation (no. 5) or who refuse to submit their fingerprints to EURODAC (no 6) or who have been expelled for reasons of public security and order (no 7).

58 Marei Pelzer and Maximilian Pichl, 'Die Asylpakete I und II: Verfassungs-, europa- und völkerrechtliche Probleme' (2016) 49 Kritische Justiz 207, 216.

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with this obligation, they can be deported to their countries of origin (§ 58 AufenthG) or otherwise repatriated, if necessary using coercion. Finally, 'Asylum Package II' contained a law[59] facilitating the deportation of foreigners who commit crimes and extending the exclusion of refugee recognition for asylum seekers who have committed crimes.

II.I.4. Faster integration for asylum seekers with 'good prospects of remaining'

While, according to the new legislation, asylum seekers with 'poor prospects of remaining' should be turned away from German territory as quickly as possible, asylum seekers with 'good prospects of remaining', which can be assumed above all in the case of Syrian, Iraqi and Eritrean nationals,[60] should, according to German law, be 'integrated into society and the world of work as quickly as possible'.[61] Accordingly, as a derogation from the previous law, they were given the opportunity to attend a language course (§ 421 SGB III new version)[62] or an integration course (cf. § 44 para. 4, sentence 2, no. 1 AufenthG) during the asylum procedure. Additionally, 'Asylum Package I' introduced another subsequent language course (§ 45a AufenthG) to teach specific German language skills for specific professions. The so-called 'Integration Act'[63] introduced additional measures, such as financial assistance for young trainees (§ 132 para. 2 and 4 SGB III). In addition, the accompanying ordinance to the Integration Act introduced,[64] among other things, easier access to the labour market for asylum seekers with 'good prospects of remaining' and so-called tolerated persons,[65] i.e. foreign nationals who may not be deported for legal or factual reasons (§ 60a AufenthG). Since the 'Integration Act' entered into force, a reason for 'tolerance' can also be seen in the fact that the foreigner pursues education

59 Gesetz zur erleichterten Ausweisung von straffälligen Ausländern und zum erweiterten Ausschluss der Flüchtlings-anerkennung bei straffälligen Asylbewerbern, BGBl I 394ff.
60 Daniel Thym, 'Schnellere und strengere Asylverfahren' (2015) 24 Neue Zeitschrift für Verwaltungsrecht 1625, 1627.
61 BT-Drs 18/6185, p 2, 27, 30.
62 ibid 58.
63 Integrationsgesetz vom 5. August 2016, BGBl I 1939.
64 BGBl I 1950; Verordnungsbegründung: BR-Drs 285/16.
65 For details, see the new version of § 32 BeschV.

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in Germany (cf. § 60a para. 2 p. 4 AufenthG), provided that he or she does not come from a 'safe third country'.[66]

II.1.5. Measures to accommodate asylum seekers

In order to meet the high demand for housing that has arisen because of the influx of almost 1 million people, it was decided, among other things, to ease the law on the construction of refugee accommodation (§ 246 BauGB).[67] Some federal states, such as Bremen or Hamburg, also have their own legal bases for securing private housing for accommodating asylum seekers.[68] Finally, a so-called 'residence regulation' was adopted in § 12a AufenthG within the framework of the 'Integration Act'. Primarily intended to prevent social and ethnic segregation,[69] this rule obliges foreign nationals – even in the case of an asylum procedure that has already been successfully completed – to reside in the county or district in which they have completed their asylum procedure. From the point of view of the people concerned, such residence requirements represent a serious restriction on their freedom of movement. However, both the German Federal Administrative Court[70] and the ECJ[71] considered the measures to be justified by concerns of the aforementioned integration policy.

II.1.6. Measures to deter new immigrants

Finally, the above laws contain a number of measures, the regulatory purpose of which can be considered solely as deterring new immigrants. These include a general suspension of family reunification for people with

66 On the contrary, citizens of a 'safe third country' are completely excluded from the labour market (cf § 47 para 1a in conjunction with § 61 para 1, para 2 s 3 AsylG new version, § 60a para 6 AufenthG).

67 More on this: Sina Fontana, 'Die Unterbringung von Flüchtlingen und Asylbegehrenden als Herausforderung für das Bauplanungsrecht' in Roman Lehner and Friederike Wapler (eds), *Die herausgeforderte Rechtsordnung* (Berliner Wissenschafts-Verlag 2018).

68 More on this: Judith Froese, 'Die Sicherstellung privaten Eigentums zur Flüchtlingsunterbringung (2016) 71 JuristenZeitung 176.

69 BT-Drs 18/8615, p 6.

70 BVerwGE 130, 150.

71 Cases C-443/14 *Ibereolica Renovables v Commission* and C-444/14 *Osso v Germany*.

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subsidiary protection (§ 104 para. 13 AufenthG[72]) and various measures lowering social standards. For example, 'Asylum Package I' contained far-reaching restrictions of social benefits (§ 1a para. 2–4 AsylbLG), which were justified by the possibility of saving costs. It simultaneously reintroduced the 'principle of benefits in kind' in § 3 AsylbLG, according to which social benefits should not be granted in cash, although this principle was only abolished in December 2014.[73] The official justification for this step was that benefits in kind could be granted more quickly and easily than cash benefits.[74] Furthermore, according to § 47 AsylG (new version), asylum seekers are obliged to live in the initial reception centre instead of shared accommodation (§ 53 AsylG) for up to six months (para. 1) or even until the decision is issued on their asylum application (para. 1a). The latter is accommodation of a much higher standard, typically flats, former hotels or hostels, while gymnasiums or comparable facilities can also serve as initial reception facilities.

II.2. Reaction as innovation? On the innovative potential of the measures taken

Now that an overview of the measures taken has been given, the question is which of these measures can be described as 'innovations'. Following a common understanding in innovation research, 'innovations' are understood here as certain 'novelties' – for example, new findings, processes, or institutions – which enable problems to be solved better than before and can, therefore, have far-reaching consequences for individuals and society.[75] A distinction can be made between technical/technological, economic,

72 Critical on this: Bellinda Bartolucci and Marei Pelzer, 'Fortgesetzte Begrenzung des Familiennachzugs zu subsidiär Schutzberechtigten im Lichte höherrangigen Rechts' (2018) 38 Zeitschrift für Ausländerrecht und Ausländerpolitik 133.

73 Art 3 Abs 2 AsylbLG idF des Gesetzes zur Verbesserung der Rechtsstellung von asylsuchenden und geduldeten Ausländern vom 23 Dezember 2014 (BGBl I 2014, 2439).

74 BT-Drs 18/6185, p 45.

75 Wolfgang Hoffmann-Riem, *Innovation und Recht – Recht und Innovation* (Mohr Siebeck 2016) 23–24.

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political, social,[76] cultural, artistic and legal innovations.[77] Of primary interest here are the legal innovations, which, in this context, are understood broadly, namely in the sense of the above definition of 'governance', so that, for example, certain innovations in procedural design or information and communication structures would also be included.

Overall, 'Asylum Package I' is considered to be ambivalent in terms of integration policy. The improvements in the area of integration are likely to include, in particular, the opening of existing[78] integration offers and the creation of new ones[79] for asylum seekers with 'good prospects of remaining'. On the other hand, asylum seekers and tolerated people from safe countries of origin (§ 29a AsylG) are not certified as having 'good prospects of remaining' from the outset, which is why they are systematically excluded from all integration offers (II.1.4.). This is seen as a danger of a two-[80] or three-class system[81] of asylum seekers. This 'pre-sorting' means the danger also arises that many asylum applications will be rejected in a sweeping and poorly justified manner. This, in turn, can lead to legal action being taken against a large proportion of these decisions, which means a considerable additional burden on the administrative courts. Between 2014 and 2017, the number of asylum cases filed doubled from year to year.[82] Reforms in the asylum procedure would have to go hand in hand with a reform of the asylum procedural law in order to achieve actual relief of all parties involved in the procedure and therefore an acceleration of the entire process from the asylum application to the final (possibly judicial) decision.[83]

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76 Wolfgang Hoffmann-Riem, ibid emphasizes that these have a reference for public life in communities and society and therefore to forms of social participation and integration, reconciliation of interests, social justice or individuality and solidarity.

77 ibid 40f.

78 These include, for example, integration courses in accordance with §§ 43–44a AufenthG or language courses in accordance with § 421 SGB III.

79 This includes, for example, job-related German language support in accordance with § 45a AufenthG.

80 See Frederik von Harbou, 'Das neue Beschäftigungsrecht für Asylsuchende und Geduldete' [2016] Asylmagazin 9, 17.

81 See Claudius Voigt, 'Die „Bleibeperspektive' [2016] Asylmagazin 245, 250.

82 Klaus Rennert, 'Änderungen des Asylrechts und Verbesserung der personellen und sachlichen Ausstattung der Verwaltungsgerichte dringend geboten' (2018) 133 DVBl. 401.

83 Dietz, 'Reformvorschläge' (n 7).

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The amendments to the Asylum Benefits Act (AsylbLG) (II.1.6.) are also problematic from an integration policy perspective. However, the legislator obviously wants to remove false incentives for new immigrants. The question must arise of whether the reduction of so-called 'pull factors' – namely positive incentives promoting flight and migration movements to a certain state – serves the intended purpose of reducing the number of asylum seekers at all. The example of civilian sea rescue has already proved that people flee even without these 'pull factors' because the situation in their country of origin leaves them no choice, and that therefore both the importance and the existence of 'pull factors' can be doubted.[84]

The residence requirement in § 12a AufenthG from the 'Asylum Package I' (II.1.4.) was introduced to avoid social ethnic segregation and to distribute the burdens associated with the award of social benefits evenly among the various institutions. It stipulates that the residence permit of people entitled to subsidiary protection who receive social benefits is subject to the condition that they take up residence in a certain place. However, the ruling establishes unequal treatment with other foreign nationals who do not fall under the scope of the ruling, which cannot be justified by the federal government's justification of a fair distribution of costs, as this is not related to a person's status as being eligible for subsidiary protection. This unequal treatment would only be legitimate if it promotes integration.[85] However, the extent to which the integration of people entitled to subsidiary protection must be promoted more than that of people with refugee status seems at least questionable.

There are also concerns about the changes to the construction planning law (II.1.5.), which are intended to facilitate the construction of refugee accommodation. It is true that this will allow a quicker response to an increased number of refugees in need of accommodation. Particularly in large cities, the construction of accommodation with large capacities or of new housing estates carries the risk of segregation and therefore spatial discrimination.[86] It would be more innovative to take measures that also provide for the spatial integration of refugees into the municipalities, as has partly been done, for example, by securing housing.

84 Elias Steinhilper and Rob J Gruijters, 'A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean' (2018) 52 Sociology 515.
85 Cases C-443/14 *Ibereolica Renovables v Commission* and C-444/14 *Osso v Germany*.
86 Becker and Kersten (n 7) 583.

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At first glance, the 'Data Exchange Improvement Act', which introduced the so-called 'core data system' (II.1.1.) within the Central Register of Foreigners, appears positive. The processing and transfer of data between the relevant authorities could be improved and procedures could be accelerated by avoiding multiple registrations. However, this innovation must also be viewed critically insofar as it contributes to the perpetuation of unequal treatment between Germans and foreigners that is inherent in existing data protection law.

Overall, German asylum and migration governance seems only to react to certain symptoms of administrative failure. There are no signs of addressing the causes of the problems or of innovative approaches. Innovations typically enable problems to be solved better than before. As has just been demonstrated, this is predominantly not the case with the measures of 'Asylum Packages I and II'. In order to be able to speak of innovation, the legislative changes should at least potentially have far-reaching consequences for the individual and for society. In the case of the changes made by the 'Asylum Packages' of 2015/2016, however, only minor changes, with partial improvements, are made, the consequences of which can hardly be rated as far-reaching. German asylum and migration governance can, therefore, hardly be described as innovative. In particular, the central problem of staff shortages in the asylum and migration administration, which was identified at the beginning, has remained unsolved.

II.3. Conclusion

At first glance, the measures that have been taken seem to have innovative potential, as accelerating procedures could contribute to easing the burden on the authorities involved. On closer inspection, however, it becomes apparent that most of them are neither novel nor desirable. Many of the innovations were made to the detriment of the rights of given refugees and appear at least questionable from a constitutional, fundamental, human rights, and moral perspective. The structures of German asylum and migration governance were mainly preserved in 2015 and 2016 within the framework of the 'Asylum Packages I and II', while far-reaching improvements or positive consequences for future-oriented governance are not apparent. The measures do not seem to be very suitable for a better management of future comparable crises and cannot be construed as innovations in the sense defined above.

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III. Lessons learned? Testing German asylum and migration governance in the context of the Russian invasion of Ukraine

In 2016, the so-called 'EU–Turkey Deal'[87] on refugees was agreed between the EU and Turkey. The deal provides for the return to Turkey of 'illegal' migrants from Syria arriving on the Greek islands from March 2016 onwards. As a result of this deal, the number of refugees arriving in Germany fell sharply, so that it was no longer appropriate to speak of a crisis for German asylum and migration governance in the sense defined above. Whether the measures taken in 2015 and 2016 within asylum and migration governance would also prove their worth after the immediate crisis situation or in the event of a renewed high number of arrivals and applications (i.e. a renewed 'flight and migration crisis') could not be verified at first.

While the number of asylum applications fell continuously after 2017, the number started to rise again from 2021.[88] What cannot be read from the BAMF statistics: since the start of the Russian war against Ukraine in the spring of 2022, the number of refugees arriving in Germany has risen sharply, with over a million war refugees coming from Ukraine.[89] A practical test of German asylum and migration governance therefore seemed imminent in early 2022. In contrast to most of the refugees who reached Germany in 2015 and 2016,[90] however, Ukrainian nationals have been able to come to Germany and further EU countries without visas since 2017, which is why issues of registration for Ukrainian citizens are less complicated than for other third country nationals.[91] However, this can also be attributed to the fact that the EU directive for temporary protection[92]

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87 For a legal assessment see: Rainer Hofmann and Adela Schmidt, '„EU-Türkei-Deal" ohne Beteiligung der EU? – Die Beschlüsse des EuG zur Erklärung EU-Türkei vom 18. März 2016' (2017) 44 Europäische Grundrechte Zeitschrift 317.

88 BAMF, 'Aktuelle Zahlen' (Dezember 2022) p 6, <www.bamf.de/SharedDocs/Anlagen/DE/Statistik/AsylinZahlen/aktuelle-zahlen-dezember-2022.pdf?__blob=publicationFile&v=3> accessed 20 March 2024.

89 BMI, Press Release of 23 February 2024 <www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2024/02/jahrestag-angriffskrieg-ukr.html> accessed 20 March 2024.

90 European Parliament, Press Release, Plenary Sessions of 6 April 2017 <www.europarl.europa.eu/pdfs/news/expert/2017/3/briefing/20170327NEW68672/20170327NEW68672_en.pdf> accessed 26 March 2024.

91 Klaus Ritgen, 'Aufnahme und Aufenthaltsrecht von Flüchtlingen aus der Ukraine: Die kommunale Perspektive' (2022) 42 Zeitschrift für Ausländerrecht und Ausländerpolitik 238, 241.

92 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on

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was activated for the first time in 2022.[93] This opened up the possibility of granting temporary protection to all Ukrainian nationals, as well as their family members and some third-country nationals under § 24 AufenthG.[94] They were also allowed to pursue professional activity (in accordance with Article 12 of the Directive) from the beginning of their stay, while 'regular' asylum seekers are not allowed to work during their asylum procedure.[95]

Therefore, a completely different path was chosen than in 2015–2016 because of the EU protection regime. It remains questionable why the Directive on temporary protection, which has already existed since 2001, was not activated in 2015 despite a situation that was comparable in principle.[96] The unequal treatment of refugees at the EU's external borders, depending on their nationality, raises the question of the extent to which the EU migration policy is racist and discriminatory.[97]

Even independently of this, there are still some ambiguities: the privileges arising for a large proportion of the refugees from Ukraine under the directive do not apply to all third-country nationals, which means there are still some unresolved legal questions, such as with regard to the

measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

93 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

94 Ritgen (n 91) 241.

95 Heinrich Griep, 'Sozialrechtlicher Status der Ukraine-Flüchtlinge' (2022) 26 Sozial-Recht aktuell 99, 101.

96 See on this Adela Schmidt, 'Die vergessene Richtlinie 2001/55/EG für den Fall eines Massenzustroms von Vertriebenen als Lösung der aktuellen Flüchtlingskrise' (2015) 35 Zeitschrift für Ausländerrecht und Ausländerpolitik 205, 211f; Daniel Thym, 'Schneller Schutz für Kriegsflüchtlinge: Ukrainer dürfen in die EU' (*LTO,* 2022) <www.lto.de/recht/hintergruende/h/krieg-ukraine-flucht-schutz-status-massenzustromsrichtlinie/> accessed 26 March 2024.

97 Katrin Elger, Interview with Sabine Hesse, 'Flüchtlinge aus der Ukraine: „Es wird mit zweierlei Maß gemessen"' *Spiegel* (Hamburg, 2 March 2022) <www.spiegel.de/panorama/interview-mit-migrationsforscherin-wird-putins-angriffskrieg-die-europaeische-asylpolitik-dauerhaft-veraendern-a-99b7cc0e-a427-4117-b42b-2d803145605a> accessed 26 March 2024; Susanne Mermarnia, Interview with Niki Drakos and Kadiatou Diallo, 'Ungleichbehandlung von Geflüchteten: „Das ist Rassismus"' *Taz* (Berlin, 1 June 2022) <https://taz.de/Ungleichbehandlung-von-Gefluechteten/!5857593/> accessed 26 March 2024.

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requirement to provide evidence.[98] Furthermore, according to Article 4 of the directive, the temporary protection status is limited to three years and it is still unclear what will follow after that.[99] The real practical test for German asylum and migration governance may therefore still be ahead of us. In any case, it remains to be said that the differences that can be observed in the reactions to the German asylum governance in spring 2022 and 2015 are not so much due to a political change within German asylum governance but to the fact that the treatment of Ukrainian nationals was dictated by EU law.

However, it should not go unmentioned that the German administration seems to benefit from the experiences of 2015 with regard to the registration and placement of asylum seekers.[100] Furthermore, the 'Act on the Acceleration of Asylum Court Proceedings and Asylum Procedures',[101] which joins the series of laws discussed above, came into force on 1 January 2023. In addition to facilitating the asylum procedure, it also aims to accelerate court proceedings. Furthermore, it has introduced a needs-based asylum procedure counselling service, which is free of charge for the applicants and independent of the authorities.[102]

The legislator, therefore, also seems to have considered the successes of the previous amendments as being insufficient and to have seen a need for further improvements.[103] It remains to be seen, however, how effective the legislative changes prove to be in practice – i.e. whether the desired acceleration effects can be achieved[104] and how the weaknesses and problems in managing asylum procedures will continue to be addressed by legislation as a long-term constructive reaction to the crisis in asylum and migration governance.

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98 Andreas Dietz, 'Kriegsvertriebene aus der Ukraine' (2022) 41 Neue Zeitschrift für Verwaltungsrecht 205, 508.

99 Wienfried Kluth, 'Was bedeutet die „Zeitenwende" für das Migrationsrecht?' (2022) 42 Zeitschrift für Ausländerrecht und Ausländerpolitik 223, 225.

100 Ritgen (n 91) 239.

101 Gesetz zur Beschleunigung der Asylgerichtsverfahren und Asylverfahren, 28 Dezember 2022, BGBl I 2817.

102 <www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/beschleunigung-asylgerichtsverfahren.html;jsessionid=2A4EEC8E24710C198CACA5F937086A80.1_cid332> accessed 20 March 2024.

103 Andreas Heusch and Andrea Houben, 'Gesetz zur Beschleunigung der Asylgerichtsverfahren und Asylverfahren' (2023) 42 Neue Zeitschrift für Verwaltungsrecht 7.

104 Markus Sade, 'Das neue Gesetz zur Beschleunigung der Asylgerichtsverfahren und Asylverfahren' (2023) 43 Zeitschrift für Ausländerrecht und Ausländerpolitik 21, 25.

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Yet, in order to be better prepared for large-scale refugee and migration movements in the long term, it is important to move away from a purely reactive migration policy towards structurally proactive approaches. Structurally proactive migration governance means that migration movements are anticipated and solutions are sought through intergovernmental cooperation.[105] However, the measures taken in German asylum and migration governance after 2015 only take effect when people are already in Germany and these measures are, therefore, only classified as reactive. However, a structurally proactive approach appears to be necessary, especially in view of the climate crisis and the enormous refugee movements that are expected in this context.[106]

The 'Match'In' project for the placement of refugees, for example, shows how the cooperation of researchers, representatives of refugees and the federal states and municipalities can produce innovation. An algorithm developed by researchers from the universities of Hildesheim and Erlangen-Nuremberg helps harmonize the needs of refuges seeking protection with the conditions in the individual municipalities ('matching') in order to make migration beneficial for municipal development and to improve integration and participation.[107] The placement system is being tested as a pilot project in four German states (*Länder*).[108] The criteria considered in the placement process range from individual healthcare needs (e.g. the need for certain treatment) and education needs (e.g. attendance of a family's children at school) to compatibility with professional qualifications (e.g. assigning skilled people to locations with good prospects of finding employment in their fields). Even preferences regarding the location of family members or other people from their personal environment who are already living in Germany will be relevant in the matching.[109] Therefore, by processing the available data and using algorithms to produce results,

105 Johannes Eichenhofer, 'Reaktives und proaktives Migrationsrecht' in Uwe Berlit, Michael Hoppe and Winfried Kluth (eds), *Jahrbuch des Migrationsrecht 2023* (Nomos 2023) 357.

106 Catherine Brouers, 'Der Schutz der Umwelt- und Klimaflüchtlinge im Völkerrecht: Regelungslücken und Lösungsansätze' (2012) 23 Zeitschrift für Umweltrecht 81, 89.

107 <http://matchin-projekt.de/> accessed 20 March 2024.

108 Dinah Riese, 'Wer schafft was?' *Taz* (Berlin, 3 February 2023) <https://taz.de/Unterbringung-von-Gefluechteten/!5910573/> accessed 20 March 2024.

109 <https://integrationskompass.hessen.de/aktuelles-mediathek/presseinformationen/details/integration-matchin-projekt-ein-algorithmus-als-gemeinsam-entwickelte-entscheidungshilfe> accessed 20 March 2024.

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the Match'-In project implements the demands that have been raised by advocacy groups for a long time. As for the placement of refugees arriving from Ukraine, the BAMF federal ministry started to use an application called 'FREE' (translated as: Specialist application for registering management, recording and initially placing for temporary protection) in May 2022. According to the ministry, in addition to the regular ratio of placements, the application helps consider individual criteria, such as family ties.[110] 'FREE' is being used exclusively for Ukrainian refugees, while asylum seekers from other countries are placed according to a different (common) system called 'EASY'.[111]

In view of the unabating crises and conflicts in the world, such as the war in Ukraine, which has now lasted more than a year, the war in Syria, which the Assad regime is still waging, as well as the foreseeable migration movements because of the climate crisis, the measures taken cannot be sufficient. In order to meet these challenges, real innovations are needed, which not only react to events that have already taken place but also prepare asylum and migration governance with foresight for developments that will take place in the future so that refugees can be granted the protection to which they are entitled as quickly as possible. The counterpart of improved asylum and migration governance must be a committed, humane migration policy that advocates for a fair distribution of refugees seeking protection at the European level and for combating the causes of flight at the global level.

110 <www.bamf.de/SharedDocs/Meldungen/DE/2022/22060x-am-free-bericht-behoerdenspiegel.html> accessed 20 March 2024.

111 <www.bamf.de/DE/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Erstverteilung/erstverteilung-node.html> accessed 20 March 2024.

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III. Pandemic Crisis

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Innovations in International Public Governance in Response to the Covid-19 Pandemic

Robert Frau

Abstract: While the Covid-19 pandemic has mainly been a challenge for national governments, administrations and domestic law, international law also has a say in the response. International law has long been set up to deal with pandemics: there is an international organization devoted to human health – the World Health Organization. There is human rights law – the right to the highest attainable standard of human health. And there is a wide-reaching obligation for states to cooperate in pandemic responses. Unfortunately, with the West African Ebola-epidemic starting in 2014, there is even a highly prominent example of those factors coming together. The governance framework has not been tested in a truly world-wide pandemic. The opportunity arose with the Corona pandemic of the 2020s. Nevertheless, the legal framework in the crisis has not been adequately modified in more than three years since the WHO declared Covid-19 a 'public health emergency of international concern.'[1] This article will highlight the opportunities for innovation, as well the responses of individual states and international organizations. It will illustrate which players are involved and their (missed) opportunities to take action. Ultimately, all possible opportunities to improve international health governance have been of no avail.

I. International law framework for pandemic responses before Covid-19

Having spent most of its existence outside the scope of major scholarly debates in international law,[2] the Ebola outbreak of 2014 placed international health law in the limelight. Legal aspects of health were often overlooked or even ignored as they constitute a rather niche field of law.[3] In the case of

1 Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) on 30 January 2020 <www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-%282005%29-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-%282019-ncov%29> accessed 12 March 2024.

2 It is clear that there were international health lawyers before 2014 who were involved in scholarly debates within their scientific community.

3 Benjamin Mason Meier and Larisa M Mori, 'The Highest Attainable Standard: Advancing a Collective Human Right to Public Health' (2005) 37 Columbia Human Rights Law Review 101, 103 ff; Obijiofor Aginam, 'Mission (Im)possible? The WHO as a "Norm Entrepreneur" in Global Health Governance' in Michael Freeman, Sarah

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health emergencies, other factors matter more and are more urgent. There seems to be no need for international law if states are eager to cooperate and stop a disease from spreading any further. Medical, social and other aspects are more pressing. Also, traditional challenges to health usually require continuous and permanent efforts – maternal and childhood health, issues arising from disabilities or HIV/AIDS, as well as poverty, are all long-term-challenges and need to be addressed accordingly.

I.1. The World Health Organization

I.1.1. The WHO as a player in international law

Nevertheless, health concerns have always existed within the international community. Within the framework created after the Second World War, the World Health Organization (WHO) has the objective of attaining for all peoples the highest possible level of health (Article 1 of the Constitution of the WHO).[4]

As an international organization, the WHO enjoys international legal personality, i.e. it bears the rights and obligations of international law and enjoys domestic immunity (Article 66 et seq. of the Constitution of the WHO). As a special organization, according to Article 57 of the UN Charter, the WHO is part of the UN family based in Geneva.

The WHO has three bodies which carry out its tasks (Article 9 of the Constitution of the WHO): The World Health Assembly (WHA) meets annually and sets the main lines of action, monitors the other bodies and appoints their members, manages the finances and reports to the UN; it may also establish institutions and take other appropriate measures to promote the objectives of the WHO (Article 18 of the Constitution of the WHO). Additionally, as will be demonstrated, the WHA has unrivalled powers in the area of treaty law. The second body is the Executive Council, the executive body of the WHA (Article 28(b) of the Constitution of the WHO). In particular, it implements the decisions and guidelines of the WHA, advises the WHA and proposes a general programme of work. The

Hawkes and Belinda Bennett (eds), *Law and Global Health* (Oxford UP 2014) 559. This holds especially true for German scholarship of international law.

4 Cf Pia Acconci, 'The Reaction to the Ebola Epidemic within the United Nations framework: What Next for the World Health Organization?' (2014) 18 Max Planck Yearbook of United Nations Law 405, 406 ff.

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Executive Board consists of 34 members, for three-year renewable terms. Finally, the Secretariat is responsible for the administration of the WHO. The Secretariat is currently headed by a Director-General, who took up his post in July 2017. Surprisingly, the Constitution of the WHO does not specify the length of the Director-General's term of office. Rather, the Director-General is appointed on terms specified by the WHA (Article 31 of the Constitution of the WHO), which, in the current case is five years.

In addition to these three main bodies, committees can also be set up if the WHA and the Executive Board consider this desirable (Article 38 of the Constitution of the WHO). The WHO has established regional sub-organizations consisting of a regional office and regional committees. The current regional offices for Africa (based in Brazzaville), Europe (Copenhagen), Southeast Asia (New Delhi), Eastern Mediterranean (Cairo), Western Pacific (Manila) and America (Washington D.C.) are intended to meet the specific needs of their geographic regions (Article 44 of the Constitution of the WHO).

I.1.2. The WHO's powers under international law

International law recognizes the binding legal sources of treaty law, customary law and general principles of international law. However, Article 38(1) of the Statute of the International Court of Justice (ICJ), from which this list is taken, is not exhaustive. Additionally, there is the category of unilateral legal acts by state or by other subject of international law, especially by international organization, namely the so-called secondary law.

Despite its ambitious goals and far-reaching tasks, the WHO lacks tangible legal powers. Nevertheless, the work of the WHO occasionally leads to familiar forms of action under international law.

(a) Internal 'law'

The legally binding decisions of the WHA only affect the organization internally, such as elections to the Director-General or the Executive Council. On the other hand, the WHO performs most of its tasks in a legally non-binding manner. Its constitution stipulates that it issues reports, recommendations and opinions or supports scientific projects. In particular, the WHA may address recommendations to the member states, which can extend to the entire mandate of the WHO (Article 23 of the Constitution

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of the WHO). These are not binding *per se*. Decisions, recommendations and opinions can be described as soft law. This means ‘regulations’ which cannot be assigned to any source of international law and are non-binding. They are not law in the actual sense of the word. Temporary recommendations which the Director-General can issue in health emergencies also constitute soft law.

(b) Treaty-making powers

In addition to the rather traditional and common possibilities of adopting conventions or agreements (Article 19 of the Constitution of the WHO) and making recommendations (Article 23 of the Constitution of the WHO) there is a unique feature under WHO law: the authority of the WHO to issue legally binding regulations under Article 21 of the Constitution of the WHO.[5] This provision empowers the organization to adopt regulations on aspects specified in its points (a)–(e). The key aspect is the effect: a convention or agreement adopted under Article 21 enters into force for all members after due notice has been given of its adoption (Article 22 of the Constitution of the WHO) – explicit consent is not required. Consequently, the regulations adopted under Article 21 of the Constitution of the WHO are binding on all its member states.[6] The only way for a state to opt out of such a regulation is for it to notify the Director-General of its rejection or its reservations before that regulation becomes binding.

This is the legal basis of the International Health Regulations of 2005, or IHR (2005), which entered into force in 2007.[7] The IHR (2005) were a result of a reform process after the outbreak of the Severe Acute Respiratory Syndrome (SARS) in 2003, which affected more than 8,000 people and killed 774 people in 27 countries.[8] The previous instruments were the IHR

5 Lawrence O Gostin, *Global Health Law* (Harvard UP 2014) 111; Aginam (n 3) 559, 561.

6 Jennifer P Ruger, ‘Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements’ (2006) 18 Yale Journal of Law & the Humanities 273, 312.

7 World Health Organization, International Health Regulations, 2005, 2509 UNTS 179, thereinafter IHR (2005).

8 Cf <www.who.int/publications/m/item/summary-of-probable-sars-cases-with-onset-of-illness-from-1-november-2002-to-31-july-2003> accessed 20 March 2024.

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(1969) adopted in 1969.[9] After two modifications in 1973[10] and 1981,[11] the scope of the IHR (1969) was limited to cholera, yellow fever and the plague. Before that, the WHO adopted the International Sanitary Regulations in 1951.[12] The current version is not limited to specific diseases.

It is important to note that this is not a unilateral act performed by the WHO. Rather, it is a special treaty conclusion procedure. In principle, contracts only become binding if states ratify them according to the traditional regulations of the Vienna Convention on the Law of Treaties or common law. This always requires action to be taken. In this case, this principle is reversed and states are bound without their active involvement. Action is exceptionally only required to prevent an act from being legal binding. However, this is not an exception to the consensus requirement of international law. This is because, upon acceding to the WHO Constitution, states are aware that the WHA has such authority. Joining the WHO – i.e. the state's consensus – includes a future commitment to future contracts. It is therefore a matter of prior consent or consent to be bound in the future.

This treaty-making model is unique to the WHO. It is a valuable example of a law-making instrument. Furthermore, it is not just a new mechanism, but a way of letting experts make their recommendations, letting them draft new laws which make sense from the point of view of the experts and of enacting those laws. The binding regulations under Article 21 of the Constitution of the WHO provide an automatism for the adoption of new rules which makes it more difficult to not become bound than to be bound. An opt-out-mechanism could provide useful in certain situations. On the other hand, it is the experts in many fields who are involved in such a scenario. More specifically, in the context of the WHO, those experts are physicians or healthcare professionals. They are not lawyers. That could prove challenging when drafting rules and binding provisions. The legal expertise is missing and may be the reason why this unique mechanism has never been adopted in other regimes of international law.

9 International Health Regulations, 1969, 764 UNTS 3, thereinafter IHR (1969).
10 World Health Organization, Health Assembly Res WHA26.55, 23.5.1973.
11 World Health Organization, Health Assembly Doc WHA34/1981/REC/I. p 10 (resolution WHA34.13); cf World Health Organization, Official Records, no 217, 1974, 21, 71, 81.
12 International Sanitary Regulations, 1951, 175 UNTS 215, thereinafter ISR (1951).

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(c) Temporary recommendations

The Director-General of the WHO has the power to issue temporary recommendations in 'Public Health Emergencies of International Concern', as defined in Article 1 IHR (2005). These recommendations are non-binding in nature (Article 1 IHR [2005]).[13] As a preparatory measure for further health crises, it may be useful to give the IHR (2005) and temporary recommendations more strength.[14] This could be achieved by either creating explicit legal effect or by re-interpreting the law.[15]

I.2. UN-Security Council's practice

The UN Security Council is a powerful player in international law which requires no introduction. When there is a threat to peace, a breach of peace or an act of aggression, the Security Council may conclude that this is the case and adopt resolutions under Articles 41 and 42 of the UN Charter. It must be reiterated that the Security Council is free to draw such conclusions. There is no second-guessing the Council. Once adopted, resolutions under chapter VII are binding.

In reality, 'a threat to the peace is whatever the Security Council says is a threat to the peace.'[16] This also holds true for health concerns, as the past has shown. In the early 2000s the Council prudently hinted that HIV/AIDS 'may pose a risk to stability and security',[17] although it did not dare to make that recommendation in the decades that followed this suggestion.[18]

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13 For a discussion see Robert Frau, 'Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it make sense for Health Governance?' in Leonie Vierck, Pedro A Villarreal and A Katarina Weilert (eds), *The Governance of Disease Outbreaks* (Nomos 2017) 327, 331.

14 Pedro Villarreal, 'Reforms of the World Health Organization in light of the Ebola crisis in West Africa: More delegation, more teeth?' (*Völkerrechtsblog*, 26 August 2015) <https://voelkerrechtsblog.org/reforms-of-the-world-health-organization-in-light-of-the-ebola-crisis-in-west-africa-more-delegation-more-teeth/> accessed 12 March 2024.

15 See infra III.4. The Way forward for the IHR [2005]?

16 Lawrence O Gostin and Eric A Friedman, 'Ebola: a crisis in global health leadership' (2014) 384 Comment 1323.

17 UN Security Council, Res 1308 (2000).

18 UN Security Council, Res 1983 (2011), which repeats the phrasing of Res 1308 (2000).

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In an astonishing move, the Security Council addressed the Ebola outbreak in 2014 in a resolution under chapter VII. In Res. 2177 (2014), the Security Council highlighted the severity of the Ebola outbreak. The Council audaciously stated 'that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security', thereby opening its powers under chapter VII. This is an innovative approach. Similarly, there is a major discussion about the scope of the notion 'threat to international peace and security' under Article 39 of the UN Charter. Scholars are divided on the interpretation of 'peace' in Article 39 of the UN Charter. Some argue in support of a broad understanding of 'peace', which includes aspects of positive peace, e.g. including 'broader conditions of social development'.[19] Others take a more cautious approach, understanding the term to only apply to negative peace, or in other words the absence of armed conflict between states.[20]

Taking note of the different players, i.e. the countries affected, neighbouring states, UN bodies and organizations, NGOs, as well as first-line responders, the Security Council called upon them to collectively address the threat posed by the epidemic. In the operative part of its resolution, the Council commended the entities for their contributions but also 'encouraged', 'called on' and 'urged' them to do even more. Of importance is not the fact that the Council was dissatisfied with the efforts to date, but rather that the Council did not 'decide' on a common strategy, nor did it 'demand' specific measures or 'request' concrete actions. It could have done so with regard to travel and trade restrictions, border management or access of healthcare workers to affected countries or regions – matters that are addressed by the WHO, as well as the Council, but purely as recommendations.[21] Also, the WHO recommendations were not transformed into legally binding obligations by Security Council actions under chapter VII of the UN Charter. The Council could have easily demanded that member states keep their borders open to affected countries, cooperate with them on border management (namely through exit and entry screenings) or address

19 Cf Michael Akehurst, *A modern introduction to international law* (6th edn, George Allen & Unwin 1987) 219.

20 Cf only Christian Tomuschat, *Obligations arising for States without or against their will* (1993) 241 Recueil des Cours de l'Academie de droit international de la Haye 195, 334 ff.

21 Cf UN Security Council, Res 2177 (2014), recitals 9, 17.

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domestic players to continue travel and transport to and from West Africa.[22] Essentially, the Council refrained from addressing the epidemic by legal means and merely issued recommendations.

II. Practice of the WHO and the Security Council during the Covid-19 crisis

The WHO's response to the Ebola outbreak has been criticized widely. However, there was neither the time nor the willingness to substantially modify the existing governance. States simply had other priorities. When the Covid-19 crisis hit, it transpired that no lessons had been learned from the Ebola outbreak.

II.1. The WHO

There is no question that the WHO acted to the limits of its capacities during the Corona pandemic. This article cannot even list the measures and meetings held by the WHO in general and its Emergency Committee on the Covid-19 pandemic in particular. This committee advised the Director-General up until May 2023, when it recommended that the acute crisis had ended.[23]

However, some things need to be emphasized. The ample powers of the WHO to introduce draft treaties into international debate under Article 19 of the Constitution of the WHO or to make recommendations under Article 23 of the Constitution of the WHO were not utilized. This may be understandable, given the lesser significance of the new law in an ongoing health crisis. Again, states and governments had more pressing things to do than negotiate over new international treaties modifying the existing law. The virus would not have been impressed by a new treaty.

22 Similarly Lawrence O Gostin and Eric A Friedman, 'A Retrospective and Prospective Analysis of the West African Ebola Virus Disease Epidemic: Robust National Health Systems at the Foundation and an Empowered WHO at the Apex' (2015) 385 Public Policy 1902, 1906.

23 Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the Covid-19 pandemic on 5 May 2023 <www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic> accessed 12 March 2024.

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The same holds true for the powers under Article 21 of the Constitution of the WHO. The WHO itself needed to allocate its resources efficiently to combat the actual virus. A new treaty entering into force under Article 21 of the Constitution of the WHO was not developed. Again, this also holds true for the IHR. This treaty defines the powers of the Emergency Committee. Given that the committees only advise the Director-General, there is no need to give them more power in a legal sense. After all, the WHO's legal framework did not evolve during the Covid-19-pandemic.

II.2. The Security Council

The Security Council felt the impact of the pandemic as we all did. It switched to videoconferencing for a longer period.[24] However, its practice is more interesting from a legal vantage point than that of the WHO.

II.2.1. Res. 2532 (2020)

The Council adopted Res. 2532 (2020) in July 2020, in which it emphasized the 'devastating impact (...) across the world, especially in countries ravaged by armed conflict or in post-conflict situations, or affected by humanitarian crises'. It considered that 'the unprecedented extent of the Covid-19 pandemic is likely to endanger the maintenance of international peace and security'. It continued to call for cease fires in ongoing conflicts and requested that the UN, especially the Secretary General, accelerate their responses to the health crisis. The Council itself, however, did not adopt any meaningful measures.

II.2.2. Res. 2565 (2021)

In February 2021, after a little more than a year from the declaration of public health emergency of international concern by the WHO,[25] the Council adopted Res. 2565 (2021). Here, the Council recalled the efforts made in the previous twelve months by several players, most importantly the WHO. The Security Council referred in the recitals to the IHR (2005)

24 Working methods of the Security Council during the presidency of the Dominican Republic, April 2020, S/2020/273 of 6 April 2020.
25 Cf IHR (2005) Emergency Committee (n 1).

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and recalled the obligations therein. It still maintained that the 'Covid-19 pandemic is likely to endanger the maintenance of international peace and security' – almost a year after the world locked down for the first time.

As a measure, the Council called for increased national and international efforts to combat the virus, in particular vaccination efforts. It also called for unhindered passage of health professionals. Apart from these suggestions, no other binding measures were adopted.

II.2.3. Statement by the President of the Security Council

The Council's president made a statement shortly afterwards.[26] Such statements are even rarer than Security Council resolutions. After deliberating with the other member states, the president highlighted vaccination efforts and the unequal availability of vaccines throughout the world. They lamented the undersupply to Africa, connected health concerns with post-conflict societies and called for increased international support. Again, no binding measures were suggested.

II.3. International Response during Covid-19 and the Innovations introduced

In brief, no legal innovations were introduced during the Covid-19 crisis. The WHO remained in line with the established framework, while the Security Council was more than reluctant to declare the Covid-19 pandemic a threat to international peace and security.

As for the Security Council, surprisingly, in 2014, the Council declared the regionally limited Ebola outbreak to be a threat. Of course, this was due to the post-conflict societies that were hit hardest.[27] It was the 'unprecedented extent' of the outbreak that constituted the threat and not the mere existence of an epidemic. However, with Corona, even more dangerous conflicts were affected and situations posed challenges with the outbreak of the Corona virus. Still, the Council did not conclude that the Corona virus was a threat.

26 UN Doc S/PRST/2021/10 of 19 May 2021.
27 For details Frau (n 13) 327, 341.

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II.4. Aftermath

It is important to mention that the WHO is currently assessing its response. There was little time during the pandemic, whereas now there is more.

A Review Committee on the Functioning of the IHR (2005) during the Covid-19 response was published as early as in May 2021.[28] The experts analysed past outbreaks of various viruses and identified shortcomings of the existing framework. It made nine recommendations in three areas. First, with regard to 'Compliance and empowerment', the failure of states to comply with certain obligations under the IHR, especially on preparedness was identified as having contributed to the Covid-19 pandemic, becoming a protracted global health emergency. Consequently, the responsibility for implementing the IHR should to be elevated to the highest level of government in each respective state, including a 'robust accountability mechanism for evaluating and improving compliance with IHR obligations.' The second group of recommendations stated that early alerts, notifications and response procedures should be improved. The Committee reiterated the need for international cooperation and fast notifications. Lastly, with regard to financing and political commitment, monetary resources are needed to foster preparedness.

Today, the task of following-up and updating the IHR (2005) is bestowed on a Review Committee with regard to amendments to the IHR (2005). The Review Committee started its work in October 2022. It has met three times as of the time of writing (June 2023). It has already produced a number of proposals, which can be seen on the WHO's website. However, as they are currently under deliberation, it is too early to engage in an abstract discussion about the proposals. For the purposes of this article, suffice is to say that the WHO is assessing its framework rather comprehensively. It is taking a look at the applicable law. This is not just words, it is also action. There are concrete proposals and not just statements of intent. In this sense, the Corona pandemic has led to a reform within the WHO, the success of which needs to be seen in the future. Many issues have been identified as major obstacles in the past work of the WHO. Most importantly, most of the contributions to the WHO are made voluntarily and do not offer a robust or reliable financial framework. Additionally, funds are mostly allocated to specific tasks within the WHO, giving the funders a say, but

28 <www.who.int/publications/m/item/a74-9-who-s-work-in-health-emergencies> accessed 12 March 2024.

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leaving less room for the experts to manoeuvre within the organization. Additionally, what has so far not been a major focus in international health law is the interplay between human rights and the response to the pandemic. Essentially, the human right to the highest attainable standard of health under Article 12 ICESCR has not been used for moving any discussion forward. It is regrettable that no major player, be it the WHO or the UN, has focussed on the human rights dimension to advance the reform process.

III. The Human Rights Dimension

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees a human right to the 'enjoyment of the highest attainable standard of physical and mental health' (Article 12(1) ICESCR). Article 12(2) ICESCR suggests several steps which state parties will take to achieve the full realization of the right enshrined in Article 12(1). These steps include the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases' and the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness.' However, under Article 2(1) ICESCR, account must be taken of a state being required to take steps to 'progressively [achieve] the full realization of the rights recognized' by the ICESCR. Therefore, Article 12(2) ICESCR complements[29] the individual human right to health with the obligations of the state parties.[30] In this sense, Article 2(1) ICESCR 'limits' the human right to health to a relatively weak and abstract obligation of progressive realization.[31] States can therefore differ in their approach to the full realization as a result of specific domestic factors.[32] Some specific areas of concern have been identified in the General Comment shaping the substantive obligations. However, these do not include substantive obligations regarding emergency situations. This has not been changed since the Ebola outbreak in 2014, even though the shortcomings were visible.

Furthermore, the human rights dimension was not once addressed by the Security Council. Given that the Council is usually quick to remind states of their human rights obligations – it even did so in Res. 2565 (2021)

29 Meier and Mori (n 3) 101, 113.
30 Cf John Tobin, *The Right to Health in International Law* (Oxford UP 2012) 75, 225 ff.
31 Critical Meier and Mori (n 3) 101, 115.
32 ibid.

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– it is worth mentioning that the right to the highest attainable standard of health was not even mentioned during the three years of the worldwide pandemic. On the side-line, this holds true for the case law of the German Federal Constitutional Court, which has not mentioned the international dimension of human rights in its judgments, although 'the German people (...) acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world' (Article 1(2) of the German Basic Law).

IV. Result

International law did not progress during the Corona pandemic. The WHO shifted its resources differently and the Security Council was not even ready to determine that the outbreak constituted a threat to international peace. The progressive realization of human rights law has not been advanced. Overall, the major health crisis opened numerous opportunities for developing international law and introducing innovations. Nevertheless, states and the major players, the WHO and the UN Security Council, failed to do so.

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Applications of Artificial Intelligence in Healthcare as an Example of Innovative Public Governance after the Pandemic Crisis: Regulatory Solutions in the European Union's Integrated Structures

Sebastian Sikorski, Michał Florczak

Abstract: Artificial intelligence (AI) has become a transformative force in the field of healthcare, with the potential to significantly improve the quality of patient care and speed up the process of diagnosis and treatment, resulting in more efficient use of medical staff time. However, it should be emphasized that the application of AI technologies in healthcare is a huge opportunity, but can also be seen as a threat. In the opinion of the authors, in addition to defining the principles of responsibility, an absolutely crucial issue is to regulate the principles of supervision of AI-qualified solutions. When using such solutions in healthcare, the absolute priority should always be to leave the final decision – through the supervision performed – in the hands of a human.

The chapter also formulates a kind of 'working hypothesis' that so-called AI with consciousness is a matter of time and, when it appears, the law will have to cope with it. That is why the authors believe it is so important to react quickly to technological progress by monitoring it. In the case of AI, we are dealing with a situation in which the law laid down will have to keep up with technological progress and not just catch up with it, as is the case in other areas of life.

I. Introduction

Innovation can be looked at from a variety of perspectives – that is, innovations in public governance, in law-making, in resource management. In the context of public administration, innovations of a social nature are often considered, as a response to the changing functions of public administration. However, these trends cannot be viewed without a technological background. In the case of the recent pandemic crisis, it became clear that, in the eyes of decision-makers, solutions of a technological nature should appear not only at the national level, but also at the EU level.

The ageing of the population and the increasing shortage of healthcare professionals in developed countries are encouraging societies to look for new solutions to support healthcare professionals and automate the caring

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process. This phenomenon, as well as the recent years of the Covid-19 pandemic, have had a significant impact on the development of new technologies in medicine, which contribute to improved efficiency and, ultimately, better patient care.[1] Artificial intelligence (AI) has become a transformative force in healthcare, with the potential of revolutionizing the way healthcare services are provided and received. AI is a tool that is increasingly used in the healthcare sector. Advanced algorithms, data analysis and machine learning mean that artificial intelligence offers physicians innovative tools, which can significantly improve the quality of patient care and accelerate the diagnostic and treatment process. The use of AI solutions in healthcare can fundamentally improve the quality and accessibility of healthcare services for patients, especially through support in diagnosis and more efficient use of the work time of the healthcare professionals, which became particularly noticeable – and necessary – during the Covid-19 pandemic. However, it should be emphasized that the application of AI technology in healthcare is a huge opportunity, but also a threat, and this is how this matter should be objectively viewed.

The use of deep learning algorithms based on neural networks is emphasized in the literature.[2] AI algorithms were initially most frequently used in radiology for diagnostic imaging purposes, where there has been remarkable progress in image recognition tasks.[3] The discussion is currently focusing on the use of AI for patient consultations, where the support of physicians in analysing symptoms of patients and the results of additional tests during consultations (differential diagnosis) is becoming the challenge. Several tools which can serve this purpose are already available on the market. Infermedica, which facilitates initial medical diagnosis and patient management, can be given here as an example,[4] whereas these algorithms do not yet take into account the analysis of variances found in physical examinations and the results of additional tests (e.g. laboratory test results,

1 Adam Bohr and Kaveh Memarzadeh (eds), *Artificial Intelligence in Healthcare Data* (Academic Press 2020).
2 Kacper Niewęgłowski and others, 'Applications of Artificial Intelligence (AI) in Medicine' (2021) 27 Medycyna Ogólna i Nauki o Zdrowiu 213 <https://doi.org/10.26444/monz/142085> accessed 27 March 2024.
3 Ahmed Hosny and others, 'Artificial Intelligence in Radiology' (2018) 18 Nature Reviews Cancer 500 <https://doi.org/10.1038/s41568-018-0016-5> accessed 27 March 2024.
4 Infermedica.com (2023), available at <https://infermedica.com> accessed 27 March 2024.

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ultrasound, etc.). The Glass Digital Notebook, which can significantly help physicians in differential diagnosis and in establishing a treatment plan, is also as an example of another application.[5]

The pandemic crisis provided a particular impetus for the introduction of public management solutions based on modern technology. In many cases, crises have the power to accelerate the development of institutional structures and regulatory solutions. In the following section, the case of artificial intelligence solutions applied to management in the health system will be used as a case study to analyse such processes of the evolution of post-crisis governance.

This section will be divided into two parts as a result of its interdisciplinary nature, whereby the first part illustrates the medical perspective that identifies possible applications of AI technologies, indicating the opportunities and threats. In the second part, the legal part, the analysis will focus on the proposal of a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending certain Union legislative acts (the so-called AI Act),[6] which is of key importance in this area. The discussion will be summarized with conclusions from both areas.[7]

II. The application of artificial intelligence in medicine – searching for innovative solutions

As mentioned in the introduction, significant developments in AI algorithms were made during the Covid-19 pandemic. According to Alberto Gerli et al., ChatGPT became a valuable tool for monitoring the pandemic. ChatGPT's ability to process large amounts of data and provide relevant information means it has the potential to provide precise and timely guidance and support for decision-making processes to reduce the spread and impact of the pandemic. Simultaneously, AI algorithms can also be used in crisis

5 Glass.health (2023), available at <https://glass.health> accessed 27 March 2024.
6 COM (2021) 206 final of 21 April 2021.
7 The section refers to the conclusions of a report commissioned by the Polish medical chamber: Maria Libura, Tomasz Imiela and Dagmara Głód-Śliwińska (eds), *Cyfryzacja zdrowia w interesie społecznym* (Okręgowa Izba Lekarska w Warszawie 2023) <https://izba-lekarska.pl/wp-content/uploads/2023/05/OIL_Cyfryzacja_raport_07042023.pdf> accessed 27 March 2024.

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management, which would allow for the better planning of appropriate efforts and resources in the case of future epidemics.[8]

II.1. Exploring technological innovation during the Covid-19 pandemic crisis

During the Covid-19 pandemic, AI started to affect almost every aspect of healthcare, from clinical decision support, through self-treatment of chronic diseases at the patient's home, to drug research. Machine learning algorithms can detect patterns and anomalies in data, which can help diagnose diseases at an early stage, before the patient starts to notice the symptoms. For example, AI systems can help detect susceptibility to diabetes, cancer or heart disease based on an analysis of the patient's data and lifestyle. Its significant contribution to the improvement of efficiency and the automation of many of the processes related to patient care is highlighted, which materially translates into greater time savings.[9] This potential has already been noticed by a number of technology companies, such as Google, Meta, Microsoft, Amazon and Apple, which are investing billions in health research using their proprietary data to understand human diseases, while financing data studies and central nervous system research to support developments in artificial intelligence.[10]

Physicians spend too much time writing out medical records and operating various computer systems during patient consultations.[11] A lack of time devoted to the patient and numerous responsibilities related to creating medical records are common causes of professional burnout among healthcare professionals. Professional burnout among physicians is an insufficiently recognized and under-reported problem, which increased significantly in the era of the Covid-19 pandemic and has frequently contributed to poorer results of treatment. The problem could affect as many as over

8 Alberto G Gerli and others, 'ChatGPT: unlocking the potential of Artificial Intelligence in COVID-19 monitoring and prediction' (2023) 65 Panminerva Medica 461.

9 Thomas Davenport and Ravi Kalakota, 'The potential for artificial intelligence in health-care' (2019) 6 Future Healthcare Journal 94.

10 Paul Webster, 'Big tech companies invest billions in health research' (2023) 29 Nature Medicine 1034.

11 pulsmedycyny.pl (2022), available at <https://pulsmedycyny.pl/biurokracja-kradnie-lekarzom-czas-a-chorzy-czuja-sie-zaniedbani-gdzies-pomiedzy-sa-pielegniarki-raport-1151512> accessed 27 March 2024.

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60 % of healthcare professionals. If it is not recognized in time, the costs to the healthcare system could be huge.[12] Therefore, there are high hopes that artificial intelligence technology will improve all aspects of healthcare, including, primarily increasing efficiency by saving time for physicians in individual administrative processes. It is expected that the time that AI helps save can be used to improve the doctor-patient relationship. AI could support the physician in the process of creating medical records based on the medical history previously collected from the patient, in the analysis of additional tests, as well as in the differentiation process. Additionally, support in issuing various documents such as medical certificates or temporary disability certificates or in the prescribing process could be important. The possibility of applying AI solutions in the healthcare system of the EU member states will accelerate governance processes in the health service and has been directly understood as an innovative improvement for many years, as part of the digitizing processes of public administration.

The analysis of medical data and information from the patient's electronic records enable AI systems to suggest personalized treatment plans, recommending appropriate drugs and dosages, taking into account interactions with other drugs, as well as the patient's possible reactions to the substances that are administered. Software supporting physicians is already appearing on the market; this is referred to as 'second diagnosis'. The physician enters the patient's symptoms, variances in the physical examination and additional tests into the system and, on this basis, the computer software formulates a diagnosis and proposes treatment.[13] According to the research, these tools are coping increasingly better with the analysis of large amounts of medical data, on the basis of which they present correct diagnoses. However, the treatment proposed by the AI algorithm does not yet take into account many aspects, such as the guidelines in force in the given EU Member State and psychological issues related to the patient's compliance with the recommendations. It does, however, efficiently analyse the drugs recommended by the physician for possible interactions.[14]

The role of empathy, which directly affects the doctor-patient relationship, as compliance and therefore, long-term results is emphasizsed within

12 Brian E Lacy and Johanna L Chan, 'Physician Burnout: The Hidden Health Care Crisis' (2018) 16 Clinical Gastroenterology and Hepatology 311.

13 Semantic Drug Search Demo (2023), available at <https://chpl-lvm3ln8z3-n1kodem-s-team.vercel.app> accessed 27 March 2024.

14 ibid.

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the framework of patient care. Better long-term results mean an improved prognosis and a longer life. Various authors believe software using AI is an important innovation generated through better compliance, as it will allow the physician to develop this relationship through significant time savings. However, the impact of large-scale deployment of AI algorithms in this process is unclear and currently difficult to predict.[15]

In turn, sceptics argue that artificial intelligence could further dehumanize medical practice. AI tools lacking the pluralism of value could encourage a return to paternalism, but this time imposed by AI and not the physician.[16] Even so, the development of telemedicine consultations that took place in the era of the Covid-19 pandemic showed that the lack of a face-to-face relationship with the patient and the short time allocated to consultations can contribute to poorer compliance. Therefore AI tools which optimize the physician's time will allow the physician to build a better relationship with the patient and improve the results of treatment.

Another threat requiring a commentary may be economic pressures. The time AI will save for a physician during a patient's appointment can be used to 'push' more patients through the system, namely a so-called productivity improvement.[17] There is a danger that health centres which use AI models, driven by the desire to achieve better economic efficiency, will want to persuade doctors to see even more patients per hour. This will not translate into a better quality of patient care or the development of personalized medicine, but will contribute to the even greater dehumanization of the treatment process and a greater risk of errors. In such a case, the question should be asked of whether this would be the fault of applying AI or perhaps human nature, which would be driven by the desire to make even greater profits at the expense of the patients themselves. Therefore, the limitations preventing such practices from being implemented systemically should be addressed immediately. A solution to this problem could be the definition of patient paths, specifying the minimum consultation time that a physician should allocate to each type of consultation (e.g. 20 minutes for

15 Olivier Niel and Paul Bastard, 'Artificial Intelligence in Nephrology: Core Concepts, Clinical Applications, and Perspective' (2019) 74 American Journal of Kidney Diseases 803.

16 Aurelia Sauerbrei and others, 'The impact of artificial intelligence on the person-centred, doctor-patient relationship: some problems and solutions' (2023) 23(1) BMC Medical Informatics and Decision Making 73.

17 Robert Sparrow and Joshua Hatherley, 'High Hopes for 'Deep Medicine'? AI, Economics, and the Future of Care' (2020) 50(1) Hastings Center Report 14.

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a first appointment, 15 minutes for an infection appointment, 30 minutes for an appointment for a patient with multimorbidity, 20 minutes for a prophylaxis appointment, etc.). The qualification of a patient for a specific type of appointment is an innovative solution which emerged during the Covid-19 pandemic and enabled treatment to start earlier, often while still asymptomatic.

The technology-enabled procedure started in Poland as early as during the process of writing out e-prescriptions. Technology and the lack of effective control enabled so-called 'prescribing machines' to appear on the market during the Covid-19 pandemic, through which patients received an e-prescription without going on an appointment to see a physician, but purely after completing a questionnaire. As a result, a physician could automatically issue dozens of such prescriptions per hour. This activity is currently being generally criticized by numerous organizations, which draw attention to the need to eliminate abuse without denying the positive effects of digital transformation.[18]

In turn, there have been numerous abuses in the USA in the past in the prescription of analgesics, including strong-acting analgesics. The introduction of an e-prescription system in which the prescription is directly sent to pharmacies has significantly reduced the scale of this procedure.[19]

II.2. New trends in patient care

A key aspect of patient-centric care is the involvement of patients in the treatment process and their ability to make decisions about their health. The patient's increasing autonomy through his or her involvement in decision-making processes is a strong objection to the outdated paternalistic model of care.[20] Some AI tools can already contribute to an increase in patient autonomy if only through patient education. AI can be a useful tool in educating patients about their diseases, treatments and ways of staying healthy. Interactive platforms and access to the medical knowledge

18 rx.edu.pl (2023), available at <https://rx.edu.pl/zdalne-wystawianie-e-recept-stanowisko-organizacji-branzowych> accessed 27 March 2024.

19 <www.kaliskleiman.com/are-electronic-prescriptions-safer.html> accessed 27 March 2024.

20 Madison K Kilbride and Steven Joffe, 'The New Age of Patient Autonomy: Implications for the Patient-Physician Relationship' (2018) 320 Journal of the American Medical Association 1973.

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base enable patients to better understand their conditions and better co-operate with the physician in the treatment process. According to Milda Žaliauskaite, an effective way of ensuring patient autonomy is to implement legal instruments such as informed consent, advance directives and so-called Ulysses contracts (a term used in medicine, especially with respect to advance directives.[21]

Remote patient monitoring systems using AI tools enable continuous tracking of the health parameters of patients. Devices worn by patients, such as smartwatches, sensors in the form of wristbands or rings and various mobile applications, collect real-time data on vital signs, activity levels and many other parameters. AI algorithms analyse this data to provide valuable information to physicians about the health trends of their patients and early warning signs of potential complications. Remote patient monitoring can enable patients to proactively pursue self-care, while enabling physicians to conduct more proactive tasks based on prophylaxis and early detection of diseases. Personalized patient care provided through telemonitoring is an innovation that evolved in the era of the Covid-19 pandemic and can significantly improve clinical practice, so it can be seen as an innovative solution which modernizes existing forms of governance.

On the one hand, certain devices used for monitoring heart failure, atrial fibrillation and cardiac rehabilitation constitute an inexpensive, non-invasive or minimally invasive approach to long-term monitoring and management in these areas. On the other hand, the availability of big data constitutes a useful tool for predicting the development and outcome of many cardiovascular diseases. In summary, the new targeted therapy enables the physician to quickly provide personalized and tailored treatment, while patients feel safe because they are constantly being monitored, which has a significant psychological effect.[22] However, the doctor-patient relationship should always remain a key element of care.

In addition, mobile apps used by patients for self-monitoring (collecting any form of health data) using AI mechanisms can increase their autonomy,

21 Milda Žaliauskaitė, 'Role of ruler or intruder? Patient's right to autonomy in the age of innovation and technologies' (2021) 36 AI & Society 573 <www.springerprofessional.de/en/role-of-ruler-or-intruder-patient-s-right-to-autonomy-in-the-age/18275722> accessed 27 March 2024.

22 Valeria Visco and others, 'Artificial Intelligence as a Business Partner in Cardiovascular Precision Medicine: An Emerging Approach for Disease Detection and Treatment Optimization' (2021) 28 Current Medicinal Chemistry 6569 <https://doi.org/10.2174/0929867328666201218122633> accessed 27 March 2024.

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which contributes to the shift in the doctor-patient relationship towards one in which both parties have a balanced distribution of rights and duties, and therefore an equal input into participation into the decision-making process.[23]

Healthcare organizations have to address a number of challenges to effectively implement AI solutions, including: i) gaining a better understanding of the technology and limitations of the given AI model, ii) defining the strategies for integrating various AI technologies into existing care systems to effectively resolve the most pressing issues currently facing healthcare organizations, iii) quickly filling the shortfall of well-trained professionals for implementing AI, who are lacking in many healthcare entities throughout Europe, iv) fixing the incompatibility of AI technologies with older infrastructure, and v) giving access to good and diverse medical data for training machine-learning algorithms.[24] For example Vishal Sikka claims the lack of well-trained professionals for developing AI algorithms in this context is a major problem. It is estimated that there are only 20,000–30,000 people in the world working on these issues.[25]

Although machine learning has achieved great success in areas using medical imaging and big data, it is not a universal solution. AI is less applicable in cases where multiple aspects need to be taken into account from various areas, e.g. not only data regarding the given specialization, but also other circumstances, such as the patient's preference for a specific type of treatment. This arises from the fact that machine learning relies on computational power and huge amounts of data for identifying superficial patterns and correlations. Therefore, it is unable to take full account of causal relationships or a clear understanding of the full phenomenon being

23 Meghan McDarby and others, 'Mobile Applications for Advance Care Planning: A Comprehensive Review of Features, Quality, Content, and Readability' (2021) 38 American Journal of Hospice and Palliative Care 983 <https://doi.org/10.1177/1049909120959057> accessed 27 March 2024.

24 Mei Chen and Michel Decary, 'AI in Healthcare: From Hype to Impact' (Workshop presented at ITCH 2019: Improving Usability, Safety and Patient Outcomes with Health Information Technology, Victoria, British Columbia, Canada, 14 February 2019) available at <https://de.slideshare.net/MeiChen39/ai-in-healthcarefrom-hype-to-impact> accessed 27 March 2024.

25 <www.zdnet.com/article/ai-experts-are-in-short-supply-thats-making-the-skills-crisis-worse> accessed 27 March 2024.

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studied. This process can then lead to errors generated by AI algorithms, which are difficult to reverse.[26]

The American Medical Association defined the role of AI in healthcare as so-called 'augmented intelligence', stating that artificial intelligence will be designed and used to augment and not replace human intelligence. This view emphasizes the human-machine partnership, which has significant implications for the use of artificial intelligence in healthcare.[27]

If a physician works with AI, this does not mean that this tool can be used on its own. The appropriate level of supervision to be exercised by a person over AI must be defined appropriately early. In certain cases, such as the identification of the population of the at-risk groups which should qualify for vaccination or the use of a chat bot to show a patient how to properly administer an insulin injection, the level of automation may be higher (human oversight lower) than for processes in which such supervision should be high (e.g. increasing clinical efficacy in the differential diagnosis process).[28]

III. Legal regulation at the European Union level

We are still currently at the stage of designing the legal regulation of artificial intelligence at the level of European Union law, in the form of a regulation of the European Parliament and of the Council, which will automatically enter into the legal orders of the EU Member States, on the basis of the provision of Article 288 in connection with Article 114 of the Treaty on the Functioning of the European Union.[29] Article 114 TFEU provides for the adoption of measures to ensure the establishment and functioning of the internal market.

The *ratio legis* itself of the adoption of AI legal solutions needs to be especially emphasized at the level of European law. On the one hand, the

26 Mei Chen and Michael Decary, 'Artificial intelligence in healthcare: An essential guide for health leaders', (2020) 33 Healthcare Management Forum 10 <https://doi.org/10.1177/0840470419873123> accessed 27 March 2024.

27 American Medical Association (2023), available at <www.ama-assn.org/press-center/press-releases/ama-adopts-policy-calling-more-oversight-ai-prior-authorization> accessed 27 March 2024.

28 Chen and Decary, 'Artificial intelligence' (n 26).

29 Treaty on the Functioning of the European Union [2016] OJ C202/47, hereinafter: TFEU.

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legal framework laid down precisely at the level of the European Union can ensure a level playing field and protection of citizens while, on the other hand, it can strengthen Europe's industrial competitiveness in this area by increasing the power to influence the shape of the AI regulations at global level.[30] It should simultaneously be noted that some EU member states are considering introducing legislation on this at national level, which, as a result, can prevent the free trade of AI-enabled goods and services, cause the fragmentation of the common market and even the loss of competitiveness in this area, especially with respect to the USA and China. Of course, the literature simultaneously also emphasizes the need for cooperation and the exchange of experiences at national levels.[31]

III.1. EU policy strategy for artificial intelligence system

A good example of shaping EU strategies to increase innovation in public management is the Europe's Digital Decade: Digital Targets for 2030 policy programme, which has been proposed at EU level.[32] This programme contains specific targets and objectives for 2030, and will set the direction of Europe's digital transformation. The Commission will pursue these targets and objectives through specific terms, namely projected trajectories at EU and national level, with key performance indicators to track progress in this area.

Strategies of a political nature are embedded in specific legislative initiatives. The act of law of key importance here, and consequently the reference point for further considerations, is the proposed regulation of the European Parliament and of the Council laying down harmonised rules on artificial

30 Karol Rębisz, 'Wybrane zagadnienia prawa cywilnego w propozycjach regulacyjnych dotyczących sztucznej inteligencji w Unii Europejskiej' (2021) 10 Europejski Przegląd Sądowy 22 <https://sip.lex.pl/komentarze-i-publikacje/artykuly/wybrane-zagadnienia-prawa-cywilnego-w-propozycjach-regulacyjnych-151397066> accessed 27 March 2024.

31 Reinhard Busse and others (eds), *Improving healthcare quality in Europe: Characteristics, effectiveness and implementation of different strategies* (World Health Organization 2019).

32 See <https://digital-strategy.ec.europa.eu/en/policies/europes-digital-decade> accessed 27 March 2024.

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intelligence (Artificial Intelligence Act) and amending certain Union legislative.[33]

According to the provision of Article 3(1) of the Draft, '"artificial intelligence system" (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.'

Therefore the wording of Annex I itself is inherent to the definition, stating that 'techniques and approaches' include: '(a) machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) statistical approaches, Bayesian estimation, search and optimization methods.'[34]

Such an approach has several implications. First of all, the definition also encompasses machine learning with a distinction between supervised learning, unsupervised learning and learning using a wide range of methods, including deep learning. Given the current state of development of solutions in the healthcare sector, such a broad view can be assessed as being positive. However, the proposed definition already has certain noticeable shortcomings. This is because the indication that its scope also includes 'logic- and knowledge-based approaches' means that a significant amount of software already in use may be included in such solutions.[35] It does not seem as if this was the intention of the drafters. Simultaneously, the definition itself differentiates between supervised and unsupervised machine learning.

Such a definition of artificial intelligence can be considered broad. It includes not only software based on machine learning mechanisms, but also,

33 COM (2021) 206 final, hereinafter: Draft. On July 12, 2024, the Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) was published in [2024] OJ L 1/144.

34 Monika Kupis, 'Stosowanie przepisów Rozporządzenia Parlamentu Europejskiego i Rady (UE) 2017/745 do sztucznej inteligencji' (2022) 4(1) Przegląd Prawa Medycznego 101 <https://przegladprawamedycznego.pl/index.php/ppm/article/view/136> accessed 27 March 2024.

35 ibid 102.

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for instance, knowledge bases and search methods, which in themselves do not necessarily have anything to do with artificial intelligence. However, in a way, by including the techniques and approaches specified in Annex I to the Draft, the intention is for the definition of AI to be periodically updated. At this point, it should be assumed that the need for modification will not only apply to the definition itself, but also the holistic view as the technology develops.

Article 3(1) of the Draft stipulates that the artificial intelligence system means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations or decisions influencing the environments they interact with.[36]

Although the matter of supervision is the subject of a separate regulation in Article 14 of the Draft, it is worth pointing out that it would be reasonable to emphasize that ultimate human supervision must be exercised in any solution that is qualified as AI. This aspect is also considered crucial by the European Economic and Social Committee, which emphasizes the need to keep certain decisions exclusively within the responsibility of humans, especially where 'these decisions involve moral aspects and legal consequences or an impact on society,' such as healthcare.[37]

The doctrine distinguishes between narrow AI systems, namely those that can perform one or several specific tasks, and general AI, referred to as superintelligence or self-conscious AI. Indeed, at the current level of technological development, we are dealing with narrow AI solutions. However, it is difficult to agree with the assertion that conscious AI is currently purely a certain hypothesis, and that even such strong AI will perhaps never arise.[38]

36 ibid 101.

37 Opinion of the European Economic and Social Committee on Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts [2021] OJ C517/61, 1.9.

38 Małgorzata Dumkiewicz, Katarzyna Kopaczyńska-Pieczniak and Jerzy Szczotka (eds), *Sto lat polskiego prawa handlowego. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Kidybie* (vol 2, Wolters Kluwer Polska 2020).

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III.2. High-risk AI systems

It seems that the question of further development of artificial intelligence is only related to time and not to the question of whether it will happen. In this regard, specific solutions for high-draw AI systems have emerged in the regulatory proposal. The wording of Article 6 of the Draft presents the classification rules for high-risk AI systems, simultaneously – importantly – emphasizing the connection between AI solutions and separate products. The identification of high-risk systems and the classification of AI technology used in the healthcare sector into precisely this group is of particular importance here. This is because it is in this area that the highest values, such as human health and life, are protected. The drafters themselves also point this aspect out in recital 28 of the Draft, emphasizing that AI systems could produce adverse outcomes to health and safety of persons, referring this threat, among other things, to the health sector, 'where the stakes for life and health are particularly high, increasingly sophisticated diagnostics systems and systems supporting human decisions should be reliable and accurate.'

Taking into account recognized standards or common specifications, the need for event logging in the case of high-risk systems, as specified in Article 12 of the Draft, also needs to be highlighted. By assumption, event logging is also intended to enable the monitoring of the performance of a high-risk artificial intelligence system for situations that can result in an artificial intelligence system posing a risk in the meaning of Article 3(19) of Regulation (EU) 2019/1020.[39] A certain reservation appears here, because the definition contained in this provision refers to a 'product presenting a risk', meaning a potentially adverse effect, among other things, on health. In the context of event logging, it is worth mentioning that the authors of this article already postulated the need to create a public register of AI solutions operating in healthcare at the level of the individual EU Member States in 2019.[40]

39 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) 765/2008 and (EU) 305/2011 [2019] OJ L169/1.

40 Michał Florczak and Sebastian Sikorski, 'Sztuczna inteligencja w medycynie – nowe wyzwanie w obszarze regulacji administracyjnoprawnej' in Irena Lipowicz, Ewelina Nojszewska and Sebastian Sikorski (eds), *Innowacje w ochronie zdrowia: Aspekty prawne, ekonomiczne i organizacyjne* (Wolters Kluwer Polska 2020).

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Article 3(15) of the Draft emphasizes that the instructions for use should 'inform the user, in particular, of an AI system's intended purpose and proper use, inclusive of the specific geographical, behavioural or functional setting.' Article 13 of the Draft contains the requirements for transparency and the provision of information to users. Transparency is intended to enable users to interpret the results of the operation of the system, which is related to specific obligations of the user and the provider. This provision emphasizes the requirement for high-risk AI systems to be accompanied by instructions for use containing 'concise, complete, correct and clear information that is relevant, accessible and comprehensible to users.' This naturally gives rise to the question of the extent to which this assumption will be realistic in practice, given the complexity of AI solutions, which will also be of significance to the scope of responsibility.

In the context of the above comments on the need for human control of AI solutions, the principles of human supervision of AI solutions are of key importance. The wording of recital 48 of the Draft very clearly emphasizes the need to design and develop high-risk AI solutions so that a human can effectively supervise their operation. Therefore, it is up to the provider to specify the appropriate measures in this respect, even before these solutions are placed on the market or put into service. This refers, in particular, to solutions involving 'in-built operational constraints', which AI is unable to bypass on its own and must react to the actions of the system's human operator. A consequence of the supervision described in this way is the wording of the provision in Article 14 of the Draft.

High-risk AI systems are specifically highlighted in Article 14 of the Draft, as their design and development must include appropriate 'human-machine interface tools' which ensure that they can be effectively overseen. This supervision involves the prevention or minimization of risks to health, safety or fundamental rights, under the assumption that the high-risk AI system is used in accordance with its intended purpose or – as should be particularly emphasized – in conditions of reasonably foreseeable misuse.

In this context, it is primarily worth drawing attention to the supervision aspect. The supervision is exercised through the designed and developed solutions mentioned above, i.e. even before the system is placed onto the market or put into service. Simultaneously, the supervision should provide sufficient information to the people exercising this supervision so that they understand the full capabilities and limitations of the high-risk artificial intelligence system that they are supervising and to catch signs of anomalies, malfunctions or unexpected results of operation as quickly as possible

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under the given circumstances. The supervisors should be critical of over-reliance on the results of operation of the high-risk artificial intelligence system (so-called automation bias) and should correctly interpret the result of the operation of such a system.

Recital 53 of the Draft specifies the principles of liability, according to which not only is the person who designed or developed the high-risk AI system liable for its placement onto the market or for putting it into service, but so are its suppliers. This is because, according to Article 24 of the Draft, in the case of high-risk AI systems which are related to products to which the acts of law referred to in Annex II, Section A apply, the producer of the product is liable and subject to the same obligations as those imposed on the supplier. In turn, according to Article 26 of the Draft, in the case of these systems, importers must ensure that the conditions of their storage and transportation do not create a threat to their compliance with the specified requirements. The obligations of distributors are specified in Article 27 of the Draft, whereby, in the case of high-risk AI, it is the distributor who is responsible, in particular, for the CE conformity marking, but also for ensuring that the conditions of storage and transportation do not create a threat to the compliance of the system with the requirements specified in the Draft.

In the case of AI solutions in healthcare, it is this aspect that makes liability stricter, which is particularly important because of the subject matter of the protection, i.e. human life and health. The identification of the entities responsible for implementing AI solutions and defining the scope of this responsibility is a key condition of the functioning of these solutions in practice.

An extremely important and simultaneously very interesting solution for the development of AI is the adoption of so-called regulatory sandboxes (Article 53 of the Draft), which should be understood as a 'controlled environment' established by one or more Member States 'that facilitates the development, testing and validation of innovative AI systems for a limited time before their placement on the market or putting into service.' At this stage, it is the participants of these regulatory sandboxes who are responsible for any damage caused by the experiments being conducted. It is therefore a controlled environment – with defined rules, including rules regarding liability – in which AI solutions can be safely tested. It can be said that such an approach by the European regulator is doubly innovative. This is because, on the one hand, the Draft in question applies to solutions of the

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highest IT and technological complexity, which AI solutions are and will be, whereas, on the other, it is a new legislative approach.

IV. Conclusions

AI tools should be an integral component of the patient pathway to clinical decision support at the time of diagnosis. This process will help the physician base the diagnosis on the analysis of a large amount of clinical data that he is currently unable to analyse on his own. This would be an important innovation which would significantly reduce the number of medical errors made by physicians. An example of the use of AI in everyday clinical practice could be the PMcardio application, which physicians use to analyse ECG tests. By uploading an image of the test to the application, the physician very quickly receives a write-up of the test with a proposal of further treatment – in fact, something like a second diagnosis by a physician.[41]

In recent years, certain machine learning algorithms proved to be reliable for detecting and diagnosing diseases. Many such algorithms have received the approval of the U.S. Food and Drug Administration (FDA) for their safe use in healthcare.[42] Furthermore, conduct would be fully in line with the latest EBM guidelines (e.g., in the case of infections of the upper respiratory tract, AI could verify the recommendation of antibiotic therapy in real time). The use of AI solutions would also serve to better optimize costs while maintaining good quality of care.

The development of AI-based or AI-enabled solutions results in the need to prepare an appropriate legal regulation.[43] At European Union level, we have seen increased activity in this area in recent years, as the EU tries to maintain its technological leadership position while ensuring that new technological solutions respect EU principles and values. The result of this activity, which is the subject matter of the analysis, is the proposal of the regulation of the European Parliament and of the Council laying

41 Jelle CL Himmelreich and Ralf E Harskamp, ‘Diagnostic accuracy of the PMcardio smartphone application for artificial intelligence-based interpretation of electrocardiograms in primary care (AMSTELHEART-1)’ (2023) 4 Cardiovascular Digital Health Journal 80.

42 Bertalan Mesko, ‘The Top 10 Health Chatbots’ (*The Medical Futurist*, 1 August 2018) <https://medicalfuturist.com/top-10-health-chatbots/> accessed 27 March 2024.

43 Andrzej Matan (ed), *Administracja w demokratycznym państwie prawa: Księga jubileuszowa Profesora Czesława Martysza* (Wolters Kluwer Polska 2022).

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down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts. It is precisely from the point of view of this draft that the key issues regarding the regulation of AI in healthcare will be identified. The Covid-19 pandemic perfectly demonstrated the requirement for the application of IT/technological solutions in healthcare. This is because the use of technology will enable the effective use of the potential of healthcare staff. AI solutions can seriously intensify these applications.

The application of AI technology in healthcare is a huge opportunity, but also a threat, and this is how the matter should be objectively viewed. The development of AI-based or AI-enabled solutions results in the need to prepare an appropriate legal regulation. It is very important that the proposed legal solutions are introduced at European Union level, with the intention of ensuring the free trading of goods and services using AI technologies and removing the threat of fragmentation of the common market, which would be the case if different solutions were introduced in individual national legal orders. Therefore, on the one hand, the regulation of AI solutions at EU level is intended to ensure a level playing field and protection for citizens, while, on the other, it should strengthen Europe's industrial competitiveness in this area.

The Draft under review contains a definition of an 'artificial intelligence system', which also encompasses machine learning with a distinction between supervised learning, unsupervised learning and learning using a wide range of methods, including deep learning. However, given the stage of development of the AI solutions which are already operating in the healthcare sector, such a broad view should be considered positive. This proposed definition has some shortcomings, because its scope also includes 'logic- and knowledge-based methods', which can mean that such a solution also includes, to a large extent, software that is already in use, even though this was almost certainly not the objective of the drafters. However, already today, at the stage of designing legal solutions addressed to AI technologies, it should, be accepted that, with the development of technology, the definition of 'artificial intelligence system' – but also the whole of the regulation – will have to be modified, which means that the level of solutions of this technology will have to be monitored.

According to the authors of this article, other than defining the principle of liability, an absolutely fundamental issue is the regulation of the principles of supervision of AI-qualified solutions. This aspect is also especially emphasized by the European Economic and Social Committee, which

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highlights the need to keep certain decisions exclusively in the hands of humans, especially where 'these decisions involve moral aspects and legal consequences or an impact on society', which is especially the case in the healthcare sector and the solutions used there.

In this light, the level of risk of individual solutions was very aptly differentiated. As already stated above, recital 48 of the Draft clearly emphasized the need to design and develop high-risk AI solutions so that a human can effectively supervise their operation, which is especially important in the healthcare sector. This is because, in this case, 'where the stakes for life and health are particularly high, increasingly sophisticated diagnostics systems and systems supporting human decisions should be reliable and accurate.'[44] That is why it is so important to introduce solutions involving 'in-built operational constraints', which AI cannot bypass on its own and must react to the actions of the system's human operator. In the case of high-risk AI systems, the design and development itself must include appropriate 'human-machine interface tools' which ensure that they can be effectively overseen. This is especially justified because this supervision is precisely related to the prevention or minimization of risks to health, safety and fundamental rights. Therefore, the absolute priority is the need to always leave the final decision in the hands of a human through supervision.

At this point, reference should be made to the specific 'working hypothesis' formulated above that the so-called conscious AI is a matter of time and when it appears, the law will have to address it. Of course, it would currently be difficult to design legal regulations so far in advance. That is why it is so important to monitor technological progress in order to quickly address it. This is a situation in which the proposed law in this area will have to keep up with technological progress and not just catch up with it, as is the case in other areas of life.

A very important and simultaneously very innovative solution from the legal and legislative point of view is the adoption of so-called regulatory sandboxes,[45] which should be understood as a 'controlled environment' established by one or more member states 'that facilitates the development, testing and validation of innovative AI systems for a limited time before their placement on the market or putting into service'. This is how a controlled environment was envisaged – with defined rules, including rules

44 Recital 28 of the Draft.
45 Art 53 of the Draft.

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regarding liability – in which AI solutions can be safely tested, which will be very important for the development of AI.

However, AI brings not only opportunities but also threats. At this point, it is worth quoting Stephen Hawking, who stated that 'unless we learn how to prepare for, and avoid, the potential risks, AI could be the worst event in the history of our civilization.'[46] From the point of view of the healthcare sector, concerns are also highlighted in the literature as to whether the value of the research conducted on the basis of AI algorithms will take into account the complexity of the whole of the human body, as well as psychological issues that are extremely important in the doctor-patient relationship.[47] However, it should be accepted that the development of this technology and its application in medicine simply cannot be stopped. Consequently, what is positive in these solutions should be accepted and an attempt should be made to anticipate and eliminate the threats. The proposed legal regulation tries to address this matter.

46 Adam Jezard, 'AI Can Solve Problems – When Will It Tell Us Which Ones Need Solving Most?' (*World Governments Summit,* 11 July 2017) <www.worldgovernmentsummit.org/observer/articles/2017/detail/ai-can-solve-problems-when-will-it-tell-us-which-ones-need-solving-most> accessed 27 March 2024.

47 Johan EH Korteling and others, 'Human – versus Artificial Intelligence' (2021) 4 Frontiers in Artificial Intelligence no 622364 <www.frontiersin.org/articles/10.3389/frai.2021.622364/full> accessed 27 March 2024.

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Innovative Governance – or Just Muddling Through? Covid-19 Pandemic and Finland[1]

Maija Dahlberg, Laura Kihlström, Eeva Nykänen, Liina-Kaisa Tynkkynen

Abstract: Most of the pandemic management measures in Finland were based on the Emergency Powers Act and the Act on Contagious Diseases, both of which entered into force in 2017. When the pandemic broke out, this up-to-date legislation was thought to provide a strong legal basis for managing the situation. However, it soon became clear that these Acts were neither comprehensive nor flexible enough to fulfil their tasks. Although the legislation covered formally pandemic types of emergencies, it did not take sufficient account of the specificities of such situations. In particular, the ambiguity of the roles and responsibilities of various players in the multi-level system of social and healthcare services, as well as exclusion of certain fields of action, such as restaurants, from the scope of legislation created a need for further regulation. Passing the new regulation was not without problems, which meant that delays arose in the adoption of the necessary measures. Despite this, it can be argued that, all in all, the Finnish public administration succeeded relatively well in dealing with the situation. Although the regulatory framework was deficient and the powers of the authorities were somewhat unclear, the national and regional authorities were able to develop policies enabling timely action.

I. Introduction

The Covid-19 pandemic arrived in Finland at the cusp of a major social and healthcare reform. At the beginning of 2023, the reform centralized the responsibility for organizing social and healthcare services to the well-being services counties that constitute a new level of self-governing regional administration.[2] The reform has modified the Finnish healthcare system in profound ways and has also affected the governance of public health security. It is now important to take stock of lessons learned regarding

1 This research has been funded by the Research Council of Finland (grant nos 340501 and 340503) and the Strategic Research Council (grant nos 345298 and 345300).

2 See more a detailed description of the new health system structure in European Observatory on Health Systems and Policies: Liina-Kaisa Tynkkynen and others, *Finland: Health system summary 2023* (World Health Organization 2023) <https://apps.who.int/iris/handle/10665/366710> accessed 17 March 2024.

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governance of the Covid-19 pandemic in Finland because it is likely that the legacy of how the pandemic was governed will live on in the new structures of the Finnish healthcare system. That said, a major reform is also an opportunity for system transformation.[3] In view of this, in this chapter, we ask what we can learn from the past and what we should avoid in the future.

Governance of the pandemic was conducted in the 'old', highly decentralized healthcare structure. In this structure, some 300 municipalities bore primary responsibility for funding and organizing social and healthcare services and public health security. Specialized healthcare services were purchased by the municipalities from 20 hospital districts organized as joint municipal boards. The decision-making on pandemic governance measures was scattered across various levels of public administration, including municipalities, hospital districts, Regional State Administrative Agencies and the Ministry for Social Affairs and Health. Uncertainty as to the roles and powers of various players, as well as the inadequacy of the legal framework for governing the pandemic sometimes required improvisation and innovative solutions, which, in turn, could result in compromised adherence to the existing legal framework and the rule of law.

This chapter assesses the strengths and weaknesses of the Finnish system for pandemic governance during the initial years of Covid-19, especially focusing on the health system from the point of view of legislative instruments. It combines a legal analysis with interview data collected from key civil servants, health system leaders and politicians (n=53) who were responsible for pandemic governance at local, regional and national levels of the Finnish healthcare system. We have two main objectives: 1) to describe and analyse the legal basis of pandemic governance and its feasibility in Finland and 2) with empirical interview data, to explain how the available legal tools were used by key decision-makers and what kind of enablers and barriers were set by the legislation for the public administration and its innovativeness in Finland. In this chapter, we refer to the term 'innovative' as new and creative actions in public administration which, while perhaps being innovative, can also undermine the rule of law and compromise the protection of fundamental rights and freedoms.

3 Soila Karreinen and others, 'Pandemic preparedness and response regulations in Finland: Experiences and implications for post-Covid-19 reforms' (2023) 132 Health Policy no 104802 <https://doi.org/10.1016/j.healthpol.2023.104802> accessed 17 March 2024.

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II. Assessing the crisis response

II.1. Overview of the administrative and legal framework

When the Covid-19 pandemic reached Finland in March 2020, legislation scattered the responsibilities for pandemic governance among several authorities functioning at various levels of the healthcare system and public administration.[4] At national level, the Ministry of Social Affairs and Health (MSAH) was responsible for supervising and steering the system, as well as for preparing new legislation. As a national research and expert organization, the Finnish Institute for Health and Welfare (THL) was responsible for collecting and producing information, as well as for national-level surveillance and monitoring of the pandemic. THL was also responsible for information steering and for providing guidance to both the MSAH and players in the local and regional healthcare system. However, THL did not have a mandate for giving binding orders. The Regional State Administrative Agencies (AVI) were responsible for deciding on restrictive measures (e.g. closing public premises) at regional level on the basis of expert statements provided by the hospital districts. The municipalities were the key players at local level, having the competence to decide on restrictive measures in their own area, as well as on the majority of mitigation measures, such as pandemic surveillance. Furthermore, in the municipalities, the physician in charge of communicable diseases was responsible, among other things, for decisions on quarantine and isolation, as well as for public outreach and public communication.

Most of the pandemic governance measures enacted in Finland were based on the Emergency Powers Act (1552/2011, *valmiuslaki*), which entered into force in 2012, and on the Communicable Diseases Act (1227/2016, *tartuntatautilaki*), which entered into force in 2017.[5] After the pandemic arrived in Finland, it soon became clear that these acts, despite being relatively recently adopted, were neither sufficiently comprehensive nor flexible enough to respond to the requirements arising from this large-scale, long-lasting societal crisis. The legislation covered pandemic types of emergencies, but it did not sufficiently take into account the special

4 For a description of the responsibilities and mandates of controlling communicable disease in the Finnish public health system from 2020 to 2022 see Karreinen and others, 'Pandemic preparedness' (n 3).

5 See also Karreinen and others, 'Pandemic preparedness' (n 3).

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characteristics of such situations. The ambiguity regarding the roles and responsibilities of the competent players in the fragmented and multi-level system of healthcare administration, as well as the exclusion of certain fields of activity from the scope of the legislation, such as some private enterprises, created a need for further regulation that was adopted hastily and on an *ad hoc* basis. The problems with the Acts were further exacerbated by the fact that not all players were familiar with the procedures and measures provided for by the legislation.[6] Even when legal instruments were at their disposal, they were not always properly applied.[7] This lack of sufficient legal knowledge, together with the need for urgent action, resulted in serious problems in drafting laws. Consequently, the Constitutional Law Committee of the Parliament (Committee), which is the body responsible for the constitutional pre-review of Government bills, concluded that several legislative measures proposed by the Government are unconstitutional, among other things because they were excessive with respect to the needs actually arising from the situation. This was the case, for instance, with a bill that would have imposed a curfew in certain regions of Finland.[8] When reviewing the constitutionality of this bill, the Committee concluded that the restrictions that this law would have caused to the freedom of movement protected under section 9 of the Finnish Constitution were neither proportional nor acceptable for the gravity of the pandemic situation. The Committee's conclusion that the bill was unconstitutional resulted in the Government withdrawing the bill from Parliament.

II.2. The legal framework

The Finnish legal system has three different legislative frameworks which address health crises. The primary act regulating the governance of infectious diseases is the aforementioned Communicable Diseases Act. This Act contains general provisions on controlling contagious diseases, such as the

6 See also Laura Kihlström and others, '"Local cooperation has been the cornerstone": facilitators and barriers to resilience in a decentralized health system during Covid-19 in Finland' (2023) 37(1) Journal of Health Organization and Management 35–52 <https://doi.org/10.1108/JHOM-02-2022-0069> accessed 17 March 2024.

7 See also Laura Kihlström and others, 'Power and politics in a pandemic: Insights from Finnish health system leaders during Covid-19' (2023) 321 Social Science & Medicine no 115783 <https://doi.org/10.1016/j.socscimed.2023.115783> accessed 17 March 2024.

8 Government Bill 39/2021 for an Act on Restrictions upon Freedom of Movement and Interpersonal Contacts.

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administration of vaccines, preconditions and procedures for mandatory medical examinations, quarantine and isolation, as well as the powers and tasks of the relevant authorities which are responsible for controlling and combating infectious diseases.

The second Act covering health emergencies is the Emergency Powers Act. This Act gives authorities a set of exceptional powers for emergency situations, such as an armed attack against Finland, especially serious accidents and highly widespread and dangerous infectious diseases. If the measures laid down in the general legislation, such as in the Communicable Diseases Act, are insufficient to govern a situation, the Emergency Powers Act can be invoked. This Act contains provisions on, for example, placing private healthcare and social welfare facilities under the control of public authorities, as well as provisions on the obligation of healthcare professionals to work.

Finally, section 23 of the Finnish Constitution allows, in the event of emergency, provisional exceptions to be made to the fundamental rights and freedoms protected under the Constitution. The precondition for applying this constitutional provision is that exceptions to fundamental rights and freedoms are necessary in the event of an armed attack against Finland or other comparable emergency situations posing a serious threat to the nation. This provision can only be applied if the competences and measures provided by the ordinary legislation are insufficient to govern the emergency. Furthermore, any exceptions made on this basis must be compatible with the international human rights obligations by which Finland is bound.

There is a hierarchy between these three legislative frameworks. The Communicable Diseases Act constitutes the primary legislative means for governing health crises. When the means and competences provided by this Act are insufficient to govern a situation, the Emergency Powers Act is invoked. The Emergency Powers Act provides additional competences to the respective authorities to combat a crisis. Lastly, if the competences and means provided by the Emergency Powers Act are insufficient, section 23 of the Constitution is applied as a last resort.

Besides these legislative means, public authorities can also use non-binding soft law instruments, such as administrative instructions and guidelines, to govern an emergency situation.[9] In fact, many of the containment measures adopted during the Covid-19 pandemic by the health authorities

9 See also Karreinen and others, 'Pandemic preparedness' (n 3).

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were non-binding guidelines and instructions rather than legally binding measures.[10] There were, however, several incidents in which non-binding recommendations were formulated in such a way that gave the impression that they constituted a binding order. This created confusion among the players to whom the recommendations were addressed. Therefore, there were situations where restrictions of fundamental rights were based on non-binding recommendations and not on legislation, despite this being contrary to the requirements arising from the Constitution.[11]

When the Covid-19 pandemic reached Finland, it soon became clear that the measures provided for by the Communicable Diseases Act were insufficient to govern the situation in hand.[12] Therefore, the Finnish Government, in cooperation with the President of the Republic, declared a state of emergency under the Emergency Powers Act on 16 March 2020 and again on 1 March 2021, and the Government subsequently issued decrees on the use of the powers laid down in the Emergency Powers Act. Consequently, a wide scale of protective and restrictive measures was adopted under the Communicable Diseases Act, the Emergency Powers Act and section 23 of the Constitution. These regulatory interventions included, for example, temporary closures of school buildings and other educational institutions, as well as public cultural and recreational venues, a prohibition of public assembly, quarantine orders and additional border controls and travel restrictions. The immediate goal of these measures was to maintain the operational capacity of the healthcare system.[13] The haste with which

10 On the use of soft law to fight the pandemic in Finland, see Emilia Korkea-aho and Martin Scheinin, '"Could You, Would You, Should You?" Regulating Cross-Border Travel Through Covid-19 Soft Law in Finland' (2021) 12 European Journal of Risk Regulation 26–44.

11 See eg case EAOA/3232/2020 of the Deputy Ombudsman, Maija Sakslin, where bans on visits to homes for the elderly were based on soft law guidance by the Ministry of Social Affairs and Health. The Deputy Ombudsman emphasized that restrictions on fundamental rights (here: the right to privacy and family life) must also be based on binding legislation and not on sources of soft law.

12 For a more detailed timeline of the measures of pandemic governance, see Karreinen and others, 'Pandemic preparedness' (n 3).

13 On legislative interventions meant to control the spread of Covid-19, see eg Ittai Bar-Siman-Tov, 'Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures' (2020) 8 Theory and Practice of Legislation 11, 14; Antonios Kouroutakis, 'Abuse of Power and Self-entrenchment as a State Response to the Covid-19 Outbreak: The Role of Parliaments, Courts and the People' in Matthias C Kettemann and Konrad Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments, and People in Times of Covid-19* (Hart Publishing 2022) 33, 34.

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the new legislation and other measures were adopted meant there was little assessment of their impacts.

II.2.1. Communicable Diseases Act

Most of the measures governing the Covid-19 pandemic were adopted under the Communicable Diseases Act. These measures included, for example, transitioning into remote teaching and the physical closure of many public buildings, such as libraries and museums.[14] However, it soon became clear that the scope of this Act was insufficiently extensive to meet the requirements arising from the pandemic. Several temporary amendments were made to the Act to address this shortcoming.[15] For instance, the Act contained provisions on closing educational institutions (section 58) but not restaurants. Therefore, the restrictions on the activities of restaurants and other catering establishments were implemented through temporary amendments to the Communicable Diseases Act (sections 58a and 58i).

While crisis management at national level was in the government's hands, the Communicable Diseases Act provided significant powers to the Regional State Administrative Agencies, the municipalities and the physicians in charge of communicable diseases. Issues such as mandatory health screenings, mandatory quarantine, contact tracing, physical closure of educational institutions and prohibition or restriction of public assembly all primarily pertain to the parallel jurisdiction of the respective municipality and Regional State Administrative Agencies, which led to confusion: it was not always clear which authority should take action in a given situation.

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14 Government Bill 73/2021 for an Act on the amendment of section 58 d of the Infectious Diseases Act and on the temporary amendment of the Infectious Diseases Act. For more on this subject, see Martin Scheinin, 'Finland's success in combating Covid-19: Mastery, Miracle or Mirage?' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the Covid-19 Pandemic* (Routledge 2022) 130, 132.

15 See eg Government Bill 72/2020 for an Act on the temporary amendment of the Infectious Diseases Act. For more on this subject, see Mehrnoosh Farzamfar and Janne Salminen, 'The Supervision of Legality by the Finnish Parliamentary Ombudsman during the Covid-19 Pandemic' (2022) 99 Nordisk Administrativt Tidsskrift 1, 5.

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II.2.2. Emergency Powers Act

According to established constitutional law doctrine, the threshold for applying emergency legislation is extremely high.[16] Ordinary legislation contains rules for handling health crises and other such serious situations, and only exceptionally grave catastrophes can trigger the application of emergency powers. When the threshold for applying emergency legislation is reached as a result of a grave civil or military crisis, the key legislative instrument for governing emergency situations is the Emergency Powers Act.[17]

This Act shifts legislative powers from Parliament to the Government and authorizes the Government to give emergency decrees to combat the crisis at hand. These decrees may concern subjects which, according to the Constitution, are normally stipulated by an act of parliament and not by a governmental decree, such as restrictions on basic rights. Importantly, the Constitutional Law Committee monitors the constitutionality and human rights conformity of both legislative bills and governmental decrees issued under the Emergency Powers Act.[18]

There is a specific procedure for activating the Emergency Powers Act. At first, the government, in cooperation with the Finnish President, declares a state of an emergency. After that, the government issues a decree defining which powers provided by the Emergency Powers Act are to be applied. This decree commissioning emergency powers (Finn. *käyttöönottoasetus*) must be submitted to parliament immediately and within a maximum of one week after the government adopts it (section 6(3) of the Emergency Powers Act). The parliament then decides whether the decree can enter into force and whether it can stay in force for the suggested period (the maximum period is six months). This commissioning decree creates the government's mandate to issue implementing decrees (Finn. *soveltamisasetus*) containing actual substantive provisions. If the parliament upholds the commissioning decree, it will review the subsequent implementing

16 See eg Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – the Case of Sweden and Finland' (2018) 19 German Law Journal 219, 244; Päivi Neuvonen, 'The Covid-19 policymaking under the auspices of parliamentary constitutional review: The case of Finland and its implications' (2020) 6 European Policy Analysis 226, 230.

17 Cornell and Salminen (n 16) 244; Neuvonen (n 16) 227.

18 See eg Neuvonen (n 16); Maija Dahlberg, 'Finland – Ex ante constitutionality review of laws relating to the Covid-19 pandemic' (2021) 4 Public Law 819.

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decrees issued by the Government to use the emergency powers *ex post* (section 10 of the Emergency Powers Act). Importantly, the parliament can repeal the decrees issued under the Emergency Powers Act in full or in part, but it cannot modify their content. From the point of view of the supremacy and status of parliament as the state's highest authority, the government's competence to apply delegated emergency powers under the Emergency Powers Act is challenging.[19]

The application of the Emergency Powers Act did not proceed without problems. Before the Covid-10 pandemic, the Act had never previously been applied, and when it had to be activated, there was some lack of knowledge about the correct procedures for adopting both the decree commissioning emergency powers and the implementing decrees issued under these powers. This stumbling block caused some delays in adopting the measures that the pandemic situation called for.

The provisions of the Emergency Powers Act that were eventually triggered applied to healthcare and social services (sections 86–88), educational institutions (sections 109), derogations from employees' rights regarding annual leave, working hours and resignation (sections 93–94), enabling compulsory work for healthcare professionals (section 95f), and restrictions on the freedom of movement (section 118).[20] For example, the government issued a decree (127/2020) under section 88 of the Emergency Powers Act waiving deadlines for access to non-emergency healthcare under sections 51–53 of the Health Care Act. Furthermore, the Uusimaa region, which is the most densely populated area in Finland, was temporarily isolated from the other parts of the country by a decree (145/2020) under section 118 of the Emergency Powers Act.[21]

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19 See eg Neuvonen (n 16) 228; Scheinin, 'Finland's success' (n 14) 131–132. For the constitutional tensions during the Covid-19 pandemic, see Tony Meacham, 'Covid-19 and constitutional tensions: Conflicts between the state and the governed' in Ben Stanford, Steve Foster and Carlos Espaliu Berdud (eds), *Global Pandemic, Security and Human Rights: Comparative Explorations of Covid-19 and the Law* (Routledge 2021) 15–34; Tom Ginsburg and Mila Versteeg, 'The bound executive: Emergency powers during the pandemic' (2021) 19 International Journal of Constitutional Law 1498.

20 See Farzamfar and Salminen, 'Supervision of Legality' (n 15) 4.

21 This was one of the most constitutionally controversial measures adopted under the Emergency Powers Act. The Constitutional Law Committee emphasized that the right to free movement constitutes part of individual self-determination; for more on this subject, see Reports by the Constitutional Law Committee (PeVM) 8/2020 vp and 9/2020 vp.

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II.2.3. Section 23 of the Constitution

Section 23 of the Constitution is the ultimate legal basis for combating emergencies. This constitutional provision is the last resort, meaning that it can only be applied when competences and means provided in the Emergency Powers Act or in ordinary legislation, such as the Communicable Diseases Act, have proved to be inadequate to address a given situation.

The concept of emergency is defined in section 23 of the Constitution as 'an armed attack against Finland or other situations of emergency posing a serious threat to the nation.' According to this provision, the emphasis is therefore on armed conflicts, but the preparatory works of the Constitution clarify that the concept of emergency is to be understood in accordance with international treaties, specifically the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[22] The Emergency Powers Act defines the concept of emergency in a more detailed manner, referring explicitly to large-scale pandemics as one type of emergency that can constitute a basis for applying this Act.[23]

Besides defining the constitutional limits for protective and restrictive policy interventions during crises, section 23 of the Constitution also establishes a legal basis for legislating temporary exceptions to fundamental rights in two ways. First, it gives the possibility of creating provisional exceptions to the fundamental rights and freedoms by an act of parliament. Second, this constitutional provision also recognizes the use of delegated emergency powers and, consequently, creates the ability to make exceptions to fundamental rights through government decrees.[24]

Section 23 of the Constitution was used as a legal basis, for instance, for an act that would have provided for restrictions on the freedom of move-

22 See Government proposal HE 60/2010 vp p 36.

23 Generally, state of emergency refers to war, while the Swedish constitution does not provide for a constitutional state of emergency in peacetime; for more on this subject, see Julia Dahlqvist and Jane Reichel, 'Swedish Constitutional Response to the Coronavirus Crisis: The Odd One Out?' in Kettemann and Lachmayer (n 13). In addition, some states (such as Germany and Switzerland) did not declare a state of emergency when the Covid-19 pandemic began. The constitutional possibilities were not considered practical or efficient with regard to the pandemic (see more Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis' (*Verfassungsblog*, 28 April 2020) <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> accessed 19 March 2024.

24 See eg Scheinin, 'Finland's success' (n 14) 133.

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ment.[25] New Covid-19 strains started to emerge in Finland in January 2021. Consequently, the government, in co-operation with the Finnish President, again declared a state of emergency under the Emergency Powers Act on 1 March 2021. The new strains were believed to pose a significant risk to the capacity of the hospitals, and therefore the government issued a legislative bill based on the emergency clause in section 23 of the Constitution to restrict the freedom of movement of the population. Section 23 of the Constitution would have provided a direct legal basis for restrictions on derogations from fundamental rights and freedoms, mainly freedom of movement. However, the Constitutional Law Committee of the Finnish Parliament considered this decree to be excessive and, therefore, unconstitutional. This case has briefly been described in section II.1.[26]

In addition, restaurants were closed for two months, with the exception of take-out orders, through a separate Act of Parliament (153/2020) enacted under section 23 of the Constitution, as an exception to the fundamental rights of property and business freedom.[27] As neither the Emergency Powers Act nor the Communicable Diseases Act gives a legal basis for such a measure, a specific law based on section 23 of the Constitution had to be enacted on this.

II.3. Conclusions on the use of legal instruments governing the health crisis

Legal scholars have argued that both the Finnish Emergency Powers Act and the Communicable Diseases Act were not fit for purpose during the health crisis. Particularly, the Communicable Diseases Act needed to be continuously complemented by new powers that were better suited to Covid-19, but often crafted in haste and unprofessionally.[28]

From a legal techniques point of view, scholars have claimed that the use of section 23 of the Constitution would have been the best alternative to enact quickly tailor-made measures to combat various health crises. This is because the scope of the Emergency Powers Act is very limited and

25 Government Bill 39/2021 for an Act on Restrictions upon Freedom of Movement and Interpersonal Contacts.

26 See Dahlberg (n 18).

27 Government Bill 25/2020 for an Act on the temporary amendment of the Act on accommodation and catering.

28 See Scheinin, 'Finland's success' (n 14) 134.

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therefore not very useful, while the Communicable Diseases Act proved to be highly inadequate when combating an airborne pathogen with a relatively high reproduction number, mortality rate and a long lifespan.[29]

Overall, some have claimed that Finland was unprepared and unprofessional in its response to the Covid-19 pandemic,[30] while others have claimed that Finland succeeded rather well in managing the crisis.[31] There are also evaluations which emphasize that both of these claims may be valid to some extent. While there were apparent regulatory and structural problems which challenged the governance of the pandemic in Finland, the key elements which can be linked to a successful pandemic response seemed to be in place. These included, for instance, sufficient state capacity, strong formal political institutions, social policies to support the compliance of citizens, as well as a high level of societal trust.[32]

III. Evaluating the crisis response

III.1. Study and data description

In this light, we shall now consider the empirical data collected from the Finnish health system leaders during the Covid-19 pandemic to shed light on how the regulation described above was actually implemented in the

29 Scheinin, 'Finland's success' (n 14) 141–142; Farzamfar and Salminen, 'Supervision of Legality' (n 15) 5.

30 See Scheinin, 'Finland's success' (n 14); Ossi Heino, Matias Heikkilä and Pauli Rautiainen, 'Caging identified threats – Exploring pitfalls of state preparedness imagination' (2022) 78 International Journal of Disaster Risk Reduction no 103121.

31 See Hanna Tiirinki and others, 'Covid-19 pandemic in Finland – Preliminary analysis on health system response and economic consequences' (2022) 9 Health Policy and Technology (2022) 649 <https://doi.org/10.1016/j.hlpt.2020.08.005> accessed 19 March 2024; Kaisa-Maria Kimmel, 'Right to Life and Right to Health in Priority Setting in the Covid-19 Prevention Strategies in Finland, Norway and Sweden' in Stefan Kirchner (ed), *Governing the Crisis: Law, Human Rights and Covid-19* (LIT Verlag 2021) 16, 30. From the insolvency law point of view, the legislative amendments during the Covid-19 pandemic were mainly successful, see Laura Ervo, 'Insolvency Law and Covid-19: The Finnish Example on Tackling the Pandemic' in Nadia Mansour and Lorenzo M Bujosa Vadell (eds), *Finance, Law, and the Crisis of Covid-19: An Interdisciplinary Perspective* (Springer 2022).

32 Karreinen and others, 'Pandemic preparedness' (n 3).

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Finnish health system.[33] Health system leaders represented municipalities (local level), joint municipal authorities, hospital districts and Regional State Administrative Agencies (regional level), as well as representatives of the Ministry of Social Affairs and Health (MSAH), the Finnish Institute for Health and Welfare, the Finnish Parliament, the Finnish Medicines Agency, the National Emergency Supply Agency, the Finnish Border Guard and the National Supervisory Authority for Welfare and Health (national level). Interviews (n=53) with health system leaders were conducted between March–June 2021 and October 2021–February 2022, with the data collection period covering roughly the events of the first one and a half years of the pandemic.

The interviews were conducted using a flexible interview guide, which was structured around three key domains: preparedness for, governance and leadership of and learning from the pandemic. Two researchers conducted an iterative process to code the data. They initially thoroughly examined all 53 transcripts to distinguish 'big ideas' from the data. They then conducted a second round of analysis to identify emerging topics and themes. They used these findings to develop an initial codebook, which was reviewed and discussed by two researchers. Every proposed code was evaluated at this stage. The initial codebook was used by both researchers to code a sample transcript independently. After this, the researchers shared their insights to address any discrepancies, differences in interpretation, or potential additions or removals from the proposed codebook to ensure consistency. The researchers then prepared and used a final codebook to code the entire data set of 53 interviews in Atlas version 9.1.

Earlier research results published from this data focused especially on resilience in the health system during the Covid-19 pandemic, as well as on the processes and dynamics of power and politics in pandemic governance.[34] The data presented in this chapter is a summary of the reflections of the interviewees on legislative issues and challenges during the pandemic. The summary arises from segments of the data classified under the category 'legislative issues and framework', comprising a total of 63 segments. The summary of the empirical findings is presented, with key quotations included. The analysis was conducted in Finnish, while the

33 The data was gathered as part of the Academy of Finland funded research project, RECPHEALS (Resilience, Crisis Preparedness, and Security of Supply of the Finnish Health System), see more details in Kihlström and others, 'Local cooperation' (n 6).

34 See Kihlström and others, 'Power and politics' (n 7).

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lead author of this research paper translated the quotes from Finnish into English. Every quote is accompanied by information about the participant's organization and their level of governance within the Finnish healthcare system. The participant's identity, consisting of a letter and a number, indicates the level of governance (N for national level participant, R for regional and L for local level participant) and the interview sequence number in the study.

Overall, the empirical findings suggest that legislation, especially the Emergency Powers Act and the Communicable Diseases Act, were not fit for purpose, specifically because they had not been made for a prolonged health crisis affecting all sectors of society. The findings shed light on a variety of challenges that came with the implementation of these acts, as well as on the perspectives of the health system leaders as to why and how these challenges arose.

III.2. Emergency Powers Act and the Communicable Diseases Act: Perspectives of the health system leaders

The empirical data contains differing views of different organizations and levels of the health system on the decision-making process which led to the exercise of the Emergency Powers Act during the Covid-19 pandemic in Finland. The process is said to have been preceded by a series of events which escalated in March 2020. These events contained a rising number of Covid-19 cases in Finland, as well as increased crisis awareness because of the 'images from Italy,' which showed how the operational capacity of the healthcare system had been compromised. The chronological order of these events is described in more detail in another article published from the same data set.[35] The escalation of events in March 2020 was described by some interviewees as somewhat surprising. One interviewee describes February as a month of 'mandate allergy' and an overall reluctance, particularly among political leaders, to prepare for and deal with a potential pandemic:

> *Political leaders wanted nothing to do with this at first. Rather, they said that they would like us to take charge of all communications and knowledge sharing regarding Covid-19. And yet, when we did take on some of this communication, they would tell us not to communicate like that.*

35 See Kihlström and others, 'Local cooperation' (n 6).

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For example, if we published models or scenarios to the wider public, the political side got worried that people would be too scared.
– Interviewee, The Finnish Institute for Health and Welfare (Participant id: N7)

This notion is, however, contested by another interviewee representing the political side of decision-making:

The expert views of the Finnish Institute for Health and Welfare were very ambiguous. I have been present in many meetings, and the Finnish Institute for Health and Welfare has also taken the view that the World Health Organization overreacted, that we are not in an international emergency.
– Interviewee, Ministry of Social Affairs and Health (Participant id: N29)

The invocation of the Emergency Powers Act is described in the interviews by many as a political solution which received very little pushback once suggested. There were, however, discrepancies in the descriptions of the interviewees of the types of justifications provided for the invocation of the Act, with descriptions that included ensuring the availability of a critical health workforce during the pandemic, fears about the economic repercussions of the pandemic, including the potential for export bans in the European Union, and the influence of the Finnish President on the decision to invoke the Act. After the invocation of the Act, the practicalities of implementing the legislation were considered chaotic and messy. The following quotation from one interviewee summarizes this view:

The Emergency Powers Act has been a sort of 'ogre' in the operations of the Ministries for quite some time. The Ministry of Justice has generally been attributed with responsibility for its existence and content. And, in our more traditional areas of security, so have the Ministry of Domestic Affairs, the Ministry of Defence, and even we (MSAH); we did not have any expertise in this. It has been acknowledged that we have this sort of legislation, and we have some mandates, but when the first questions were asked at some point in the second half of February about what we should do if our country applied the Emergency Powers Act… or what the Act even contained…in practice, we had no one in this Ministry, no one besides myself, who would have known anything about the Emergency Powers Act, who would have been able to activate it. It wasn't just us, though. The Prime Minister's office, which formally bears the responsibility for leading and coordinating a situation like this, was not at all aware that they had

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a role like this to play. It was a pretty general note in the parliament's instructions, which had been externalized… it was for a completely different kind of era, legislation for wartime. No one had prepared for an issue like this to be solved in any capacity.
– Interviewee, Ministry of Social Affairs and Health (Participant id: N25)

As the above statement suggests, most of the coordination and decision-making regarding Covid-19 was centralized to one sectoral ministry (the Ministry of Social Affairs and Health, MSAH) during the early months of 2020. This was done despite the MSAH being understaffed and under-resourced, particularly on matters regarding legislation and despite the fact that governance of the pandemic required the expertise of several other ministries. The interview data also suggests that the knowledge base for implementing the Emergency Powers Act was insufficient at other levels of the Finnish administration. For example, some municipalities made decisions on the basis of the Emergency Powers Act in the spring of 2020, before the law had officially been activated. Finally, the evidence base for the need for the Emergency Powers Act is also questioned in the empirical data. For example, one interviewee stated that one of the justifications used for activating the Emergency Powers Act was the need to ensure operational capacity, particularly the availability of a healthy workforce, during the pandemic. However, there is no national-level data on the availability of a healthy workforce in Finland on which such a decision could be based.

As for the Communicable Diseases Act, the interviewees described several challenges in its implementation. One interviewee described the legislation as being incomplete for a prolonged pandemic, and therefore political action was required to enforce more drastic measures:

The Communicable Diseases Act is designed for controlling a situation such as a rubella epidemic in schools. The law even has some provisions for large epidemics, but not for a pandemic faced by the whole nation. It just did not have enough provisions and tools to help control the spread of this disease, leaving the issues on this to be urgently dealt with at the level of the government. We thought that, legally, we did not have the power required to take the necessary action.
– Interviewee, Prime Minister's Office (Participant id: N10).

Others remarked that the legislation was not only unsuitable for a prolonged crisis, but that, during its planning stage, no one had anticipated that such a scenario as the Covid-19 pandemic could take place. Addition-

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ally, the Communicable Diseases Act did not contain provisions on measures at country borders during an epidemic. These shortcomings meant there was a need to amend this act, and the amendments had to be made in a hurry. Interviewees described the sense of rush and lack of time as key challenges throughout the health system: statements on the legislation sometimes had to be provided overnight without much preparation or insight:

> *The government made tough calls. The Emergency Powers Act was activated, the Uusimaa region was closed off, restaurants were closed and so forth. These were tough decisions. The decisions were justified by the Emergency Powers Act. Legislative work has been slow, late and rushed since the deactivation of the Emergency Powers Act. For example, some decisions arrived for comment on Friday, and comments have to be ready by Monday. This was the rule, not the exception.*
> *– Interviewee, hospital district (Participant id: R16)*

The Communicable Diseases Act was described by one interviewee at local level as hard to comprehend 'even for an army of lawyers'. These challenges especially applied to section 58, which dealt with social gatherings, school closures and restrictions to business operations. The language in section 58 was described as ambiguous with concern about school closures, which, according to some interviewees, made it difficult to implement such closures at the local level.

The interview data also points to several challenges regarding parallel responsibilities and uncertainties in mandates. For example, the Communicable Diseases Act emphasizes local governance and decision-making. When the pandemic reached Finland, decisions-making was by and large centralized to the national authorities. Starting in the autumn of 2020, the hybrid strategy adopted in Finland shifted the emphasis in managing the pandemic from the national authorities to local and regional governance. Despite this shift, health system leaders at the local and regional levels refer to being micromanaged from the national level, even though the Communicable Diseases Act granted decision-making powers to the municipalities, joint municipal authorities and Regional State Administrative Agencies. Local and regional levels refer to being publicly chastised by political leaders for not being sufficiently proactive in their decision-making, while trying to make sure that their decisions would have a sound legislative basis. Civil servants at the regional level even said they were being personally pressured through phone calls from key policy-makers:

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> *The Ministry of Social Affairs and Health tried to take power, which the law does not grant it. This happened several times. The minister tried to use such power by making phone calls about school closures and such matters. And the question was whether or not we would do what the minister wanted us to do. If they did not have authority to address the topic at hand, then we made our own decisions. But in terms of restrictions and non-pharmaceutical interventions, there were many unclear issues. For example, last spring, we decided – as did others – that no visits should be allowed in assisted living units. And then, during our summer holidays, we read the Ombudsman's statement that we could not prevent people from inviting others to their homes.*
> *– Interviewee, Joint authority for health and well-being (Participant id: R7)*

Civil servants also mentioned receiving anonymous death threats and other kinds of harassment, which further increased their anxiety in an already stressful situation.

The use of various soft-law measures also invited criticism from several of the civil servants interviewed, especially those at local and regional levels. Guidance from the national level (MSAH), which had no legislative mandate but 'was presented as such,' was described as 'not satisfying the criteria of good governance' and even being in conflict with existing legislation. Additionally, regional-level health system leaders expressed their confusion about the decision to keep restaurant closures under the government's jurisdiction when, according to the legislative framework, the correct entities for this would have been Regional State Administrative Agencies. Overall, these issues led to some describing the pandemic as being 'politicized,' and decision-making during the pandemic as being 'an expression of political will.'

III.3. Innovative management during Covid-19

The empirical data reveals some innovative solutions on how the pandemic was governed by the Finnish authorities. Finnish legal culture has strong roots in the principle of legalism and the rule of law and therefore it is quite surprising that national authorities (MSAH) were ready to ignore

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provisions of the law and steer the authorities at the local level through non-binding guidance.[36]

Other elements showing innovation by the Finnish authorities is that, even though the ministries had no lawyers or legal expertise on the procedural steps and legal details regarding the implementation of the Emergency Powers Act, the implementation of the Act still succeeded – even though some steps were unlawful at both the national and local levels (e.g. some municipalities made decisions on the basis of the Emergency Powers Act in the spring of 2020 before the law had officially been activated). In this sense, a pragmatic approach to solving legal problems seems to be evident in the Covid-19 pandemic in Finland.[37]

The empirical data also points to factors which enhanced adaptation and resilience during Covid-19 in Finland. Local and regional players described cooperation as crucial for governing the pandemic and, during the first year of the pandemic, several new structures of collaboration were set up to identify solutions at local level. Such structures were set up organically at local level, as well as through the recommendations of the MSAH, which, during the autumn of 2020, directed the regions to set up regional Covid-19 coordination groups. Given that municipalities and regions bore the primary responsibility for health and social services during Covid-19 in Finland, these novel networks of cooperation brought many benefits, such as bringing together people who had not actively cooperated before the pandemic. This enabled resources to be shared and tensions to be resolved and, while these networks had no formal decision-making powers, they were largely considered valuable.[38]

36 More on this topic (in Finnish), see Moona Huhtakangas and others, '"Peruskehikko on olemassa, mutta sitä ei seurattu" – asiantuntijanäkemykset kansanterveysjärjestelmän toiminnasta ja ketterästä hallinnasta Covid-19-pandemiassa vuosina 2020–2021' (2023) 42 Hallinnon tutkimus 149–168.

37 Pragmatism is one basic feature of the Nordic legal culture, which means that legal decision-making is not bound so closely to the written statutory text but rather is free to seek more general argumentative bases for justification purposes; see eg Jaakko Husa, 'Panorama of World's Legal Systems – Focusing on Finland' in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris 2012) 5, 14.

38 Kihlström and others, 'Local cooperation' (n 6).

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III.4. Summary of the empirical findings

The empirical findings present a snapshot of the perspectives of the health system leaders on issues regarding legislation during the Covid-19 pandemic in Finland. They reveal a lack of capacity and expertise to use certain legislative instruments, such as the Emergency Powers Act. This may arise from reduced human resources in the government administration, as well as the silo structures of the Finnish government. The lack of capacity and expertise can also partly explain why the use of soft law instruments, such as recommendations, were both communicated and interpreted as binding rather than non-binding recommendations.

Furthermore, the results reveal that the legislation (which was) in place for the governance of the pandemic was not fit for purpose with regard to a widespread epidemic with a long duration. This was reflected by both the lack of regulatory instruments to implement necessary non-pharmaceutical interventions and the ambiguous roles and responsibilities of the players at various levels of the system. While the unclear roles enabled the expansion of the mandates of certain players, it also became possible to avoid responsibility in situations where roles were not clearly stated.

Finally, the results highlight how politics was involved in the governing of the pandemic in a manner which undermined the separation of powers between the legislators and those with decision-making powers at the local and regional levels. The full extent to which civil servants were pressured by politicians during the Covid-19 pandemic cannot be fully captured by this study, but it can be stated that this phenomenon was real and, indeed, was reported by several interviewees.

IV. Conclusions

The Covid-19 pandemic revealed that, in Finland, the legal bases provided by the three core legislative frameworks intended to govern emergencies of a pandemic type were not very innovative in the sense that they did not take into account the variety, complexity and diversity of potential threats and crises arising from such situations, as well as their magnitude.[39] It seems that scenarios such as an armed conflict or even full-scale war, as well as nuclear disasters, were the core considerations when the emer-

39 Heino and others (n 30).

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gency legislation was being drafted. However, in modern societies, with high levels of global connectivity and reliance on computerization, threats can take on a number of different forms. Finnish preparedness legislation should, therefore, be reformed to take better account of unexpected threats.

Although the regulatory framework for governing the pandemic was deficient and the roles and powers of the authorities were somewhat unclear, it can be argued that, all in all, the Finnish public administration succeeded relatively well in maintaining the capacity of the healthcare system. The national and regional authorities were able to develop innovative policies and modes of operation enabling the spread of the virus to be controlled and the capacity of the healthcare system to be maintained.[40]

At times, this innovativeness came at the cost of weakening the rule of law and the protection of fundamental rights. There are examples of various authorities overstepping their powers, as well as of the excessive use of restrictive measures. For instance, at times, the legal nature of the instructions and guidelines given by the authorities was not clear, as soft law instruments were formulated as if they were legally binding. There were incidents where fundamental rights were restricted on grounds of such non-binding instruments – which is strictly prohibited by the Finnish Constitution. In addition, there were cases where political guidance sought to override powers based on the law through personal calls to civil servants or through the media – a practice that is highly problematic in the light of the separation of powers.

On the other hand, at all levels of the Finnish administration, authorities were quickly able to develop new forms of cooperation. For example, regional coordination groups were an administrative solution proposed by the Ministry of Social Affairs and Health, and they brought together local and regional players starting in the autumn of 2020. This is an example of an administrative innovation, which several interviewees also mentioned in the empirical data as an administrative structure which it would be beneficial to continue with after the pandemic. Municipalities were able to move personnel flexibly from one task to another, thereby responding to needs as they arose. For instance, as libraries and museums were closed, employees from these sectors were able to play a role in testing and tracing, as well as delivering meals to older people who, at the time, were recommended to

40 Kihlström and others, ‘Local cooperation’ (n 6); Karreinen and others, ‘Pandemic preparedness’ (n 3).

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stay at home. This was possible because every municipality constituted one employer organization within which the transfer of personnel was flexible. At the same time, private service providers, such as service housing units, were struggling because of the lack of staff caused by quarantines and sick leave of personnel. As a whole, the Finnish public administration proved to be rather flexible and agile; in order to serve the management of the crisis at hand, the organization of the administration could be modified in a matter of hours through the transfer of personnel and administrative structures. For instance, the municipalities and hospital districts also provided additional central government funds for governance of the pandemic, which made the flexibility of operations even greater.[41]

In conclusion, the key problems appeared to be limits of competence and scarcity of (human) resources for managing the pandemic. The crisis was managed in rather small units by a limited number of experts. The question can be raised of the extent to which, for example, overstepping of powers and other problems arose from the fact that the law was unclear or deficient or from the fact that the relevant players were unfamiliar with the legal rules and, consequently, unable to apply them correctly. The resources and the know-how in Finland's public administration need to be strengthened so as to better manage future crises. The reform of social welfare and healthcare in Finland would be a step in the right direction.

41 Ruth Waitzberg and others, 'Balancing financial incentives during Covid-19: a comparison of provider payment adjustments across 20 countries' (2022) 126 Health Policy 398 <https://doi.org/10.1016/j.healthpol.2021.09.015> accessed 19 March 2024.

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Index

Accountability: 41, 61-62, 70, 78
Act 4622/2019: 65, 67, 76-78
Action in emergency situations: 51
Administration: 144-147
Administration – Administrative reform: 66-67, 69-71, 73-74, 78-80, 85
Administration – Modern Public Administration: 78
Administration – Political administration: 84
Afghanistan: 113-115, 130
African Union: 131
Agencification: 83-84
AI in healthcare: 184-190
AI in healthcare – Application cases: 184-186
AI in healthcare – Augmented intelligence: 190
AI in healthcare – Dehumanization: 186
AI in healthcare – Implementation challenges: 189
AI in healthcare – Patient autonomy: 187-189
Artificial Intelligence (AI): 182
Artificial Intelligence (AI) – ChatGPT: 183
Artificial Intelligence Act: 191-199
Artificial Intelligence Act – AI system: 192
Artificial Intelligence Act – High-risk AI system: 193-196
Artificial Intelligence Act – Regulatory sandboxes: 196, 199
Artificial Intelligence Act – Transparency: 194-195
Australia: 93, 100-106
Authoritarian liberalism: 66-67, 81-82
Authoritarian statism: 66
Authorities: 115, 118, 142, 144, 145, 149, 150, 151, 158
Balkan route: 113, 114, 131
Basel
Basel – Basel Committee of Banking Supervision: 31
Basel – Basel II: 43
Basel – Basel III: 31-32, 36
Belarus: 92, 96, 111, 115-117, 135
Board of Supervisors: 50, 54-55
Borders: 102, 103, 114, 116, 122, 127, 129, 133-135, 145, 160
Borders – Border controls: 124, 134, 145
Breach of EU law: 51
Camp: 98, 102, 122, 131
Central Mediterranean route: 113
Clientelism: 74, 68
Colonial: 89, 94
Common supervisory culture: 47-48
Conversion: 41
Cooperation: 105, 122, 131-133, 135, 138, 144, 147, 162
Covid-19: 26-27, 32-35
Creative legal thinking: 90
Criminal: 94, 119, 150, 153, 157
Currency: 27-30
Database: 148, 150
Deportation: 150
Deregulation: 72, 79
Detention: 103, 108
Displacement: 41
Drift: 41
Dublin: 121, 124, 127, 129, 142, 145, 146
Eastern Mediterranean route: 113, 114, 131
Ebola outbreak of 2014: 167, 173-174, 176, 178
Economic and Financial Affairs Council: 43
Enforcement: 49-51
Eritrea: 113, 126, 153
European / Greek debt crisis: 44-46, 57, 65-68
European agencies: 54
European agencies – European Asylum Support Office (EASO): 115, 121, 135
European Banking Authority: 47, 49
European Banking Union: 43
European Central Bank: 42, 44, 47-50, 52-55, 58-59, 61-62, 64
European Commission: 121-123, 126, 129
European Council: 122, 127, 129, 132,
European Financial Stability Facility: 55-58, 63
European Insurance and Occupational Pensions Authority: 47, 54
European Legislation
European Legislation – Delegated acts: 49
European Legislation – Implementing acts: 49
European Securities Markets Authority: 47, 54, 60
European Stability Mechanism: 55, 57
European Supervisory Authorities: 43
European System of Central Banks: 47
European Systemic Risk Board: 44, 49

https://doi.org/10.5771/9783748944874, am 13.09.2024, 06:17:32
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Europeanization: 52
Eurozone crisis: 68-69
EU-Turkey statement: 104, 132, 133
Executive (Governance) Centre: 70
Executive State: 65-67, 72-73, 76, 80, 82-85
Expert regulation: 45
Externalization: 89, 91, 94-96, 104, 105
Financial crisis: 27, 31, 39-64
Financial crisis – Financial market crisis: 39
Financial market: 28-29, 39-64
Financial safety net: 28
Financial safety net – Global financial safety net: 28
Financial Stability Board: 30
Finnish healthcare system: 201-222
Finnish healthcare system – Communicable Diseases Act: 203-207, 210-212, 214, 216-217
Finnish healthcare system – Emergency Powers Act: 203-206, 208-212, 214-217, 219-220
Finnish healthcare system – Finnish Constitution: 204-206, 208-211, 221
Finnish healthcare system – Lack of capacity and expertise: 220
Finnish healthcare system – Lack of regulatory instruments: 220
Finnish healthcare system – Legal framework: 203-212
Finnish healthcare system – New structures of collaboration: 219
Finnish healthcare system – Old structure: 202
Finnish healthcare system – Soft law instruments: 220
Frontex: 121, 133, 134
G 8: 30
G 20: 30
Generally Accepted Accounting Practices: 29
Geneva Convention: 116, 124, 145
German Federal Constitutional Court: 58-60, 64
Germany: 115, 117, 122, 127, 130, 134, 141, 142, 146, 147, 149, 159, 162
Global North: 89-92, 94-96, 104, 105, 107, 108
Global South: 94
Globalization: 21-22, 82
Governance: 21-24
Governance – Global governance: 21-22, 25
Governance – Governance innovation: 39
Governance – Polycentric governance: 23
Governance – (Public) Governance: 118, 126, 141, 142, 144-148, 158-163
Governmental Council: 77
Governmental Council – Governmental Council on Economic Policy: 77
Governmental Council – Governmental Council on National Security: 77
Greece: 114, 121, 126-128, 130, 145
Greece – Greek crisis legislation: 77
Historical Institutionalism: 40, 63
Hotspots: 121-123, 138
Housing: 104, 137, 148, 154, 157
Human rights: 89-93, 96, 104, 105, 108, 115, 116, 138, 145, 146, 158
Humanitarian: 89, 107, 116, 117, 119, 120, 133, 136,
Implementation: 89, 93, 119, 138,
Incentive: 157
Innovation: 181
Innovation – innovative: 202
Innovation – Innovativeness: 41
Innovative Public Governance: 39
Integration: 35, 37, 43, 119, 144, 147, 148, 153, 156, 157, 162,
Intergovernmental: 133, 162
International Bank for Reconstruction and Development: 29
International community: 25
International Covenant on Economic, Social and Cultural Rights (ICESCR): 178
International Covenant on Economic, Social and Cultural Rights (ICESCR) – Human right to physical and mental health: 178-179
International law: 89-91, 93, 94, 105, 107, 108
International Monetary Fund: 29, 56
International relations: 24
Interviews with Finnish health system leaders: 212-220
Interviews with Finnish health system leaders – Data description: 212-214
Interviews with Finnish health system leaders – Study description: 212-214
Iraq: 113-116, 126, 153
Italy: 113, 114, 121, 126-128, 131, 134, 145
Joint Supervisory Teams: 52
Labour market: 68-69, 71-73
Laissez-faire liberalism: 82
Lamfalussy process: 53-54
Layering: 41, 63
Legitimacy: 53, 59, 61-62, 64
Libya: 113, 121, 131, 132
Macroeconomic policies: 29
Maladministration: 74
Management: 133, 135, 144, 148, 150, 158
Maximum harmonization: 47
Memorandum(s) of Understanding: 65, 68-69
Meroni-doctrine: 60
Middle East: 111, 113, 123, 137

https://doi.org/10.5771/9783748944874, am 13.09.2024, 06:17:32
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Migration
Migration – Economic migrants: 96, 123
Migration – Migration flows: 105, 116, 117, 120, 121, 130, 135
Migration – Pull factor: 98, 119, 120, 127, 129, 157
Migration – Refugee protection: 89-91, 93, 94
Migration – Temporary protection: 91, 105, 124, 136, 137, 159-161, 163
Mobility: 90, 94, 95, 132
Modern Public Administration: 78
Modern State: 74, 78
Monetary regime: 27-30
Myth of difference: 94-96
New International Financial Architecture: 30
New Public Management: 66, 82-83
North Africa: 111, 113, 122, 123, 137
OECD Frascati Manual: 12
Offshore: 93, 94, 97, 100-103, 105, 106
Organization for Economic Cooperation and Development (OECD): 69-70
Outright Monetary Transactions: 58
Pandemic: 27, 32-35
Permacrisis: 85
Poland: 111, 116-118, 129, 130, 135, 138
Polish-Belarusian border: 92, 115-117
Political administration: 84
Political crisis: 111, 119
Presidency of the Government: 75-76
Presidency of the Government – General Secretariat for Legal and Parliamentary Affairs: 76
Presidency of the Government – General Secretariat for the Coordination of Internal Policies: 76
Presidency of the Government – General Secretariat for the Coordination of Economic and Developmental Policies: 76
Presidency of the Government – General Secretariat of Communication and Information: 76
Presidency of the Government – General Secretariat of the Prime Minister: 76
(Public) Governance: 118, 126, 141, 142, 144-148, 158-163
Public policies: 22, 33, 70, 76, 84
Public policies – International public policy: 27-35
Public Sector Purchase Programme: 58
Pull factor: 98, 119, 120, 127, 129, 157
Rationalization: 78
Reception: 104, 137, 143, 144, 149, 150, 155
Recession: 72
Refoulement: 99, 102, 124
Refugee protection: 89-91, 93, 94
Registration: 135, 148-150, 158, 159, 161
Regulatory governance: 74
Regulatory law: 45-46, 62
Relocation: 94, 105, 121, 123-130
Reorganization: 78
Resettlement: 93, 100, 107, 125-127, 131
Russia: 91, 96, 107, 111, 117, 136, 159
Rwanda: 91, 107
Schmitt's authoritarian / theoretical model: 80-82
Service Secretary: 77
Settlement of disagreements: 51
'Significant' credit institutions: 49, 52, 54-55
Single Rule Book: 46, 62
Social crisis: 111, 112
Soft law: 47, 50, 170
Solvency II Regulation: 54
Sound Economy: 82-83
Sovereign debt crisis: 65-68
Sovereignty: 24, 61-62
Special Purpose Vehicle: 56
SRB Regulation: 55-56
SSM Regulation: 48-50, 52-55
Steering state: 70
Stress tests / stress testing: 49
Strong State: 80-83
Supervisory Review and Evaluation Process: 49
Sweden: 121, 134
Syria: 93, 105, 113-116, 126, 130, 153, 159, 163
Technical Barriers to Trade Agreement (TBT Agreement): 34
Technical standard: 49-50, 60
Terror: 100, 102, 119
Transparency: 74, 78, 31
Ukraine: 96, 107, 108, 111, 117, 118, 123, 129, 136-138, 159, 160, 163
UN Security Council: 172-174
UN Security Council – Practice during Covid-19-crisis: 175-176
UN Security Council – Res. 2532 (2020): 175
UN Security Council – Res. 2565 (2021): 175-176
Uncertainty: 123, 143
United Kingdom: 91, 101, 106, 121
United States: 90, 93, 97-100
Weberian approach: 84
Welfare State: 83
Westphalian model of international relations/cooperation: 22-23
Westphalian paradigm: 22-24, 27-28, 37
White Paper on 'Growth, Competitiveness, and Employment': 68
World Bank: 29

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World Health Organization (WHO): 32-33, 168-179
World Health Organization (WHO) – Executive Council: 168-169
World Health Organization (WHO) – Practice during the Covid-19-crisis: 174-175
World Health Organization (WHO) – regional offices: 169
World Health Organization (WHO) – Review Committee on the Functioning of the IHR (2005) during the Covid-19 response
World Health Organization (WHO) – Secretariat: 168
World Health Organization (WHO) – Treaty-making powers: 170-171
World Health Organization (WHO) – World Health Assembly (WHA): 168-171
World Trade Organization: 29, 32, 34

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