RESEARCH PROPOSAL

Asylum, Law and Crisis

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Table of Content

I. Introduction and Problem ........ 3
II. Legal Frame .................. 4
III. Goals and Methods .......... 12
IV. State of Research .......... 12
V. Research Questions and Hypotheses ... 13
VI. Provisional Structure ... 13
VII. Expected Time Frame ... 14
VIII. Selection of Literature ... 15
I. Introduction and Problem

Crisis is a broad and fluid term with varying definitions and facets depending on the subject and frame of usage. According to the encyclopaedia of crisis management a crisis ‘is associated with urgent, high-stakes challenges in which the outcomes can vary widely (and are very negative at one end of the spectrum) and will depend on the actions taken by those involved.’ In this general view, a crisis is determined by a period of heightened strain, a divergence from the status quo, creating uncertainty for the future of its stakeholders, who are therefore forced to act. The topic has been subject to broad discussions in the areas of social and political sciences as well as economics long since. A crisis requiring the legal actions of states and governments, however, must be subject to a legal discourse as well.

This legal discourse, which has been somewhat neglected in Europe during the last decades of stability and prosperity, resurrected due to the pressure of recent crises. For instance, the United States used the threat of terrorism as a reason to reduce data protection rights and to send military units into several countries. France, also in response to several terror attacks, declared an emergency state and eased restrictions on house searches. In Turkey, President Erdoğan, after an attempted coup d’état, declared an emergency state allowing him to govern by decree and to derogate from fundamental rights, such as press freedom and the right to liberty, without a possible review by the constitutional court. Also the European Union (EU) took on several obligations in the aftermath of the financial crisis posing additional burden on its Member States (MS). This ongoing list of incidents indicates that, in spite of each crisis’ uniqueness, they might have certain legal symptoms and dynamics in common.

In 2015, Europe experienced a strong inflow of refugees caused by the ongoing war in Syria and the unstable situations of Afghanistan and Iraq. During this time Austria became the bottleneck on their path from Greece or Italy to the West with a peak of 20,000 daily arrivals in September 2015, which led to rather chaotic scenes at train stations and asylum reception centres. Eventually, a total of 89,000 persons applied for asylum in Austria. This situation and its management will serve as a guiding example for the crisis-analysis in the proposed paper. Using the aforementioned definition by the encyclopaedia of crisis management, it very well can be argued that Europe and Austria were facing a “refugee crisis” in September 2015 regarding the upheaval it has caused. This does not confirm, however, that the wording of the accorded legal provisions, such as a “threat to public policy and internal security”, were reached and whether the measures taken stayed within their limitations or which long- and short-term consequences they will have on the respective legal order. The subsequent paragraphs will outline the main questions for the analysis of this problem.

First, there is a problem in the rhetoric of crisis: Talking about crises can serve politicians or other actors to spread fear and hysteria in order to convince the public of a certain cause. In this regard, a crisis might sometimes simply be a social construction to legitimize unpopular measures according to cultural requirements. However, it can also work the other way around. Hysteria in the public can push governments to take a certain path even against their rational conviction. Migration in general and asylum particularly, are very demonstrative examples for both. Obviously the latter dynamic has severe effects on the legal order as well. This political influence will be assumed in the proposed study and will not be the subject of separate analysis.

Secondly, it became a relevant legal question, not only if refugees can per se pose a threat to national security and public order, but also when a risk becomes an imminent threat and, thus, prevails over the regular system and its balance of interests, and, most importantly, who is the competent authority to decide this question. The Austrian government’s controversial justification of its emergency regulation illustrated this issue very well, when it referred to

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1 K. Bradley Penuel, Matt Statler and Ryan Hagen, Encyclopedia of Crisis Management (SAGE 2013).
2 See eg Wolfgang Gratz, Das Management der Flüchtlingskrise: Never let a good crisis go to waste (NWV 2016); Ansgar Thießen (ed), Handbuch Krisenmanagement (2nd edn, SpringerVS 2014).
3 See also Lamiss Khakzadeh-Leiler, ‘Recht und Krise’ in Manuel Aigner et al (eds), Krise und Recht (forthcoming in Jan Sramek 2017) 2.
8 See Khakzadeh-Leiler 10.
an overload of the social system, the labour market, the administrative jurisdiction and the budget in general.\textsuperscript{9} Yet, the question of what constitutes a crisis and who is eligible to determine a “state of emergency” is not new, but has been a question for scholars long since.\textsuperscript{10} Depending on the type of crisis or the severity of its cause, the word can have different meanings and legal implications, which are relevant for the scope of measures falling within its purpose, as the provisions named in Chapter II will indicate. Likewise it is important to know when the state of crisis has ended to observe the temporary nature of exemptive provisions. By definition the crisis must either end by returning to the original or progress into a new state of normal.\textsuperscript{11} Hence, the differentiation and comparison of respective legal provisions is necessary to solve the preliminary question of when and how crisis mechanisms may be triggered or at least to create guidelines for this determination and find a common threshold.

Finally, crises might pose a problem to the legal order. Under the pressure of a state of crisis, legislative and administrative acts usually neglect the regular precautionary procedures and rationales with their thorough considerations, which might foster shortcomings and reduce their legitimation.\textsuperscript{12} This might include a shift of power from legislative to executive organs and, thus, reduce, blur or shift responsibility for decisions.\textsuperscript{13} Hence, the legal circumstances for a crisis situation should be clearly defined in advance such as the applicable competences and limitations to crisis measures.\textsuperscript{14} If not, or when the respective rules are not applied narrowly enough, it might have detrimental effects on existing procedural and substantive standards or lead to ill-conceived changes in the legal system. Especially for the EU, which is often faced with allegations of undermining the democratic principles of MS, these effects might cause severe troubles.\textsuperscript{15} Therefore, legal effects as well as limitations and possible control mechanisms need to be reviewed in order to capture the crisis’ consequences.\textsuperscript{16}

The proposed study will attend to the last two issues – the determination of a crisis of mass immigration in legal terms and its impact, limitations and overall consequences – on the basis of the refugee crisis in full awareness of its overlapping and sometimes contradicting discussion in other disciplines. Therefore, the study will concentrate on legal issues and only refer to political and social symptoms, where indicated by a factual nexus. The term refugee crisis, in the context of this study, is thus to be understood as a crisis of Austrian and European refugee law. Occasionally, reference to other crises will be made, where common determinants or rationales are observed.\textsuperscript{17} Furthermore, the general results of crisis measures might indeed be comparable beyond their respective purpose as they follow similar mechanisms.\textsuperscript{18}

In order to outline the aforementioned legal issues the proposed study will in its first chapter analyse applicable exemptive provisions in an attempt to determine a crisis threshold for situations of mass immigration. In its second chapter it will review the impact of these provisions on state obligations, competences and individual rights as well as possible limitations thereof. The third chapter will offer a broader discussion of critical observations, including the legal analysis of the refugee situation in 2015 and general implications of the discussed crisis mechanisms. The proposed study argues that the application of crisis mechanisms might have secondary effects detrimental to the legal order: On the one hand, issues seeking a long-term solution might be dealt with in a short-term manner through emergency regulations as a “quick fix”. On the other hand, amendments of regular legal provisions adopted under a situation of crisis might jeopardize existing standards by becoming a permanent possibility and, thus, creating a downwards spiral. Furthermore, possible impacts on the rule of law, democracy, the balance of powers and responsibility will be pointed out.

The subsequent chapter of this proposal will serve to set out the legal frame regarding relevant provisions and innovations of Austrian and European law as a point of origin for later analysis. Problems will be addressed where deemed appropriate, but will remain to be assessed in greater detail in the course of the proposed study. Especially, the named third chapter can only be introduced here as it will mainly contain observations on the basis of the analysis in the first and second chapter of the study.

\textsuperscript{10} See eg Carl Schmitt, \textit{Politische Theologie} (1922).
\textsuperscript{11} Khazadzeh-Leiler 13.
\textsuperscript{12} Wolfgang Hoffmann-Riem, Innovation und Recht – Recht und Innovation: Recht im Ensemble seiner Kontexte (Mohr Siebeck, 2016) 182.
\textsuperscript{13} See eg in reference to the Euro crisis Hoffmann-Riem 174, 176, 184.
\textsuperscript{14} See Khazadzeh-Leiler 8.
\textsuperscript{15} See eg Hoffmann-Riem 176.
\textsuperscript{16} See Hoffmann-Riem on “crisis intelligence” 194.
\textsuperscript{17} See eg Hoffmann-Riem 172.
II. Legal Frame

1. Exemptive Provisions

Law as a means for crisis management can have various forms. It might anticipate general provisions for emergency situations or specific exemptive provisions to prevent a crucial situation from emerging to an actual crisis. They might also be of interventional character, for example conveying power to one organ (usually the executive) to take measures in an already acute situation of crisis. Such provisions generally serve the purpose of reducing the complexity of norms and decision mechanisms and thereby allowing a faster course of action. Moreover, legislators might react to a situation of crisis in hindsight by creating new provisions. This section attempts to give an overview of national and European Union provisions, either generally relevant in situations of crisis or concerning exemptions of refugee law. They illustrate their common or at least comparable objective, which is often to wield a threat to national security and public order. Similar provisions and measures will need to be considered in the course of the proposed study. Conceivably, these will be provisions and measures from the area of disaster management and general hazard defence, possibly provisions concerning threats originating from individuals in the national and European context and many more.20

On the level of EU law, Art 4 para 2 TEU ensures MS’ competences touching upon their sovereignty, such as ‘territorial integrity [...]’, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.21 Although this provision remains disputed, just as the nature of competences conveyed to the EU in the Area of Common Foreign and Security Policy, the prevailing doctrine agrees that the provision’s last sentence must rather be seen as a tool for interpretation than an exemptive provision to directly rely on. Furthermore, it needs to be assessed in connection with respective provisions in Title V TEU, where Arts 28 para 4 and 30 para 2 TEU, for example, also foresee rapid procedures in ‘cases of imperative need’ or ‘requiring a rapid decision’. Also Arts 69 and 72 TFEU in its Title V concerning the Area of Freedom, Security and Justice are relevant in this regard ensuring the responsibility of MS regarding the maintenance of law and order and the safeguarding of internal security. In this connection Art 347 TFEU might be taken into account, which obliges MS to consult each other in order to ensure the functioning of the internal market ‘in the event of serious internal disturbances affecting the maintenance of law and order.’22

Furthermore, Title V of the TFEU in its Chapter 2 holds specific provisions for policies on border checks, asylum and immigration in accordance with the goal to create a ‘common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.’23 Within this Chapter, Art 78 para 1 TFEU foresees a common asylum policy in accordance with the Geneva Convention. Even for situations of massive inflow, Art 78 para 2 lit c TFEU prescribes the creation of a common system and in its para 3 conveys the power to adopt provisional measures for the benefit of MS ‘confronted by an emergency situation characterized by a sudden inflow of nationals of third countries’24 to the Council.

Moreover, many provisions within European refugee law provide for derogation in the case of crisis or emergency with varying descriptions, often using terms like “threat” or “risk” to national security, public order, internal security etc. Similarly, the Schengen Borders Code in its Chapter II lays down rules for the temporary reintroduction of border

19 Khakzadeh-Leiler 4, 9.
20 For general examples of crisis regulations in Austria see Khakzadeh-Leiler 9.
22 See eg Karl Stöger and Haider in Heinz Mayer and Karl Stöger (eds), EU/V/AEU: Art 4 EUV (rdb.at 2012) MN 44.
24 Art 347 TFEU.
25 Art 67 para 2 TFEU.
controls at internal borders, when there is a ‘serious threat to public policy or internal security in a Member State.’ However, these provisions often concern individuals who constitute such a threat, for instance in the exceptions of the Reception Standards Directive and the Asylum Procedures Directive. Certainly, human rights instruments such as the Charter of Fundamental Rights (CFR) and the European Convention of Human Rights (ECHR) recognise derogations due to threats to national security and public order in various provisions as well. Also Art 33 para 2 of the Geneva Convention determines an exception of the principle of non-refoulement for individuals who constitute a threat to the security of a country.

It is to be questioned, whether some of these provisions may serve to develop guiding principles for situations of mass immigration, since the dangers originating from individuals might be very different from those originating from a mass. The proposed study will not only discuss this question, but also whether a mass influx of refugees can arise to the level of a threat to national security and public order and whether this was the case in 2015. Especially so, as specific procedures for situations of mass immigrations exist within Union Law and have been drafted for exactly the circumstances, which Europe encountered in 2015. These provisions foresee, for instance, a faster procedure and a temporary residence permit but have not been applied. However, despite these many possibilities to derogate from standards and norms, absolute limits might exist. For instance, Arts 2 and 3 ECHR as non-derogable rights according to Art 15 para 2 ECHR can set such absolute limitations. Furthermore, most provisions require a derogation to be necessary and proportional. Hence, the interests at stake must be considered and there must not be any lighter means to cope with the particular threat. Under the precondition of necessity, it might be possible to question, whether a State that contributed to the escalation of a risk, by not applying existing law, can rely on the reservation at all. Also, in the light of existing Union law and the fact that MS have conveyed certain competences in the Area of Freedom, Security and Justice to the EU, it is debatable whether MS can act on a national level, when the EU’s scope of action has not been exhausted yet. It has been argued that national solutions can be justified, in cases where the EU’s action would come too late, but these measures must be of temporary nature until supranational solutions are found. Still, other MS that are affected by the decision must be considered under Union law and its principles of solidarity and shared responsibility, loyalty, mutual trust and sincere cooperation under Art 4 para 3 TEU, especially solidarity in policies on border checks, asylum and immigration as governed by Arts 77 to 80 TFEU.

Also the Austrian constitution provides several general provisions for a state of emergency. Art 18 para 3 B-VG conveys to the president the power to issue emergency decrees in times of restraint of the ordinary legislative procedure in parliament, if immediate measures are necessary to prevent an evident, irreversible damage from the general public. These measures, however, must be supported by the consent of government and must be lastly acting under the reservation at all. Also, in the light of existing Union law and the fact that MS have conveyed certain competences in the Area of Freedom, Security and Justice to the EU, it is debatable whether MS can act on a national level, when the EU’s scope of action has not been exhausted yet.


30 See eg art 8 para 3 lit j and recital 20 APD.


32 Recommendations for mass influx are contained in the UN General Assembly Resolution 58/169 (22 December 2003) UN Doc A/RES/58/169; see also UNHCR, ExCom Conclusion No 22 (XXXII) ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981).


34 See eg art 8 para 1 TPD; see also Nika Bačić Selanec; ‘A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation’ (2015) 11 CYELP 94.

35 See eg art 15 para 1 ECHR.

36 Art 5 TEU; art 77–80 TFEU.

37 Hailbronner/Thym 763.


2. New Measures and Proposals in Reaction to the Refugee Influx of 2015

The refugee influx of 2015 triggered several new proposals by the European Commission within the political programme of a “European Agenda on Migration”. The implementation package of this Agenda included several legal proposals and operational measures. These can be categorized according to their three purposes: the management of the crisis internally, securing the external border and cooperation on the international level.

Internally, the instrument of relocation was introduced to assist Italy and Greece (and subsequently also Hungary) in their significant asylum pressure by distributing applicants in clear need of international protection to other MS. This included the establishment of “Hotspots” in Greece and Italy, operated by Migration Management Support Teams (MMST) and the proposal of the extension of the European Asylum Support Office (EASO) to a genuine European Union Agency for Asylum (EAA). Similarly, a resettlement programme was introduced to allow refugees qualifying for protection and waiting at the borders a legal and safe way to asylum in the EU. So far these programmes have not been very successful: Of the designated 160,000 refugees only 8,162 were relocated from Greece and Italy by December 2016. Later on a proposal for the amendment of the Dublin-regulation introducing a permanent crisis relocation mechanism with fixed quotas for MS was issued. However, the dispute amongst MS retrospectively approved in parliament. Art 79 para 5 B-VG limits the autonomous action of the Austrian military force to cases, where the respective authority appropriate to command the military action is unable to do so and a delay would cause irreversible damage to the general public. It also refers to the military force’s general purposes, amongst them the prevention of damage to national security and public order. Austrian refugee law is largely based on Union law and, thus, foresees similar provisions as previously discussed. Many exceptions are provided for individuals constituting a threat to national security, yet mostly in the sense of criminal activity. Furthermore, national security is often mentioned in bilateral agreements regarding police and military cooperation in the context of data exchange. etc.

40 Art 18 para 3 Austrian Constitution BGBl I 1930/1 as amended by BGBl I 2016/106 (Bundesverfassungsgesetz, hereinafter: B-VG). Due to the federal structure of Austria, similar provisions exist conveying power to state governments (art 97 para 3 B-VG) and state governors (art 102 para 5 B-VG). Furthermore, the president may change the place of residence of the supreme federal authorities and of the parliament’s convening according to arts 5 para 2 and 25 para 2 B-VG.
41 Art 79 para 2 cit 1 lit b and para 5 B-VG.
42 See eg § 21 (2) Z 12, § 41, § 53 Freundenpolizeigesetz BGBl I 2005/100 as amended by BGBl I 2016/24 (hereinafter: FPG); see also § 11 para 4, § 28 Niederlassungs- und Aufenthaltsgesetz BGBl I 2005/100 as amended by BGBl I 2015/122 (hereinafter: NAG).
concerning the so-called “Dublin-system” is not new. The crux of the Dublin-system is that it principally provides for the competence and responsibility for asylum applications of the State of first entrance.54 The recent decades of failing implementation, even during low pressure periods and more so in the year 2015, have made evident that this concept is not well conceived.55 Yet, the subsequent recast proposal (“Dublin IV”),56 repeats the system, in spite of pragmatic solutions suggesting that its approach prevents spontaneous compliance and, therefore, might be rather counterproductive.57

Furthermore, prevailing doctrine is that the right to asylum and non-refoulement do not guarantee an individual right to choose the country of asylum, since this would infringe states’ right to control the entry of non-citizens.58 Amongst others, the notion of “safe third countries”59 plays an important role here and the Commission also issued a proposal to establish an EU common list of safe countries of origin to harmonize recognition rates in the MS and allow for faster procedures.60 Nowadays, this notion might even become relevant within the EU in view of the current development of the mutual trust amongst MS.61 Due to the issue of secondary immigration and the malfunctioning of the Dublin-system, a “race to the bottom” amongst MS has emerged in an attempt to deter potential asylum applicants. This affects reception conditions, procedural standards, quotas, as well as MS’ willingness to participate in resettlement and relocation.62

To tackle these issues that threaten to increase the seemingly irreconcilable West-East and North-South division of the EU on the topic of asylum, in July 2016, the European Commission has presented its ‘proposals to complete the reform of the Common European Asylum System in order to move towards a fully efficient, fair and humane asylum policy – one which can function effectively both in times of normal and in times of high migratory pressure.’63 These

54 Art 3 para 2 of 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 (26 June 2013) OJ L180/31 (hereinafter: Dublin III).
57 It might create additional complications such as the waste of financial resources in repressive actions, diplomatic tensions, fostering smuggling services and lack of integration, social exclusion and frustration on the side of asylum seekers. See Marcello Di Filippo, “Dublin “reloaded” or time for ambitious pragmatism?” (EU Immigration and Asylum Law and Policy, 12 October 2016) <http://eumigrationlawblog.eu/dublin-reloaded/> accessed 12.10.16, who suggests either a “free choice” or “personal characteristics” approach.
58 See also UNHCR, Stabilizing the situation of refugees and migrants in Europe (Proposals to the Meeting of EU Heads of State or Government and Turkey on 7 March 2016, 3 March 2016); Pro Asyl (ed), Memorandum: Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility (K+F Druck, Frankfurt am Main, 2013).
59 See eg Hailbronner/Thym 753, 754; see arts 35 und 38-39 APD.
62 For conditions in Hungary see eg Mohammed v. Austria App no 2283/12 (ECHR, 6 June 2013); Jean-Paul Marthoz, ‘UN review of Hungary shows country “treats human rights as a public enemy”’ (Committee to Protect Journalists, 13 May 2016) <https://cpj.org/blog/2016/05/un-review-of-hungary-shows-country-treats-human-r.php> accessed 04.10.16; for infringements of the common asylum system by other Member States see eg European Commission ‘Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings’ (Press release, 10 December 2015) IP/15/6276.
63 Throughout the last year, many MS (especially the Visegrid Group) have voiced their restraint to participate in a fair sharing of responsibility and to practice solidarity towards frontline States in spite of the obligations conveyed by Art 80 TFEU. They argue that these countries would need to fulfil their responsibility under the Schengen agreement first and secure the external borders, only then they would offer solidarity. See eg De Bruycker/Tsourdi; see further Jens Vedsted-Hansen, ‘Reception Conditions as Human Rights: Pan-European Standard of Systemic Deficiencies?’ in Vincent Chetail, Philippe De Bruycker, Francesco Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (2016) 39 Immigration and Asylum Law and Policy in Europe 317.
proposals include a common procedure,\textsuperscript{64} uniform standards of protection and rights\textsuperscript{65} and the harmonization of reception conditions\textsuperscript{66} - partially in form of regulations instead of directives. However, these proposals stand in opposition to many national developments and, hence, it remains to be seen whether they will be approved in the legislative process.

In order to safeguard the protection of external borders further action has been taken, such as the proposal for a renewed Schengen Borders Code.\textsuperscript{67} Already in December 2015, the Commission proposed the establishment of a new European Border and Coast Guard on the basis of Frontex with supranational competences to intervene in cases of structural deficits.\textsuperscript{68} This proposal was adopted in a rapid legislative process and the new agency is working already since October 2016.\textsuperscript{69} Moreover, a new operational plan for the sea operation Triton, formally Poseidon, by Frontex was established and its budget was raised to the amount of the Italian operation Mare Nostrum already in early 2015. Also, EUNAVFOR Med, the first EU military operation, was launched in May 2015 and expanded under the name Operation Sophia, in October 2015.\textsuperscript{70} By land, apart from the support of MS through hotspots, MMST and EASO, the capacities of the Frontex-operated Rapid Border Intervention Teams (RABIT) were strengthened and deployed in several MS along the Balkan route.\textsuperscript{71}

In the connection of safeguarding the external borders, the Agenda focuses on combating migrant smuggling. It is set out in the “EU Action Plan against migrant smuggling”\textsuperscript{72} and was supported, for example, by the establishment of a European Migrant Smuggling Centre (EMSC) by Europol, which made smuggling one of its nine priority crime areas.\textsuperscript{73} To assist the safeguarding of borders and combat smuggling, the EU also reinforced the collection of data at the border, for instance through national authorities taking finger prints of asylum applicants according to EURODAC,\textsuperscript{74} the surveillance programme by Europol EUROSUR,\textsuperscript{75} the proposal of a creation of European Travel Information and Authorisation System (ETIAS) for visas and the proposal of a general establishment of “smart borders” for data collection regarding entry and exist of the Schengen area of third country nationals (EES).\textsuperscript{76}


\textsuperscript{68} See Hailbronner/Thym 753, 761.


\textsuperscript{74} Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’, for identifying an illegally staying third-country national or stateless person, for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast) COM(2016) 272 final.


Focusing on the execution of existing law, an Action Plan on Return\textsuperscript{77} and recommendations therefor in the form of a Return Handbook\textsuperscript{78} and a proposal for a European travel document for the return of illegally staying third-country nationals\textsuperscript{79} were developed and enforced by the new European Border and Coast Guard. In the international sphere, a Trust Fund for Africa,\textsuperscript{80} a partnership framework with third countries\textsuperscript{81} and a recommendation on a voluntary admission scheme with Turkey were established.\textsuperscript{82} Also, integration and legal entry possibilities for key workers were part of the agenda, for instance by the suggestion of a Blue Card Directive.\textsuperscript{83}

This summary of proposals and measures shows that most efforts were oriented towards the enforcement of external border controls and the defence against the refugee inflow and migrant smuggling. Furthermore, the EU targeted harmonization to foster a balance of burdens amongst MS and reduce secondary migration. Although many measures were proposed by the Commission and heads of states in the course of the crisis, it could be argued that they constitute rather political tranquilizers than actual crisis management measures.\textsuperscript{84} By December 2016, most of the legislative measures, apart from the regulation amending Frontex, are still in the origination process. The implemented measures mostly concerned the effective implementation of the already established system and were within the competence of EU agencies, such as Europol or EASO, or decided by heads of states.\textsuperscript{85} If the legislative acts do not serve the acute management of the crisis and, moreover, are unlikely to be adopted in the current political atmosphere, it is to be questioned whether they should have been subject to a more thorough scrutiny and serve the coherent renewal of the system at a later point.

Also on a national level, in Austria, the refugee influx of 2015 provoked several new provisions. First of all, over the course of 2015 the accommodation of asylum seekers became a seemingly unsolvable issue. Thus, the government proposed a temporary amendment of the constitution introducing the “BVG-Unterbringung” in order to allow for it to directly use properties in the competence of Austria’s federate states without following the regular administrative procedures.\textsuperscript{86} The adoption of this law allowed for the government to create new accommodation swiftly in the present times of increased demand and reduced the reviewing mechanism to a concentrated procedure binding the minister of interior only to indispensable minimum requirements.\textsuperscript{87} Similar simplifications can be observed on the level of federal states, for instance in Vorarlberg, which also introduced a special procedure to its building law.\textsuperscript{88}

Furthermore, in July 2015 the new “Fremdenrechtsänderungsgesetz 2015” entered into force. It introduced several amendments of Austrian asylum and migration law.\textsuperscript{89} These concerned competences, procedures and substantive provisions alike for the purpose of a more flexible and efficient system, next to the implementation of EU legislation and jurisdiction.\textsuperscript{90} Already in September 2015 another amendment of the Austrian Asylum Act was under discussion. The government sought to reduce the refugee influx into Austria and considered introducing a temporal limitation for residence permits on the ground of asylum to three years as one measure.\textsuperscript{91}

After a lengthy legislative procedure the amended Asylum Act entered into force in May 2016 including not only temporary asylum and restrictions to family reunification but also a new exemptive provision for asylum procedures at

\textsuperscript{78} Commission, ‘Recommendation of 1.10.2015 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks’ C (2015) 6250 final.
\textsuperscript{81} Commission, ‘On establishing a new Partnership Framework with third countries under the European Agenda on Migration’ (Communication) COM (2016) 385 final.
\textsuperscript{84} See Selanec 94.
\textsuperscript{86} Constituional law on the accommodation and allocation of aliens in need of protection (Bundesverfassungsgesetz über die Unterbringung und Aufteilung von hilfs- und schutzbedürftigen Fremden) BGBI I 2015/120 (hereinafter: BVG-Unterbringung).
\textsuperscript{87} Valentina Arnez and Tamara Völker, ‘Legistische Maßnahmen zur Bewältigung der Flüchlingskrise’ in Gerhard Baumgartner, Öffentliches Recht: Jahrbuch 16 (NWV 2016) 14.
\textsuperscript{88} § 20a VbG BauG LGBI 2001/52 as amended by LGBI 2015/54; see Khakzadeh-Leiler 10.
\textsuperscript{89} Amendment of the Austrian migration and asylum law 2015 (Fremdenrechtsänderungsgesetz 2015) BGBI I 2015/70.
\textsuperscript{90} See Arnez/Völker 19-22.
\textsuperscript{91} Arnez/Völker 22.
the border in times of reintroduced internal border controls due to mass immigration. In the explanations accompanying this newest amendment, the Austrian government argued that it is currently facing a threat to public order and internal security and that this emergency state would legally allow Austria to derogate from existing international, European and constitutional standards. This explanatory notes and the somewhat heated discussion between the government’s coalition partners, however, revealed that the determination of a crisis situation was ambiguous to them as well. Eventually, their reasoning had to face accusations of being a mere means to circumvent obligations imposed by EU law. Also the applicability of the announced maximum limits for asylum applications is unclear. Although the limit of 37,500 was not reached in 2016 and, hence, the government did not make use of its competence to activate § 36 AsylG, this might be the case in 2017. Most probably, it will then be reviewed by the Austrian constitutional court and possibly also the European Courts.

Furthermore, border control officers received the authority to take finger prints and photographs in the course of border controls and compare them with the police data base. This amendment was part of the reintroduction of (internal) border controls at the Hungarian and Slovenian borders enacted by a regulation of the Austrian minister of interior to ensure public order and safety. The border controls were supposed to only last several months in accordance with the Schengen Borders Code, but were prolonged several times. Unsurprisingly, Austria is not alone in taking this direction. Also Belgium, Denmark, Germany, Hungary, Slovenia, Sweden and Norway reintroduced their internal border controls invoking Art 25 of the Schengen Borders Code. France temporarily reintroduced border controls, however, referring to the occurred terrorist attacks not to the refugee influx. Although, the European Commission confirmed the necessity of border controls in autumn 2015, it later urged the respective countries to resolve this situation swiftly and return to the ordinary Schengen system.

In this regard, Austria is acting in a sensitive political atmosphere since its affected neighbouring countries carry contradictory interests and the concept of solidarity within the EU’s member states is currently being put to the test once again. Whether the conduct of Member States was legitimate will also be decided by the outcome of several pending infringement procedures.

96 Haybronner/Thym 754.
97 § 12a para 2 Austrian Border Control Act (Grenzkontrollgesetz, GreKoG) BGBl 1996/435 idF BGBl I 2016/25. This amendment stood in direct connection with the entry of refugees as the explanations the comments to the amendment reveal; see IA 1531/A 25 GP 2.
98 Regulation of the Austrian Minister of the Interior concerning the temporary reintroduction of internal border controls BGBl II 2015/260 as amended by BGBl II 2016/311.
101 Commission, ‘Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)’ C (2015) 7100 final; Commission, ‘Back to Schengen’.

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“Asylum, Law and Crisis”

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III. Goals and Methods

This wide range of seemingly hysteric reactions with provisions and measures issued both, on Union and national level, indicates the adoption of the typical conduct under a crisis situation omitting the regular consideration process. Thus, there is a need to systemise and classify the occurrences, look at their nature, targets, application and long-term consequences, which constitutes one principal aim of the proposed study. In order to do so, the study will assess the possibility of generating guidelines for the determination of a crisis of mass immigration in European and Austrian law, or in the absence of such, a general threshold thereof. The analysis will rely on a textual and systematic interpretation of relevant provisions. Furthermore, related jurisdiction of the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ) and Austrian courts will be assessed. Also, state practice might be regarded where found applicable. In a second step, the study will review potential impacts of crisis management provisions on competences and procedures, state obligations and individual rights, categorise them according to their temporal application and inspect possible limitations. Finally, the third chapter will hold critical observations on the basis of the foregoing dogmatic analysis regarding general crisis law and the refugee crisis in comparison to other crises.

IV. State of Research

The consideration of emergency allowances as a potential threat to the regular legislative process and its risk of misuse is not new. It has been a topic for philosophers, political scientists and legal theorists alike throughout the last century. In the last decade, however, much attention of the legal discourse on crises has circled around terrorism and data protection on an international level and the financial crisis on a European level. Now in the face of the European refugee crisis, many of their conclusions prove to be valid during these circumstances as well. However, the refugee crisis comes with some unique characteristics, such as a distinct legal basis, specific root causes and particular political sensitivity. Almost weekly, conferences are held on the topic of the refugee or other crises and a certain perplexity is always present. The statements range from moral appeals to solidarity amongst MS and towards refugees to calls upon politicians to restore control over internal borders and ensure a firm regulation of migration flows by introducing hotspots in North African countries, dispose of “pull-factors” etc. Although, there is indeed a constant output of articles in academic journals and legal blog-posts on the topic, increasingly so since 2014/15, they usually only assess singular issues or reveal the political agenda of their respective author. In this context, however, it is necessary to mention that the phenomenon is not only very recent, but also ongoing. Hence, more comprehensive work is presumably still in progress as well as the publication of various conference proceedings of the year 2016. So far, Gratz reviewed the occurrences of autumn 2015 in Austria holistically from the perspective of political sciences and also the legal scholars Depenheuer and Grabenwarter reviewed the same period broadly. Yet, the problem and its long-term consequences have not been considered in a coherent and holistic manner from a legal point of view with regard to current developments in Austrian and European refugee law in comparison with other crises. Hence, there is an apparent demand for the proposed comprehensive legal analysis.

104 See eg Carl Schmitt, Politische Theologie (1922); for Austria see eg Gernot D Hasiba, Das Notverordnungsrecht in Österreich (1848-1917) (VOAW 1985) 37 as cited in Khakzadeh-Leiter 8; for a recent discussion see William E Scheuerman, ‘Die Globalisierung von Carl Schmitt?’ (forthcoming in Kritische Justiz, 2017).
106 See eg Ludwig Boltzmann Institute for Human Rights, ‘Human Rights Talks: Human rights under pressure - Exceptional circumstances as the new normal in Europe?’ (YouTube, 21. October 2016) <https://www.youtube.com/watch?v=v8R4FUz7vYE&t=8s&list=PLAKt9w2BzmmxOrYS_1KX1e3q7lcqwH&index=2> accessed 18.11.16; Universität Innsbruck, ‘EU und Immigration’ (Conference, 14.-15.11.16);
108 See eg Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (forthcoming Oxford University Press) and other forthcoming articles mentioned in the selection of literature of this proposal.
109 For a political analysis of the Austrian crisis management in 2015 see Gratz.
110 Otto Depenheuer and Christoph Grabenwarter (eds), Der Staat in der Flüchtlingskrise: zwischen gutem Willen und geltendem Recht (Schöningh 2016).
V. Research Questions and Hypotheses

Research Question 1: Is it possible to capture the term “refugee crisis” in a legal context?

Hypothesis 1: The term refugee crisis can have a legal significance in regard to several exemptive provisions in European and Austrian refugee law.

Research Question 2: What is the impact of crisis provisions and measures on the legal order of Austrian and Union law? How does crisis law function in the example of the refugee crisis?

Hypothesis 2: Crisis mechanism often trigger a shift of power to the executive and derogation from procedural and substantive standards having an evident impact, not only on competences, the rule of law, the balance of power and the democratic principle, but also on individual rights and burdens as well as state obligations and responsibilities.

Research Question 3: Does the application of crisis management provisions show detrimental effects that could be avoided?

Hypothesis 3: In the long run, these shifts and derogations might become an integral part of the legal order, ie the crisis become the new normal, and thus, cause a long-term alteration of existing standards without the designated precautionary mechanisms of the regular legislative and administrative process and thereby reduce these standards leading to a downwards spiral. Vice versa, due to the use of short-term emergency measures, issues requiring a long-term solution do not experience the well-conceived systematic change necessary to their sustainable solution.

VI. Provisional Structure

I. Introduction
   1. The Term Crisis
      i. Historical Incidents and Refugee Situation of 2015
      ii. Communicative and Political Questions
   2. General Legal Aspects

II. The Crisis in Refugee Law
   1. Analysis of Exemptive Provisions
      i. Provisions for General Emergency Situations
         (1) European Union
         (2) Austria
      ii. Provisions in Refugee Law
         (1) European Union and ECHR
         (2) Austria
      iii. Sub-Conclusion
         (1) Common Characteristics and Functionality
         (2) Common Threshold
         (3) Prerogative of Interpretation
   2. Legal Reactions since 2015
      i. European Union
      ii. Austria

III. The Crisis and its Legal Implications
   1. Possible Impact and Consequences
      i. Functional and Substantive Consequences
         (1) State Obligations
         (2) Competences, Jurisdiction and Procedures
a. Legislation
b. Administration
   (3) Individual Rights and Burdens
   ii. Temporal Impact
      (1) Temporary Measures
      (2) Non-Temporary Measures within Crisis Law and the Regular Legislative Procedure
2. Limitations
   i. Non-Derogable Provisions
   ii. Proportionality
IV. Observations
1. Crisis Rationale, Crisis Law and Crisis Reality
   i. General
   ii. The Refugee Situation 2015
2. Crisis and the Legal Order
   i. Rule of Law
   ii. Democracy
   iii. Balance of Powers
   iv. Responsibility
3. Crisis as a Downward Spiral?
   i. The State of Crisis Becoming the New Normal
   ii. Solving Long-Term Issues with Short-Term Solutions
4. [Others
   i. Mutual Trust and Solidarity within the EU
   ii. Allegations of Hypocrisy/Undermining EU’s Position as “Human Rights Defender”
   iii. Weak standing of Interest Group]
5. Possible Revision and Control Mechanisms
   i. Judicial Revision in Austria and Europe
   ii. Commission Infringement Proceedings
   iii. Others [eg. Monetary Control?]
V. Conclusion

VII. Expected Time Frame

Until November 2016
- Mandatory courses and seminars
- Literature and judicature research/Choice of topic

January/February 2017
- Preparation of the research proposal
- Presentation of the topic in a seminar
- Submission and publication of the research proposal
- Dissertation agreement with supervisor

Summer Semester 2017
- Detailed draft
- Chapter II
- Regular consultation of supervisor

Winter Semester 2017/18
- Chapter III
- Regular consultation of supervisor

Summer Semester 2018
- Chapter IV
- Regular consultation of supervisor

Winter Semester 2018/19
- Introduction and Conclusion
- Regular consultation of supervisor

Summer Semester 2019
- Finalising and submitting thesis

September 2019
- Defence
VIII. Selection of Literature


Depenheuer O and Grabenwarter C (eds), Der Staat in der Flüchtlingskrise: zwischen gutem Willen und geltendem Recht (Schöningh 2016).

Di Filippo M, ‘Dublin “reloaded” or time for ambitious pragmatism?’ (EU Immigration and Asylum Law and Policy, 12 October 2016).

Eisenberger I, Innovation im Recht (Verlag Österreich 2016).


Finke J, ‘Krisen und die Dynamik des Rechts’ (Habilitation, Johann Wolfgang Goethe-Universität Frankfurt am Main 2015).


Gratz W, Das Management der Flüchtlingskrise: Never let a good crisis go to waste (NWV 2016).


Mühlner J, Rechtliche Rahmenbedingungen der Katastrophenbekämpfung (Verlag Österreich 2016).


Penuel KB, Statler M and Hagen R, Encyclopedia of Crisis Management (SAGE 2013).


