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

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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

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]

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).

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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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