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LEGISLATIVE AND JUDICIAL RESPONSES TO THE "REFUGEE CRISIS" IN SLOVENIA AND AUSTRIA: A COMPARATIVE PERSPECTIVE

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ABSTRACT

Legislative and Judicial Responses to the "Refugee Crisis" in Slovenia and Austria: A Comparative Perspective

The article compares key normative and judicial responses to the 2015–2016 "refugee crisis" in Slovenia and Austria. It does so by comparing the asylum statistics, the main changes to the legislation reflecting populist reactions to the "refugee crisis," and judicial responses to these changes and reactions. The qualitative legal analysis is based on examples of the most important changes and responses. The article considers the populistic context of these changes, as discussed by some political scientists, who demonstrate that with the crisis, a new wave of populism—"the populist Othering of migrants"—emerged.

KEYWORDS: "refugee crisis", constitutional court, Slovenia, Austria, populism

IZVLEČEK

Zakonodajni in pravosodni odzivi na »begunsko krizo« v Sloveniji in Avstriji: primerjalna perspektiva

Avtorica primerja ključne normativne pristope k obravnavanju »begunske krize« v obdobju 2015–2016 ter odzive sodstva na te pristope v Sloveniji in Avstriji. K temu pristopi s primerjavo statističnih podatkov na področju azila, najpomembnejših zakonodajnih sprememb, ki odražajo populistične odzive na »begunsko krizo«, ter odgovorov sodišč na te spremembe in odzive. Analiza je kvalitativna in temelji na izbranih primerih najpomembnejših zakonodajnih sprememb. Članek upošteva populistični kontekst teh sprememb, kot ga razumejo politologi. Ti pokažejo, da se je s krizo pojavil tudi nov val populizma – populistično označevanje migrantov kot Drugih.

KLJUČNE BESEDE: »begunska kriza«, ustavno sodišče, Slovenija, Avstrija, populizem

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INTRODUCTION

This article compares key normative and judicial responses to the 2015–2016 "refugee crisis" in Slovenia and Austria. It compares asylum statistics for the two countries, the main legislative changes reflecting populist reactions to the "refugee crisis," and key judicial responses to these changes and reactions. The main research questions of this paper are: what kind of legislative tools have been used by the two countries to respond to the increased numbers of arrivals; what were the differences and similarities; which legal issues have arisen from these legislative responses; and were these responses compatible with the constitutional, international, and EU law. The legal analysis used to answer these questions is qualitative and critical, based on examples of the most significant developments. It is performed based on international refugee law, EU law, and constitutional norms concerning the following rights: the right to seek asylum, the right to have one's asylum application examined (which derives from Article 6 of Directive 2013/32/EU), the prohibition of torture, degrading and inhuman treatment, non-refoulement, and the right to an effective remedy. The conclusions in this article are based on the synthesis of facts, figures, and analyzed processes. The article considers the populistic context of these changes, as discussed by those political scientists who criticize authoritarian and nationalistic types of populism (there is a need to differentiate between different types of populism, see Tushnet & Bugaric, 2020: 90). They demonstrate that with the refugee and migration crisis, a new wave of populism—"the populist Othering of migrants"—emerged (Pajnik & Šori, 2021: 10). It involved, among others, ideas of closing the state borders, adopting restrictive legislation on asylum seekers, or expulsion of migrants from the country (Pajnik & Šori, 2021: 10). These ideas later materialized in the actual legislative proposals that, jointly with the most important judicial responses, will be discussed later in the paper.

CONTEXT AND BACKGROUND INFORMATION

Although they are neighboring countries, there are hardly any similarities between Austria and Slovenia regarding asylum statistics. Austria is a country that many migrants and refugees choose as their country of destination (cf. Josipovic & Reeger, 2019: 26). This choice is attested by the 196,767 asylum applications lodged in Austria between January 1, 2015, and December 31, 2020 (Statistics Austria, 2021). During the same period in Slovenia, 13,305 asylum applications were lodged (Ministry of Interior of the Republic of Slovenia, 2020: 21), indicating that not many of the people looking for a better life consider Slovenia a destination country. Instead, most migrants and refugees consider it a transit country where they do not intend to stay. These differences are particularly interesting since Austria and Slovenia have been mainly on the same migration route since 2015, when Hungary erected its

razor-wired border fence. Many people on the route who do not decide to apply for asylum in Slovenia do so in Austria. This phenomenon was quite noticeable also during the 2015–2016 migration crisis, when in Slovenia, only 277 people applied for asylum in the entire year, while the number for Austria was 88,340 (Statistics Austria, 2021)—318 times more. Statistics even show that in 2015, at the peak of the "refugee crisis," Austria was the country with the third-largest increase in absolute numbers of asylum applications in the EU (Eurostat, 2015), while Slovenia saw a surprising decrease.

There are also differences between the countries in shares of approved asylum applications. For example, in Austria in 2020, protection was granted in 10,145 (52.5%) out of 19,331 cases decided on merits (AIDA, 2020). In Slovenia, protection was granted in a mere 89 (29%) out of 304 cases decided on merits (Ministry of Interior of the Republic of Slovenia, 2020: 26). The recognition rate in Slovenia has always been comparatively low (cf. Kogovšek Šalamon, 2018).

These differences are unrelated to the countries' legislation, as they share almost the same legal framework. Austria and Slovenia are bound by the 1951 UN Geneva Convention on the Status of Refugees (UN General Assembly, 1951) and the EU secondary law in the field of asylum. Both countries must consider this framework when redesigning their respective asylum systems. In the aftermath of the 2015–2016 crisis, this framework has been set aside, which is legally and constitutionally unacceptable.

RESTRICTIVE LEGISLATIVE CHANGES

The differences in statistics could mislead us into believing there could also be differences in the two countries' approaches to responding to increased numbers of arrivals with new legislation. However, many similarities arise. The main reason for these similarities is that Slovenia is evidently replicating Austria's approach. However, there are also similarities in populist political discourses that have come to prevail in both countries in recent years (Pajnik & Fabijan, 2022; Benedek, 2019). The most notable example of similar responses is the legislative amendments intended to allow the authorities to start refusing to receive asylum applications after a certain point in time. Namely, both countries adopted legislation allowing them to declare some de facto "state of emergency" without actually using the term as if this would allow them to no longer abide by the obligation to carry out the asylum procedures for the newcomers. In Slovenia, that the government saw the situation as an actual emergency without formally declaring a state of emergency derives from the fact that it proposed the key legislative changes to be passed in urgent legislative procedures (Pajnik & Šori, 2021) in the absence of public debate.

Researchers show that in Austria and Slovenia, the "refugee crisis" of 2015–2016 represented a crucial inflection point in how the asylum policy was drafted

(Josipovic & Reeger, 2019: 8; Zagorc & Kogovšek Šalamon, 2017). In both countries, refugee protection enshrined in the international protection law remained intact and was not abolished. However, several restrictions were introduced to make it more difficult for people to apply for asylum or to keep their status as asylum seekers, in particular, obstacles to accessing the territory and the asylum procedure and restrictions on the rights of recognized refugees (Josipovic & Reeger, 2017: 8; Zagorc & Kogovšek Šalamon, 2017). Both countries witnessed the peak of the inflow of asylum seekers in 2015. Political leaders thus exploited the peak to politicize refugee protection, making migration and refugee protection one of the most important subjects on the political agendas used to gain political support and electoral votes.

A DISCUSSION ABOUT THE UPPER LIMIT (QUOTA) SYSTEM AS A RESPONSE TO MASS ARRIVALS TO ASYLUM SEEKERS

During the summer of 2015, as growing numbers of asylum seekers arrived at both countries' borders, the authorities initially refrained from specific legislative activity. Both countries' authorities adopted a pragmatic approach to registering newcomers but then waved them through the state territory and assisted them in transit by providing basic care and transportation (Josipovic & Reeger, 2017: 18; Kogovšek Šalamon & Bajt, 2016). In this period, Austria accepted Europe's second-largest number of asylum seekers per capita (Benedek, 2019: 949).

In early 2016, in Austria, the amendment act No. 24/2016 (RIS, 2016) introduced a unilateral quota for the annual admission of persons to the asylum procedure. The justification for the quota was very similar to the justification the Slovenian authorities introduced a year after, as I will show in the continuation. Under the title "Exceptional provisions for the maintenance of public order and the protection of inner security during the enforcement of border controls," the Austrian draft law allows the Austrian Federal Government (together with a committee of the National Council) to pass a government decree that would suspend further processing of international protection applications outside of border control posts and registering points of the police. The decree would allow the authorities to check if the denial of entry violates the principle of non-refoulement. If the assessment was negative (in that there was no danger to their life and safety), people could then be returned to the neighboring countries from which they entered (Benedek, 2019: 951–952).

This new legal option shows that a certain number of foreigners applying for international protection can be automatically considered a "threat to public order and internal security" and a threat to the functioning of state systems (RIS, 2016, Section 36). Accordingly, annual upper limits of new asylum applications for the following four years were introduced in Austria: 37,500 in 2016, 35,000 in 2017, 30,000 in 2018, and 25,000 in 2019. As no upper limit was reached by 2021, no government decree has actually been passed based on this legal amendment.

This politically agreed-upon limit was inspired by what the Austrian Government presented as its "integration capacity," allegedly based on the number of applications received before the 2015 peak (between 11,012 in 2010 and 28,064 in 2014). However, this limit was a response to pressures from right-wing political parties, part of the public, and the media that demanded a cap on the number of asylum seekers received (Benedek, 2019: 951–952).

In Slovenia, which also adopted restrictive legislation following the "refugee crisis," aiming at the closure of the border for asylum seekers at a specific time (which will be presented in more detail below), the numerical upper limit was not publicly discussed or adopted. The difference between the two countries is that Austria discussed the actual numbers of where the reception would end and where the state would no longer accept applications. Slovenia, on the contrary, only introduced the option to stop accepting applications altogether without politically indicating at which point this would happen, opening the door for unpredictable and arbitrary decisions. This situation, however, does not mean that the numbers set in advance are any less arbitrary. Namely, as Benedek (2019) and Josipovic and Reeger (2019) point out, no serious research was presented in Austria to demonstrate that the numbers reflect the actual capacity of the Austrian society to integrate the newcomers. It was a purely political decision. Consequently, legal scholars, asylum law experts, and civil society organizations have heavily criticized this approach, claiming that such upper limits are unconstitutional, contrary to Austria's human rights obligations, and in violation of EU law (Josipovic & Reeger, 2017: 18; Benedek, 2019: 950–951; Agenda Asyl, 2017: 2).

EU law experts Obwexer and Funk (2016) were more lenient toward the Austrian Government. Initially, they characterized the quota as a legal novelty. They argued that EU law fails to provide for an option of passing emergency decrees to sustain public order (European Union, 2012: Article 78) and that such threats indeed may exist during periods of temporary border controls. However, the European Commission must permit the latter under the Schengen Border Code. They also warned that such decrees could be in disaccord with the general obligation of an EU Member State to at least consider an application for asylum, which must take place "with an unreserved adherence to the fundamental rights of private and family life and non-refoulement" (Obwexer & Funk, 2016). However, they then stressed that immediate repulsions to neighboring countries would be possible, but only if the European Court of Justice decisions failed to suggest the possibility of chain-refoulement due to deficiencies in a Member State's asylum system (Obwexer & Funk, 2016). The experts clarified that the Geneva Refugee Convention neither includes a right to have one's asylum application examined nor prohibits sending an asylum seeker to a country where their life or freedom is not threatened. However, Benedek points out that under Article 6 of the EU Asylum Procedure Directive, the responsible EU Member State must provide access to an asylum procedure (2019: 953–954). Benedek also revealed that the Austrian Government ordered the legal opinion provided by Obwexer and Funk

to legitimize its introduction of a ceiling to asylum applications. Despite the critical aspects of the legal opinion, the Austrian authorities decided to adopt the legislative change, "making it possible for a populist undermining of the rule of law" (Obwexer & Funk, 2016: 955).

Legal scholar Hilpold (2017: 79) expressed another critical approach when he argued that Article 78 TFEU cannot be interpreted contrary to the Geneva Convention on the Protection of the Status of Refugees and that such an interpretation would also not be in line with the Common European Asylum System. He claimed that the interpretation that the Commission could approve the Schengen exemption provisions (in that a large number of asylum seekers is a threat to public order) would conflate and mix up the Schengen and the Dublin regimes. He concluded that a unilateral quota contradicts fundamental human rights principles and has no legal basis in international and EU law (Hilpold, 2017: 79). This was later confirmed by the European Commission's public statements concerning the quota system introduced in Austria (Josipovic & Reeger, 2017: 19). As Benedek (2019: 949) stated, setting an upper limit of asylum applications and the possibility of suspending its obligations under international and European asylum law are legally doubtful measures, also because they are based on the assumption that the fulfilled quota automatically threatens the maintenance of public order and the protection of internal security, which is impossible to prove. Many authors argued that an international obligation, such as the right to apply for asylum, could not be subject to a quantitative limitation. The result of these legislative changes was, as Benedek (2019: 950–951) states, that the Austrian asylum policy shifted from a "showcase" asylum system to one of the most restrictive in Europe. Benedek (2019: 950–951) and Rosenberger and Gruber (2020) indicate that this change originated from the pressure that the Austrian right-wing Freedom Party imposed on the Austrian Government and that the People's Party started to compete for supporters of the Freedom Party. The authors hence make a clear link between populist discourses and political tendencies and the legislative changes resulting from these discourses.

THE "EMERGENCY REGIMES" AS RESPONSES TO THE MASS ARRIVALS OF ASYLUM SEEKERS

In addition to the support limit, the Austrian authorities prepared to set up a new border regime for future larger numbers of arrivals. Among several amendments to the Asylum Law of 2005 proposed in early 2016, new special provisions addressed the maintenance of public order and the protection of internal security based on Article 72 TFEU. The provisions provide for the Austrian Federal Government to adopt an emergency decree (*Notstandsverordnung*) in cooperation with a committee of the National Council. The emergency decree only needs to state that the maintenance of public order and the protection of internal security are in danger.

In this case, the Government would be given leeway to re-establish border controls and set up "registration offices" at the borders for potential asylum seekers. Based on the decree, before an asylum procedure is opened, the border authorities shall examine whether the person can be prevented from entering the country through "hindrances, refusal, or outright removal" (Benedek, 2019: 955–956). The only exceptions to this rule are if the person can demonstrate that if they are returned, they will be at risk concerning their right to life or the prohibition of torture or inhuman treatment, or if their presence in Austria should be authorized due to the right to protection of private and family life. This limited set of exceptions means that the asylum applications will not be considered except for cases of possible violations of Articles 2, 3, and 8 of the European Convention on Human Rights or if it is impossible to return the person—for instance, if the neighboring state refuses to cooperate. The law provides the right to appeal against the decision at the border and claim judicial review. The Government will not consider the asylum request if the Court finds no violation. The same result prevails if the applicant has made no complaint (Benedek, 2019: 955–956). The reactions of experts, scholars, and liberals to the draft law were critical. The bill, drafted in secret, was finally granted a very short peer review period and then adopted into law with only minor changes. The Austrian Government also argued that the regime would not become operational without the adoption of the "emergency decree," which would "only be unnecessary if the upper limit was unlikely to be reached" (Benedek, 2019: 955–956).

Even though the number of asylum applications dropped, the Austrian People's Party continued to pressure the coalition partner to adopt the emergency decree, which did not happen. Benedek further argues that the pressure had additional political consequences: a candidate of the right-wing Freedom Party at the Austrian presidential elections advocated for stronger measures in the field of asylum and presented migrants as a danger to Austria. Hence, the Austrian Government was trying to show the public that the issue was being addressed. Consequently, the amendments to the asylum law were also passed on April 27, 2016, amid the presidential election campaign (Benedek, 2019: 957).

In September 2016, the draft emergency decree (which the Austrian Government prefers to call euphemistically a "special decree") became public, revealing the arguments that attempted to justify the triggering of the emergency regime should the decree be adopted. In line with Article 36 (1) of the amended Austrian Asylum Law, the justification of the decree mentioned "the existence of a threat to the maintenance of public order, as well as internal security" to justify the derogation from EU law on asylum under Article 72 TFEU. The government also argued that the labor market and social security systems are under pressure due to refugees recognized in 2015 and 2016. Such pressure could lead to an "increased unemployment rate, result in social tensions and unrest, and further threaten the security, public order, and social peace in Austria to the detriment of public institutions and functions" (Benedek, 2019: 959). It also claimed that an even higher number of new arrivals

could lead to "higher criminality and to inter-religious and inter-ethnic tension and conflicts" (Benedek, 2019: 959). Benedek (2019: 959) shows that the arguments are exaggerated, indicating that the policymakers do not have substantiated grounds for such measures.

This particular aspect of the Austrian approach is comparable to the Slovenian one since the same formulations and justifications can be found in the Amendments to the Slovenian Aliens Act of January 2017. The relevant difference between the two countries is that the developments in Austria were fueled by presidential elections and the debates surrounding election campaigns. In Slovenia, there were no elections at the time. However, the debates were similarly fierce and pressurized by the extreme right, resulting in the center liberal party of the then Prime Minister Miro Cerar taking a harsh turn into the discourse on fences and emergency legislative measures. Ironically, Cerar extensively used the human rights discourse to defend the exclusionary positions of his government.

As evidence shows, the Austrian legislative approach toward increased arrivals has been dutifully observed and studied by Slovenian political leaders. Continuous cooperation of the EU Member States leaders within meetings and processes of the institutions of the EU (particularly the Council of the EU, but also the European Council) allows for an exchange of ideas on both progressive as well as restrictive approaches to migration management. A popular joke went that the then Slovenian Minister of Interior of the Miro Cerar liberal government, Vesna Györkös Žnidar, an attorney-at-law and former legal defender of protesters during the 2012 uprising in Slovenia, became "radicalized" when attending these meetings. As various EU Member States started to come up with ideas on emergency regimes, upper limits, pushbacks, and the like, Slovenia quickly followed. On January 10, 2017, the Slovenian Government submitted draft amendments to the Aliens Act to the National Assembly (National Assembly of the Republic of Slovenia, 2017). The amendments were adopted by the National Assembly on January 26, 2017, allowing the Slovenian state to activate the de facto emergency regime that would allow the closure of state borders for asylum seekers in case of mass arrivals.

Similarly, as in the case of Austrian political leaders, who also prefer to use euphemistic terms, such as a "special decree," the Slovenian Government calls the situation that would trigger the new regime a "changed migration situation," due to which "public order and internal security of the Republic of Slovenia may be or are threatened," making the "functioning of central State institutions and provision of their vital functions more difficult" (Aliens Act, 2021: para. 2 of new Article 10a). In the assessment of such a "special migration situation," which should be prepared by the Ministry of Interior, the ministry must consider several factors, such as the circumstances in the countries from which third-country nationals will (intend to) enter Slovenia, the migration situation in the region, the number of third-country nationals residing illegally in Slovenia, the number of foreigners with "permission to remain" (special toleration that protects a person from expulsion but that is not

a residence permit) in Slovenia, the number of asylum seekers and the number of persons granted international protection, as well as the integration and accommodation capacities of the Republic of Slovenia for all these persons (Aliens Act, 2021: para. 3 of new Article 10a). An additional factor that must be considered is the possibility of implementing the International Protection Act, as well as any other relevant factor that could affect public order and internal security (Aliens Act, 2021: para. 3 of new Article 10a).

As one can observe, the terminology used in the justification of the new regime closely matches the Austrian terminology. If the state authorities assess that such changed circumstances, which resemble the mass influx witnessed in 2015 and 2016, have arisen, the government shall propose to the national assembly to activate the extraordinary measures, effectively leading to the closure of the borders (Aliens Act, 2021: para. 2 of new Article 10a). The measure will last for six months but may be extended every six months for an indefinite period. This is one of the differences between the Slovenian measure and the Austrian emergency law, which limits extraordinary measures to two years. As in the case of Austria, the Slovenian amendments to the Aliens Act are also based on the presumption that migration may pose a direct threat to public order, internal national security, and the functioning of state institutions, regardless of whether this is an evidence-based confirmed fact or not (Gornik, 2018a: 78; Gornik, 2018b: 162).

As in Austria, in Slovenia, the new emergency legislation has been criticized by legal scholars and civil society, stating that this legislation is contrary to the Geneva Convention, the Common European Asylum System, and the Slovenian Constitution. Scholars also underlined that such provisions constitute a de facto derogation from fundamental constitutional principles, such as the prohibition of torture and inhuman treatment (Zagorc & Kogovšek Šalamon, 2017; Gornik, 2018a). They warned that the act deliberately obfuscates the constitutional guarantees on limitations of human rights in times of state of emergency (Article 16 in connection with Article 92 of the Slovenian Constitution). Namely, the Slovenian law foresees that if the emergency regime is activated, a person's expression of intention to apply for international protection will be rejected as ill-founded if, in the neighboring EU Member State from which the foreigner entered, there are no systemic deficiencies concerning the asylum procedure and reception conditions of asylum seekers which could result in torture, inhuman, or degrading treatment. In such cases, the foreigner will be returned to the state of entry. The appeal against such decisions is allowed but fails to suspend the enforcement of the decision (Aliens Act, 2021: para. 2 of the new Article 10b). This regime is exempt only for health reasons, family reasons, or when the foreigner is a minor (Aliens Act, 2021: para. 3 of the new Article 10b).

These provisions would replace all asylum legislation in force in Slovenia if activated. If the regime is activated, the police will have new powers that they usually do not have in asylum cases: to reject the expression of intention to apply for asylum; to assess whether systemic deficiencies exist in the asylum system of the country

the person entered from; to assess whether these systemic deficiencies amount to torture or inhuman or degrading treatment; to assess whether deportation is possible in light of the person's health situation; and to assess whether the person is a minor (Zagorc & Kogovšek Šalamon, 2017).

One of the main differences between the described Slovenian and Austrian amendments is that no quotas or upper limits are defined in the Slovenian amendments. Hence, it is unclear at which point the "emergency regime" would be activated by the National Assembly, rendering the decision affecting constitutionally protected rights an arbitrary one. In contrast, Austria's situation was somewhat more predictable (as the authorities operated with concrete numbers). However, even in this case, it was not completely clear when the regime should be activated by adopting the "special" emergency decree (Benedek, 2019: 960).

THE JUDICIAL RESPONSE

In both countries, courts had an important role in responding to populist responses of the executive and legislative branches. Particularly in Slovenia, the Constitutional Court has declared this emergency legislation unconstitutional. The constitutional review has been requested by the Slovenian Human Rights Ombudsman, led at the time by Vlasta Nussdorfer. On September 18, 2019, the Court delivered decision no. U-I-59/17, assessing the impugned provisions from the perspective of compliance with the principle of non-refoulement (defined in Article 18 of the Constitution). The Court reminded that non-refoulement is an international legal principle that prohibits a state from removing, expelling, or extraditing an individual to a state where the individual would be in grave danger of being subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment. The principle of non-refoulement guarantees the applicant the right to enter and reside in the country from which one is requesting protection and the right to access a fair and efficient procedure in which the competent authority assesses whether the removal, expulsion, or extradition of the applicant could violate this principle. The Court explained that a state might only exceptionally expel, remove, or extradite an applicant for international protection to another state without considering the substance of the application if it is convinced that the third state is safe (safe third country concept). A third country is safe if it offers the applicant effective individual protection against a breach of the principle of non-refoulement. The same requirements apply to transferring individuals to another EU Member State. Under the impugned provisions of the Aliens Act, a foreigner who, during special conditions in the country, has expressed an intention to apply for international protection could challenge the presumption of security of a neighboring EU Member State only by referring to the existence of systemic deficiencies in the neighboring country and in case of exceptions as provided for by the amendments. However, the Court noted

that the foreigner is, according to the new law, unable to invoke other circumstances that might be relevant from the perspective of protecting the principle of non-refoulement. In its assessment, the Constitutional Court had to consider the circumstances in which introducing a special legal regime was permissible. It ruled that the special situation at the time of the changed situation in the field of migration, as defined in the second paragraph of Article 10a of the Aliens Act, does not mean the existence of a state of emergency in the country under Article 92 of the Constitution. According to the Constitution, the Court underlined that the restriction of human rights could be assessed only in a normal state (Article 15 of the Constitution) and in a state of war or emergency (Article 16 of the Constitution). As the situation regulated by the second paragraph of Article 10a of the Aliens Act does not formally constitute a state of emergency in the country, the Constitutional Court could assess the impugned provisions only following the criteria of constitutional review in force in the normal situation, i.e., in the absence of the formal declaration of the state of emergency. The Court emphasized that the legislator was obliged to regulate the procedure that enables the effective exercise of the non-refoulement. It found that the new regime that would be enacted under the "special migration situation" failed to provide sufficient legal guarantees for foreigners who expressed an intention to apply for international protection. In addition, the contested provisions limited the type and number of circumstances in which the foreigner could challenge the presumption of the security of a neighboring EU Member State to foreigners who claimed that their individual circumstances did not make a safe third country safe for them. Such an arrangement did not enable the effective exercise of the right under Article 18 of the Constitution. Therefore, it constitutes an interference with the right from Article 18 of the Constitution. The rights from Article 18 of the Constitution (freedom from torture) cannot be derogated. Interference with this freedom is always inadmissible. Therefore, the Constitutional Court annulled the second sentence of the second paragraph of Article 10b and the third paragraph of Article 10b of the Aliens Act (Constitutional Court, 2019). As can be observed, the Court, with its decision, reaffirmed the basic principles of asylum law as it is in force on the national and international level, effectively confirming the doubts and criticisms expressed by scholars regarding Austrian legislation.

Despite the Constitutional Court decision, in April 2021, the Slovenian National Assembly adopted the amendments to the Aliens Act once again, with only minor corrections. The adoption of the amendments was received in disbelief by scholars and experts working in the field (Slovenska filantropija, 2020). The special, de facto emergency regime may still be proposed by the Slovenian Government and activated by the National Assembly in case of the "changed migration circumstances" that lead to a "complex crisis." In this, the National Assembly must consider the principle of proportionality. The exceptions are the same as in the case of the 2017 amendments. However, the 2021 amendments also foresaw that the police must allow a foreigner to apply for international protection if one shows the probability of

facing a real danger of torture, inhuman, or degrading treatment in a neighboring country and that one has not been able to apply for international protection in that country for justified reasons (Aliens Act, 2021: Article 10b(2)). In all other cases and in the absence of other exceptions (family ties, health reasons, minors), the foreigner would not be allowed to apply for asylum. In this case, they could file an appeal against the decision of the police, which would, however, not have a suspensive effect (Aliens Act, 2021: Article 10b(3)).

This time around, the Human Rights Ombudsman, now led by Peter Svetina, decided not to re-submit the amendments to the Aliens Act to the Constitutional Court for review. Seemingly disappointed as the National Assembly adopted provisions with virtually the same wording, the Ombudsman decided not to claim constitutional review once against but instead decided to notify the European Commission about the legislation, with an explanation: "In light of past experience in 2017, therefore, the question is what would actually be achieved in the event of a re-challenge of the amended regulation and a possible success before the Constitutional Court" (Petrovčič, 2021). Civil society and legal scholars working in the field of asylum and constitutional rights have heavily criticized both the re-enactment of the amendments by the National Assembly and the decision of the Human Rights Ombudsman, stating that the corrections are cosmetic and that if the Constitutional Court reviewed the law, it would once again be declared unconstitutional (Smajila, 2021).

CONCLUSIONS

As Benedek states, all these new measures intend to make the countries less attractive for asylum seekers and thereby reduce the number of applications and the costs for the state. He emphasizes that it will be "up to the Austrian and European Courts to review whether these measures comply with constitutional law, human rights, and European law" (Benedek, 2019: 962). Adjudication of cases will take place in the framework of ever-harsher political rhetoric gaining continuous support among the voters. In both countries, previously moderate political parties repeatedly adopt ever more extreme nationalistic positions, fearing losing popular support if they fail to do so. Erecting fences, adopting emergency legislation, and other asylum law restrictions all worked for that purpose: to attract and keep the voters who also seem to be moving to the right. The result is that, gradually, exceptions become the rule, which could, in fact, finally culminate in derogation from the right to asylum as a whole. As Benedek points out, these policy shifts have been quite remarkable in Austria, which has traditionally been more welcoming and accommodating toward asylum seekers. As for Slovenia, the situation is very different. The idea of asylum as a genuine will of the state as a member of the international community to provide protection because it wants to, not because it must, has never had a domicile in Slovenia. It is

a concept that has been understood as imposed on the state by external actors, such as the EU. The state, wanting to progress on the international social ladder, was pretending to diligently follow what was expected, adopting all the necessary asylum legislation and the asylum system in general (Kogovšek Šalamon, 2018).

What is at stake in this situation is the general respect for human rights protection standards stemming from the experience of World War II. It is also a question of respect for the principles of the rule of law, the division of powers, and the checks and balances that should be at work in such situations. It has been revealed by these developments that we can no longer rely upon checks and balances and the respect of one branch of the government toward the other. It takes blunt authorities that show a significant level of pretentiousness to simply disregard the positions of the Constitutional Court. The latter is as powerful as the other branches of power are willing to respect its positions. While it seemed that the Constitutional Court could stand against populist and unconstitutional legislative approaches toward migration management, when populism is on the rise, the courts will not be sufficient to firmly set the constitutional boundaries that must be respected. Generally speaking, the courts cannot be relied upon to perform this task on their own, particularly on the systemic legislative level.

However, in individual cases, the court has played a pivotal role in protecting the rights of persons who used legal remedies to secure their rights enshrined in the legislation on the national, European, and international levels. In Austria, Josipovic and Reeger (2019, 46) underline that not only high courts but also administrative courts responsible for appeals against first-instance decisions of the Immigration Office have acted as safety nets protecting individual rights. The situation in Slovenia was the same (Kogovšek Šalamon, 2018). Hence, on this more individual level, courts seem to be some of the few barriers to populism left.

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POVZETEK

ZAKONODAJNI IN PRAVOSODNI ODZIVI NA »BEGUNSKO KRIZO« V SLOVENIJI IN AVSTRIJI: PRIMERJALNA PERSPEKTIVA

Neža Kogovšek Šalamon

Avtorica primerja ključne normativne pristope k obravnavanju »begunske krize« v obdobju 2015–2016 ter odzive sodstva na te pristope v Sloveniji in Avstriji. K analizi pristopi s primerjavo statističnih podatkov na področju azila, najpomembnejših zakonodajnih sprememb, ki odražajo populistične odzive na »begunsko krizo«, ter odgovorov sodišč na te spremembe in odzive. Analiza je kvalitativna in temelji na izbranih primerih najpomembnejših zakonodajnih sprememb. Članek upošteva populistični kontekst teh sprememb, kot ga razumejo politologi, ki so kritični do avtoritarnih in nacionalističnih vrst populizmov. Ti pokažejo, da se je s krizo pojavil tudi nov val populizma – populistično označevanje migrantov kot Drugih, ki se je odražalo in se še odraža v idejah o drastičnem zapiranju državnih meja, sprejemanju skrajno restriktivne zakonodaje in kolektivnem izganjanju migrantov iz države. V tem kontekstu se avtorica osredotoči na primerjavo sprememb zakonodaje v Sloveniji in Avstriji, ki so bile sprejete po t. i. begunski krizi v letih 2015/16. V obeh državah se je politika na begunsko krizo zaradi javnega mnenja odzvala s sprejetjem novih predpisov, ki bi državnim institucijam omogočili, da bi po prihodu določenega števila prosilcev za mednarodno zaščito omejile dostop do učinkovitega azilnega postopka. Obe sta sprejem zakonodaje utemeljevali z neke vrste »izrednimi razmerami«, ne da bi jih izrecno poimenovali s tem nazivom, v obeh državah pa so bile te zakonske določbe v nasprotju s pravom EU in mednarodnim pravom. V Sloveniji je to izrecno potrdilo ustavno sodišče, v Avstriji pa so ukrepe kot pravno problematične označili različni pravni strokovnjaki, medtem ko se avstrijsko ustavno sodišče o njih ni izreklo, saj jih tudi nihče ni izpodbijal. Izpodbijanje navedenih določb avstrijske zakonodaje bi bilo vsekakor smiselno, saj je postopek ustavne presoje v Sloveniji pokazal, da v prid temu govori vrsta strokovnih argumentov s področja prava mednarodne zaščite. A kot je pokazal primer v Sloveniji, tudi uspešna ustavna zavrnitev določb ni zagotovilo za preprečevanje učinkovanja protiustavnih ureditev. Slovenski zakonodajalec je namreč nekaj let po izdani odločbi ustavnega sodišča razveljavljene določbe v skoraj identični obliki sprejel še enkrat. To sproža številna vprašanja o učinkovitosti varstva ustavnih pravic v obeh državah, o načelih delitve oblasti in o učinkovitosti sodstva. V nobeni od držav sicer zakonodajni ukrepi niso bili aktivirani in uporabljeni v praksi, ostajajo pa veljavni in na voljo državnim organom obeh držav. Medtem ko med ukrepi obstajajo očitne podobnosti, pa so dejanski družbeni konteksti, v katerih so bili sprejeti, povsem različni. Drži, da se Avstrija in Slovenija nahajata na isti begunski poti od jugovzhoda proti severozahodu, toda statistični podatki za obe državi kažejo zelo različno sliko. Medtem ko je med 1. januarjem 2015 in 31. decembrom 2020 v Avstriji za azil zaprosilo 196.767 ljudi, jih je v Sloveniji v istem obdobju zaprosilo samo 13.305.