The COVID-19 Emergency in Finland: Best Practice and Problems

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Finland has a modern Constitution with an ambitious catalogue of fundamental rights. Has this framework, including the constitutional regulation of emergency powers, been able to cope with the COVID-19 crisis? Are there lessons to learn from Finland?

Emergency Powers and their Use

In its fundamental rights reform of 1995 Finland adopted an internationally-inspired clause on derogating from fundamental rights when facing an emergency, subsequently placed as Article 23 of the 1999 Constitution.

The 2013 wording of Article 23 of the Constitution is:

Section 23 – Fundamental rights during situations of emergency

> Temporary exceptions to fundamental rights that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or during other situations of emergency defined by an Act as posing a serious threat to the nation, may be enacted through an Act, or through a Government Decree issued on the basis of authorization given in an Act for a specific reason and subject to a precisely circumscribed scope of application. The grounds for temporary exceptions shall always be laid down by an Act.
>
> Government Decrees concerning temporary exceptions shall without delay be submitted to Parliament for consideration. Parliament may decide whether the Decrees will be in force.

There are other provisions of the Constitution that would be applicable during armed conflict but they are not relevant for the current topic. The wording of Article 23 is highly complicated, and therefore its main elements are broken down here as follows:

- Temporary exceptions are not limited to situations of armed conflict but may be allowed also in other emergency situations defined by an Act (of Parliament).
- Such temporary exceptions can be issued directly by Parliament through a simple majority in the application of Article 23 itself.
- Alternatively, should Parliament foresee and define certain categories of emergencies through an Act, it can delegate the authority to enact exceptions from fundamental rights through Government Decrees.

- All exceptions must be compatible with Finland's international human rights obligations.
- Parliament shall be operative during a state of emergency but shifting from full legislative procedure to a more straightforward exercise of a power of *veto* in respect of emergency Decrees.

What complicates the matter further is that the Emergency Powers Act of 2011 was *not* enacted on the basis of Article 23 but through a traditional power of Parliament, maintained in Article 73 of the Constitution, to enact *exceptions* to the Constitution through the procedure required for amending the text of the Constitution. Article 23 of the Constitution provides a constitutional framework for eventual *new* emergency powers but the Emergency Powers Act provides a parallel source for emergency powers.

Section 3, item 5, of the Emergency Powers Act defines a dangerous contagious illness as one of five emergency situations foreseen. Section 5.1 includes a requirement of compatibility with Finland's international human rights obligations, similar to Article 23 of the Constitution. Sections 6, 7 and 10 give the Cabinet (the Government) the power to issue emergency Decrees that will be reviewed, and can be vetoed, by Parliament. There is a four-step sequence in the application of emergency powers under the Emergency Powers Act:

- *Step 1*. The Cabinet, jointly with the President of the Republic, declares that Finland is faced with a type of emergency listed in Section 3.
- *Step 2.* The Cabinet issues a Decree that defines which specific provisions of the Emergency Powers Act are taken into use. Each of the five types of an emergency triggers the potential application of a different set of such provisions. Parliament reviews the Decree *ex ante* as to whether it shall enter into force. In an exceptionally urgent situation the Cabinet can issue a Decree that enters into force immediately, in which case Parliament will review it *ex post facto* and may order it to be repealed.
- *Step 3.* The Cabinet or Ministries exercise the authority delegated to them in Step 2 by issuing Decrees. These Decrees will enter into force immediately. Parliament will review them *ex post facto*, and may order them to be repealed. Some provisions of the Act, however, are crafted so that this step will be bypassed and administrative authorities can directly apply a triggering Decree of Step 2.
- *Step 4*. Administrative authorities apply the Decrees.

Finally, it should be mentioned that some ordinary laws may include emergency-type provisions. A case in point is the Communicable Diseases Act that provides for declaring, through a Decree issued by the Cabinet, of a hazardous communicable disease, as was done also in the case of COVID-19. This Act provides then for far-reaching powers such as mandatory testing, quarantine and even detention of individuals, as well as the closing of schools and other educational institutions, banning of public gatherings etc. (see, In particular, Section 58). Even if normally such powers are decentralised, the Cabinet has instructed regional state authorities for uniform nationwide application.

Application of Emergency Powers During the COVID-19 Epidemic: Six Problems

Much of Finland's response to the COVID-19 epidemic has been based on legal measures other than actual emergency powers, namely on *recommendations* to the public and legally binding orders pursuant to the 2016 *Communicable Diseases Act*. This reflects the principle of normalcy and is therefore commendable. For instance, physical distancing in everyday life has been implemented through "soft" recommendations to the public and employers, coupled with "hard" unilateral decisions by public authorities about the moving of education online and physical closing of many public buildings such as libraries and museums.

Nevertheless, on 16 March the Emergency Powers Act was taken into use. Within four weeks, several emergency Decrees have been issued and subsequently upheld by Parliament. In addition, one measure was adopted through the full legislative procedure directly under the emergency clause (Article 23) of the Constitution.

The provisions of the Emergency Powers Act that have so far been triggered relate to health care and social services (Sections 86-88), to educational institutions (Section 109), derogations from employees' rights concerning annual holidays, working hours and resignation (Sections 93-94), introducing compulsory work for health care professionals (Section 95 et seq.), and restrictions upon freedom of movement (Section 118). The two last-mentioned measures triggered criticism (see below). After Section 95 was triggered, the authorities have started to chart the persons covered by the obligation to work by using nationwide database of professionals. The application of Section 118, in turn, was used to seal off the capital Helsinki and the region of Uusimaa around it, from the rest of the country for three weeks.

In addition to these emergency Decrees issued pursuant to the Emergency Powers Act, restaurants were closed down, save for take-out orders, through a separate Act of Parliament (Act 153/2020) enacted directly under the emergency clause (Article 23) of the Constitution, as an exception to the fundamental rights of property and free conduct of business.

Within the first month of the COVID-19 emergency, at least six distinct problems have emerged in the application of emergency powers:

1. No Parliamentary scrutiny of declaring a state of emergency. Pursuant to Section 6.1 of the Emergency Powers Act, the Cabinet, jointly with the President of the Republic, declared that Finland was in a situation of a double emergency, both a health emergency (Section 3, item 5) and an economic emergency (Section 3, item 3). The emergency declaration itself is *not* reviewed by Parliament. Only when the Cabinet issues a Decree to take into use some specific *powers* under the Emergency Powers Act, such Decrees will be subject to scrutiny. All Decrees so far have been based on Section 3, item 5, while the parallel economic emergency has not triggered any action. By its own decision not to resort to any of the potentially available very far-reaching powers that resemble a war-

like centralized state-run economy, the Government has itself proven that on 16 March there was no economic emergency. An economic emergency may still arise, but it is problematic that it was declared but not reviewed.

2. The Cabinet has been stumbling over the complicated structure of the Emergency Powers Act and the failure to synchronize it with revised Article 23 of the Constitution. Parliament's Committee on Constitutional Law has urged the Cabinet to follow the rulebook and to respect the separation between different types of emergency Decrees under the Emergency Powers Act. The Committee has also stated that the Cabinet has triggered several provisions of the Emergency Powers Act too early. (Reference is made to a series of weekly blog posts by professor Pauli Rautiainen.)

3. *Lack of expertise*. The Government appears to suffer of lack of adequate legal and constitutional expertise in crafting emergency Decrees. This problem can be attributed rather to the senior lawyers and other civil servants advising the Cabinet than to the Ministers themselves. The Decrees have appeared amateurish, not only in the way indicated in the previous point, but also by not properly specifying the legal basis for each Decree, and by failing to provide a proper assessment of compatibility with Finland's international human rights obligations.

4. *Also the scrutiny by Parliament* appears not to utilize all available expertise. Professors of constitutional law are heard as external experts but issues related to international human rights treaties, economic, social and cultural rights (even if in the Constitution), or rights of vulnerable groups such as persons with disabilities are not adequately reflected when hearing experts. In some matters Parliament has ignored the expert advice it asked for; political consensus perhaps replacing the requirement of full conformity with the Constitution.

5. *Risk of neglecting international human rights obligations*. When reviewing emergency Decrees, the Committee on Constitutional Law includes in its report a phrase that reminds those who will *apply* the emergency Decrees about the requirement to comply with international human rights. For instance, when dealing with the Decree to seal off the Uusimaa region Parliament's Committee on Constitutional Law laconically stated: "In addition, the Committee draws attention to Section 5 of the Emergency Powers Act, according to which the application of the Act shall comply with international obligations binding upon Finland and generally recognized rules of international law". As the Constitution does not include any category of non-derogable rights, there is a risk that human rights treaties will not receive proper attention even where non-derogable rights may be at issue. For instance, the sealing off of the Uusimaa region where one third of the population lives, was decided as an exception to freedom of movement, under the justification of protecting the right to life of people living outside Uusimaa where the virus was less prevalent but where there also is less capacity for patients needing intensive care. The problem with the Decree was, as discussed in this joint blog post with Pauli Rautiainen, that it failed to introduce protective measures *within* Uusimaa, so as to protect the elderly and other persons belonging to high-risk categories. Without such

measures, sealing off Uusimaa might in a worst-case scenario compromise the right to life of those people in the name of protecting the right to life of others. Compulsory work of health care professionals is another matter where an analysis of non-derogable rights would be needed, especially as no COVID-19-tailored upper age limit (e.g. 50) was set when triggering the power.

6. *Exceptions and derogations*. Related to the previous problem, one needs to ask whether the prevailing construction of the emergency Decrees constituting exceptions to, rather than permissible restrictions upon, fundamental rights enshrined in the Constitution, does not call upon Finland to notify Council of Europe under ECHR Article 15 and the United Nations under ICCPR Article 4 about derogating from those treaties. The prevailing view is that exceptions to constitutional rights would qualify as permissible limitations under human rights treaties. The soundness, or at least honesty, of this position has been questioned in another blog post by this author. One clear benefit of depositing notifications of derogation would be that Finland would need to specify the human rights treaty provisions from which it derogates, thereby also ending up in upholding non-derogable rights.

Four Elements of Best Practice

Despite the problems just mentioned, there are a number of best practice lessons that Finland may be able to provide. Some

1. The principle of normalcy: Parliament is not suspended but very much involved in day-to-day management of the emergency, even if not in the form of full legislative procedure. Its ability to operate is secured through internal measures adopted by Parliament itself, e.g. moving much of its official business online. Measures about physical distancing in everyday life are primarily implement through recommendations.

2. Human rights clauses: Both the emergency clause in the Constitution and the Emergency Powers Act contain explicit clauses that require compliance with international human rights obligations.

3. Sunset clauses: All emergency Decrees are required to be of temporary nature (maximum 6 months and in practice during the COVID-19 epidemic much shorter) and to lapse automatically if not renewed by the Cabinet and reviewed anew by Parliament. Also the only Act so far adopted directly under the emergency clause (Article 23) of the Constitution contains a sunset clause.

4. Systematic and pluralistic review of constitutionality and fundamental-rights-conformity: The Chancellor of Justice screens the legality of every Decree before it is decided by the Cabinet. As part of parliamentary review, the standing Committee of Constitutional Law scrutinizes the constitutionality and fundamental-rights-conformity of every emergency Decree. In so doing, the Committee, also when dealing with urgent emergency Decrees, hears external academic experts, typically professors of constitutional law whose legal

opinions are made public. The Decrees are in real time also subject to public scrutiny in Perustuslakiblogi, a Finnish-language constitutional law blog which is being followed by e.g. journalists and politicians.

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All the best, *Max Steinbeis*

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