



## Legislation, emergencies and the need for swift action

Tensions between the executive branch and emergency legislation during the COVID-19 pandemic in Finland

Tuukka Brunila

To cite this article: Tuukka Brunila (25 Sep 2024): Legislation, emergencies and the need for swift action, The Theory and Practice of Legislation, DOI: [10.1080/20508840.2024.2407225](https://doi.org/10.1080/20508840.2024.2407225)

To link to this article: <https://doi.org/10.1080/20508840.2024.2407225>



© 2024 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 25 Sep 2024.



Submit your article to this journal [↗](#)




View related articles [↗](#)



View Crossmark data [↗](#)

# Legislation, emergencies and the need for swift action Tensions between the executive branch and emergency legislation during the COVID-19 pandemic in Finland

Tuukka Brunila 

Doctor of Social Sciences, Faculty of Law, University of Turku, Post-Doctoral Researcher

## ABSTRACT

In this article, I analyse the tensions between the need for swift action and enactment of emergency legislation during Finland's COVID-19 pandemic response. I focus on how this demand for the executive branch to take swift and decisive action met and clashed with the temporal (in)efficiency of emergency legislation. A legalist emergency measures theory is developed to approach this issue in the context of the Finnish emergency regime, which is legalist in principle. Legalist emergency regimes are those that (1) require emergency measures to be grounded in law, (2) seek to legislate emergency powers in advance, and (3) necessitate that legislation is active during emergencies. Based on reports regarding the executive branch's actions during the pandemic, I discuss issues regarding the alleged slowness of legislation during emergencies. The article seeks to further develop the theoretical discussion on the temporal aspects of emergency measures.

**KEYWORDS** Emergency legislation; COVID-19; Finland; legal theory; temporality

## 1. Introduction

In trying to ensure both effective emergency governance and the respect of the rule of law and commitments to human rights treaties, societies do, however, witness tensions between the executive branch and the legal system, strains which were also present during the pandemic.<sup>1</sup> One aspect of this tension comes from the fact that during an emergency situation, laws may inhibit an effective emergency response. As Kim Lane Scheppele maintains, such a perspective on emergency powers is based on the notion that 'constraining

**CONTACT** Tuukka Brunila  tuukka.brunila@utu.fi  Doctor of Social Sciences, Faculty of Law, University of Turku (20014, Finland), Post-Doctoral Researcher

<sup>1</sup>Nicos Alivizatos and others, *Interim Report on the Measures Taken in the EU Member States as a Result of the COVID-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights*, CDL-AD (2020)018 (Venice Commission 2020) 18.

© 2024 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

the executive by ordinary rules of law when the state faces a mortal challenge is to deprive the state of the wherewithal to protect and defend itself in the ways it may need in order to survive'.<sup>2</sup> In contrast to this perspective, defended by extralegalists,<sup>3</sup> a legalist emergency regime seeks to legislatively regulate emergency measures. According to one proponent of this theory, Michael Ignatieff states, 'to conduct a defense of liberal society in defiance of these precommitments is to betray the order that is being defended, as well as the citizens whose security depends on that order'.<sup>4</sup> This is the basic principle of legalism, which necessitates that in an emergency, legality must not be shelved.

In this contribution, I discuss and analyse the tension between legislation and the executive branch in Finnish governance during the COVID-19 crisis. I base my analysis on reports by Finnish public authorities, such as the Safety Investigation Authority (*Onnettomuustutkintakeskus*), and surveys commissioned by the State Council of Finland or other public agencies. My analytical focus is on the tension derived from the need to act swiftly and decisively, while simultaneously ensuring that the law is upheld whenever exceptions to fundamental rights are made. I focus on how this demand to act swiftly in measures taken by the executive branch, which mostly refers to the government, administration, and the president, comes into contact and conflicts with legal limits. I approach this topic by discussing the temporal (in)efficiency of emergency legislation. My hypothesis is that an analysis of concrete examples in which the need to act swiftly is in direct conflict with legislation can reveal new insight into legalist emergency regimes, while further developing legalism as a branch of emergency measures theory.

The Finnish model can be understood to, some extent, follow the legalist model, at least in the sense that all emergency powers are prepared for in advance by legislative means.<sup>5</sup> Section 23 of the Constitution of Finland requires that provisional exceptions to basic rights and liberties must be compatible with Finland's international human rights commitments, while ensuring that the grounds for such provisions must be stipulated by a legal act. Furthermore, Finnish emergency powers and responsibilities are legislated in advance and exceptions to fundamental rights are ordained legislative acts. While these basic legalist principles were mostly respected in Finnish pandemic governance, administrators, government officials, and

---

<sup>2</sup>Kim Lane Scheppelle, 'Legal and Extralegal Emergencies' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press 2009) 165–66.

<sup>3</sup>Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Victor V Ramraj (ed.), *Emergencies and the Limits of Legality* (1st edn., Cambridge University Press 2008) <[https://www.cambridge.org/core/product/identifier/CBO9780511552021A011/type/book\\_part](https://www.cambridge.org/core/product/identifier/CBO9780511552021A011/type/book_part)>.

<sup>4</sup>Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (4th print., 1st paperback print, Princeton Univ Press 2005) 53.

<sup>5</sup>Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' (2018) 19 *German Law Journal* 219.

the president, felt that the emergency (would have) sometimes required an overreach of pre-existing laws, maintaining that the pandemic response should have been quicker. It is in these examples, which I analyse below, that the tension between the need to act swiftly and legislative processes and the legalist emergency regime became apparent.

My analysis concerns the temporal aspects of emergency governance. It is a perennial topic, as the slowness of legislation in reacting to crises has been noted by thinkers such as Machiavelli<sup>6</sup> and other classics of political philosophy regarding states of emergencies.<sup>7</sup> The response to this issue has mainly been by requiring that governments prepare for emergencies in advance.<sup>8</sup> It is easier to agree upon limited and proportional measures when the emergency is not at hand.<sup>9</sup> For example, David Dyzenhaus states that, regarding the temporality of emergencies and emergency legislation, governments during a state of normalcy ‘have the luxury of time to craft a response to emergency situations’.<sup>10</sup> While this is definitely an aspect of how actual legalist emergency regimes seek to resolve the issue, preparation does not exhaust the strategies that such regimes have at their disposal. As I point out in my analysis, legalist emergency regimes can also hasten the legislative process, a strategy which was also used in Finland during the pandemic. To be sure, speeding up legislative processes often leads to decline in quality and rule of law compliance,<sup>11</sup> it is still an underdeveloped aspect of how legalist emergency regimes actually function and seek to solve the issue regarding the temporal (in)efficiency of emergency legislation.

## 2. Legal limits to the state of emergency

In this section, the main phenomenon I am interested concerns the demands that the need to act swiftly poses to the legal system, my focus being on the

<sup>6</sup>Niccolò Machiavelli, *Discourses on Livy* (Harvey C Mansfield and Nathan Tarcov trs, University of Chicago Press 1998) 74.

<sup>7</sup>See David Dyzenhaus, ‘States of Emergency’ in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

<sup>8</sup>In this context, the Venice Commission recommends legislating and regulating emergency in advance as it can provide better guarantees for fundamental rights, democracy and the rule of law. Nicos Alivizatos and others, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections*, CDL-PI(2020)005rev (Venice Commission 2020) 6.

<sup>9</sup>David Dyzenhaus, ‘The Compulsion of Legality’ in Victor V Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press 2008) 53.

<sup>10</sup>David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (1st edn., Cambridge University Press 2006) 213.

<sup>11</sup>Pandemic examples include Sweden and France. See Iain Cameron and Anna Jonsson Cornell, ‘Dealing with COVID-19 in Sweden: Choosing a Different Path’ in Joelle Grogan and Alice Donald (eds.), *Routledge Handbook of Law and the COVID-19 Pandemic* (1st edn., Routledge 2022) 243–44; Marie-Laure Basilien-Gainche, ‘The French Management of COVID-19: Normalisation of Regimes of Exception and Degradation of the Rule of Law’ in Joelle Grogan and Alice Donald (eds.), *Routledge Handbook of Law and the COVID-19 Pandemic* (1st edn., Routledge 2022) 441; Arianna Vedaschi and Chiara Graziani, ‘COVID-19 and Emergency Powers in Western European Democracies’ in Joelle Grogan and Alice Donald, *Routledge Handbook of Law and the COVID-19 Pandemic* (1st edn., Routledge 2022) 394.

temporal aspects of emergencies and legislation. While emergencies are often fast-paced and necessitate quick decisions, for its part, legislation functions according to a different, typically much slower time-frame.<sup>12</sup> In the following, I discuss two oppositional theoretical perspectives on this issue: extralegalist and legalist.<sup>13</sup> The former demands that for the sake of quick action, the law should be put aside during emergencies.<sup>14</sup> According to the latter, emergency measures should be grounded in legal precedents and regulated by legislative and judicial means, even during emergencies.<sup>15</sup>

Whilst engaging with this theoretical discussion, I seek to elaborate how, during emergencies, there is pressure to abandon the legalist approach and utilise extralegal measures instead. My first goal is to describe a basic theoretical perspective on how the need to act swiftly creates a demand to act beyond legal limits and how this need manifests itself in actual crises. Second, I elaborate a normative legalist standpoint on why legal limits to emergency measures should be upheld in emergencies. To emphasise, my discussion of normative approaches to law and legislation is aimed at describing (rather than prescribing) the normative background of legalist emergency regimes.

The following analysis of pandemic emergency response is meant to further develop the discussion of temporality from a legalist standpoint. Different legal layers and practices are temporally distinct.<sup>16</sup> For example, the ordinary legislative process has its own temporality,<sup>17</sup> which is enforced by procedural requirements.<sup>18</sup> An emergency, for its part, is temporally distinct from normal legal practices and processes,<sup>19</sup> as it implies an urgent threat that demands immediate action.<sup>20</sup> For this reason, some argue that because of a law's inherently time-consuming temporality, it is altogether irreconcilable with the temporal pressure of an emergency.<sup>21</sup>

While law is indeed slow to react to all social phenomenon, emergency measures offer a special case. Emergencies differ from other social issues

---

<sup>12</sup>Sven Opitz and Ute Tellmann, 'Future Emergencies: Temporal Politics in Law and Economy' (2015) 32 *Theory, Culture & Society* 107, 117–18; Sascha Mueller, 'Turning Emergency Powers inside out: Are Extraordinary Powers Creeping into Ordinary Legislation' (2016) 18 *Flinders Law Journal* 295, 306.

<sup>13</sup>Scheppele (n 8).

<sup>14</sup>Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 *Yale Law Journal* 1011.

<sup>15</sup>Dyzenhaus, *The Constitution of Law* (n 16).

<sup>16</sup>Kaarlo Tuori, *Properties of Law: Modern Law and After* (Cambridge University Press 2021) 142.

<sup>17</sup>Kari Palonen, 'Four Times of Politics: Policy, Polity, Politicking, and Politicization' (2003) 28 *Alternatives: Global, Local, Political* 171, 180.

<sup>18</sup>Sergio Bartole and others, *Rule of Law Checklist* (Venice Commission 2016) 21.

<sup>19</sup>Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge university press 2006) 174; Ninon Grangé, *L'urgence et l'effroi: l'état d'exception, la guerre et les temps politiques* (ENS éditions 2018) 92.

<sup>20</sup>Ninon Grangé, 'Les temporalités de l'état d'exception' in Marie Goupy and Yann Rivière (eds.), *De la dictature à l'état d'exception: approche historique et philosophique* (École française de Rome 2022) 378–80.

<sup>21</sup>Opitz and Tellmann (n 22) 122.

as legal systems often authorise a shift in the balance of power in favour of the executive.<sup>22</sup> Therefore, emergencies need to be truly exceptional and temporally limited phenomena. For example, the Venice Commission states that emergency powers should not ‘be applied in case of threats that, however unfortunate and dramatic, are endemic to modern societies and can never be fully eradicated (common crime, sporadic terrorist attacks, etc.)’.<sup>23</sup> Emergencies are therefore temporally distinct from crises, which often tend to become indefinite state of affairs without clear temporal limits.<sup>24</sup>

However, emergencies can be prolonged, along with their temporal limits, therefore becoming ambiguous,<sup>25</sup> as the end of any emergency is unknown and far away, at least in the initial stage.<sup>26</sup> This uncertainty might even lead to an indefinite renewal of emergency legislation,<sup>27</sup> thus making it difficult to distinguish between ordinary and emergency legislation – as the very distinction is based on the fact that emergency laws are temporarily valid in contrast to ordinary ones.<sup>28</sup> Here, however, I am only interested in the temporal aspect of emergencies regarding the need to act swiftly and the kind of tension it implies between legislation and executive action. In fact, as I argue below in section 4, there are still unexplored aspects of this tension that should be addressed by the legislator and legislative practices.

The need to act swiftly during emergencies is a venerable topic in political and legal thought. For example, the renaissance thinker Niccolò Machiavelli argued that it is better that a single person is in charge during emergencies as the need to negotiate among individuals and reconcile different opinions is too time consuming.<sup>29</sup> According to William E. Scheuerman, the fact that an emergency creates a demand for making quick decisions and acting swiftly has led many to assume that an executive unencumbered by legal limits is better suited for dealing with any emergency.<sup>30</sup> The need to act swiftly in an emergency often implies an all-encompassing theory of state power as a

<sup>22</sup>Alvizatos and others (n 6) 16.

<sup>23</sup>Alvizatos and others (n 14) 6.

<sup>24</sup>Janet Lee Roitman, *Anti-Crisis* (Duke University Press 2014) 64; Lotte List, ‘Crisis Sovereignty: The Philosophy of History of The Exception’ (Copenhagen Business School 2023) 212.

<sup>25</sup>William E Scheuerman, ‘Rethinking Crisis Government’ (2002) 9 *Constellations* 492, 499–501; Gross (n 24) 1022; J Ferejohn and P Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *International Journal of Constitutional Law* 210, 228; Gross and Ni Aoláin (n 29) 175; Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 45–48.

<sup>26</sup>Grangé (n 30) 381.

<sup>27</sup>Mark Neocleous, ‘The Problem with Normality: Taking Exception to “Permanent Emergency”’ (2006) 31 *Alternatives: Global, Local, Political* 191, 200.

<sup>28</sup>David Dyzenhaus, ‘States of Emergency’ in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (Blackwell Publishing 2007) 809; Antonios Kouroutakis and Sofia Ranchordas, ‘Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies’ (2016) 25 *Minnesota Journal of International Law* 29, 76.

<sup>29</sup>Machiavelli (n 12) 74.

<sup>30</sup>Scheuerman (n 35) 493–94.

unified whole. That is, political and legal theorists tend to understand the executive as an embodiment of this unity, as it is allegedly more hierarchically structured in contrast to the parliament, hindered by its numerous representatives.<sup>31</sup>

In theories of emergency measures, it has often been emphasised that laws simply hamper emergency governance. Clinton Rossiter argues that as the constitutional order is ‘essentially designed to function under normal, peaceful conditions’, the law simply stands in the way of effective emergency response.<sup>32</sup> This means that ‘there is no denying the fact that responsible statesmen in every free country have broken the law in order to protect the nation in time of serious national emergency, and responsible statesmen will do it again’.<sup>33</sup> Similarly, Richard A. Posner claims that ‘in conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later’.<sup>34</sup> In a fast-paced and evolving emergency, law order presents merely a limit on, or a hindrance to, the executive’s response to the crisis.

For extralegalists, attempts to pre-emptively legislate emergency measures and powers are dangerous in so far as they slow down the emergency response.<sup>35</sup> A prominent example of these types of extralegal emergency measures theory has been developed by Eric A. Posner and Adrian Vermeule, a theory that demands ‘the constitution should be relaxed or suspended during an emergency’.<sup>36</sup> Through an analysis of the US’s response to the 9/11 attacks, they claim that legislation simply limits the executive’s room for action.<sup>37</sup> Furthermore, legislatures are inefficient at limiting the executive as their role is reduced to a mere reactive role rather than empowering them to take charge in the drafting of policies.<sup>38</sup> Therefore, Posner and Vermeule argue that norms cannot grasp the exception or that ‘ex ante legal rules cannot regulate crises in advance, because unanticipated events will invariably arise’.<sup>39</sup> Accordingly, they maintain that emergencies are complex issues that require secrecy,

---

<sup>31</sup>Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2010) 10.

<sup>32</sup>Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers 2002) 5.

<sup>33</sup>ibid 12.

<sup>34</sup>Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006) 4.

<sup>35</sup>Mark Tushnet, ‘Emergencies and the Idea of Constitutionalism’ in Mark Tushnet (ed.), *Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press 2005) 46–47; Posner (n 44) 86; Mark Tushnet, ‘The Constitutional Politics of Emergency Powers: Some Conceptual Issues’ in Victor V Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press 2008) 149–50; Posner and Vermeule (n 41) 91.

<sup>36</sup>Eric A Posner and Adrian Vermeule, ‘Accommodating Emergencies’ (2003) 56 *Stanford Law Review* 605, 606.

<sup>37</sup>Posner and Vermeule (n 41) 50–51, 60–61, 207–08.

<sup>38</sup>ibid 55.

<sup>39</sup>ibid 42.

speed and a chain of command – capacities that only the executive branch holds, though which an effective executive can execute unilateral action.<sup>40</sup>

In contrast, the legalist perspective maintains that legality and legitimacy are vital part of the effective emergency governance. An executive unbound by law can appear unconstitutional and therefore illegitimate. In this context, the Venice Commission makes a distinction between constitutional, *de jure*, and extra-constitutional, *de facto*, states of emergency, recommending *de jure* constitutional emergency powers as they ‘can provide better guarantees for fundamental rights, democracy and the rule of law’.<sup>41</sup> These guarantees are not simply limits on effective emergency governance but can be conceived as regulations that ensure the legality and legitimacy of emergency measures. Specifically, this means constitutional regulation of emergency powers by principles such as necessity, proportionality, temporariness and predictability. This is legalist as it seeks to legislate emergency authorities and capacities, in advance, in order to make emergency governance more legitimate and less extensive.<sup>42</sup>

Dyzenhaus has developed a legalist theory of emergency measures demanding that, during emergencies, the executive must answer to the ‘compulsion of legality’. Only those extraordinary executive acts formulated on a legal basis are legitimate.<sup>43</sup> For this reason, Dyzenhaus argues that legalism requires some moral standards.<sup>44</sup> For a law to be legitimate, it must be able to prevent the arbitrary use of power. Emergencies should *not* offer an exception to this principle.<sup>45</sup> This does not, however, imply that all governance is equivalent in normal and emergency situations. Rather, a special emergency legislation is created *in antecessum* to delegate tasks and designate authorities in a state of emergency. By means of special legislation, the executive remains accountable to legal, legislative and judicial oversight during emergencies.<sup>46</sup> It is only then that emergency measures remain legally legitimate.

### 3. Tensions between swift action and legislation in Finland’s pandemic response

In this section, I will analyse the pandemic-era tension between the legislative and executive branches in instances where the need to act swiftly came into conflict with existing laws and legislative processes. In Finland, the main issues regarding pandemic governance have been coordination and rushed

---

<sup>40</sup>ibid 9, 11.

<sup>41</sup>Alvizatos and others (n 14) 6.

<sup>42</sup>Mueller (n 22) 296.

<sup>43</sup>Dyzenhaus, ‘States of Emergency’ (n 13) 451.

<sup>44</sup>Dyzenhaus, ‘The Compulsion of Legality’ (n 15) 58.

<sup>45</sup>Dyzenhaus, ‘States of Emergency’ (n 13) 451–52.

<sup>46</sup>Ignatieff (n 10) 44.

legislation. These issues were evident at all levels of the executive branch. Ministries, administration and even the Finnish President reacted to these conflicts in their own manner. The examples I discuss in this section are not meant to be exhaustive, rather, my focus is placed on questions regarding temporal (in)efficiency of emergency legislation. For this reason, discussion concerning the extensiveness of some of the Governmental Decrees and Acts of Parliament, and the subsequent conflicts with fundamental rights and international commitments, are only mentioned in passing.<sup>47</sup>

### 3.1. COVID-19 and emergency governance

Every emergency is different and the challenges pertaining to them are often novel and unique. Therefore, it is important to first elaborate the challenges and aspects of emergency governance during the pandemic before analysing the Finland's pandemic response.

First, pandemic governance, especially in the beginning of spring 2020, was necessarily based on inadequate information as research regarding the disease was still in its nascent phase.<sup>48</sup> This challenge has always been present in cases of pandemics.<sup>49</sup> Furthermore, a contagious disease can create a more fundamental sense of uncertainty because of its 'invisibility' and unpredictability,<sup>50</sup> which might lead to the employment of extensive and, sometimes, even excessive measures.<sup>51</sup> In contrast to other emergencies, the lack of information and solutions often leads to a temporally distinct strategy of 'buying time' as the situation develops. During the COVID-19 pandemic, this was known as the 'flattening the curve' strategy, which Mary Dobbs describes as a course of action that 'involves trying to control the spread of the disease so that the increase in cases, especially those requiring medical treatment, hospitalisation and specifically the use of ventilators, is slowed (e.g. until  $R_0 = 1$ ) and remains within the capacity of the public health system'.<sup>52</sup> Flattening the curve involves ensuring that society and

<sup>47</sup>See e.g. Martin Scheinin, 'Finland's Success in Combatting COVID-19' in Joelle Grogan and Alice Donald (eds.), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022); Tuukka Brunila, Janne Salminen and Mikko Värttö, 'Oikeuden Resilienssi Poikkeuksellisissa Oloissa – Perustuslakivaliokunnan Rooli Oikeuden Ylläpitämisessä Covid-19-Pandemian Aikana' [2023] *Lakimies* 1011.

<sup>48</sup>Mary Dobbs, 'National Governance of Public Health Responses in a Pandemic?' [2020] *European Journal of Risk Regulation* 1, 243.

<sup>49</sup>D Buchillet, 'Epidemic Diseases in the Past: History, Philosophy, and Religious Thought' in Michel Tibayrenc (ed.), *Encyclopedia of Infectious Diseases* (1st edn., Wiley 2007).

<sup>50</sup>Davina Lohm and others, "'Fuzzy" Virus: Indeterminate Influenza Biology, Diagnosis and Surveillance in the Risk Ontologies of the General Public in Time of Pandemics' (2015) 17 *Health, Risk & Society* 115, 1515.

<sup>51</sup>However, sometimes the opposite might happen. As was the case in the US and Brazil, where the executive initially refused to anything to resolve the issue. See David E Pozen and Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 *American Journal of International Law* 608.

<sup>52</sup>Dobbs (n 63) 244.

social institutions do not collapse under the pressure of the crisis, while also ensuring that citizens comply with instructions and restrictions. This does not seek a complete suppression of the rate of infection but rather attempts to keep infection levels at manageable levels.

Second, the pandemic was a markedly legislative phenomenon. A recent study by Ginsburg and Versteeg highlights that more than half (of the globally surveyed) countries relied on legislation.<sup>53</sup> In a pandemic, especially when information about its nature and effective response strategies are scant, new legislation might sometimes be necessary in response to unforeseen events. However, the abovementioned danger in legislating during a crisis, namely that there is no time for due reflection for both democratic and expert opinions, was also present during the COVID-19 pandemic. For example, Sweden hurriedly introduced bills for providing temporary executive powers with only a short period of consultation from public bodies.<sup>54</sup> For this reason, after its introduction, the type of crisis legislation should be reviewed or be made temporally limited with an expiration date to best ensure that the normal legal order is not affected by them.<sup>55</sup>

Lastly, according to Joelle Grogan and Alice Donald, one can neither simply infer from the form of regimes (democracy or autocracy) nor from the legal frameworks (pre-existing constitutional emergency articles or lack thereof) how various states eventually managed to tackle the crisis.<sup>56</sup> This means that there cannot be a general theory of pandemic government. During the pandemic, the world witnessed a plurality of various responses, a plurality that reflected the various legal systems, power relations, and political cultures of many nations. This means that one has to analyse pandemic measures in order to understand legal system rather than focus on mere pre-existing legislation and past emergencies.

### 3.2. Finnish emergency governance and the pandemic

Finnish emergency governance is based on legalist principles.<sup>57</sup> Emergency authorities and powers are legislated in advance and existing legislation is amended if the pre-existing legislation is found insufficient.<sup>58</sup> A state of

<sup>53</sup>Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498, 1515.

<sup>54</sup>Cameron and Jonsson Cornell (n 17) 243–44.

<sup>55</sup>For example, in France legislation regarding contagious diseases has created permanent laws without necessary temporal limits. See Basilien-Gainche (n 17) 441; Vedaschi and Graziani (n 17) 394.

<sup>56</sup>Joelle Grogan and Alice Donald, 'Lessons for a 'Post-Pandemic' Future' in Joelle Grogan and Alice Donald (eds.), *Routledge Handbook of Law and the COVID-19 Pandemic* (1st edn., Routledge 2022) 474–75.

<sup>57</sup>Johannes Heikkonen and others, *Valmiuslaki Ja Perusoikeudet Poikkeusoloissa: Valtiosääntöoikeudellinen Kokonaisarvio Valmiuslain Ja Perustuslain 23 §:N Suhteesta* (Valtioneuvoston kanslia 2018) 18; Erin Houlihan and William Underwood, *Emergency Law and the COVID-19 Pandemic: Global State of Democracy Thematic Paper 2021* (International Institute for Democracy and Electoral Assistance 2021) 4.

<sup>58</sup>HE 248/1989 vp, 4; PeVL 10/1990 vp, 1-2; HE 63/2022, 8; PeVL 29/2022 vp, 2; see Scheinin (n 57) 132.

emergency can be declared, but only if the situation cannot be governed by means of normal legislation.<sup>59</sup> Section 23 of the Constitution aside, the Emergency Powers Act (1552/2011) regulates the use of emergency powers. Section 6 of the Act grants the power during exceptional circumstances to issue decrees for applying exceptional competences provided in the second part of the Act.<sup>60</sup> The legislator's intention was that these competences should not be applied just to be on the safe side,<sup>61</sup> and that the decrees issued must be both necessary and proportional.<sup>62</sup> The grounds for applying these competences have to be grave and exceptional.<sup>63</sup> For example, during the pandemic the preservation of the functional capacity of the health care system was seen as such a ground for granting this power.<sup>64</sup> Furthermore, there are also relevant ordinary laws regarding pandemic governance, notably the Communicable Diseases Act (1227/2016), which was amended throughout the COVID-19 pandemic to better deal with specific challenges.<sup>65</sup>

The main rationality behind this legislative emergency framework is that emergency authorities and powers are legislated advance.<sup>66</sup> There is a temporal aspect to this rationale, as evidenced by the *travaux préparatoires* of the 2011 amendments to the Emergency Powers Act:

The powers needed in exceptional circumstances must be based on legislation prepared in advance in normal circumstances. This ensures that, on the one hand, *exceptional measures can be taken swiftly in exceptional circumstances* and, on the other hand, that the powers are not excessive or interfere unnecessarily with fundamental rights.<sup>67</sup>

The Emergency Powers Act, therefore, is meant to ensure that the government has the necessary capacity to respond quickly to emergencies. Furthermore, it is established according to legalist principles, as its intention to ensure that this is done in a way that respects fundamental rights and constitutional commitments.<sup>68</sup>

The Government of Finland oversees emergency governance. Both Section 6 of the Emergency Powers Act and Section 23 of the Constitution

---

<sup>59</sup>HE 248/1989 vp, 5, 11; PeVM 9/2020, 3; HE 94/2022 vp, 5; PeVL vp, 29/2022 vp, 3; PeVL 37/2022 vp, 3.

<sup>60</sup>Jonsson Cornell and Salminen (n 11) 240.

<sup>61</sup>PeVM 9/2022 vp, 5. However, during the pandemic, this seems to have happened as the Government declared a state of economic emergency without applying any of competences. Tuukka Brunila and Janne Salminen, "Regular Powers Are No Longer Enough" – Checks and Balances in Declaring a State of Emergency According to the Constitution of Finland' (2024) 70 *Scandinavian Studies in Law* 215, 230.

<sup>62</sup>HE 3/2008 vp, 34; HE 63/2022 vp, 62M PeVM 9/2022 vp, 5.

<sup>63</sup>HE 3/2008 vp, 1; HE 63/2022 vp, 7.

<sup>64</sup>PeVM 9/2022 vp, 4.

<sup>65</sup>Jari Stenvall and others, *Koronajohtaminen Suomessa: Arvio Covid-19 Pandemian Johtamisesta Ja Hallinnosta Syksystä 2020 Syksyyn 2021* (Valtioneuvoston kanslia 2022) 41.

<sup>66</sup>HE 248/1989 vp, 1, 4; HE 63/2022 vp, 7.

<sup>67</sup>HE 3/2008 vp, 5, emphasis added.

<sup>68</sup>HE 3/2008 vp, 30.

of Finland require that emergency decrees must be submitted to the parliament. The parliament then reviews the proportionality and necessity of these decrees. The parliament has the power to decide whether it remains in force or not, and whether the time it is in force should be shorter than intended.<sup>69</sup> At the beginning of the pandemic, one of the issues in this context was that neither the Emergency Powers Act nor the Communicable Diseases Act anticipated the need to intervene in freedom of trade by closing restaurants.<sup>70</sup> The government passed a temporary amendment (HE 25/2020) to the Act on Accommodation and Food Service Activities (308/2006).

The Government's response oscillated between suppression of the rate of infection and the aforementioned flattening the curve strategy.<sup>71</sup> In Spring 2020, at the onset of the pandemic, the rate of infection was suppressed through the enactment of extensive restrictions.<sup>72</sup> After declaring a state of emergency and adopting the Emergency Powers Act on 13 March 2020, which was later repealed on 15 June 2020, the Government closed down pubs and restaurants as well as established a border between the capital region of Uusimaa and the rest of Finland to restrict movement.<sup>73</sup> The second phase, from Autumn 2020 onwards, introduced a hybrid strategy with more targeted and localised action. During this time, the Government relied on ordinary legislation. In the third phase, the state of emergency again entered into force on 1 March 2021 and was repealed on 27 April 2021. In contrast to the state of emergency in March 2020, the powers granted by the Emergency Powers Act were used to a lesser extent.<sup>74</sup>

### 3.2.1. The government and administration

One of the main problems at the onset of the pandemic concerned the coordination of responsibilities.<sup>75</sup> Leadership and responsibility were initially unclear,<sup>76</sup> both within the Government and between state and local level administration.<sup>77</sup> Cooperation between social and health

<sup>69</sup>Brunila and Salminen (n 85) 223.

<sup>70</sup>Martti Mörttinen, *Valtioneuvoston Ydin Kriisitilanteissa: Covid-19-Pandemian Paineet Suomalaiselle Päätöksenteolle* (Sitra 2021) 31.

<sup>71</sup>Scheinin (n 57) 134.

<sup>72</sup>Tapio Juntunen and Ari-Elmeri Hyvönen, 'Koronakriisi, Informaatio Ja Resilienssipolitiikka' (2020) 5 *Kosmopolis* 72, 79.

<sup>73</sup>Toomas Kotkas and others, 'Finland: Legal Response to Covid-19' in Jeff King, Octávio LM Ferraz and et al. (eds.), *Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press 2023) 14.

<sup>74</sup>*ibid.*

<sup>75</sup>Onnettomuustutkintakeskus, *Koronaepidemian Ensimmäinen Vaihe Suomessa Vuonna 2020* (2020) 92.

<sup>76</sup>Deloitte, *Selvitys Koronakriisin Aikana Toteutetun Valtioneuvoston Kriisijohtamisen Ja Valmiuslain Käytönoton Kokemuksista* (Valtioneuvoston selvityksiä 2021) 33–35.

<sup>77</sup>Onnettomuustutkintakeskus (n 100) 92–93; Deloitte (n 101) 36; Laura Kihlström and others, *Globaali Pandemia Ja Paikalliset Ratkaisut – COVID-19 Pandemian Paikallinen Hallinta Ja Johtaminen Suomessa* (Terveyden ja hyvinvoinnin laitos 2021) 4; Laura Kihlström and others, 'Kenenkä Vastuulla Tää Nyt Sitten on? Ei Ehkä Ainakaan Meidän': *COVID-19-Pandemian Hallinta Ja Johtaminen Suomessa* (Terveyden ja hyvinvoinnin laitos 2022) 4.

ministries was especially difficult, partly due to the differences in practices and organisational culture,<sup>78</sup> but also because there are no clear regulations on cooperation.<sup>79</sup> Based on these issues, the government opted to establish a coordination body comprised of the chief secretaries of state council.<sup>80</sup> This ad-hoc type of governmental body did not clear the situation in the early stages as it diverged from the standard state crisis management approach.<sup>81</sup> At the end of 2021, the Government decided to form a new coordination body consisting of the ministers whose portfolios were relevant to pandemic governance.<sup>82</sup>

Because of the quickly unfolding situation, the Government prioritised effective governance and health security objectives.<sup>83</sup> However, it soon became apparent that there was an inherent conflict between these objectives and legalist and constitutional principles.<sup>84</sup> While the rule of law was a central principle even during the state of emergency, it was sometimes seen to limit and delaying effective governance.<sup>85</sup> Interviews with government officials and administrators often emphasise the notion that the legislative model of emergency governance is slow in so far as it requires constant legislative amendment during the crisis.<sup>86</sup> One interviewee, whose perspective was shared by others, claimed that ‘the biggest issue in our system is the constitution and the fact that in every situation you have to follow the constitution, and interpretations of the constitution are such that none of the measures that would have been possible elsewhere were not so in Finland, and, at the very least, were impossible to carry out swiftly’.<sup>87</sup> Constitutional limits and the legalist practice in general were seen as being too rigid for emergency governance.<sup>88</sup>

The Government felt frustrated by the legally-limited powers that they had at their disposal.<sup>89</sup> The regular legislative process was also deemed too slow for effectively governing the crisis situation.<sup>90</sup> The Communicable Diseases Act and other relevant legislation was lacking from the point of view of COVID-19 pandemic governance,<sup>91</sup> which meant that the government had

<sup>78</sup>Stenvall and others (n 89) 112; Kihlström and others (n 102) 4.

<sup>79</sup>Stenvall and others (n 89) 39.

<sup>80</sup>Onnettomuustutkintakeskus (n 100) 84.

<sup>81</sup>ibid 13.

<sup>82</sup>Stenvall and others (n 89) 87.

<sup>83</sup>Deloitte (n 101) 17; Stenvall and others (n 89) 46.

<sup>84</sup>Stenvall and others (n 89) 43.

<sup>85</sup>Onnettomuustutkintakeskus (n 100) 61.

<sup>86</sup>Stenvall and others (n 89) 42.

<sup>87</sup>ibid 47.

<sup>88</sup>ibid 114, 254.

<sup>89</sup>Risto Niemikari and Tapio Raunio, ‘Finland: Balancing Centralized Leadership and Regional Interests’ in Kennet Lynggaard, Mads Dagnis Jensen and Michael Kluth (eds.), *Governments’ Responses to the Covid-19 Pandemic in Europe* (Springer International Publishing 2023) 291.

<sup>90</sup>Onnettomuustutkintakeskus (n 100) 61; Stenvall and others (n 89) 81.

<sup>91</sup>Stenvall and others (n 89) 41.

to proceed through a regular legislation process, which the Government claimed to have slowed down the crisis response considerably.<sup>92</sup> However, it should also be noted that legislative drafting was often of poor quality and insufficient, meaning that amendment and reform processes were slowed down even further, which then undermined effective pandemic governance.<sup>93</sup> While the Ministry of Social Affairs and Health argued that the slow legislative process did not meet the demands of the fast-changing crisis, of which there was often little knowledge available,<sup>94</sup> there were also issues related to a lack of legal expertise.<sup>95</sup>

However, these issues regarding temporal (in)efficiency did not mean that the Government was incapable of acting decisively and extensively. The most significant example is apparent in the restriction of traffic between Uusimaa and other Finnish regions (146/2020). Residents officially living in Uusimaa could not leave and non-residents could not enter, apart from some exceptions, such as official duties, occupational reasons, and family emergencies.<sup>96</sup> This extraordinary action was valid from 28 March 2020 until 19 April 2020. While it was not withdrawn due to unconstitutionality, it was nonetheless heavily criticised and caused many conflicts with fundamental rights.<sup>97</sup>

The Government also used less extensive methods such as recommendations, which however had no legal basis.<sup>98</sup> Nevertheless, such recommendations were interpreted by officials as legally binding and therefore mandatory in practice.<sup>99</sup> For example, the Ministry of Health established guidelines (given on 20 March 2020 and amended on 16 April 2020) regarding visiting care facilities. These guidelines and other recommendations given by the Government were deemed by the parliamentary deputy ombudsman as rights violations, partly because non-binding legal recommendations used to place limits on fundamental rights (EOAK/3232/2020).<sup>100</sup> Because of this use of guidelines and instructions, it was sometimes unclear to citizens whether certain guidelines were in fact legally binding.<sup>101</sup> Another example were the instructions regarding border crossings, which were not in fact legally binding, but were followed by border officials as if they were, which was also in conflict with fundamental rights.<sup>102</sup>

---

<sup>92</sup>Onnettomuustutkintakeskus (n 100) 101.

<sup>93</sup>Mörttinen (n 95) 45; Scheinin (n 57) 133.

<sup>94</sup>Onnettomuustutkintakeskus (n 100) 102.

<sup>95</sup>Stenvall and others (n 89) 114.

<sup>96</sup>Kotkas and others (n 98) 17.

<sup>97</sup>Mehrnoosh Farzamfar and Janne Salminen, 'The Supervision of Legality by the Finnish Parliamentary Ombudsman during the COVID-19 Pandemic' (2022) 99 *Nordisk Administrativt Tidsskrift* 1, 9.

<sup>98</sup>Brunila and Salminen (n 85) 231.

<sup>99</sup>Emilia Korkea-Aho and Martin Scheinin, "'Could You, Would You, Should You?' Regulating Cross-Border Travel Through COVID-19 Soft Law in Finland' (2021) 12 *European Journal of Risk Regulation* 26, 12.

<sup>100</sup>Farzamfar and Salminen (n 122) 12; Onnettomuustutkintakeskus (n 100) 47.

<sup>101</sup>Onnettomuustutkintakeskus (n 100) 22, 78.

<sup>102</sup>For a thorough discussion of this case, see Korkea-Aho and Scheinin (n 124).

### 3.2.2. *The president*

The new Constitution of Finland, which entered into force on 1 March 2000, transformed the Finnish system from a semi-presidential system into a parliamentary one. While in the twentieth century, the President and the Government shared executive power over domestic politics, the new constitution extensively reduced the President's power and limited their primary role to foreign policy. The President has, however, a formal role in declaring states of emergency. According to Section 6(1) of the Emergency Powers Act, the Government states in cooperation with the President that exceptional circumstances are at hand and the Emergency Powers Act application decrees must be adopted.<sup>103</sup> The reason why the President was given this role is because emergencies will often have foreign policy dimensions to them.<sup>104</sup>

In semi-presidential systems, executive authority is shared between the president and the government.<sup>105</sup> There is a potential for conflict in this arrangement as it can lead to intra-branch competition between the two executives.<sup>106</sup> A president will often feel that their political legitimacy is stronger than the government's because the government is a coalition that indirectly represents the voters, and the president appears to represent the whole country directly.<sup>107</sup> For this reason, presidents' frustration with the imbalance between their strong legitimacy and limited powers might theoretically lead them to resort to the use of exceptional measures to further their own power and interests.<sup>108</sup> In Finland, this was especially during President Kekkonen's reign (1956–1982) when this contradiction between the President and the Government was at its peak,<sup>109</sup> as Kekkonen repeatedly dissolved governments that he felt did not align with his policies.<sup>110</sup>

While the parliamentary system did indeed replace the semi-presidential system, the tensions between the Government and the President did not cease after the introduction of the new constitution. For example, in the early 2000s the President and the Government disputed over who represents

---

<sup>103</sup>Brunila and Salminen (n 85) 225.

<sup>104</sup>*ibid.*

<sup>105</sup>C Skach, 'The "Newest" Separation of Powers: Semipresidentialism' (2007) 5 *International Journal of Constitutional Law* 93, 96–97.

<sup>106</sup>*ibid* 96; Tapio Raunio, 'Semi-Presidentialism and European Integration: Lessons from Finland for Constitutional Design' (2012) 19 *Journal of European Public Policy* 567, 596.

<sup>107</sup>Raunio (n 131) 569.

<sup>108</sup>Skach (n 130) 103.

<sup>109</sup>Raunio (n 131) 574. The most infamous example of the President's prerogative during Kekkonen's reign took place when the Parliament made an exception to the two-term limit of the President by enabling Kekkonen to serve a third term as President of the Republic. Johanna Rainio-Niemi, 'Managing Fragile Democracy: Constitutionalist Ethos and Constrained Democracy in Finland' (2019) 17 *Journal of Modern European History* 519, 535.

<sup>110</sup>Jaakko Nousiainen, 'From Semi-Presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland' (2001) 24 *Scandinavian Political Studies* 95, 101.

the country in the European Council.<sup>111</sup> Furthermore, as Presidents tend to have a strong political mandate in Finland, they often comment on domestic issues. While they have no actual power over these issues, it is due to their popularity and political authority that it is challenging for governments to enter into conflict with the President.

The pandemic seems to have brought about some tensions (although far less dramatic than the ones during Kekkonen's reign) between the ruling Government and the President.<sup>112</sup> In fact, on 13 March 2020, during the joint meeting of the Ministerial Committee on Security Policy and the President, Finnish President Sauli Niinistö stated that Finland is now in a state of emergency.<sup>113</sup> Apparently, the Government was unprepared for this, as the agenda of the meeting did not officially include the declaration of a state of emergency.<sup>114</sup> Nonetheless, the state of emergency was declared shortly after the meeting, with some arguing that the Government essentially had no other choice but to comply with the President's statement.<sup>115</sup> In effect, the President's strong political mandate was central in influencing the government to declare a state of emergency.<sup>116</sup>

Another interesting, although less effective, example of the President's attempt to influence emergency governance during the pandemic also took place in March 2020. The President of the Republic sent a letter to the Prime Minister suggesting the establishment of an operative coordination body, 'corona-fist'.<sup>117</sup> The letter, which was later published, recommended the establishment of an ad hoc crisis-coordination body that would take over the coordination of the pandemic response. Although President Niinistö claimed that the 'corona-fist' body would not have had any decision-making authority,<sup>118</sup> it was seen by some as an attempt on the part of the president to renegotiate power relations in pandemic governance,<sup>119</sup> and also serves as an example of the tension between the President and the Prime Minister.<sup>120</sup> Ultimately, the Prime Minister turned down the President's

<sup>111</sup>Raunio (n 131) 576.

<sup>112</sup>One could even argue that in including the President in declaring a state of emergency, the practice is in itself semi-presidential. See Brunila and Salminen (n 85) 229.

<sup>113</sup>Onnettomuustutkintakeskus (n 100) 3359.

<sup>114</sup>Mörttinen (n 95) 26.

<sup>115</sup>Risto Uimonen, *Sauli Niinistö: suomalaisten presidentti* (Werner Söderström Osakeyhtiö 2023) 359; see also Brunila and Salminen (n 85) 231.

<sup>116</sup>Brunila and Salminen (n 85) 232. A newspaper reports on the incident adopted a more extreme view as the journalist from one of the largest newspapers claimed that in fact the president forced the state of emergency into effect. Timo Haapala 'Setä Arkadia: Presidentti Niinistö jyräsi poikkeuslait voimaan', 21.03.2020, *Iltalehti* <https://www.is.fi/politiikka/art-2000006447204.html>.

<sup>117</sup>'Tasavallan presidentin viesti pääministerille 26.3.2020' 30.3.2020, Tasavallan presidentin kanslia <https://www.presidentti.fi/uutinen/tasavallan-presidentin-kirje-paaministerille-26-3-2020/>.

<sup>118</sup>'[S:n tiedot: Presidentti lähetti hallitukselle nyökkiryhmästä kirjeen – kohteliaassa vastauksessa idealle ei nähty tarvetta' 29.3.2020, *Iltalehti* <https://www.is.fi/kotimaa/art-2000006457022.html>

<sup>119</sup>Mörttinen (n 95) 74.

<sup>120</sup>Niemikari and Raunio (n 114) 286–87.

proposal because it was deemed unconstitutional.<sup>121</sup> Furthermore, the Government was worried that the ‘corona-fist’ might have sidelined the Government’s decision-making power.<sup>122</sup>

#### 4. Legalist solutions for temporal (in)efficiency

In this section, I discuss solutions regarding the temporal (in)efficiency of emergency measures in a legalist emergency regime.<sup>123</sup> When extralegalists argue that emergency legislation and legislative processes are not fast enough to be efficient,<sup>124</sup> legalists often respond that this is in fact a problem of preparation.<sup>125</sup> However, legalists have left the question of how to develop the temporal efficiency of legislative processes during emergencies unexplored. For example, Dyzenhaus claims that ‘how the law should react when there is no time to engage in this process is an interesting question, but it is mostly interesting because of the light it sheds on how to craft legal responses when there is time’.<sup>126</sup> For this reason, the question occupying legalism has been whether legislatures can anticipate and control the executive.<sup>127</sup> While the lack of preparation was indeed a problem in Finland at least in some cases,<sup>128</sup> a legalist emergency regime might also have strategies resolve the tension between the need to act swiftly and legislation *during* emergencies. Indeed, as I explain below, this was part of the Finnish pandemic response strategy.

My first finding indicates that there was an absence of legislation especially in the context of coordination and delegating responsibility, which was lacking in the emergency legislation. The relevant authorities and practices to coordinate pandemic response were insufficient and ad-hoc cooperative bodies, deviating from the previous crisis governance approach,<sup>129</sup> were needed. One could even argue that the President’s suggestion to form the ‘corona-fist’ was a reaction to this shortcoming. These issues can be categorised as a practical issue of preparation, which a legalist emergency regime needs to consider after the emergency is over. Undoubtedly, as

<sup>121</sup>Stenvall and others (n 89) 87.

<sup>122</sup>‘Näin presidentti Niinistö esitti ministereille “nyrkin” perustamista ja näin pääministeri Marin vastasi – ehdotus ei saanut hallitukselta vastakaikua” 30.3.2020, YLE, <https://yle.fi/a/3-11283078>.

<sup>123</sup>For a discussion of temporal efficiency during emergencies, see Scheuerman (n 35).

<sup>124</sup>This critique was already established by Carl Schmitt, who argued that legislation merely slows down effective state action. See William E Scheuerman, ‘States of Emergency’ in Jens Meierhenrich and Oliver Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2014) 560.

<sup>125</sup>Dyzenhaus, *The Constitution of Law* (n 16) 213.

<sup>126</sup>Dyzenhaus, ‘The Compulsion of Legality’ (n 15) 53.

<sup>127</sup>*ibid* 58; Christian M Günther, ‘Legal vs. Extra-Legal Responses to Public Health Emergencies’ (2022) 29 *European Journal of Health Law* 131, 140–42.

<sup>128</sup>In the *travaux préparatoires* for the Emergency Powers Act, the notion of what it actually means to govern in a pandemic and the challenges that it entails were unclear. See Harriet Lonka, ‘Valmiuslaki Koronapandemian Sääntelystrategiana’ (2023) 42 *Hallinnon Tutkimus* 183, 189.

<sup>129</sup>Onnettomuustutkintakeskus (n 100) 13.

mentioned above, no emergency is the same and unique challenges surrounding pandemics indicate an epistemological problem resulting from their unprecedented nature. However, basic authorities, powers and principles can and should be legislatively prepared in advance to ensure that no need or demand for ad-hoc institutions ensues. One of the problem during Finland's governance of the COVID-19 pandemic was not that the legislation came in the way of effective governance but, on the contrary, the lack of relevant legislation impeded its efficacy. Furthermore, a pandemic as an emergency is multifaceted as it requires different authorities, both state and local level, and the collaboration with diverse spheres, such as economic and social, to work together in unison. The issue was that the principles and practices regarding how different levels of government should function together were lacking.

It is one thing to consider questions regarding whether the possibility to prepare for all eventualities in advance is in fact necessary in a legalist regime. It is another thing to determine whether legislative practices inhibit effective governance. In this context, for the executive branch the legal system and legislative processes did seem to stand in the way of swift action. Here, the abovementioned theoretical discussion regarding the need to act swiftly and legislation is most relevant. While it could be categorised with issues regarding cooperation, as the need to legislate during emergencies reveals the lack of preparation, it can also be seen as a distinct issue from preparation. As all emergencies are different, and pandemics in particular entail some unprecedented aspects that make advance preparation difficult, legislative processes must rise to the challenge during these crises and develop strategies on how to ensure that legislation is both quickly and in a way that complies with legal principles and not affect the legal order in a state of normalcy. One strategy is to require that laws are temporary, by means of sunset clauses, for example.<sup>130</sup> Another is to require *ex ante* review and legislative oversight<sup>131</sup> or *ex post* review and judicial oversight.<sup>132</sup>

In Finland, the Government made important temporary amendments to legislative processes to hasten legislation. Firstly, parliamentary discussions were limited to only necessary and urgent matters related to the pandemic, so that other parliamentary matters were postponed. Secondly, remote official meetings, digital connections and secure online voting were enabled.<sup>133</sup> Thirdly, the consultation period for comments regarding

---

<sup>130</sup>Kouroutakis and Ranchordas (n 38).

<sup>131</sup>Mikko Värttö, 'Parliamentary Oversight of Emergency Measures and Policies: A Safeguard of Democracy during a Crisis?' [2023] European Policy Analysis 1.

<sup>132</sup>Desirée LeClercq, 'Judicial Review of Emergency Administration' (2022) 72 American University Law Review 143; see also Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 The Theory and Practice of Legislation 71.

<sup>133</sup>Kotkas and others (n 98) 9.

legislation was limited from the normal six weeks to two.<sup>134</sup> These amendments were made in order to render the legislative process better suited to the changing situation.<sup>135</sup> Another issue that should perhaps be considered is the transfer of more resources for law drafting and expertise regarding emergency measures, which, if improved, should further speed up the process.<sup>136</sup>

From the legislative point of view, the legislative process should certainly not be too rushed to ensure that its constitutionality and effects are properly assessed. For example, the limited commenting period led to above mentioned issues regarding the poor quality of proposed legislation.<sup>137</sup> Furthermore, another relevant issue concerns the possibility that legislation could become a mere rubber stamp for emergency concerns.<sup>138</sup> In order to ensure compliance with the constitution and fundamental rights, both the parliamentary Constitutional Law Committee, which is responsible for the reviewing the constitutionality of planned legislation, and the Parliamentary Ombudsman, who responds to complaints made by citizens regarding actions taken by officials in conflict with fundamental rights, had remained active during the pandemic.<sup>139</sup>

The amendments to the legislative process and the various mechanisms for reviewing and overseeing it can be seen as part of an overall strategy to balance the demand for swift action and the compliance of legislation with the rule of law. Balancing these two requirements is of course never easy. In the future, these tools should be further discussed and developed in the context of legalist emergency regimes.

## 5. Conclusions

In this article, I have analysed the tension between the need to act swiftly and legal legitimacy or legislated emergency authority during Finland's COVID-19 pandemic response. Based on reports regarding the executive branch's actions and experiences during the pandemic, I analysed the temporal (in)efficiency of legislation. I connected this analysis to a core of issues regarding the legalist emergency regime. In my examination of the tension between the need to act swiftly and the enactment of emergency legislation,

---

<sup>134</sup>ibid.

<sup>135</sup>Furthermore, it needs to be pointed out that part of the reason that parliamentary discussion and oversight did not slow down the legislative process because of the opposition's willingness to collaborate with the Government. See Kevin Deveaux, Natália Švecová and Tim Baker, *Parliaments Responding to a Pandemic: Lessons Learned for Emergency Planning* (Report from the House Democracy Partnership and The Swiss Agency for Development and Cooperation 2021) 30.

<sup>136</sup>Stenvall and others (n 89) 118.

<sup>137</sup>ibid.

<sup>138</sup>See Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar 2014).

<sup>139</sup>Farzamfar and Salminen (n 122); Värttö (n 157).

I highlighted some unexplored issues. My findings indicate that, generally speaking, accelerating the legislative process, coupled with the issues and eventualities that it entails, is still a crucial aspect of legalist emergency regimes.

### **Disclosure statement**

No potential conflict of interest was reported by the author(s).

### **Funding**

This work was supported by the Strategic Research Council at the Academy of Finland [grant number 345950].

### **ORCID**

*Tuukka Brunila*  <http://orcid.org/0000-0002-2165-2951>