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FINLAND

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Section 1: The concept of “emergency” and other associated notions in the legal orders of the Member States

Question 1

The Constitution of Finland and other relevant laws regulating emergency measures define emergencies, literally “exceptional circumstances” (*poikkeusolo*), as a situation in which the Government may be authorized to use emergency powers. Section 23(1) of the Constitution of Finland (*Suomen perustuslaki*, 731/1999, this Section is amended by 1112/2011), “Basic rights and liberties in situations of emergency,” establishes that provisional exceptions are necessary “in the case of an armed attack against Finland or in the event of other situations of emergency.” Currently, two relevant permanent parliamentary acts refer to Section 23 of the Constitution, namely the Emergency Powers Act (*valmiuslaki*, 1552/2011) and the Act on the State of Defence (*puolustustilalaki*, 1083/1991). These acts include definitions of emergencies.

The Emergency Powers Act categorizes six emergency conditions that authorize the use of emergency powers, which are provided in the Act. Furthermore, the Act on the State of Defence authorizes the President of the Republic to declare a state of defence “in a time of war against Finland and in the event of internal violent disturbances which seriously affect the maintenance of public order and which seek to overthrow or alter the constitutional order of the State.” Such emergencies are truly exceptional as they provide the Government (or, in the case of Act on the State of Defence, the President of the Republic) with powers that make provisional exceptions to basic rights and liberties.

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The regulation of emergencies in the Finnish legal order builds upon the dichotomy between, on the one hand, normal or ordinary circumstances and, on the other hand, exceptional circumstances. The regulation of the latter in Section 23 of the Constitution is inspired by the idea of a “public emergency” which threatens “the life of a nation” foreseen in Article 4 of the International Covenant on Civil and Political Rights and in Article 15 of the European Convention on Human Rights. This approach is visible also in the approach of the Constitution to emergency regulation as concerned with derogating from fundamental rights. That said, the Emergency Powers Act and the Act on the State of Defence regulate various crisis situations comprehensively.

A definition for “crisis” as such seems to be lacking in the Finnish legislation. There are not many instances in which crisis as an extraordinary situation is mentioned. Examples include the laws regarding the use of intelligence gathering practices during crises, such as the Police Act (*poliisilaki*, 872/2011, chapter 5, section 3), Act on Telecommunications Intelligence in Civil Intelligence (*Laki tietoliikennetiedustelusta siviilitiedustelussa*, 582/2019, section 3), and the Act on the Supervision of Social Welfare and Health Care (*laki sosiaali- ja terveydenhuollon valvonnasta*, 741/2023, chapter 3, section 16). However, these do not authorize the use of extraordinary powers, at least not in the sense of making provisional exceptions to basic rights and liberties.

While there are sector-specific ordinary laws regarding emergencies, such as the Communicable Diseases Act (*tartuntatautilaki*, 1227/2016), the Finnish emergency framework is based on a dichotomy between a state of emergency and a state of normalcy. Extraordinary measures are limited to exceptional circumstances, but only if they cannot be governed by means of normal legislation. This “principle of normalcy” was visible during the pandemic, as the state of emergency was declared only for a limited period of time.¹ The Constitutional Law Committee of the Parliament (*perustuslakivaliokunta*) has also repeatedly emphasized that priority must always be given to the use of ordinary legislation and powers susceptible to affect the enjoyment of fundamental rights as little as possible.²

¹ Farzamfar Mehrnoosh, Salminen Janne, and Tuominen Janna, “Governmental Policies to Fight Pandemics: Defining the Boundaries of Legitimate Limitations on Fundamental Freedoms: National Report on Finland,” *Governmental Policies to Fight Pandemic*, edited by Vedašchi Arianna. Brill Nijhoff, 2024, 180, 180–181.

² See, for example, PeVM 9/2020 vp, p. 3.

Question 2

Finnish law provides for a general constitutional and legislative framework that covers emergency situations.³ Section 23 of the Constitution of Finland regulates the use of emergency powers and that the grounds for using them have to be laid down by an Act of Parliament. Currently, the Emergency Powers Act and the Act on the State of Defence are such acts. The former regulates emergency governance in general and the latter armed attacks and similar emergencies. However, the Emergency Powers Act is an exceptive enactment that deviates from the Constitution of Finland and Section 23 specifically.⁴ Attempts to amend the Act to conform with the Constitution have been made to provide for a general constitutional framework.⁵ The practice in developing the emergency framework has been that emergency provisions cohere under one law rather than dispersing emergency authorizations under policy-specific legislation.⁶

In the wake of Russia's war of aggression against Ukraine, the Emergency Powers Act expanded, in 2022, the definition of "exceptional circumstances," and thereby the Act's scope, to encompass various hybrid threats to essential societal functions, such as public decision-making capacity, maintenance of border security and public order, availability of essential social and health or rescue services as well as the supply of energy, water, food, medicines, and other indispensable goods, the provision of essential financial services, the functioning of critical transport systems, or yet threats to the supporting data and communication technology services and systems connected to the above.⁷

Furthermore, at present, the Emergency Powers Act is under comprehensive review at the Ministry of Justice. The aim is to update the Act regarding its scope, obligations on preparedness for public authorities, compatibility with the Constitution especially as regards derogations from fundamental rights and delegated norm-giving powers, as well as procedures for its deployment and the organization of institutional powers.⁸

³ Brunila Tuukka, "Legislation, Emergencies and the Need for Swift Action: Tensions between the Executive Branch and Emergency Legislation during the COVID-19 Pandemic in Finland," *The Theory and Practice of Legislation* (2024), p. 1.

⁴ On "exceptive enactments," that is, acts which derogate from the Constitution without formally amending it, see, for example, Ojanen Tuomas, "Constitutional Amendment in Finland," *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, edited by Xenophon Contiades, Taylor & Francis Group, 2012, pp. 93–113, 94.

⁵ Jonsson Cornell Anna and Salminen Janne, "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland," *German Law Journal*, 19 (2018), pp. 219, 240–241.

⁶ HE 248/1989 vp, 6.

⁷ Laki valmiuslain muuttamisesta (706/2022).

⁸ See: Memorandum on the establishment of the working group responsible for the review of the Act, 29 September 2022 (in Finnish): <https://valtioneuvosto.fi/hanke?tunnus=OM015:00/2022>.

Other provisions regarding emergency preparation exist in policy-specific legislation. These are mostly laws requiring specific sectors, such as health care, to prepare for contingencies. It should be underlined that the Finnish emergency law framework is based upon the principle that the emergency powers can only be deployed when ordinary legislation does not provide sufficient means to respond to a crisis (principle of normalcy, referred to above). Currently, the government is also reviewing the possibilities to respond to crises through ordinary legislation within the Finnish legal order.

Question 3

The Emergency Powers Act includes six emergency conditions: (1) an armed attack, (2) a threat of an armed or a similarly serious attack, (3) a threat to the livelihood of the population or national economy, (4) a grave natural disaster, (5) a wide-spread contagious disease, (6) a hybrid threat, including attempts to influence society's essential functions resulting in substantial and widespread disruption. Originally, the earlier Emergency Powers Act (1080/1991) included five emergency conditions, of which some have later been subsumed together and some new have been added, such as (5) a widespread contagious disease (in 2011) and (6) hybrid threats (in 2022). The practice developed by the Emergency Powers Act is that emergency conditions should be determined as exactly as possible. Furthermore, emergency powers should only be used when governing by means of ordinary powers and legislation is not enough.⁹ For example, the Communicable Diseases Act provides for measures to respond to a contagious disease under ordinary circumstances.

As for the Act on the State of Defence, it can be enforced during a war or equally severe internal disturbance to secure national independence and maintain law and order in Finland.

Question 4

The Constitution is silent about which institution can declare an emergency and according to what procedure.¹⁰ The Emergency Powers Act, however, stipulates a three-phase deployment procedure. According to that procedure (Section 6), if the Government, in cooperation with the President of the Republic, finds that there are exceptional circumstances (i.e., an emergency), in which the

⁹ See Brunila (n 6), 10; Salminen Janne, "Finsk Krishantering i Fredstid — Beredskapslagen Tillämpas För Första Gången," *Svensk Juristtidning* (2020), pp. 1116, 1118.

¹⁰ Brunila Tuukka and Salminen Janne, "'Regular Powers Are No Longer Enough' – Checks and Balances in Declaring a State of Emergency According to the Constitution of Finland," *Scandinavian Studies in Law* 70 (2024), pp. 215, 223.

ordinary competences of authorities are not enough, a Government decree (Emergency Powers Act application decree) may provide for the application of the exceptional competences (provisions of Part II).

The Constitution and the Emergency Powers Act require that all decrees issued thereunder are submitted to the Parliament. The Parliament decides whether the Government decree may remain in force or whether it must be repealed in part or in full, and whether it is in force for the intended period or a shorter one. All Emergency Powers Act application decrees that have not been submitted to Parliament within a week of their issuance shall lapse. A decree may be issued for up to six months. According to the Act on the State of Defence, the President of the Republic issues a decree declaring the state of defence and this decree is to be submitted to the Parliament, which may repeal it or let it remain in force.¹¹

In addition, according to the terms of Section 23 of the Constitution, basically any other law adopted by the Parliament could declare a state of emergency provided that the requirements in that provision – including the temporary nature of the fundamental rights restrictions at issue, their compliance with international human rights obligations, and the presence of exceptional circumstances related to an armed aggression or other serious threat prescribed by law – are fulfilled. Since the Constitution does not establish requirements as to what constitutes an “emergency,” the Parliament could in such a case lay down in that act the conditions under which a state of exception prevails.

Question 5

The Emergency Powers Act as well as the Act on the State of Defence define situations of emergency for the purposes of applying these acts. As such, there appears to be limited scope for EU law to influence the definition of situations of emergency in the Finnish legal order. Nevertheless, it has been argued that when applying, for example, the Emergency Powers Act, obligations deriving from EU law should be taken into consideration in its interpretation.¹²

In this regard, it may be noted that, among the Emergency Powers Act’s criteria for establishing the presence of “exceptional circumstances” feature emergen-

¹¹ For a detailed analysis of checks and balances during emergencies, see: Brunila and Salminen (n 13).

¹² See: Heikkonen, Johannes, Kataja Pauli, Lavapuro Juha, Salminen Janne, and Turpeinen Mira, “Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta,” *Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja* 64 (2018), pp. 38ff.

cies other than of military nature. For example, an economic emergency can be declared in case of a “particularly serious event or threat for the public welfare or the foundations of the country’s economic life due to which the essential societal functions are substantially jeopardized.” Relatedly, Chapter 5 of the Act provides for possibilities for extensive economic regulation, for example, restrictions on exports, price controls, as well as rationing of raw materials, agricultural products and the energy supply.

It has been observed in literature that the definition of an emergency under the Emergency Powers Act, particularly as regards economic emergencies, is broader than the exceptional circumstances envisaged in Articles 346 and 347 TFEU. This has been interpreted to imply that the restrictive impact of economic or other non-military emergencies on rights derived from EU law are to be assessed in relation to the more specific grounds of justification related to public order and security.¹³

From the perspective of EU law, nationally defined “exceptional circumstances” do not relieve Member States from the observance of EU obligations. Instead, emergency measures are assessed against the various grounds of derogation and justification provided in the Treaties. The European Court of Justice (ECJ) has accepted derogations from rights to free movement within the internal market on grounds of economic threats rising to the level of matters of public security. However, such derogations are subject to the strict observance of the principle of proportionality and, in any event, justifying restrictions on these grounds is not possible where EU legislation fully regulates the issue.¹⁴

Another question which arises in connection with the economic emergency powers is to what extent Member States may regulate matters which fall within exclusive EU competences.¹⁵ The Emergency Powers Act enables far-reaching regulation of trade with third countries. To the extent its application could encroach upon measures adopted within the EU’s common commercial policy – an exclusive Union competence – it may be enquired to what extent, if any, the EU Treaties would tolerate such derogations. While such economic emergency measures could arguably be justified under Articles 346 and 347 TFEU, these provisions only relate to the specific cases of war and related trade measures.

Finally, it can be mentioned that the preparatory works to the Emergency Powers Act have incidentally referred to the “Solidarity Clause” in the EU Treaties, namely Article 222 TFEU, which establishes an obligation on the Union and

¹³ Ibidem, pp. 39–40.

¹⁴ Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256, paras. 27 and 37 et seq.

¹⁵ On this point, see also: text under Section 2, Question 4 below.

Member States to provide assistance, when requested, in the event of terrorist attacks, or natural or man-made disasters.¹⁶ Presumably, the underlying indication is that such situations also qualify as emergencies from an EU law perspective.¹⁷

Question 6

During Finland's EU membership, the constitutional emergency powers under the Emergency Powers Act have only been triggered in the context of the COVID-19 pandemic. In those situations, the emergency powers were not triggered by prior EU action.

As for the joint EU-Member State handling of the pandemic, the most important EU emergency measures with regard to the Member States, for the purposes of the management of the pandemic, may have been the financial support mechanisms, such as the Recovery and Resilience Facility, which were adopted to support the Member States' recovery from the economic impact of the health emergency.¹⁸ Other measures which responded to the economic impact of the pandemic and modified the ordinary regulatory framework included, for example, the loosening of State aid control by the Commission.¹⁹

However, while many EU measures, such as the "EU Digital COVID Certificate," supplemented national emergency action in the course of the pandemic, none of them appears to have risen to the level of emergency instruments, in a constitutional sense, so that the pandemic could be characterized as having been handled, in Finland, jointly by "EU and national emergency measures."

¹⁶ See: preparatory works to the Emergency Powers Act, HE 3/2008, p. 19. See also: Declaration (no. 37) on Article 222 of the Treaty on the Functioning of the European Union.

¹⁷ Other solidarity mechanisms in the EU Treaties, which could have been mentioned (but have not been) in the preparatory works on the Emergency Powers Act include those of Article 42(7) TEU regarding Member States' obligation of aid and assistance in the case of an armed aggression directed at another Member State, and Article 122 TFEU concerning solidarity in case of shortages of products like energy.

¹⁸ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 2021, L57, p. 17.

¹⁹ See, for example, Communication from the Commission "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak," OJ 2020, C91I/1.

Section 2: The constitutional framework governing emergency law in the Member States

Question 1

As the highest level of legislation within the Finnish legal system, the Constitution of Finland recognizes, predicts and – to a certain extent – regulates a state of emergency. Section 23, Basic Rights and Liberties in Situations of Emergency, authorizes the declaration of such a state of emergency. Section 23 permits inserting exceptions on fundamental rights if, and only if, it is absolutely necessary and proportional to the aims and objectives. The constitution requires that these exceptional provisions must fully comply with international human rights obligations. Furthermore, with the phrase “in the case of an armed attack against Finland or in the event of other situations of emergency,” the legislator’s intention has been to expand the instances of states of emergency to more than merely armed conflicts. While such an open-ended list might leave room for interpretation, the Constitution of Finland, nonetheless, establishes boundaries on how the Parliament and parliamentary law is to interpret that an emergency must “pose a serious threat to the nation.” Lastly, provisional exceptions must be grounded in law by means of formal legislative acts. Therefore, the Finnish Constitution can be seen as establishing a legalist practice of emergency measures with enforceable exceptions to rights originating from precise delegation of provisional powers, which are granted by acts of parliament or governmental decrees.

While Section 23 is not comprehensive enough to regulate emergencies solely on its own terms, the requirement to constitutionally review decrees upholds legality by giving no room for unregulated, extra-legal, or extra-constitutional emergency law-making. Namely, Section 23 requires that all the governmental decrees concerning provisional exceptions must be submitted to the Finnish Parliament for further parliamentary consideration. As a constitutional rule, the Finnish Parliament has the authority to decide on the legal validity of these governmental decrees. Therefore, the constitution establishes that provisional exceptions cannot go beyond what the Constitution of Finland has explicitly and clearly regulated. Both the Emergency Powers Act, which actually grants more far-reaching powers to the Parliament than this, as well as the Act on the State of Defence include this requirement.

Question 2

Regarding the Emergency Powers Act, a three-phase procedure binds the Government, the President of the Republic and the Parliament together. The

Government and the President declare the emergency together, the Government issues Emergency Powers Act application decrees, and the Parliament reviews any decree issued.

According to the Emergency Powers Act, the Finnish Government, in cooperation with the President of the Republic, may declare a state of emergency, when the criteria for a state of emergency exist. Under emergency conditions, the authorities may exercise only powers that are necessary and proportionate to the objectives pursued. The Finnish Emergency Powers Act provides only a limited set of additional powers. These powers are closely purpose-related. A declaration of emergency as such does not mean that all powers mentioned in the Emergency Powers Act are automatically at the authorities' disposal. The Act, instead, includes a procedure, according to which the Government must first issue a decree stating clearly which powers are needed to handle the emergency. This decree is then subjected to Parliament's scrutiny. If the decree is accepted by the Parliament, the Government can issue further decrees to apply the adopted powers. All these decrees are reviewed by the Parliament ex-post their issuance. In addition, the specific powers in disposal, according to the Emergency Powers Act, are dependent on the emergency in question. *Mutatis mutandis*, the Parliament has similar powers according to the Act on the State of Defence in case the President as the commander-in-chief of the defence forces (Section 128 of the Constitution) issues a decree on the state of defence.

Question 3

Finland is a unitary state. The levels of subnational government do not have any specific role in the decision-making regarding emergencies. However, in the situations of emergency the state, in order to implement the decisions, typically needs to rely on regions and local authorities. For example, healthcare and social welfare services and rescue services are provided by self-governing public entities (wellbeing services county). Regarding the Åland Islands, which is a special autonomous region of Finland with self-government and its own legislative powers, the state has the legislative powers concerning situations of emergencies (Section 27(34) of the Act on the Autonomy of Åland, *Ahvenanmaan itsehallintolaki*, 1144/1991).²⁰

²⁰ See also: statements of the Constitutional Law Committee of the Parliament PeVL 6/2009 vp and PeVL 29/2022 vp, reports PeVM 1/2021 vp ja PeVM 2/2021 vp, and, in addition, the Statement of the Supreme Court OH 2020/168, KKO-HD/97/2021.

Question 4

According to Section 23 of the Constitution emergency exceptions to basic rights and liberties have to be compatible with Finland's international human rights obligations. Both the Emergency Powers Act and the Act on the State of Defence require that the States party to the International Covenant on Civil and Political Rights must be informed if a state of defence is declared or the emergency powers under the Emergency Powers Act are enforced. Same applies regarding the information to the Council of Europe. Article 5 of the Emergency Powers Act provides that the application of the Act must comply with Finland's international obligations. The preparatory works to the Act, while indicating that EU obligations are subsumed under the expression "Finland's international obligations," also specify that the primacy of EU law, nonetheless, follows directly from that law.²¹ Therefore, it appears that, in principle, the primacy of EU law measures is acknowledged also in relation to national measures adopted under emergency powers. Under ordinary circumstances, the primacy of EU law is in principle recognized in Finland, even though the Parliament has in certain high-stakes situations recently ignored, or at best paid lip service, to the EU obligations, particularly in the context of border controls.²² Neither the preparatory works to the Emergency Powers Act, nor any other sources analyse – to the best of our knowledge – the question of a potential conflict of national emergency measures with EU law in any great detail.²³

The preparatory works have paid more attention – albeit also at a relatively high level of generality – to the impact which the application of national emergency law might have on Finland's obligations under EU law and, in particular, the functioning of the internal market.²⁴ In this regard, it has been submitted that the grounds for an emergency (or, under the terms of the Act, "exceptional circumstances") are by and large comparable to those providing for derogations from the provisions of the EU Treaties. Thus, an "armed aggression" or its threat within the Emergency Powers Act has been viewed as equivalent to the derogations authorized under Article 347 TFEU on grounds of "war" or "serious international tension constituting a threat of war." As regards other exceptional circumstances, such as a natural disaster or a pandemic, it has been

²¹ See: preparatory works to the Emergency Powers Act, HE 3/2008, p. 34.

²² See, on the issue of primacy in the practice of the Constitutional Law Committee of the Parliament, for example, PeVL 20/2017 vp, pp. 6–7, and PeVL 23/2022 vp, para. 14. cf. Opinion of the Administrative Law Committee of the Parliament on amendments to the Border Guard Act, HaVM 16/2022 vp, p. 15, as well as concerning the Act on Temporary Measures to Repel Instrumentalized Immigration 482/2024, HaVM 15/2024 vp.

²³ In addition, see: Heikkinen Johannes, Kataja Pauli, Lavapuro Juha, Salminen Janne, and Turpeinen Mira, "Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta," *Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja* 64/2018, pp. 38ff.

²⁴ HE 3/2008, p. 21.

considered that the emergency measures could be covered by the derogations allowed under the provisions in the EU Treaties relating to the maintenance of law and order, such as Articles 4 TEU and 72 TFEU, or those relating to derogations to the free movement of goods, persons, services, and capital in Articles 36, 45, 52 and 65 TFEU.²⁵

Nevertheless, it has been equally noted that obligations deriving from EU law must be taken into account when applying the Emergency Powers Act in concrete situations.²⁶ In fact, since the Act does not address questions of EU law, it is implied that such questions must be considered at the stage of introducing concrete measures under the Act. This approach presupposes, of course, that Member States have the competence to adopt measures in the first place. The situation where the EU has exclusive competence has been noted in passing when drafting the preparatory works. Such a situation could arise, in particular, in the case of measures falling within the monetary policy in the Euro area, where the role of the European Central Bank would be relevant in regulating financial and insurance operations.²⁷ The preparatory works have highlighted, in this respect, that any problems of application regarding EU law should, as a matter of principle, be primarily resolved “via the EU.”²⁸

Question 5

As explained in response to Section 2, Question 2 above, the Constitution enables, in its Section 23, temporary derogations to fundamental rights in emergencies. That provision provides guidance on how fundamental rights should be protected also in emergencies and on the limits of permissible derogations. When national emergency measures implement EU law, the Charter Fundamental Rights of the European Union (the Charter) is applicable. In that regard, it has been noted in the preparatory works to the Emergency Powers Act that the Charter does not, as indicated in the Explanations to its Article 52,²⁹ preclude Member States from providing for derogations to fundamental rights in emergencies in accordance with Article 15 of the European Convention on Human Rights (ECHR) or from taking action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4 TEU and in Articles 72 and

²⁵ See: *ibidem*, pp. 17–21, and preparatory works to a subsequent amendment of the Act, HE 63/2022 vp, pp. 31–32.

²⁶ HE 3/2008, p. 22

²⁷ *Ibidem*, pp. 21–22.

²⁸ *Ibidem*, pp. 19.

²⁹ Explanations Relating to the Charter of Fundamental Rights of the European Union, OJ 2007, C303, p. 17, 33.

347 TFEU.³⁰ The judicial protection of fundamental rights in emergencies is addressed in the responses to the questions in Section 4 below.

As for the existence of specific non-judicial bodies, the parliamentary oversight of fundamental rights protection during emergencies is linked closely with the peculiar Finnish system of *ex ante* constitutional review. In this system, the constitutionality of the legislation is reviewed by the Constitutional Law Committee of the Parliament. It is composed of members of the parliament and it reviews drafts bills and authoritatively interprets the constitutional basis of legislation. Importantly for the purposes of fundamental rights protection, it is also in charge of the review of emergency decrees in the Parliament (see, on that review, response to Question 4 above).³¹

There are also other oversight institutions with responsibilities over fundamental rights protection, namely the Chancellor of Justice of the Government and the Parliamentary Ombudsman.³² They supervise the legality of the actions of public authorities. During emergencies, both function as institutions that respond to complaints regarding rights violations, upholding protection under law and ensuring due process. A recent law on the division of tasks between these two institutions (330/2022) states that the Chancellor of Justice focuses on supervising the decisions and activities of the Government, the President of the Republic, and legal counsels, while the Ombudsman's supervision concerns mainly other public officials, such as the military, border control, police, intelligence, prisons, and, among others, minority rights.

Question 6

On this question, please see the response to Section 5, Question 2 below, which deals with: (1) the travel restrictions in Finland under the COVID-19 pandemic and the Commission's view on the proportionality of those restrictions with regard to free movement rights, as well as (2) Finland's recent border control measures regarding "instrumentalized migration" which have been considered to contravene certain fundamental rights under the Charter.

³⁰ HE 63/2022 vp, p. 32.

³¹ Brunila Tuukka, Salminen Janne, and Värttö Mikko, "Oikeuden Resilienssi Poikkeuksellisissa Oloissa – Perustuslakivaliokunnan Rooli Oikeuden Ylläpitämisessä Covid-19-Pandemian Aikana" (2023) *Lakimies* 1011.

³² Farzamfar Mehrnoosh and Salminen Janne, "The Supervision of Legality by the Finnish Parliamentary Ombudsman during the COVID-19 Pandemic" (2022) 99 *Nordisk Administrativ Tidsskrift* 1.

Section 3: Statutory/executive emergency law in the Member States

Question 1

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Question 2

Section 23(1) establishes that “the grounds for provisional exceptions shall be laid down by an Act.” The Emergency Powers Act is such an act, which, however, deviates from the Constitution. The Act and the subsequent amendments³³ have been legislated by means of exceptive enactment, a procedure enabled by section 73 of the Constitution.³⁴ Attempts have been made to bring the Emergency Powers Act in line with the Constitution.³⁵ A reform process (OM015:00/2022) has been initiated recently to solve this issue. Currently, however, the Act still remains an exception to the Constitution.

Question 3

Section 23 subjects an emergency decree to parliamentary oversight. In normal situations, such an explicit oversight regarding single governmental decrees does not exist. This is evident in the difference between governmental decrees in general and those regulated under Section 23. The issuance of governmental decrees in general is regulated under Section 80 of the Finnish Constitution. According to this Section, the President of the Republic, the Government, and a Ministry may issue decrees based on the authorization given to them in the Constitution or in another act. If there are no specific provisions on who should issue a decree, it is issued by the Government. The principles governing the rights obligations of private individuals and other matters that are legislative in nature shall be governed by the legislative acts of parliament. This means that the Constitution includes several reservations for using parliamentary acts on certain issues; for example, the grounds of the rights and obligations of individuals must be enacted in law. Regarding the decrees created under Section 80 of the Constitution, the Parliament has the possibility to consider only the sections on which the decree has been issued. In this context, the main restricting element of the content of decrees is the requirement of enacting certain issues on the level of parliamentary acts.

³³ For example, 706/2022.

³⁴ See also: n 5 above.

³⁵ HE 3/2008 vp, 24, 30, 125. See: Perustuslain tarkastamiskomitea, Perustuslain tarkastamiskomitean mietintö [Betänkande av kommittén för en översyn av grundlagen] (Oikeusministeriö: Edita Publishing 2010), 60.

In contrast, Section 23 of the Constitution concerns the emergency decrees, issued only after the declaration of a state of emergency. Unlike the ordinary or general decrees issued under Section 80, the decrees issued under Section 23 must be temporary and necessary in nature and subjected to an immediate parliamentary review. During its review, the Parliament has the power to approve or disapprove the validity of these governmental decrees. What is relevant here is that although the Finnish Constitution allows some exceptions to the constitutional rights, it does not allow official institutions to derogate from their public duties, such as matters related to the relationship between the Government, the President of the Republic, and the Courts. The same applies to the institutional duties of municipalities or other self-governmental regional bodies. The Constitution does not recognize any other temporal changes during emergencies than those stipulated based on and under Section 23 of the Constitution. Thus, the Finnish system of emergency powers presupposes that the Finnish Parliament and Government should function together even during the hassles of the states of emergency.

Materially the constitutional limits are, according to the Constitution, the temporary and necessary nature of the exceptions of the basic rights and liberties which, in addition, have to be compatible with Finland's international human rights obligations. Although the Government is allowed to issue decrees, the grounds for provisional exceptions have to be laid down by an Act.

In addition, it should be noticed that according to the Constitution under situations of emergency no other exceptions than those of basic rights and liberties are allowed. Thus, other provisions of the Constitution may not be derogated under emergency.

Question 4

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Section 4: Judicial review of emergency powers in the Member States

Question 1

The judiciary in Finland consists of a two-track system with civil and criminal matters heard by ordinary courts and administrative matters heard before administrative courts. Within the administrative track, the jurisdiction to hear actions challenging “measures to address situations of emergency” depends on the type of measure at issue. Such measures may include, most prominently,

executive measures adopted under the Emergency Powers Act or the Act on the State of Defence, which establish frameworks transferring broad decree-giving power to the government, as well as ordinary legislative enactments, which have included in the past, for example, amendments to the Communicable Diseases Act or the Border Guard Act (578/2005). During emergencies public authorities adopt decisions as part of their administrative duties which can be of individual nature or have the character of generally applicable rules or standards.

The Constitution of Finland foresees only limited judicial review of legislation, including government decrees. Under Section 106 of the Constitution, where an act of parliament is “in manifest contradiction” with the Constitution, the courts are to grant priority to the Constitution. A lower bar for review is provided for government decrees: under Section 107, the courts are to grant priority to the Constitution if such decrees are “in contradiction” with the Constitution. No *actio popularis* exists to enable abstract review of ordinary legislation. Therefore, these forms of limited judicial review are available only incidentally as part of the resolution of concrete controversies before courts. Subject to very limited exceptions, individual applicants do not have standing to challenge a government decree in court.³⁶ In no cases do the courts have jurisdiction to repeal legislative acts, including acts of delegated legislative authority such as government decrees.

In contrast with the limited review available against legislative acts, administrative decisions adopted by public authorities are, in principle, always capable of judicial review. Section 21 of the Constitution provides that everyone has the right to have “a decision pertaining to his or her rights or obligations reviewed by a court of law” and this right is given concrete expression by the provisions of Chapter 2 of the Administrative Courts Procedure Act (808/2019), whereby it is stipulated *inter alia* which decisions can be subjected to review, who can petition for review, and which courts are competent to hear such actions.

However, since in the emergency context the salient administrative decisions tend to be measures of general application, in practice this review is limited due to the grounds of standing available to private parties to challenge such measures. Under Section 7 of the Administrative Courts Procedure Act, administrative decisions can be challenged by the “addressees of the decision,” by those whose “right, obligation or interest is immediately affected,” and by those who are “specifically entitled by law” to do so. Individuals do not have standing to challenge an administrative decision establishing a generally applicable scheme simply because it affects them incidentally. For example,

³⁶ See: Supreme Administrative Court of Finland, ECLI:FI:KHO:2022:63.

during the COVID-19 pandemic, the decision of the Northern Finland Regional Administrative Authority to limit gatherings of over 50 persons and public assemblies subject to certain health precautions, which was based on the Communicable Diseases Act, could not be challenged in court by an individual simply on the ground that the Constitution guaranteed them the right to freedom of movement.³⁷ A challenge against a pandemic-related decision to temporarily close public swimming pools and gyms by a person who was merely a frequent swimming pool goer was similarly rejected for lack of standing.³⁸

At the same time, the availability of judicial protection against administrative decisions which immediately affect the rights, obligations, or interests of individuals remains the general rule. Thus, an action against the abovementioned decision, which could not be challenged by the public swimming pool user, was considered admissible when brought by a corporation operating a gym in as much as the decision imposed concrete obligations upon the gym operator concerning the closure of its business premises.³⁹ When private parties are able to demonstrate an individualizing interest, their actions are admissible before the administrative courts, as in when, during the pandemic, restrictions imposed on public gatherings affected the campaigning in local elections or when a city official unlawfully imposed a ban on visits to a care facility for persons with disabilities.⁴⁰

Question 2

The general rules on judicial review apply regardless of whether a state of emergency is invoked or not. The Constitution, the Emergency Powers Act or the Act on the State of Defence do not contemplate a role for the judiciary in emergencies which would be different from that in normal times. This solution is both applauded and contested. An ongoing scholarly discussion in Finnish law journals exists as to whether this constitutional solution protects the right to judicial protection against unduly restrictive emergency measures targeting the judiciary, or whether effective judicial protection would be better safeguarded by designing specific rules for the way courts should carry out their work during emergencies.⁴¹

³⁷ Supreme Administrative Court of Finland, ECLI:FI:KHO:2020:108.

³⁸ Supreme Administrative Court of Finland, ECLI:FI:KHO:2023:9.

³⁹ See: Supreme Administrative Court of Finland, ECLI:FI:KHO:2023:9.

⁴⁰ See, respectively, Supreme Administrative Court of Finland, ECLI:FI:KHO:2022:140 and ECLI:FI:KHO:2021:1.

⁴¹ Cf. Lavapuro Juha, "Oikeuden Resilienssi," *Lakimies*, no. 7–8 (2020), pp. 1262, 1265 (considering not foreseeing special emergency regime for judiciary positive feature) with Fredman Markku. "Oikeudenhoito ja asianajo poikkeusoloissa," *Defensor Legis*, no. 1,5 (2022), p. 323 (arguing lack of specific rules for judiciary in emergencies is problematic).

Question 3

The formal standard of judicial review is the same for emergency measures and for any ordinary legislative or administrative measure. In practice, there are certain differences owing to the applicable constitutional and legislative framework, especially insofar as the review of legislative enactments is concerned. For example, the review of emergency measures which are adopted under the Emergency Powers Act must proceed taking into account that Section 23 of the Constitution precisely authorizes the government to decree, pursuant to delegated legislative authority, temporary “derogations” from fundamental rights where such measures are indispensable to address the emergency at hand. Thus, the fact that such measures derogate from the regular fundamental rights regime is not per se a ground for assessing their compatibility with the Constitution.⁴² However, even such measures can be subjected to judicial review as regards other aspects of their constitutionality, such as their necessity or their compatibility with Finland’s international human rights obligations, which are conditions that Section 23 expressly obliges the legislature and government to observe.

Question 4

The principle of proportionality is enshrined in the Act on Public Administration (434/2003) as one of the fundamental legal principles which bind the administration. According to Section 6 of the Act, the acts of public authorities must be *inter alia* “proportionate to the aim sought.” The assessment of proportionality contains various components, namely the public act should be apt, effective and suitable for achieving the legitimate aim sought, it must be necessary and it should also comply with proportionality *stricto sensu*, that is, it should not restrict private rights or use public power more than what is necessary and that the least restrictive option should be selected. It has been noted in doctrine that the principle of proportionality in Finnish administrative law corresponds by and large to the principle in EU law.⁴³ The Finnish administrative courts habitually apply the principle in both the domestic and EU law contexts.⁴⁴

⁴² As was noted above, under Section 107 of the Constitution the courts are to grant priority to the Constitution if government decrees are “in contradiction” therewith.

⁴³ See: for this view, the third edition of a major administrative law textbook: Mäenpää, Olli, *Halinto-oikeus*. Alma Talent, 2023, 168, 171.

⁴⁴ See, for example, Supreme Administrative Court of Finland, ECLI:FI:KHO:2024:61 (assessing proportionality of COVID-19 travel restrictions in case of EU citizen who was denied entry to Finland to visit their partner).

Section 5: Implementation of EU emergency law in the Member States

Question 1

To comprehensively identify all the “specific principles of national law that interact with principle and rules of EU law” is a tall order, but this section attempts to provide a brief overview as well as some specific examples of such principles. First of all, it should be noted that the Constitution of Finland expressly affirms Finland’s membership in the EU (Section 1 § 3). This approach which reflects the Constitution’s openness and respect towards European law, or a Finnish variety of *Europarechtsfreundlichkeit*,⁴⁵ characterizes the place of EU law within the Finnish legal order. This is an overarching constitutional principle which applies, in principle, also as regards EU crisis measures. However, such measures have also at times provoked controversy.

Another “principle” of the national implementation of EU crisis measures is their *ex ante* scrutiny before the Parliament of Finland (*eduskunta*). Thus, in Finland, many of the salient debates regarding EU crisis measures are found within the legislative branch. During the sovereign debt crisis, the various European-level bailout measures, which were legally engineered as “intergovernmental” as opposed to “EU” acts, were reviewed by the Constitutional Law Committee of the Parliament nonetheless as “EU measures” for the purposes of the Finnish Constitution. From its robust constitutional position, the Parliament has affected European-level decision making. For example, in 2012, it required the government to secure its budgetary prerogatives in the European negotiations over the qualified-majority decision-making powers of the Board of Directors of the European Stability Mechanism.⁴⁶

As regards administrative authorities’ national-level implementation of EU emergency measures, the Act on Public Administration extends the principles of good administration to all these authorities (with limited exceptions regarding, for example, policing, judging, and military activities). The principles include those of legality, non-discrimination, impartiality, proportionality, and the protection of legitimate expectations. The public authorities are also bound, as per Section 22 of the Constitution, to guarantee the observance of fundamental rights and human rights. By and large, these principles correspond to those existing in EU law as general principles or fundamental rights. Some rights and principles have, nonetheless, greater weight or a different outlook in the national context.

⁴⁵ For the use of the term, see: Leino Päivi and Salminen Janne, “The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?,” *EuConst*, vol. 9 no. 3 (2013), pp. 451, 456.

⁴⁶ *Ibidem*, pp. 465ff.

A case in point is the right of access to documents, which is a broadly interpreted constitutional right in Finland.⁴⁷ During the sovereign debt crisis, the Finnish government required a collateral guarantee as a condition for its participation in the emergency lending provided to Greece. The agreement signed by the finance ministers was politically sensitive for both governments and Greek representatives had expressly required that it should remain confidential. A Finnish opposition MP challenged the non-disclosure of the agreement judicially. In the appeal against the Ministry of Finance's non-disclosure decision, it was argued that "EU secrecy" as well as hiding behind the "commercial secrets" of private law corporations established by Member States was inimical to the Finnish legal culture of public access to documents. The Supreme Administrative Court ruled that the finance ministers' agreement as well as the annexed agreements on financial products and escrow arrangements were to be made public, except for the names and other identifying information of the investment banks involved.⁴⁸

Yet other principled approaches have been employed in connection with EU emergencies in recent years. The protection of public health, even the right to life, as well as the precautionary principle were extensively invoked during the COVID-19 pandemic to justify restrictions on freedom of movement to Finland from other Member States. Following increased numbers of border crossings by asylum seekers in 2023, which were identified by Finnish authorities as a form of hybrid warfare by Russia following Finland's accession to the NATO, Finland has also adopted strict measures on its eastern border with Russia which have been justified with reference to national security. The controversies regarding the implementation of both the travel restrictions and the border closure are briefly recapped in the next section.

Question 2

The Commission identified shortcomings in Finland's initial response to the COVID-19 pandemic. The Finnish response to the pandemic during the first year was to ban entry to the country from the outside, including from the other Member States, subject to exceptions which included travelling for strictly defined "indispensable" reasons, including "indispensable" travel for work.⁴⁹

⁴⁷ Under Section 12 § 2 of the Constitution, "[d]ocuments and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings."

⁴⁸ Supreme Administrative Court of Finland, ECLI:KHO:2013:90.

⁴⁹ Cf. "Maahantulon rajoituksia kiristetään 27.1," sisäministeriön tiedote 22.1.2021, <https://intermin.fi/-/maahantulon-rajoituksia-kiristetaan-27.1>. See also: Neergaard Ulla, Paju Jaan, and Raitio Juha, "Closure of Borders in the Three Nordic EU Member States During the Covid-19 Pandemic," *Free Movement of Persons in the Nordic States: EU Law, EEA Law, and Regional Cooperation*, edited by Hyltén-Cavallius Katarina and Paju Jaan. Hart Publishing, 2023.

These measures were determined largely unilaterally and the Commission critically noted that Finland could protect public health with more targeted restrictions so as to better observe the needs of free movement.⁵⁰ However, the government did not consider the criticism as valid but maintained that the health and safety of the population justified the strict measures.⁵¹

In the context of migration, Finland has adopted particularly strict measures on its Russian border which go beyond those foreseen in the EU's Crisis and Force Majeure Regulation, adopted as part of the 2024 Pact on Migration and Asylum.⁵² By relying on a 2022 amendment to the Border Guard Act, Finland has closed all its land border crossing points on the eastern border where it is not permitted to apply for asylum.⁵³ A new law adopted in 2024, the Act on Temporary Measures to Repeal Instrumentalized Immigration (482/2024) provides for a procedure for "pushbacks" of asylum seekers on the border, which can be put to use in an acute emergency.⁵⁴ These most recent measures are in tension with EU law; at the time of writing, many aspects of their implementation on the ground, however, remain unclear.

⁵⁰ Letter from the Directorate-General for Justice and Consumer Matters to the Government of Finland, 22 February 2021, Ref. Ares (2021)1401086 (on file with the authors).

⁵¹ Letter from Ministry of the Interior to the Commission, 4 March 2021 (on file with the authors).

⁵² Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024.

⁵³ See, for this interpretation: the preparatory acts to the Border Guard Act, HaVM 16/2022 vp, 13–14.

⁵⁴ Laki väliaikaisista toimenpiteistä välineellistetyn maahantulon torjumiseksi (482/2024).