

Finland: Soft measures, respect for the rule of law, and plenty of good luck

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In mid-April 2020 Verfassungsblog published my first take on Finland's response to COVID-19, under the characterisation '[Best Practice and Problems](#)'. Into February 2021, Finland has remained one of the few European champions in combating the epidemic, with 9,423 cases and 131 deaths (both per one million inhabitants and by [18 February 2021](#)). Notably, Finland's success has not followed from strict 'draconian' measures but from a combination of factors that include at least geographical location; cultural patterns that support physical distancing and even isolation; a well-functioning healthcare system; a good level of compliance; [comparatively good levels of vitamin D](#); and sheer luck which would be related to the first factor, geographical location.

Throughout 2020, the left-centre-green coalition government of Sanna Marin (Social Democrats) was in charge, and COVID-19 was the number one issue of politics and governance. The Cabinet met frequently in formal and informal sessions to discuss the country's strategy and decide on new piecemeal measures. For instance, border controls were almost permanently on its agenda with frequent adjustments in one or the other direction. A state of emergency was in place for three months (from mid-March to mid-June) but the prospect of reinstating it was communicated throughout the year. Finland adopted neither a clear strategy to suppress the epidemic nor a strategy of letting the virus wash through the younger and healthier segments. Even officially, Finland declared itself to follow a '[hybrid strategy](#)' which entails emphasis on testing, tracing, (primarily voluntary) quarantine, working from home when possible, income support to people in quarantine, reduction of all travel across international borders, and limitations on public gatherings. In comparative terms, measures related to masks, restaurants, public transport and 'non-public' (such as religious) gatherings remained very relaxed. With a hybrid strategy and the constant compromising it entails, the epidemic could have turned much worse. But it didn't, so far.

The central government's response can be described as more communicative than regulatory: With an early declaration of a state of emergency and a rapid return to the state of normalcy, and with strong emphasis on recommendations, the population was made conscious of the severity of the threat but by and large, legally speaking, left at liberty as to their modes of everyday conduct.

On 26 January 2021 the Cabinet [updated its national strategy](#) against COVID-19 in a situation of a new surge of cases in Europe, entailing the spread of more contagious virus variants. Instead of moving to quick and decisive action, as recommended by many experts including [this author](#) as well as the [President of the Republic](#), the Cabinet chose to follow the advice by a modeling group of the [Finnish Institute for Health and Welfare](#). The updated hybrid strategy entails close monitoring of the

situation, proactive communication, and fine-tuning of existing restrictions but also postponing more severe restrictions such as a lockdown. This choice was based on an assessment that the health care system will be able to cope with the growing epidemic until the end of March, despite the already recorded presence of more contagious variants. To many a civil society commentator, [including this author](#), postponing stronger measures may be a strategic error and will require revisiting.

The Executive and Use of Powers in Response to Emergency

Finland is a unitary State with relatively autonomous municipalities and a more far-reaching regional autonomy of the [Åland Islands](#) with its own legislature. The mainland territory of the country is allotted into the jurisdiction of six [Regional State Administrative Agencies](#) which are organs of the central government. Due to a political compromise the law is unclear as to whether they are mere administrative arms of the Cabinet or closer to semi-autonomous Agencies that belong to the State administration but are not under the direct command and control of Cabinet Ministers. For instance, the Finnish Institute for Health and Welfare is one such Agency.

Measures against COVID-19 primarily have been dealt with by the Cabinet, including in respect of the triggering of the Emergency Powers Act, recommendations to the public, and the frequently amended regime at the country's territorial borders. The three most prominent Ministries have been the Prime Minister's Office, the Ministry for Social Affairs and Health, and the Ministry of the Interior.

Section 80 of the [Constitution](#) entails a strict requirement that matters that affect the rights and duties of individuals must be regulated through an Act of Parliament which only to a limited degree can delegate legislative power to the Executive. Chapter II of the Constitution, on fundamental rights, imposes strict requirements that restrictions must be enacted in the form of an Act of Parliament. Also during COVID-19, any amendments to existing Acts of Parliament have required the application of the full legislative procedure. In contrast, the Emergency Powers Act does shift legislative power into the hands of the Cabinet. That said, it is an important feature of the regime for emergencies, as set forth in Section 23 of the Constitution and in the Emergency Powers Act that there is real-time constitutional and parliamentary scrutiny of any emergency regulations issued. As a consequence, major dimensions of Finland's responses to COVID-19 have all the time been decided by Parliament where the Constitutional Law Committee exercises continuous scrutiny over the constitutionality and human-rights-conformity both of legislative Bills and of Cabinet regulations issued under the Emergency Powers Act. This Committee, in turn, regularly hears constitutional law experts and is surrounded by a public debate.

While the Emergency Powers Act had prime place in March-June 2020, later on the legislative response has mainly focused on piecemeal amendments to the [Communicable Diseases Act](#). Restrictions of international travel were, however, handled through Cabinet decisions and recommendations. On 19 February

2021, a [Bill](#) was finally submitted to Parliament concerning compulsory testing and associated measures, including when entering the country, as yet another amendment to the Communicable Diseases Act.

The Effectiveness of Judicial and Legislative Scrutiny and Oversight

Courts have generally adapted themselves to the situation by modifying their methods of work. The epidemic has resulted in delays in court proceedings but not as severely as in many other countries. Administrative courts have gradually started to decide cases directly related to COVID-19 such as [restrictions imposed by institutions of care](#).

The two main institutions for oversight of legality, the Chancellor of Justice (of the Cabinet) and the (Parliamentary) Ombudsman have received a large number of complaints related to responses to COVID-19. Both appear to have adopted a fairly soft approach of pointing out shortcomings and even mistakes but not finding illegality or instituting criminal prosecution which would be within their powers. In the issue of measures at Finland's territorial borders, both oversight institutions have [criticised](#) the Cabinet and the [Border Control Agency](#) for ambiguous drafting of and misleading communication on decisions that have the appearance of legally binding regulations but that in closer analysis have been recommendations,. These decisions can be read so as to reflect acceptance or at least toleration of extra-constitutional emergency powers, which would be very atypical for Finland.

Federal, Regional and Local Response and Coordination

While the response primarily has been in the hands of the central Government, and in particular the Cabinet, the Communicable Diseases Act creates an important exception as it primarily is based on a decentralised model where the role of Regional State Administrative Authorities, municipalities and individual specialist doctors is significant. Issues such as mandatory health screening, mandatory quarantine, contagion tracing, physical closing of educational institutions, and banning or restricting public assemblies all primarily pertain to the parallel jurisdiction of the respective municipality and Regional State Administrative Authority. As the latter nevertheless are authorities of the State, they have closely coordinated their actions and also been receptive to instructions from the Cabinet. Notably, in August 2020 the Regional State Administrative Authorities however demonstrated a degree of autonomy in relation to [contradictory](#) instructions from the Ministry of Social Affairs and Health concerning restrictions upon public assemblies.

Due to the central role of the Ministry of Social Affairs and Health in the national response and the decentralised model of the Communicable Diseases Act, one recurring theme in legislative responses considered has been efforts to make the powers and role of the said Ministry more prominent in the application of the Act.

Notably, in February 2021 Parliament, following an [Opinion](#) by its Committee on Constitutional Law, rejected an important amendment of the Act that would have brought into its scope powers to restructure and reorganise the provision of health and social services, powers that otherwise would only be available pursuant to the Emergency Powers Act but were now proposed to be exercised by the Ministry of Social Affairs and Health without the parliamentary scrutiny that would apply if the Emergency Powers Act was triggered. Had the Bill been adopted, it would have represented function creep through the insertion of delegated emergency powers into ordinary legislation, undoing the safeguards related to the actual use of the Emergency Powers Act. As said, the effort failed.

Human Rights Considerations

The Constitution has a comprehensive catalogue of fundamental rights, including a comprehensive clause (Section 22) on positive obligations in respect of both constitutional rights and international human rights. A pluralist system of scrutiny entails that fundamental rights scrutiny is built into drafting of Bills, parliamentary proceedings and the application of legislation or regulations. There is also a lively [public debate](#) on any legal reform with human rights implications.

During COVID-19 and the year 2020, rights protections worked relatively well. Examples of strict upholding of the standards include the right to privacy (the COVID-19 app) and freedom of religion (exclusion of religious gatherings from the scope of restrictions upon assemblies). Confusion and failures to respect human rights did, however, result from ambiguously worded recommendations, including visiting rights at institutions of care. No proper legal basis was found or created for restrictions on cross-border movement which therefore have remained dubious.

Finland's choice of a 'hybrid strategy' has translated into reluctance to impose certain restrictions widely in use elsewhere. Wearing of face masks has been dealt with merely in the form of recommendations that have lacked consistency and produced relatively low compliance. Restaurants were subjected to restrictions through an amendment of the law but in substance those restrictions, mildly reducing maximum occupancy, are very relaxed compared to other countries. These and some other cases of refraining from quick and rapid action may be criticized as failures to meet the country's positive human rights obligations under the right to health and the right to life. As a consequence, the safe conducting of local elections scheduled for 18 April 2021 [may be confronted with unforeseen challenges](#).

2021 Outlook: Recommendations for Governance, Democracy, Human Rights, and the Rule of Law

The trajectory of the epidemic in 2021 will be a race between vaccinations and new virus strands. Finland's communication-centred hybrid strategy may suddenly be faced with an exponential rise of cases. If that were to happen, the Emergency Powers Act would not be fit for purpose as its usefulness proved quite limited in March-June 2020. A more adequate response could be based on the emergency

powers provision in Section 23 of the Constitution, for the quick enactment of tailor-made COVID-19 emergency measures, including derogations from freedom of movement and other human rights and also triggering notifications concerning derogations from the ECHR and ICCPR.

If this were to happen, the positive features of Finland's approach to emergency powers could still be preserved: immediate parliamentary scrutiny of any use of emergency powers, including by hearing independent constitutional law experts by the Constitutional Law Committee of Parliament, vigilance by legality oversight authorities, and continued commitment to the restoration of normalcy as a lodestar for any use of emergency powers.

If, however, the more virulent strands do not become a significant problem and the race is won by vaccinating the population, attention should immediately shift to a careful comprehensive review of both the Emergency Powers Act and the Communicable Diseases Act. These two legal instruments have been central in Finland's handling of the epidemic, but they also have both proven to be highly inadequate when the country is faced with an airborne pathogen that has a relatively high reproductive number and relatively high fatality rates. COVID-19 will not be the last pandemic with these parameters.

As Finland has been one of the EU countries that have de facto restricted intra-EU travel, it would be well placed to take the initiative towards creating a proper legal basis for the partitioning of the EU area during a public health emergency. It is absurd that while Member States may be imposing lockdowns internally, including by cordoning off parts of their territory, cross-border movement cannot be controlled through evidence-based decision-making but is outside everyone's competence because of what ultimately is an ideological commitment to the four economic freedoms of European integration. If the EU was a federal State hit by a deadly pandemic, then evidence and reason, rather than ideology and impotence, would govern its approach to freedom of movement.

Finally, governments, academics and international organisations should join forces in conducting a [human rights assessment of strategies against COVID-19](#). Doing so would better equip the world for future pandemics, as human rights assessment could be built into all plans for preparedness and prevention.

