Administration of justice in times of crisis – how to guarantee access to justice?

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Professor of Practice *Markku Fredman* wrote about the administration of justice and the practice of law in times of crisis in the previous special issue of Defensor Legis.[1] Fredman's article contained a detailed analysis of Finland's negative experiences of the handling of criminal cases during and after the First and Second World War.[2] He gave numerous examples of past failures to uphold the principle of a fair trial and the constitutional rights of citizens in the contexts of, for example, death sentences, courts-martial, shortcomings in the defence of the accused – such as failures to provide access to defence counsel even in death penalty cases, concealment of information and restrictions on the choice of counsel and the admissibility of witness testimony – and covert surveillance of lawyers.

The war in Ukraine has carried on since the publication of Fredman's article, and the latest statistics show that more than 110,000 war crimes and more than 16,000 crimes against public order have already been reported in Ukraine. These cases involve not just soldiers and military leaders but also public authorities and political decision-makers.[3] At least some of the aforementioned issues that the Finnish criminal justice system has struggled with in times of crisis appear to now be surfacing in Ukraine: while Ukrainian lawyers continue to pursue their constitutional mission – defending their clients against criminal charges and protecting their rights and interests – the authorities have started to confiscate lawyers' documents, computers and mobile phones as well as to pressurise lawyers to break legal professional privilege ("LPP" or attorney–client privilege). Many lawyers are also working on cases that involve unlawful arrests, torture or forced labour.[4]

The pertinence of the question that Fredman set out to answer in his article – how can the administration of justice in Finland be safeguarded in highly exceptional circumstances,

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[1] Markku Fredman: 'Administration of justice and the practice of law in times of crisis', Defensor Legis 1.5/2022, pp. 323–333.

[2] Fredman, 2022, pp. 327–329.

[3] Public Prosecution Office of Ukraine, 4 November 2023.

[4] Tero Ikäheimonen: 'Valon puolella – Ukrainan kansallisen asianajajaliiton varapuheenjohtajan Valentyn Gvoziyn haastattelu' ['On the side of light – Interview with Vice-President of the Ukrainian National Bar Association Valentyn Gvozdiy'], Advokaatti 5/2023, p. 22.

during times of war and even enemy occupation[5] – is concretised by the number of crimes and issues with the administration of justice that the war in Ukraine is causing. Section 23 of the Constitution of Finland obligates the State to also ensure compliance with Finland's international human rights obligations during times of crisis. Article 15 of the European Convention on Human Rights (ECHR) gives the signatories, in time of war or other public emergency threatening the life of the nation, the right to 'take measures derogating from their obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law'.

Fredman's question could be reworded as follows: *how can the legal rights guaranteed under section 21 of the Constitution of Finland – everyone's right to have his or her case dealt with appropriately as well as the other guarantees of a fair trial and good governance* – be upheld in times of crisis? What would it take in practice to guarantee the right of defence and the right to a legal remedy – which are interlinked with other constitutional rights such as the protection of property provided for in Article 15 of the Constitution – when emergency mechanisms, such as the requisitioning of land or buildings, are triggered? For example, the Emergency Powers Act (1552/2011) and more specifically section 130 of the Act, which was added on 16 February 2023, stipulates that the appeals procedure is based on the Administrative Judicial Procedure Act (808/2019) but does not explain how the right of appeal will be guaranteed if, for example, the status and position of lawyers are not protected, and the same section also states that decisions must be enforced immediately regardless of any pending appeals, unless the competent administrative court orders otherwise.

The Emergency Powers Act also contains special penal provisions that complement sections 1 to 3 of chapter 46 of the Criminal Code of Finland (39/1889) regarding regulation offences, aggravated regulation offences and petty regulation offences respectively. Section 133 of the Emergency Powers Act provides for violations of the Act, and dealing with these violations requires not only a functional court and prosecution system but also lawyers to protect the rights of the parties.

It is not only the procedural laws governing trials that must be taken into account but also the Advocates Act (496/1958), the Act on Licensed Legal Counsels (715/2011) and the Act on Legal Aid and Public Guardianship Districts (477/2016), none of which provides for the kinds of emergency conditions referred to in the Emergency Powers Act. In the event of a war, private lawyers subject to mandatory military service would presumably be called into military service. How can lawyers be expected to exercise their profession in times of crisis when there are no special rules about lawyers in these circumstances? How can it be ensured that there is no government interference in, for example, the right to legal representation in criminal proceedings? How will lawyers be protected in the event that public opinion turns against them? For example, Ukrainian lawyers have already represented a number of Russian soldiers who have been suspected or accused of war crimes, and this has sparked opposition from some Ukrainians[6] The need for constitutional reform also needs to be considered in this context: are the legal rights guaranteed under section 21 of the Constitution of Finland

[5] Fredman, 2022, p. 323.

[6] Ikäheimonen, 2023, p. 22.

enough, or should chapter 9, which deals with the administration of justice but makes no provision for lawyers, also be revised?

Ensuring the independence and impartiality of lawyers during times of crisis is not enough either; attention must also be given to the aftermath of conflicts. For example, the war-responsibility trials conducted in Finland after the Second World War included a motion from the special prosecutor to abolish the Finnish Bar Association.[7] How can the independent and impartial conduct of not just lawyers but also the entity that regulates and oversees the profession be ensured during and after times of crisis?

There is again a parallel with Ukraine: the Ukrainian National Bar Association (UNBA), whose status in enshrined in the Constitution of Ukraine as well as in a special Act, continues to administer bar examinations and deal with complaints about the misconduct of lawyers despite the war – the UNBA has even grown by more than 2,000 new members since the start of the invasion.[8] How can the status of the Finnish Bar Association, which is based exclusively on the Advocates Act, be ensured in similar situations without special rules? Should Finland afford constitutional protection to its lawyers like Ukraine? More potent protective provisions may be needed to prevent any future attempts to strip the Finnish Bar Association of its powers.

On the effects of the coronavirus pandemic on the administration of justice

The Emergency Powers Act has seen little action in practice: the previous version of the Act never had to be applied, and the current version was triggered for the first time on 13 March 2020 in response to the coronavirus outbreak that led to the COVID-19 pandemic.[9] The Government issued a decision to lift the state of emergency on 27 April 2021 when it was established that the use of powers under the Emergency Powers Act was no longer justified.

The COVID-19 pandemic had a big impact on the operation of courts. Many proceedings had to be suspended – especially in 2020 – and the courts' outstanding caseload increased considerably.[10] Complex cases in particular had to be rescheduled, and processing times grew longer.

One of the most interesting points in the context of the administration of justice during the COVID-19 pandemic relates to a 2021 government proposal (HE 39/2021 vp), which sought to protect the population from the spread of the virus by locking down key functions of society. The so-called 'lockdown proposal' set out a schedule of temporary restrictions on close contacts and the freedom of movement, which is normally guaranteed under the Constitution of Finland. The proposal was issued as a provisional exception to account for exceptional circumstances pursuant to section 23 of the Constitution.

The special measures proposed by the Government made no mention of the administration of justice; in other words, guaranteeing the legal rights arising from section 21 of the

[7] Helsingin Sanomat, 29 November 1946.

[8] Ikäheimonen, 2023, p. 18.

[9] Memorandum on the establishment of a working group to oversee the reform of the Emergency Powers Act, 29 September 2022, p. 2.

[10] The National Courts Administration's statistics on suspended cases in 2021 can be found online at https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlqgymkm.html.

Constitution – everyone's right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice – was not considered important enough to provide for in the lockdown regime. All it would have taken to protect these rights was to add the administration of justice to the list of 'essential' reasons for which people would be allowed to leave their homes during the lockdown.

Although the proposal was withdrawn[11] by the Government, this list of exemptions[12] is indicative of the Government's understanding of what is – and what is not – essential for the functioning of society. This failure of the Government to see the administration of justice as a critical function of society is unfortunately also evident in the mandate of the working group overseeing the reform of the Emergency Powers Act.

Reform of the Finnish Emergency Powers Act

The Government established a parliamentary monitoring group to support the reform of the Emergency Powers Act on 24 March 2022 and appointed a working group on 6 October 2022. The working group's mandate did not, however, include any special provision for maintaining legal order (section 1 of the Emergency Powers Act)[13], even though a number of influential figures, including former Chair of the Parliament of Finland's Constitutional Law Committee *Johanna Ojala-Niemelä*, had spoken out about the importance of such a provision during the COVID-19 pandemic.[14] Despite strong arguments in favour of providing specifically for the administration of justice, such as the aforementioned excellent article by Fredman, the working group's mandate remains unchanged in this respect. The application of the Emergency Powers Act during the pandemic nevertheless highlighted certain other weaknesses in the provisions, which is why it was decided to undertake a comprehensive reform of the Emergency Powers Act.

The Parliament instructed the Government to carry out a constitutional law analysis of the relationship between the Emergency Powers Act and section 23 of the Constitution of Finland15 in connection with the drafting of the previous version of the Emergency Powers Act. The analysis shows that, even after the latest constitutional amendments (1112/2011, adopted on 4 November 2011), the scope of application of section 23 of the Constitution is noticeably narrower than the definition of 'emergency conditions' given in the Emergency

[11] Government communication VNK/2021/39.

[12] Government proposal HE 39/2021 vp, with justifications for section 3.

[13] The mantra about the importance of 'maintaining legal order' is repeated in the draft version of the Act (HE 3/2008 vp) on pages 6, 28, 30, 32 and 99. However, in the context of the Emergency Powers Act, the references to 'maintaining legal order' are likely to have more to do with the triggering of emergency powers than the preservation of the regular judicial system.

[14] Fredman, 2022, p. 325.

[15] Valmiuslaki ja perusoikeudet poikkeusoloissa: Valtiosääntöoikeudellinen kokonaisarvio valmiuslain ja perustuslain 23 §:n suhteesta [Emergency Powers Act and constitutional rights in times of crisis: Comprehensive constitutional law analysis of the relationship between the Emergency Powers Act and section 23 of the Constitution of Finland], Publications of the Government's analysis, assessment and research activities 64/2018.

Powers Act. Another fundamental flaw unearthed by the analysis is the extensive delegation of legislative powers under the Emergency Powers Act. A statement by the Parliament of Finland's Constitutional Law Committee (PeVL 29/2022 vp) on the government proposal amending the Emergency Powers Act (HE 63/2022 vp) highlighted the need to reform the Emergency Powers Act with constitutional constraints in mind. The Defence Committee, the Administration Committee and the Transport and Communications Committee also issued statements (PuVM 2/2022 vp, HaVL 19/2022 vp and LiVL 21/2022 vp respectively), in which they emphasised the need to re-examine the whole of the Emergency Powers Act and to do so urgently.

The working group overseeing the reform of the Emergency Powers Act is made up of government officials, but also three permanent experts have been appointed: two professors and a member of the Supreme Administrative Court of Finland. This member of the Supreme Administrative Court of Finland is the only legal professional in the working group, and there is no separate subcommittee for the administration of justice. A decision was taken on 14 June 2023 to establish nine subcommittees, which focus on (1) restrictions on the freedom of movement and civil defence; (2) ensuring the availability of basic services and livelihoods; (3) finance and insurance; (4) critical ICT services; (5) energy and water supply; (6) logistics and transport; (7) agriculture and industrial production; (8) trade regulation; and (9) housing and construction.[16] The need to ensure the administration of justice was also overlooked in the examination of international benchmarks, which was part of the Security Committee's phenomenon-based scenario analysis of weaknesses in the Emergency Powers Act and one of the starting points for the aforementioned sectoral division of the working group's responsibilities.[17] The authorities had already conducted a number of other sectoral analyses, none of which covered the administration of justice either.[18]

As is stated in the aforementioned phenomenon-based scenario analysis of weaknesses in the Emergency Powers Act, in a functional society based on the rule of law, the enforcement of laws does not stop when emergency powers are triggered, and it is very likely that situations will arise during a crisis and after a state of emergency has been declared that are either beyond the scope of application of the special powers conferred in emergency legislation or that do not require the use of emergency powers, since the laws that apply in normal times already give the authorities enough powers to deal with such events and circumstances.[19] As the example given above regarding the COVID-19 pandemic demonstrates, the administration of justice was not guaranteed the last time the Emergency Powers Act was activated, so how could the situation have automatically changed in this respect? This question is especially

[16] Decision of 14 June 2023 establishing subcommittees of the working group overseeing the reform of the Emergency Powers Act.

[17] Security Committee: Valmiuslain uudistamistarpeita kartoittava ilmiöpohjainen skenaarioselvitys [Phenomenon-based scenario analysis of weaknesses in the Emergency Powers Act], pp. 14–16, 3/2021; available online at https://api.hankeikkuna.fi/asiakirjat/9a8ae543-89b2-4f04-bcf8-6e1685260cf5/2d698648-55d1-4598-a1f0-47e0755baab4/JULKAISU_20221214122028.pdf.

[18] Raimo Luoma: Viranomaisten toimivaltuudet häiriötilanteissa [Powers of the authorities in times of crisis], Publications of the Ministry of Justice, Reports and guidelines 2019:18, pp. 7–8; available online at https://julkaisut.valtioneuvosto.fi/handle/10024/161604.

[19] Security Committee, 2021, p. 2.

pertinent considering the possibility of a more serious crisis, such as what is happening in Ukraine.

There is naturally no reason, from the perspective of legislative drafting, why emergency conditions could not be provided for in laws other than the Emergency Powers Act. The problem is that the scenarios examined in the course of a regular legislative process are not the same as those examined in the context of the Emergency Powers Act and emergency conditions in particular. The administration of justice would have to be incorporated into these scenarios and not be examined as a separate entity. Without such a holistic approach, there is a risk that fundamental legal remedies could be overlooked. Unfortunately, legislative resources are generally allocated according to whatever the most recent Government Programme identifies as priorities, and there are effectively no resources left over for special legislative projects involving, for example, the examination of the effect of emergency conditions on the administration of justice.

A working group was appointed earlier this year to come up with guarantees for the rule of law and improvements to the Finnish judicial system[20]; the working group has a mandate until 2027, which includes examining the effectiveness of procedural law and other regulations relating to the functioning of the judicial system, as well as, for example, ways to improve digital services. The mandate is already extremely broad, and it would be unreasonable to expect the working group to also incorporate a procedural examination of emergency conditions into its workload, even though one of the working group's objectives is to analyse constitutional and other legislative weaknesses from the perspective of the judicial system's impartiality and make proposals as to how these could be fixed by means of legislative drafting by 31 December 2026.[21] The working group's analysis of impartiality is sure to identify issues with the roles of various operators and lead the working group to explore how these could be strengthened to guarantee the rule of law on a constitutional level, but this will unfortunately be no substitute for an examination in the context of the reform of the Emergency Powers Act. The aforementioned scenario analysis makes a good point in this respect:

> 'The Emergency Powers Act plays a key role in Finland's system of emergency legislation. The Act does much more than give special powers to the authorities in times of crisis. Effective emergency legislation that provides for foresight and preparedness can also help to prevent crises. The Emergency Powers Act contains not only provisions that deal specifically with the additional powers conferred to the authorities representing each government department when a state of emergency is declared but also provisions that describe the objectives and scope of application of those powers on a general level as well as the criteria that must be satisfied before the Act can be triggered and the procedure for doing so. *The existence of carefully drafted legislation the application of which the authorities and other interested parties have practised together is in itself a deterrent at least to intentionally inflicted crises and emergencies.* The Emergency Powers Act obligates the authorities to take various steps to ensure that their duties will be performed with the least amount of disruption also in emergency conditions.'[22]

[20] Project OM012:00/2023 of the Ministry of Justice; the decision to establish the project and supporting documents are available online at https://oikeusministerio.fi/hanke?tunnus=OM012:00/2023.

[21] *Ibid*, see the task 5 of the establishment decision. The report on judiciary (Government publications 2022:67), noted out the same, p. 58, available at http://urn.fi/URN:ISBN:978-952-383-938-0.

[22] Security Committee, 2021, p. 1.

Serious consideration needs to be given to Fredman's suggestion[23] to incorporate a chapter dedicated to courts, court proceedings and the judicial administration into the Emergency Powers Act.

The working group overseeing the reform of the Emergency Powers Act should also examine the potential need to update the State of Defence Act (1083/1991) and the Military Court Procedure Act (326/1983), albeit that the latter is due, according to the Government Programme, a review of its own later during the current term of government.[24]

Towards constitutional reform

Upholding the right to a fair trial, access to effective legal remedies and the rule of law requires not only impartial and independent courts and prosecutors but also impartial and independent lawyers.[25] The legal professionals involved in a typical criminal case are a judge, a prosecutor and lawyers representing the parties. In civil cases, only the judge and the parties' lawyers represent the legal profession. There is, of course, no practical reason why courts – especially administrative courts – could not hear both criminal and civil cases without the parties' having legal representation, and this is what can happen in a society in which the role of lawyers is not protected by law.

The EU Charter of Fundamental Rights provides that everyone must have the possibility of being advised, defended and represented (EU Charter of Fundamental Rights, Article 47). The European Convention on Human Rights provides, for example, that everyone has the right to defend himself in person or through legal assistance of his own choosing (ECHR, Article 6(3)) and that there must be 'equality of arms' on both sides in order to ensure a fair trial (ECHR, Article 6(1)).

The CJEU has previously observed that the concept of lawyers as an independent profession acting in the interests of the administration of justice and within the rules of professional ethics and discipline laid down and enforced in the general interest is found in the legal order of the European Union (case C-155/79, AM & S Europe v Commission, paragraph 24 and case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission and others, paragraph 42).

The CJEU has also observed that lawyers must be in a situation of independence vis-à-vis the public authorities, other operators and third parties and must never be influenced[26] by them so as to guarantee that all steps taken in a case are taken in the sole interest of the client (case C-309/99, Wouters, paragraph 102).

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[23] Fredman, 2022, p. 325.

[24] Sotilasoikeudenkäyntilainsäädännön uudistaminen [Reform of military court procedure legislation], Publications of the Ministry of Justice, Memorandums and statements 2021:5.

[25] In identifying the individuals who, as 'independent lawyers', should be protected by the Constitution, it is important to note the established interpretation of the Court of Justice of the European Union (CJEU) that there must be no employment relationship between a lawyer and his or her client and that the concept of an independent lawyer must be defined both in positive terms – through the rules of professional ethics – and in negative terms – through the absence of an employment relationship between a lawyer and his or her client (*AM & S Europe v Commission*, case C-155/79, paragraph 24 and *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others*, case C-550/07 P, paragraph 42).

[26] The requirements of impartiality and independency are related also to self-regulation and supervision.

The latest version of the Constitution of Finland affords protection to judges and prosecutors (Constitution of Finland, sections 98–103 and section 104 respectively), but leaves the independence and impartiality of lawyers for lower-level regulations, international treaties and the court system to ensure.

Enforcing the right of defence, the equality of arms and the rule of law as defined in supranational instruments and case law – and even just guaranteeing a fair trial – requires the following constitutional changes:

1. The inclusion of independent and impartial attorneys-at-law in the constitution along other actors of administration of justice;
2. Recognition of an independent body, which exercises public power, responsible for the regulation and oversight of the attorneys-at-law to ensure their independence and impartiality; and
3. Safeguarding the legal professional privilege (LPP) as a constitutional right.

I sincerely hope that these perspectives will be taken into account the next time the Constitution of Finland is reviewed – especially if the objective of the review is to strengthen the roles of the operators involved in the administration of justice. The lessons that can be learned from Ukraine in the light of the examples I have given above prove that all of the aforementioned constitutional changes are necessary – and not forgetting the last point.

The Council of Europe's new legislative instrument

Recent years have also seen a rise in violations of fundamental rights of defence and other attacks against lawyers in the EU and in Council of Europe member states, such as Poland and Hungary. The Council of Europe is responding with a new legislative instrument to protect lawyers, which will be binding on all Council of Europe member states.[27] The plan is to start implementing the instrument in 2025. The instrument is designed, for example, to protect the right of lawyers to exercise their profession independently but also to ensure the impartial status, vis-à-vis national governments and other operators, of entities that regulate and oversee lawyers.

It is still too early to assess the effects of the instrument on national regulation. In addition to the nature of the instrument (binding or non-binding), there is also a question of the willingness to implement the instrument into national legislation and, if it were a binding instrument, how the implementation of the instrument would be monitored.

The latest example of the issues that the new instrument seeks to address is the arrest of lawyers representing the Russian opposition leader *Alexei Navalny*. The lawyers are being held on remand on suspicion of belonging to an extremist group and face up to six years of imprisonment if convicted.[28]

[27] See https://www.coe.int/en/web/cdcj/cj-av.

[28] See, for example, Financial Times: 'Russia arrests three of Alexei Navalny's lawyers', 13 October 2023; available online at https://www.ft.com/content/e318a3a0-14b4-4905-9790-f7245d9b4d05;; and Helsingin Sanomat: 'Venäjän marssi syvenevään pimeyteen jatkuu' ['The Russian march into ever-deeper darkness continues'], 20 October 2023; available online at https://www.hs.fi/paakirjoitukset/art-2000009932694.html.

Guaranteeing the independence and impartiality of lawyers regardless of the political situation and any exceptional circumstances is essential for ensuring that the rule of law is upheld at all times.

Conclusions

As mentioned above, there are at least two projects in progress at the moment that could incorporate a perspective on emergency conditions: the reform of the Emergency Powers Act and the working group tasked with guaranteeing the rule of law and improving the Finnish judicial system. However, ensuring the administration of justice in times of crisis is not a priority in either mandate. This issue must be examined from multiple perspectives, taking advantage of the many insightful and extensive scenario analyses that have already been conducted. Society cannot function without a functional legal system. And the legal system cannot be reformed without a social context – in this case an analysis of what happens to the administration of justice during a state of emergency.