“Regular Powers are No Longer Enough” – Checks and Balances in Declaring a State of Emergency according to the Constitution of Finland

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1 Introduction

In this article, we discuss *checks and balances in declaring a state of exception*.

Our focus is on *how the Constitution of Finland and legislation concerning the use of emergency powers uphold the checks and balances in declaring a state of emergency*. Building upon a process which had started already earlier, the current Constitution of Finland, from the year 2000, transformed the Finnish system from a semi-presidential to a parliamentary one, which is visible in many of the constitutional arrangements. The Government is now in charge of emergency action and the role of the Parliament has been strengthened in checking the executive during the state of emergency. The development of Finnish emergency legislation, however, did not happen suddenly; even before the present Constitution the provision concerning basic rights and liberties in situations of emergency was re-modelled and included in the chapter of the Constitution concerning fundamental rights. Furthermore, this process has continued by means of a separate parliamentary act, the Emergency Powers Act (2011), which now regulates both procedure and competences regarding the emergencies under it, and which is currently under revision process.

Recent years have provided unexpected and novel experiences of organizational practice of the declaration of the state of emergency as emergency powers were put to use for the first time during the COVID-19 pandemic.[1] At the time, the Prime Minister, Sanna Marin, gave the following statement to the Parliament:

> Regular powers are no longer enough to protect the population from the widely spread dangerous infectious disease. For this reason, the government has decided to implement the Emergency Powers Act and those decrees that the government sees as being necessary in the current situation and proportional to limiting the spread and advance of the COVID-19 pandemic […].[2]

In order to deal with the situation that was seen as ungovernable by means of regular powers, the Government decided on emergency measures, the use of which is regulated by the Finnish Constitution (Section 23) and the Emergency Powers Act. Thus, we now have some experience of the use of emergency powers and declaring emergency under the Finnish legal system. Indeed, during the COVID-19 pandemic years of 2020-2022, emergency was declared twice. This experience has to be evaluated in view of the ongoing revision of the Emergency Powers Act, which is under preparation.[3] Similar issues are discussed, for example, in Sweden.[4]

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1 Martin Scheinin, 'Finland's Success in Combatting COVID-19' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (London: Routledge 2022).

2 Speech of the prime minister Marin in Finnish parliament, 'Pääministeri Marinin puhe eduskunnassa 17.3.2020' The Government Communications Department 18 March 2020 https://valtioneuvosto.fi/-//10616/paaministeri-marinin-puhe-eduskunnassa-17-3-2020.

3 See Ministry of Justice information sheet, at https://oikeusministerio.fi/valmiuslaki-uudistuu (accessed 17 February 2024).

4 See *Stärkt konstitutionell beredskap* SOU 2023:75.

Declaring a state of emergency is a fundamental requirement for the use of emergency measures. According to the Venice Commission, "it is good practice for a declaration of a state of emergency to precede the activation and use of emergency measures."[5] Here, the declaration itself helps uphold the distinction between emergency and normalcy. The commitment to this division is, indeed, one of the important prerequisites of the emergency as a state of exception. There should be a clear point and moment in which the change from normalcy to emergency happens. Furthermore, requiring a declaration establishes temporal limits to emergency powers. In this context, the balance of powers is crucial. A declaration, at the very least, should be overseen by other branches to ensure that the state of emergency is justified and proportional. In the Finnish setting, we will discuss both the "intra-relation" of the executive, i.e. between the Government and the President of the Republic, and the interrelation between the executive and legislative power, i.e. the Parliament when declaring the state of emergency. Here, it should be noted that we are not interested in the judicial side of the checks and balances. This is because the Finnish constitutional system, as is the case in other Nordic countries,[6] relies heavily on parliamentary constitutional control.[7]

We underline the checks-and-balances principle in our analysis of the Finnish Constitution regarding the declaration of the state of emergency. We will first discuss the basic principles of the separation of powers and checks and balances, and explicate how these principles are relevant to declaring a state of emergency (section 2). We then move on to analysing the Finnish legal order, *de lege lata*, regarding the declaration of the state of emergency, both on the level of the Constitution and on the level of the Emergency Powers Act (section 3). The section elaborates the role of the legislative branch in checking the executive and the authority of the executive(s) in declaring a state of emergency. By means of our theoretical discussion and legal analysis, we will evaluate critically the declaration requirement's political entailments for the Finnish legal system and propose some changes for the future, *de lege ferenda* (section 4). This evaluation critically assesses the present legislation regarding the declaration and its recent practice during COVID-19 pandemic.

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5 Alivizatos and others, *Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights* (Opinion No. 995/2020) (Strasbourg: Venice Commission, 2020) 8.

6 Jaakko Husa, 'Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?' (2011) 55 Scandinavian Studies in Law 101; Markku Suksi, 'Common Roots of Nordic Constitutional Law? Some Observations on Legal-Historical Development and Relations between the Constitutional Systems of Five Nordic Countries' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions – a Comparative and Contextual Study* (Hart Publishing 2018); Jaakko Husa, 'Locking in Constitutionality Control in Finland' (2020) 16 European Constitutional Law Review.

7 J Lavapuro, T Ojanen and M Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law.

2 Checks and Balances in Declaring a State of Emergency

2.1 Checks and Balances?

In this section, we develop the conception of checks and balances in the context of declaring a state of exception. With the checks-and-balances principle, we refer to the role of the three branches of government in overseeing and controlling each other. There are, however, a few disclaimers that need to be stated. While our focus is on the role of the legislative branch in overseeing and controlling the executive, we want to keep our discussion at the level of the checks-and-balances principle rather than discuss legislative oversight specifically. First, while we discuss central insights of research addressing legislative oversight, the checks-and-balances doctrine is more connected to the broader question of the separation of powers – a fact that we seek to emphasize in our analysis. Second, it should be noted that, while the checks-and-balances principle is often associated with United States constitutionalism,[8] its basic principles can be discussed in the European context as well.[9] The basic idea, as defined by Jeremy Waldron, is that the principle "requires the ordinary concurrence of one governmental entity in the actions of another, and thus permits one entity to check or veto the actions of another."[10] This principle, although not explicitly defined as checks and balances, can be found according to our analysis in the Finnish Constitution regarding the declaration of a state of exception.

2.2 Capacity of the Parliament to Check the Executive

In the context of the capacity of the parliament to check the executive, scholars of legislative oversight often argue that the presidential system is better at facilitating the capacity of the parliament in controlling the executive because the president as an executive is separated more clearly than the government is in parliamentary systems.[11]

However, there are theoretical and practical issues with this idea. First, these accounts tend to conflate the separation of powers and checks and balances with one another. Second, the executive president, in both presidential and semi-

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8 Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: Oxford University Press 2009); cf. Joshua Macey and Brian Richardson, 'Checks, Not Balances' (2022) 101 Texas Law Review 89.

9 E.g. Mauro Barberis, 'Le future passé de la separation des pouvoirs' (2012) 143 Pouvoirs; see Ulrich Battis and Christoph Gusy, *Einführung in Das Staatsrecht* (Berlin: De Gruyter 2018) 220.

10 Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 438.

11 David Beetham, *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice*, (1. repr. October, Geneva: Inter-Parliamentary Union 2007), 115; Hironori Yamamoto, *Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments* (Geneva: Inter-Parliamentary Union 2007), 11; Chen Friedberg and Reuven Hazan, *Legislative Oversight* (Albany: Center for International Development 2012), 7, 10; Venice Commission, *Compilation of Venice Commission Opinions and Reports Concerning Separation of Powers, CDL-PI(2020)012* (Strasbourg: Counsil of Europe, 2020) 4.

presidential systems, may abuse emergency measures for their own benefit. We will elaborate these two points respectively.

According to what many call the "pure doctrine" of the separation of powers, the three branches of government must be kept separate for the sake of protecting political liberty.[12] Instead of defending such a doctrine, scholars often summon it to prove its untenability. As many have pointed out, the pure doctrine cannot be maintained, because it does not describe how power is actually distributed among branches, and because it is be normatively untenable.[13] That is, the separation of powers in existing constitutional systems neither exist as a "one branch – one function" sort of sense,[14] nor does it establish any coherent normative principles.[15] For example, a strict distinction fails to make different branches accountable to one another, as the more independent they are the more difficult their control is.[16] Especially in presidential systems, where the separation between branches is closer to the pure doctrine, impeachment of the president is often very difficult in contrast to parliamentary systems.[17]

Checks and balances is meant to oversee and limit the possibility of abusing power.[18] M. Elizabeth Magill, although she dismisses both of them as complete failures because of their unhelpfulness and incoherence as a practice,[19] distinguishes these two principles so that the separation of powers is about characterizing different forms of powers and allocating them to different departments, and the checks and balances on power entails making sure that power in general is evenly distributed and that the departments can ensure this by having various mechanisms to check one another.[20] These two, therefore,

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12 M. J. C. Vile, *Constitutionalism and the Separation of Powers*, (2nd ed, Indianapolis: Liberty Fund 1998), 14; Zoltán Balázs, *The Principle of the Separation of Powers: A Defense* (Lanham: Lexington Books 2016), 2; Jiří Baroš, Pavel Dufek, and David Kosař, 'Unpacking the Separation of Powers' in Antonia Baraggia, Cristina Fasone, and Luca P. Vanoni (eds), *New Challenges to the Separation of Powers: Dividing Power* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing 2020).

13 M. Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 University of Pennsylvania Law Review 603–60; Carolan (n 13); Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press 2016) 221–39; Baroš, Dufek, and Kosař (n 12) 133.

14 Kavanagh (n 13) 225.

15 M. Elizabeth Magill, 'The Real Separation in Separation of Powers Law' (2000) 86 Virginia Law Review 1183–94.

16 Baroš, Dufek, and Kosař (n 12) 139.

17 Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, Mass.: Belknap Press of Harvard University Press 2010) 29; Susan Rose-Ackerman, Diane Desierto, and Natalia Volosin, 'Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines' (2011) 29 Berkeley Journal of International Law 329; Steffen Ganghof, *Beyond Presidentialism and Parliamentarism: Democratic Design and the Separation of Powers*, (1st ed. Oxford University Press Oxford 2021) 14, 17.

18 Kavanagh (n 13) 234.

19 Magill 'Beyond Powers and Branches in Separation of Powers Law' (n 13) 605.

20 Magill 'The Real Separation in Separation of Powers Law' (n 15) 1174–75; Baroš, Dufek, and Kosař (n 12) 136–39.

entail a different set of questions and worries. Whereas the separation of powers is meant to ward off tyranny, that is, the situation in which multiple powers are united in a single department, checks and balances as a principle is concerned with one department becoming too powerful and capable of undermining the other two.[21] The checks-and-balances principle, therefore, operates in mechanisms that seek to prevent abuse of power by means of overlap between functions.[22]

Checks and balances therefore limits the capacity of a branch to act unilaterally.[23] Especially the authority to use drastic measures, such as emergency measures, should not be given to just one branch. This means that checks and balances assumes some form of separation of powers. However, separation needs to be combined with oversight and control.[24] As Aileen Kavanagh puts it, the branches must be both "independent *and* interdependent."[25] Many systems try to strike an institutional balance between overlap and separation, but results differ, as too much overlap, such as in the U.K., threatens the separation,[26] and a too strict separation, such as in the U.S., makes controlling other branches more difficult.[27]

In a parliamentary system, where the executive is the government, there is overlap between executive and legislative functions.[28] In such systems, the government is often constrained by the parliament (or, more concretely, by the opposition) by means of oversight mechanisms, such as committees, hearings and questioning.[29] This not only means limits and control but coordination and joint action.[30] According to the Venice Commission, "parliaments must defend their right to control governments and to have an active role in decision-making."[31] This is especially the case with controlling emergency measures, so that the parliament should have power to control the declaration, continuation

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21 Magill (n 15) 1174–75.

22 Baroš, Dufek, and Kosař (n 12) 139.

23 Randall Holcombe, 'Checks and Balances: Enforcing Constitutional Constraints' (2018) 6 Economies 7.

24 Kavanagh (n 13) 233.

25 Kavanagh (n 13) 236, emphasis in original.

26 Richard Albert, 'Presidential Values in Parliamentary Democracies' (2010) 8 International Journal of Constitutional Law 221; Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18 International Journal of Constitutional Law 1172.

27 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 658.

28 Friedberg and Hazan (n 11) 7; Albert (n 26) 221–22.

29 Riccardo Pelizzo and Rick Stapenhurst, 'Tools for Legislative Oversight: An Empirical Investigation' in Rick Stapenhurst and others (eds) *Legislative Oversight and Budgeting – A World Perspective* (Washington: WBI Development Studies, 2008) 9–13.

30 Kavanagh (n 13) 235.

31 Venice Commission (n 11) 8.

and termination of the state of emergency.[32] This ensures control of the executive in dealing with emergencies. However, it also secures the democratic legitimacy of emergency measures, since parliament represents the people and has ultimate norm-issuing power.[33]

2.3 Declaring a State of Emergency

The declaration of a state of emergency is an important instrument, which should be distinguished from the measures used during a state of emergency. It is a common instrument in constitutions.[34] All such measures can (and should) be used only once the declaration has been authorized and within the confines of the state of emergency. This is crucial to limit the use of emergency measures and distinguish between state of normality and emergency. Only after the declaration has been authorized does the executive have the appropriate powers available to deal with an emergency. Otherwise, emergency measures could become a routine practice and develop into a political instrument to resolve governmental impasses or further private interests in normal circumstances. As the Venice Commission points out, routinization of the use of emergency powers is a problem because it, *inter alia*, "weakens external checks on the Government and disregards the principle of the separation of powers."[35] For this reason, requiring a declaration is not merely a formality, but central in regulating the use of emergency measures.[36]

Requiring a declaration regulates the use of emergency measures and limits them to specific conditions. Instead of being able to use emergency measures in normal circumstances, a state of emergency must be declared to ensure their regulation. For example, constitutions with explicit emergency regulation will often have a sunset clause, which regulates the continuation of the state of emergency.[37] The declaration requirement means that emergency measures are not available in normal circumstances. Otherwise, these powers, in the hands of an executive that seeks to further their power at the expense of other branches, would create a temptation to use them to maneuver around constraints and

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[32] Nicos Alivizatos and others, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency - Reflections, CDL-PI(2020)005rev* (Strasbourg: Venice Commission 2020) 18.

[33] Alivizatos and others (n 32) 14; Gabriele De Angelis and Emellin De Oliveira, 'COVID-19 and the 'State of Exception': Assessing Institutional Resilience in Consolidated Democracies – a Comparative Analysis of Italy and Portugal' (2021) 28 Democratization 5, Hoi Kong, 'Thresholds, Powers, and Accountability in the Emergencies Act' (2023) 46 Manitoba Law Journal 46.

[34] Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31 Alternatives: Global, Local, Political; Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 International Journal of Constitutional Law 1506.

[35] Venice Commission (n 11) 13.

[36] Alivizatos and others, (n 5) 8.

[37] Alivizatos and others (n 5) 17.

control.[38] For this reason, the declaration requirement helps to uphold the normal situation from deteriorating by enabling routinization of emergency measures.

Declaring a state of emergency should not be a unilateral procedure, but the separation of powers and the checks-and-balances principle should be relevant to it.[39] When there is a system of parliamentary oversight the executive has to articulate the reasons why such a declaration is necessary, and these reasons should be evaluated by the parliament. Making governing an articulated process and based on general principles is one of the basic principles of the rule of law, as it protects against arbitrary power.[40] For this reason, both the declaration and the use of emergency measures concerns the legislative branch.[41] As Nomi Claire Lazar puts it, "the clearer the government's statement of why they reasonably believe emergency powers are necessary, the more accountable we can hold them."[42] This means that it is necessary to have parliamentary oversight mechanisms in the context of declaring a state of emergency, so that the government has to give reasons why they see it necessary, which makes the declaration more transparent and the government more accountable.

3 Declaring a State of Emergency in the Finnish Constitutional Context

3.1 Current Legislation

We will now analyse how the declaration of a state of emergency is regulated in the Finnish constitutional context. We will focus on the Emergency Powers Act (2011), as it is the most relevant part of the regulation regarding checks and balances. We will briefly survey the background and the development of this regulation and then move on to the relevant aspects of the executive and legislative branch in the declaration procedure. In the context of checks and balances, we focus on the role of the president, the cooperation of the two executives, and the relationship between the executive and legislative branches. We will discuss these three aspects respectively in separate sub-sections.

The Constitution of Finland regulates emergency situations from the viewpoint of provisional exceptions to basic rights and liberties. According to the Section 23(1) of the Constitution of Finland:

> Such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in

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38 Rose-Ackerman, Desierto, and Volosin (n 17) 249, 329.

39 Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 University of Pennsylvania Journal of Constitutional Law 1014; Ginsburg and Versteeg (n 34) 1527.

40 Waldron (n 10) 457; Martin Krygier and Adam Winchester, 'Arbitrary Power and the Ideal of the Rule of Law' in Christopher May and Adam Winchester (eds) *Handbook on the Rule of Law* (Cheltenham: Edward Elgar Publishing 2018) 77.

41 Jamie Cameron and Robert Diab, 'Public Order Policing: A Proposal for a Charter-Compliant Legislative Response' (2023) 46 Manitoba Law Journal 88.

42 Nomi Claire Lazar, 'What's 'Necessary' Under the Emergencies Act?' (2023) 46 Manitoba Law Journal 53.

> the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation may be provided by an Act or by a Government Decree to be issued on the basis of authorization given in an Act for a special reason and subject to a precisely circumscribed scope of application. The grounds for provisional exceptions shall be laid down by an Act, however.

In addition, according to the Section 23(2) of the Constitution, "Government Decrees concerning provisional exceptions shall without delay be submitted to the Parliament for consideration. The Parliament may decide on the validity of the Decrees".

As Jonsson Cornell and Salminen consider, the Finnish Constitution leaves open the competency to exercise emergency powers. The Constitution generally provides that parliamentary law must regulate emergency powers. Within this context, however, both the Parliament and the Government can enact exceptions to basic rights. As regards the separation of powers, the Constitution does not specify which State organ will have the power to consider whether an emergency occurs nor to declare the emergency. It also does not separate the authority to declare a state of emergency from the holding of emergency powers.[43]

Furthermore, from the point of view of checks and balances, it can also be noticed that the Constitution sets out rather abstract preconditions for a state of emergency. The Constitution remains silent as to which institution can declare a state of emergency and according to what procedure.[44] However, these issues are further regulated in a parliamentary act called the Emergency Powers Act.

The Emergency Powers Act stipulates a three-phase deployment procedure. According to this Act (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 ordinary competences of authorities are not enough, a Government decree (Emergency Powers Act application decrees) may provide for the application of the exceptional competences (provisions of Part II). Such a decree may be issued for a limited period of up to six months. The Emergency Powers Act application decrees must be submitted to Parliament immediately. 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 a specified or shorter period of time. If the Emergency Powers Act application decree has not been submitted to Parliament within a week of its adoption, it shall lapse. Thus, the three-phase procedure binds the Government, the President of the Republic and the Parliament together in decision-making while the Government and the President act together in declaring the emergency, after which the Government issues an Emergency Powers Act application decree which, in turn, will be submitted to the Parliament for its consideration. The exceptional competences can be implemented only after the Parliament has decided whether the decree may remain in force or not.

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[43] Anna Jonsson Cornel and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' (2008) 19 German Law Journal 219, 242.

[44] Jonsson Cornell and Salminen (n 43) 219, 249.

3.2 Background of the Current Legislation

The current Emergency Powers Act dates from 2011.[45] In the context of checks and balances, the current Act is not unique, as previous emergency powers legislation had corresponding solutions, which required the cooperation of the President, the Government and the Parliament.[46] In addition, another Finnish emergency enactment, the Act on the State of Defence[47], has a decree-based mechanism to activate the state of defence. In the deployment procedure of that particular act, a decree by the President of the Republic is used. However, unlike the Act on the State of Defence, the Emergency Powers Act is essentially based on decrees issued by the Government.

The current decision-making procedure on the introduction of the emergency powers has not faced any major criticism in the practice of the Constitutional Law Committee of the Parliament, which is charged with the review of the constitutionality of parliamentary acts. In its evaluation, the arrangements have usually been viewed from the point of safeguarding the influence of the central state institutions in the decision making. The constitutionality of the various procedural steps has not, as such, been an issue of its consideration.

It follows from the *travaux préparatoires* for this legislation that the main argument for the role of the Parliament in the decision-making procedures was the wide and rather general competences that are open for the executive to use as emergency powers after the deployment procedure. While the competences might be not that clear and precise, basically the decision-making is divided between the Government and the President. Because a great deal of powers was delegated to the President and the Government, the Parliament, in order to retain some of its legislative prerogatives, was invested with the power to control the decrees.[48] During the legislative procedure, the Constitutional Law Committee of the Parliament considered such a deployment procedure to be necessary.[49]

Regarding checks and balances, the regulation of the power to issue decrees is connected to broader developments under the present Constitution of Finland. Originally, in the revision of this legislation during the late 1990s, the President of the Republic was granted powers to issue a decree for the deployment of emergency powers.[50] In this context, for the existing 2011 Emergency Powers Act, the key reform was related to the proposal to introduce powers under the Emergency Powers Act by government decree instead of presidential decree. This was, however, to be preceded by joint action by the Government and the President of the Republic to assess and establish the emergency conditions. The Act therefore both regulates the use of such decrees to a state of emergency and limits their routinization and, therefore, strengthens parliamentarism.

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45 Emergency Powers Act (1552/2011).

46 Emergency Powers Act (1080/1991).

47 Act on the State of Defence (1083/1991).

48 Government Bill HE 248/1989 vp.

49 Statement of the Constitutional Law Committee PeVL 11/1990 vp.

50 See Government Bill HE 186/1999 vp and the Statement of the Constitutional Law Committee PeVL 1/2000 vp.

However, it should be noted that this development was not unilinear progress towards parliamentarism and legislative oversight. The Emergency Powers Act also kept the President, whose powers over domestic issues were otherwise almost completely removed, involved in the decision making. In addition, in the bill regarding the current legislation, it was initially also proposed to waive the Parliament's right of post-inspection regarding the decrees implementing the emergency powers. The idea was that the control of the decrees would take place in the administrative courts based on filed appeals.[51] However, the Constitutional Law Committee of the Parliament objected to this proposal. The Committee found it appropriate that the Parliament has the opportunity to verify the appropriateness, necessity and proportionality of decrees issued under the Emergency Powers Act immediately after their adoption.[52]

3.3 Role of the President of the Republic?

The role of the President of the Republic in the Finnish constitutional setting has changed during the last decades. These changes are also visible in the history of the legal arrangements regarding the competences when using emergency powers.

According to Section 6(1) of the Emergency Powers Act, the Government must state, in cooperation with the President of the Republic, that there are exceptional circumstances in the country prior to the adoption of the Emergency Powers Act application decrees. In turn, such a decree is enacted by the Government without the President. This is a new development, as no similar procedure was included in the Emergency Powers Act of 1991, according to which the Government could be authorized by a decree of the President of the Republic to exercise the powers of the Emergency Powers Act "under exceptional circumstances".

The power to adopt the Emergency Powers Act application decrees was transferred to the Government from the President when the new Emergency Powers Act was passed. The main motivation behind this was that the Emergency Powers Act is intended to be widely applicable to crises other than military ones. The powers of the Emergency Powers Act are largely within the competences of the Government. However, since there are likely to be foreign policy dimensions behind the crises requiring the introduction of the Emergency Powers Act, it was seen as important to ensure cooperation between the President of the Republic and the Government in the assessment of emergency conditions before the adoption of any Emergency Powers Act application decrees. The emergency might have significance in terms of the activities of the Defence Forces as well. These are the particular sections of the competences in which close cooperation between Government and the President is relevant. In addition, it has been considered that partitioning the cooperation between the Government and the President according to the nature of various crises would disrupt the clarity of the decision-making system. The need of the interpretation about the possible foreign policy implications of the acute crisis would be difficult and

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[51] See Government Bill HE 3/2008 vp.

[52] Statement of the Constitutional Law Committee PeVL 6/2009 vp.

could cause unnecessary tensions between the institutions. An emergency can arise on grounds of many kinds of exceptional circumstances occurring simultaneously, which could strain the decision-making system even more if that system was not streamlined.[53] Upon the recent revision of the Emergency Powers Act, the necessity of close cooperation between the President of the Republic and the Government in establishing emergency conditions was highlighted during parliamentary procedures.[54]

3.4 Cooperation within the Executive When Declaring the State of Exception and Procedure

As considered already, the Constitution as such does not state anything concerning the actual declaration of the state of emergency. Furthermore, regarding the procedure, the Emergency Powers Act or its *travaux préparatoires* do not specify how the co-operation between the Government and the President of the Republic is to be carried out in order to declare the state of emergency.

According to the statement of the Constitutional Law Committee, the form of co-operation may vary according to the nature and urgency of the situation in question.[55] Especially concerning emergencies which relate to foreign and security policy, the most convenient manner to establish the cooperation between the President and the Government is the decision-making at the joint meeting of the Ministerial Committee on Foreign and Security Policy and the President, which is the forum for joint decision making between them in foreign affairs issues. In other emergency conditions, a more informal meeting between the President and key ministers could be possible way to establish the cooperation. Thus, the procedure, in order to achieve the joint understanding about emergency conditions, can vary and is related to the nature of the emergency.

The current legislation leaves open the question about the possible disagreement inside the executive about the conditions of emergency. Needless to say, however, is that the assessment about conditions for the emergency requires considerable information about the circumstances and, in addition, an assessment about the insufficient nature of regular powers of the authorities in the situation, as well as the necessity of the additional powers in order to manage the situation. In the Finnish context, it is ordinarily the responsibility of the Government to make this kind of assessments. As such, the Emergency Powers Act or its *travaux préparatoires* do not include a clear position in view of the situation where the Government and the President of the Republic would disagree on the existence of exceptional circumstances, nor does Section 58 of the Constitution on presidential decision-making answer the question.[56] However, the wording of the Emergency Powers Act suggests that the view of

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[53] See the statement of the Constitutional Law Committee PeVL 6/2009 vp, also the Statement of the Foreign Affairs Committee UaVL 4/2008 vp, and the Report of Defence Committee PuVM 3/2010 vp.

[54] The statement of the Defence Committee PuVM 2/2022 vp.

[55] See the statement of the Constitutional Law Committee PeVL 6/2009 vp.

[56] See also the Report of Defence Committee PuVM 2/2022 vp.

the Government in the matter is decisive.[57] Our understanding is that cooperation with the President is a formal requirement and an important part of the preparation. While the role of the cooperation is from the point of Government more or less consultative, it is important that in decision-making also the views of the President are respected. In actual decision making it is most unlikely that their respective opinions about the prevailing conditions would diverge. Nevertheless, diverging opinions about the existence of the emergency conditions are most likely to affect the position of the Government in front of the Parliament. To elaborate, since during the next steps of the management of the emergency according to the Emergency Powers Act the President has no special powers at all, the added value of the declaration of the emergency in the Finnish constellation is indeed in the participation of the executive through both the Government and the President in this stage. Especially when the emergency touches upon the foreign relations, as it very often can be the case, it is important that the President has the possibility to express an opinion.

3.5 From Declaration of the Emergency to Operation - Role of the Parliament

Once emergency is established, the Government can proceed to the adoption of the so-called Emergency Powers Act application decrees. Thus, after the formal consideration of the existing emergency, the Government has the possibility to decide on such a decree. According to the Emergency Powers Act, this is the only power which the Government has based on the declaration of the state of emergency. As the very built-in idea of the state-of-emergency-related actions within the state is that the regular powers are not enough, these decrees are designed to complement them.

The system is built so that the additional powers only come into use through the Emergency Powers Act application decrees. The Government has the power to adopt them. Indeed, the system according to the Emergency Powers Act has two subsequent decision-making moments which are very close to each other: first the Government in cooperation with the President decides about the emergency, and thereafter the Government adopts the Emergency Powers Act application decrees.

As such, the declaration of the state of emergency has no immediate legal consequences regarding the actual emergency measures to be adopted. However, societally it may have huge importance. It sets the whole nation on alert. In every case, declaring the state of emergency in a European country has a significant political signal effect. Such a declaration is most certainly also noted in a country's foreign affairs.

As has already been mentioned in connection with the description of the three-phase deployment procedure, under the Emergency Powers Act all the Government's application decrees are immediately delivered to the Parliament for processing. The Parliament decides whether the decree may remain in force or whether it must be repealed in part or in full and whether it is in force for a specified or shorter period of time. If the application decree has not been

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[57] See also Governmental Statute about the Decision-making Section 3(22).

submitted to the Parliament within a week of its adoption, the decree will lapse. Once the Parliament has made its decision, the decree can be applied to the extent that the Parliament has not decided that it must be repealed.

Thus, the main rule concerning the application decrees under the Emergency Powers Act allows the Parliament as the legislative power to check in detail the powers the Government is planning to use during the emergency. Nevertheless, it should be emphasised that the procedure of declaring the state of emergency is currently based on the regulation contained in the Emergency Powers Act. The Constitution does not require it, and an emergency can be established based on a separate parliamentary act as well under Section 23 of the Constitution. Thus, emergency conditions referred to in the Constitution can prevail in the country, even without having been established under the Emergency Powers Act.

4 Discussion of Results

4.1 General Remarks

As pointed out above in section 2, the checks-and-balances principle demands that possibilities for abusing power are prevented. Specifically, this means that no branch of government becomes too powerful or acts unilaterally, and that its tasks are interdependently organized and relevant mechanisms of control and oversight are established. In the context of emergency measures, we established that it is important that the use of emergency powers is preceded by a formal declaration. This is relevant so that using emergency measures can be regulated and the executive's plan to enact extraordinary decrees checked. Furthermore, requiring a declaration means to ensure that emergency measures are not routinized. This is in line with the checks-and-balances principle, as such routinization might lead to the executive overpowering the other branches.

Having analysed the regulation of declaring a state of emergency in the Finnish Constitutional context, we will, based on our theoretical discussion above, now establish evaluative comments regarding that regulation's status from the point of view of checks and balances. After general remarks regarding the Finnish Constitutional context, we move on to discuss concrete examples from the COVID-19 pandemic. Experiences from the first-time responses to emergencies based on the Emergency Powers Act are to be collected and evaluated for the future development of legislation.

As we pointed out above, the checks-and-balances principle demands that different branches of government remain both independent and interdependent. While it is important that the branches of government are independent, to ensure genuine capacity to check and oversee one another, there should also be genuine overlap between functions. In the Finnish context, the fact that the Government is the chief executive in charge of emergency measures rather than the President, whose tasks in general are limited to foreign policy, ensures that there is genuine overlap between the executive and the legislative branches.

In investing the Parliament with control over the emergency decrees, interdependence of the executive and the legislative branches is strengthened. When the Government submits its decrees to the Parliament for review, it must make public the reasons why regular powers are not enough. It is these explicated reasons that the Parliament can reflect upon, in addition to any

constitutional and rule-of-law concerns it may have, when assessing decisions regarding specific decrees and whether they are proportional to their aim. This control therefore ensures that the legislative branch is relevant in making the executive accountable.

It is an interesting aspect of the Finnish emergency powers regulation that both executives, the President of the Republic and the Government, have a role in declaring the state of emergency. This arrangement is of semi-presidential nature, in the sense that the executive branch is further divided into two institutions.[58] Nevertheless, the Government has the decisive role here. As mentioned above, the separation of powers does not necessarily mean a strict distinction between branches and tasks among institutions but, rather, the sharing of a task among institutions can bolster control within a branch of government. This type of intra-branch-control[59] can be seen as further making the government interdependent and therefore less prone to abusing emergency measures.

However, there are relevant worries regarding this arrangement. Scholars have pointed out that dividing the executive implies ambiguity and potential conflict within the executive branch.[60] Such problems ensue in cases where the president either takes a very active role and pressures the government into declaring a state of emergency, or when the president is hesitant and stalls the declaration (at least in situations where such action is required, thus leading to executive underreach[61]). While, in Finland, the involvement of the President in declaring the state of emergency was originally meant to underline that emergencies often imply foreign policy concerns, it is also the case that including the President means that the President is given, under the guise of foreign policy implications, domestic power – something that is (somewhat) antithetical to the Finnish principles of parliamentarism.[62]

Another issue is that neither the Constitution nor the Emergency Powers Act explicitly regulates the termination of the state of emergency. During the pandemic, the Government decided on the matter. While the Parliament has the power to decide whether an emergency decree may remain in force, from the perspective of the checks-and-balances principle it is an issue that both the declaration and termination are up to the executive. The legislative branch should have a say when the emergency is overcome and emergency measures are no longer needed.[63] Whereas the temporality of the emergency decrees is clear, the fact that terminating the state of emergency itself is unregulated implies serious issues, such as the possibility that the state of emergency becomes

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58 C Skach, 'The "Newest" Separation of Powers: Semipresidentialism' (2007) 5 International Journal of Constitutional Law 96-97.

59 Andreas von Arnauld, 'Gewaltenteilung Jenseits Der Gewaltentrennung. Das Gewaltenteilige System in Der Verfassungsordnung Der Bundesrepublik Deutschland' (2001) 32 Zeitschrift für Parlamentsfragen 686.

60 Skach (n 58) 96; Tapio Raunio, 'Semi-Presidentialism and European Integration: Lessons from Finland for Constitutional Design' (2012) 19 Journal of European Public Policy 569.

61 David E Pozen and Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114 American Journal of International Law.

62 Jaakko Nousiainen, 'From Semi-Presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland' (2001) 24 Scandinavian Political Studies 105.

63 Alivizatos and others (n 5), 18.

"normalized."[64] By normalization in this context, scholars refer to the possibility that the state of emergency is continued indefinitely.[65] In order to counter this possibility, the parliament should have an active role in deciding whether an emergency is still at hand.

4.2 COVID-19 Pandemic - Emergency Experiences

During the COVID-19-pandemic emergency was established twice. The Government, in cooperation with the President, stated that Finland is under emergency conditions due to the epidemic and decided to adopt the powers laid out by the Emergency Powers Act on 13 March 2020. On 15 June 2020, the Government issued a decree repealing the use of the powers of the Emergency Powers Act and stated that the current situation in the country no longer constituted a state of emergency. Later, at the end of February 2021, a state of emergency was declared again due to the epidemic. The state of emergency entered into force on 1 March 2021. On 27 April 2021, the Government issued a decree repealing the use of the powers of the Emergency Powers Act. The government declared the first state of emergency on two accounts, as a health emergency and as an economic one. However, the issued decrees only concerned the health emergency.[66] It seems that the Government declared an economic emergency just in case it would later need to issue decrees later during the pandemic. For this reason, Martin Scheinin notes that it is an issue that the declaration itself is not reviewed but only the decrees issued after it.[67]

During the pandemic, the role of the Parliament was highlighted in overseeing the Government and in assessing the proportionality and constitutionality of the issued decrees. The parliamentary Constitutional Law Committee has throughout the pandemic been active in requiring the government to disclose relevant information. It has required changes and amendments in governmental decrees regulating emergency.[68] In this context, the Committee has criticized the Government for inadequate justifications.[69] Without relevant information and justifications, the Parliament's capacity to check and hold the Government accountable would be severely hindered. The activity of the Committee, therefore, can be interpreted as taking action to defend the right of the Parliament

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64 Antonios Kouroutakis and Sofia Ranchordas, 'Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies' (2016) 25 Minnesota Journal of International Law 76.

65 Bruce Ackerman, 'The Emergency Constitution' (2020) Journal of Constitutional Law 26.

66 Report of the Constitutional Law Committee 2/2020 vp.

67 Martin Scheinin, 'Finland's Success in Combatting COVID-19' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 133.

68 Tuukka Brunila, Janne Salminen and Mikko Värttö, 'Oikeuden resilienssi poikkeuksellisissa oloissa – Perustuslakivaliokunnan rooli oikeuden ylläpitämisessä covid-19-pandemian aikana' (2023) Lakimies 1026.

69 Report of the Costitutional Law Committee PeVM 13/2020; Mikko Värttö, 'Parliamentary Oversight of Emergency Measures and Policies: A Safeguard of Democracy during a Crisis?' (2023) European Policy Analysis 10.

to control the Government and uphold the checks-and-balances principle.[70] However, the Finnish system of checks and balances is not completely in line with the standard tri-partite separation of powers as both constitutional review primarily and the control of emergency measures is mainly done by the Parliament. The Finnish courts have not been involved in the declaration of emergency measures,[71] and probably will not be in the future either, as the Finnish legal tradition regarding constitutional review heavily relies on the views of the Constitutional Law Committee.[72]

One problem during the COVID-19 was that sometimes the government did not use decrees to enact emergency powers but used something akin to extra-legal power. This was possible by means of not exerting actual power based on the Constitution at all, but by means various governmental instructions and political guidelines, which were considered as if they were legally binding by individuals and partly followed by the administration as well.[73] This caused problems as fundamental rights too were limited based on these kinds of legally non-binding sources, which were initially meant only as recommendations.[74] Many administrative recommendations and instructions were followed closely as if they were legally binding rules. This phenomenon demonstrates the power of the declaration of the state of emergency for the behaviour of individuals. For this reason, the declaration itself should be legislatively overseen by the Parliament.

In the context of the president's role in declaring the state of emergency, the problem of active president discussed in the last sub-section became apparent during the pandemic. According to some reports, on 13 March 2020 during the joint meeting of the Ministerial Committee on Foreign and Security Policy and Security Policy and the President, the President stated that Finland was in a state of emergency.[75] This came as a surprise to the Government, as it had not planned on discussing the pandemic or declaring an emergency during the meeting.[76] However, while this meeting did not yet lead to declaring the state of exception, some argued that basically the Government had no other choice,[77] with one of

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70 Venice Commission (n 11) 8.

71 Janne Salminen, 'Finsk krishantering i fredstid — Beredskapslagen Tillämpas För Första Gången' (2020) Svensk Juristtidning 1128.

72 Lavapuro, Ojanen & Scheinin (n 7) 510, 517, 529.

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

74 See for example decisions of legal oversees, e.g. Parliamentary Ombudsman 7.9.2020, EOAK/2889/2020 and also Chancellor of Justice decisions OKV/905/1/2020, OKV/733/1/2020, OKV/552/1/2020. See also Mehrnoosh Farzamfar and Janne Salminen, 'The Supervision of Legality by the Finnish Parliamentary Ombudsman during the COVID-19 Pandemic' (2022), 99 Nordisk Administrativt Tidskrift.

75 Onnettomuustutkintakeskus, *Koronaepidemian ensimmäinen vaihe Suomessa vuonna 2020* (2020) 20; Risto Uimonen, *Sauli Niinistö: suomalaisten presidentti* (Werner Söderström Osakeyhtiö 2023) 359.

76 Martti Mörttinen, *Valtioneuvoston Ydin Kriisitilanteissa: Covid-19-Pandemian Paineet Suomalaiselle Päätöksenteolle* (Sitra 2021) 26.

77 Uimonen (n 75) 359.

the biggest newspapers claiming that the president "bulldozed the state of emergency into effect."[78] While statements like these might exaggerate the issue, the case still points towards the worries we have outlined above regarding the relationship within the executive. A president with a strong political mandate can influence the government by means of his role in the phases of declaring a state of emergency.

After the meeting, the Prime Minister was unsure as to how to declare the state of emergency in cooperation the President of the Republic. As we pointed out above, the process is flexible, as it is not determined how cooperation between the two executives is established. Ultimately, the Prime Minister decided to consolidate the cooperation with a phone-call rather than call together a joint meeting.[79] To be sure, both the President, in trying to compel the Government, and the Prime Minister, in establishing cooperation, might have had good reasons to think that swift action was needed and that there was no time for further discussion. However, we want to emphasize that the powers of the Government and the President of the Republic, as well as the conditions for decision-making in general should be clarified. It is especially cases like these that remind us that decision-making procedures should be made clear and consistent. In Finland, the current Emergency Powers Act provides the Parliament with an important role in scrutinising the application decrees which the Government issues based on the declaration of the state of exception. Thus, there is a strong checks-and-balances element right after the state of emergency is declared by the executive and the possibility for strong legislative oversight of the situation and the decision-making process. These application decrees cover the information about the particular competences Government is planning to take into use. This right of the Parliament is based on the parliamentary act. In addition, Section 23 of the Constitution provides that the actual decrees will be scrutinised by the Parliament, meaning that currently there is a double lock and a strong role for the Parliament.[80]

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78 Timo Haapala 'Setä Arkadia: Presidentti Niinistö jyräsi poikkeuslait voimaan', 21.03.2020, *Iltalehti* https://www.is.fi/politiikka/art-2000006447204.html.

79 Mörttinen (n 76) 26.

80 However, taking into consideration the Finnish current tradition with majority governments, the Government probably can rely on the trust in Parliament in such a situation, especially in the beginning of an emergency. From the constitutional point view this is somewhat balanced through the Constitutional Law Committee within the Parliament.