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# Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland

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**Abstract**

Within Scandinavia, Sweden stands out for not having gone to war in over 200 years. Its neighboring states—Finland, Denmark, and Norway—have not been as fortunate. Their respective constitutions each provide insight into their different experiences. The Swedish Constitution remains silent on emergency situations that do not rise to the predefined level of "war." The Finnish constitution differs from the Swedish in that it allows for time-limited restrictions to protect fundamental rights and freedoms during a state of emergency, aggression, or any other situation that poses a severe threat to the nation, if stipulated by law and in congruence with international obligations of Finland. Importantly, when and how a government can declare a state of emergency is a question of ordinary law, rather than a constitutional one. This Article offers a comparative constitutional law analysis of the relative constitutional silence in Sweden and Finland as concerns emergency powers. The analysis takes as its starting point Böckenförde's *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances*.

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**A. Introduction**

Recently, and for various reasons, emergency regimes and emergency laws have attracted a lot of scholarly attention. Terrorist attacks like the ones in France, Belgium, Spain, and Britain, as well as the coup d'état in Turkey, have revived public and scholarly interest in emergency regimes. Emergency laws are, of course, not a new phenomenon. Numerous studies have focused on the topic.[1] This Article offers a new comparative constitutional law analysis to the increasing landscape of studies on emergency laws. The Article compares the emergency laws of Sweden and Finland by taking as its starting point Böckenförde's *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances*. The Article begins by presenting the analytical framework for the comparative analysis. The next two sections turn to the case studies of Sweden and Finland. The Article concludes with a discussion of the results of the comparative analysis as applied within the theoretical context of Böckenförde's *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances*.

Although different constitutional and legal methods may differ in how they deal with emergency situations, they all serve one purpose—managing situations of acute and critical danger. Emergency situations may have different traits. They may manifest as very short and temporary disturbances or more prolonged conflicts. Whatever the case, they are by definition extraordinary and impermanent. They result from violent acts like terrorist attacks or political upheavals, environmental disasters, and financial crises. Resolving emergency situations inherently requires the State to take swift and extraordinary measures. Taking constitutional democracies as a starting point, states of emergency signal a temporary need to cast aside principles like the separation of powers and functions, and checks and balances. The State can restrict fundamental rights and freedoms and expand the power of the executive. From the point of view of constitutional law, the question thus becomes how the constitutional legal framework will deal with an emergency situation. And, from a normative point of view, the main question becomes whether the State can preserve the fundamentals of rule of law in an emergency situation. Accordingly, some of the main challenges involve preventing abuses of power during emergency situations and safeguarding against allowing the use of emergency powers to become "the new normal."[2]

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[1] As is well known, Carl Schmitt was among the first to make real contributions in this field. *See* CARL SCHMITT, POLITISCHE THEOLOGIE: VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT (1922). After his seminal works various phases have followed. *See* NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES (2009) (discussing various phases of emergency concepts and attitudes); *see e.g.*, William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law after 9/11*, 14 J. POL. PHIL. 61, 61–62 (2006); KARIN LOEVY, EMERGENCIES IN PUBLIC LAW: THE LEGAL POLITICS OF CONTAINMENT (2016).

[2] See Ernst-Wolfgang Böckenförde, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances [1978]*, *in* 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 128 (Mirjam Künkler & Tine Stein eds., 2017) on why constitutional silence on regulating emergencies may undermine the rule of law and how the use of ordinary laws to regulate state of emergencies may slowly become the new norm. *See also*

In terms of constitutional and political culture, the Swedish and Finnish constitutional systems share some similarities, but also have important differences.[3] Both reflect parliamentary democracies orientated towards traditions of consensus, especially within the context of difficult and trying times. Other similarities include the role of courts and the historically weak position of these courts as compared to their respective legislatures. The accessions of Sweden and Finland to the European Union as well as their respective ratifications of the European Court of Human Rights (ECHR) has changed the constitutional order of both States in similar ways.[4] Despite these similarities, some important differences remain. One such difference rises from the differing constitutional approaches for managing internal emergency situations.

For the purpose of comparative analysis, the Article focuses on formal sources of constitutional law. The Article focuses on constitutions and secondary laws, as well as preparatory works and reports by parliamentary committees. This work demonstrates that, although differing in degree, both constitutional systems suffer from constitutional silences regarding possible states of emergency. The Article relies on Böckenförde's thesis on constitutional silence to help explain how and why these omissions may prove problematic from the point of view of constitutional law. In this context, specific constitutional law questions arise. For example, does it matter whether constitutions remain silent on questions of internal emergencies? What does constitutional silence look like and what does it mean? What was the constitutional legislature's intent, if any? Böckenförde's theory on constitutional silence will guide our analysis and evaluation of the Swedish and Finnish constitutional approach to emergency laws.

**B. Analytical Framework**

*I. Two Sets of Questions*

The analysis largely revolves around two sets of questions. The first set of questions focus on procedural rules and matters of competence. The second set of questions focus on the material aspects of states of emergencies, with an emphasis on restrictions of rights. Thus, the first question becomes whether a constitutional or legal definition of a state of

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KARIN LOEVY, EMERGENCIES IN PUBLIC LAW: THE LEGAL POLITICS OF CONTAINMENT (2016); *see also* GIORGIO AGAMBEN, STATE OF EXCEPTION 2–3 (2005).

[3] *See, e.g.*, Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki, *Nordic Law – Between Tradition and Dynamism*, *in* NORDIC LAW – BETWEEN TRADITION AND DYNAMISM (Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki eds., 2007); R. Kari West, NORDIC CONSTITUTIONAL JUDICIAL REVIEW: A COMPARATIVE STUDY OF SCANDINAVIAN JUDICIAL REVIEW AND JUDICIAL REASONING (2013).

[4] *See, e.g.*, Fredrik Sejersted, *Grunnlovens funksjon i de nordiske land*, 127 TIDSSKRIFT FOR RETTSVITENSKAP 535–62 (2014).

emergency exists within the legal order at hand. Answering this question involves paying special attention to identifying which level of law provides the operative definition—the constitutional, semi-constitutional, or ordinary level?[5] Subsequent efforts should focus on describing *how* the relevant level of law defines a state of emergency. Does the law envision a broad definition? Does the law consider several and different types of states of emergencies?

Critically, identifying the appropriate scope of the definition matters for two primary reasons. Taking into account the nature of emergencies per se, it might be necessary to adopt a broad or vague definition. Emergencies often result from the culmination of a swift chain of unpredictable events. At the same time, an overly broad or vague definition opens up the possibility of abuse. This latter point in turn prompts idiosyncratic questions of who or what institutions may declare a state of emergency. Answering these sorts of questions requires delving beyond simply identifying which individuals or institutions have the authority to declare a state of emergency. To elaborate, if a legislature takes the decision to declare a state of emergency, voting rules become important. Does declaring a state emergency require the support of a simple majority or does the law require a qualified majority? Further examination would then focus on issues of time limits. Does the law clearly delineate durational limits for the state of emergency and the circumstances for renewing or terminating the state of emergency? Furthermore, does the law establish restrictions on how many times a state of emergency can be renewed? Who or what institutions can renew a state of emergency? Finally, the holder of emergency powers should not be the same as the body, which declares a state of emergency.[6] This first set of questions could be referred to as issues of procedure and competence. In order to avoid abuse, these are certainly important aspects of the constitutional and legislative framework.

The second set of questions has a more material character. They focus on the extent to which a state of emergency affects a constitution. Key aspects of this examination involve questions related to the separation of powers and the relationship between different State bodies, restrictions of rights, and whether the constitution itself allows for amendments, changes, or repeals during a state of emergency. Here, as in the first set of questions, large differences exist as to which level of law imposes the relevant regulations and how the national legal orders detail these regulations. Other important questions relate to which individuals or institutions can decide to restrict rights, which rights these entities can and cannot restrict, and the form that such decision will take.[7] Does the law set out any time

[5] If the law is silent, a different set of questions will need to be posed. We will return to them below (see the section below on Böckenförde and constitutional silence).

[6] ERNST-WOLFGANG BÖCKENFÖRDE, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances [1978]*, *in* 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 128 (Mirjam Künkler & Tine Stein eds., 2017).

[7] The different forms that these decisions may take include administrative measures, laws, etc.

limits for exercising restrictions of rights? What control mechanisms do private citizens and state control organs have with respect to restricted rights?

From a legal technical point of view, different approaches exist. The law either enumerates which rights the State may restrict or explicitly provides that the State cannot restrict certain rights during a state of emergency. Additionally, in determining the status of rights during these moments, legal orders like Finland also make explicit references to their respective international law obligations ex ante or post factum political review may also figure into establishing measures that restrict rights during a state of emergency.[8] Such review provides further control and accountability during state of emergencies. Finally, some jurisdictions allow for judicial review of the decision to declare a state of emergency as well as the subsequent measures taken during the state of emergency.[9] Other jurisdictions prevent judicial review during states of emergency and still others remain entirely silent on the subject.[10] In general, courts tend to be more deferential towards the executive in matters of national security.

*II. On Constitutional Silence*

*1. Why Does It Matter?*

Certainly, not all constitutions regulate emergency situations explicitly. This does not mean, however, that such legal orders lack the tools or means to regulate emergency situations. Several legal orders regulate the matter through ordinary legislation and although there might not be an explicit reference to states of emergency, the legislature is most likely to have several tools and means at hand to handle an emergency situation. For example, although Sweden has no designated emergency law, it nevertheless remains legally capable of responding to an emergency situation. Referring to Böckenförde, this suggests the absence of a clear distinction between "normal" situations and the seemingly more worrisome "emergency" situations. Thus, striking a reasonable balance between constitutional and legal flexibility, on the one hand, and the integrity of the constitutional order and respect for the rule of law, on the other, presents some difficulty. Strong arguments favor the explicit regulation of emergency powers.[11] Such arguments largely develop according to two different directions. The first direction tends towards recognizing the high likelihood that the executive will act timely and efficiently if the constitutional or ordinary legal framework provides boundaries and guidance. The second points to the

[8] On political review, *see* BÖCKENFÖRDE, *supra* note 6, at 130.

[9] These jurisdictions include South Africa and the Philippines.

[10] Oren Gross, *Constitutional and Emergency Regimes*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 342 (Michael Rosenfeld & András Sajó eds., 2012).

[11] *Id*. at 348.

challenge that comes with a constitutional or legal recognition of states of emergency, especially the risk pertaining to the abuse and broadening of emergency powers, should important control functions be weak.

*2. Böckenförde and the Question of Constitutional Silence*

As a response to the anti-terror laws adopted in West Germany in 1968, Böckenförde presented his thesis on how the State authority should exercise its authority in extraordinary circumstances in order to protect the integrity and normality of the rule of law State. Böckenförde's thesis is that states of emergency need to be recognized as a possibility and that they therefore should be anchored in constitutional law. He argues against the handling of emergency situations through ordinary laws and dismisses the notion of a "supra-legal state of emergency."[12] As examples of such justifications Böckenförde refers to the Traube case, the Stuttgart-Stammheim prison case, and the Schleyer kidnapping case. In all three cases, the Minister of Justice ordered actions such as secret bugging, secret recording of privileged communication, and no-contact measures for prisoners and detainees. These actions were justified by referring to the legal concept of the supra-legal or justifying state of emergency.[13] The supra-legal state of emergency emanates from the idea that "the legal concept of the supra-legal state of emergency has the function of providing a certain relief in this regard, in that certain conflicts of legally protected rights and interests are not regarded as unlawful and are thus exempted from criminal liability."[14] The problem, as Böckenförde points out, is that the supra-legal state of emergency presents a problem insofar as it functions beyond a simple norm that limits the basis for liability; the supra-legal state of emergency also becomes a norm of competency and authority. Moreover, just because an action does not invoke criminal or civil liability does not mean that it is automatically legal under constitutional law.[15]

The fact that the concept of a supra-legal state of emergency becomes a norm of competence and authorization means that it surpasses the legal framework. To elaborate, the supra-legal state of emergency becomes supra-constitutional, growing beyond the competences that a constitution anticipates for the State and its bodies. Such a supra-legal state of emergency may displace the constitution, in part or in whole, and even worse, may provide a legal claim for action.[16] The result will be, according to Böckenförde, that we create

[12] BÖCKENFÖRDE, *supra* note 6, at 108–33.

[13] *Id*. at 110–11.

[14] *Id*. at 112. In the German context read out from § 34 of the Penal Code (Strafgesetzbuch, StGB) and § 228 of the Civil Code (Bürgerliches Gesetzbuch, BGB).

[15] BÖCKENFÖRDE, *supra* note 6, at 113.

[16] *Id*.

a "perfect, inherently open, general authorization to deal with emergency situations, against which every constitutional or legal elaboration and limitation of powers becomes provisional."[17] Such a general authorization violates the fundamental structure of the constitutional State, and hence contributes to the "dissolution of the integrity of the constitution based on the rule of law and the abandonment of the principle of the constitutional [S]tate."[18] In order to preserve the normal state of affairs, the integrity of the constitution, and hence the rule of law, it is required to explicitly acknowledge the existence of states of emergency in the constitution, according to Böckenförde. The theoretical, and actual, legal problem that arises is whether states of emergency should be recognized as a legal problem and explicitly referred to in the legal text or not? Noting that non-action in emergencies hardly represents an appropriate alternative, the question must be: Should such actions be taken in accordance with and under the laws, or in violation with the law?

At the time when Böckenförde presented his thesis in 1978, the undeclared, supra-legal state of emergency prevalent in West Germany together with the doctrine on anticipatory statutorification jointly represented the main argument against an explicit recognition of a state of emergency in the constitution. Those against explicit constitutional regulation of a state of emergency have largely persisted in their counter-arguments since Böckenförde first introduced his thesis. Among other reasons, they note that only exceptional cases of war and military defense require such regulation. Further, the unforeseeable nature and circumstances of states of emergency require giving the government leeway to react to such situations. And finally, rejecting an explicit constitutional anchor for a state of emergency allows parliament to retroactively justify and authorize actions that result in constitutional violations. According to the proponents of constitutional silence, such reasons in light of anticipatory statutorification, would preserve the integrity and inviolability of the normal state of affairs.[19]

Böckenförde criticizes the method of anticipatory statutorification. He argues that the approach can neither resolve theoretical nor actual problems because the approach ignores the specific traits of emergencies and the legal demands they raise. Moreover, in order to avoid the abuse of emergency powers and the undermining of the constitutional and rule of law state, the constitution should regulate the following: The preconditions and occurrence of a state of emergency, the competence to exercise emergency powers, and the goal of and constraints on emergency powers.[20] One of the main arguments put forward against statutorification in relation to emergencies is that it risks undermining "the integrity of the normal state of affairs. The attempt to create general, long-term norms for abnormal

[17] *Id*. at 114.

[18] *Id*.

[19] *Id*. at 121.

[20] *Id*. at 119–20.

situations lead to situation-specific powers in a general form, powers that become usable beyond the targeted case."[21] Generalized and exceptional defensive measures adopted in the form of statutes change the normal state of affairs piece by piece.[22] Böckenförde further calls for continuous, comprehensive monitoring of such statutory developments. He mentions anti-terrorism law as a concrete example of this. Notably, considering the backdrop of contemporary counter-terrorism policies, this example remains valid even today.[23]

## C. Sweden – A Case of Constitutional Silence

### *I. Constitutional Framework*

In order to get the full picture of how internal emergencies are dealt with in the Swedish legal order and political system, a few constitutional fundamentals are needed. The government and individual ministers do not have a constitutional right to command State administrative authorities during an emergency. Rather, the general constitutional and legal framework applies. As a main rule, State administrative authorities remain independent in relation to the government. The government governs the country through the 1974 Instrument of Government,[24] which in turn causes all State administrative authorities to come under the government.[25] It does so through a collective decision-making procedure.[26] Thus, a minister does not have a constitutional right to command State administrative authorities that fall under his or her ministry (in Swedish *förbud mot ministerstyre*). When it comes to applying the law, and making decisions against individuals or local authorities involving the exercise of public authority, State administrative authorities function independently from the government.[27] Within this particular field, general normative acts—like regulations—form the main tools for governing. Beyond this, the government has a national coordination responsibility, and when acting within this sphere, take measures

[21] *Id*. at 120.

[22] *Id*. at 126.

[23] See the growing literature on preventionism within criminal law and how it is at odds with general theories of criminal law. Using criminal law measures prevent threats to national security such as terrorist acts. Furthermore, national security and criminal policy are intertwined.

[24] IG 1:6. The Swedish Constitution consists of four fundamental laws: The Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.

[25] IG 12:1.

[26] IG 7:3.

[27] IG 12:2. For an elaborate account for what this means in an emergency see, RiR 2008:09, 92.

necessary in order to handle an emergency or extraordinary situation.[28] Drawing a line between applying the law and exercising public authority, on the one hand, and engaging in concrete actions that form part of the everyday activities of State administrative authorities, on the other hand, is both necessary and difficult in times of emergencies. The Swedish state maintains a strong consensus and tradition for the independent administrative authorities having the operative responsibility in an emergency. Thus, providing resources and coordinating efforts forms the government's primary responsibility.[29] The government has its own legislative powers[30] as well as those that parliament confer upon it.[31] The government can use these legislative powers to handle an internal emergency. The government, however, remains accountable to the parliament[32] and, as a general rule, this accountability equally applies in times of emergencies or extraordinary circumstances.[33] In conclusion, the sectoral administrative State authorities have the operative responsibilities in a state of emergency. Beyond its competence to regulate through general provisions and coordinated efforts, the role of the government remains limited.[34]

*II. Constitutional and Legal Definitions of Emergencies in Sweden*

Swedish legal doctrine recognizes three kinds of emergencies: War or an attack on the nation, extraordinary circumstances, and an internal state of emergency.[35] Of these, the constitution only regulates the first set of circumstances—those characterized as external emergencies.[36] Ordinary law—statutes and regulations—define the second kind of emergency.[37] Neither ordinary law nor the constitution explicitly recognizes the third

[28] Compare to the responsibility of ministers to be proactive (*principen om ministeransvar*), Anna Jonsson, *Förvaltningens självständighet och förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005*, *in* GOD FÖRVALTNING – IDEAL OCH PRAKTIK 163–90, 183 (Lena Marcusson ed., 2006).

[29] RiR 2008:09, 34, 103.

[30] IG 8:7.

[31] IG 8:3–5.

[32] IG 1:1, 13:4.

[33] 2005/06:KU8.

[34] RiR 2008:09, 100. See HENRIK JERMSTEN, KONSTITUTIONELL NÖDRÄTT 42-43 (1992) for an account of the discussion involving a more generous approach to what the government can do during an internal emergency, including governmental decisions on operative matters. This proposition is, however, challenged by Thomas Bull in RiR 2008:09.

[35] *See e.g.*, Johan Hirschfeldt, *Mänskliga rättigheter och andra konstitutionella kärnvärden när krisen slår till*, *in* MÄNSKLIGA RÄTTIGHETER I DET OFFENTLIGA SVERIGE 194 (Anna-Sara Lind, Elena Namli & Studentlitteratur eds., 2017).

[36] IG Chapter 15.

[37] For example, the law (2006:544) *om kommuners och landstings åtgärder inför och vid extraordinära händelser i fredstid och höjd beredskap* defines what is an extraordinary circumstance in the meaning of the law. For an

section. Such internal emergencies can result from terrorism,[38] organized crime, large accidents, natural disasters, epidemics, and large failures or shut downs of vital infrastructures.[39] In these cases, the general legal and constitutional framework applies[40] together with the practice of a supra-legal state of emergency. As a general rule, the rights and freedoms laid down in Chapter Two of the IG always apply. This does not mean that the government cannot restrict those rights, but rather that such restrictions would have to be done in accordance with the criteria and procedures laid down in the constitution.[41]

The question whether internal emergencies should be recognized in constitutional law has been dealt with extensively in the preparatory works to the Instrument of Government. The main idea since the 1974 Instrument of Government is that emergency powers only apply in times of war. It is stated in the preparatory works to the Instrument of Government that external emergencies should be explicitly recognized in constitutional law due to the following reasons. First, even within times of external emergencies, there remains a need to respect the principle of legality. Second, explicit constitutional recognition of states of emergency helps negate claims that the State has acted illegally. Third, constitutional recognition makes it more difficult for irresponsible forces to grab power.[42] In light of these arguments and their counterparts for internal emergencies, the constitutional silence on internal emergencies demands further exploration, with particular attention to the practice of a supra-legal state of emergency that has developed in Sweden.

*III. Internal Emergencies and the Constitutional Silence*

The Swedish constitutional and political tradition is familiar with the concept of a supra-legal state of emergency as defined by Böckenförde (in Swedish *konstitutionell nödrätt*).[43] This is a practice that grew out of a number of emergencies that occurred during the 1970s. It only applies to the government and its ministers and it mainly concerns *measures* and *decisions*

overview and analysis of relevant statutes and regulations, see PER BERGLING ET AL., KRISEN, MYNDIGHETERNA OCH LAGEN: KRISHANTERING I RÄTTENS GRÄNSLAND (2015).

[38] A large terrorist attack could be considered an act of war and hence trigger the application of Ch. 15 IG.

[39] SOU 2008:61, p. 21.

[40] *See* prop. 2009/10:80, p. 207.

[41] *See* Hirschfeldt, *supra* note 35, at 200–04.

[42] *See, e.g.*, 2008:125, 503.

[43] *Cf.* Wennerström who categorizes the Swedish system as *utomkonstitutionell* and *systembevarande*. Erik Wennerström, *Inget undantag utan regel – den konstitutionella nödrätten och Sverige*, *in* VÄNBOK TILL STEN HECKSHER 364 (2012).

rather than provisions.[44] It is not settled whether this practice has reached the status of an unwritten constitutional principle, on the one hand, or if it should be considered an *in casu* exception based on the criminal law exception that applies in situations of self-defense, on the other.[45] In the preparatory works to the IG it is stated that Swedish law does not recognize a supra-legal state of emergency, but at the same time the right to act in contradiction with the law if necessary in case of an emergency is recognized.[46] Thus, the question becomes whether the exception from liability for individual ministers rests on the criminal law concept of self-defense (*nödvärn*), or whether exemption from individual liability derives from a constitutional principle or practice resting on decisions taken by the Committee on the Constitution.[47] Before elaborating on the status of the supra-legal state of emergency in Swedish constitutional law,[48] it is necessary to provide some background to this practice.

The Swedish version of a supra-legal state of emergency was first elaborated as a result of the *Bulltofta* case (1972). Three hijackers hijacked a domestic commercial airplane and forced it to change its route. The hijackers demanded the release and transfer to the airplane of seven Croatians imprisoned in Sweden. They also demanded a ransom. The Swedish government met all their demands and the plane continued on to Madrid. The Minister of Justice led the negotiation. After the incident, the Committee on the Constitution reviewed the government's decision to meet the demands of the hijackers. The Committee declared the decision taken by the government to be illegal and thereafter stated that taking into account the urgency of the situation and the fact that lives were at stake—lives the government had a duty to protect—the government had to balance that fact in relation to overstepping the legal boundaries. After analyzing the government's actions in light of the recognized emergency, the Committee reached the same assessment made by the government, i.e. that there was an emergency, and hence did not criticize the government for its actions.[49] Consequently, the Committee sanctioned the illegality of the government's actions post factum.

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[44] *Id*. at 367. *See also* SOU 2008:125, 525–526. Notably, measures and decisions do not include provisions.

[45] BERGLING ET AL., *supra* note 37, argues that this it is a political, not a constitutional, custom. More on this below. *See also* RiR 2008:9, 96 with reference to Jermsten, *supra* note 34.

[46] *See e.g.*, SOU 2003:32, 96. SOU 2008:125, 525.

[47] The Committee on the Constitution is one of the most important and influential parliamentary committees in Sweden. Aside from preparing future decisions by the parliament, the Committee on the Constitution exercises parliamentary control over how the government may exercise its powers.

[48] *Infra* Part IV.

[49] KU 1973:20, 16–17. *Uppenbar nödsituation*.

In the *Norrmalmstorg* case of 1973, the government once again overstepped its powers and competences in order to save hostages. The Minister of Justice, with the consent of the Prime Minister, ordered a prisoner to be put at the disposal of the police in order to be ready to meet the demands of the hostage takers. A later decision, taken by the Minister of Justice upon a power of attorney from the government, declared that the police were authorized to exchange the prisoner for the release of the hostages. The police then effectuated the exchange of the prisoner for the hostages. In this case, the actions and decision of the Minister of Justice was in violation with (the current) sections IG 7:3-4 and 12:2 of the IG. Again, the Committee on the Constitution declared this to be an emergency situation that justified the actions taken by the government and police, and these violations were authorized post factum.[50] Thus, in both cases, the review process referred to a supra-legal state of emergency to sanction decisions and actions ex post factum.[51]

The Committee on the Constitution, as a parliamentary committee, engages in ex post factum review of the actions taken by the government and its ministers during emergencies. The Committee first assesses whether the decisions and actions taken violated the constitution. If the answer to this question is yes, the committee proceeds to assessing whether the circumstances justified the measures taken.[52] If yes, the Committee sanctions the violation of the constitution by referencing what can be called a supra-legal state of emergency. In the two cases appearing above, as well as in later decisions and reports, the Committee asked for clearer regulations indicating what the government can do in a state of emergency. The Committee also asked for clearly stipulated demands on documentation of decisions taken during an emergency. The latter stipulation would serve to facilitate future ex post factum reviews of governmental actions taken during emergency situations.

It is noteworthy how the government—and the Ministry of Justice in particular—overtime has been reluctant to propose legislation that clearly stipulates what the government can do during times of extraordinary circumstances and internal emergencies.[53] This is especially interesting taking into account that it is the parliament, through the Committee on the Constitution that has asked for clarification.[54] Nevertheless, following the government's hesitation, the parliament has not insisted on such legislation to be adopted subsequent to

[50] KU 1974:22, 17–20. Additional emergencies include the terrorist attack on the 1975 West German Embassy in Stockholm, where one of the terrorist was expelled from the county as a result of a government decision; the 1981 U 137 case; and the 2004 Tsunami (2004). For an extensive list, see BERGLING, *supra* note 37, and Hirschfeldt, *supra* note 35.

[51] For a more extensive list of extraordinary circumstances and emergencies within the 21st Century, *see* Wennerström, *supra* note 43, at 365–66.

[52] *See, e.g.*, 2005/06:KU8.

[53] *See, e.g.*, prop. 2009/10:80 s 202 ff, and SOU 2008:61, 81–83 n. 12–13.

[54] *See* SOU 2008:61, 100.

the government expressing its view. This could potentially be explained in terms of deference to the executive concerning emergency situations and a general political consensus that the government needs room to maneuver during an emergency. One could also argue that such reasons largely explain the unwillingness of the parliament and government to lay down the emergency powers of the government in the constitution. To be sure, not having clear regulations on how to deal with internal emergencies may work in times of parliamentary stability and political consensus. Such a model, however, can be risky, considering the increasing instability of the parliamentary situation in Sweden in combination with growing illiberal influences in the country.[55] The unwillingness to legislate, in combination with the unwillingness to recognize a supra-legal state of emergency as a constitutional principle, clearly leaves an important and potentially dangerous vacuum. The question thus surfaces: To what extent is the Swedish constitutional and legal system capable of countering a potentially dangerous situation that rises to a national level of concern?

*IV. Is There a Swedish Doctrine of a Supra-Legal State of Emergency?*

The status of the Swedish supra-legal state of emergency is not clear. As pointed out by Erik Wennerström, it is debated and unclear whether a supra-legal state of emergency represents a constitutional principle that should guide the government in times of crisis.[56] Despite this uncertain status, the Committee on the Constitution acknowledges the existence of and applies the idea of a supra-legal state of emergency.[57] Thus, even if not recognized as a constitutional principle, the supra-legal state of emergency exists as an empirical fact, although the decisions by the Committee on the Constitution in the cases mentioned above are not easily interpreted. Another question is whether the supra-legal state of emergency rests on political or constitutional practice. Bergling and others argue that because it lacks explicit support in the constitution while also constituting an exception to the principle of legality, the supra-legal state of emergency represents political practice,

[55] For example, the rise of the *Swedish Democrats* and their possibility to become a coalition partner in the future.

[56] Wennerström, *supra* note 43, at 360. *See also* RiR 2008:09, 95 and BERGLING ET. AL., *supra* note 37, at 77. *See also* JERMSTEN, *supra* note 34, at 84, concluding that the decisions by the Committee on the Constitution up to the 1980s do not adequately indicate Committee precedent, but that these decisions certainly provide guidance. He concludes that *konstitutionella nödrätten* potentially could be considered an unwritten constitutional emergency rule. *Id*. at 91–92. He goes so far as to extend the supra-legal state of emergency to include the legislative powers of the parliament.

[57] BERGLING ET. AL., *supra* note 37, at 80, 81.

rather than constitutional practice.[58] In this way, they reconcile the growing normative force of the constitution and the rule of law with the Swedish supra-legal state of emergency.[59]

Another important aspect pertaining to the supra-legal state of emergency and its unclear constitutional status is the issue of accountability. Henrik Jermsten and Thomas Bull separately argue that the exemption from liability results from the criminal law principle of self-defense (*nödvär*n).[60] In other words, such an exemption does not derive from a constitutional principle, because any other conclusion would undermine the integrity of the principle of rule of law and the constitution.[61] Comparatively, accepting the supra-legal state of emergency as a constitutional principle engenders consequences for other parts of the constitution. First, doing so could potentially mean creating an exception to IG 12:2 and the Swedish model of independent State administrative authorities. Moreover, the criminal liability for civil servants, when they act according to a potentially unconstitutional instruction given under a supra-legal state of emergency, would be difficult to assess.[62] At the same time, the minister who gave this instruction can be held unaccountable due to the application of a supra-legal state of emergency. Although there are important differences between these two approaches, the common trait for both of them is that there is a high degree of uncertainty in both cases and that it is only after the fact that the minister or decision-maker in question will know whether the actions and decisions taken were legal.[63]

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[58] *Id*. at 81–82. In this context, custom refers to practice or a number of decisions taken by relevant authorities that taken together may guide the understanding of the law.

[59] *Id*. *Cf.* RiR 2008:9.

[60] If deemed an emergency according to these rules, a nominally illegal act might be considered legal due to an emergency." 1973:90, 423. C*ompare* Böckenförde's illustration of and argument on the connection between the German regulation on exception civil and criminal liability and the German doctrine of a supra-legal state of emergency, BÖCKENFÖRDE, *supra* note 6.

[61] *See* the Swedish Penal Code, Brottsbalken (BrB) 24:4. JERMSTEN, *supra* note 34, at 89; RiR 2008:9, 96. See also *Id*. at 93–94, where Bull argues that the criminal liability of ministers as laid down in IG 13:3 might be affected by the recognition of supra-legal state of emergency as a constitutional principle that gives competence and authority to act. IG 13:3 is only applicable to acts and decisions that *typically* fall under the responsibility of a minister. The main question here would then be whether a decision during a supra-legal state of emergency is *typical*? If IG 13:3 is not applicable to actions taken under supra-legal state of emergency to begin with, it cannot constitute the constitutional foundation for such a principle. "De gärningar som bör bli föremål för en särskild prövning är endast sådana som ingår som led i själva utövningen av statsrådstjänsten och som alltså kan tänkas vara styrda av politiska motiv och värderingar." 1973:90, 423.

[62] *Cf.* BrB 20:1. *See* RiR 2008:9, 93–94, and BERGLING ET AL., *supra* note 37, at 82. The issues that arises in this context gives additional strength to the argument put forward several times by the Committee on the Constitution that documentation during an emergency is key to a successful post fact review.

[63] Hirschfeldt, *supra* note 35, at 200, n. 17.

If we connect back to the analytical framework presented above, one can conclude that this is exactly the uncertainty that might lead to inefficiency— inaction resulting from fear of its potential consequences—or abuse. In conclusion, Jermsten, Bull, and Bergling et al. thus rule out the supra--legal state of emergency as a constitutional principle. Bergling et al. et al. go even further by wholly dismissing the supra-legal state of emergency as a means for resolving emergencies and extraordinary circumstances under all circumstances. They argue that the supra-legal state of emergency violates the rule of law and the Swedish constitution, and that it is unfit as a guiding principle for how to deal with internal emergencies.[64] We share this conclusion. But acknowledging as much only leads to a larger question: What does this conclusion mean in terms of regulating?

*V. Anticipatory Statutorification*

Anticipatory statutorification (*författningsberedskap*) represents the general approach within the Swedish legal system for resolving internal emergencies and extraordinary circumstances. The idea behind anticipatory statutorification is that statutes (ordinary laws) should prepare for emergencies.[65] It could be argued that this approach is closely connected to the principles of legality, democracy, and rule of law.[66] As the primary expression of the will of the people, Swedish constitutional law stipulates that all state bodies should act under and in accordance with the law.[67] The difficulty of this method, however, rests upon the presumption that the legislature will reasonably predict future emergencies, or that it will act swiftly once it has clearly identified such a need.[68] Unlike other legal orders, Swedish constitutional law does not formally recognize a principle of executive prerogative in matters of national security, internal emergencies or extraordinary circumstances. Hence, in Sweden, statutes form the main instrument of governance in matters of national security

[64] BERGLING ET AL., *supra* note 37, at 82.

[65] Hirschfeldt, *supra* note 35, at 197. See for example *lagen (2003:778) om skydd mot olyckor*, 4:10, para. 1, according to which the government can appoint and decide on one state agency to take responsibility for larger extraordinary circumstances. The government cannot however decide on what specific measures that agency should take. Although not explicit from the wording of the law this paragraph allows for the government itself to take the overall responsibility for the operation. *See* SOU 2005:104, 313. *See also smittskyddslagen (2004:168)* 9:6, and *lagen* (2006:544) om kommuners och landstings åtgärder inför och vid extraordinära händelser i fredstid och höjd beredskap.

[66] *Compare* Böckenförde's argument against this approach, BÖCKENFÖRDE, *supra* note 6, at 125–27, *with* the German argument for this approach, BÖCKENFÖRDE, *supra* note 6, at 125.

[67] On legality in this context, see BERGLING ET AL., *supra* note 37, at 67.

[68] This concern expressed in SOU 2008:125, 525. Since it is difficult to predict what kind of regulation is necessary and in order to protect the integrity of the rule of law state, the constitution, and the principle of legality it is argued that the Government should be granted emergency powers to adopt a provision (*föreskrift*) when there is a danger in delaying. A time limit of 12 days was suggested, and the norm should, as soon as possible, be put before the Parliament. *Id*. at 527.

and emergencies. It follows that the principle of legality also dominates in times of extraordinary circumstances and internal emergencies,[69] and as described above, the only possible exceptions to it are the supra-legal state of emergency and the Penal Code.

*VI. Challenges*

There are three main concerns regarding the legal framework and the capacity of the government to deal with extraordinary circumstances and internal emergencies. In addition to the powers and competences of the government, the issues of organizational capacity and effectiveness have been pointed out as areas of concern. The Tsunami Report from 2005 demonstrated that the organizational structure within the government at that time could not sufficiently resolve the emergency.[70] Moreover, the report asked whether the rule requiring the concerted action of five ministers for the government decision to be valid[71] was necessary in emergencies.[72] As a follow up, the Expert Inquiry[73] considered whether to adjust the collective decision making rule so as to require the participation of less than five ministers, and whether to broaden the legislative powers for the government. The government rejected both proposals and the proposal did not reach parliament.[74] In 2008, the Swedish National Audit Office published the result of its audit of the government's capacity to govern and coordinate in a serious emergency.[75] Among other things, the report found that the legal framework was not prepared for a serious emergency that implicated the whole country. Further, the report found that such an emergency could potentially require centralizing operative responsibility to one actor at the national level. Noting that the report took into account the Swedish model of independent State administrative authorities, its findings clearly criticize anticipatory statutorification as a viable method. The report explicitly recommended that the government should have the power to appoint one State administrative authority with the national responsibility to lead and coordinate all necessary measures and operations during an exceptional emergency and that such powers should be laid down in an emergency law.[76] The Swedish model with independent State administrative authorities, relatively broad powers and independent municipalities, and the

[69] *See* BERGLING ET AL., *supra* note 37, at 66.

[70] The report documented the deaths of hundreds of Swedish citizens during the tsunami in Thailand.

[71] IG 7:3 (laying down the collective decision principle).

[72] SOU 2005:104, 305.

[73] The Expert Inquiry formed a part of the Constitutional Reform Inquiry (*Grundlagsutredningen*).

[74] Prop 2009/10:80, 207.

[75] RiR 2008:9.

[76] *Id*. at 8.

fragmentation of the law that comes with it, represents one of the main organizational and legal challenges to a serious, nation-wide and serious crisis.

An exception to the collective decision-making rule is controversial because it would go against the main rule stipulating independence of State administrative authorities in relation to the government. The Constitutionally dictated independence of State administrative authorities in relation to the government is an important constitutional rule that aims to protect the public from undue political influences in matters of applying the law and ensures that the expertise of State administrative authorities guide its decisions-making. After balancing the rule of collective-decision making against the fact that the definition of when an exception to this rule should apply would have to be vague and general, together with a statement that from a historical point of view such a rule had not been needed in times of crisis, the Expert Inquiry recommended that no change should be made to the constitution. Should a situation arise where the collective decision making procedure as laid down in the IG cannot be respected, the government will have to fall back on a supra-legal state of emergency.[77] Still, the 2010 constitutional reform presented a concrete legislative proposal for the sake of the debate that included an exception to the collective decision-making rule, and expanded legislative powers for the government. The Expert Inquiry suggested that the government should have more extensive legislative powers available to it during internal emergency situations. The Expert Inquiry further recommended that the government should be able to adopt provisions within the sphere of legislative powers that according to the constitution normally are reserved for the parliament.[78] A substantial number of the referral bodies expressed considerable concern over this proposal, and hence the government ultimately declined amending the constitution to this effect. Instead, it the government suggested appointing a future inquiry into this and other questions related to internal emergencies.[79]

Effectively, the need to recognize and define internal emergencies in the constitution, and its accompanying agony, caused the State to fall back on the non-regulated practice of a supra-legal state of emergency. Constitutional silence thus decidedly trumps explicit regulations. An implicit or—at the very least—unarticulated idea of deference to the government in internal emergencies may account for this preference. Thus, the Article argues that the notion of a supra-legal state of emergency in Sweden rises out of political practice as opposed to some principle or doctrine deriving from Swedish constitutional law. The preparatory works and decisions by the Committee on the Constitution similarly point towards deference to the government in emergencies, without recognizing the supra-legal

[77] SOU 2008:61, 109. For an account of a similar argument in the German debate, *see* BÖCKENFÖRDE, *supra* note 6, at 121.

[78] *Cf*. IG 15.

[79] SOU 2008:61, 109.

state of emergency as a constitutional principle or doctrine. If these conclusions are correct, then the political and constitutional vacuum that surrounds internal emergencies can easily be filled. The inherent uncertainty of the situation does not necessarily benefit the safekeeping of the democratic, liberal, rule of law State.

*VII. Conclusions*

Returning to the analytical framework presented above recalls the main questions: Should States recognize states of emergency as a legal problem and explicitly refer to them through legal text? Because non-action in emergencies almost never represents a viable alternative, the following question also becomes relevant: Should States allow or tolerate taking emergency actions that violate existing law? In Sweden, the legislative powers and procedures as stipulated in the constitution have been considered appropriate also for internal emergencies. The same applies to the speed in decision-making.[80] This conclusion goes hand in hand with the political practice of a supra-legal state of emergency. Unconstitutional measures are allowed according to the practice of a supra-legal state of emergency and the legislature has, thus far, decided to accept that such measures are taken in violation with the law should it be necessary, hence not recognizing internal emergencies as a legal problem. This, however, raises serious rule of law concerns. In addition, we argue that it should be of special concern that according to the Swedish supra-legal state of emergency, it is the same body, i.e. the government, that first determines that an emergency exists (without any formalized procedure) and thereafter holds and exercises undefined emergency powers. The concern becomes more significant upon recognizing that the review of emergency actions occurs only after the fact and it is political in character.

As described above, although some question the status of the supra-legal state of emergency, the notion remains an empirical fact. Nevertheless, within those few cases that apply the concept, the more important decisions of the Committee on the Constitution are old. Furthermore, the preparatory works contain contradictions. These facts, together with constitutional silence on the matter, do not suggest a strong foundation for protecting the integrity of the constitution and the rule of law State. This is especially the case in a political situation marked by increasing parliamentary difficulties and a global geopolitical climate that exhibits growing social and security tensions. Sweden's effectiveness in responding to emergencies historically derives from consensus and strong cooperation between its political parties. But, times continue to change, and the challenges posed by terrorism, migration, and illiberal tendencies in society may present a real and serious threat to the rule of law and integrity of the constitution in the future. Within the Swedish constitutional setting, the method of anticipatory statutorification may lead to a piecemeal nibbling away

[80] SOU 2008:61, 100.

of constitutional rights that, together with a general fragmentation of the law, makes it difficult to assess the merit of method.[81]

**D. Finland**

*I. Constitutional Fundamentals*

Finland has a long-lasting tradition of formal legalism. The constitution has mostly been procedural in its nature and has served as the "corner stone of all legislation and executive power."[82] Starting in the 1990s, Finnish constitutional law has undergone many changes, including a total reform of the Constitution. The correspondence between the constitution and international obligations has been one of the main trends driving constitutional development and practice. The memberships in the Council of Europe and in the European Union have functioned as catalysts for these changes.[83]

Nowadays, the constitution includes basic rules concerning emergency situations within the context of exceptions of fundamental rights.[84] Emergencies are further regulated in a parliamentary act called the Emergency Powers Act. Finnish peculiarities include that this relatively new law incorporates a so called exceptive enactment. This rarely used mechanism allows parliament to create an exception to the constitution by enacting a statute that conflicts with the constitution.[85] Notably, this exception becomes effective without formally amending the constitution.[86] Although the constitution itself only allows parliamentary acts to make limited exceptions, the Emergency Powers Act goes beyond the normal limits set out in the constitution.

Similar to the growing importance of international commitments, another trend visible in the context of regulating emergencies in Finland is the growing power of the parliament and securing the rights of parliament. This has also meant stripping down the competences of the president of the republic.[87]

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[81] For an analysis of the Swedish terror laws from this point of view see, Iain Cameron & Anna Jonsson Cornell, *Terroristbrott – en Översikt,* SVENSK JURISTTIDNING 709–34 (2017).

[82] JAAKKO HUSA, THE CONSTITUTION OF FINLAND: A CONTEXTUAL ANALYSIS 3 (2011).

[83] *Id*. at 30–32.

[84] Section 23.

[85] HUSA, *supra* note 82, at 9–10.

[86] *Id*.

[87] *Id*. at 46–49.

*II. Constitutional and Legal Definitions of Emergencies in Finland*

To understand the current Finnish legislation on emergency situations, some historical background is needed. Notably, since the beginning of Finland's independence in 1917, its emergency laws rose from a clear dichotomy between war and peace. The only thinkable emergency for the young nation was an armed conflict—a war between sovereign States. Therefore, that the State should only use rules of emergency after war had been declared formed the basis of emergency regulations. Similarly relevant, the Act for Wartimes was based on the idea that after war had been declared, the State and society would have ample time to prepare for war before actual wartime actions began.[88]

The process of preparing a new legislative framework for emergencies started in the 1970s through various preparatory committees and legislative drafts. These efforts ultimately culminated in the 1990s with the enactment of two acts of parliament for emergency situations: The Emergency Powers Act and the State of Defense Act. While the State of Defense Act, as wartime legislation, bears some characteristics of the legislation which it replaced,[89] the Emergency Powers Act attempts to respond to various other situations that can lead to war or other equally serious emergency situations. Comparatively, in addition to providing for external emergencies like a state of war, the State Defense Act provides competences for situations that are comparable to war. Such comparable situations include internal revolutionary conflicts where the acts of revolution threaten the constitutional order of the state. Thus, these two acts partly overlap, and the same tradition continues even in the current applicable legislation. Nevertheless, this Article focuses on the Emergency Power Act and the situations covered by it.

The current legislative setting builds on the idea that regular legislation—i.e., parliamentary legislation other than the Emergency Powers Act—must provide competences for the government and the State generally that cover situations not cognizable as emergencies, but rather as situations where normal functions of public power are disturbed and under severe pressure.[90] Competences in regular legislation—those not particularly designed for emergencies like the Emergency Powers Act—raise the threshold for using special emergency powers acts and therefore decrease the likelihood of their use. This refers to situations that fall short of an internal emergency or state of defense within the meaning of the law. In the Finnish understanding, such emergencies are exceptional compared to those situations that regular legislation can resolve.[91] From the perspective of the analytical

[88] *See* Seppo Tiihonen, *Sotatilalainsäädäntö ja hätäoikeus autonomian lopulta toiseen maailmansotaan*, *in* LUKEEKO HÄTÄ LAKIA 85–94 (Kaarlo Tuori & Martin Scheinin eds., 1988).

[89] Martial Law.

[90] *Cf.* the Swedish principle of anticipatory statutorification (författningsberedskap), *infra* Part C, Section V.

[91] Legislation for Salvage and Rescue includes some competences for handling disasters. Only very serious catastrophes might cause a need for emergency competences. Legislation for serious infectious disease includes

framework provided by Böckenförde, the situation prompts asking whether this is a case of *Vergesetzlichung*, in other words, using emergency powers that are regulated in the constitution. The State, however, reserves such use for rare and highly exceptional situations that have not occurred in Finland so far. As a result, parliamentary laws that do not have the character of emergency laws handle various abnormalities.[92] But, when these powers do not suffice for public action, the Emergency Powers Act or the State of Defense Act provide the necessary competence. Nevertheless, the State has not had to resort to using these acts since their enactment.

Before 2000, and although revised at different times, Finland had in force constitutional acts that dated back to the beginning of its independence. With the total reform of the constitution, the new constitution replaced those previous constitutional acts that had been in force since 2000. Finland adopted the current Emergency Powers Act after the new constitution was already in force. The 2000 constitution thus sets the context and limitations of the emergency laws of the nation. Importantly, the constitution provides the only constitutional grounds for emergency legislation. The wording is short and rather abstract. While it covers the basic regulatory factors according to Böckenförde, the Constitution provides the elements of those factors on a very general level.[93] As such the constitution does not require enacting an emergency powers act, rather provides an opportunity for such a legislation to be enacted.

The constitution defines the concept of emergency by referring to "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." Thus, although the constitution covers the most extreme situations, it leaves much open.[94] The preparatory works indicate that the concept of emergency in Finnish constitutional law means the same as is found in international treaties, specifically the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[95] The constitution stipulates that the details be laid down in ordinary law.

The Emergency Powers Act defines those situations in which the act applies. Emergency conditions include:

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provisions for protection from communicable disease. Only in pandemics might there be need for emergency powers based on the Emergency Powers Act. Even legislation on police covers some of these situations.

[92] *See* BÖCKENFÖRDE, *supra* note 6, at 115, 120–21.

[93] *Id*. at 119–20.

[94] *Id*.

[95] *See, e.g.*, Hallituksen esitys 60/2010 vp, 36.

> 1) an armed attack against Finland, as well other as serious attacks and their aftermath, 2) a threat of armed attack or a threat of other equally serious attack against Finland, which requires the competences of the Emergency Powers Act to be used, 3) a serious threat to the livelihood of the population or the foundations of the national economy which endangers the necessary functions of the society; 4) a catastrophe or its aftermath or 5) pandemia which resembles catastrophe.

As Finland's constitution strives to enact only the very constitutional grounds for possible exceptions to the constitution, the emergency laws must take on a more material and detailed character. Although the constitution allows for a state of emergency, it does not define in great detail what constitutes an emergency situation, or regulate questions related to competence, limits, or controls. Accordingly, ordinary law regulates all such aspects.

If the emergency does not require immediate action, the government, in cooperation with the President of the republic, declares whether an emergency situation exists.[96] After that the government decides, by issuing a decree, which powers imbued within the Emergency Powers Act to put to use. The government shall submit this decree to parliament for immediate consideration. Parliament may then repeal the decree totally or partly. Barring enduring emergency conditions, the decree shall only remain in force for a fixed period of three months. Further, if parliament does not receive the decree within one week of its being issued, the decree shall automatically lapse. The Act provides for shorter time limits and finer mechanism when the emergency requires immediate action, but the basic structure generally turns on the interaction between government, the President, and parliament.

The current Emergency Powers Act dates to 2011.[97] After the enactment of the new constitution, it became obvious that the previous Emergency Powers Act did not conform to the constitution.[98] Thus, the government intended to reform the Emergency Powers Act to achieve coherence with the new constitution. The new Emergency Powers Act, however, fails precisely in this respect. Many consider the act to violate the constitution insofar as it assigns broad emergency powers to the government. Defining economic crises as emergencies proved problematic as well. As a result, the Finnish parliament enacted the

[96] Emergency Powers Act (1552/2011), Chapter 2.

[97] Emergency Powers Act (1552/2011).

[98] Emergency Powers Act (1080/1991), https://www.finlex.fi/en/laki/kaannokset/1991/en19911080.pdf.

current Emergency Powers Act as an exceptive enactment.[99] The exceptive enactment is a peculiar Finnish mechanism that allows parliament the possibility of enacting ordinary laws that nonetheless conflict with the Constitution. The parliament adopts such laws by following the same procedural requirements as with constitutional amendments.[100] As previously mentioned, using exceptive enactments is highly problematic and nowadays occurs very seldom.[101] Parliament similarly criticized the Emergency Powers Act when it enacted it. Parliament required the government to evaluate the act in the light of the reformulated section 23 of the Constitution, which was amended in tandem with the Emergency Powers Act. The idea was to prepare new legislation in order to create a workaround to the exceptive enactment.[102]

*III. Rights Restrictions During a State of Emergency*

Chapter Two of the Constitution—which consists of provisions concerning fundamental rights—includes a basic section on the exceptions to the basic rights and liberties in the event of emergency. According to section 23 of the Constitution,

> [S]uch provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or in the event

[99] See PeVL 20/2011 vp on LJL 1/2011 vp (Lepäämässä oleva ehdotus valmiuslaiksi ja eräiksi siihen liittyviksi laeiksi), and PeVL 6/2009 vp on HE 3/2008 vp valmiuslaiksi ja eräiksi siihen liittyviksi laeiksi.

[100] According to Section 73 of the Constitution of Finland, which provides:

> [A] proposal on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation of the Constitution shall in the second reading be left in abeyance, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. The proposal shall then, once the Committee has issued its report, be adopted without material alterations in one reading in a plenary session by a decision supported by at least two thirds of the votes cast. However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance and it can be adopted by a decision supported by at least two thirds of the votes cast.

Enactment of limited derogation of the Constitution does not change the wording of the Constitution and does not proclaim to be the Constitution. It can be amended in case the original limited derogation still holds after the amendment, in the order of enacting ordinary parliamentary laws.

[101] Veli-Pekka Viljanen, *Poikkeuslakien välttämisen periaate*, 6–7 LAKIMIES 961 (1999).

[102] Eduskunnan kirjelmä 28/2011 vp.

> 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. 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.

Thus, section 23 of the Constitution has four important elements. First, enforceable exceptions to basic rights originate from precise delegations of provisional power as granted by acts of parliament or governmental decrees. Second, these necessary exceptions can only arise during armed attacks against the nation or some other equally serious emergency. Third, all the exceptions must conform to Finland's international human rights commitments. Last, parliament must ground the provisional exceptions through formal legislative acts.

In light of Böckenförde's framework, the Finnish Constitution leaves open the competency to exercise emergency powers.[103] To be sure, the Constitution generally provides that parliamentary law must regulate emergency powers. Within this context, both parliament and the government can enact exceptions to basic rights. But, the constitution does not specify which State organ will have the power to consider whether an emergency occurs. It also does not separate the authority to declare a state of emergency from the holding of emergency powers. Although the Emergency Powers Act indicates that the government and the President can work together to declare a state of emergency, the government can issue further decrees and has the power to decide which powers provided in parliamentary act to use. Thus, the government holds the capacity to exercise emergency powers.[104] Nevertheless, the Constitution constraints these exceptional powers in two important respects. Both constraints identify parliament as the institution that can reel in the emergency powers of the government. Critically, the entire state of emergency process operates on the basis of a parliamentary act. Where these acts provide for the use of governmental decrees, parliament can engage in ex post review of the decrees.[105] Furthermore, as concerns substantial constraints, the Constitution explicitly refers to the international human rights obligations of the State.

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[103] BÖCKENFÖRDE, *supra* note 6, at 119.

[104] *Id*. at 128–29.

[105] *Id*. at 119–20.

Thus, section 23 provides two means of making exceptions to the Constitution. First, the section provides the possibility of creating exceptions to the basic rights guaranteed by the Constitution. Second, the section provides the possibility of creating exceptions in the legislative powers otherwise granted to parliament. But, the section also includes several safeguards. Many of the elements above that are typically used to regulate emergencies—possible restrictions of basic rights and the relationships between State bodies in decision-making—reflect the manner by which the Constitution deals with the possibilities of a state of emergency. Accordingly, section 23 of the Constitution is an exception to the normal rules detailing the delegation of legislative powers under section 80 of the Constitution.[106] This deviation from the norm ensures that the State enjoys a broader capacity for delegating legislative powers during a state of emergency. The State nevertheless continues to face many restrictions, including limitations on the delegation of legislative powers and those in parliamentary acts. These limitations represent constraints on the use of power and the goals which the government can set for restoring the normal state of powers.[107] To elaborate, all exceptions must be provisional and limited in duration. Moving forward through governmental decrees rather than acts of parliament is only permissible in cases where a special reason exists. The scope of application of such decrees must always be precise. And in any event, parliament must enact the fundaments of the exceptions. As of the time of this writing, the government has not had to use these delegation powers.

Where the government uses its delegated legislative powers, parliament has the power to determine the validity of such decrees. This functions as a major constraint. Such *ex post* review ensures that parliament will have the opportunity to truly consider the worth of the exceptions to fundamental rights that decrees have laid down. From a constitutional perspective, such consideration and review directly test the constitutionality, necessity, and proportionality of the exceptions immediately after the decrees are issued. In addition, the question in parliament can turn to political expediency. Importantly, this mechanism secures

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[106] According to Section 80.1 of the Constitution:

> The President of the Republic, the Government and a Ministry may issue Decrees on the basis of authorization given to them in this Constitution or in another Act. However, the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts. If there is no specific provision on who shall issue a Decree, it is issued by the Government.

The practice concerning issues of "the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature," which have to be enacted by Parliamentary Acts, is wide and deep. This practice has strengthened the position of Parliament after the reform of the Constitution. *See* Veli-Pekka Viljanen, *Onko eduskunnan asema lainsäädäntövallan käyttäjänä muuttunut?*, 7-8 LAKIMIES 1050 (2005).

[107] BÖCKENFÖRDE, *supra* note 6, at 120.

that parliament has the final say in legislative matters and safeguards parliament's position as the main legislative body even during states of emergency. Parliament has powers to overturn the decree or alter the period of validity of the decree. Within the Finnish setting, this is of particular interest as the Constitutional Law Committee of parliament represents a key institution in the Finnish constitutional scene. The Constitutional Law Committee can more than adequately assist the parliament in examining questions relating to fundamental rights during *ex ante* constitutional review. This in turn suggests that the Committee would likely participate in ex ante review of emergency decrees that the government issues.[108]

The only permissible limitations to the Constitution during times of emergencies are those that the Constitution explicitly mentions. Impermissible limitations of the Constitution include changes to the separation of powers, State functions, and the main responsibility of parliament as laid out by the Constitution. Importantly, the Constitution does not prohibit amending the Constitution during times of emergency. Effecting amendments could not be accomplished through emergency laws and would instead depend upon the amendment procedure that the Constitution lays out. The only possible issue that could affect the separation of powers would be the limited use of governmental decrees in situations that would otherwise require ordinary parliamentary legislation.[109] But as noted earlier, the Constitution narrowly constrains the limiting of fundamental rights during an emergency. Parliament has previously discussed whether to widen the scope of exceptions beyond the current limits. Emergencies may very well create additional temporary exigencies to limit other constitutional arrangements. These discussions have been very general and have not concerned themselves with any particular issue. The Constitutional Law Committee expressed the prudence in further investigations into the matter, and noted that circumstances that create new needs requiring amendments to the Constitution could potentially exist.[110] Such needs could arise, for example, in the areas of the constitutionally guaranteed autonomous status of municipalities or the decision-making procedures of State finances. But, predicting such needs remains a very difficult task. So far, the Constitution does not permit such limitations.[111] The Finnish discussion suggests that Finland has attempted to preserve its regular constitutional order as much as possible. This includes, for example. the desire to maintain consistent, normal regulations between State institutions during emergency situations.[112]

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[108] *See e.g.*, Hallituksen esitys 60/2010 vp, 37; *see also* Statement of the Constitutional Law Committee, PeVL 6/2009 vp.

[109] Section 23.

[110] *See* Statement of the Constitutional Law Committee, PeVL 6/2009 vp.

[111] *See* Hallituksen esitys 60/2010 vp, 23.

[112] *See* BÖCKENFÖRDE, *supra* note 6, at 129–30, 131.

The current Constitution places a rather high demand on the use of parliament's legislative powers during times of emergency. Understanding this prerogative becomes clear upon considering the background surrounding the revision of the rights chapter of the 1995 Constitution. The revision introduced very strict standards for using parliamentary laws when legislating on rights or the obligations of individuals or other issues covered by the Constitution. Notably, the 2000 constitutional reform did not amend the exceptions section. But, section 23 of the Constitution—that is, the section detailing the emergency exceptions—underwent a revision in 2012. This change largely occurred because the process of reforming the Emergency Powers Act could not fulfill the new constitutional demands for exceptions to the Constitution. The procedures of amending the Constitution and enacting the new Emergency Powers Act timely overlapped. But, a lack of political will to follow the demands of the Constitution lead to the use of exceptive enactment for a time. The interpretation of section 23 of the Constitution that then emerged resulted in a situation where parliament had to enact the new Emergency Powers Act as an exceptive law. But, as it has been a general trend as well as a constitutional demand to avoid exceptive enactments, eventually enough political will crystalized to amend this aspect of the Constitution in 2012.[113] Hence, the current Emergency Powers Act fulfills the demands of the amended Constitution *better* than was the case before. Nevertheless, continued consideration of the Emergency Powers Act as an exceptive enactment may prove necessary especially regarding the delegation power. Another thing that is problematic from a constitutional perspective is whether purely economic crises qualify as emergency situations. The issue may also prove problematic from an international treaties perspective.[114]

*IV. Challenges: Recent Constitutional Amendments Regarding Emergency*

With the enactment of the new Constitution in 2000, the Finnish Constitution adopted revised provisions for emergency situations. The amendments raised two separate concerns.

First, the concept of an emergency has been simplified to better fit with Finland's international commitments. That is, the Finnish definition of an emergency changed to more closely reflect the requirements and wording of a state of emergency as defined in contemporaneous international human rights treaties. This change was made to emphasize the connection between the notion of an emergency and these treaties. To elaborate, the Emergency Powers Act defines the concept of emergency situations in the same way as international human rights treaties—specifically, the European Convention and UN-

[113] Amendment Nr 1112/2011 (entry into force: Mar. 1, 2012).

[114] See for example the so called *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (July 1, 1984), para. 41 stating that economic difficulties per se cannot justify derogation measures. *Available at* https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

Covenant on Civil and Political Rights.[115] Actually achieving this similarity within the Finnish context meant loosening the original wording of the Constitution. In addition to external armed conflicts, the Finnish emergency situations cover other kinds of emergencies that seriously threaten the nation. Such emergencies, however, do not need to be comparable with an armed conflict. According to Finnish constitutional law, an emergency can include very serious natural catastrophes, pandemic diseases, or even major accidents that seriously threaten the nation. Due to the connection to the criteria set by international treaties, purely economic crises do not qualify as emergencies. Parliamentary law needs to define more closely the concept of an emergency. At present, the Emergency Powers Act provides the definition.

Secondly, the 2012 revision of the Constitution loosened the need to use parliamentary legislation to make exceptions to fundamental rights. As seen above, in special cases the government currently has the right to issue decrees when law defines basic competences. Parliamentary law may delegate to the government a capacity to issue limitations to the fundamental rights provided a special need for such a competence exists and that the limitations have a clear scope of application. In the Finnish setting, delegation of such a competence falls solely to the government; neither the president nor a minister can receive such a competence. Furthermore, the government has never had to use the powers established by the Emergency Powers Act. The preparatory works identify the difficulty in foreseeing the special circumstances where such competences are required. They also point out the need for very detailed legislation. Consideration of the possibility of such special circumstances in light of the possibilities for delegation under Section 23 of the Constitution should also recognize the narrow limits of the Section 80.2 of the Constitution.[116]

The current Emergency Powers act motivated these amendments to the Constitution. Parliament considered the new Emergency Powers Act alongside the amendments to the Constitution. The need to establish a competence for the government partly resulted from the desire to abandon the model of exceptive enactments. Namely, when reforming the Emergency Powers Act it became obvious that reforming the act would require delegating to the government a far-reaching capacity to issue decrees. The desire to open the possibility for the government to issue decrees culminated in an amended Constitution. This in turn provided parliament with a right to engage in ex ante review of the governmental decrees. Furthermore, law must account for and contain the fundamentals of such limiting delegations. The amendment of the Constitution thus provides constitutional guarantees for such a stipulation. Parliament's ex post review forms an especially important oversight mechanism.[117]

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[115] *See* Hallituksen esitys 60/2010 vp, 23, 36.

[116] *See* Hallituksen esitys 60/2010 vp, 37.

[117] BÖCKENFÖRDE, *supra* note 6, at 130.

**E. Comparative Analysis and Conclusions**

The present Section returns to the two sets of questions identified above as well as the challenges brought by constitutional silence on states of emergency. Swedish constitutional law lacks a definition of internal emergencies. The debate continues as to whether the constitutional practice of *konstitutionell nödrätt*—a supra-legal state of emergency—is a constitutional practice or principle, a political practice, or just an exception to be applied at the discretion of the government. Finnish constitutional law also does not define what constitutes an internal emergency. The Finnish Constitution, however, lays down some abstract and general elements and boundaries. The constitution delegates to ordinary law to realize a more precise definition. Thus, Sweden and Finland share the constitutional silence of how to define an internal emergency. The important difference being of course that, although not clearly defined, the Finnish constitution recognizes internal emergencies. More importantly, Finnish constitutional law may restrict fundamental rights and freedoms during an internal emergency provided that such restrictions meet all the requirements stipulated in the constitution and ordinary laws. Such restrictions could even take the form of governmental decrees when parliament delegates such powers by statute. Moreover, the Finnish constitution sets out close connections between their understanding of internal emergencies and international obligations. In other words, all measures and provisions concerning states of emergency must conform to Finland's international obligations. Because of this endeavor, the status of serious yet purely economic crisis remains open and in need of further clarification.

The Finnish Emergency Powers Act specifically places political and constitutional control in parliament. It is typical for Finnish courts to not have a particular role in this context. The government and the President determine whether emergencies exist. The parliament engages through various mechanisms and in different phases in the application of emergency powers. Both the constitution and the Emergency Powers Act underlie the interaction between parliament and government. The interaction between the two ensures political accountability. Nevertheless, parliament cannot hold the President politically responsible—the government bears the responsibility.

Sweden's supra-legal approach to internal emergencies enables the government to declare whether an emergency exists and vests within it the capacity to exercise emergency measures. The Committee on the Constitution subsequently engages in ex post political review of governmental actions. Comparatively, the Finnish constitution—while silent on the definition of emergencies—clearly anticipates parliamentary approval and review of all government decrees that establish provisional exceptions to the constitution. Swedish constitutional law should aspire to this design. One of the main arguments against regulating internal emergencies in the Swedish constitution has been the difficulty of establishing a workable definition for an emergency. In addition, Finland allows parliament to delegate its legislative powers to the government during an emergency. Sweden has discussed such a

solution, but again has turned it down, *inter alia*, because of the perceived difficulties connected to defining what constitutes an emergency. Thus, during a state of emergency, the Finnish government can temporarily restrict fundamental rights and freedoms. Indeed, this is the main substance and ratio of regulating emergency situations on the constitutional level. Parliament will stipulate the grounds for such provisional exceptions by statute. Accordingly, the provisional exception can take the form of a statute or a governmental decree, although the latter rarely occurs in the Finnish setting. That a strong endeavor to respect the parliamentary legislature even in times of emergency is evident in parliament's mechanism of review of governmental decrees. In Finland, the aim has been to modify the criteria for using emergency laws so as to restrict the powers of parliament to limit fundamental rights only when absolutely necessary. The use of exceptive enactment, however, remains the default. Such a default may signal that the legislature has been unable to follow the material criteria set in the constitution.

In Sweden, the constitution continues to apply during emergencies and extraordinary situations. All restrictions of fundamental rights and freedoms must take the form of law and conform to the special procedure and requirements laid down in the IG.[118] This is in line with what Böckenförde has called anticipatory statutorification. Anticipatory statutorification also forms the starting point and main rule for Finland as to how to handle emergencies. But, the tools available in Finland do not end there. As was the case in West Germany when Böckenförde presented his thesis on constitutional silence, the supra-legal state of emergency and the doctrine of anticipatory statutorification form the main arguments against explicitly recognizing a state of emergency in the Swedish constitution. The counter-arguments demanding explicit constitutional regulation are almost identical to those presented in Germany. Among others, these include that such recognition is not needed except for cases of war and military defense; that the unforeseeable nature and circumstances of real state of emergencies do not lend themselves to such recognition; that governments nevertheless acts despite lacking clear recognition; and that lacking such recognition allows parliament to ex post justify government actions that violate the constitution. According to the proponents of constitutional silence, these arguments and anticipatory statutorification help preserve the integrity and inviolability of the normal state of affairs.[119] Böckenförde counters that this approach allows the normal state of affairs to become a permanent state of emergency, which picks away at the integrity of the constitution and the rule of law State.

According to Böckenförde, to prevent the abuse of emergency powers and undermining the constitutional and rule of law State, a constitution should explicitly regulate the following: The preconditions and occurrence of a state of emergency, the competence to exercise

[118] IG Chapter 2.

[119] BÖCKENFÖRDE, *supra* note 6, at 121.

emergency powers, and the goal of and constraints on emergency powers.[120] Both the Finnish and the Swedish constitution fail this test. In the case of Finland, the constitution sets out very abstract preconditions of a state of emergency. To elaborate, the constitution remains silent as to which institution can declare a state of emergency and according to what procedure. Despite parliament's ex post review of governmental decrees, no special constraints singularly designed for emergency situations exist. Of course, regular constraints on the government's use of powers continue to apply during a state of emergency. But, the theoretical and actual legal problem that still lingers with the Swedes is twofold. First, should the constitution recognize a state of (internal) emergency as a constitutional problem? And second, should the constitution make an explicit reference to such circumstances within itself? Because non-action in emergencies does not represent a viable alternative, should such actions invariably conform to existing law? And, could or should the Swedish supra-legal state of emergency constitute a competence norm? If the answer to the last question is "yes," the Swedish constitutional silence delivers a severe blow to the integrity of the Swedish Constitution, while simultaneously undermining the rule of law. If "no," then what forms the constitutional basis for the government's actions during times of emergencies? First and foremost, the basis is in the law—in accordance with anticipatory statutorification. But when the law has not foreseen the emergency at hand, the government will still have to act without the support of the law. Again, such acts would undermine the integrity of the constitution and the rule of law.

[120] *Id*. at 119–20.