



Peer reviewed article

The supervision of legality by the Finnish Parliamentary Ombudsman during the COVID-19 pandemic

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Summary

This article studies the legal supervisory role of the Finnish Parliamentary Ombudsman during the COVID-19 pandemic in 2020. A major legal problem during public emergencies is that respect for the rule of law tends to get lost in the midst of rapid decision-making process. Therefore, in addition to the parliamentary control and the judicial review of courts, ombudsmen find a complementary position in supervising the legality of public actions during emergencies. The annual report of the Finnish Parliamentary Ombudsman shows that 931 complaints arrived the Office in 2020, concerning issues on the COVID-19 pandemic. These cases have tested public actions against the Finnish Constitution and other laws during the pandemic. To analyse the legal supervisory role of the Finnish Parliamentary Ombudsman during this period, we have selected three themes including restrictions on the freedom of movement of people, imposing visit bans on care centres, and limiting business activities. This analysis exposes the nature of the COVID-19 pandemic as a societal syndemic, meaning that although the health-related aspect of this crisis may prevail initially, the use of public power may not only endanger the principle of legality, but also may cause further societal, economic, and political changes, which may last for years after the crisis.

Keywords: Ombudsman, legal supervision, COVID-19 pandemic, emergency, Finland

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1. Examining the COVID-19 Pandemic through the Lenses of the Supervision of Legality

‘Even in genuine cases of emergency situations, the rule of law must prevail.’¹

The rule of law consists of several aspects, one of the most important part of which is the legal supervision of public decision-making.² Supervising the legality of the use of public power, in all its forms, pursues maintaining and enhancing the rule of law. An independent legal supervision is one of the domestic means, through which the compliance of administration of public power with relevant laws could be secured, also in times of emergencies, when legality is highly at risk. As the Venice Commission has underlined, through their mandate to promote and protect human rights, the ombudsman institutions contribute to flag human rights issues during emergencies and assist citizens affected by emergency measures in claiming their fundamental rights. Therefore, it is accurate to claim that the ombudsman’s supervision of legality effectively complements the parliamentary control and judicial review.³

This article studies the supervision of the legality of measures taken by the Finnish Parliamentary Ombudsman during the COVID-19 pandemic in 2020. Despite the fact that the pandemic has lasted for over two years, in this article, we focus only on cases that happened during the first year, meaning in 2020. This choice of timeframe is a deliberate one, in order to demonstrate that the empirical data collected from the Ombudsman’s cases could have already been used as an indicator about the nature of the pandemic and therefore guide further legislative and executive actions in coming years. Although the legal supervision of restrictive measures holds various arrangements, institutions, and aspects, our focus, in this article, is on the supervision of legality performed merely by the Finnish Parliamentary Ombudsman.⁴

The main observation here is that the Finnish Parliamentary Ombudsman, by monitoring the actions of those exercising public power during the COVID-19 pandemic, has challenged some broader issues related to justice and equality during crises. Although the main reason behind declaring a state of emergency in Finland was the health-related aspects of the COVID-19 pandemic, the actions of authorities, in this regard, have widened the effects of government’s restrictive measures by combining the health aspects with social, economic, and political ones. This, in its turn, raises the vulnerability and socio-economic belongings as one of the key issues in the pandemic. For the justified emergency actions, as well as for the recovery from the pandemic, we should notice existing research concerning the society’s most at-risk groups during crises. According to the previous research, the groups of people that are in vulnerable positions are more likely to experience discrimination or negligence in

emergencies. These groups of people include, for example, ethnic minorities, people belonging to disadvantaged socio-economic class, women, children, immigrants, and refugees. The adversities of crises and measures taken to combat the situation, may lead to impediments regarding access to healthcare and education or a fair distribution of economic resources. In addition, people who need care daily are affected the most in a negative way by crises and restrictive measures taken against them. In this regard, for example, elderlies in need of care and people with disabilities have been affected the most in countries at higher income levels.⁵

For a closer discussion, we have selected three thematic rights from the compilation of complaints submitted to the Finnish Ombudsman's Office in 2020, those cases that have resulted in decisions, which highlight the diversity of questions concerning fundamental rights' protection in crises. These complaints have addressed questions on the compliance of public actions with the Constitution of Finland and other laws and regulation during the COVID-19 pandemic in 2020. The study of these complaints and decisions of the Ombudsman on them reveal the wider nature of the COVID-19 pandemic as a societal syndemic.⁶ Alongside addressing the challenges on protecting human rights and fundamental freedoms during public emergencies, this article through studying some of the 2020 cases concludes that the nature of the COVID-19 pandemic, as a complex societal problem, had already been visible at rather early stages of the pandemic.

2. An Overview of Legal Actions during the COVID-19 Pandemic in Finland

Since the very early stage of the COVID-19 pandemic in 2020, several public health emergency reactions have been triggered in Finland. The Finnish Government gathered many resources at its disposal to offer a response to the newly emerged situation. These resources include a wide range of health-related, epidemiological, biological, scientific, legal, managerial, governmental, and administrative measures, amongst many other ordinary and extraordinary mechanisms available. These include new legislation, as well as using the emergency powers.⁷

In its Section 23, the Constitution of Finland (Suomen perustuslaki 731/1999, amended by 1112/2011) predicts a state of emergency, during which fundamental rights might be temporarily limited or derogated. The limitation or derogation of rights, however, must take into consideration the international human rights obligations of Finland. As a special legislation on emergencies, the Emergency Powers Act of Finland (valmiuslaki 1552/2011) recognises pandemics to be one of the grounds for declaring a state of emergency. Moreover, a separate legislation on communicable diseases i.e., the Communicable Diseases

Act (tartuntatautilaki, 1227/2016), includes various possibilities for authorities to limit some of the people's fundamental rights through administrative decisions.

In March 2020, the Finnish Government, together with the President of the Republic of Finland, announced a state of emergency based on Section 23 of the Finnish Constitution and therefore, triggered the application of the Emergency Powers Act. Pursuant to the continuation of the pandemic, the state of emergency was evoked again in 2021. Therefore, during the COVID-19 pandemic, two separate sets of states of emergency have been declared in Finland. The first one was for three months in 2020, between 16 March and 16 June, and the second round lasted for about two months in 2021, starting from 01 March until 27 April.

The declaration of a state of emergency under the Emergency Powers Act means that the Finnish Government had power to issue decrees for assigning various measures in its combat against the COVID-19 pandemic. Accordingly, during the first state of emergency, the Finnish Government issued multiple decrees on the commissioning of the powers laid down in the Emergency Powers Act. These delegations include a wide range of issues related to social welfare, healthcare services, employment, education, and even restricting the freedom of movement. The justification for commissioning these powers under the Emergency Powers Act was that delegating these powers were necessary to protect the population from the consequences of a highly widespread communicable disease and to ensure fundamental and human rights in an emergency. The aim of these decrees was announced to be preventing the spread of the virus, protecting special groups of the population, who are vulnerable such as elderly and people with compromised immunity. These decrees were also used to ensure the adequacy of social welfare, healthcare personnel, and the capacity of intensive care during this crisis.⁸

The power of the Finnish Government to issue these emergency decrees, however, is limited by the Constitution and the Emergency Powers Act. In addition, all governmental decrees, which are based on the use of emergency powers, are subjected to parliamentary and judicial reviews. The governmental decrees that target limiting human rights and fundamental freedoms of individuals and a group of people are all subjected to an immediate parliamentary review. Section 23 of the Finnish Constitution, while predicting the possibility of temporal and provisional exceptions to fundamental rights and liberties in emergencies, specifies that the grounds for these exceptions and their conditions must be provided explicitly in a separate parliamentary act. Hence, the need for special legislation under exceptional conditions has been identified at constitutional level in Finland. The necessity of such act originates from the rule of law and the respect for the principle of legality – a principle that has roots in both the Finnish Constitution and legal tradition. In fact, the Finnish legal system of emergency powers strives that the Parliament and the

Government should be able to function together and based on the rule of law, even during the hassles of a state of emergency, when rapid and expeditious decision-making is required.⁹

In 2020-2022, various legal instruments have been used to handle the situation. The use of powers granted in regular legislation existing since before the COVID-19 pandemic, however, has been the primary solution. In this respect, especially the Communicable Diseases Act is of major importance. The current pandemic, nevertheless, has been difficult to fit within the idea of a typical communicable disease, as envisaged in this Act. Due to the considerable number of infected people, the current pandemic has put the healthcare system and state authorities under a much heavier burden than what the legislator had predicted. As the COVID-19 pandemic could not, for many reasons, be handled like other communicable diseases, amending this legislation became necessary.

Moreover, normal statutory powers to manage the pandemic were used during the emergencies and beyond. In this regard, as mentioned above, the most importantly applicable legislation is the Communicable Diseases Act. During the pandemic, multiple provisions of this Act have been going through series of amendments, in order to increase the powers of authorities. Partly these amendments are of temporal nature and motivated only in relation with the COVID-19 pandemic. Some of these amendments have only been minor revisions, aiming to make it clear that the provisions of the Act are as well applicable to the current COVID-19 pandemic. Other statutory legislations have also been subjected to similar amendment procedures or the Government has proposed even new legislation. The Parliament has also decided on several supplementary budgets. The legislative amendments have been related to many aspects of societal life. Changes have been made to legislation concerning the labour market and social security, various business subsidies and financing, the public finances of the Government and local authorities, securing immigration especially for the availability of seasonal labour, pharmaceutical services, education at schools, vocational and higher education, and transportation. Some temporary changes also have been made to administrative processing times and other public service deadlines. Many of these laws are on a temporal basis and exist to ensure the functioning of society during the crisis.¹⁰

In addition to amending legislation, the Government and various governmental institutions have been issuing many guidelines, recommendations, instructions, action plans, guidance papers, etc. Based on the powers vested in the legislation, regional state authorities and local authorities in the municipalities have taken several administrative decisions targeting individuals. The variation of decisions is huge: from quarantine and isolation decisions to compulsory health examinations, and temporal closing various businesses and recreational activities to minimising contacts between people. In the review of the legality of these

measures, a lack of understanding or clarification on the exact legal status or binding nature of these documents has caused serious confusion amongst not only the public, but also the officials. In this regard, for example, some regulations issued by authorities were mistakenly regarded as being binding laws, whereas they were merely a guiding principle with no legally enforcing power.¹¹

3. The Supervision of Legality by the Finnish Parliamentary Ombudsman during the COVID-19 Pandemic

As mentioned above, the legal supervision of public power – ranging from the primacy of the Constitution and subordination of lower-level statutes to official accountability – consists of several elements and actors. In addition to the parliamentary and judicial review of legislation and the exercise of public power, an important intra-administration overseeing of legality exist in Finland. This type of oversight is mostly conducted by two supreme, independent legal supervisors i.e., the Parliamentary Ombudsman and the Chancellor of Justice.¹² Both of these institutions are vested with almost similar tasks and powers, when it comes to overseeing the legality of the actions of authorities and public officials. Only the Ombudsman, however, has the power to examine issues concerning the Finnish Defence Forces, Finnish Border Guard, or peacekeeping personnel. In addition, only the Ombudsman oversees prisons and other closed institutions, where people are held against their will. Since in this article we focus merely on the complaints filed with the Ombudsman Office, the actions addressed by the Chancellor of Justice are to be discussed in a separate study.¹³

The Ombudsman in various constitutional systems is a legal product imported from Sweden. The Parliamentary Ombudsman in Finland was established by the 1919 Finnish Republican Constitution. Section 109 of the Finnish Constitution provides the Ombudsman with the right to oversee and ensure that courts of law, other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. In the performance of this task, the Ombudsman, together with two independent deputies, monitors the implementation of basic rights and liberties and human rights through conducting on-site investigations in public offices and closed institutions such as care facilities and prisons. The deputy Ombudsmen have the same powers as the Ombudsman and shall decide on their respective cases autonomously. The oversight of legality or the legal review by the Parliamentary Ombudsman is performed either in response to individual complaints submitted to the Office, or is based on the Ombudsman's own initiative.¹⁴

According to the Parliamentary Ombudsman Act (laki eduskunnan oikeusasiamiehestä, 197/2002), the Parliamentary Ombudsman submits an annual report to the Finnish Parliament, elaborating on the functioning of the Office in the past year. Section 12 of the Parliamentary Ombudsman Act states that the annual report of the Ombudsman must also include a review of the situation regarding the performance of public administration and the discharge of public tasks, on the administration of justice, and on any shortcomings in legislation. This is part of the requirements of transparency in public activities and the good governance practice of officials.

In her general comments in the annual report of 2020, the Deputy Ombudsman Maija Sakslin asserted that the COVID-19 pandemic had indeed challenged the Finnish legal system of protecting fundamental rights in an unprecedented manner. According to her, '... during different crises, the fundamental rights and their protection mechanisms do fall under the threat of violation more than ever, and that is exactly why fundamental and human rights and their enforcement mechanisms are needed the most during these difficult times.'¹⁵ In addition to responding to individual complaints, the Ombudsman has performed a significant supervisory and advisory role during the COVID-19 pandemic by issuing several statements, conducting inspections at different institutions, and addressing some pandemic-related issues on his own initiative.¹⁶

In 2020, from the 7,059 complaints submitted to the Office of the Parliamentary Ombudsman, 931 of them covered issues related to the COVID-19 pandemic. From all these complaints, 601 cases were completely resolved, 109 of which led to decisions on new measures. The resolved cases covered topics related to the administrative branch of the Government, amongst them mainly the matters of education, social welfare, and healthcare.¹⁷ Regarding the statements, the Office of the Parliamentary Ombudsman issued ten statements on topics related to the COVID-19 pandemic.¹⁸ In this regard, for example, immediately after the declaration of the state of emergency in Finland in March 2020, three statements were issued on the first governmental decrees concerning the commissioning or application of powers laid down in the Emergency Powers Act.¹⁹ Some statements were also issued on matters such as the governmental decrees on the rights of a municipality to deviate from the time limits for non-urgent healthcare and on the proposal for the introduction of a contact-tracking application (koronavilkku) to support the management of the spread of coronavirus.²⁰

While the on-site inspection of public offices and closed institutions – where people are deprived of their personal freedoms and liberties – are a part of the duties of the Parliamentary Ombudsman, it should be noted that the COVID-19 pandemic and various restrictive measures against it caused a significant drop in the number of inspections that the Office performed in 2020. Compared to more than one hundred on-site inspections

(both announced and unannounced), which had been carried out in the year before the pandemic meaning in 2019, the Office of the Parliamentary Ombudsman performed only 23 on-site inspection visits during the first year of the pandemic, meaning in 2020.²¹

In the following section of this article, to illustrate the oversight of legality performed by the Finnish Parliamentary Ombudsman, we will study three themes of rights, which were intensively affected by the measures taken against the COVID-19 pandemic in Finland in 2020. Instead of addressing the rights of different groups such as elderly, children, immigrants, or prisoners, we have selected three thematic rights, including restrictions on the freedom of movement of people, imposing visit bans on care institutions, and limiting business activities. While providing empirical data as a sample of a bigger group of complaints, these cases represent early-stage problems that individuals had faced during the first year of the COVID-19 pandemic. What all these cases have in common is that the challenged restrictive measures have created new crisis-related legal questions about safeguarding the rule of law for the purpose of protecting human rights and fundamental freedoms. The most significant outcome of the following analysis is that combating crises now and in future should not happen in vain, without considering the multi-dimensional effects of the governmental actions on the people's lives and rights, particularly on vulnerable and at-risk groups. After all, although the health-related aspects of the COVID-19 pandemic seemed bolder at the beginning, we should be aware that the use of public power in imposing restrictive measures during crises might endanger not only the principle of legality, but also it might impose adverse effects on the legal system of protecting fundamental rights. This situation may cause some societal, economic, and political challenges, which all could last for years after the crisis.

4. The Study of Three Thematic Issues addressed by the Office of the Parliamentary Ombudsman

4.1 Restricting the Freedom of Movement of People

One of the first measures taken against the COVID-19 pandemic in Finland, once a state of emergency was announced in March 2020, was restricting the mobility of people between Uusimaa (the part of the country where the capital area is located) and the rest of the country.²² By the deployment of the Emergency Powers Act in the first round of the states of emergency, the Finnish Government issued a decision in the form of a decree, according to which the residents of Uusimaa were not allowed to leave the region, nor those, who are not officially the residents of the capital area, could enter the Uusimaa region (Government Decree SM/2020/21). The reason stipulated supporting this decision was that the spread of

the coronavirus was faster in Helsinki metropolitan area, compared to the rest of Finland. This prohibition, however, predicted certain exceptions such as if the movement were necessary for performing the official activities of people i.e., their jobs or for the reason of family emergencies.²³

Even though the closure of Uusimaa borders were in effect for a brief period (from 28 March 2020 until 19 April 2020), this prohibition caused many controversies regarding the violation of people's fundamental right to the freedom of movement and other rights associated with that, such as the right to privacy and family life. To be more specific, numerous complaints were submitted to the Office of the Parliamentary Ombudsman against the closure decision and the activities of law enforcement in implementing this decision. In addition to individual complaints, the Ombudsman and his deputies took some initiatives to address the legality of this closure and to oversee the activities of the police and other law enforcement officials regarding the prohibition of the movement of people at Uusimaa border.

In 2020 and during the COVID-19 pandemic in Finland, the Office of the Parliamentary Ombudsman received seven complaints against the police operations and the supervision of the border control of Uusimaa.²⁴ To give an example, in the case EOAK/3213/2020, the complainant asserted that the reason for their travel and therefore crossing the Uusimaa border was to provide care for and assist their 86-year-old father, who not only lived alone, but also belonged to the high-risk group of elderly suffering from a chronic disease. According to the complainant's submission, they had explicitly informed the police that the reason for entering the Uusimaa region was to supply the old father with food and medicine, as they would regularly do. Despite this essential information, the police prevented them from entering the capital region and returned the family from Uusimaa border, reasoning that the municipality authorities would help their father.

In his evaluation of this complaint, the Ombudsman Petri Jääskeläinen assessed that the decree, which had imposed the Uusimaa border closure, had not intended to prevent a close family member from travelling for the purpose of assisting a family member in need, even not on the ground that the assistance of an authority might have been available. Hence, the Ombudsman considered that in this case, the need for care had met the criterion of necessity for border crossing with taking into consideration the old age of the father and the fact that people belonging to high-risk groups should avoid close contacts as much as possible. In addition, the Government Decree SM/2020/21 had explicitly recognised family emergencies as an exceptional ground to the border-crossing ban. Therefore, the Ombudsman decided that the prevention of travelling to Uusimaa, in this case, was unjustifiable and therefore illegal.²⁵

In addition to the restriction of people's movements inside Finland between Uusimaa and other regions of the country during the first emergency state of the COVID-19 pandemic,

travel restrictions have been imposed on borders between Finland and other Schengen countries.²⁶ For the implementation of this prohibition, the Finnish Border Guard (rajavartiolaitos) played the primary role as the executive authority. Several complaints and vast public debate against the legality of the activities of the Finnish Border Guard regarding the implementation of the fixed-term restoration of internal Schengen border control reached the Office of the Finnish Parliamentary Ombudsman in 2020. Henceforth, due to the importance of the subject from the legality point of view, the Deputy Ombudsman Pasi Pölönen opened an investigation into the matter on his own initiative.²⁷

In his assessment of the legality of the activities of the Finnish Border Guard in enforcing the re-introduced internal Schengen border controls, the Deputy Ombudsman conducted a balancing act, juxtaposing the right of people to health and the right to life against the right to the freedom of movement of persons. According to the Deputy Ombudsman, the aim of the Government with the reintroduction of internal Schengen border control was to prevent the spread of the infectious disease COVID-19, to protect groups at risk, and to prevent overloading of health care system, and to protect the life and health of all citizens. While the Finnish Border Guard has merely played the role of an executive authority in the temporary reintroduction of internal Schengen border control, the Government had clearly defined the permitted border crossing points and the modes of transport permitted at them, as well as the border crossing purposes, which were considered as permitted. The border control of the Western border of Finland and the border checks belonging to it were also amended by adding the elements of the purpose of the trip and the health situation required by the Government's decision.²⁸

However, what the Government had failed to explicitly clarify, in its instructions to the Border Guards on the implementation of the internal Schengen border control, was the content of the individuals' constitutional rights to the freedom of entry and exit, especially for Finnish citizens. In this way, many persons intending to cross the border had the impression that leaving Finland was not allowed. In addition, there has also been ambiguity in the exercise of the right of entry. From the perspective of the legality requirement for the activities of authorities, the recommendations should not give the impression that they have a stronger legal standing than recommendations. Therefore, the Deputy Ombudsman concluded that it would be unreasonable to blame individual border guards for on the one hand, guiding people's behaviour in accordance with the will of the Government and, on the other hand, for educating citizens about their constitutional freedom to movement. Therefore, a more balanced realisation of fundamental rights could have been achieved if people had already been advised in accordance with the Government's guidelines that leaving the country was not advisable, instead of banning the travel being misunderstood as a binding rule.²⁹

4.2 Visit Bans on Care Institutions

Most complaints submitted to the Office of the Parliamentary Ombudsman in 2020 and regarding the COVID-19 pandemic were concerned with the issues of healthcare and social welfare. These issues included matters related to child protection, social assistance, home quarantines, and particularly limiting social relationships of people living in care homes by restricting or banning visits. The latter instance has negatively affected the enjoyment of the right to privacy and family life. In addition to the violation of the right to privacy and family life, visit bans on care homes have resulted in the violation of various aspects of the rights of older people, children, people with disabilities (all of whom could be categorised as vulnerable groups), prisoners, and the right of a guardian to visit their principal in inpatient care.³⁰

The application of the Communicable Diseases Act, during the COVID-19 pandemic, has been triggered several times with a special focus on Chapter 6 of this law, with the purpose of preventing the spread of communicable diseases and minimising the harm inflicted, thereof. The fulfilment of restrictive measures laid down in this Chapter – particularly Section 58 – meant that municipal authorities could decide on closing social and health care units, educational institutions, day care centres, residential apartments, and other similar facilities, as well as prohibiting general meetings and public events. Sections 4 and 5 of the Health Care Act (terveydenhuoltolaki 1326/2010) allocate the main responsibility for operating care units to local authorities of each municipality through Regional State Administrative Agencies. Section 5 of this Act, however, gives the power to supervise care units – including the elderly persons' nursing homes – to the Ministry of Social Affairs and Health with a power to issue decrees. The Regional State Administrative Agencies, henceforth, have the power to make corresponding decisions, when such decisions are necessary in an area covering several municipalities. Administrative decisions concerning quarantining an individual, however, must always be in accordance with Sections 60 and 63 of the Communicable Diseases Act.

Based on the Health Care Act, a more specific law was adopted on providing social and health care services targeted particularly at the elderly population. This law is the Act on Supporting the Functional Capacity of the Older Population and on Social and Health Care Services for Older Persons (laki ikääntyneen väestön toimintakyvyn tukemisesta sekä iäkkäiden sosiaali- ja terveystalvveluista 980/2012). Section 12 of this legislation gives a power of decision-making to local authorities within regions to issue guidance on the services that support the wellbeing, health, functional capacity, and the independent living of the elderly population. Section 86 of the Emergency Powers Act and Section 17 of the Communicable Diseases Act provide the Ministry of Social Affairs and Health and the relevant Regional State Administrative Agencies the authority to make binding decisions in

the form of decrees, obliging a healthcare and social welfare unit to modify its operations. According to this legislation, on 20 March 2020, the Ministry of Social Affairs and Health issued a guidance addressing all municipalities in Finland to prohibit visits to care facilities, as a necessary measure to fight the coronavirus. Based on this guidance, all the municipalities were obliged to issue guidelines to all their 24-hour care facilities and similar private facilities in their area on visit bans. These guidelines applied to health care and social welfare units as well, such as hospitals, care institutions, and other housing service units.³¹

Pursuant to the issuance of the above-mentioned visit ban guidance by the Ministry of Social Affairs and Health, many local authorities at different municipalities, imposed visiting restrictions in form of guidance and recommendations on elderly care units, places accommodating people with disabilities, and healthcare nursing wards. This situation resulted in a particularly high number of complaints lodged with the Ombudsman Office in 2020. For example, in the case EOAK/3232/2020, the Deputy Ombudsman Maija Sakslin assessed the legality of restrictions made in care units for the elderly. In this assessment, it was found that the restrictions placed on visits to elderly home care units by preventing close family members from visiting elderly relatives was in violation of the right to privacy and family life protected under both the Finnish Constitution (Sections 10 and 19) and the European Convention on Human Rights (Article 8). The reasons for this decision were multi-folded. First, no general or unlimited restrictions on fundamental rights protected by the Finnish Constitution is allowed. Secondly, any restrictions on fundamental rights under Article 23 of the Finnish Constitution should with no delay be submitted to the Parliament for legal review. Thirdly, the legal nature of the guidance on the Ministry of Social Affairs and Health to municipalities on restricting visits to elderly care homes is rather a 'softer source of law,' not a binding legislation. Based on this reasoning, the Deputy Ombudsman submitted a proposal to the Ministry of Social Affairs and Health to change the regulation on visit bans imposed on elderly homes and specially to remove the blanket ban on family visits.³²

Another case, which concerns a complaint against the prohibition of visiting a family member at a healthcare centre, where patients with coronary heart disease were kept, is the case EOAK/3739/2020. In her assessment of this case, the Deputy Ombudsman Maija Sakslin applied the test of balancing act, which encompasses a four-level test of legality, legitimacy, necessity, and proportionality. Based on the principle of legality, the exercise of public power must be based on law (Section 2 of the Finnish Constitution). Moreover, any interference with people's fundamental rights requires that the relevant legislation be strictly observed in the performance of the administrative task (Section 80 of the Finnish Constitution). Besides being rooted in law, restrictions must chase a legitimate aim and meet the criteria of necessity and proportionality. The tests of necessity and proportionality, however, are dependent on whether the law clearly has defined the limitations and the

legitimate aims they pursue. In the case under question, because of the absence of detailed and well-defined legislation, like in case EOAK/3232/2020, the healthcare centres had difficulty in assessing the necessity and proportionality i.e., whether alternative practices would protect the population from coronavirus infection. The lack of information and misconception that the restriction was based on law resulted in insufficient discussion with the relatives on how the meetings could have been held without endangering the relatives or other residents or employees of the healthcare unit. Hence, the Deputy Ombudsman ruled that the ban on family visit in this case was illegal also by considering that the care unit had made no arrangements to accommodate with the individual circumstances of the case (the patient's inability to move and their room located on the third floor of the building).³³

Most of the people, who have died because of the COVID-19 disease, have been over 70 years old. At an early stage of the spread of the coronavirus, it was estimated that age is a significant risk factor for the severe cases of the COVID-19 disease. Cases EOAK/3479/2020, EOAK/2889/2020, and EOAK/3847/2020 are about visit restrictions on service housings and elderly nursing homes and the right of the elderly couples to live together. In addition to the protection of the rights to privacy and family life in all these cases, the case EOAK/2889/2020 on the isolation of people over 70 sheds light on the right of elderly couples to live together, a right protected under the Act on Care Services for Older Persons.

In the assessment of all the above-mentioned cases, the Deputy Ombudsman Maija Sakslin referred to her decision in the earlier case EOAK/3232/2020, emphasising on the fact that since then, the authorities should have clarified the recommendations that are in effect at a given time. Pursuant to the legislation proposal offered by the Deputy Ombudsman in the case EOAK/3232/2020, the Ministry of Social Affairs and Health sent a letter to all municipalities reminding them of no restrictions to be imposed on constitutional rights unnecessarily or without a legal basis. There was no such basis for the restrictions concerning the duration of meetings or the need to have staff present, all of which are against the principles of equality and prohibition of discrimination. What mitigated the conduct of the care units was the fact that national guidance was unclear. Therefore, in all the above-mentioned cases, the obligatory isolation of the elderly (people over 70), hence, preventing elderly couples to live together, and the prevention of family visits were all considered illegal and in violation of equality, the principle of non-discrimination, the fundamental rights to privacy and family life, and the right of old couples to live together.³⁴

4.3 Restricting Business Activities and the Rise of Unemployment

The COVID-19 pandemic has caused a direct negative impact on the labour market in Finland, partly due to the restricting measures on social contacts to minimise the spread of the virus amongst the population and to prevent the healthcare system from being

overloaded.³⁵ The amendments to the Communicable Diseases Act made it possible for the local authorities to take restrictive measures on different businesses and leisure activities. Many sectors have been confronted by some kinds of restrictions, ranging from shortening the opening hours of businesses and closing down their premises, to switching economic activities to online platforms. Unemployment rate and the numbers of bankruptcies have arisen, especially since the pandemic has been prolonging beyond what had been initially predicted.³⁶

During the COVID-19 pandemic in 2020, in total, 44 complaints concerning unemployment funds and unemployment securities arrived at the Office of the Finnish Parliamentary Ombudsman. These complaints have dealt with broader issues related to the right to work and freely engage in economic activities and economic rights affected by restricting business activities such as unemployment security. Majority of these complaints were made against the activities and decisions of the Employment and Economic Development Office (työ- ja elinkeinotoimisto, or TE Office) – a state authority, which works under the Ministry of Economic Affairs and Employment (työ- ja elinkeinoministeriö) and with the main duty to provide and organise employment-related and business development services. Compared to other matters submitted to the Office of the Ombudsman and based on the lower number of these complaints, it could be argued that the Employment and Economic Development Office (TE Office) had managed well to overcome the challenges associated with the COVID-19 pandemic restrictive measures.³⁷

From the 44 complaints submitted to the Ombudsman's Office on labour market and employment-related matters during the COVID-19 pandemic in 2020, 34 of them led to measures to be issued by the Deputy Ombudsman. These 34 cases concerned the activities of the TE Office and were in cases where the legal deadline for issuing a labour policy statement and processing an unemployment benefit application was exceeded.³⁸ In this regard, for example, we could refer to the case of EOAK/2935/2020, which covers all the decisions made by the Employment and Economic Development Offices located in the Uusimaa region (the capital region of Finland and the Helsinki metropolitan area). The complaints assessed in this case concerned the timing of the processing of unemployment security applications submitted to the TE Offices located in the region of Uusimaa. In spring of 2020, the handling of unemployment security cases in the Unemployment Security Unit of the TE Offices became congested, due to an exceptional increase in the number of unemployment rates a result of the COVID-19 pandemic and its restrictive measures. From March to May 2020, the number of unemployed jobseekers registered at the TE Offices increased from around 70,000 to exceeding 150,000. At the beginning of April 2020, the TE Offices were also given a new task, when the Unemployment Security Act was amended on a temporary basis, so that entrepreneurs in difficulty because of the COVID-19 pandemic

could be covered by labour market support. At the beginning of March 2020, the number of reports processed by the Unemployment Security Unit of the TE Offices was approximately 5,700 and the processing time was approximately 25 days. The number of pending investigations more than doubled in five weeks. At the time of the report, the number of queued cases was approximately 13,000.

According to Section 21 of the Constitution of Finland, everyone has the right to have his or her case heard properly and without undue delay by a court or other authority competent by law. In addition, Section 23 of the Administrative Procedure Act provides that an administrative matter must be addressed without undue delay. An explicit deadline has been set for the issuance of labour policy statements. According to Section 1 of the Decree of the Ministry of Employment and Economy on the issuance of a labour policy opinion and information relevant to the statement (1556/2016), the labour policy statement referred to in Chapter 11, Section 4 of the Unemployment Security Act (1290/2002) shall be issued without undue delay within one day of the submission of the statement by the applicant or of the expiry of the time limit for the submission of the statement.

In assessing this case, the Deputy Ombudsman Pasi Pölönen addressed the limitation of resources available to the TE Offices, the service processes, and operating methods for unemployment security matters. He also, paid a particular attention to the differences in the processing times of TE Offices from the perspective of equal treatment of their clients. From the point of view of proper and prompt handling of unemployment benefits, he found it problematic that, at least in some TE Offices, a considerable proportion of the experts providing unemployment benefits who perform permanent statutory tasks had been hired on fixed-term funding. When developing the implementation of the unemployment insurance scheme and preparing for the possible transfer of tasks, attention should be paid to how equal treatment of unemployed jobseekers could be better ensured. Some provisions of the Public Employment and Business Services Act (916/2012) and the Unemployment Security Act governing the tasks of TE Offices have been temporarily amended due to the COVID-19 pandemic.

However, no changes had been made to the above-mentioned Decree of the Ministry of Employment and the Economy on issuing an opinion on employment policy; therefore, the 30-day deadline is still in force. The Government's proposal (HE 58/2020 vp) to temporarily amend Chapters 2 and 8 of the Public Employment and Business Services Act and Chapter 2a, Section 13 and Chapter 11 of the Unemployment Security Act states that the amendments included in the proposal support the appropriate operation of TE Offices and safeguarding the right of unemployed jobseekers to unemployment benefits. According to this proposal (HE 58/2020 vp), the changes aim, among other things, to safeguard the jobseeker's right to unemployment benefit and to support the appropriate allocation of

resources of employment and economic development offices during a pandemic. Overall, the Deputy Ombudsman concluded that while the TE Offices in question had exceeded deadlines in violation of legal provisions, the fact that the offices had immediately used the measures available to them at the beginning of the pandemic to ensure service capacity as the number of customers increased, should not be ignored.³⁹

5. Concluding Remark

Due to an urgent need to act promptly, the legal supervision of restrictive measures during public emergencies such as the one during the COVID-19 pandemic finds a more important place. The 2020 annual report of the Office of the Finnish Parliamentary Ombudsman shows that this Office has played a complementary role to the Finnish Parliament and judiciary system in supervising the use of public power in response to the COVID-19 pandemic. In line with its mandate to promote and protect fundamental and human rights and through its independent supervision of legality of restrictive measures, the Finnish Parliamentary Ombudsman has contributed to safeguarding the principle of legality and the respect for the rule of law in Finland during exceptional times.

The above-mentioned thematic case studies suggest that the individual complaints addressed by the Office of the Finnish Parliamentary Ombudsman with regard to COVID-19 pandemic's restrictive measures could act as indicators for a real-time situation of human rights at early stages of the pandemic. Therefore, the study of these cases and their outcomes could be used to guide government officials on how and what to decide further. Perhaps that is why one year into the pandemic, meaning in 2021, the Committee of Ministers at the Council of Europe adopted guidelines to help Member States in upholding equality and protecting against discrimination not only during the COVID-19 pandemic, but also with reference to similar crises in the future. According to these guidelines, Member States should have in place efficient structures and procedures to manage crises and their specific impacts on disadvantaged groups. Moreover, the authorities are guided to reach out to vulnerable groups in times of crises to collect data on the impacts of restrictive measures on this sect of population.⁴⁰

Thereby, we suggest that governmental authorities should additionally take advantage of the data gathered from individual complaints that were submitted to the ombudsmen's offices for the supervision of legality, by analysing them systematically and using the results as supplementary information, when preparing actions in times of pandemics or other similar crises. In fact, this should be done already from the very early phases of the crises.

¹ The Council of Europe, 'Venice Commission - COVID19: Emergency powers - what standards?', <https://www.coe.int/en/web/human-rights-rule-of-law/venice-commission-covid19>

² The European Commission for Democracy through Law (Venice Commission), 'Opinion on the Protection of Human Rights in Emergency Situations (Venice, 17-18.3.2006), Opinion no. 359/2005, para 13.

³ The European Commission for Democracy through Law (Venice Commission), 'Report – Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections, 19.6.2020 Study no 987/2020, CDL-AD (2020)014. See also the 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, 8.10.2020 Opinion No. 995/2020, CDL-AD (2020)018.

⁴ On the Finnish Parliamentary Ombudsman, see: Liisa Nieminen, 'Eduskunnan oikeusasiamies "pienen ihmisen" asialla – joustavuutta vai hampaattomuutta näkökulmasta riippuen?' (*Lakimies* 2018, pp. 143–176), Kirsi Kuusikko, *Oikeusasiamiesinstituutio* (Suomalainen Lakimiesyhdistys 2011) and Markus Kari, Syyttäjistä kehittäjäksi: Eduskunnan oikeusasiamiehen kehitys kansalais- ja perusoikeuskeskeiseksi in Markus Kari, Jukka Lindstedt and Susanna Reinboth: *Eduskunnan oikeusasiamies 1920–2020: sata vuotta laillisuusvalvontaa ja oikeusturvaa*. Edita, 2020. For Nordic comparison on the role of Parliamentary Ombudsmen, see Björg Thorarensen, Mechanisms for the Parliamentary Control of the Executive, in Helle Krunke and Björg Thorarensen (eds.) *The Nordic Constitutions, A Comparative and Contextual Study*, Hart 2018, pp. 67-105, pp. 90-93.

⁵ Sarah E. DeYoung, 'Vulnerable Groups during Crisis' (2021) *Politics*. Paul Ladd and Eva Bortolotti, *Protecting and Supporting Vulnerable Groups through the Covid-19 Crisis* (Geneva: United Nations Research Institute for Social Development, 2020). The Steering Committee on Anti-Discrimination, Diversity, and Inclusion (CDADI), *Responses to the Covid-19 Pandemic in the Fields of Non-discrimination, Diversity, and Inclusion: Promising and Good Practice Examples* (Strasbourg: The Council of Europe, 2021).

⁶ See syndemics in public and community health sciences e.g., Merrill Singer, *Introduction to Syndemics: A Critical Systems Approach to Public and Community Health* (San Francisco: John Wiley & Sons, Inc. 2009).

⁷ On the Finnish situation after the first pandemic year, see: Janne Salminen, Finsk krishantering i fredstid - beredskapslagen tillämpas för första gången, *Svensk juristtidning* (2020) 10, and Päivi Johanna Neuvonen, 'The COVID-19 Policymaking under the Auspices of Parliamentary Constitutional Review: The Case of Finland and its Implications', *European Policy Analysis* (2020) 6(2). Maija Dahlberg, 'Finland-Ex ante constitutionality review of laws relating to the COVID-19 pandemic', *Public Law* (2021) 4. On the Finnish emergency legislation, see: Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' *German Law Journal* (2018) 19(2). Also see: Mehrnoosh Farzambar, Janne Salminen, and Janna Tuominen, 'Governmental Policies to Fight Pandemics: Defining the Boundaries of Legitimate Limitations on Fundamental Freedoms' (forthcoming in *Ius Comparatum* Journal).

⁸ Government Decrees (valtioneuvoston asetukset) M 1/2020 and M 2/2020 on the adoption of certain emergency powers within the Emergency Powers Act and Government Decrees M 3/2020, M 4/2020, and M 5/2020 on the application of the powers were all given to Parliament on the same day and discussed by Parliament on 17.03.2020.

⁹ J. Salminen, 'Finsk krishantering i fredstid - beredskapslagen tillämpas för första gången' *Svensk juristtidning* (2020) 10. Also, see: A. Jonsson Cornell and J. Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' *German Law Journal* (2018) 19(2), 219, 241-242. T. Ginsburg and M. Versteeg, 'The bound executive: Emergency powers during the pandemic' (2021) *International Journal of Constitutional Law*.

¹⁰ Acts 400/2020 (based on the Governmental proposal, HE 72/2020 vp); 555/2020 (HE 80/2020 vp); 582/2020 (HE 101/2020); 727/2020 (HE 139/2020 vp); 1186/2020 (HE 225/2020 vp) ; 147/2021(HE 245/2020 vp); 165/2021 (HE 6/2021 vp); 224/2021 (HE 15/2021 vp); 262/2021 (HE 31/2021 vp) ; 304/2021 (HE 32/2021 vp); 446/2021/446 (HE 73/2021 vp); 447/2021 (HE 73/2021 vp); 701/2021 (HE 105/2021 vp); 721/2021 (HE 67/2021 vp); 859/2021 (HE 118/2021 vp); 876/2021 (HE 131/2021 vp); 1221/2021 (HE 226/2021 vp); 1378/2021 (HE 230/2021 vp).

¹¹ 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(1) *The European Journal of Risk Regulation* 26-44. Also, see: the Letter of the Chancellor of Justice 28.4.2020 for the COVID-19 Coordination group, and Decisions of the Deputy Ombudsman EOAK/3232/2020 and EOAK/2889/2020.

¹² Thorarensen 2018, p. 90, and Jaakko Husa, *The Constitution of Finland. A Contextual Analysis* (Hart 2011), p. 155.

¹³ The Chancellor of Justice has made many important COVID-19 related decisions. For example, the Chancellor of Justice, in response to media criticisms on the issue of lack of transparency in decision-making during COVID-19 pandemic, examined whether the Ministry of Social Affairs and Health and its administration had complied with the requirement of transparency in the activities of public authorities and the production and sharing of information. See koronavirusepidemian hoitoa koskevan päätöksenteon avoimuus, Decisions OKV/461/70/2020; OKV/458/70/2020; OKV/461/70/2020-OKV-5.

¹⁴ The Parliamentary Ombudsman of Finland, 'The Ombudsman and the Deputy-Ombudsmen', https://www.oikeusasiamies.fi/en_GB/web/guest/the-ombudsman-and-the-deputy-ombudsmen

¹⁵ Maija Sakslin, 'About Restrictions and Derogations of Fundamental Rights' (2020) *Report of the Parliamentary Ombudsman of Finland*, 20-24.

¹⁶ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 191-218.

¹⁷ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 192-195.

¹⁸ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 195.

¹⁹ Oikeusasiamies Petri Jääskeläinen, 'Valtioneuvoston asetus valmiuslain 86-88, 93-95 ja 109 §: ssä säädettyjen toimivaltuuksien käyttöönotosta', Ratkaisu EOAK 2033/2020, 18.3.2020. Oikeusasiamies Petri Jääskeläinen, 'Valtioneuvoston asetus valmiuslain 118 §: ssä säädettyjen toimivaltuuksien käyttöönotosta (m 8/2020 vp)', Ratkaisu 2274/2020, 27.3.2020. Oikeusasiamies Petri Jääskeläinen, 'valtioneuvoston asetus valmiuslain 95 §: n 2 momentissa säädetyn toimivaltuuden käyttöönotosta ja 96-103 §: n soveltamisesta (m 7/2020 vp)', Ratkaisu 2275/2020, 27.3.2020.

²⁰ Apulaisoikeusasiamies Maija Sakslin, 'Lausunto valtioneuvoston asetuksesta kunnan oikeudesta poiketa terveydenhuollon kiireettömän hoidon määräaikojen noudattamisesta ja sosiaalihuollon palvelutarpeen arvioinnista', Ratkaisu 2101/2020, 16.4.2020. Apulaisoikeusasiamies Maija Sakslin, 'Valtioneuvoston asetus kunnan oikeudesta olla väliaikaisesti noudat-tamatta terveydenhuollon kiireettömän hoidon ja sosiaalihuollon palvelutarpeen arvioinnin aloittamisen määräaikoja', Ratkaisu 2553/2020, 17.4.2020. Apulaisoikeusasiamies Maija Sakslin, 'lausunto luonnoksesta hallituksen esitykseksi laiksi tartuntatautilain väliaikaisesta muuttamisesta (koronavilkun rajat ylittävä käyttö)', EOAK/6799/2020, 28.10.2020.

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²³ Government Decision (valtioneuvoston päätös) SM/2020/21.

²⁴ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 191-218.

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²⁶ Government Decision (valtioneuvoston päätös) SM/2021/55.

²⁷ Apulaisoikeusasiamies Pasi Pölönen, 'Rajavartiolaitoksen menettely rajaliikenteen rajoittamista koskevassa asiassa', Ratkaisu EOAK/3257/2020, 12.11.2020.

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³⁰ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 202-209.

³¹ Ministry of Social Affairs and Health, 'Guidance from the Ministry of Social Affairs and Health: Taking account of the emergency conditions caused by COVID-19 when arranging the activities of primary health and social services', <https://stm.fi/en/-/stm-kuntien-turvettava-perustason-sosiaali-ja-terveyspalvelut-ja-tuettava-heikoim-massa-asemassa-olevia-poikkeusoloissa>

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³⁸ The Parliamentary Ombudsman of Finland, 'Issues related to Coronavirus' (2020) *Report of the Parliamentary Ombudsman of Finland*, 215.

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