Legalising Illegality

Finland's Proposed Pushback Legislation

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In response to Russia's facilitation of migrants to the Finnish border since last fall, Finland's newly formed right-wing coalition government temporarily closed the border relying on recent amendments to the Border Guard Act. After renewing the closure on several occasions, it closed the eastern land border indefinitely on 4 April 2024. For anyone arriving from Russia, it is now impossible to reach any remaining open border crossing points. Worried that this step will not be enough to ensure national security, the government is finalising a Draft Act on Temporary Measures to Combat Instrumentalised Migration, currently under revision. While most comments on the draft were highly critical, some argued the changed situation requires new tools for authorities to counter instrumentalisation of migrants. It is possible – even likely – that the bill reaches the required 5/6 majority in the Finnish Parliament (eduskunta).

The draft bill allows for pushbacks in violation of *non-refoulement* and openly admits a conflict with Finland's human rights obligations, EU law and own constitutional system, which is unusual. While the Finnish Constitution formally allows Parliament to pass a law that forms a limited derogation from the Constitution, in practice such "exceptive" laws are used sparingly. Relying on an exceptive law in the case of a non-derogable right such as *non-refoulement* therefore raises concern. The unprecedented nature of the proposed measures is particularly worrying given that the Act appears unlikely to effectively address the essentially political problem that "migrant instrumentalisation" poses.

Legalising Pushbacks

The draft bill allows border guards to refuse applications for international protection in a limited area on Finland's border where there is evidence or justified suspicion of migrant instrumentalisation. In practice, the eastern land border could be closed while border crossing points at ports and airports would remain open. The procedure – not to be confused with the border procedure that the government is also proposing – requires border guards to assess whether the person is vulnerable or would face inhuman or degrading treatment upon return. If not, the person will be returned from Finnish territory without assessing their application. This assessment is to be conducted during a merely informal "interaction" as opposed to a formal asylum process, in which a person is registered as an asylum-seeker and their application is processed by the Immigration Service. The government plenary session would decide about activating the Act together with the President of the Republic, and the decision could be made for a maximum of one month at a time. The law would be temporary, remaining in force for a year.

The proposal is more far-reaching than Lithuania's legislation which the CJEU found to breach the Asylum Procedures Directive (paras 12-15). While Lithuania prohibited lodging asylum applications outside border crossing points and transit zones, the Finnish proposal bans the assessment of all applications in the designated area, even at open border crossing points. Unlike the Lithuanian legislation, however, the Finnish legislation only concerns cases of instrumentalisation, not any situation of mass influx of migrants.

While the government's initial decisions to close the land border noted a "tension" with EU law, the draft bill openly admits a conflict with human rights obligations and EU law, noting that:

> *"the proposal does not secure everyone's right to apply for asylum upon reaching Finnish territory, which is in conflict with human rights obligations binding on Finland. The fact that a person would not have the right to have their case initiated at the competent authority can also be considered problematic from the perspective of access to justice (p. 83)."*

The draft bill recognises that forcing migrants back without allowing them to apply for asylum would breach *non-refoulement* and the prohibition of mass expulsions. Conflicts with various other rights are also noted. The draft bill acknowledges, for example, that refusing to examine asylum applications could result in a violation of the right to life.

There are also problems with how the procedure would be administered in practice. For example, while vulnerable persons are exempted from the procedure, it is unclear how border guards would identify them just by their appearance. The procedure also puts border guards themselves in an insecure position, given that they would be the ones deciding about whether a person is sent back. As officials of the Border Guard pointed out, border guards would violate their official duties by following an Act of Parliament which purposely violates the Constitution and human rights obligations. Violating an official duty is a criminal offence (Criminal Code, Chapter 40, Section 9). In response, the government plans to transfer responsibility upwards.

The Concept of Exceptive Laws

The government proposes to enact the Act as an exceptive law, which refers to an Act of Parliament substantively in breach of the Constitution and adopted under the procedure for constitutional enactment (Section 73) which provides for two alternatives. In the normal procedure, Parliament first adopts the proposal by a simple majority, after which it is left in abeyance and the next Parliament adopts it with a 2/3 majority. The urgent procedure – which is needed to pass the bill during the current Parliament – requires the proposal to be declared urgent with a 5/6 majority, after which it can be adopted by a 2/3 majority.

The exceptive laws system has been a part of Finnish constitutional law since the era of Russian governance (1809-1917). Exceptive laws were routinely used in the past to reach political goals, often without justifying why the procedure should be invoked. However, the criteria for exceptive laws became stricter following the ratification of the European Convention on Human Rights (ECHR) in 1990 and joining the EU in 1995. A central objective of Finland's comprehensive fundamental rights reform in 1995 was to approximate the domestic fundamental rights system with newly adopted human rights obligations. Human rights are now an integral part of the Constitution and enjoy a semi-constitutional status, as reflected in Section 22 stipulating that "[t]he public authorities shall guarantee the observance of basic rights and liberties and human rights". According to the practice of the Constitutional Law Committee of the Parliament, charged with *ex ante* review of legislative proposals from the perspective of the Constitution and human rights treaties, Section 22 is also binding on the domestic legislature.

Despite the stricter criteria for exceptive laws, the Constitution still allows for the enactment of "limited derogations" (Section 73), that is, exceptive laws. The procedure is not to be confused with emergency derogations from fundamental rights which the Constitution allows to be made in situations of an armed attack or other emergency (Section 23). The use of exceptive laws is not limited to emergencies.

Despite the formal availability of exceptive laws, conflicts with the Constitution should primarily be addressed by changing the legislative proposal instead of invoking Section 73. Moreover, exceptive laws cannot interfere with the core of the Constitution, such as the foundations of the constitutional system. Against this background, it is very hard to argue that a proposal violating a non-derogable right protected in EU law, several human rights treaties and the Finnish Constitution remains a "limited derogation". From the perspective of international law, a domestic exceptive

laws system obviously cannot justify violating human rights treaties or EU law.

Countering Instrumentalisation with Legislation

While recognising the problems with human rights obligations, EU law and the Constitution, the proposal argues that instrumentalisation of migrants is a new situation that requires new tools which EU law arguably does not provide. Even though the new Crisis and Force Majeure Regulation provides for derogations from asylum procedures in the presence of instrumentalisation – a solution that has been criticised for normalising derogations – it is not considered effective enough as it does not allow returning asylum-seekers without examining their applications.

Like pushback legislations of other countries, the Finnish proposal assumes that "genuine" asylum-seeking and instrumentalised migration are two completely different phenomena. This ignores that an "instrumentalised" person can also be in need of international protection. Indeed, distinguishing between artificial and natural migratory movements does not correspond to the realities on the ground. While there is clear evidence that Russia has facilitated migrants to the Finnish border and – unlike its earlier practice – allowed migrants to arrive at the border, Russia's actions are not the sole cause of arrivals. It is tricky to determine whether an applicant needs asylum before examining an application – after all, this is what asylum procedures are for.

Furthermore, the assessment of whether a situation qualifies as instrumentalisation is based on mostly secret intelligence. The draft bill depicts potential scenarios of further escalation of the situation, such as the arrival of thousands of asylum-seekers per week and violent border crossings. While the secrecy of intelligence is understandable, it is impossible for Parliament and the public to verify the accuracy of these scenarios. This is problematic, especially in a securitised environment. The government has a wide margin to decide when the Act should be activated, which constitutes a transfer of power to the executive branch concerning legislation that openly violates Finland's Constitution, human rights obligations and EU law.

Finally, there is significant doubt about the effectiveness of legal solutions to the problem of hybrid threats. The draft bill reflects a view that legislation is capable of effectively addressing instrumentalisation and unauthorised border crossings. However, as the officials of the Border Guard pointed out, would the proposed legislation prevent Russia from continuing instrumentalisation? Moreover, there is a real question whether a law can be designed to effectively address the instrumentalisation of migrants without breaching *non-refoulement*, given the problems of distinguishing between instrumentalisation and other causes of migration. Presenting migration legislation as an effective answer to Russia's actions can create a false sense of security.

What's Next?

If the government issues a government bill based on the draft, it will be scrutinised by the Constitutional Law Committee. Despite the fundamental legal problems, the Parliament is formally capable of passing the law with a 5/6 majority if the Committee approves it. The Committee is the main authority of constitutional review and interpretation in Finland, and its statements are regarded binding. As with other parliamentary committees, it is composed of members of Parliament. The functioning of the system is largely based on the idea that review by the Committee relies on legal argumentation and that Committee members assume a quasi-judicial function. The system, however, does not have safeguards for ensuring that the Committee's statements are not affected by politics.

If enacted, the law would complicate accessing national courts, given the absence of an administrative decision following the "interaction" at the border. However, decisions of a government plenary session can be appealed to the Supreme Administrative Court (Section 8 of the Administrative Judicial Procedure Act). Finnish courts only possess limited power to review the constitutionality of legislation. According to Section 106 of the Constitution, a court shall give primacy to the Constitution if the application of an act

would be in evident conflict with the Constitution in a specific case. The threshold of "evident conflict" is high and unlikely to be found if the Constitutional Law Committee has approved the act. However, courts must assess the compatibility of national laws with EU law and disapply an act that violates it. In practice, they do the same regarding human rights treaties.

Article 35 ECHR requires the exhaustion of all domestic remedies before the ECtHR can hear a case. This requirement only concerns effective domestic remedies, meaning that a remedy must be accessible, capable of providing redress in respect of the applicant's complaints and offer reasonable prospects of success (eg *Sejdovic v. Italy*, para 46). Consequently, if an applicant has no access to a Finnish administrative court, the ECtHR can assess an application directly. A case concerning alleged pushbacks from Lithuania to Belarus is currently pending before the ECtHR's Grand Chamber. While the ECtHR has addressed cases concerning the Belarusian border (eg *M.K. and others v. Poland*), extensive argumentation concerning instrumentalisation is yet lacking in its judgments.

At the EU level, Von der Leyen has flagged her support to the border closure, making it clear that the European Commission will not contest the proposed legislation by opening an infringement procedure for breaches of EU law. However, the matter could land before the CJEU through a preliminary ruling request by the Supreme Administrative Court, unless CJEU's ruling on Lithuania's pushback legislation is deemed to settle the legal question at hand definitely.

Undermining the Rule of Law in the Name of Security

Russia's hostile behavior will surely continue in one form or another. The Finnish government's attempt to solve the matter fails to see that legislation might not be capable of addressing this complex and essentially political issue. Formally, Parliament can pass the law despite its breach of human rights obligations, EU law, and the Finnish Constitution. The substantive problems persist, however, mainstreaming pushbacks and having broader implications for the rule of law in Finland and the EU.

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