



Akava

15. 2. 2021

# *Akava's policy concerning the development of the rule of law*

## **The development of the rule of law must be strengthened in Finland**

The development of the rule of law has been an active topic for public discourse as of late, both in Finland and abroad. Within European Union activities, in particular, the European Rule of Law Mechanism has risen to the forefront as certain Member States have actively endeavoured to question the principle of the rule of law and its necessity.

The principle of the rule of law has no unequivocal legal definition. The Finnish discourse rests on the Constitution of Finland and its definition that sets out the minimal contents for the rule of law. In the Constitution of Finland, the principle of the rule of law is expressed in the form of the principle of legality: 'The exercise of public powers shall be based on the law. In all public activity, the law shall be strictly observed.' Broadly defined, the key aspects of the rule of law include the separation of powers, the legal liability of public powers, the guaranteed realisation of human and basic rights, the legal control of public powers and a fair trial in independent and impartial courts.

Along with the principle of the rule of law, Finland is also strongly committed to the principle of democracy. These two principles are partially congruent and are, within Finnish society, currently bound tightly to basic rights, such as the freedom of expression. The realisation of the principle of democracy requires the recognition of human equality. Equal opportunities must be guaranteed for different groups of people to participate in political discourse and activities.

Over the years, the rule of law has developed into a system grounded on the separation of powers and public powers that are based on law. One key prerequisite for a functional rule of law is sufficiently resourced judicial administration, police and prosecuting authorities and courts. Additionally, all societal structures that support the realisation of basic rights contribute to upholding the rule of law. In terms of the future development of the rule of law, the safeguarding of citizens' freedom of expression and opinion and the realisation of citizens' educational rights play a key role. The upholding of the rule of law also calls for the prevention of marginalisation and the assurance of inclusion and experience of a meaningful life. One important aspect of the freedom of assembly and freedom of association prescribed in the Constitution of Finland is the freedom to form trade unions and to organise for the purpose of interest supervision.

## Reinforcing the development of the rule of law

- Akava views it as important that the development of the rule of law be supported by reinforcing the realisation of the principle of legality, basic rights and the principle of democracy.
- Those in charge of the administration of justice hold a central role in developing the rule of law and securing the legal protection of citizens. Police, prosecutors, judges, lawyers and others who handle the administration of justice need sufficient resources and tools to uphold and promote the rule of law and its effective implementation.
- To foster the realisation of the freedom of expression, an action programme must be initiated that contains measures for the different administrative branches to support education, freedom of expression and freedom of opinion. Special attention must be focused on reducing hate speech in public discourse.
- The freedom of assembly must be secured. Demonstrations must be organised in a peaceful manner that does not endanger the safety or violate the rights of any participants or bystanders.
- The realisation of human and basic rights as well as the smooth operation of the democratic and justice systems calls for the expert input of teachers and researchers as well as technical and economic professionals.
- Educational rights must be reinforced by strengthening the different levels of the educational system and by facilitating continued learning for all people. Sustainable work to bolster the prevention of marginalisation and the assurance of inclusion and experience of a meaningful life will contribute to providing the foundations for the realisation of the principle of the rule of law.
- One obstacle to the realisation of the principle of the rule of law is the often slow pace and high costs of trials. There needs to be more focus placed on improving the functionality of the administration of justice. A broad action programme is needed that includes expansion of the entitlement to legal aid, securing the availability of legal aid services, expansion of coverage under legal expenses insurance, provision of increased resources for the criminal investigation authorities, prosecuting authorities and the courts, and the development of court processes and alternative dispute resolution methods.

## Online targeting and shaming undermine the development of the rule of law

One of the greatest modern challenges concerning the rule of law is interference and online targeting and shaming. Online targeting and shaming refers to systematic activities intended to silence people or influence their activities, for example, by threatening or spreading personal or unfounded information about them in the internet. The objective of those carrying out online targeting and shaming is to intimidate their subject. In the long term, a fear of online targeting and shaming can already influence the choice of topics that are discussed publicly and the ways in which they are discussed.<sup>1</sup> The possibility to become a victim of online targeting and shaming reduces the appeal of public positions for new graduates, whereby the top applicants end up being employed elsewhere. The aim of online targeting and shaming is to inappropriately influence the activities of authorities.

Even though online targeting and shaming may be directed at one particular person, the practice damages the rule of law and the freedom of expression climate on a broader level by reducing people's desire or the courage to express themselves as well as limiting the public's right to get information about what is being considered and is happening within society at large.

Although directed at a single individual, online targeting and shaming seeks to have a broader effect on the entire democratic society, the legal system and the application of the law, for example, by limiting freedom of expression. The more common consequence of online targeting and shaming is that as it continues the activities of authorities are compromised and the public's right to information about others' opinions is being limited.

The goal of online targeting and shaming is to hamper the activities of the victim, to prevent them from, for example, using their freedom of expression, which is one cornerstone of a democratic society and one aspect involved in realising the principle of the rule of law. Although targeting and shaming actions are often referred to as a form of using one's freedom of expression, they cannot be viewed as fulfilling the core purpose of freedom of expression. This use of freedom of expression may seriously inhibit the use of freedom of expression by the person who is the victim of the targeting and shaming.

The phenomenon is complicated and multidimensional and dealing with it requires an understanding of its impacts as well as relevant legislative measures. Online targeting and shaming should be considered as an independent phenomenon within the Criminal Code, even though many of its concrete manifestations may already be criminalised.<sup>2</sup> The current forms of criminalisation do not, however, take into account the people-power nature inherent to online targeting and shaming.

The principles of criminalisation include the principle of protection of legally established rights and interests as well as the ultima ratio principle; the latter means that criminalisation should only be used as a last resort measure to achieve an objective.

<sup>1</sup> Korpisaari, Päivi. Sananvapaus verkossa – yksilöön kohdistuva vihapuhe ja verkkoalustan ylläpitäjän vastuu. Lakimies 7-8/2019, s. 930.

<sup>2</sup> E.g., Criminal Code of Finland: Chapter 24, Section 9 – Defamation; Chapter 25, Section 7 – Menace; Chapter 25, Section 7a – Stalking.

In terms of the criminalisation of online targeting and shaming, the relevant objects of legal protection are the fundamental freedom of expression and opinion, which is essential for the development of a democratic rule of law, and the possibility to perform official functions without inappropriate interference. Criticism, as such, is allowed but not defamation of a specific person. As regards the realisation of the ultima ratio principle, we must assess whether alternative approaches might be effective to prevent online targeting and shaming. For example, simply regulating the liability of digital platforms is likely not effective since targeting and shaming can also be carried out outside of the internet. Furthermore, the realisation of the liability for content moderation by private actors involves certain problems of principle that are discussed below.

When weighing the harms and benefits, it basically comes down to whether the development of a democratic rule of law means that it is acceptable to utilise criminalisation to limit an individual person's misuse of the freedom of expression for the purposes of safeguarding the freedom of expression of the broader public and victims of targeting as well as preventing interference with the activities of the authorities.

In addition to the societal dimension, online targeting and shaming is also a matter of occupational safety and health. Already now, employers are obligated to take action and support employees who have, for example, fallen victim to online targeting and shaming. The Occupational Safety and Health Act (728/2002) contains several provisions that relate to online targeting and shaming.<sup>3</sup> The problem, however, is the same as with the Criminal Code; there is no single, clear-cut norm on the matter or the currently valid norms do not take a clear enough stand on this new but already known and recognised threat known as online targeting and shaming.

### **Problems related to increasing the liability of digital platforms**

One proposed alternative to the criminalisation of online targeting and shaming is the increasing of incentives to moderate the content of digital platforms so that any illegal content would be removed from the platforms before they can cause any damage.

In terms of the development of the rule of law, however, there are significant problems related to the increased liability of digital platforms to moderate their contents. Presently, there is no common European model for the liability of digital platform providers. If digital platforms were assigned an even stronger obligation to filter content, this would also create, in practice, a chilling effect, whereby lawful materials might also be removed during the filtering process, either as part of the technical screening or manually by people as a safety precaution, simply as a means of avoiding legal responsibility. Content moderation does not carry the judgement of disapproval that is typical for criminalisation.

As a matter of principle, an increase in the liability of digital platforms for content moderation would signify the transfer of a task that is inherent to the rule of law and belonging to the State, namely the safeguarding of the freedom of expression, to the discretion of a private actor. The result of such a transfer would inevitably weaken the principle of good governance, state legitimacy and legal protection for individuals. In practice, attempts to moderate digital platforms have been ongoing throughout the entire existence of the internet, nearly thirty years, so discussion focused on increasing the liability for content moderation is nothing new.

<sup>3</sup> E.g., Occupational Safety and Health Act: Sections 8, 9, 10, 14, 25, 27 and 28.

## The criminalisation of online targeting and shaming is essential

- It is Akava's opinion that Finland must enact an amendment to the Criminal Code that combines all descriptions of criminal acts related to targeting and shaming under a single provision that criminalises online targeting and shaming. Furthermore, the activities of the authorities must be safeguarded separately.
- The aim of the criminalisation of online targeting and shaming is to generate preventive effects. The criminalisation of online targeting and shaming endeavours to protect those objects of legal protection that are particularly essential for the principle of the rule of law, i.e., freedom of expression and freedom of opinion, while also securing the realisation of the principle of legality (i.e., rule of law) within the activities of authorities that are subject to public liability without inappropriate interference concerning an individual person.
- It is Akava's opinion that a suitable starting point for the criminalisation of online targeting and shaming would be, for example, the proposal presented in the report<sup>4</sup> (Appendix 1) by Mika Illman, LL.D. Any incompleteness would be solved during further elaboration.
- In addition to the criminalisation of online targeting and shaming, Akava supports a moderate increase of regulation regarding the activities of digital platforms, provided that particular caution is taken as regards the digital platforms' power to restrict public debate. The regulation of the activities of digital platforms is not an alternative to the criminalisation of online targeting and shaming. Technological regulations should not be used to transfer significant societal power further away from the structures of the democratic rule of law and the exercise of that power in society.
- A clear reference to online targeting and shaming must be added to the Occupational Safety and Health Act as well as a clear obligation for employers in this regard to take the necessary measures to eliminate the interference, even if the threat comes from outside of the workplace and does not fall within the sphere of the employers' supervisory rights.

## The rights to industrial action secure the negotiating position of employees

An inseparable part of a democratic rule of law is the freedom of association and the right to join a trade union, the purpose of which is to oversee the collective supervision of interests. One means for trade unions to have influence is through industrial actions that can be used as a tool for negotiation. In Finland, the right to industrial action is viewed as being safeguarded by the Constitution

<sup>4</sup> Mika Illman, LL.D., Järjestelmällinen häirintä ja maalittaminen – Lainsäädännön arviointia, Government Report 2020:3

and as a basic right related to the freedom to form trade unions that is also protected by international and EU conventions and legal praxis. The right to industrial action is more limited for those in public-service employment relationships than for those in contractual employment relationships.

As a means of safeguarding the realisation of the right of collective negotiations, unions have the freedom to carry out industrial actions. In non-contractual situations, the freedom is at its broadest due to the fact that there is no obligation to maintain industrial peace linked to the validity of an agreement and, therefore, industrial actions can be undertaken. During the validity of a collective bargaining agreement, the obligation to maintain industrial peace is inherent, and any strikes that occur may be viewed as illegal strikes if they are later proven in court to have violated the obligation to maintain industrial peace.

In Finland, industrial conflicts cannot be limited to use in connection with collective bargaining situations only. Thus, industrial actions are permitted for purposes other than to generate a collective agreement, such as secondary actions and industrial actions of a political nature. Like employees, employers also have the right to apply pressure by means of, for example, lock-outs.

Discourse concerning the right to industrial actions must differentiate between legal and illegal industrial actions. As regards illegal industrial actions, we should be able to distinguish acceptable actions, such as walkouts, from other illegal industrial actions.

In terms of the undisturbed functioning of the labour market, it is most advantageous if the employees and employers can reach an agreement without any industrial actions.

### Restricting industrial actions

- It is Akava's opinion that the right to industrial actions should only be utilised for legal industrial conflict purposes. Within the fields in which Akava members are working, illegal strikes are extremely uncommon.
- The majority of strikes that are condemned as illegal concern co-operation negotiations that aim to reduce the labour force, and the strikes are generally short, spontaneous, company-specific walkouts.
- Akava does not, however, support heavier sanctions for illegal strikes or the expansion of sanctions to the individual level. Instead, attention should be focused on ways in which to avoid situations such as those that drive workers to engage in illegal strikes.
- Equality requires that the process of expediting contractual issues using legal industrial actions must be the same regardless of the type of employment relationship.
- The current legislation concerning industrial peace should be renewed in its entirety.

## Appendix 1 Proposal for the criminalisation of online targeting and shaming

Mika Illman, LL.D. Selvitys järjestelmälliseen häirintään ja maalittamiseen puuttumisesta, GOVERNMENT REPORT 2020:3

### Involvement in illegal online targeting and shaming

Those who, via an electric information network and

1. by threatening an individual with violence or an act that gravely jeopardises the well-being of the threatened individual;
2. by disseminating inaccurate information or an insinuation about a person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt;
3. by presenting derogatory information about a person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt;
4. by unlawfully disseminating personal information about one's private life, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt; or
5. by inciting or persuading others to commit a crime against a person in such a way that there is a risk that such a crime or a punishable attempt thereof will actually be carried out;

participate in an activity with multiple contributors that exposes the victim to several of the threats or offences, as specified in items 1–4, or exhortations concerning the victim, as specified in item 5, shall be sentenced, if they had reason to suspect that such threats, offences or exhortations will be presented within the activity, to a fine or imprisonment for a maximum of six months for participation in illegal online targeting and shaming.

Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously exceed the limits of propriety does not constitute participation in illegal online targeting and shaming, as referred to in items 3 and 4 of paragraph 1.

Presentation of an expression in the consideration of a matter of general importance shall also not be considered participation in illegal online targeting and shaming, as referred to in items 2–4 in paragraph 1, if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not obviously exceed the limits of propriety.