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## **LEGAL ASPECTS OF MARTIAL LAW: CONFLICT BETWEEN THE CONSTITUTION AND EMERGENCY POWERS**

Martial law is an emergency measure implemented to protect against threats to national security, warfare, or widespread unrest. However, the imposition of such measures often brings about tensions between constitutional principles, which are rooted in the protection of citizens' rights and freedoms, and the necessity for the expansion of extraordinary powers of the executive authority.

The article comprehensively analyses the legal aspects of implementing a state of martial law. By identifying potential contradictions between constitutional norms and emergency powers, this study examines the issue of ensuring the compatibility of upholding law and order with civil liberties during emergency situations. Additionally, possible solutions and recommendations for addressing such contradictions are proposed.

The article analyses the legislative norms applicable to the declaration of martial law and their practical implementation. Additionally, it investigates the extent to which the rights and freedoms of citizens are restricted or, conversely, expanded in such circumstances. The nature and scale of the extraordinary powers conferred upon the executive during martial law, their legal limitations, and their impact on the balance among the branches of government are also focal points of the discussion.

The concluding section examines proposals and potential solutions aimed at ensuring the compatibility between national security and civil rights. These recommendations focus on the development of effective legal instruments for regulating the state of emergency, as well as enhancing the protection of citizens' rights in line with democratic principles. The article provides practical and theoretical foundations on these significant issues.

**Key words:** martial law, constitutional rights, emergency powers, legal conflict, restrictions on rights and freedoms, legislative regulations, martial law as a form of dictatorial government, judicial oversight, parliamentary supervision, national security, democratic principles, law enforcement practices, the rule of law, legal awareness, and legal culture.

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### **Әскери жағдайды енгізудің құқықтық аспектілері: конституция мен төтенше өкілеттіктер арасындағы қақтығыс**

Әскери жағдай – бұл ұлттық қауіпсіздікке, қарулы қақтығыстарға немесе жаппай тәртіпсіздікке төнетін қауіп-қатерлерге қарсы бағытталған шұғыл қорғаныс шараларының жиынтығы. Аталған режимді енгізу барысында, бір жағынан, азаматтардың құқықтары мен бостандықтарын қорғауға негізделген конституциялық қағидаттарды сақтау қажеттілігі мен, екінші жағынан, атқарушы биліктің төтенше өкілеттіктерін кеңейтуді талап ететін жағдайлар арасында қайшылықтар туындауы мүмкін. Бұл қайшылықтар құқықтық реттеудің ерекше тетіктерін әзірлеуді және олардың тепе-теңдігін сақтауды талап етеді.

Мақалада әскери жағдай режимін енгізудің құқықтық аспектілері кешенді түрде талданады. Зерттеу барысында конституциялық нормалар мен төтенше өкілеттіктер арасындағы ықтимал қайшылықтар айқындалып, төтенше жағдайлар кезеңінде құқықтық тәртіпті сақтау мен азаматтық бостандықтарды қамтамасыз ету мәселелері қарастырылады. Сонымен қатар, аталған қайшылықтарды шешудің тиімді тетіктері мен ықтимал құқықтық шешімдер ұсынылады.

зерттеудің теориялық негіздері мен тәжірибелік ұсыныстары төтенше жағдайлар режимін құқықтық реттеудің тиімділігін арттыруға бағытталған.

Зерттеудің басты мақсаты – демократиялық құндылықтарды сақтауды және азаматтардың құқықтарын қорғауды қамтамасыз етумен қатар, төтенше жағдайлар кезеңінде мемлекеттік биліктің тиімділігін арттыруға мүмкіндік беретін құқықтық тетіктерді әзірлеу болып табылады. Бұл мәселенің шешімі әскери режим жағдайында билік өкілеттіктерінің теріс пайдаланылуын болдырмай, құқықтық мемлекеттің тұрақтылығы мен құқық үстемдігін қамтамасыз етуде шешуші маңызға ие.

Қорытынды бөлімде ұлттық қауіпсіздік пен азаматтық құқықтардың үйлесімділігін қамтамасыз етуге бағытталған ұсыныстар мен ықтимал шешімдер жан-жақты талданады. Бұл ұсынымдар әскери жағдай режимін құқықтық реттеудің тиімді құралдарын әзірлеуге және демократиялық қағидаттарға сәйкес азаматтардың құқықтарын қорғау тетіктерін нығайтуға бағытталған. Мақалада аталған мәселелердің практикалық және теориялық негіздері ұсынылып, оларды іске асырудың өзектілігі мен құқықтық реттеуге қосар үлесі айқын көрсетілген.

**Түйін сөздер:** әскери жағдай, конституциялық құқықтар, төтенше өкілеттіктер, құқықтық қақтығыс, құқықтар мен бостандықтарды шектеу, заңнамалық реттеу, диктатураның басқару түрі ретіндегі әскери жағдай, сот бақылауы, парламенттік қадағалау, ұлттық қауіпсіздік, демократиялық принциптер, құқық қолдану практикасы, құқықтық мемлекет, құқықтық сана, құқықтық мәдениет, құқықтық тәртіп.

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### **Правовые аспекты введения военного положения: конфликт между конституцией и чрезвычайными полномочиями**

Военное положение – это экстренная мера защиты, направленная против угроз национальной безопасности, войны или массовых беспорядков. Однако в процессе его введения часто возникают противоречия между конституционными принципами, основанными на защите прав и свобод граждан, и необходимостью расширения чрезвычайных полномочий исполнительной власти.

В статье всесторонне анализируются правовые аспекты введения военного положения. Выявляя потенциальные противоречия между конституционными нормами и чрезвычайными полномочиями, в этом исследовании рассматривается вопрос обеспечения совместимости поддержания правопорядка с гражданскими свободами в чрезвычайных ситуациях. Кроме того, предлагаются возможные решения и рекомендации по устранению таких противоречий.

В статье анализируются законодательные нормы, применимые к объявлению военного положения, и их практическая реализация. Кроме того, исследуется, в какой степени ограничиваются или, наоборот, расширяются права и свободы граждан в таких обстоятельствах. Характер и масштаб чрезвычайных полномочий, предоставляемых исполнительной власти в условиях военного положения, их правовые ограничения и их влияние на баланс между ветвями власти также являются центральными темами обсуждения.

В заключительном разделе рассматриваются предложения и возможные решения, направленные на обеспечение совместимости национальной безопасности и гражданских прав. Эти рекомендации направлены на разработку эффективных правовых инструментов регулирования чрезвычайного положения, а также на усиление защиты прав граждан в соответствии с демократическими принципами. В статье излагаются практические и теоретические основы этих важных вопросов.

**Ключевые слова:** военное положение, конституционные права, чрезвычайные полномочия, правовой конфликт, ограничение прав и свобод, законодательное регулирование, военное положение как форма правления диктатуры, судебный контроль, парламентский национальная безопасность, демократические принципы, правоприменительная практика, правовое государство, правосознание, правовая культура, правопорядок.

## Introduction

The introduction of martial law is a crucial legal instrument for ensuring state security. While this measure is vital for safeguarding the country's independence and stability, the issue of adherence to the fundamental principles of the rule of law necessitates a thorough discussion during its implementation. Specifically, questions may arise regarding its alignment with the principles of the rule of law and the protection of citizens' rights and freedoms.

In the context of contemporary international and internal conflicts, the challenge of balancing extraordinary powers with constitutional norms is more pertinent than ever. The constitutions of various countries provide clear regulations for this procedure, detailing the conditions and consequences of implementing martial law. The legal foundation of martial law demands not only the protection of national security but also the establishment of harmonious mechanisms aimed at preserving the stability of the constitutional system and the legal trust of civil society.

Thus, the policy of introducing martial law should be grounded in maintaining a balance between legal responsibility, civil liberties, and state security. However, in practice, the implementation of these norms is often influenced by political, social, and legal factors, which can adversely affect their effectiveness and adherence. The tension between safeguarding state interests and ensuring the rights and freedoms of individuals remains one of the most pressing issues that necessitates a thorough examination of this topic. In this context, a comprehensive analysis of the legal aspects surrounding the introduction of martial law and the establishment of appropriate control mechanisms by society and law enforcement agencies is regarded as one of the most critical tasks facing lawyers and legal practitioners today.

This analysis should aim not only at enhancing the effectiveness of legal norms but also at formulating specific proposals that will foster adherence to the principles of the rule of law and bolster public trust. Thus, legal science and practice play a pivotal role in maintaining the equilibrium between societal stability and the protection of citizens' rights. The introduction of martial law will serve as a battleground for a profound conflict between constitutional guarantees and the extraordinary powers conferred upon state bodies. The constitutional framework, at its essence, is designed to

safeguard the fundamental rights and freedoms of citizens—freedom of speech, privacy, and the right to seek justice in a fair court. These principles underpin public trust as a cornerstone of the rule of law and the supremacy of justice.

However, the implementation of martial law may necessitate the introduction of temporary restrictions on these rights and freedoms to achieve significant interests, such as enhancing public security and safeguarding the territorial integrity of the state. In such instances, it is essential to strike a balance between the principles of the rule of law and the observance of public interests.

Thus, the legal foundation of martial law requires a balanced policy aimed at preserving and protecting the constitutional rights of citizens, as well as establishing effective mechanisms for ensuring state security. This is a complex and responsible task not only for legal science but also for the practical management system.

The introduction of martial law grants state bodies a broad range of emergency powers designed to ensure national security and maintain public order. Within the scope of these powers, it may be necessary to prohibit gatherings and demonstrations, impose strict media censorship, establish a special wartime regime, and implement mass containment measures.

Although these measures aim to bolster the stability and security of the country in emergencies, they are closely linked to the risk of infringing upon the rights and freedoms of citizens guaranteed at the constitutional level. Fundamental democratic values, such as freedom of speech, the right to assemble freely, and personal inviolability, may be temporarily suspended or significantly restricted, which heightens the tension between the principles of the rule of law and the powers of the extraordinary.

Thus, the introduction of martial law serves not only as a means of safeguarding public security and national interests but also as a complex task of maintaining legal balance. The measures implemented should adhere to the fundamental principles of respecting citizens' rights and their protection, ensuring the stability of the state.

The contradiction between the necessity of ensuring state security and the government's steadfast commitment to upholding constitutional guarantees presents an urgent issue that demands deep reflection. This conflict arises, on one hand, from the demands for public stability and the protection of national interests, and on the other hand, it hinges on

the respect for the rights and freedoms of citizens, which form the foundation of the rule of law.

### **Research methodology**

This scientific article thoroughly examines the legal aspects surrounding the introduction of martial law, with a particular focus on the intricate interaction between constitutional guarantees and extraordinary powers. The research methodology aims to analyze this conflict from the perspective of legal balance and adherence to the principles of the rule of law.

The primary forms of research consider constitutional guarantees and the mechanisms for their temporary restriction, which are employed during martial law. This analysis seeks to determine the legal validity of these restrictions and the effectiveness of the framework for their application, while also maintaining a balance between citizens' rights and state interests.

The article addresses pressing issues in legal doctrine and practice, proposing methods to ensure that martial law influences constitutional rights and fosters harmonious interaction between society and authorities throughout this process.

The array of methods utilized in this research is designed to ensure a high level of scientific analysis. Specifically, through the examination of normative legal acts, the study intends to explore the content and structure of legal norms. The comparative legal research method enables the identification of features and similarities in practice by analyzing the legal systems of various countries.

In addition, the method of system analysis aims to reveal the relationships between legal phenomena, considering them in their entirety. Comparative legal analysis enables the identification of the characteristics of legal institutions and the evaluation of their effectiveness. The method of legal modeling is employed to propose innovative approaches for forecasting and optimizing legal processes.

The combination of these methods enhances the scientific validity and practical value of the study.

As part of the analysis of regulatory legal acts, a comprehensive examination of the constitutional provisions of various countries is conducted, focusing on the procedures for introducing martial law and its legal foundations. This analysis seeks to identify the content and characteristics of constitutional norms, assess the scope of their application, and determine the effectiveness of legal regulation

concerning martial law. The study also considers the intersections of national and international law and their potential contradictions.

Throughout the study, constitutional guarantees of citizens' rights and freedoms, as well as the range of restrictions that may be imposed during the introduction of martial law, are analyzed in detail. This issue is examined from the perspective of maintaining a legal balance and protecting fundamental rights in emergency situations.

Additionally, through comparative legal research, a comparison of the regulatory legal acts from various countries governing the implementation of martial law is conducted. This approach enables the identification of effective legal mechanisms for resolving conflicts between the delegation of emergency powers during martial law and the maintenance of constitutional guarantees. The study's results aim to analyze optimal solutions derived from the practices of legal systems and facilitate their practical application.

### **Results and discussions**

The military situation is a complex and multifaceted phenomenon within the legal framework. When viewed as a temporary measure to preserve or restore government functions, it clearly illustrates the capabilities of the executive branch and the extent of its influence in emergency situations. This regime is distinct from the mere suppression of internal unrest through force.

Upon the introduction of martial law, some of the most critical functions of the government, along with certain powers typically held by the legislative and judicial branches, may also be transferred to the executive branch. Although these measures are implemented to ensure state security and order, they prioritize the maintenance of the legal system's stability and the balance among government branches. The legal foundation of martial law serves as a crucial test for safeguarding the boundary between authorities and society.

The discourse surrounding extraordinary powers is a vital component of the broad and intricate issues in legal, political, and constitutional theories that examine the interplay between law and policy regarding the limitation of state power. These discussions yield various approaches to the theoretical understanding of emergency powers, allowing for their classification into three primary models based on their application and oversight.



In simple terms, these models can be categorized as legal-judicial, legal-procedural, and socio-political. The legal-judicial model emphasizes the legal oversight of emergency powers to ensure their legitimacy. The legal-procedural model highlights the significance of procedural regulations governing the actions of authorities during emergencies. Meanwhile, the socio-political model is grounded in public perceptions of emergency powers and their political legitimacy.

These models offer comprehensive strategies for the effective implementation of emergency powers while maintaining a balance between the stability of the legal system and the branches of government.

The theoretical exploration of this topic is largely informed by proverbs and aphorisms, which are often cited as universal truths, leading to a departure from the true essence and context of the military situation. However, the specific legal and political implications of martial law warrant deeper scrutiny, as theoretical analyses frequently fail to adequately address this crucial aspect.

Such contradictions result in a variety of definitions of martial law and differing analytical approaches, indicating the multifaceted nature of this complex phenomenon. The military situation emerges as a significant subject of study not only in legal terms but also through the close interplay of social, political, and philosophical dimensions.

Considering this compatibility, a profound understanding of the essence of martial law and its analysis necessitates defining its specific content and carefully delineating the scope of its application. This process requires not only the examination of legal systems but also a holistic approach to evaluating the impact of emergencies on society, the state, and human rights. Thus, the study of martial law enables us to uncover its comprehensive legal, social, and philosophical dimensions.

What is the legal nature of the so-called «martial law» declaration? The essence of this question seeks to understand the profound connections between power and law in emergency situations. Is such a declaration a means of granting the government extraordinary powers that it did not previously possess, or does it merely serve as a legal procedure to justify the legality of the measures taken? At the same time, the question of whether this declaration has specific content that justifies its advantages, or whether it is limited to articulating only the political goals of state power and priorities aimed at national security, is also significant. The search for answers

to these questions is crucial for understanding the legal, political, and social essence of the military situation. An analysis of the nature of this declaration necessitates addressing whether it is genuinely a legal document justifying the need and effectiveness of emergency measures, or whether it should be viewed as an important message directed to society by the authorities.

Regarding the legal nature of the declaration of martial law, another important question arises: Does this statement hold reliability based on facts? If martial law is enacted in certain cities or regions, how objectively is this decision justified, and are the courts required to concur with the validity of such a statement? These questions possess not only theoretical but also practical significance.

Determining when and on what basis martial law was enacted plays a decisive role in assessing the legality and fairness of legal procedures. These issues emerge as a crucial factor in the process of considering specific cases, necessitating a review of the legal and factual grounds for declaring martial law. Such questions delineate the legal boundaries of applying the emergency regime and the need for judicial oversight. Therefore, these inquiries should be regarded as pressing issues not only of academic speculation but also of legal practice.

*The first model* defines the central role of the judiciary and judicial oversight in the system of control over emergency powers. This concept emphasizes the necessity of subordinating sovereign power to the law during emergencies, underscoring the significant threats to the principle of the rule of law in such times. The role of the courts has become particularly crucial, as the exercise of extraordinary powers carries the risk of bypassing legal restrictions or distorting legal norms. The judicial system not only serves as a pillar of law enforcement but also acts as a reliable guarantor of the protection of citizens' rights and freedoms. Thus, this model prioritizes the independence of the courts and their accountability in emergency situations to ensure the stability of the legal system.

*The second model* underscores the critical significance of preliminary procedural control (ex ante) in the exercise of extraordinary powers. Advocates of this approach question the effectiveness of the courts in restraining the executive branch during a crisis and suggest turning to alternative means within the legal system. They argue that the most reliable and effective method of control is the institutionalization of procedural oversight by legislative

bodies. This strategy entails preemptively limiting the exercise of the executive branch's emergency powers to specific provisions, thereby ensuring the stability of the legal order and maintaining a balance among the branches of government. Consequently, the mechanism of preliminary control is viewed as a vital component in upholding the rule of law during emergency situations.

*The third model* expresses skepticism regarding the judiciary's ability to restrict the executive's actions concerning the control of emergency powers. This concept emphasizes not the interaction between legal and political systems as the primary mechanism for power control in emergencies, but rather the decisive role of socio-political mechanisms. Within this framework, the significance of society, along with social norms and values that uphold law and order, is highlighted. These elements are viewed as the fundamental basis for checking and limiting the actions of the executive branch. According to this concept, the political and social culture of society, along with the value system that supports the rule of law, can deter the excessive use of extraordinary powers. This model underscores the crucial role of societal engagement and its reliance on moral and ethical principles as a safeguard for legal stability.

Each extraordinary authority examined in the article is considered within the broader context of constitutional theory discussions. This analysis seeks to enhance our understanding of the legal limitations on power during emergencies and their impact on the principles of adherence to the rule of law. Each authority enables us to explore the connection between the fundamental principles of the constitutional system and the legal and political dimensions of emergency situations. Consequently, the scientific article in question uncovers new aspects of understanding the nature of emergency powers and the constitutional framework governing their application.

#### ***Legal, judicial, and legislative frameworks in the implementation of martial law***

Legal-judicial models depend on the judiciary as the primary institution overseeing the executive branch's exercise of emergency powers. This approach is based on several key factors that justify the significant advantages courts have in limiting emergency powers.

First, judicial decisions are made through a retrospective analysis of events, allowing for a deep and comprehensive assessment of all aspects of the situation.

Second, judicial control occurs during the consideration of specific cases, ensuring the accurate application of legal norms not at an abstract theoretical level, but in the context of real-life experiences and specific situations.

Third, the requirement for courts to justify their decisions creates precedents and fosters the development of specific mechanisms for regulatory restrictions that can be applied in future emergencies.

Thus, legal-judicial models serve as an effective mechanism for implementing emergency powers within the framework of law and order while protecting citizens' rights. This approach is a crucial tool for maintaining the rule of law and ensuring legal stability in emergency situations.

However, unconditional trust in the judiciary regarding emergency control is somewhat questionable. First, the complexity of cases involving national security, as has often been noted, may exceed the institutional competence of the judiciary, limiting their ability to adequately and comprehensively assess such cases. This limitation is likely to hinder the effective and fair issuance of legal decisions by the courts.

Secondly, since confidential intelligence data is frequently utilized in cases concerning national security, there is an issue with treating this data as part of an open trial. It is highly probable that state bodies will oppose the disclosure of such information, as it could impact the thoroughness of judicial proceedings. Consequently, the effectiveness and fairness of judicial oversight in emergency situations remain a complex subject that necessitates open dialogue and enhanced legal mechanisms.

The contemporary rationale for the model of law and court is thoroughly articulated in the works of David Townhouse. The core principle of this approach is founded on the belief that judges should not be exempt from accountability for strict adherence to the fundamental principle of the rule of law, even in emergency circumstances. Dozens emphasize that even during times when legal and political institutions face significant pressure, it is crucial to recognize that there are sufficient moral and institutional resources available to uphold law and order.

In this context, he critiques the practice of implementing special legal regimes that operate alongside the standard legal system to address emergency situations. He argues that such regimes can evolve into perilous mechanisms that grant the executive branch privileges beyond legal constraints. This, in turn, considerably undermines the stability of the le-

gal system and the principles of the rule of law. Dozens' Vision serves as a vital theoretical and practical guide in matters of reinforcing the legal system during emergencies and curbing excessive actions by authorities.

In their work, the authors concentrate on the limited competence of the courts regarding national security and the challenges posed by the secrecy and sensitivity of intelligence information. To address these issues, they propose new avenues through creative approaches to institutional design. These strategies, grounded in the principles of modern administrative law, facilitate an effective response to emergencies while ensuring adherence to the fundamental principles of the rule of law.

At the core of the solution suggested by several scholars and legal experts is the concept of establishing a specialized tribunal. Such a tribunal, on one hand, upholds the principles of legality within the legal system, and on the other hand, employs unique legal instruments that consider the distinct nature of cases related to national security. The structure and operation of these tribunals can serve as an effective means of safeguarding the rule of law while preserving the autonomy of the judicial system.

At the same time, the authors stress that courts of general jurisdiction should retain the authority to review their decisions, while also highlighting the necessity for specialized tribunals to function independently. This is crucial for maintaining a balance between national security and the rule of law, as courts of general jurisdiction remain the primary guarantor of legal control mechanisms.

In his study, David Eisenhower underscores the unique and enduring role of judges in upholding the rule of law. He points out that even amidst close interactions between the legislative and executive branches, judges play a pivotal role in preserving this principle. When such cooperation has weakened or entirely ceased, the judges' responsibility to ensure the stability of the legal system becomes more critical than ever.

As David Eisner notes, in these situations, judges not only fulfill supervisory roles but also openly highlight deviations from the principles of law and order. This enables them to draw public attention to violations or the erosion of legal norms. Judges serve not only as guarantors of justice but also as a regulatory body in upholding the rule of law.

This approach enhances trust between society and state institutions and aids in preserving the integrity of the legal system. The proactive engage-

ment of judges is a crucial aspect of safeguarding the fundamental principles of the rule of law and democratic order (Dozens 2006:65).

The martial law regime generates complex and atypical disputes for the justice system, where judges frequently encounter challenges. Such disputes inherently involve issues that are uncommon in the routine practice of the legal system and necessitate judges to seek new approaches that extend beyond standard methodologies. Despite numerous contradictions and varying perspectives, in certain instances, even when a unified position is established, the pathways for judges to arrive at a final decision can vary significantly.

The military regime of government is marked by a disruption of the balance between civil and military authority. In such circumstances, military power functions as a structure that assumes control over individual or all governmental functions, often disregarding civilian governance.

This regime serves as a distinct method of addressing emergencies within the national community; however, it can threaten legal principles, particularly the rule of law and civil rights. Thus, the imposition of martial law presents a significant challenge for the legal and institutional framework. Within this framework, judges strive to resolve disputes arising under military administration fairly and equitably, while upholding their supervisory and law enforcement roles.

In contemporary legal discourse, the notion of imposing martial law is viewed as an antiquated concept, having lost its relevance and retaining only historical significance. Nevertheless, it is acknowledged that during the era of the Tudors and Stuarts, this concept extended beyond its original limits and was frequently employed illegally and arbitrarily. The principles of a state of war were utilized as a means of punishing civilians both in peacetime and in areas unrelated to military operations.

Such practices deviate from the original purpose of military power, illustrating that it has become an unjust tool that contradicts civil rights and the rule of law.

This phenomenon clearly manifested the use of military regulations by the authorities of that era for their own interests, as well as the deviation of legal norms from ensuring freedom and justice.

Thus, the history of the martial law regime reveals that it was not merely a security measure for the political and legal system, but also a symbol of power abuse. This experience laid the ground-

work for the development of a negative attitude towards lawlessness and injustice in modern legal culture.

The right to suspend criminal procedural norms is deemed unconstitutional according to the provisions of the Petition Act, which is regarded as one of the foundational documents of democratic structures from the perspective of constitutional law theory. This ruling establishes the essential principles for protecting civil rights and preventing power abuse within the legal system.

The concept of «martial law» is frequently linked to military legislation and refers to a set of specific legal norms that govern the activities of the Armed Forces. In this context, martial law is viewed as a distinct regime of legal order. However, in certain contexts, this term is used synonymously with the concept of military administration. Such administration is characterized as a unique form of governance under conditions of hostile occupation, where military authority assumes the primary functions of civilian management.

Thus, the concept of martial law is multifaceted in both legal and political contexts, encompassing various phenomena and regimes within the framework of the rule of law and democratic principles. This underscores its particular significance in discussions from both theoretical and practical perspectives.

Among the most visible and large-scale manifestations of martial law are the conduct of legal proceedings by military commissions and the imposition of punitive measures against civilians. This practice illustrates how military power transcends civil jurisdiction, broadens its influence, and undermines the legal protections of civil society.

Military commissions, primarily functioning in emergency situations or during conflicts, diverge from the principles of traditional judicial proceedings. In these instances, they serve as a means to limit civil rights and freedoms by rendering decisions and imposing punitive measures on the civilian population. This represents one of the most contentious aspects of wielding power as a legal instrument aimed at managing emergency situations.

Consequently, under martial law, Military Commissions are perceived as a distinct legal mechanism that conflicts with civil law and democratic principles. This situation necessitates a reevaluation of the fundamental legal and moral questions it raises, highlighting the adaptability of the legal framework in times of emergency.

### ***Models of legal processes in the implementation of martial law***

The second model, grounded in constructive considerations regarding the judiciary's capacity to effectively constrain emergency powers, underscores the importance of procedural control mechanisms embedded within the constitutional framework. Proponents of this approach frequently refer to historical models for managing crises, notably the utilisation of the institution of dictatorship in the Roman Republic.

In Roman practice, a dictator could be entrusted with unlimited powers; however, these powers were strictly limited to a six-month term. The principal aim of the dictator was to swiftly neutralise the acute threat and restore the normal constitutional order. This approach is widely regarded as a historical precedent for a temporary yet effective response to emergencies and crises.

Within the realm of contemporary legal and political thought, these concepts have been revisited and adapted to modern democratic systems, most notably in the influential works of Clinton Roister, particularly his seminal piece «Constitutional Dictatorship».

Roister's research underscores the significance of procedural control mechanisms in maintaining the stability of democracy and introduces new models for ensuring the supremacy of legal norms even during emergency situations. Thus, this approach is particularly vital as a means of integrating historical experience with modern political and legal requirements.

Bruce German, a prominent scholar in the study of emergency law, proposes the necessity of including a specific provision on emergency situations in the Constitution. His concept allows the executive branch to take unilateral action swiftly during crises. This measure is suggested to facilitate a prompt and effective response to extreme threats.

A key aspect of German's concept is the assurance that such powers are temporary and strictly regulated. He emphasizes that the granting of extraordinary powers, such as the authority to detain terrorism suspects, can only be deemed legal if it garners broad support from Parliament. In his view, this support should be manifested through the Progressive Agreement of Representatives in Parliament, ensuring that the proposed measures align with democratic principles.

Ackerman's vision sets forth a novel framework for legitimising and regulating the actions of the



executive branch during states of emergency. This framework seeks to enhance the flexibility and efficiency of the constitutional order whilst preserving democratic principles. His propositions serve as a significant theoretical foundation in the quest to balance the stability of the legal system with its capacity to adapt to emergency circumstances (Finkelstein, L.A. 2016:465).

In his research, Bruce Ackerman enhances the concept of «supermajoritarianism» with critical elements, placing particular emphasis on the executive branch's responsibility to compensate innocent individuals for harm incurred during counterterrorism operations. This idea proposes innovative means to constrain governmental actions in emergency situations, aiming to ensure adherence to the principles of legality and justice.

William E. Scheuerman highlights one of the key strengths of this concept: its ability to curtail the executive branch's tendency to monopolise decision-making concerning the necessity and appropriateness of emergency measures. In his view, Ackerman's model ties the exercise of emergency powers to oversight by other branches of government, achieved through the establishment of rigorous institutional control mechanisms.

This approach seeks to reinforce the scrutiny of emergency powers and maintain a balance of authority. Such mechanisms contribute to enhancing governmental accountability, preventing the misuse of emergency measures, and safeguarding the rule of law and democratic principles. Consequently, Ackerman's concept of «supermajoritarianism» represents a pioneering tool for integrating the effectiveness and legitimacy of governance during states of emergency (Amanda L. Tyler, 2006, p. 19).

Similarly, Fe Ferejohn and Pasquino, in their analysis of the consolidation of emergency powers within constitutional frameworks, arrive at comparable conclusions. However, their examination employs a methodologically distinct perspective. Their study seeks to differentiate between two primary models of emergency governance—legislative and constitutional (neo-Roman)—and to justify the effectiveness of each approach.

**The legislative model** seeks to employ conventional legal mechanisms to temporarily delegate special powers to the executive branch during crisis situations. This approach imposes strict limitations on the scope and duration of executive authority, with clearly defined boundaries regarding the time frame and content of such powers. The primary ob-

jective of this model is to prioritise the preservation of the day-to-day stability of the legal system.

Conversely, the **constitutional or neo-Roman model** allows for a swift and comprehensive response to emergencies. Under this model, extensive powers are conferred upon the president or another constitutional authority, including the ability to issue decrees, impose censorship, suspend legal procedures, and temporarily restrict civil rights. These powers are granted principally to restore constitutional order and uphold legal stability.

Ferejohn and Pasquino underscore the advantages of the constitutional model, as it enables prompt and effective responses to political crises while ensuring the continuity of the legal order. They argue that such an approach strikes a balance between preserving legal stability and adapting to emergency circumstances. Accordingly, the researchers conclude that the constitutional model takes precedence due to its superior flexibility and effectiveness in public administration during states of emergency.

Ferejohn and Pasquino identify several compelling arguments in favour of the neo-Roman model for managing emergencies. Firstly, while traditional emergency legislation emphasises institutionalisation and long-term application, the neo-Roman model, by contrast, regards emergency powers as a means to preserve the ultimate stability and conservatism of the legal system. The primary aim of this model is to restore the constitutional order to its original state, without pursuing long-term structural changes.

A defining characteristic of the neo-Roman model is that the powers invoked during emergencies are pre-defined within the constitutional framework. This pre-emptive regulation ensures that their legality and limitations are upheld, thereby minimising the risk of abuse of authority. Such an approach ensures that emergency measures remain within the boundaries of the law and fosters a balance among the branches of government.

The researchers observe that traditional emergency legislation often results in enduring alterations to the legal system. This tendency is particularly apparent in cases where emergency legislation gains the support of lower judicial authorities, such as the Supreme Court. The likelihood of temporary measures being incorporated into permanent legal practice is significantly higher within the context of traditional legislation, posing a potential threat to the stability of the legal order.

In this regard, Ferejohn and Pasquino argue that the neo-Roman model holds a distinct advantage, as it preserves the integrity of the legal system by maintaining the temporary nature of emergency powers. This approach ensures the long-term stability of the legal framework, safeguarding it from permanent disruptions (<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1671&context=concomm>).

***Socio-political frameworks for the implementation of martial law.***

The next approach, which examines emergency powers beyond the scope of direct judicial control, is characterised by socio-political models of emergency management. These models acknowledge the existence of certain elements of judicial and legislative oversight in emergency situations but highlight their limited and constrained influence.

According to socio-political models, courts and legislatures can intervene to a degree in regulating the actions of the executive branch during emergencies. However, their role is neither systematic nor comprehensive, tending instead to be temporary and limited. This approach shifts the focus to informal mechanisms, which operate in alignment with the social and political realities of society, particularly in times of crisis.

These informal mechanisms function as the primary means of restraint and balance in the exercise of the executive's extraordinary powers. They enable actions that transcend the existing legal and institutional frameworks in emergency situations, adapting to the prevailing political context and social structures. Consequently, this model underscores the significance of social and political influences in managing emergencies, rather than relying solely on formal legal controls.

The foundational principle of socio-political models is the notion that constraints on the executive branch are achieved primarily through interaction with social norms, political processes, and the consensus prevailing within society. This approach demonstrates that informal structures and mechanisms, beyond institutional frameworks, play a pivotal role in maintaining the rule of law and ensuring a balance of power during emergencies.

Social norms and political agreements guide public support for governmental actions in emergencies, curbing the potential for excessive executive authority. Simultaneously, these informal structures act as crucial supplementary mechanisms for preserving the stability of the legal order. Their op-

eration, in conjunction with the social and political dynamics of society, allows for the effective management of crises.

Thus, socio-political models highlight the interplay between formal legal oversight and informal social influence, emphasising the multifaceted nature of limiting and regulating governmental actions during emergencies (<https://api.repository.cam.ac.uk/server/api/core/bitstreams/cb1256d2-bcf1-489e-8b06-103138363c6a/content>).

The theories outlined above clearly illustrate a diverse array of approaches to constraining state power under extreme conditions within a liberal democracy. These theories highlight the tensions between frameworks rooted in the principles of legal constitutionalism or legal liberalism, and those that prioritise procedural mechanisms established by the Constitution or informal social and political mechanisms designed to regulate power through the limitation of judicial oversight.

Advocates of legal liberalism assert the efficacy of legal norms and judicial oversight as the cornerstone for restraining state power. From their perspective, adherence to the rule of law and constitutional principles can safeguard the integrity of the legal system, even in extraordinary circumstances. Conversely, proponents of informal limitations advocate for the use of informal, yet effective, mechanisms to influence power—such as social norms, political processes, and societal consensus. These approaches emphasise a reduced reliance on judicial control while promoting broader public participation in overseeing the actions of the authorities.

Nonetheless, it is evident that all of these models presuppose the stability of state institutions that reliably uphold the ideals of liberal democracy, as well as the existence of a robust social and political culture that facilitates the realisation of these ideals. These underlying assumptions constitute the essential prerequisites for their efficacy, irrespective of whether legal or informal mechanisms are employed to limit state power. Thus, the theories seek to identify the foundational conditions necessary to preserve the values and stability of liberal democracy during periods of extremity.

The procedure for declaring a state of emergency (or martial law) typically comprises two principal stages: the initiation phase and the approval phase. The initiation phase involves the proposal or preliminary decision to declare a state of emergency, while the approval phase entails the formal confirmation of this decision, granting it legal effect.

In the practice of many states, the initiation phase is generally entrusted to the executive branch. The executive serves as the primary authority empowered to declare or propose the introduction of a state of emergency, substantiating its necessity. This prerogative is designed to enable the executive to respond swiftly and decisively to crisis situations.

The legislative branch, however, plays a pivotal role during the second and critical phase of the procedure. It is responsible for reviewing and approving the proposed measures, thereby ensuring that the declaration of a state of emergency aligns with legal standards and democratic principles. This interplay between the executive and legislative branches establishes a vital mechanism for ensuring the democratic legitimacy of the process of enacting a state of emergency.

The combination of these two phases helps ensure that the declaration of a state of emergency is conducted in accordance with the rule of law and serves as a safeguard against potential misuse of governmental powers. In some legal systems, a state of emergency does not take legal effect until it has been approved by the legislature, emphasising the legislature's decisive role in maintaining democratic oversight and legitimacy.

In other systems, a state of emergency may come into force immediately following a decision by the executive. However, such a decision must subsequently receive parliamentary approval to confirm its legality. This framework reflects the need for prompt action during emergencies while preserving legislative oversight as a critical counterbalance.

This two-tiered procedural structure serves as an effective mechanism for upholding the stability of the legal order while preventing the excessive exercise of governmental powers during crises. It ensures that the declaration of a state of emergency adheres to democratic principles, allowing the executive branch to act swiftly while preserving the legislature's control function.

In the United States, the «National Emergencies Act» grants the president the authority to declare a state of emergency, subject to certain delegated powers. This mechanism aims to clarify the executive's role in emergency management while maintaining a balance between the branches of government.

Under the Act, the president is required to notify Congress immediately upon declaring a state of emergency. This involves publishing the relevant notice in the Federal Register and providing a detailed description of the intended actions. Once

the declaration is formally issued, the president is vested with additional powers to manage the crisis and mitigate its consequences. This framework balances the need for rapid executive action with the oversight and accountability provided by legislative institutions.

The introduction of a state of emergency is subject to congressional review, with Congress holding the authority to revoke it either through a joint resolution or at the president's initiative. Furthermore, the possibility of extending the duration of the state of emergency is examined if crisis conditions persist. However, the granting of extensive powers to the president during a state of emergency raises significant constitutional concerns, particularly in relation to the potential use of a presidential veto to override congressional resolutions aimed at terminating the emergency regime.

This issue is currently the subject of considerable debate, focusing on the balance of powers between the branches of government and the risk of executive overreach. Consequently, the necessity of imposing strict limitations on such presidential powers is a frequent topic of discussion in both legal and political circles. This legal dimension is of particular relevance to the preservation of democratic principles and the safeguarding of accountability within governmental structures during the management of emergencies.

### ***Contradictions Between Emergency Powers, the Rule of Law, and Liberalism in the Implementation of Martial Law***

In any constitutional system, there exists an inherent tension between the principle of limiting state power within the framework of the law and the necessity of granting emergency powers to ensure effective responses to crisis situations. These contradictions underscore the complexity of adapting to emergencies while preserving law and order.

This legal challenge is particularly evident in the conflict between the expanded powers of the executive during emergencies and the principles of the rule of law and liberal democracy. On the one hand, such expanded powers are deemed essential for safeguarding national security and addressing crises promptly; on the other hand, the misuse of these powers risks undermining legal norms and eroding democratic values.

These contradictions highlight the need for the development of robust legal and institutional mechanisms to strike a balance between the effectiveness

of state power and the protection of civil rights. The focus must be placed on ensuring both the legality and legitimacy of governmental actions during emergencies.

Modern debates concerning the legal nature of a state of emergency and its role within the constitutional framework revolve around two principal theoretical approaches. The first, rooted in the classical ideas of the German philosopher Carl Schmitt, emphasises the exceptional nature of emergency decision-making and the concept of sovereignty. According to Schmitt, the state of emergency represents a moment that defines the boundaries of state power, with sovereignty being inherently tied to the authority's ability to suspend legal norms in extraordinary circumstances.

The second approach, often referred to as the «anti-Schmittian» perspective, directly challenges Schmitt's views. Proponents of this school of thought prioritise adherence to the rule of law even during emergencies, advocating for the establishment of stringent institutional oversight mechanisms. They argue that emergency powers should be integrated into the existing legal framework through specialised regulation and control measures to prevent threats to the integrity of the legal system.

These divergent theoretical frameworks form the foundation of contemporary discourse, both theoretical and practical, on the role, limits, and impact of the state of emergency on modern legal systems. They serve as critical reference points for deeper analyses and for devising strategies that seek to reconcile the demands of emergencies with the principles of law and order.

Schmitt contended that there is an intrinsic contradiction between the liberal model of governance and the concept of emergency powers. In his view, emergencies are fundamentally unique and cannot be anticipated or regulated within legal norms, as they necessitate the exercise of absolute authority. Schmitt argued that, particularly in extreme situations such as counter-terrorism efforts, the liberal order is inevitably prone to giving way to authoritarian governance, which he perceived as more effective in addressing such crises.

In contrast, advocates of the «anti-Schmittian» approach assert that extraordinary powers must not only be incorporated into the legal system but also be subject to strict institutional controls. They argue that abuses of power can be mitigated by embedding emergency powers within legal and constitutional constraints. Even in times of crisis, this perspective

stresses the importance of upholding the rule of law and posits that effective emergency management can be achieved without compromising liberal-legal principles.

These two opposing viewpoints continue to shape the primary debates within the field of emergency management, both theoretically and practically. While Schmitt's ideas on the necessity of easing legal restrictions during emergencies intensify discussions around the effectiveness of authoritarian decision-making, the anti-Schmittian perspective underscores the importance of preserving the stability of legal systems and adhering to democratic principles even in the most extreme circumstances (<https://academic.oup.com/hawaii-scholarship-online/book/24220/chapter-abstract/189945510?redirectedFrom=fulltext>).

In European countries, there are marked differences in the approaches to the exercise of emergency powers. For instance, in Switzerland, Norway, and France, extraordinary powers are regarded, in principle, as a special legal mechanism operating outside the framework of conventional legal norms. In these countries, emergencies are assessed as exceptional and unregulated situations, addressed through specialised mechanisms tailored for urgent action.

In contrast, Germany and Spain adhere to alternative approaches. These countries strive to regulate and strictly delimit the exercise of extraordinary powers through their Constitutions and supplementary legislative acts. The Basic Law of Germany and the Constitution of Spain establish precise conditions and limitations on the use of governmental powers during emergencies, thereby ensuring the legitimacy of such powers and protecting against potential abuses.

Thus, the European experience is characterised by two distinct models of emergency management. The first favours the use of flexible, informal legal approaches, while the second prioritises the systematic regulation of emergency powers and the explicit definition of their scope through pre-approved legal frameworks. These variations reflect the unique legal traditions of different nations and their differing priorities in responding to emergencies.

When a state of emergency is declared, authorities are often empowered to implement extraordinary measures that may affect the exercise of fundamental rights. The unique nature of emergencies may justify the temporary suspension or significant restriction of certain human rights and freedoms.



However, the exercise of human rights during such situations is legally nuanced and varies in scope.

Human rights are classified into different legal categories, including «absolute», «non-absolute», and those with internal limitations. Fundamental rights such as the right to life and the prohibition of torture fall under the category of «absolute» rights and cannot be restricted under any circumstances, even during a state of emergency. The inviolability of these rights is firmly enshrined in international standards for human rights protection.

On the other hand, non-absolute rights may be subject to certain restrictions in exceptional circumstances. However, these restrictions must adhere to the principles of proportionality and necessity, ensuring that the balance between effective state responses to emergencies and the protection of human rights is maintained. This approach seeks to uphold the legitimacy of emergency measures while safeguarding fundamental rights.

Consequently, the declaration of a state of emergency necessitates a delicate balance between the rule of law and the observance of human rights. A differentiated system for the protection of human rights enables the preservation of core rights and ensures the continued application of the rule of law, even in times of crisis.

Among the absolute rights are the prohibition of torture and slavery, as well as the principle of non-retroactivity in criminal law. The absolute nature of these rights signifies that they cannot be restricted, even in pursuit of legitimate legal objectives. This principle is recognised not only in the domain of human rights but also within the frameworks of national legal systems and international law.

At the same time, the majority of human rights are not absolute in nature. The exercise of such rights may be restricted by the state, provided that these limitations adhere to specific legal conditions. Such restrictions are often justified by pressing concerns, such as the need to combat terrorism or maintain public order. However, these measures must themselves comply with the principles of proportionality and necessity as established under international and national law.

During a state of emergency, non-absolute rights may face significant restrictions or, in certain cases, may even be temporarily suspended. In such instances, the state's responsibility is to uphold the stability of the rule of law and preserve democratic values while safeguarding fundamental human rights and freedoms during the implementation of

emergency measures. As a result, the distinction between absolute and non-absolute rights is crucial in delineating the legal and moral boundaries during emergencies.

The right to impose restrictions allows states to temporarily curtail certain civil and political freedoms during crises, as permitted by international treaties or national constitutions. The primary objective of such measures is to restore societal normalcy by maintaining law and order and ensuring national security in response to a state of emergency.

However, the legality and legitimacy of such restrictions are contingent upon meeting strict criteria. Not every public order disturbance or natural disaster automatically qualifies as a threat to the life of the nation. A thorough and comprehensive evaluation is required, particularly for situations such as terrorist attacks.

Decisions regarding the validity of restrictions must be based on the real magnitude of the threat to the state's independence, territorial integrity, or fundamental functions. Declaring a state of emergency is permissible only when the level of danger poses a serious and existential threat to the state's survival, and even then, such declarations must strictly comply with established legal and constitutional norms.

Thus, the mechanism of restriction serves as a means to balance the legal framework with adherence to democratic principles in managing emergency situations. Its effectiveness relies on the proportionality and legality of the state's actions.

The principle of proportionality mandates that the actions of state authorities must be grounded in necessity and legality, a requirement that becomes particularly significant in cases involving extreme measures that affect human rights and freedoms.

International human rights standards impose especially rigorous requirements on restrictions enacted during emergencies. These standards aim to ensure that states comply with their international obligations. Additionally, any extraordinary measures must adhere to the principle of non-discrimination, ensuring that they do not unjustly target specific groups or individuals.

The procedural requirements for declaring a state of emergency are equally vital. International law necessitates the formal proclamation of a state of emergency, along with the timely notification of international organisations and associations regarding the restrictions imposed. These procedural safeguards ensure the legality of the emergency

measures and facilitate monitoring to ensure their adherence to the rule of law.

In conclusion, ensuring the proportionality of restrictions is essential for maintaining a balance between the protection of human rights and compliance with international obligations. Respecting the principle of proportionality guarantees that emergency measures remain necessary and do not infringe upon the broader framework of law and order.

### ***Management of Emergency Powers in a Military Context***

Extraordinary powers, as outlined above, involve the exclusive concentration of executive authority, significantly increasing the risk of human rights violations and undermining the rule of law. Consequently, the periodic review of emergency powers and strict oversight of their implementation are of critical importance. Such oversight mechanisms aim to ensure that the executive branch operates within the bounds of the law during emergencies and adheres to established legal norms.

Control over extraordinary powers is conducted at international, regional, and national levels, creating a multi-layered framework to safeguard the rule of law.

International courts, human rights bodies, and supervisory institutions such as the United Nations or regional organisations monitor compliance with international legal obligations during emergencies. These bodies play a pivotal role in ensuring that emergency measures respect human rights and do not violate international norms.

Regional courts and organisations act as intermediaries between international and national frameworks. For instance, the European Court of Human Rights in Europe and the Inter-American Commission on Human Rights in the Americas oversee the implementation of regional legal standards and monitor how emergency powers affect human rights.

At the national level, oversight is exercised by legislative bodies, judicial authorities, and civil society institutions. These entities assess the legitimacy and proportionality of emergency powers, striving to prevent abuse while ensuring adherence to constitutional principles.

This multi-tiered mechanism serves as a crucial safeguard to protect human rights and uphold the rule of law, providing checks and balances to regulate the conduct of authorities during emergencies.

At the national level, the legislative and judicial branches bear primary responsibility for overseeing

emergency powers. However, in extreme circumstances, the expansion of executive authority can diminish the ability of the legislature and judiciary to fulfil their oversight functions effectively.

Although expanded executive powers enable rapid decision-making in crisis situations, they can undermine the effectiveness of parliamentary scrutiny and judicial review. In such contexts, the legislature and judiciary often face significant obstacles in assessing the legality and proportionality of emergency measures.

This situation underscores the need to strengthen national oversight mechanisms, ensuring that the balance of power between branches of government is maintained. Strengthened judicial and legislative oversight should not only involve formal measures but also specific mechanisms that guarantee proportionality, legality, and compliance with democratic principles in the exercise of emergency powers.

The legislature plays a pivotal role in maintaining a balance of power during emergencies and safeguarding democratic principles. This responsibility involves evaluating the legality and necessity of emergency measures. The Syracuse Principles emphasise the obligation of the legislature to independently and promptly review emergency measures to ensure their compliance with the rule of law.

National constitutions and emergency laws should establish mechanisms for the legislature to periodically and independently review executive actions and initiatives during emergencies. This ensures ongoing oversight and limits the risk of abuse.

The legislature must approve the declaration of a state of emergency and the measures proposed within it. Additionally, it should have the authority to extend, limit, or terminate emergency powers as needed. Such oversight allows for the evaluation of legal justifications and the impact on civil rights and freedoms.

The effectiveness of legislative oversight depends on the institutional structure governing its relationship with the executive. Legislatures must act swiftly and systematically to ensure robust scrutiny, especially in matters of extending or curtailing emergency powers.

In many countries, legislatures have the right to regularly assess the legality of the state of emergency and its scope. This role is instrumental in preventing abuse of extraordinary powers and ensuring their proportional application. When necessary, the legislature can suspend or revise emergency mea-

asures, providing a critical check against excessive executive actions.

The requirement for the legislature to convene when a state of emergency is declared is enshrined in the legal practices of numerous nations. This provision enables the prompt and effective monitoring of executive actions during emergencies. The regular functioning of parliament, particularly in relation to the extension or termination of emergency powers, is vital for preserving the balance between branches of government.

The constitutions of several countries establish specific mechanisms for overseeing the functioning of Parliament during emergencies. These mechanisms delineate the organisation of the legislative body's activities and ensure the effective exercise of its powers in regulating emergency situations. Such mechanisms play a pivotal role in preserving the rule of law and democratic principles, even under extraordinary circumstances.

Therefore, the control and oversight functions of parliaments in relation to emergencies constitute a crucial component in upholding the rule of law and enhancing the accountability of state authority.

#### ***Extraordinary powers in the restoration of constitutional order during the imposition of martial law***

The process of restoring constitutional order is intrinsically influenced by the historical, political, and social context in which it is situated. This process may take varied forms depending on the circumstances: a coordinated and phased transfer of power in the postcolonial era, the revision of a constitution under a transitional military government, or the expedited drafting of a constitution aimed at ensuring post-conflict stability. In these differing scenarios, the normalisation of constitutional order emerges as a complex and multifaceted endeavour.

The involvement of extraordinary powers further complicates this process. Such powers highlight the interplay of law, politics, and authority, necessitating a distinctive role for political power in shaping the emerging constitutional order. In these contexts, a critical challenge lies in ensuring the subordination of authority to legal norms and upholding the rule of law.

The invocation of extraordinary powers in the establishment of constitutional order underscores the importance of maintaining a balance between authority and law. Political power, while tasked with protecting the nascent order, may at times re-

sort to urgent and unconventional measures. However, these measures must be directed towards the long-term reinforcement of the rule of law.

Consequently, the restoration of constitutional order is a multidimensional process that not only involves the creation of legal frameworks but also the implementation of effective mechanisms to constrain political power through law. This balance is essential for ensuring the supremacy of the rule of law and for building a stable and equitable constitutional system.

#### ***The extraordinary powers of states in the implementation of martial law within emerging democracies***

Due to political instability in certain states and the frequent occurrence of armed conflicts, states at later stages encounter significant and multifaceted challenges in administering transitional justice. A primary task involves determining the accountability of individuals accused of crimes under the former regime and resolving their fate through judicial processes. This issue traces its origins to the debates between Hart and Fuller that emerged in the aftermath of the Second World War, subsequently becoming a focal point for scholarly inquiry in the field of transitional justice (Ballantine 1912: 531).

Subsequent research has broadened the scope of transitional justice, focusing on deeper examinations of issues within the context of post-conflict or revolutionary transformations. These studies contribute to understanding the core challenges of constitutionalism during transitional periods, with particular attention given to ensuring the legitimacy of the emerging constitutional order. To this end, the development of mechanisms to facilitate social, political, and legal change becomes a critical task.

A fundamental aspect of transitional justice is establishing accountability for past misdeeds. This process involves not only a retrospective assessment but also forward-looking reforms. To ensure the stability and legitimacy of the new constitutional framework, these mechanisms must incorporate the restoration of justice and lessons learned from prior failures.

Thus, in post-conflict states, transitional justice is not merely a tool for restoring the rule of law but also an essential step towards achieving justice and lasting peace. This process serves as a bridge between the past and the future, reinforcing the foundations of a new constitutional system.

In post-conflict periods, legal and political institutions should aim to function as neutral public spaces, where political disagreements and conflicts can be resolved through adherence to the principles of the rule of law. This principle necessitates clarity and stability of legal norms and limits on the discretionary actions of the executive branch. The rule of law is recognised as a cornerstone for establishing a governance model based on legality and transparency.

However, in post-conflict contexts, achieving this goal is often complicated by the invocation of extraordinary powers by new governments seeking to eliminate political instability. While such measures may enhance short-term efficiency, they frequently undermine adherence to the principles of the rule of law. This scenario exemplifies the ‘paradox of extraordinary powers,’ where their use is more likely to erode the rule of law than to uphold it.

Therefore, the primary challenge in constructing a post-conflict legal and political order is to develop clear legal mechanisms to limit emergency powers and ensure their compatibility with the rule of law and democratic values. This approach demonstrates political institutions’ genuine commitment to the rule of law and strengthens their legitimacy as neutral and just public spaces.

Emerging democracies, particularly post-conflict states, face the dual challenge of establishing constitutional order while adhering to the principles of legality. This order aims to facilitate the peaceful resolution of political disagreements based on norms accepted by the democratic majority. However, in pursuing this goal, governments may resort to extraordinary powers as a means of achieving temporary political stability.

The complexity lies in the potential incompatibility of emergency powers with the principles of the rule of law. Such measures risk undermining the legal boundaries of power and diminishing the authority of legal norms. Consequently, fostering a culture of legality becomes more difficult, as extreme measures may inflict long-term damage on the legal system.

Thus, the tension between strengthening a nascent democratic constitutional order and the need to exercise extraordinary powers emerges as a significant legal challenge. Resolving this challenge requires developing adaptable and lawful mechanisms to address emergencies while maintaining the rule of law.

A notable example of these challenges in South-east Asia is East Timor. Following twenty-five years

of Indonesian occupation and prolonged political violence, the country undertook significant steps to achieve peace and restore stability. East Timor sought to stabilise its political landscape and restructure state institutions, including the legal system, with support from the UN Interim Administration Mission.

This experience underscores the difficulty of balancing the need for extraordinary powers with the goal of fostering a stable culture of the rule of law. While emergency powers are essential to address immediate state needs, their misuse risks undermining legal norms in the long term.

East Timor’s case illustrates the importance of adhering to the principles of the rule of law in rebuilding the legal system and strengthening democratic institutions. This process not only ensured stability but also contributed to solidifying the legal and political foundations necessary for lasting peace and justice.

The case of East Timor exemplifies the intricate interplay of power and law in emergency situations and transitional periods, as well as the constructive role of reinforcing the rule of law. In the formation of a constitutional democracy overcoming the dire consequences of prolonged conflict, the use of extraordinary powers, while paradoxical, can align with the long-term objectives of constitutionalism. When exercised with restraint and under strict oversight, such powers can provide the initial stability needed for political and legal institutions to take root and function on a sustainable basis.

Other states undergoing similar transitions face comparable challenges, described by Bernard Williams as ‘the first political question.’ These include ensuring order, protection, security, trust, and effective cooperation. In such cases, temporary and limited extraordinary powers can serve as vital tools for restoring and strengthening the core structures of statehood.

This approach emphasises the necessity of laying the groundwork for the long-term development of democratic institutions while recognising the temporary nature of extraordinary measures. The experience of East Timor and similar states demonstrates the importance of properly calibrated emergency actions in ensuring political stability and law and order, while maintaining compatibility with the rule of law and democratic principles (McCallus 1989: 133).

Until the foundational issues essential for establishing organised governance are addressed, ex-



tensive discussions on legal and political accountability mechanisms or constitutional interpretation principles remain premature. This highlights the complexity of restoring constitutional order and the necessity of revising the underlying legal and political structures.

One of the most pressing issues in constitutionalism is the challenge posed by the use of extraordinary powers to the constitutional order. This challenge underscores the need to subordinate political authority to the rule of law. It requires deliberate efforts to implement the state's coercive mechanisms, including the use of force, strictly within legal parameters.

The stability of the constitutional order is intrinsically tied to ensuring that political authority remains subordinate to legal norms. Achieving this requires the development of robust mechanisms to limit the powers of authorities during emergencies, ensure their legality, and uphold democratic principles. Balancing the necessity of extraordinary powers with the obligation to preserve law and order thus becomes a fundamental aspect of constitutionalism (Ziborov 2015: 96).

Even if a sufficient level of political stability is achieved to restore the basic institutional infrastructure, two critical issues remain unresolved.

The first issue involves cultivating a legal and political culture of accountability in states transitioning to democratic governance. This is particularly important in societies where competing social and political structures interpret accountability and political power through divergent frameworks. Establishing a unified and coordinated foundation that upholds legal norms and ensures accountability is essential for state stability.

The second issue requires the executive branch to cede some of its powers to other institutions or branches of government. This process necessitates the creation of mechanisms that maintain a balance between the branches of government, reinforcing democratic principles, ensuring the rule of law, and preventing the excessive consolidation of executive authority.

These two challenges represent critical tasks for states seeking to consolidate new democratic institutions. They are fundamental prerequisites for the long-term stability of the legal and political system and the peaceful and just development of the state.

### *Conflict and Constitutionalism under Martial Law*

Constitutionalism, regarded as a commitment to the principle of the rule of law, has become a significant topic of legal and political discourse. This concept encompasses various interpretations, including formal, semantic, and more complex versions associated with emergency regimes. It is this conceptual versatility of the rule of law that makes it a subject of interest from a theoretical perspective.

A.V. Dicey characterises the rule of law, as embodied in the English constitution, as the fundamental principle underpinning state authority, rejecting any manifestation of 'arbitrary power.' According to Dicey, the rule of law must preclude 'arbitrariness, privileges, or excessively broad discretionary powers by state institutions.' This principle requires that state authority remains constrained by the law, ensuring both the stability of the legal system and its predictability (Dicey 1907:190).

In his research, Lon Fuller argued that the functionality of a legal system depends on adherence to a series of fundamental requirements. He stressed the importance of clear, stable, public, consistent, intelligible, and forward-looking rules. According to Fuller, the application of these rules must be carried out with honesty and integrity, as only compliance with these conditions can ensure the legitimacy and effectiveness of a legal system (Fuller 2016:165).

Thus, the interplay between constitutionalism and the rule of law serves as the cornerstone of a stable legal system, capable of fairly limiting the exercise of power. These principles are crucial for preserving the legal framework and sustaining the democratic structure of the state.

Giorgio Agamben, in his critique of the concept of 'constitutional dictatorship,' highlights Carl Schmitt's assertion that legal norms are inapplicable to exceptional cases, a principle rooted in Schmitt's broader legal theory. According to Schmitt, in situations where legal questions cannot be resolved by existing norms, such norms become insufficient. In these exceptional cases, the official tasked with resolving the matter—most often a judge—must make a discretionary decision, transforming the decision into quasi-legislative or quasi-sovereign power.

This conclusion reflects Schmitt's scepticism about the universality and rigidity of legal norms. He posited that legal norms are inadequate in emergencies or crises, as they lack the flexibility to ad-

dress unforeseen circumstances. Therefore, in such cases, the exercise of power might necessitate decisions that fall outside the established legal framework. These decisions, ultimately, are not bound by legal norms and are regarded as emergency measures aimed at resolving the crisis.

Agamben critiques this approach, emphasising that such reliance on extralegal measures weakens the principles of the rule of law and risks legitimising unlawful state actions. This dynamic, involving the inapplicability of legal norms to emergencies and the extension of executive powers, raises a crucial debate about maintaining the stability of legal order and constitutional principles during crises (Agamben 2011:24).

Ronald Dworkin and his followers adopted a substantive interpretation of law, deliberately avoiding the term 'rule of law.' This approach links legal norms closely with institutional structures, embedding them within the broader context of justice. It demonstrates that law should not be confined to a purely regulatory framework but should reflect the collective notions of justice within society (Dworkin 1963: 630).

Dworkin's interpretation of law rests on the moral and social values of society, aiming to harmonise legal norms with social structures. In his view, law is not merely a set of rules but a mechanism for implementing the principles of justice and equality. This perspective underscores the interconnectedness of law and society, asserting that the legal system must serve the cause of justice.

Thus, the substantive interpretation of law aspires to create a harmonious relationship between law and morality, as well as between legal norms and social justice. This approach seeks to ensure that the legal system upholds not only formal legitimacy but also moral legitimacy, reinforcing its alignment with the values of society.

## Conclusion

The imposition of martial law represents one of the most complex and debated aspects of the interplay between constitutional governance and the extraordinary powers of the state. Although constitutional norms provide mechanisms to enable a prompt response to emergencies, these mechanisms are designed to balance the protection of individual rights with the prevention of abuses of state power.

This duality underscores a significant internal contradiction regarding state actions during emer-

gencies. On the one hand, emergencies necessitate urgent and decisive measures, often requiring an expansion of executive powers. On the other hand, such measures must remain bound by the principles of the rule of law and the protection of democratic values.

This inherent tension highlights the necessity of maintaining a legal and political equilibrium during emergencies. While the framework of martial law allows states to respond effectively to critical crises, these responses must adhere to the rule of law and safeguard civil rights and liberties. Consequently, the martial law regime serves as a critical test of the ability to reconcile emergency measures with democratic norms while upholding the stability of the constitutional order.

The introduction of martial law poses a serious challenge to the stability of the constitutional foundations of the state. While extraordinary powers may enhance administrative efficiency during crises, their unchecked use risks undermining the constitutional order. Such situations can lead to an excessive concentration of power and even pave the way for authoritarian tendencies.

The importance of constitutional mechanisms to mitigate these risks cannot be overstated. Judicial oversight and legislative review procedures are vital safeguards to ensure the balanced and responsible exercise of emergency powers. These mechanisms are aimed at keeping executive actions within the bounds of legality, ensuring proportionality and adherence to the rule of law.

Thus, the introduction of martial law underscores the need to strike a balance between preserving the stability of the constitutional order and adhering to democratic principles. Limiting the scope of extraordinary powers and ensuring effective oversight mechanisms are critical for safeguarding the legal foundations of the state and upholding the rule of law.

The exercise of extraordinary powers presents an ongoing challenge to the stability of the constitutional order. While such powers are intended to enhance state effectiveness in crisis management, their unauthorised or unrestricted use can undermine the constitutional framework. In such scenarios, the excessive centralisation of power and heightened risks of authoritarianism threaten the integrity of the state.

Moreover, constitutional mechanisms such as judicial oversight and legislative review play an essential role in ensuring that emergency powers are exercised within the confines of legality and respon-

sibility. These mechanisms help maintain the legality, balance, and proportionality of state actions during emergencies.

The regime of martial law is, therefore, a litmus test for maintaining a balance between the stability of the constitutional system and adherence to democratic principles. Effective mechanisms for controlling and limiting emergency powers are essential for protecting the legal foundations of the state and strengthening the rule of law.

The contradiction between the exercise of extraordinary powers and the guarantee of fundamental rights and freedoms is one of the core legal challenges in emergency situations. This contradiction necessitates finding a delicate balance between ensuring national security and respecting the principles of the rule of law.

The constitutional framework for martial law provides legal guidelines defining the boundaries of emergency powers, their implementation procedures, and mechanisms for oversight. These norms aim to ensure that the actions of the authorities during emergencies remain within the rule of law, while minimising the impact of emergency powers on individual rights and freedoms.

Legal regulation in emergencies plays a pivotal role in balancing enhanced state power with the protection of civil liberties. The critical importance of constitutional norms lies in maintaining the legality of emergency powers and reinforcing control over their alignment with democratic principles.

Additionally, the potential for abuse of emergency powers necessitates the establishment of robust monitoring systems. Such systems should include parliamentary oversight, judicial review, and mechanisms for public scrutiny to ensure that state actions remain within a legal and democratic framework.

Parliamentary oversight plays a central role in evaluating the legality and scope of emergency powers. Judicial oversight ensures the stability of the legal order by upholding compliance with constitutional norms. Public control mechanisms en-

hance civil society participation, increase the transparency of government actions, and align them with the public interest.

The creation of such a comprehensive control system is vital for maintaining the legitimacy of emergency powers and ensuring their consistency with democratic values. This framework not only strengthens the protection of the rule of law and civil liberties but also fosters trust between the state and its citizens.

The contradiction between the exercise of extraordinary state powers and the protection of fundamental rights and freedoms remains one of the most pressing legal issues during emergencies. Addressing this challenge requires balancing the imperative of national security with adherence to the rule of law.

Constitutional norms provide the legal foundation for martial law, clearly delineating the scope of emergency powers and the mechanisms for their application. These norms are designed to ensure the legality of emergency measures while keeping state actions within a legal framework. However, the potential for overreach demands the establishment of effective oversight systems.

An effective control system must include parliamentary supervision, judicial oversight, and active public monitoring mechanisms. Parliamentary supervision ensures the legality and proportionality of emergency powers. Judicial oversight safeguards the stability of the legal order by monitoring compliance with constitutional principles. Public control mechanisms enhance transparency and accountability, fostering civil society involvement.

Ensuring the responsible and effective exercise of emergency powers is essential for upholding the rule of law, protecting civil liberties, and sustaining democratic principles in public governance. Such a control system strengthens the legal foundations of the state, reinforces trust between citizens and authorities, and supports the long-term stability of the constitutional order.

#### Литература

- Агамбен Дж. Номо sacer. Чрезвычайное положение. – М.: Издательство «Европа», 2011. – 148 с.  
Дайси А.В. Основы государственного права Англии: Введение в изучение английской конституции. – М., 1907. – 208 с.  
Зиборов О.В. Компонентное исследование военного положения. Среднерусский вестник общественных наук, (1), 2015, с. 95–99.  
Фуллер Л.Л. Мораль права. – М., Челябинск: ИРИСЕН; Социум, 2016. – 308 с.

Alston, P. (2007). The United Nations and the Protection of Human Rights in Times of Emergency. Oxford University Press. [Электрондық ресурс] <https://global.oup.com/academic/product/the-united-nations-and-human-rights-9780198298373?cc=kz&lang=en&> (Дата обращения: 01.12.2024).

Amanda L. Tyler (2006). «Is Suspension a Political Question?» Stanford Law Review, 58(1), 1-48.

Ballantine, Henry Winthrop. «Martial Law». Columbia Law Review, vol. 12, no. 6, 1912, pp. 529–38. JSTOR, <https://doi.org/10.2307/1110933>. (Дата обращения: 01.12.2024).

David Dyzenhaus (2006). «The Constitution of Necessity». In Emergency Powers: The Constitutional Politics of Emergency Powers, edited by David Dyzenhaus and Arthur L. Goodhart, 1-24. Cambridge University Press. [Электрондық ресурс] <https://api.repository.cam.ac.uk/server/api/core/bitstreams/cb1256d2-bcf1-489e-8b06-103138363c6a/content> (Дата обращения: 05.12.2024).

Dworkin R. Judicial Discretion // Journal of Philosophy. 1963. Vol. 60. N 21. P. 624-638.

Finkelstein, L. A. (2016). Martial Law and the Constitution: The Tension Between Legal Order and Military Authority. Yale Law Journal, 125(2), 450-472.

McCallus, J. P. (1989). THE MYTHS OF THE NEW FILIPINO: PHILIPPINE GOVERNMENT PROPAGANDA DURING THE EARLY YEARS OF MARTIAL LAW. Philippine Quarterly of Culture and Society, 17(2), 129–148. <http://www.jstor.org/stable/29791974>

Scheiber, Harry N., and Jane L. Scheiber, «Introduction: War time Emergency Powers and Martial Law», Bayonets in Paradise: Martial Law in Hawai'i during World War II (Honolulu, HI, 2016; online edn, Hawai'i Scholarship Online, 17 Nov. 2016), <https://doi.org/10.21313/hawaii/9780824852887.003.0001> [Электрондық ресурс] <https://academic.oup.com/hawaii-scholarship-online/book/24220/chapter-abstract/189945510?redirectedFrom=fulltext> (Дата обращения: 06.12.2024).

William H. Rehnquist (1998). All the Laws but One: Civil Liberties in Wartime. William Morrow & Co. [Электрондық ресурс] <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1671&context=concomm> (Дата обращения: 05.12.2024).

## References

Alston, P. (2007). The United Nations and the Protection of Human Rights in Times of Emergency. Oxford University Press. [Электрондық ресурс] <https://global.oup.com/academic/product/the-united-nations-and-human-rights-9780198298373?cc=kz&lang=en&> (data obrasheniya: 01.12.2024).

Amanda L. Tyler (2006). «Is Suspension a Political Question?» Stanford Law Review, 58(1), 1-48.

Agamben Dzh. (2011) Homo sacer. Chrezvychajnoe polozhenie [Homo sacer. State of emergency]. – М.: Европа. – 148 s.

Ballantine, Henry Winthrop. «Martial Law». Columbia Law Review, vol. 12, no. 6, 1912, pp. 529–38. JSTOR, <https://doi.org/10.2307/1110933>. (data obrasheniya: 01.12.2024).

David Dyzenhaus (2006). «The Constitution of Necessity». In Emergency Powers: The Constitutional Politics of Emergency Powers, edited by David Dyzenhaus and Arthur L. Goodhart, 1-24. Cambridge University Press. [Электрондық ресурс] <https://api.repository.cam.ac.uk/server/api/core/bitstreams/cb1256d2-bcf1-489e-8b06-103138363c6a/content> (data obrasheniya: 05.12.2024).

Dajsi A.V. (1907) Osnovy gosudarstvennogo prava Anglii: Vvedenie v izucheniye anglijskoj konstitucii [Fundamentals of the Public Law of England: An Introduction to the Study of the English Constitution]. – М. – S. 208.

Dworkin R. Judicial Discretion // Journal of Philosophy. 1963. Vol. 60. N 21. P. 624-638.

Finkelstein, L. A. (2016). Martial Law and the Constitution: The Tension Between Legal Order and Military Authority. Yale Law Journal, 125(2), 450-472.

Fuller L.L. (2016) Moral prava [Morality of Law ]. М. – Chelyabinsk: IRISEN; Socium, 2016. 308 s.

McCallus, J. P. (1989). THE MYTHS OF THE NEW FILIPINO: PHILIPPINE GOVERNMENT PROPAGANDA DURING THE EARLY YEARS OF MARTIAL LAW. Philippine Quarterly of Culture and Society, 17(2), 129–148. <http://www.jstor.org/stable/29791974>

Scheiber, Harry N., and Jane L. Scheiber, «Introduction: War time Emergency Powers and Martial Law», Bayonets in Paradise: Martial Law in Hawai'i during World War II (Honolulu, HI, 2016; online edn, Hawai'i Scholarship Online, 17 Nov. 2016), <https://doi.org/10.21313/hawaii/9780824852887.003.0001> [Электрондық ресурс] <https://academic.oup.com/hawaii-scholarship-online/book/24220/chapter-abstract/189945510?redirectedFrom=fulltext> (Data obrasheniya: 06.12.2024).

William H. Rehnquist (1998). All the Laws but One: Civil Liberties in Wartime. William Morrow & Co. [Электрондық ресурс] <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1671&context=concomm> (Data obrasheniya: 05.12.2024).

Ziborov, O. V. (2015). Komponentnoe issledovanie voennogo polozheniya [Component Study of Martial Law]. Srednerusskij vestnik obshchestvennyh nauk, (1), 95-99.

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