INFORMAL CONSTITUTIONAL CHANGE IN PROLONGED STATES OF EMERGENCY: IMPLICATIONS FOR DEMOCRACY AND THE RULE OF LAW

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ABSTRACT

Modern constitutionalism, shaped significantly by the aftermath of World War II, largely aims to ensure stability even in extraordinary turbulent times that go beyond the established "constitutional normalcy" by embedding mechanisms for states of emergency and martial law within constitutional texts.

In post-Covid, epidemic-related emergency era, the classical understanding of the "emergency constitution", "state of exception" and "constitutional change" is no longer as widely relevant. This phenomenon is evidently represented in conflict-related emergencies, where the threat of prolonged emergency may lead to an equivocal constitutional framework reform through means of informal constitutional change. The longer such a legal regime persists, the more drastic will be the implications for the rule of law.

Conflating normative textual claims with non-formal characteristics of the emergency is relevant for this analysis. This study examines and theorizes concepts, causal mechanisms and processes that lead to informal constitutional change (through militarization of law enforcement and institutional reform) in a prolonged state of emergency that originated in the nexus of the conflict and transformed gradually from a de-jure to a de-facto legal regime.

Through a comparative and cross-national functional analysis, the thesis investigates the transformation of the constitutional frameworks without formal amendments, particularly during or post conflict-related crises, focusing on cases from Europe (Ukraine, Georgia) and South America (Colombia, Peru). Informal constitutional change in prolonged emergencies and the broader implications for democracy and the rule of law are explored.

INTRODUCTION

Constitutionalism, change and crisis have formed an inextricable connection. Yaniv Roznai and Richard Albert point out that over the past 40 years, more than 200 constitutions have been adopted in times of crisis[1]. Modern constitutionalism emerged as a response to the global upheaval of World War II, prompting a postwar rethinking of the idea of constitutionalism and constitutions as fundamental[2].

These new constitutions are designed as acts of indefinite duration, meant to provide stability to the foundations of constitutional order even through crises and political turbulence. To this end, constitutional texts provide for extraordinary mechanisms for responding to emergencies, including the conditions and procedures for the introduction of martial law and a state of emergency. For instance, the Ukrainian Constitution is no exception[3]. Born in the context of the political crisis of 1995-1996, it passed the test of the truly revolutionary situations of 2004 and 2014[4]. It provides for the possibility of introducing special constitutional regimes of martial law and state of emergency, as well as environmental emergencies.

Similarly, the Constitution of Georgia is designed to be a durable document, capable of guiding the nation through both stable times and periods of significant distress. It includes emergency clauses, ranging from the essential procedural Article 71 to incorporating provisions into articles on presidential and parliamentary elections, sittings and sessions, which allows for the imposition of martial law or a state of emergency under specific conditions[5]. These provisions

[1] Roznai Y., Albert R. Introduction: Modern Pressures on Constitutionalism, in Richard Albert, Yaniv Roznai ed. Constitutionalism Under Extreme Conditions Law, Emergency, Exception. Cham: Springer, 2020. p. 1.
[2] Holmes, Stephen, 'Constitutions and Constitutionalism', in Michel Rosenfeld, and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, 2012; Oxford Academic. p.192-196
[3] Constitution of Ukraine_eng (ccu.gov.ua)
[4] Ukraine's turbulent history since independence in 1991 | Reuters
[5] Constitution of Georgia_eng(matsne.gov.ge)

have been crucial during Georgia's tumultuous years, ensuring legal continuity and state functionality during crises.

In times of crisis, the constitutional order, constitutional rights and freedoms become vulnerable to the external and internal disturbances. According to Eric Posner and Adrian Vermeule, "in times of emergency, people panic, and when they panic, they tend to support policies that are unwise and excessive."[6] This raises an urgent and quite practical question, which Yaniv Roznai and Richard Albert formulated as follows:

> What can a constitutional democracy legitimately do to protect itself in times of emergency or crisis that could potentially undermine the very foundations of democracy or the constitutional order?[7]

Such periods of crisis are not always characterized by a revolutionary situation, but the established authorities and constitutional mechanisms as part of the entrenched constitutional design for responding to emergencies may simply be ineffective or unable to overcome the crisis (political, economic, social, environmental).

Thus, there are various types of legal instruments that are available or potentially available within constitutional order for the purpose of bringing change or adjusting said order to new conditions. Among them, the types that this work attempts to conceptualize and differentiate are instruments and models of *constitutional legal order's reform* ***of ways how*** *it responds to the extreme conditions* and *informal changes* ***of*** *the constitutional order in extreme conditions* through the prism of *"normalized emergencies".*

This requires conceptualization of all the aforementioned terms in a contextual manner. Firstly, moving away from the institutional framework of the legal regimes of martial law, siege or state of alarm, the mere existence of emergency (extreme) conditions is a matter of "fact", not

[6] Posner E., Vermeule A. Accommodating Emergencies. Stanford Law Review. 2003. Vol. 56. P. 609.
[7] supra 1, p. 4

"law". These regimes are only one of the tools for responding to such conditions, and their use depends on the decision of an official or executive body in accordance with the procedure provided for by the Constitution and relevant legislation, even more so on a rational choice.

Secondly, constitutional legal order's reform and constitutional reform are terms distinct in their substantive meaning. Constitutional reform is normally understood as involving formal textual constitutional amendments through established procedures, often reflecting societal evolution or enhancing governance[8]. Constitutional change, that is closer related to the notion of constitutional legal order's reform, encompasses both these formal amendments and other forms of the non-formalist modifications to the framework itself [9], including, for instance, the dynamic interpretation of constitutional principles by courts, which can set precedents in common law systems[10]. It also includes shifts in constitutional application influenced by cultural or political developments, as well as institutional reform[11]. Thus, while reform is an explicit modification of the constitution, change can also occur through interpretative and informal adaptations.

The term tools or models of adaptation may also refer to accommodation of the existing legal order to the extreme conditions through issuing normative and executive acts aimed at mitigating the causes or negative implications from the emergency itself (as it happened during COVID-pandemic: school and workplace closures, cancellation of public events and gatherings, travel restrictions, debt relief, personal income support, business subsidies,

[8] Richard Albert. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford University Press, 2019. p. 15-27

[9] ibid

[10] Graber, Mark A., 'Constitutional Change', *A New Introduction to American Constitutionalism* New York, 2013. p. 140-173

[11] Davis, L. E., and Douglass C. North. "A Theory of Institutional Change: Concepts and Causes." *Institutional Change and American Economic Growth*. Cambridge: Cambridge University Press, 1971. p. 3–25

vaccination and stay-at-home policies etc. [12]) or acts aimed to adapt the procedural aspects of response to the emergency to current conditions.

However, when they do not work, grounds arise for the exercise of constituent power for the self-preservation of the constitutional order[13]. The instruments of such self-preservation - the tools of transformation - include both changes to the existing constitutional order and the establishment of a new constitutional legal order in place of the constitutional order destroyed by extreme conditions that may adversely affect the rule of law and democracy in general.

Democracies increasingly rely on emergency measures to address divisive issues, fueling debates, despite the fact that in the classical model, constitutional emergencies aim to make declarations temporary and respect rights. However, as will be shown in this thesis, the case of transformation of conflict-related emergencies from de-jure to de-facto as it happened in Colombia, Peru and Georgia of 2008, they often lead to lasting changes.

The reliance on emergency powers is considered a "new governance model." Covid-19 saw over 100 countries declare emergencies[14]. Debates continue four years later as some experience prolonged states of emergency that may fundamentally change governance over time (Georgia 2020 included).

Prolonged emergencies pose constitutional and democratic risks, like in Venezuela, where autocracy strengthened, extending concerns beyond, threatening liberal values and being part of the general democratic backsliding.

As established, constitutional changes tied to mitigating emergency conditions and reforming responses that are common globally will be examined. The normalization of emergency

[12] Policy Responses to the Coronavirus Pandemic - Our World in Data
[13] supra 6
[14] Coronavirus & Civic Space - ICNL

measures in democracies has led to significant changes and reforms. Analysis aims to reveal a shift towards "permanent" emergencies, raising concerns over security and rights balances. Precedents will illustrate how emergencies can cause governance and liberty alterations affecting other nations. This highlights the critical role of safeguards and accountability amid swift executive legislative and presidential action in emergencies. It warns against emergencies eroding democratic principles and emphasizes scrutinizing long-term impacts on rule of law and state identity.

In conclusion this thesis seeks to understand the causal mechanisms and processes behind such changes, which often transition from de jure to de facto legal regimes without formal amendments. By examining cases from Europe (Ukraine of 2022 and Georgia 200-moving onto 2020) and South America (Colombia and Peru), the research will explore the implications for democracy and the rule of law when recurring emergency regimes are invoked informally. The central question is: How do these informal constitutional changes in prolonged emergencies challenge the upholding of democracy and the rule of law? What are the implications for Ukraine entering its third year of martial law regime?

CHAPTER 1: CONCEPTUALIZING THE SCOPE AND NATURE OF EMERGENCY AND CONSTITUTIONAL CHANGE

1.1 On emergencies, constitutional order and constitutional "normality"

The concept of extreme conditions in the theory of modern constitutionalism does not depend on the normative concept of martial law and the state of emergency as formalized regimes. After all, by general definition, emergency regimes are situations that cause a serious disruption of the functioning of the political system or the rule of law, which threatens their very existence[15]. Therefore, it is necessary to define the concept and scope of extreme conditions, their classification, the differences between the ordinary and the extraordinary, between reform and revolution, between normality, crisis or disaster and "normalized emergencies".

The concept of a state of emergency, as highlighted by the pandemic, lacks a clear uniform theoretical framework within constitutional law, leading to varied interpretations and applications in democratic states.

These questions are not new, but they have long developed as a part of the Jacobin tradition of opposing reform and revolution[16]. In the legal discourse, the study of extreme conditions was primarily limited to the consideration of legal regimes of states of emergency or special cases like coups or revolutions. At some point, the tradition of declaring a state of emergency, introducing significant amendments to the constitution or even subsequently,voting for the new constitution at the referendum became unsurprising (e.g. Tunisia[17],Mali[18], Chad[19] etc). In other

[15] Ferejohn J., Pasquino P. The Law of the Exception: A Typology of Emergency Powers. International Journal of Constitutional law. 2004. Vol. 2, No. 2. P. 231.
[16] Luxemburg R. Reform or Revolution. in Helen Scott ed. The Essential Rosa Luxemburg. Chicago: Heymarket Books, 2008. P. 65-66
[17] Tunisia referendum: Voters give president near unchecked power (bbc.com)
[18] Mali's military junta holds referendum on new constitution it calls a step toward new elections | AP News
[19] Chad holds referendum on new constitution amid opposition protests | Elections News | Al Jazeera

words, the scientific discussion usually revolves around a particular case of extreme conditions, when martial law or other emergency regimes are introduced, applied and terminated. However, the issue of extreme conditions is much broader and more complex.

The modern understanding of law that emerged during the Enlightenment is based on an implicit dichotomy between the powers of government under ordinary or normal conditions and the powers of government during extreme conditions. Modern constitutionalism is based on the principle of limiting public power in order to protect human rights[20], and the use of emergency powers under normal conditions poses a direct threat to constitutional principles. Therefore, the study of this dichotomy - normal and extreme conditions - is essentially a study of the conditions for the existence of constitutionalism, the conditions for the legitimacy of public power in a democratic society[21].

The very concept of extreme conditions is rather "flexible"[22]. In theory, three types of extreme conditions are usually distinguished: (1) those associated with violence or the use of force (martial law, war, armed insurgency, terrorist attacks, etc.), (2) natural and man-made disasters, and (3) political or economic crises[23]. However, such a classification does not answer the practical question of under what circumstances do these conditions become extreme for the purposes of applying the relevant emergency response mechanisms, both those provided for by the constitution and legislation and those special ones that may be proposed to return to normal conditions?

[20] Van Caenegem R. An Historical Introduction to Western Constitutional Law. Cambridge: Cambridge Unviersity Press, 1995. P. 79.
[21] Gross O. Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? The Yale Law Journal. 2003. Vol. 112, No. 5. P. 1071
[22] Gross O., Aolain F. Law in Times of Crisis. Emergency Powers in Theory and Practice. Cambridge: Cambridge University Press, 2006. P. 167
[23] Salzberger E. 'The Rule of Law Under Extreme Conditions and International Law: A Law and Economics Perspective', in Thomas Eger, Stefan Oeter, Stefan Voigt eds., The International Law and the Rule of Law Under Extreme Conditions. Tubingen: Mohr Siebeck, 2017. P. 23.

To give conceptual meaning to this term, the concept of extreme conditions encompasses all circumstances that distinguish a situation of "normality" from possible deviations. As Elie Salzberger notes:

> In each of these categories, we can draw a dichotomous line (rather than a clear dichotomy) between a major crisis ... and minor disruptions to normal life ... In a philosophical sense, normalcy can be defined as the most routine or similar repetition of events - which is not actually the case in reality, because every life situation and every period of time is different to some extent. Therefore, the line separating extreme conditions is not obvious or natural.[24]

The line that separates normal and extreme conditions is quite relative, as the perception of normality is in constant flux. Deviations from normality can both disappear and evolve in perception as normal. However, despite this uncertainty, the notion of extreme conditions is inextricably linked to the understanding of "normality" in the sense that these conditions are seen as phenomena that lie outside the normal course of events or expected actions. As Oren Gross notes, "to define an emergency, we need to have an understanding of normality"[25]. Thus, according to Elie Salzberger, we can distinguish three possible modes of the rule of law: a period of normality, a period of emergency and a period of state of emergency, that differ in intensity, prevalence and geographical coverage, and the predictability of the situation dynamics and urgency[26].

This leads to a general paradigm of the relationship between extreme and normal conditions, according to which normal conditions are the rule and extreme conditions are the exception, that due to their nature, are limited in time and pose a particular threat to the established constitutional "normalcy" (or normality).

[24] ibid
[25] Gross O., p. 50
[26] Salzberger E.,p.27-28

In a sense, the category of normality is a rebuttable presumption[27] and conceptualizing normal conditions as a presumption means that extreme conditions are grounds for rebuttal of a general presumption of normality, which in the legal sense imposes a high burden of proof that is not bound by formal features. In other words, this means that a formal decision to introduce emergency regimes is not enough - the actual circumstances of "abnormality," "urgent danger," and "urgency" must be proven[28].

In the classical theory of extreme conditions, the separation of normal and extreme is conceptualized along three dimensions: temporal, territorial, and group[29]. Although, contemporary extreme conditions do not always fit into these three dimensions, which has been evident especially since Covid, the normalization of emergency has become even more evident since Russia's invasion of Ukraine in 2022.

The conceptualization of extreme conditions in constitutional law as an exception and normal conditions as a rule means that extreme conditions can be neutralized or eliminated, which makes certain measures that are illegitimate or illegal under normal conditions permissible[30]. As Oren Gross notes:

> Normality and emergency are considered to occupy alternative and mutually exclusive time frames. Normality exists before the crisis and is restored after the emergency is resolved. Crises are short intervals that interrupt the continuity of normality.[31]

[27] Sunstein C. Problems with Rules. California Law Review. 1995. Vol. 83, No. 4. P. 963
[28] ibid
[29] The United Nations Human Rights Committee, General Comment No. 29. States of Emergency (Article 4). CCPR/C/21/Rev.1/Add.11. 31 August 2001. para. 4.
[30] Greene A. Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis. Oxford, London, New York, et al.: Hart, 2018. P. 45-46.
[31] supra 25

However, extreme conditions can last for an indefinite period of time and gradually become normalized or transform from the declared state of emergency into an undeclared "normalized emergency"[32].

From the point of view of the theory of constitutionalism, the defining feature of extreme conditions is an urgent, i.e. real and immediate, threat to the constitutional order. Therefore, the logic of the extraordinary regime as a mechanism for responding to such threats is to protect and preserve it. However, this is where the paradox of constitutionalism in extreme conditions arises: in such circumstances, short-term considerations of overcoming the crisis prompt public authorities to neglect long-term interests in preserving the constitutional order, leading to unreasonable or excessive decisions and measures that may themselves pose a threat to the constitutional order. This paradox, in fact, has prompted the acceptance, "normalization" and integration of emergency-based legal instruments and responses into established constitutional order through various means.

[32] Lurie G. Introduction: Emergency, Exception and Normalcy. in Richard Albert, Yaniv Roznai ed. Constitutionalism Under Extreme Conditions Law, Emergency, Exception. Cham: Springer, 2020. P. 18

1.2. On the legal instruments for constitutional transformation or accommodation in emergencies

If we look at the tools used by constitutional democracies in extreme conditions to restore "normality", we can see the blurred lines between the modes of government functioning in normal and extreme conditions. As the practice of states shows, in response to extreme conditions, the state can use various tools: *the use of statutory exceptions established for atypical or unusual circumstances; temporary special legislation* (sunset legislation) or *transformation mechanisms*.

These types of legislation are probably the oldest form of exercising the powers of a representative body since the birth of European parliamentarism, whose function historically was to give consent to emergency taxes and laws proposed by the monarch to overcome a particular danger. Since the establishment of the legislative state in the form of res publica, temporary legislation has been inferior to permanent legislation. It was only in the 1970s that it returned as an instrument of parliamentary control over the executive branch[33]. This legislative technique is based on two important principles: (1) limited time effect and (2) ex post evaluation. In other words, it is legislation with a fixed term that expires on a date determined by the legislator, unless the legislator decides to extend it. This, in turn, means that it is necessary to assess the effect and consequences of such legislative regulation when deciding whether or not to extend it. This category, in particular, includes the Law of Ukraine "On the Special Order of Local Self-Government in Certain Districts of Donetsk and Luhansk Regions" of September 16, 2014, No. 1680-VII, which is extended annually.

[33] Finn J. Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation. Columbia Journal of Transnational Law. 2010. Vol. 48, No.3. P. 442

Another way is to introduce *special (sectoral) regimes* that are adopted based on the nature of the emergency. These regimes are not states of emergency or martial law, but a way to establish separate systems for responding to specific extreme conditions. This is the path taken by many countries in response to the COVID-19 pandemic[34]. Another example is the Law of Ukraine "On Civil-Military Administrations".

A fairly common way is to *introduce the state of emergency or martial law provided for by the Constitution and legislation.* These are the regimes referred to, in particular, in part two of Article 64, paragraph 31 of part one of Article 85, paragraph 19 of part one of Article 92, paragraph 21 of part one of Article 106, part two of Article 157 of the Constitution of Ukraine.

By their nature, these tools can be divided into three types: (1) leges ex ante, i.e., predefined in advance (statutory exceptions, state of emergency and martial law or siege provided for by the Constitution and laws), (2) leges latae, i.e. instruments adopted during extreme conditions based on their intensity, nature and threats, but within the framework established by the Constitution and legislation (temporary special legislation, special sectoral regimes) and (3) leges ex post, i.e. legislative instruments adopted in extreme conditions outside the pre-established constitutional or legislative framework, and which are legitimized or declared unconstitutional after the situation has normalized (special sectoral regimes)[35].

These types of tools for responding to extreme conditions, depending on the peculiarities of the constitutional legal order, determine the following models of adaptation of the

[34] Walker C., Blick A. Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism, Just Security (12 May 2020)
[35] supra Roznai Y., Albert R, see also Gross O.

constitutional order to extreme conditions: *the usual order of functioning, the model of legislative accommodation, the neo-Roman model and ex post facto legitimization model*[36].

The "business as usual" model denies any possibility of deviation from the normal mode of functioning of the constitutional order, since substantive norms and decision-making procedures can be applied under any conditions, including extreme ones. It proceeds from the presumption of completeness and integrity of the legal system, which means its ability to regulate any issues under any conditions, including extreme ones[37].

Legislative accommodation proceeds from the fact that overcoming extreme conditions can and should take place within the framework of the normal constitutional legal order by adopting relevant legislative acts in accordance with the usual procedure. The introduction of temporary legislation or special regimes in response to extreme conditions is part of the general and normal legislative process[38]. As this model is currently the most common among modern democracies, practical examples for it will be given in the following chapters.

According to the neo-Roman model, which was implemented in the Weimar Constitution and the 1958 French Constitution, in the event of extreme conditions, the head of state acquires extraordinary powers to overcome the emergency as the way to create a link between normal form of governance and emergency[39].

The last model derives from the doctrine of prerogative powers and is based on the assumption that it is impossible to define specific norms in advance in case of extreme conditions, given the unpredictability of such conditions. According to this model,such prerogative powers arise

[36] ibid
[37] see Gross O.
[38] Voigt, S. Contracting for Catastrophe:Legitimizing Emergency Constitutions by Drawing on Social Contract Theory. *Res Publica* **28**, 149–172 (2022).
[39] ibid

on the basis of the constitutional duty to preserve the state and organized society[40]. Their theoretical foundations, developed by John Locke, who defined prerogative as "the power to do good without a rule," are sometimes seen to even be contrary to the rule of law[41].

However, in contrast to John Locke's concept, modern prerogative powers are not exempt from judicial or constitutional control, and these powers themselves can be limited by law.

These models are not mutually exclusive. The constitutional system of a state may combine elements of these models or allow for recourse to any of them. For example, in the constitutional history of Ukraine, certain decisions of February 2014 should be analyzed as the ex post facto legitimation model, and measures in response to the armed aggression of the Russian Federation against Ukraine in eastern Ukraine should be analyzed through the model of legislative accommodation.

These tools of adaptation are essentially exogenous, as they are not related to a change in the constitutional order. Their goal is to return to normalcy, to the normal functioning of the constitutional order. If they do not work, restoration of normalcy may require endogenous instruments, i.e., amendments to the constitution. Models of adaptation and transformation of the constitutional order raise a separate issue of the correlation between state of emergency and the ordinary legal order.

In the constitutional doctrine, two fundamental approaches to the concept of emergency regimes can be distinguished, which can be labeled as monism and dualism. Representatives of the first approach believe that there is no significant difference between the constitutional

[40] Frankenberg G. Political Theology and the Erosion of the Rule of Law. Normalizing the State of Exception. Cheltenham: Edward Elgar, 2014. P. 25

[41] Locke J. The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government. In John Locke, Two Treatises of Government and A Letter Concerning Toleration (ed. and with an Introduction by Ian Shapiro, with essays by John Dunn, Ruth W. Grant and Ian Shapiro). New Haven and London: Yale University Press, 2003. P. 172

order functioning under normal conditions and governance under extreme conditions. Monism sees no significant difference between normal governance and emergency conditions, advocating for mechanisms within the constitutional order that protect the state and ensure a return to normality, rooted in Hobbes's concept of salus populi[42] .

Dualism, on the other hand, recognizes a temporary suspension of individual rights and a shift from the usual constitutional order is stopped, which is replaced, albeit temporarily, by an extraordinary legal system. This conceptualization of extraordinary regimes, according to which, under extreme conditions, the ordinary constitutional order stops and an extraordinary legal system takes its place, comes from Roman law and its re-understanding in Republican theory[43] through the work of Machiavelli and the works of Jean-Jacques Rousseau, James Harrington and John Locke[44].

These two classical approaches, however, are not adequate for today. Modern extreme conditions are not always limited in time and space. Modern threats, such as terrorism, hybrid warfare, cyber threats, etc., require the introduction of emergency measures that may require simultaneous coexistence with the normal legal order -thus becoming normalized. Secondly, technological and industrial development, social changes and economic factors refute the possibility of establishing predefined legal regimes to effectively address the threats they may cause.

In other words, as per Carl Schmitt's theory, during extreme conditions the constituent power of the people as sovereign may be realized or change may occur in different forms. Revolution (in a more general sense - change) and constitution, therefore, describe two sides of liberal

[42] Hobbes T. Leviathan (ed. with Introduction and Notes]. C. A. Gaskin). Oxford, New York: Oxford University Press, 1998. P. 222

[43] Hamilton A. The Federalist No. 70. in Alexander Hamilton, James Madison, and John Jay. The Federalist with The Letters of "Brutus". Cambridge: Cambridge University press, 2003. P. 341

[44] Locke J. The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government.

political transformation, which embodies the fundamental social paradigm of the modern democratic state[45].

However, the nuance is that this is not only about the case of the exercise of primary constituent power, Constituent moment or constitutional revolution, when the tools of transformation are launched. Yet, "transformation" as a concept also embodies inner informal or formal change through the already existing means by the governing body. Such a constitutional phenomenon will be examined in the following chapters.

[45] Carl Schmitt (Stanford Encyclopedia of Philosophy)

1.3. Constitutional change in "Normalized long-term emergencies": a look into practice

The notion of extreme conditions covers not only crisis situations marked by riots, violent acts, social conflict and similar events. This concept also includes economic and social crises, which can also acquire signs of extreme, extraordinary and unpredictable. As history shows, both violent and non-violent extremes can equally pose an urgent threat to the fundamental principles of the constitutional order and become normalized.

In recent decades, democracies have increasingly relied on emergency measures to address divisive issues. This trend towards a "permanent" state of emergency has normalized the use of urgent defense mechanisms across the political spectrum, fueling both constitutional change, reform and contestation[46].

Sharing his views on restoration and recreation of normalcy, based on the analysis of Portugal's response to Covid-19 emergency, Pedro Lomba highlights that the constitutional emergency model aims to ensure that emergency declarations and actions are constitutionally bound, temporary, and respectful of fundamental rights and the principle of proportionality, which is closely tied to the "paradigm of constitutional self-defense"[47]. The goal is to restore constitutional normality promptly once the emergency subsides, with fundamental rights returning to their full effect.

[46] Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and The 'Norm-Exception' Dichotomy", in *Cardozo Law Review*, Vol. 21, 2000, pp. 1840-1841

[47] Lomba, Pedro: The Constitutionalized State of Emergency: The Case of Portugal, VerfBlog, 2020/4/15

However, this idealized view is challenged by the reality that emergencies often lead to irreversible changes, particularly in economic freedoms and activities. The emergency state is not just about defense but also involves proactive measures to support and protect citizens' rights, which may include creating exceptional rules, "when normality has been profoundly altered or generated a loss that cannot be restored"[48]. Such proactive measures can have both positive and negative effects in the long run, e.g. regarding remote jobs [49] or natural disaster response.[50]

As emergencies evolve, states must balance between defensive actions and creative solutions, ensuring ongoing legitimacy. Even after an emergency ends, some measures may persist under different legal justifications, raising questions about the transformative role of states during crises.

This urge for indulging into transformative power of states during crises, Allan Greene traces back to the post-9/11 global counter-terrorism response that set a precedent for permanent emergencies, where states adopt proactive measures that simultaneously often bypass constitutional values like human rights and the rule of law[51].

The 9/11 attacks marked a shift in government paradigms, with emergency powers becoming more prominent, as seen in the US with the Patriot Act of 2001. This act redefined the boundary between normalcy and exception, leading to what has been described as a 'permanent global

[48] ibid
[49] Le travail à distance, préfiguration du monde post-COVID-19, selon l'ONU | Nations Unies
[50] Turkish state of emergency gives government leeway in disaster response | Reuters
[51] Greene, Alan: From the War on Terror to Climate Change: Democracies and The Four Emergencies of the 21st Century (so far), VerfBlog, 2022/5/18

state of emergency' that has affected both domestic and international law[52]. The reliance on emergency powers is now considered a "new model" of governance [53].

The Covid-19 pandemic further exemplified this model, with over 100 countries declaring emergency regimes. Two years into the pandemic, debates about their legitimacy and effectiveness continued, with countries like China, Canada, and France experiencing prolonged states of emergency[54]. France, in particular, has seen its legal framework permanently altered by counterterrorism measures and the introduction of a new sanitary state of emergency in response to Covid-19[55].

These developments suggest that states of emergency are increasingly normalized, raising concerns about their impact on democratic governance and civil liberties. The trend towards permanent emergency powers poses significant challenges for maintaining a balance between security and freedom.

This 'new normalcy' also suggests that emergencies demand transformative, not temporary, responses. Similarly, economic crises have led to permanent shifts in policy-making[56]. While COVID-19 emergency measures appear more transient,other emergencies like climate change or recurring armed conflicts require a permanent, revolutionary approach that democracies seem reluctant to embrace[57]. This highlights a trend where emergencies lead to lasting changes

[52] Vedaschi, Arianna & Scheppele, Kim Lane (eds.) (2021). 9/11 and the Rise of Global Anti-Terrorism Law: How the Un Security Council Rules the World. Cambridge University Press.
[53] John Ferejohn, Pasquale Pasquino, The law of the exception: A typology of emergency powers, *International Journal of Constitutional Law*, Volume 2, Issue 2, April 2004, p. 215
[54] Coronavirus & Civic Space - ICNL
[55] Taming the exception? Lessons from the routinization of states of emergency in France | International Journal of Constitutional Law | Oxford Academic (oup.com)
[56] Hennette-Vauchez, Stéphanie: *The other legacy: States of exception as new ordinary paradigms of government, VerfBlog,* 2022/5/17
[57] supra Greene

in state identity and governance, challenging the notion of a return to pre-emergency "normality".

In emergencies, the executive often assumes a dominant role due to its capacity for swift action and handling sensitive information, leading to a pattern of deference from other government branches. This phenomenon, termed 'Constitutional Dictatorships' by Clinton Rossiter, does not preclude scrutiny; rather, it accentuates the need for it. Carl Schmitt's assertion that 'Sovereign is he who decides on the exception' suggests that such powers are beyond legal regulation, yet emergencies are replete with legal frameworks. Deference should not equate to abdication; both legislature and judiciary have constitutional duties to hold the executive accountable and ensure lawful action[58].

However, this is the commonly-accepted perspective on the necessity and objectivity of emergency regulations as well as oversight mechanisms. But what if transformation happens due to the emergency that has already ended or it's been continuously prolonged; or the emergency is not occurring in the country itself but has an imminent impact? What if the constitutional change in the latter leads to further deterioration of the rule of law?

Emergencies that substantially modify the constitutional order are seen not as an exercise of emergency power but as constituent power, akin to Schmitt's concept of sovereign dictatorship, which can create a new legal order[59]. However, this concept is less relevant today due to entrenched democracy and rule of law. Yet, Greene's idea of the transformative nature of a permanent state of emergency remains pertinent[60], as seen in Turkey's 2016-onwards post-coup actions where emergency powers were used to centralize authority and enact

[58] ibid
[59] Carl Schmitt (Stanford Encyclopedia of Philosophy)
[60] Greene A. Permanent states of emergency and the rule of law: constitutions in an age of crisis. 1st ed. Oxford, UK; Portland, Oregon: Hart Publishing, 2018. 256 p.

constitutional changes. Such transformations highlight the lasting impact emergencies can have on legal and political structures. The concept of 'emergency unamendability' has been proposed to limit constitutional amendments during crises, but more comprehensive solutions are needed for extreme cases where emergencies serve as a facade for state re-engineering[61].

As this kept happening through pandemic regarding adaptations of legal framework of the right to vote in Portugal[62], or alternatively, the notorious Constitutional Court's judgements on the constitutionality of the rights of movement, residence, assembly suspension and parliamentary unwillingness to amend the organic laws regulating emergencies in Spain,[63] there has been a developing controversy about constitutional change, emergency and the rule of law.

Prolonged states of emergency pose significant constitutional and democratic concerns, especially when used by governments to reinforce autocratic tendencies, as was seen in Hungary[64] and Poland[65]. These concerns are not limited to autocracies but also challenge established democracies, threatening liberal constitutionalism from within.

The Russian invasion of Ukraine in 2022 prompted Hungary to propose the 10th amendment of its Fundamental Law[66] (that later was voted for), allowing the government to declare a state of danger and rule by decree in response to armed conflicts or humanitarian crises in neighboring countries. This move is part of a broader trend of democratic and rule-of-law backsliding in Hungary, where exceptional measures have become so routine that they blur the line between emergency and ordinary law. The COVID-19 pandemic and the Ukraine war have

[61] Turkut, Emre: *On 9/11 and three natures of a permanent state of emergency, VerfBlog,* 2022/5/09
[62] Violante, Teresa: Voting in the Pandemic: How Omicron Restored the Right to Vote in Portugal, VerfBlog, 2022/1/28
[63] Legislative Activity and Inactivity in the COVID Pandemic in Spain – Verfassungsblog
[64] Kovács, Kriszta: *Hungary and the Pandemic: A Pretext for Expanding Power, VerfBlog,* 2021/3/11
[65] Jaraczewski, Jakub: *The New Normal? – Emergency Measures in Response to the Second COVID-19 Wave in Poland, VerfBlog,* 2021/3/24
[66] Justice Minister Submits 10th Constitutional Amendment Proposal (hungarytoday.hu)

exacerbated this trend, with emergency decrees becoming a permanent fixture in Hungary's legal order, allowing autocratic governance practices like ruling by decree on matters unrelated to the original emergencies, such as economic measures[67].

Hungary's transition from a pandemic 'state of danger' to a humanitarian 'state of danger' is imminent, with the government poised to prolong emergency powers indefinitely. Since 2015, Hungary has had a migration emergency regime for crises like the war in Ukraine, but the government opts for a new emergency framework that bypasses existing laws and centralizes power[68]. This move reflects an ongoing pattern where Prime Minister Viktor Orbán leverages emergencies to consolidate authority, raising concerns over the erosion of constitutional safeguards and the overuse of emergency measures as a norm in governance introducing a permanent state of exception.

However, not only countries where rule of law has been declining and authoritarian tendencies arising have been affected by the martial law in Ukraine or been experiencing emergencies of their own.

For instance, Canada's invocation of the Emergencies Act in February 2022 to address protests in Ottawa[69] marked its first use since 1988, highlighting a mild emergency. Concerns arose over secrecy, broad regulations, and untested compliance with rights, potentially allowing emergency laws to seep into ordinary law. This reflects on Canada's historical overreactions to emergencies, such as internment during World War II and martial law in 1970. While reforms like the Emergencies Act and Charter aim to prevent abuse of powers, they don't

[67] Mészáros, Gábor: *Never-Ending Exception: The Ukraine War Perpetuates Hungary's Government by Decree, VerfBlog,* 2022/5/10
[68] ibid
[69] Canada Gazette, Part 2, Volume 156, Number 1: Proclamation Declaring a Public Order Emergency

ensure it, as seen in the limited scope of inquiries into federal actions without addressing local policing failures that contributed to the protests[70].

In Europe, in mid-summer of 2022, almost half a year into Russian invasion of Ukraine, the Finnish Parliament unanimously passed a set of Bills in response to security threats from Russia's aggression in Ukraine and Finland's decision to seek NATO membership. The President signed these amendments into law on 8 July, with them taking effect on 15 July 2022[71]. This swift legislative action underlines the urgency and determination of Finland to protect itself against external threats.

However, the new laws could become dangerous tools if used by a government with an autocratic leaning, there are concerns about their potential misuse. One significant decision involved amending the Emergency Powers Act instead of properly defining "hybrid threats" or amending the Constitution's Section 23, which allows for temporary exceptions to fundamental rights during emergencies[72]. This approach resulted in the Emergency Powers Act being adopted as an Exceptive Act, a problematic legal tool that is incompatible with the Constitution, reflecting a flawed legislative process from 2011 that was meant to be temporary[73].

A new category of exceptional circumstances was added to the Emergency Powers Act, which remained vague and replaced Section 23 of the Constitution for derogating constitutional rights in emergencies. This category covers threats affecting decision-making, border security, public services, and critical infrastructures, allowing the government broad discretion to trigger it[74].

[70] Roach, Kent: *The Dilemma of Mild Emergencies that are Accepted as Consistent with Human Rights, VerfBlog,* 2022/5/12
[71] Scheinin, Martin: *Is Finland Joining the Backsliding Trend in Europe?, VerfBlog,* 2022/7/10
[72] Valmiuslaki 1552/2011 - Ajantasainen lainsäädäntö - FINLEX ®
[73] supra 71
[74] ibid

Additionally, amendments to the Border Guard Act were issued, allowing the temporary closing of borders and restricting cross-border traffic, which has already been triggered[75].

In conclusion, as it has been previously established, the constitutional change and constitutional reform process examined here is tied either to mitigating the emergency conditions and adapting or transforming the "response" procedure itself, both of which have been a common occurrence all over the world. The increasing normalization of emergency measures in democracies, has led to significant constitutional changes and reforms. The analysis of broader global trends reveals a shift towards a "permanent" state of emergency, raising concerns about the balance between security and fundamental rights. Historical precedents, such as Weimar, post-9/11 counter-terrorism measures, and the ongoing undeclared states of emergency in Turkey, Hungary etc. and martial law in Ukraine illustrate how emergencies can lead to lasting alterations in governance and civil liberties and affect other nations. The chapter highlights the critical role of constitutional safeguards and the need for accountability, even as emergencies necessitate swift executive action. Ultimately, it warns against the potential for emergencies to erode democratic principles and emphasizes the importance of scrutinizing the long-term impacts of emergency powers on the rule of law and state identity.

[75] Finland to close four border-crossing points on eastern border on Saturday (helsinkitimes.fi)

CHAPTER 2: CONSTITUTIONAL CHANGE AND EMERGENCIES AT THE NEXUS OF THE CONFLICT: COMPARATIVE ANALYSIS

As David Landau cautions: "Constitution-making moments should not be idealized; they are often traumatic events.[76]" Similarly, constitution-breaking or changing moments may be dramatic and traumatic events that occur during the periods of political upheaval, emergency, urgency and immense pressure on the actors involved. Formal constitutional amendments, as per definition, examined in Chapter 1, if not derogated from the classical understanding are procedurally challenging and are oftentimes constrained by a multitude of additional regulations.

For instance, entrenchment clauses in constitutions create higher barriers for amendments than ordinary laws, either making changes more difficult or outright impossible. These clauses are prevalent globally and serve to protect fundamental democratic values like human rights and the rule of law, yet they also raise debates about their legitimacy in restricting democratic sovereignty. An analysis of 210 constitutions from 1975 to 2015 indicates that historical precedents and specific procedural choices during constitution-making are more decisive in adopting entrenchment clauses than the state of democracy itself[77].

[76] Landau D.Constitution-making gone wrong. Alabama L Rev 64(923). 2012.p. 923

[77] Hein, M. Impeding constitutional amendments: why are entrenchment clauses codified in contemporary constitutions?. *Acta Polit* **54**,2019. p. 197

The 1996 Constitution of Ukraine exemplifies complex entrenchment with four distinct clauses: a two-thirds parliamentary majority is required for amendments, with changes to chapters I, III, and XIII needing a referendum (Art. 156); restrictions on rights or sovereignty are banned (Art. 157.1); amendments are not allowed during war or emergencies (Art. 157.2); and each provision can only be amended once per legislative period (Art. 158)[78]. Such clauses, aiming to safeguard constitutional democracy and protect against extraordinary circumstances, were found in four-fifths of all national constitutions by the end of 2015[79].

Similarly, emergency powers and relevant provisions regarding safeguards, prohibitions and restrictions are generally entrenched in the constitution, they are part of constitutional design. An "emergency constitution" is considered to be a part of the main constitution, outlining formal legal provisions for declaring emergencies, who can declare them, the conditions required, and the special powers granted. It excludes government decrees or informal traditions. These provisions aim to restore constitutional order by temporarily suspending it, setting a legal maximum for government actions during emergencies, and providing checks to prevent misuse by those seeking to maximize power[80].

The Weimar Constitution of 1919 is a historical example where Article 48 provided the President with the authority to take emergency measures without the prior consent of the Reichstag. This article was intended to safeguard the state during times of crisis but also opened the door for potential misuse, as seen during the rise of the Nazi regime. Academic discourse often cites this as a cautionary tale of how emergency provisions can be both necessary for state security and a vulnerability if not carefully limited and overseen [81].

[78] supra 3, Constitution of Ukraine
[79] supra Hein,M.
[80] Christian Bjørnskov, Stefan Voigt, The architecture of emergency constitutions, *International Journal of Constitutional Law*, Volume 16, Issue 1, January 2018
[81] Ackerman, B. 2004. The Emergency Constitution. *The Yale Law Journal*, 113(8), 1029-1091

Some countries like Norway and Canada do not detail emergency provisions in their constitutions, leaving the legislature to define emergency powers. For instance, the US Constitution allows habeas corpus suspension under specific conditions, and the National Emergencies Act of 1976 outlines the president's emergency declaration process. Canada's Emergencies Act of 1988 stipulates conditions for declaring various emergencies and their management. Conversely, the Netherlands' Constitution provides a general framework, delegating details to ordinary laws[82]. While legislative discretion in emergencies may work in nations with strong constitutional traditions, it poses risks where democratic values are less established. Therefore, modern constitution-building often involves directly incorporating emergency powers into the constitution to ensure procedural clarity and maintain the balance of power during crises.

As for formal constitutional change, many constitutions limit constitutional amendments, amendments to electoral law or even certain types of institutional reform during emergencies, a temporal measure distinct from unamendability. The Venice Commission's Report on Constitutional Amendment (CDL-AD(2010)001, Para. 224) suggests that the constitutional legislator should determine when such situations arise, cautioning against executive misuse to block reforms[83]. Internationally, there's no formal rule against amendments in emergencies, yet several constitutions prohibit it to protect political fundamentals, as emergencies can impair parliament's function and political freedoms (Albania, Estonia, Georgia, Lithuania, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain, Ukraine). The checklist constructed by the Commission on the Relationship between the Parliamentary Majority and the Opposition

[82] Bulmer, E. 2018. Emergency Powers. International IDEA Constitution-Building Primer (No. 18)
[83] European Commission for Democracy Through Law (Venice Commission). (2020). Compilation of Venice Commission Opinions and Reports on States of Emergency. Strasbourg: Council of Europe. CDL-PI(2020)003

in a Democracy also recommends avoiding constitutional amendments during emergencies to prevent executive overreach[84].

Although, there's no international law barring elections during emergencies, some constitutions allow postponing them or extending parliamentary terms. The Venice Commission's Code of Good Practice on Referendums outlines standards for free and fair elections, emphasizing universal suffrage, clear questions, independent organization, objective information, neutral media, and respect for fundamental human rights. The Commission warns against democratic process risks when normal law is restricted and electoral principles like equality of opportunity are compromised. It approved Georgia's constitutional provision barring elections during emergencies or martial law until 60 days post-emergency to ensure a conducive political atmosphere (**Opinion on the Draft Amendments to the Constitution of Georgia (CDL-AD(2004)008)**)[85].

Thus, deriving from the previous review and analysis, there is a presumption that if the "emergency constitution" and the entrenched constitutional clauses exist, they would have two major goals- mitigating the causes and minimizing negative effects of the emergency; and moving to reestablish the status quo- the "constitutional normalcy" that existed ante the emergency. Yet, despite the overarching understanding that all the legal instruments, whether they are of the nature of accommodation or transformation, they shall be used primarily for restoration purposes. But as we've established in Sub-Chapter 1.2, that is a classical understanding. What is the modern one, in this case?

States normally require a justification for the temporary derogation from civil and political rights or constitutional text, framework amendments that would allow the government to deal

[84] ibid
[85] ibid

more effectively with the emergency, yet what if the change that occurs is gradual and largely informal? What if such informal constitutional change occurred during or post-declared martial law or military emergency that was prolonged indefinitely or had continuous recurring regime establishments over the years? What are the threats to democracy and implications for the rule of law? These are the central questions of this thesis.

2.1 Constitutional Change in conflict-related emergencies

War has been a constant in human history, with the dream of perpetual peace being an age-old aspiration. However, it wasn't until after World War II that the international community formally prohibited unilateral aggression (Art.2(4)UN Charter)[86]. The rules governing the use of force are crucial in international law, yet security-related actions nationally reveal a variety of normative(according to the emergency provisions entrenched in the constitutional text or organic laws) and political responses.

International peace largely depends on regulating military power both nationally and internationally. A review of the acts and resolutions from the League of Nations to the United Nations shows an evolution in controlling force, despite new threats from various actors and advanced military technologies, as it is becoming more and more vital to uphold the principles of jus ad bellum to prevent unjustified public emergencies and undermining of these norms. This complex interplay of national legislation and international standards is required to create

[86] Chapter I: Article 2(1)–(5) — Charter of the United Nations — Repertory of Practice of United Nations Organs — Codification Division Publications

an effective response within the countries for the future possibility of restoration of peace and "constitutional normality" [87].

A public emergency includes armed conflict, genocide, riots, insurrections and public health emergencies. During officially proclaimed public emergencies based on the conflict situation that results from the use of force and threatens the nation's life, states may derogate from most rights temporarily and exceptionally[88]. A public emergency, as defined by the Siracusa Principles, is an "exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organized life of the community," surpassing mere civil disturbances[89]. It must be "actual or imminent," not speculative, and can include armed conflict, genocide, riots, insurrections, and public health crises[90]. During such times, states must adhere to international obligations like humanitarian law (IHL), which mandates non-discrimination in applying the laws of warfare. Both human rights law and IHL stress the fundamental nature of non-discrimination in peace or emergency[91].

Yet recent derogations for events like terrorist attacks, coups, "special operations" and undeclared emergencies, examples of which are available worldwide, have sparked debates in the fields of international, supranational, constitutional law and human rights court considerations.

[87] Sergey Sayapin, Rustam Atadjanov, Umesh Kadam, Gerhard Kemp, Nicolás Zambrana-Tévar, Noëlle Quénivet, International Conflict and Security Law. Springer Nature, 2022. p. 282

[88] see in Human Rights Committee, CCPR General Comment 29: States of Emergency, Seventy-second Session, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para 2 "of exceptional and temporary nature"

[89] Siracusa Principles, Principles 39 and 40.

[90] Hartman J F (1981) Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations. Harvard International Law Journal 22:1–52

[91] Alston P, Goodman R (2013) International Human Rights. Oxford University Press, Oxford p.402

In general, there are two types of approaches regarding derogations and their regulations: the human rights approach (aimed at individuals) and the public international law approach regarding the state's response(more procedural in nature). The human rights approach focuses on ensuring that any derogations do not infringe upon the core, non-derogable rights and are strictly necessary for the situation at hand. It emphasizes that limitations on rights must be proportionate, legal, and legitimate, with a clear aim to address a pressing public need. Some rights, such as the right to life, freedom from torture, and freedom of thought, are non-derogable under Article 4(2) of the ICCPR to protect the nation's life without undermining fundamental rights and freedoms [92]. On the other hand, the public international law approach allows for derogations in response to lawful acts of war or other significant threats, provided they meet stringent criteria of necessity and lawfulness. Additionally, states must notify affected individuals and international bodies like the UN of any derogations, through application, reservation, unilateral declarations[93] etc. ensuring transparency and accountability[94].

Linking these approaches to national states of emergency, it is recognized internationally that a state may declare such an emergency in response to severe threats. However, this declaration must align with the principle of minimal derogation, meaning that any restrictions on rights should be no more than what is strictly required by the exigencies of the situation[95]. This ensures that while states have the flexibility to respond to crises, they remain bound by their obligations under international law to uphold fundamental human rights and maintain the organized life of their communities.

[92] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para 25.
[93] Greene, Alan. "Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights." *German Law Journal* 12.10 (2011): 1764–1785.
[94] Derogations and Reservations in International Law - International Law - Oxford Bibliographies
[95] supra 87

The two main types of conflict-related states of emergency—martial law and the state of siege—represent national responses to crises that are deeply rooted in historical and legal precedents. Martial law, often associated with military control over civilian functions of government, is a response to significant threats against national security, while a state of siege is typically declared in times of war or insurrection, transferring certain powers from civil to military authorities[96]. Constitutional law plays a major role in creating an intricate link between these national emergency responses and international standards. This framework ensures that while states exercise their sovereignty in managing emergencies, they do so within the bounds of international human rights law, respecting the principle of minimal derogation and maintaining a balance between national security and individual liberties. Thus, constitutional law serves as the nexus that harmonizes domestic measures with international obligations during states of emergency.

When governments face emergencies, the choice between martial law and the state of siege is crucial. Both doctrines aim to protect the government and people by enhancing military readiness and executive power to address disturbances or foreign aggression effectively. However, they differ in their approach to maintaining democratic checks and balances and safeguarding fundamental liberties.

Martial law and the state of siege share a primary goal: to bolster government response during crises. They both expand executive authority, allowing for swift action against threats. A constitutionally-based scheme for emergency powers offers significant advantages. It allows for a pre-planned, reasoned response to national crises, ensuring rapid action while upholding individual rights and democratic principles. Over half of the 28 European constitutions differentiate at least two states of exception: martial law for war and other emergencies. Nations

[96] Feldman, W. (2005). Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege. *Cornell International Law Journal, 38*(3), Article 17.

with recent authoritarian histories, like Estonia, Poland, and Spain, have a three-tier system for disasters, emergencies, and siege/war. Hungary's constitution uniquely specifies five states of exception, though their distinctions are not always explicit.[97]

Constitutional dualism protects civilian legal operations during emergencies by maintaining two separate legal systems: one for normalcy and another for emergencies. This ensures that any restrictions on freedoms are confined to the emergency period, preventing lasting impacts on constitutional guarantees[98]. The Korematsu case illustrates the potential for post-hoc rationalizations that can occur without such separation[99].

Furthermore, constitutional provisions for emergencies can be updated to address modern warfare and technology changes, allowing nations to respond effectively to evolving threats. Unlike martial law, which is based on outdated precedents and is difficult to modernize, constitutional emergency powers provide a flexible approach to national security challenges. This adaptability is crucial in an era where warfare has evolved from traditional invasions to include threats like terrorism, hybrid warfare and gang-related civil unrest.

However, martial law and state of siege provisions within constitutional frameworks are typically reserved for declared emergencies, serving as legal mechanisms to manage acute national crises. Nevertheless, the occurrence of undeclared emergencies or prolonged states of emergency, originating from the conflict or previously imposed state of emergency—whether permanent or mild (as defined in Chapter 1)—poses a significant threat to the rule of law. In such scenarios, where the primary basis of conflict is not formally acknowledged, there is a heightened risk of informal constitutional changes that can undermine legal norms and

[97] Khakee, A. (2009). *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*. DCAF Policy Paper No. 30, p.11
[98] ibid, p.18
[99] Facts and Case Summary — Korematsu v. U.S. | United States Courts (uscourts.gov)

principles. This process can lead to a gradual erosion of established legal checks and balances on government power, as authorities may exploit the ambiguity and extended duration of an emergency to enact measures that would otherwise be unacceptable. The lack of formal declaration prevents the clear application of emergency provisions, creating a gray area where the rule of law is vulnerable to being weakened or disregarded under the guise of maintaining order or national security.

Emergency powers, akin to democracy, are inherently political and present a challenge in projecting these concepts onto the global political stage, particularly as global governance increasingly grapples with crisis responses. The normative debate surrounding constitutional interpretation and authoritative weight on emergency-related decisions—whether it should be the domain of parliament or the judiciary—extends beyond power allocation to questions of authority and the state's ability to command citizen loyalty[100]. Political constitutionalists argue that parliament's representative nature legitimizes state authority, while legal constitutionalists contend that judicial pronouncements carry authoritative weight[101].

This debate shows a deeper conception of sovereignty as institutional, where either the legislature or judiciary is seen as sovereign. Yet, this view fails to capture the dynamic interplay between law and politics within constitutional governance. Constitutionalism arose as a response to societal changes that diminished traditional authorities and centralized power within the state. It has since served as a means for the state to legitimize its power and authority over society. Constitutionalism's essence lies in its rootedness in the interaction between state and society; detached from this interaction, its principles become elusive[102].

[100] M.-S. Kuo, 'From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization' in R. Albert and Y. Ronzai (2020)
[101] Kuo, Ming-Sung, Democracy and Emergency: Finding the Constitutional Foundation of the Knowledgeable State in Social Dynamics, June 17, 2022. p.8-12
[102] ibid

The inception of modern constitutionalism highlights society's role in reshaping state power and authority within a constitutional framework. As such, constitutional change is not merely legal or political but a reflection of ongoing societal dynamics[103]. This understanding is crucial for appreciating how constitutional orders evolve and adapt in response to both internal developments and external pressures. In this context, international law and constitutional law intersect with broader democratic principles and institutional frameworks[104], shaping how states navigate constitutional change while maintaining legitimacy and authority.

There is a multitude of questions to address regarding the rigidity of the constitution, constitutional unamendability, constituent power vested in "we the people" (and who is to be understood as such),yet once we established that constitutional change is simultaneously legal, political and social, it is tied directly to the institutions, it becomes easier to identify informal constitutional change in forms other than extra constitutional constitutional change but rather institutional and societal legal framework.

Informal constitutional change encompasses various mechanisms beyond formal amendments, including interpretation, legislation, conventions, customs, policies, and the influence of European or international law.[105] The context in which a constitution operates can significantly alter its normative outcomes.

Constitutional conventions can informally influence written constitutions by creating, slowing, or hastening constitutional changes without altering the text. Such changes result in new constitutional meanings through the informal entrenchment of conventions, leading to two

[103] Mark Tushnet, Constitutional revolutions and the constituent power: A rejoinder to Jan Komárek, *International Journal of Constitutional Law*, Volume 13, Issue 4, October 2015, Pages 1059–1062
[104] H. Heller, Sovereignty: A Contribution to the Theory of Public and International Law, ed. and trans. D. Dyzenhaus (2019) p. 101–109, 184.
[105] Passchier, R. (2017, November 9). Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective. The Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University.

primary methods of change: incorporation of new elements or repudiation of old ones. For instance, the Venezuelan Constitution allows municipalities to retain fines and administrative charges, while the Mexican Constitution allots daily broadcast time to the Federal Electoral Institute during elections[106].

However, no constitution can fully reflect all constitution-level laws due to statutes gaining quasi-constitutional status, extracanonical rules forming part of the 'constitution outside the constitution,' and constitutional conventions from political practice exerting significant influence. These conventions either fill voids in the constitutional text where it is silent or refine it by adding new interpretations to existing provisions without inconsistency, thus revealing the true function of a constitution beyond its written text[107].

Scholars debate whether such changes occur at distinct moments or gradually over time, and whether they happen silently or with explicit recognition by constitutional actors. Voermans warns that informal changes could undermine a written constitution's value, advocating for constitutional issues to be addressed through formal amendment procedures[108]. Grimm echoes this sentiment, emphasizing that a constitution must be supreme law to effectively regulate public power. He argues that supermajority requirements for amendments are crucial to maintain political consensus and protect the constitution from being manipulated by transient majorities[109].

Yet what would be the situation if there is a supermajority? And if there is a situation of constitutional exception known as emergency? We'll look at it comparatively from the perspective of prolonged states of both declared and undeclared emergencies putting Ukraine

[106] Albert, Richard N.. "How Unwritten Constitutional Norms Change Written Constitutions." (2015).
[107] ibid
[108] supra 105
[109] ibid

and its informal constitutional change over the last decade, since the 2014 occupation of Crimea, in focus.

2.2 Informal Constitutional Change in prolonged states of emergency: comparative analysis of Ukraine with Georgia, Colombia and Peru

Formal constitutional norms can evolve over time through changing interpretations and practices, even when they initially don't align with the constitution's intent (or even could have been illegitimate). For instance, despite Ukraine's constitution declaring its territory indivisible, the 2014 events in Crimea, where Russian forces and separatists took control and a subsequent referendum led to Crimea joining Russia, challenged this principle. Ukrainian constitutional actors have not recognized the constitutionality of these developments, viewing them as a violation of Ukraine's territorial integrity[110]. However, such "facts" may gradually

[110] Bilych et al. (2014), 'The Crisis in Ukraine: Its legal Dimensions', Razom, 21. http://www.usukraine.org/pdf/The-Crisis-in-Ukraine-Its-Legal-Dimensions.pdf

gain acceptance as justified over time, illustrating how illegitimate actions can morph into informal constitutional change despite the non-willingness of the society to accept it but not having a real opportunity to change it.

To my opinion, this situation and the previous resolution by Verkhovna Rada (the parliament) of Ukraine on the resignation of its former President Viktor Yanukovich[111], who fled the country, leaving the parliament without any formal legal mechanisms prompted the creation of circumstances for a different type of informal constitutional change that we see today.

Qualitative and empirical evidence suggests that the centralization of political power during emergencies normally in the hands of one authority (the President or the executive) can challenge democratic values and potentially lead to prolonged states of emergency from international conflict or civil war farther in time after the ceasefire or even peace and reconciliation procedures[112]. This centralization may incentivize leaders to engage in executive aggrandizement prompted by the indefinite emergency, affecting the balance of power in democracies[113]. Moreover, constitutional change and powers extended in wartime often persist into peacetime, raising questions about the classification of states with strong emergency powers as true liberal democracies. The study by Bryan Rooney highlights that variations within democracies, especially those with strong emergency powers, can blur the lines between autocracy and wartime democracy[114]. It shows the need for refined measures of regime types that account for institutional structures during conflicts, happening largely due to informal

[111] RESOLUTION of the Verkhovna Rada of Ukraine On Self-Removal of the President of Ukraine from the Exercise of Constitutional Powers and Calling of Early Presidential Elections (Vidomosti Verkhovna Rada (VVR), 2014, No. 11, p. 158).
[112] Rooney, B. (2019). Emergency Powers in Democracies and International Conflict. Journal of Conflict Resolution, 63(3), 644-671
[113] Tarunabh Khaitan, Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism, *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, Pages 342–356
[114] ibid Rooney B.

constitutional change, rather than relying on traditional distinctions between democracy and autocracy[115].

2.2.1 Militarization of the law enforcement

The militarization of law enforcement, as theorized for contexts of prolonged emergencies, extends beyond the civilian police force, encompassing a broader range of government agencies that adopt military-style weapons, organizational structures, and training. This process results in a spectrum of law enforcement practices, from non-militarized civilian police focused on community-oriented policing and using force as a last resort, to fully militarized entities such as paramilitary forces and soldiers tasked with domestic public safety, operating under military jurisdiction with a higher degree of force and hierarchical command[116]. This continuum reflects the varying degrees to which law enforcement agencies in different contexts have integrated military principles into their operations for maintaining public safety.

Paramilitary police represent a midpoint in the militarization of law enforcement, adopting military practices while maintaining civilian law jurisdiction and a serve-and-protect approach (e.g. Chile's Carabineros, Brazil's Polícia Militar, Spain's Guardia Civil). At the extreme end, armed forces assume public safety roles, operating under military law with an engage-and-destroy directive, and reporting to the Ministry of Defense or Ministry of Public Safety or Internal Affairs (e.g. constabularized militaries are the Peruvian armed forces during part of Alberto Fujimori's rule)[117].

[115] ibid Rooney, B.
[116] Flores-Macías, Gustavo A., and Jessica Zarkin. "The Militarization of Law Enforcement: Evidence from Latin America." *Perspectives on Politics* 19.2 (2021): 519–538
[117] ibid

For example, in Colombia, following a peace agreement with FARC in 2016[118], there was a shift from a longstanding narrative dividing the country into "civilized" central areas and "savage" peripheral regions controlled by guerrillas. This dichotomy has historically justified the militarization of these marginal areas to combat guerrillas and integrate them into the national order. The peace agreement, which underwent revisions after a narrow plebiscite rejection, marks a policy translation of this narrative, aiming to demilitarize and restore state presence in these long-neglected territories[119].

Colombia's approach to civil-military governance, particularly through the Integrated Action doctrine, exemplifies the militarization of law enforcement in prolonged states of emergency and post-conflict settings. This doctrine, fully implemented in 2004 under Defense Minister Santos and President Uribe, blends social policies with military and police action, reflecting a belief that militarization is key to nation-building and sovereignty. The Center for Coordination of Integrated Action (CCAI), established to institutionalize this model, directs development as a security strategy for territorial control, funded by the US since 2007[120]. The CCAI's expansion from seven regions in 2005 to fifteen by 2011 showed the state's reliance on military ideologies for unifying the nation and asserting state presence in marginalized areas, often at the expense of civilian governance and oversight[121].

The militarization of law enforcement poses significant challenges for democratic governance, impacting citizen security, human rights, police reform, and legal order. As law enforcement becomes more militarized, with heavier weaponry, combat training, and hierarchical

[118] *Noticias de América Latina y el Caribe* . 2017. "Colombia: segundo informe sobre la implementación de los acuerdos con las Farc de la Fundación Paz y Reconciliación." July 21
[119] (PDF) Militarism on the Colombian Periphery in the Context of Illegality, Counterinsurgency, and the Postconflict (researchgate.net)
[120] Schultze-Kraft, Markus. 2012. "La cuestión militar en Colombia: la fuerza pública y los retos de la construcción de la paz." In Construcción de paz en Colombia , ed. Rettberg, Angelika.
[121] Diamint R. (2015). A new militarism in Latin America. *Journal of Democracy*, 26(4), 155–168.

organization, the potential for excessive force and violence increases. This is particularly true for law enforcement institutions, which have the greatest disruptive capacity and are more likely to engage in human rights violations. The distance between military personnel and communities can lead to a lack of accountability and an escalation of violence as organized crime responds in kind to the militarized force. These dynamics can result in a cycle of increased casualties and a tit-for-tat escalation with criminal organizations, undermining constitutional protections and eroding the principles of democratic governance[122].

The militarization of law enforcement complicates police reform and strains the constitutional framework[123]. Popular support for tough-on-crime policies and the perceived effectiveness of militarized forces reduce incentives for reforming less militarized agencies[124]. The deployment of military forces in domestic policing roles, often without clear legal boundaries, can undermine the rule of law and contribute to impunity[125]. As law enforcement becomes more militarized the challenges in aligning their actions with democratic principles and civilian legal jurisdictions increase, leading to higher levels of violence, human rights violations, and a disconnect between law enforcement practices and the legal order.

In Peru, the military's role in domestic law enforcement dates back to Alberto Fujimori's authoritarian regime, particularly in regions suspected of Shining Path activity. Since 2003, the Peruvian government has consistently declared the VRAEM region—a major cocaine production area—as an emergency zone, granting the armed forces control over internal

[122] Hochmüller M., Müller M.-M. (2023). The myth of demilitarization in Costa Rica. *NACLA Report on the Americas*, 55(4), 370–376, for this para see also Harig C. (2022). Militarisation by popular demand? Explaining the politics of internal military roles in Brazil. *Bulletin of Latin American Research*, 41(3), 465–482

[123] supra 114

[124] supra 120.2

[125] Tiscornia, L. (2024). Police reform in the aftermath of armed conflict: How militarization and accountability affect police violence. *Journal of Peace Research*, *61*(3), 383-397

security[126]. Presidents have renewed states of emergency in various districts to combat drug trafficking, with President Pedro Pablo Kuczynski doing so in 2016 and 2017[127]. This militarization of law enforcement during undeclared emergencies has become a form of informal constitutional change that persists to this day.

Colombia's experience parallels Peru's, with the armed forces involved in internal order since the 1960s. The establishment of specialized military units like the Counternarcotic Brigade and subsequent operations under Plan Colombia significantly increased military intervention in domestic affairs. The Ministry of National Defense's Fourteenth Directive further involved the military in organized crime combat, exemplified by large-scale operations like Operation Troy. Despite the 2016 peace accord with FARC, Colombia continues to deploy its military for citizen security activities, including occupying former FARC territories under Plan Victoria[128].

This ongoing reliance on military forces for law enforcement in both countries indicates a lasting impact on their constitutional practices. The blurred lines between military and police roles during and after declared emergencies have led to a sustained militarization of law enforcement, raising concerns about the implications for the rule of law and civil liberties. The situation portrays the need for careful consideration of how prolonged states of emergency can lead to enduring changes in governance and legal frameworks.

The militarization of law enforcement in Peru and Colombia offers a cautionary tale for Ukraine, where, following the Russian invasion of 2022, there has been a significant increase in military involvement in domestic affairs. As of 2024, Ukraine's Parliament has passed laws

[126] El Peruano. 2016. "El estado de emergencia en el VRAEM regirá por 60 días." October 6.
[127] supra 115
[128] Meger, Sara, and Julia Sachseder. 2020. "Militarized Peace: Understanding Post-Conflict Violence in the Wake of the Peace Deal in Colombia."

to expand conscription and tighten enforcement amid the ongoing conflict[129]. Martial law[130] and mobilization[131] have been extended and amended multiple times, with the latest prolongation being after May 6th , 2024[132]. While these measures are deemed necessary for national defense, they raise concerns about the long-term implications for Ukraine's rule of law and democratic governance.

If this state of emergency becomes prolonged, as seen in Latin American examples, there is a risk that the distinction between military and police roles may blur, potentially leading to a permanent shift in governance structures and legal norms. Ukraine has endorsed a strategic law enforcement reform plan to align with EU standards[133] but the continuous reliance on military forces for internal security could hinder these efforts. The challenge for Ukraine will be to balance immediate security needs with the preservation of democratic institutions and civil liberties, ensuring that temporary measures do not result in lasting constitutional changes that compromise the rule of law.

Simultaneously, Ukraine's adoption of a new hybrid army transformation model has been crucial in its defense against the Russian invasion. The model introduced new structures and priorities, such as an effective command and control structure, development of a Non-Commissioned Officers (NCO) Corps, Special Force Operators, Territorial Defense Forces, and targeted procurement objectives. These reforms have bolstered Ukraine's resilience and warfighting potential while simultaneously increased the level of absolute militarization of the

129 Ukraine's Controversial New Plan to Enlist More Soldiers | TIME
130 Pravda - Ukrainian parliament approves extending martial law in Ukraine
131 Law of Ukraine on General Mobilization (amended as of May 14th) | від 24.02.2022 № 65/2022 (rada.gov.ua)
132 On the prolongation of martial law | від 06.05.2024 № 271/2024 (rada.gov.ua)
133 Ukraine Endorses Strategic Law Enforcement Reform Plan to Align with EU Standards — EUAM Ukraine (euam-ukraine.eu)

country's life[134]. It went even further when certain Police units were granted auxiliary power to exercise military functions.

During martial law, the National Police of Ukraine experienced an expansion of their functions and powers. Legislation was amended to allow the police to operate within the constraints of martial law, balancing their duties with restrictions on citizens' rights and freedoms. Key changes included temporary laws optimizing police activities, addressing the status of missing persons, and assigning special ranks to police officers[135].

One notable amendment was to the police uniform regulations. Officers in civilian clothes are generally required to carry a special badge, but this requirement can be waived during martial law or when it hinders operational activities. Additionally, identification numbers or special badges on protective equipment are not mandatory when such equipment is used by officers performing their duties under martial law[136].

Article 23 of the Law of Ukraine "On the National Police" saw extensive amendments, granting new powers such as: requesting necessary information from state bodies and legal entities for police duties, with a mandated response time; escorting and guarding detained individuals, including prisoners of war, with transport to specified institutions by the Ministry of Internal Affairs (MIA); detaining individuals in temporary detention centers for various offenses; conducting operational demining activities; managing access to special explosive works for

[134] Sanders, D. (2023). Ukraine's third wave of military reform 2016–2022 – building a military able to defend Ukraine against the Russian invasion. *Defense & Security Analysis*, *39*(3), 312–328.
[135] Law of Ukraine "On Amendments to the Laws of Ukraine "On the National Police" and "On the Disciplinary Statute of the National Police of Ukraine" in order to optimize the activities of the police, including during martial law" - is valid temporarily, for the period of martial law in Ukraine, implementation of measures to ensure national security and defense and 60 days thereafter.
[136] Law of Ukraine "On Amendments to Certain Laws of Ukraine on Assignment of Special Ranks to the Police during Martial Law"

police officers; representing Ukraine in and cooperating with Interpol, Europol and other states' authorities[137].

Changes to Section 5 of the Law also enhanced police measures during martial law: the authority to check documents and record data for individuals resembling escapees from prisoner-of-war detention facilities; the right to stop vehicles based on information about occupants resembling escapees; the use of technical means like drones, specialized software for analytical processing of photo and video information, including identification purposes[138].

These changes reflect a comprehensive expansion of police capabilities aimed at maintaining order and security during martial law. Even though measures are supposed to be temporary but with martial law being constantly prolonged, it raises concerns for the possibility to balance derogations from the human rights protection and the threat of active infringements.

Despite Ukraine's progress in building a military capable of self-defense, it faces persistent challenges that impede effective reform. These include inadequate democratic oversight, rampant corruption, and the need to modernize state-owned defense industries to meet the Ukrainian Armed Forces' needs[139].

In response to Western pressure, Ukraine established anti-corruption institutions before the invasion[140]. However, these bodies have struggled to effectively combat high-level corruption. The ongoing conflict may serve as a catalyst for further change.

Militarization in countries like Peru, Colombia, and Ukraine can be seen as a form of informal constitutional change when it significantly alters the balance of power within the state without

[137] supra Law of Ukraine "On the National Police"
[138] ibid
[139] supra 133
[140] Fighting Corruption in Wartime Ukraine | Wilson Center

formal amendments to the constitution. This shift often occurs during conflict-related emergencies when military forces take on greater roles in governance and security, which can lead to an erosion of checks and balances. For instance, increased police powers and border control practices have been linked to the expansion of military influence and a weakening of constitutional constrainti[141].

In Colombia, the absence of procedural safeguards for territorial units has led to institutional instability and threats of defederalization due to the enormous number of militarized self-sustaining law enforcement units and agencies scattered regionally, which can be exacerbated by militarization during times of internal conflict[142]. Similarly, historical periods in Peru under military rule have seen significant changes in the role and outlook of the armed forces, impacting institutional structures[143].

The challenge for these countries in restoring constitutional normality post-conflict is to recalibrate the role of the military to ensure it does not undermine constitutionalism and democracy. This involves re-establishing civilian oversight, ensuring transparency in defense spending, and reaffirming the primacy of democratic institutions. The process requires careful demilitarization to prevent a permanent shift in power dynamics that could hinder democratic governance.

2.2.2 Institutional reform and its implications for long-term emergencies

Informal constitutional change, particularly through institutional reform during prolonged emergencies, is a nuanced process. As was mentioned before, this type of change involves the alternation of constitutional norms and practices without formal amendments to the

[141] Goodman, N.P. Border militarization and domestic institutions. *Const Polit Econ* (2024)
[142] Institutional Instability and (De)federalizing Processes in Colombia
[143] Masterson, Daniel M. "Caudillismo and Institutional Change: Manuel Odría and the Peruvian Armed Forces, 1948-1956." *The Americas* 40.4 (1984): 479–489.

constitution's text and it is often driven by the need to adapt to extraordinary circumstances that demand swift and effective responses, which formal procedures may not be able to provide in a timely manner.

During prolonged emergencies, governments may resort to informal institutional reforms to enhance their capacity to manage the crisis. These reforms can include expanding executive powers, altering the roles of legislative and judicial bodies,delegating legislative powers, reforming or creating new institutions to deal with specific aspects of the emergency. While these changes are often justified as necessary responses to urgent situations, they can also lead to concerns about the erosion of checks and balances and the potential for abuse of power.

One of the instances of such change is the development of informal coping strategies by local actors to circumvent formal institutional restrictions. Over time, these strategies can gain an institutional reality of their own, leading to endogenous institutional change[144].

The phenomenon of informal constitutional change without formal amendment has been studied from various perspectives. Some scholars focus on comparative analysis, examining how different countries experience and manage such changes. Others explore the political law approach, which highlights the gaps in formal legal frameworks and emphasizes the relevance of informal constitutional change[145].

It is crucial to critically examine these informal changes to ensure that they do not compromise fundamental constitutional principles or lead to unintended long-term consequences. The

[144] Carlos Bernal, Foreword—Informal Constitutional Change: A Critical Introduction and Appraisal, *The American Journal of Comparative Law*, Volume 62, Issue 3, Summer 2014, P. 493–514
[145] Altwegg-Boussac, Manon. (2020). Informal Constitutional Change and Political Law. 10.1007/978-3-030-38459-3_6.

balance between flexibility and stability must be carefully managed to maintain the integrity of constitutional governance during emergencies.

One example of informal constitutional change through institutional reform can be found in the Georgian Parliament's and executive's evolving roles within its country's governance structure. Initially conceived with limited powers, the executive has gradually acquired more influence through informal changes in institutional practices after 2020 state of emergency Presidential decree[146] rather than formal constitutional amendments.

During the 2020 state of emergency in Georgia, the government declared a state of emergency on March 21, extending it initially until May 23, and again to July 2021. There were concerns about the growing influence of the executive branch over the Constitutional Court, which was evident in the handling of lawsuits related to the pandemic[147]. Additionally, on June 29, 2020, the President of Georgia signed a new law amending the Constitution to change the election system and electoral process[148]. As was discussed previously, electoral laws and emergency laws are generally viewed as "not to be amended", yet this example emphasizes the autocratic turn that the Georgian government took in 2020[149], similarly to the situation in 2008 after Russia's occupation of North Ossetia and Abkhazia regions, prompting minority violence and crises[150].

In Georgia, the President is the state head and Supreme Commander-in-Chief of the Defense Forces of Georgia, and similarly to Ukraine is not considered to be part of the executive branch and only exercises powers specified directly in the Constitution[151]. While Parliament holds

146 On the Declaration of State of Emergency throughout the whole territory of Georgia
147 BTI 2024 Georgia Country Report: BTI 2024 (bti-project.org)
148 Georgia: Constitution and Election Code Amended to Change Electoral System | Library of Congress (loc.gov)
149 The Dangers of Democratic Backsliding in Georgia | Council on Foreign Relations (cfr.org)
150 Clash in the Caucasus: Georgia, Russia, and the Fate of South Ossetia | Origins (osu.edu)
151 Constitution of Georgia, Article 49 (1) and 49 (2).

lawmaking authority, both formal laws and material legal acts, which include subordinate normative acts as per Article 7 (9) of the Law of Georgia "On Normative Acts"[152], impact the country's legal framework.

The Constitution, under Article 71, permits temporary alterations to the separation of powers in emergencies like armed conflicts, case of violation of the country's territorial integrity, military coups or disasters of natural, techno or epidemic character. During such times, the President can issue decrees with the force of organic law based on the Prime Minister's recommendation[153]. This situation necessitates an analysis of how governmental powers, particularly norm-making, the scope and limits of power delegation in emergencies, what institutions and governmental actors can exercise such power and which standards are upheld despite the state of emergency or martial law.

The Georgian Constitution establishes the Government as the highest executive authority, responsible for domestic and foreign policy, without constitutional law-making powers[154]. However, in practice, the government influences legislation through its right of legislative initiative and its unique role in the State Budget process.

Specifically, the Government has the privilege to request expedited reviews of draft laws and is solely authorized to present the State Budget draft to Parliament after preliminary committee consultations that practically mirrors Ukrainian legal tradition.Additionally, Parliament can only increase budget expenditures or introduce new financial obligations with Government approval, ensuring executive control over fiscal legislation[155].

[152] Geórgia_Law of Georgia "On Normative Acts".pdf
[153] Constitution of Georgia, Article 71
[154] Constitution of Georgia, Article 54
[155] Constitution of Georgia, Article 66

Nevertheless, despite certain practical implications regarding the scope of executive powers, delegation of power to issue subordinate normative acts, thus transferring part of legislative mandate by the President from legislature to the executive was not permitted according to the text of the Constitution, but "served the purpose of flexibility", according to the explanation provided:

> Since the legislative branch does not possess the ability to provide normative regulations for every issue related to public life, legislation requires distribution of work between the executive and legislative branches of the government. The legislative branch has to regulate normative aspects of important issues, while leaving the prerogative to regulate the details to governing bodies[156].

It is crucial to ensure that certain issues specified in the Constitution are regulated only through the "law" to avoid unconstitutionality on formal grounds[157]. According to the case law of the Constitutional Court of Georgia:

> A reference to regulating a matter through organic law or law does not in itself exclude the Parliament's ability to delegate the power to regulate these issues to another body but sets forth guiding criteria and principles related to proper delegation. In certain cases, this stems from the necessity to delegate this power to other organs, and it is thus compatible with the requirements of the Constitution.[158]

The Presidential Decree №1 of 21 March 2020 was challenged as it left the determination of restricted rights to the Government of Georgia, rather than specifying them. In emergencies and martial law, the President's decrees have the legal effect of organic laws, effectively replacing the Parliament to some extent. Thus, a decree can assign tasks to governing bodies

[156] RELATIONSHIP BETWEEN THE PROCESS OF EMERGENCY RELATED NORM-MAKING AND THE PRINCIPLE OF THE LEGAL STATE IN LIGHT OF A STATE OF EMERGENCY IN GEORGIA DECLARED ON 21 MARCH 2020_Nodar Kherkheulidze

[157] Judgment of the Constitutional Court of Georgia №2/3/1279 dated 5 July 2019 in the case of "Levan Alapishvili and JSC 'Alapishvili and Kavlashvili – Georgian Bar Group' v. the Government of Georgia", para. II-19.

[158] Judgment of the Constitutional Court of Georgia №2/5/658 dated 16 November 2017 in the case of "Citizen of Georgia Omar Jorbenadze v. the Parliament of Georgia", para II-27.

but must adhere to Georgian and international law-making standards. Decrees must not exceed permitted delegation limits and must comply with the Constitution and the Organic Law "On Normative Acts". Even with the legal effect of organic laws, the President must follow the requirements of the Law "On Normative Acts" and relevant case-law, particularly from the Constitutional Court of Georgia, to ensure proper delegation of powers. Failure to do so threatened legal stability with inconsistent legislation[159].

Consequently, the rule of law is fundamental to democratic governance and ensures that all public powers act within the constraints set out by law. In Georgia, Article 71 of the Constitution allows for temporary alterations to the separation of powers during emergencies, granting the President significant decree powers[160], yet this raises concerns about potential overreach and the erosion of checks and balances as it already happened with the Presidential Decree of 2020. Prolonged states of emergency can lead to a 'new normal' where executive powers are expanded and normalized, potentially threatening democratic principles and accountability.

If this influence extends unchecked during emergencies, it could lead to informal constitutional changes where executive decrees replace parliamentary legislation, undermining the legislative branch's role. To mitigate these risks, it's essential that any delegation of power is clearly defined, limited in scope, and subject to judicial review. The Constitutional Court's guidance on proper delegation is crucial in maintaining the constitutionality of such actions, unless the Court is being politically influenced.

Overall, while flexibility during emergencies is necessary, it must be balanced with safeguards to protect the rule of law and prevent the entrenchment of autocratic governance.

[159] supra 152
[160] Constitution of Georgia, Article 71

While there are promising implications for Georgian democracy, especially from the civil society, war in Ukraine has affected both countries, causing the EU to rethink its enlargement policies (despite granting candidacy to both countries)[161]. Now, after reviewing the legal situation in Georgia regarding the dangers of not maintaining constitutional checks and balances, there is a need to look at Ukraine as raising similar concerns due to its rapid pace of constitutional change.

Here, we'll look at several major reforms: the reform of the Constitutional Court of Ukraine and the adaptations of parliamentary legislative process to the realia of martial law,after the initial review of the constitutional reform tradition in Ukraine.

Since gaining independence, Ukraine has notoriously faced pervasive corruption at all government levels. The judiciary has been particularly susceptible to external influences, and even after establishing specialized anti-corruption institutions post-2014, these bodies were often undermined by political interference.

In response, the Ukrainian Parliament has undertaken extensive reforms to combat corruption and strengthen the rule of law, with substantial influence from the European Union (EU) as part of Ukraine's bid to join the EU. Reforms included establishing key institutions: the National Anti-Corruption Bureau (NABU), the Specialized Anti-Corruption Prosecution Office (SAPO), the National Agency for Prevention of Corruption (NAPC), the Asset Recovery and Management Agency (ARMA), and the High Anti-Corruption Court (HACC). Despite resistance, including a Constitutional Court ruling against NABU-related presidential

[161] Geopolitical and Security Concerns of the EU's Enlargement to the East: The Case of Ukraine, Moldova and Georgia - Intereconomics

powers, Parliament enacted laws to align NABU regulations with the constitution and ensure its independence[162].

A significant reform was amending Article 80 of the Constitution, removing parliamentary immunity to hold deputies accountable for criminal activities. Additionally, Parliament passed an anti-money laundering bill aligning with European standards and a de-oligarchization law to limit oligarchs' influence in politics and privatization[163].

On February 24, 2022, Ukrainian President Volodymyr Zelensky issued Decree No. 64/2022 on the Introduction of Martial Law on the entire territory of Ukraine. The Verkhovna Rada (Ukrainian Parliament) approved the presidential decree allowing imposition of the legal regime of martial law for a period of 30 days, that over more than two years has been consecutively prolonged[164].

Furthermore, following the Russian invasion, Parliament, in coordination with NABU, indicted several judicial officials tied to oligarchic corruption and replaced the Kyiv District Administrative Court with a new one. Parliament also passed the Anti-Corruption Strategy, crucial for EU membership candidacy, to reduce corruption in critical sectors like judiciary, economy, and defense[165].

Other war effort legislation included governing activities for conscription and compulsory military service; specifying conditions for excusing people from military service under martial law; specifying the procedure for contract military service by foreign and stateless persons in

[162] Ukraine's path to European Union membership and its long-term implications (bruegel.org)
[163] Ukraine's Parliament in the war shows continued functioning, adaptation and transformation (hansardsociety.org.uk)
[164] Ukraine: Martial Law Introduced in Response to Russian Invasion | Library of Congress (loc.gov) see also supra 131
[165] Wise, C. R., Suslova, O., & Brown, T. L. (2024). Ukraine's parliament in war: the impact of Russia's invasion on the Verkhovna Rada's ability and efforts to legislate reforms and join the European Union. *The Theory and Practice of Legislation*, *12*(1), 1–20.

the Armed Forces of Ukraine; ratifying a memorandum of understanding between Ukraine's Government and NATO on cooperation for consultation, management, communication, intelligence, surveillance, and reconnaissance within the NATO Partnership for Peace Programme etc[166].

Further legislative actions addressed the opaque ownership of shadow companies, improved the regulation of beneficial ownership, and aligned Ukrainian laws with EU directives to combat money laundering and terrorist financing. Transparency in defense procurement was boosted following a corruption scandal in the defense ministry, leading to new legislation requiring public disclosure of purchase prices[167].

Civil society organizations (CSOs) have played a vital role, urging Parliament to ratify the Istanbul Convention against domestic violence and advocating for environmental laws during the war. The EU has supported CSOs in reform efforts, funding projects like 'Civil Society for Ukraine's Post-War Recovery and EU Readiness' to aid the Cabinet of Ministers and Parliament in overcoming war consequences and advancing towards EU membership[168]. These projects focus on improving public procurement policies, designing economic reforms, ensuring access to justice, restoring governance in liberated areas, and reintegrating displaced persons.

However, after CEPR proposed a 'Marshall Plan' for Ukraine's reconstruction, it included essential governance reforms for post-war Ukraine[169]foundations for which began being fast-tracked through the parliament, which created a dichotomy of opportunities for more radical reforms, aligning with Ukraine's EU candidacy and democratic aspirations and total

[166] ibid
[167] ibid
[168] Ukraine-wartime-recovery-role-civil-society-lutsevych.pdf.pdf (chathamhouse.org)
[169] Ukraine's needed postwar institutional changes | CEPR

militarization, at first glance reasonably explained by the ongoing war and existing security threats.

It is evident that post-war periods are critical for shaping a country's future institutions. Ukraine must aim to establish a liberal democracy with robust institutional safeguards immediately after the war, yet this requires preparation even while the conflict continues. The reconstruction phase will need swift decision-making, especially for physical infrastructure, while ensuring democratic processes compatible with EU membership[170].

One of the most prominent examples is judicial reform: judiciary's reconstruction should be top-down with international expert assistance. Other reforms should reinforce the separation of powers, maintaining a balanced executive and legislative relationship. Strengthening the party system, civil service professionalization, and continuing decentralization are also essential.

In the very center of this turmoil since 2020 have been constitutional crisis[171], challenges to anti-corruption mechanisms and European Union (EU) integration efforts[172]. The constitutional crisis of 2021 emerged as a central moment for Ukraine's legal framework. The Constitutional Court's decision to annul critical anti-corruption legislation sparked concerns over judicial independence and the potential for unchecked political power. Scholars such as Jakab and Kirchmair have emphasized the importance of constitutional safeguards in maintaining the rule of law, arguing that the crisis underlined the need for robust checks and balances within the judiciary and implementation of actual practices and narratives in addition to formal rules when it comes to democratic institutions[173].

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[170] ibid

[171] Ukraine's Constitutional Court Crisis | Institute for War and Peace Reporting (iwpr.net)

[172] Ukraine takes two steps forward, one step back in anti-corruption fight – POLITICO

[173] András Jakab, Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary, *The American Journal of Comparative Law*, Volume 68, Issue 4, December 2020, Pages 760–800,

But the CCU, tasked with upholding the Constitution, caused a significant crisis on October 27, 2020, when it declared key elements of Ukraine's anti-corruption laws post-2014 unconstitutional[174]. This decision led to the cancellation of over 100 ongoing corruption investigations, potentially threatening future EU-Ukraine trade and economic cooperation under the 2014 Association Agreement.

In response, President Zelensky issued a decree ultra vires, calling for the premature dismissal of all Constitutional Court judges, and suspended the Court's chairman for two months[175]. These actions, of questionable legality, drew widespread criticism and caused chaos in Ukraine's political system.Then, the President appealed to the Venice Commission, the Council of Europe's advisory body on constitutional matters, to assess the legality of the Court's decision. On 10 December, the Venice Commission, the Council of Europe's constitutional advisory body, published its second urgent opinion on Ukraine's constitutional situation following the Constitutional Court's controversial Decision of 27 November 2020. This Decision, which invalidated significant portions of anti-corruption legislation, underlined the need for reform of the Constitutional Court. The decision showed that the Court did not possess the mechanisms that other high courts possess to try to diffuse a highly political case[176].

The first urgent opinion, released on 9 December, addressed the implications of the Decision on anti-corruption laws and proposed solutions for the Verkhovna Rada. The second opinion

[174] Decision 13-p/2020, CCU, October 29, 2020

[175] President of Ukraine signed a decree on the suspension of Oleksandr Tupytsky from the post of a judge of the Constitutional Court for a period of two months," President of Ukraine official website, December 29, 2020

[176] Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legislative situation regarding anti-corruption mechanisms following Decision No. 13-r/2020 of the CCU

provided recommendations on reforming the Constitutional Court in alignment with Ukraine's Constitution and principles of constitutionalism[177].

Consequently, the biggest risk that hasn't been fully resolved yet is the independence and proper functioning of the CCU, as it is incapable of providing neither proper judicial oversight nor act as the guardian of the Constitution. In June, the EU member states voted to grant EU-candidate status to Ukraine, recognizing its reform achievements amidst Russian aggression. The European Commission recommended seven key reforms, placing the reform of Ukraine's Constitutional Court at the forefront[178].

To address EU recommendations, Ukraine's Parliament proposed draft law №7662[179] in September, introducing a competitive selection process for CCU judges, featuring an Advisory Group of Experts (AGE)[180] for candidate assessment to significantly improve the non-partisan, three institution based CCU judge selection system, ensuring maximum transparency, minimizing corruption risks, and helping to ensure the integrity of the CCU judiciary… or that was the idea.

This draft suggested that only candidates approved by the AGE could be appointed, ensuring integrity and independence. However, the Venice Commission's urgent opinion on the draft law recommended that AGE decisions should not be binding, potentially allowing low-integrity candidates to be appointed. Additionally, the Commission endorsed political

[177] CDL-AD(2021)006-e Ukraine - Opinion on the draft law on Constitutional Procedure (draft law no. 4533) and alternative draft law no. 4533 -1 adopted by the Venice Commission at its 126th Plenary Session (19-20 March 2021)
[178] EU grants Ukraine candidate status, 'beginning a long journey together' | Reuters
[179] Draft law № 7662 as a direct way for the politically loyal composition of the Constitutional Court until the end of April – DEJURE Foundation
[180] Ukraine's parliament approves bills seen as key for EU talks | Reuters

involvement in the AGE, citing unspecified "current circumstances," likely referring to the ongoing war with Russia[181].

Comparing key recommendations for amending the Law on the Constitutional Court, with previous opinions it is quite unexpected that some of them are not what could potentially be viewed as promoting active engagement of the Court in institutional dialogue but rather limiting and halting the judicial activism and creating loopholes for possible politicization by: explicitly limiting the scope of Constitutional Court decisions to the specific questions raised; requiring Grand Chamber confirmation for decisions declaring legal provisions unconstitutional; creating a screening body for judicial candidates but without the representatives of civil society[182].

With current emergency going into a prolonged state the ambiguity of constitutional change and rapid-tracking of reforms prompts both misalignment with the needs of the community, lack of continuity of constitutional tradition, inconsistencies of the recommendations even by international bodies as well as factual turmoil on the ground with potential institutional deadlock due to poorly conducted and outlined institutional reform.

In conclusion, informal constitutional change through institutional reform in prolonged emergencies is a dynamic process that reflects the tension between the need for adaptability and the preservation of constitutional order. While it can provide necessary flexibility and adapt to the urgency of the process in times of crisis, it also poses challenges to democratic governance and requires vigilant oversight to prevent potential overreach as in Georgia or absolute misapplication as in Ukraine.

[181] Venice Commission's urgent opinion CDL-PI(2022)046 on the draft law №7662

[182] ibid

CHAPTER 3: DEMOCRATIC DECLINE IN LONG-TERM EMERGENCIES: IMPLICATIONS OF INFORMAL CONSTITUTIONAL CHANGE FOR THE RULE OF LAW

As with any constitutional debate, terminology and the scope of its definition varies substantively, especially with regards to Democratic Decline. Drawing on Rosalind Dixon and David Landau's Abusive Constitutionalism article[183] and the review essay by Thomas M. Keck, to describe the situation of deterioration of the rule of law and democratic crisis or decline using three competing metaphors - democratic erosion, democratic backsliding and abusive constitutionalism[184].

Thomas Merk, in reference to various scholars, like Levitsky and Ziblatt, who settled on the term "democratic erosion", Haggard and Kaufman, who similarly to Nancy Bermeo adopt the term of " backsliding" as "rather deliberate negative change", Tom Ginsburg and Aziz Huq who use other metaphors relating to "decay", "constitutional rot" etc., theorizes the definition and solutions to this phenomenon[185]. Nonetheless, for the purposes of this research, terms "democratic decline" and "democratic backsliding" will be used almost indiscriminately to supplement the concept of the "erosion of the rule of law" prompted by certain types of informal constitutional change in or as a result of long-term emergencies.

[183] Rosalind Dixon and David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy (Oxford: Oxford University Press, 2021)
[184] Keck, Thomas M. "Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline." *Law & Social Inquiry* 48.1 _2023. p. 314
[185] ibid p. 317-320

Democratic backsliding is no longer a threat only to democracies in transition, but now affects both established and new democracies, as well as those remaining in any type of "extraordinary", "transitional" or "transformative" state[186].

Emergency powers are essential during states of emergency, differing from normal executive powers to address crises effectively. While authoritarian regimes inherently possess such powers, liberal democracies must declare states of emergency to enact them, reflecting their adherence to democratic principles and the rule of law even in crises. These democracies, bound by international norms and human rights laws, must maintain legal certainty and the separation of powers, altering state structures only as necessary to restore normalcy post-crisis[187]. Autocracies, on the other hand, operate efficiently without such legal constraints. Democracies require specific laws for emergencies to protect citizens and ensure state functionality. The rule of law and democracy dictate that emergency laws must be concrete, necessary, and urgent, with clear guidelines for initiation, duration, and cessation of emergency states. The degree to which a state follows these principles correlates with its alignment with democratic ideals but states deviating from these standards may still be democracies[188].

Moreover, neither democracy nor rule of law are uniform concepts, they consist of a multitude of categories that shall be evaluated and given weight comparatively, both separately and in tandem as their sub-categories both contribute to and oppose each other (e.g. human rights and security).[189]

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[186] CHOUDHRY, SUJIT. "Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School." *Global Constitutionalism* 7.1. 2018. p. 55-57

[187] Zwitter, Andrej. "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy." *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, vol. 98, no. 1, 2012, pp. 95–107

[188] ibid

[189] R Kleinfeld, Competing Definitions of the Rule of Law – Implications for Practitioners, Carnegie Papers No. 55, 2005 p. 20-24

Reviewing previous examples given in depth, informal constitutional change comes in a variety of forms, relating both to models of adaptation or transformation of emergency provisions and to institutional or socio-political reforms occurring with the state of emergency serving as the background - or "new normality".

Unwritten constitutional norms as well as informal constitutional change can coexist with a codified constitution and formal amendments, but issues arise when they override rather than support the written law, challenging the rule of law[190] as in examples regarding militarization of the law enforcement in Peru and Colombia or informal power recomposition in power delegation case of Georgia. While a constitutional text alone doesn't ensure the rule of law, it serves as an agent for democracy by providing a framework for citizens to understand their rights and duties. This 'popular textualism' is crucial for nonlawyers interpreting their constitutional governance[191]. Moreover, written constitutions play a role in nation-building by uniting diverse peoples under a common legal framework. Although the rule of law doesn't necessitate a written constitution, as seen in jurisdictions without one, codification can bolster democratic values like transparency, accountability, and predictability. However, this is just one aspect of the complex interplay between textual interpretation and legal practice[192].

In both Colombia and Peru, periods of prolonged conflict-related emergencies have significantly contributed to the militarization of law enforcement and its subsequent impact on democracy and the rule of law.

In Colombia, more than fifty years of armed conflict involving various guerrilla groups, most notably the Revolutionary Armed Forces of Colombia (FARC), have led to millions of

[190] Albert, Richard, How Unwritten Constitutional Norms Change Written Constitutions (July 9, 2015). 38 Dublin University Law Journal 387 (2015), Boston College Law School Legal Studies Research Paper No. 364. p. 20
[191] ibid
[192] ibid

internally displaced people and widespread violence[193]. The peace agreement in 2016 marked a turning point, but the legacy of conflict persists, with continued violence affecting the most vulnerable communities[194].

Peru has also experienced its share of conflict, such as the Colombian-Peru War in the early 1930s and more recent internal conflicts involving insurgent groups like the Shining Path[195]. These conflicts have necessitated a strong military presence, which has often spilled over into law enforcement roles.

For instance, the militarization of law enforcement as the informal constitutional change in Colombia and Peru has been a significant factor contributing to the democratic decline and erosion of the rule of law in these countries. These prolonged conflicts have created a state of emergency that justified extraordinary measures, including the deployment of military forces in domestic policing roles. This has led to a blurring of lines between military and police functions, contributing to an environment where democratic norms are compromised and the rule of law is weakened.

Militarization often replaced the traditional police role of 'protect and serve' with a military stance of 'overwhelm and defeat,' which led to human rights violations and undermined public trust in law enforcement. In Peru, according to Amnesty International, for example, the use of military personnel for immigration enforcement has raised serious concerns about the risk to migrants' and refugees' human rights.[196]

[193] Colombia - Changing conflict dynamics still disproportionately affect most vulnerable | IDMC - Internal Displacement Monitoring Centre (internal-displacement.org)
[194] ibid
[195] Peru: Colombia-Peru War Remembered 80 Years Later · Global Voices
[196] Peru: Militarization of borders puts human rights at risk - Amnesty International

The militarization in response to these emergencies has had lasting effects on both countries' democratic institutions. It has fostered a culture where military solutions to civil issues are normalized, leading to an erosion of civil liberties and a decline in public trust in government institutions. This historical context helps explain why both Colombia and Peru have seen their rule of law indices decline over time.

Rule of law indices reflect this decline. Colombia's ranking fell in the World Justice Project's Rule of Law Index, indicating a deterioration in factors such as fundamental rights and constraints on government powers[197]. Similarly, Peru's ranking also fluctuated, with noted declines in areas like government constraints. [198]

The experiences of Colombia and Peru with the militarization of law enforcement and prolonged states of emergency serve as a cautionary tale for Ukraine. Since the Russian invasion in 2022, Ukraine has seen an increase in military involvement in governance. While these measures are necessary for national defense, they pose risks to Ukraine's democratic governance and rule of law.

Georgia's democratic backsliding over the past decade has also become more pronounced, particularly in the context of Russia's invasion of Ukraine and its own prolonged states of emergency, despite the indices portraying a different picture with order and security outweighing other rule of law sub-categories[199]. The ruling party has been accused of undermining democratic institutions, exerting control over the media, and engaging in election malpractices. These actions have eroded public trust and stalled Georgia's path to EU

[197] Colombia_2021 WJP Rule of Law Index Country Press Release.pdf (worldjusticeproject.org)
[198] Peru_2021 WJP Rule of Law Index Country Press Release.pdf (worldjusticeproject.org) see alsoWJP Rule of Law Index | Peru Insights (worldjusticeproject.org)
[199] WJP Rule of Law Index | Georgia Insights (worldjusticeproject.org)

membership, with the EU setting stringent criteria for judicial and media independence and reducing oligarchic influence[200].

The introduction and subsequent withdrawal of the "foreign agent" law, reminiscent of similar legislation in Russia, further highlighted Georgia's democratic challenges[201]. The law aimed to label organizations with foreign funding as "foreign agents," drawing widespread protests and international condemnation[202]. This incident illustrates the tension between government actions and public sentiment, as nearly 90 percent of Georgians support Ukraine in its conflict with Russia, despite the government's cautious stance[203].

The intertwined fates of Georgia and Ukraine emphasize the broader geopolitical implications. Georgia's democratic regression contrasts sharply with Ukraine's resilience in the face of Russian aggression. Success in Ukraine could reinforce the viability of democratic and Euro-Atlantic aspirations for other post-Soviet states. Conversely, a democratic collapse in Georgia would serve as a stark reminder of the fragility of democratic progress in the region and the persistent threat of reverting to authoritarian influence under Russia. International pressure is crucial to steering Georgia back toward a democratic path, ensuring that the struggle for democracy in the region is not lost.

Similarly, Ukraine's situation highlights the dangers of normalizing long-term emergency states and informal constitutional changes. Such conditions can lead to a gradual erosion of democratic norms and civil liberties. However, Ukraine also has the opportunity to circle back from martial law and state of emergency to a progressive constitutional normality. As a

[200] Public Opinion Survey Residents of Georgia | International Republican Institute (iri.org)
[201] Russia Is Furious as Georgians Fight for Their Democracy (foreignpolicy.com)
[202] ibid
[203] NDI Georgia_March 2022 poll_final_public version_ENG.pdf

democracy, it is crucial for Ukraine to ensure that any temporary measures do not become permanent fixtures that undermine its democratic institutions.

One of the first steps, recognized by the international community, is to hold the parliamentary and presidential elections[204] despite direct prohibition in the Constitution to do so until martial law is revoked[205]. Although, with recent technological developments[206] and progressive reforms, structuring an abundance of constitutional change could uncover potential opportunities for leaving the vicious circle of permanent emergency and moving forward before it reflects upon the fundamental constitutional framework.

The path forward for Ukraine requires careful balancing of security needs with the preservation of democratic values. Learning from the experiences of other nations, Ukraine can strive to restore its constitutional normality and strengthen its rule of law once the immediate threats have subsided.

[204] Ukraine Can't Hold Elections During the War. Does It Matter? | Journal of Democracy
[205] Why Ukraine cannot hold elections under the martial law
[206] Ukrainian elections in Diia - Ministery of Digital Transformation reveals | RBC-Ukraine

CONCLUSION

The concept of extreme conditions in constitutional theory transcends formal emergency regimes like martial law or states of emergency. It encompasses situations threatening the political system or rule of law, prompting varied interpretations and applications, as seen during events like the pandemic. Understanding these conditions involves distinguishing between normal and extreme circumstances, crucial for preserving constitutional principles amidst crises.

The distinction between normality and emergency is foundational in constitutionalism, where emergencies are viewed as exceptions to the rule of normal conditions. This conceptual framework helps justify emergency measures while ensuring they do not undermine constitutional order. However, the challenge lies in preventing emergency measures from becoming normalized, risking prolonged deviations from constitutional norms.

This paradox shows the need for rigorous justification of emergency actions, balancing short-term crisis management with long-term constitutional integrity. As emergency measures

integrate into constitutional practice, their careful application becomes essential to safeguarding democratic governance and the rule of law.

Many modern constitutions, shaped by crises, aim to provide stability and resilience, as seen in the constitutions of Ukraine and Georgia, which include provisions for handling emergencies to maintain legal continuity during turmoil or apply instruments of constitutional change.

Recent decades have seen democracies increasingly resort to emergency measures, leading to a normalization of such responses and blurring the line between temporary emergency and ordinary law. This trend, exemplified by responses to events like the COVID-19 pandemic and conflicts such as Russia's invasion of Ukraine, highlights the transformative impact emergencies can have on legal frameworks and governance.

This shift towards a "permanent" state of emergency raises significant concerns about the balance between security measures and fundamental rights in democratic societies. Historical and contemporary examples illustrate how emergency powers, once invoked, can result in enduring changes to governance structures and civil liberties, posing challenges to democratic norms and constitutional safeguards. As governments navigate emergencies, ensuring accountability and safeguarding the rule of law become paramount in mitigating potential long-term erosion of democratic principles.

In examining the link between constitutional change and emergencies, it becomes evident that these moments are extraordinary, often characterized by both trauma and transformation in political landscapes. The integration of emergency powers into constitutional frameworks aims to provide clarity and procedural safeguards during crises. However, challenges arise when emergencies become prolonged or recurrent, leading to informal constitutional changes that may undermine democratic principles. The evolving nature of emergency responses requires a reassessment of constitutional norms to mitigate risks of executive overreach and uphold the

rule of law. The ongoing debate highlights the need for adaptive constitutional frameworks that balance emergency responses with safeguarding fundamental rights and democratic processes, thereby ensuring resilience in times of crisis without compromising long-term democratic stability.

In exploring the intersection of informal constitutional change and conflict-related emergencies, it becomes clear that these dynamics are shaped by both national responses and international legal norms. The challenge lies in balancing the necessity of temporary derogations during emergencies with the imperative to protect fundamental rights and maintain societal order, highlighting the complex relationship between constitutional reforms and rule of law.

Established informal changes regarding militarization of law enforcement, and institutional reform, tied to prolonged emergencies in Ukraine, Georgia, Colombia and Peru were examined. Emergency normalization in democracies led to significant constitutional framework reforms. Analysis of these tendencies revealed how shifts towards permanent emergencies were raising ambiguous security and rights concerns. Precedents illustrate governance alterations adversely affect checks and balances and increase the risk of politicization of institutions (reform of the Constitutional Court of Ukraine), as well as open grounds for executive aggrandizement (legislative prerogative delegation in Georgia). These findings lead to the need to emphasize safeguards and accountability amid swift action in emergencies and warn against erosion of democratic principles.

The research explored implications when recurring emergency regimes informally transition from de jure to de facto without formal amendments. The central question that was explored throughout the thesis related to how these informal changes challenge upholding democracy and rule of law, including for Ukraine entering a third year of martial law.

General presumption was reaffirmed: democratic decline, often manifested as the erosion of the rule of law through informal constitutional change during emergencies, is a threat to democracies at all stages. This phenomenon is not uniform; it varies based on a country's unique socio-political landscape and history. For instance, Colombia and Peru have seen militarization of law enforcement due to prolonged conflicts, which has led to democratic backsliding and weakened rule of law. In Colombia, decades of conflict with guerrilla groups have resulted in violence and displacement, despite a peace agreement in 2016. Peru's history with insurgent groups has similarly necessitated military involvement in civilian policing.

Such militarization has replaced traditional police roles with military operations, often leading to human rights violations, diminished public trust, normalized military responses to civil issues and eroded civil liberties.

Rule of law indices from the World Justice Project reflect these declines. Colombia's ranking fell in certain years when the legal regime of emergency was reinstated due to deteriorating fundamental rights and government constraints, while Peru showed fluctuations with declines in government constraints.

Ukraine's situation since the 2022 Russian invasion mirrors these challenges. Increased military governance poses risks to democratic governance and rule of law. However, Ukraine also faces an opportunity to revert from martial law to constitutional normality post-crisis.

Georgia's democratic backsliding is pronounced amidst Russia's invasion of Ukraine. Accusations against its ruling party for undermining democracy have stalled its EU membership progress. The fate of democracy in post-Soviet states like Georgia and Ukraine is intertwined with broader geopolitical dynamics. Successes or failures in these countries have regional implications for democratic aspirations or authoritarian influences.

In conclusion, Ukraine as the country that is considered "not yet" at that stage of prolonged emergency must balance security needs with democratic values preservation. Learning from other experiences can guide Ukraine towards restoring constitutional normality and strengthening rule of law after the conflict comes to an end. Holding elections despite constitutional prohibitions under martial law is a step recognized by the international community towards this goal.

In conclusion, these nations' experiences highlight the importance of maintaining democratic integrity during emergencies and avoiding permanent emergency states that erode democratic norms and civil liberties.

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