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LEGITIMACY OF EMERGENCY POWERS: THE UKRAINIAN EXPERIENCE UNDER MARTIAL LAW AS A TEST CASE FOR GENERAL LEGAL THEORY

ЛЕГІТИМНІСТЬ НАДЗВИЧАЙНИХ ПОВНОВАЖЕНЬ: ДОСВІД УКРАЇНИ В УМОВАХ ВОЄННОГО СТАНУ ЯК ПЕРЕВІРКА ЗАГАЛЬНОТЕОРЕТИЧНОГО ПРАВОЗНАВСТВА

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The full-scale armed aggression of Russia against Ukraine has exposed, with unusual acuity, the theoretical limits of the concept of legitimacy as applied in general legal theory. When the state suspends the ordinary mechanisms of democratic accountability, restricts fundamental rights under martial law, and administers territory captured in the course of armed conflict, the normative justification of each such measure becomes irreducible to formal legality. The existing Ukrainian scholarship on this problem, while growing since 2022, remains primarily institutional in orientation. Kovalchuk proposes a two-plane model for assessing the legitimacy of extraordinary state measures: such measures must be both urgent, in the sense of responding to an actual threat to the constitutional order, and accountable, in the sense of remaining subject to judicial and civil-society oversight [1]. This contribution is significant, but it leaves open the question of how the substantive content of restrictions – their proportionality, their correspondence to the values of human dignity and the rule of law – is to be evaluated independently of the adequacy of surrounding procedures. The present theses proceed from the thesis, developed in general legal theory, that legality and legitimacy are irreducibly distinct yet systematically related categories, where legality is a necessary but insufficient condition of legitimacy [2], and apply this analytical framework to three dimensions of the Ukrainian experience under martial law.

First dimension: the legitimacy of the suspension of elections. Ukrainian law expressly prohibits the holding of elections during martial law [3; 4], and the legality of this prohibition is beyond dispute. Its legitimacy, however, cannot be determined by formal enactment alone. The comparison between the wartime electoral practices of the United States and the United Kingdom during the Second World War is instructive here, but its lesson is more nuanced than is commonly supposed [5]. The United States held presidential elections in November 1944; the United Kingdom did not hold elections until July 1945, a decade after the previous vote. The difference was not one of constitutional principle but of empirical circumstance: the scale of the conflict, the degree of direct exposure of the state's territory to hostilities, and the realistic possibility of conducting a genuinely free vote. In the Ukrainian context, the risks that substantively justify the suspension are not logistical but normative: the impossibility of free campaigning under conditions of information mobilisation and monopolisation, the vulnerability of the electoral process to hostile interference by the aggressor state, the inability of millions of displaced citizens and servicemembers to express their genuine will, and the institutional instability that a governmental transition would generate under maximum military pressure [5]. The proportionality assessment that legitimacy requires is therefore not a comparison of two quantifiable harms but a judgement about whether the very conditions for legitimate electoral expression can, under the circumstances, exist at all.

Second dimension: acts of occupation administrations. The relationship between occupation, legitimacy, and international humanitarian law is more complex than a simple binary between legitimate and illegitimate occupying administrations suggests. A foundational principle of International Humanitarian Law (IHL) is the separation of jus in bello from jus ad bellum: the obligations governing the treatment of civilian populations apply to any party exercising effective territorial control, regardless of the legality of the armed force that established that control. Article 55 of the Fourth Geneva Convention requires any occupying power to ensure the provision of food and medical supplies; Article 69 of Additional Protocol I extends this to other vital supplies [6]. This framework generates a principled distinction that the Ukrainian case illustrates directly. The Russian occupation administration in Ukrainian territories is not only illegal under jus ad bellum but also structurally illegitimate in the normative sense: it does not express the will of those subject to it, systematically violates IHL through the imposition of citizenship and loyalty oaths and the deportation of children, and pursues the project of denying the very statehood of those it governs. The Ukrainian military administration established in Russia's Kursk region following the operation of August 2024 presents an analytically

different case: whatever the jus ad bellum assessment of that operation, the administration it created functioned to fulfil, not violate, the positive IHL obligations incumbent on any de facto territorial authority, ensuring access to medical care and maintaining essential services for the civilian population. The legitimacy of acts issued by an occupying administration is therefore not determined by the legality of the occupation itself but by whether those acts conform to, or contradict, the normative standards that IHL establishes to protect the fundamental interests of civilian populations.

Third dimension: the active maintenance of legitimacy under suspended electoral accountability. The suspension of elections does not exhaust the relationship between legitimacy and democratic accountability under martial law. The most theoretically significant feature of the Ukrainian experience is the active effort by state authorities to maintain the normative justification of their power through non-electoral mechanisms. The most visible of these is the systematic rotation of senior officials – regional military administrators, commanders, and prosecutors – creating accountability cycles within the institutional hierarchy that partially compensate for the absence of electoral renewal. Rotation preserves the structural condition of removability that elections normally guarantee, and in this sense functions as a legitimacy-sustaining practice even in their absence. A complementary mechanism is the maintenance of parliamentary oversight of presidential decrees and the continuation of judicial review in matters related to military administration. Kovalchuk's observation that wartime legitimacy requires the preservation of independent judicial and civil-society control [1] points precisely to this dimension: the absence of elections does not automatically undermine legitimacy if the institutions that remain functional continue to constrain the exercise of power. Survey evidence from 2023 indicates that 81 per cent of Ukrainian citizens oppose holding elections during active hostilities [7], which itself constitutes a form of social recognition that partially compensates for the absence of electoral renewal. The legitimacy of Ukrainian state institutions under martial law thus rests on a combination of three elements: social recognition, procedural accountability maintained through judicial oversight and institutional rotation, and normative justification grounded in the evident urgency of the threat the state is responding to. None of these elements alone is sufficient; together they constitute the specific structure of legitimacy that wartime democratic governance must sustain.

The Ukrainian experience under martial law confirms three propositions of general theoretical significance. First, the legitimacy of any emergency restriction cannot be determined by its formal enactment: it requires a substantive proportionality assessment that evaluates the actual conditions of the restriction and the specific values it places at risk. Second, the acts

of occupying administrations must be evaluated not through the binary of legitimate versus illegitimate occupation but through the normative framework of IHL obligations incumbent on any de facto territorial authority, making legitimacy in occupied territory a function of substantive compliance with the standards of civilian protection. Third, democratic legitimacy under suspended elections is not simply absent but is maintained through institutional substitutes whose adequacy is itself a continuing object of normative evaluation. These conclusions support the development of a multi-dimensional concept of legitimacy in general legal theory that is adequate to the conditions of armed conflict.

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