

Unconstitutional States of Emergency

Christian Bjørnskov, Stefan Voigt, and Mahdi Khesali

ABSTRACT

Nine of 10 modern constitutions contain explicit emergency provisions describing who can declare a state of emergency (and under what conditions) and the additional powers the government enjoys under a state of emergency. As states of emergency typically allocate additional powers to the executive, they lend themselves easily to abuse and provide political incentives to declare emergencies. In this paper, we analyze the conditions under which government behavior under a state of emergency deviates from constitutional provisions and a gap between de jure provisions and de facto behavior thus results. In a novel data set comprising 853 emergency declarations, 115 are identified as unlawful. We find that autocratic governments are more likely than democratic governments to violate the constitution. The requirement that a second chamber approve the emergency declaration is associated with a higher likelihood of its being unconstitutional.

1. INTRODUCTION

States of emergency (SOEs) are declared frequently. At least 140 countries have declared an SOE at least once over the course of the last 40 years (Hafner-Burton, Helfer, and Fariss 2011; Bjørnskov and Voigt 2018a), and 99 did so in the spring of 2020 because of the COVID-19

CHRISTIAN BJØRNSKOV is Professor of Economics at Aarhus University and Researcher at the Research Institute of Industrial Economics. STEFAN VOIGT is Professor in the Institute of Law and Economics at University of Hamburg and Fellow at CESifo. MAHDI KHESALI is a Doctoral Student in the Institute of Law and Economics at University of Hamburg and Fellow at the Max Planck Institute for Research on Collective Goods. This paper emerged out of the joint research project “The Economics of Compliance with Constitutions,” which was supported by the German Research Foundation (grant 381589259) and the National Science Center Poland as part of the Beethoven 2 initiative. The authors thank Abishek Choutagunta for his help in creating the data set underlying this paper. Bjørnskov gratefully acknowledges support from the Jan Wallander and Tom Hedelius Foundation. The authors thank Dan Brinks, Adam Chilton, Kevin Cope, Benjamin Engst, Paula Herm, Katerina Linos, Mariana Llanos, Mark Tushnet, and Mila Versteeg for constructive suggestions.

[*Journal of Legal Studies*, vol. 51 (June 2022)]

© 2022 by The University of Chicago. All rights reserved. 0047-2530/2022/5102-0015\$10.00

pandemic (Bjørnskov and Voigt 2022). Nine of 10 constitutions currently in place include explicit provisions dealing with emergencies (hereafter, emergency constitutions). One major reason to declare an SOE is a natural disaster such as a hurricane or earthquake. Political turmoil is another major reason, which can range from peaceful demonstrations to terrorist attacks. These SOEs, regardless of how seemingly reasonable and constitutionally granted they are, entail the risk of government abuse of its emergency powers (Bjørnskov and Voigt 2020).

In this paper, we ask to what degree governments comply with formal emergency provisions. The paper thus aims to identify a possible gap between *de jure* provisions and *de facto* behavior. Using a novel data set that identifies 115 of 853 analyzed SOE declarations as unconstitutional, we take first steps toward identifying the reasons that lead governments to violate constitutional rules. Because of the particular structure of the data, this paper is largely confined to correlational analysis, and we therefore cannot claim that our findings are fully causal. We find that political turmoil is more likely than natural disasters to be followed by unconstitutional emergency declarations. Autocratic governments are more likely than democratic governments to violate the constitution. Finally, bicameral systems are more likely than unicameral ones to suffer from unlawful SOEs. If domestic events induce a government to declare an SOE, an unconstitutional one is particularly likely if the constitution requires emergency approval from a second chamber of parliament.

This paper adds to the studies that analyze emergency constitutions empirically. Emergency constitutions channel government behavior in various ways. The declaration of an SOE is influenced by the difficulty of formally announcing an SOE: the more costly it is, the less likely it is that an SOE will be declared (Bjørnskov and Voigt 2018a). With regard to the effectiveness of containing the consequences of natural disasters, the more benefits can be enjoyed by the government after having declared an SOE, the higher the number of fatalities, taking the severity of a disaster into account by controlling for the number of people who are affected by it (Bjørnskov and Voigt 2021). This is an indication that emergency constitutions are often misused. A study analyzing the relationship between announcing an SOE and the likelihood of terrorist events finds that countries declaring an SOE subsequent to a terrorist attack are more likely to suffer from another attack than countries that do not (Bjørnskov and Voigt 2020).

This study also contributes to a small but fast-growing literature in-

quiring into the factors that determine whether governments comply with constitutional provisions. Although an old tradition claims that constitutions are nothing but parchment barriers, empirical research inquiring into the factors that make politicians comply (or not) with their constitutions is still scarce. (Chilton and Versteeg [2020] focus on the likelihood of individual rights being implemented in comparison with group rights; Voigt [2021] surveys existing studies and provides an overview of the underlying research program.)

The rest of the paper is organized as follows: In Section 2, we develop a number of theoretical conjectures regarding the conditions under which governments are particularly likely not to comply with their emergency constitutions. In Section 3, we introduce a novel data set. In Section 4, we provide empirical evidence of when governments choose to declare unlawful SOEs. In Section 5, we discuss the results and conclude.

2. FRAMING THE ISSUE

We frame this issue by first spelling out possible types of unconstitutional government behavior related to emergencies. We then inquire into possible reasons for the behavior.

2.1. Types of Unlawful Government Behavior

We distinguish three phases during which unlawful behavior can occur. (1) The declaration of an SOE can be unconstitutional. (2) The acts chosen by the executive during an SOE can be unconstitutional. (3) The way in which the SOE is prolonged can be unconstitutional. It is, of course, possible that two or even all three types of noncompliance with the constitution occur in sequence.

For phase 1, at least four such ways can be distinguished. First, the executive may declare an SOE without a triggering event. Second, the executive might declare an SOE for a reason not specifically mentioned in the constitution. Third, an SOE may be unconstitutional if it is declared by a government actor who does not have the authority to declare one. Finally, an SOE may be unconstitutional even if declared by the appropriate actor when formal conditions (such as the consent of parliament) in the constitution are not met.

In terms of phase 2, governments can overstep their authority in a variety of ways. They could, even with benevolent intentions, be too ac-

tive in their rescue missions following a natural disaster by, for example, relying on the military domestically, ignoring binding budget constraints, having rescuers transgress or expropriate private property without respecting owners' rights, and so forth. A second way in which governments can overstep their authority is to strengthen their own position by weakening the opposition; possible means include dissolving parliament, postponing elections, and suppressing media freedom. A third possible way is to weaken other checks on power such as the judiciary by, for example, suspending judicial review during an SOE or creating entirely new courts. A fourth possible way—which might be difficult to delineate in practice from the last two just named—is to strengthen the position of the executive by creating new ministries, relying more heavily on executive decrees, and so on.

Finally, unconstitutional behavior can also occur in prolonging an SOE. Many constitutions define a maximum length for an SOE. The most famous of these provisions dates to republican Rome, where the tenure of a dictator expired after 6 months. Should a government wish to extend the emergency beyond the maximum length provided for in the constitution, it needs to seek approval of the bodies specified in the constitution. Governments can therefore behave unconstitutionally either by not seeking approval before prolonging an SOE or by prolonging it despite not getting approval from the relevant actor(s).

The baseline for ascertaining unconstitutional behavior by the executive branch is the underlying emergency provisions contained in a country's constitution. In this study, we use these provisions as data. However, they are not simply given but are the consequence of choices made by some constitutional assembly. In a previous study, we analyze the factors leading to the inclusion of emergency provisions in a country's constitution and the specific type of emergency constitution chosen (Bjørnskov and Voigt 2018a).

2.2. Theoretical Considerations

We now discuss possible reasons why the executive might rely on potentially unconstitutional means. We start from the assumption that the relevant decision makers act to remain in office. In established democracies this implies seeking reelection, and in autocracies it means preventing potential competitors from becoming too strong. But would-be autocrats might also misuse an emergency as a welcome pretext for getting rid of democratic institutions (see Lührmann and Rooney 2021).

To structure the analysis further, we distinguish between two groups of event types, namely, natural disasters and political turmoil. Natural disasters include biological events (such as malaria or the COVID-19 pandemic), geophysical events (such as earthquakes), hydrological events (such as floods), and climatological events (such as droughts). Political turmoil, in turn, encompasses mass demonstrations and general strikes but also assassinations (and attempts) and terrorist acts.

We choose this binary categorization because natural disasters are exogenous events beyond the control of governments.¹ Political turmoil, in turn, is highly endogenous to government behavior: demonstrations, but also terrorist acts, are often a response to government policies. This distinction is analytically useful for at least two reasons: First, endogeneity and reverse causality are much less of a concern with regard to natural disasters than political turmoil. Second, precisely because of the exogenous nature of natural disasters, citizens' reactions to executives violating the constitution might differ from their reactions to executives violating the constitution as a reaction to domestic political turmoil.²

Unconstitutional SOEs that are declared by executives who aim to safeguard or even extend their own powers to the detriment of other political actors and the population at large are, on the other hand, much more likely to be triggered by domestic turmoil. While natural events cannot reasonably be blamed on the government, domestic events can, and they give incumbents a political incentive to safeguard their position. We use this conceptual framework to propose a number of hypotheses.

Hypothesis 1. Executives not respecting the constraints of the constitution during normal times are unlikely to respect them during an SOE.

It might be that their unconstitutional behavior becomes a sort of habit from which they will not deviate after an SOE has been declared. The question then becomes, Why would executives that do not respect the constitution under normal circumstances declare an SOE in the first

1. This refers to the events but not necessarily to the effects of such events. An earthquake in a region with lax or underenforced construction regulation might, for example, cause more fatalities than the same earthquake in a country with strict construction regulation (Escaleras, Anbarci, and Register 2007).

2. A reviewer pointed out that some events that potentially trigger the declaration of a state of emergency (SOE) are not covered by this binary classification. Such events are, for example, financial crises and external wars but also man-made disasters such as the fallout from nuclear power plants or the explosion of chemical factories. In our data set, there are very few such man-made disasters, which is why we constrain the analysis to natural disasters and political turmoil.

place? A possible reason is that declaring an SOE accords an aura of legitimacy to their behavior.

A government's decision to declare an SOE is heavily influenced by the institutional setting prevailing in a country. Elsewhere, we analyze the triggers that lead governments to declare an SOE and find that it is crucial to distinguish between natural disasters and political turmoil (Bjørnskov and Voigt 2018b).

Further, autocracies are more likely than democracies to declare an SOE following political turmoil, whereas no such association is found with regard to natural disasters. Precisely because political turmoil is likely a response to government behavior, it is more threatening for the government's survival.

Hypothesis 2. We expect governments to exhibit a higher propensity to violate constitutional constraints as a consequence of political turmoil than natural disasters.

Hypothesis 3a. In situations in which the declaration of an SOE is unconstitutional (phase 1 above), we expect that the more constraints the constitution contains regarding the issuance of an emergency declaration, the more likely it is that an emergency will be declared in contravention of the constitutional constraints.

Hypothesis 3b. Closely related, we expect that executives in countries with a bicameral legislature are more prone to overstepping their authority in declaring an SOE than executives in countries with a unicameral legislature because obtaining the consent of two houses is more cumbersome than securing the consent of a single chamber.

Once an SOE has been declared, the executive chooses the means for addressing the emergency (phase 2). Again, it has the choice between relying on means allocated to it under the constitution or overstepping the constitution and relying on means not in accordance with it.

Hypothesis 4. The less additional authority allocated to the executive during an SOE, the higher the probability of noncompliance.

We now move on to phase 3 of SOEs. In phase 3, the executive branch can violate the constitution by not ending it on time.

Hypothesis 5. The executive is likely to prolong an SOE unconstitutionally to the extent that not doing so represents a likely future threat to the government's survival in office.

In addition to these hypotheses, we propose controlling for a number of potentially confounding influences. If current economic growth is negative, large parts of the population are likely to be unhappy with the government. A natural disaster can be the starting point (Schelling 1960) for antigovernment demonstrations that the government is likely to answer by nonconstitutional means. Finally, we control for whether a constitution is democratic or autocratic.

Hypothesis 6. Given a case in which an autocrat declares an SOE, we expect autocracies to violate the constitution more frequently than democratic regimes because many monitoring mechanisms that are relied on in a democracy are weak or entirely absent.

3. DATA

3.1. The Dependent Variable

To be able to analyze the determinants that make governments overstep their constitutionally determined authority, a complete list of SOEs—both constitutional and unconstitutional—is needed. The starting point of our analysis is the data set assembled by Hafner-Burton, Helfer, and Fariss (2011), which we updated to 2017. Including only national-level SOEs results in a data set of 853 SOEs that occurred between 1949 and 2017.

We then separate unconstitutional SOEs from constitutional SOEs. To identify a gap between *de jure* provisions and *de facto* behavior, we evaluate government behavior using the constitution in place in the country.³ To separate lawful from unlawful behavior, we first rely on both legal and media sources in Factiva and LexisNexis, combining the search terms “state of emergency” and “unlawful.”⁴ Second, we use the annual reports of international nongovernmental organizations that are concerned with basic human rights and political or civil freedom more generally. The reports provided by Freedom House proved to be particularly useful.

3. Some constitutions read as if they were written to make their governments immune from acting unlawfully under an SOE. In 1981, the Malaysian constitution was amended to make the proclamation of an emergency, the continuation of an SOE, any emergency ordinance, and continuation in force of those ordinances nonjusticiable (Ramraj 2010, p. 40). The Pakistani constitution contains a very similar clause (Kalhan 2010, p. 97).

4. Although one of our search terms is “unlawful,” we also refer to this behavior as “unconstitutional.” This is warranted since of 115 identified cases of such behavior, only three involve noncompliance with statutory law.

Third, to determine unconstitutional behavior in phase 3, we calculate the length of an SOE in days and compare it to the maximum length stipulated in the constitution. If the actual length exceeds the constitutionally stipulated length, we search for information about extensions passed through parliament. If no such information is found, the SOE is coded as unconstitutional.

Decisions about whether a particular behavior of the executive is in line with or a breach of the constitution are always subjective. Thus, the questions are, Whose evaluation should be taken into account, and whose evaluation should be discarded? Our search of Factiva and LexisNexis does not rely exclusively on court decisions but includes evaluations of law professors, nongovernmental organizations, and journalists reporting on the SOEs. We deem such inclusion to be justified because relying exclusively on courts is likely to give us far too few unlawful SOEs, as the independence of courts from the executive is weak in many countries.

Using searches in Factiva and LexisNexis essentially means that we rely on reports that ran in major newspapers, with the vast majority of them appearing in English and from the richest countries of the world. This likely results in some underreporting of SOEs—and correspondingly their unlawfulness—in quite a few countries in the global south. In addition, coverage also depends on the degree to which the domestic press is allowed to report freely, as domestic reports are often the impetus for foreign newspapers to report on events. Finally, the coverage of events in far-away countries and the digitization of newspapers—which is a precondition for inclusion in the databases—is subject to a time trend. According to our data set, the vast majority of unlawful SOEs took place after 1990. In all likelihood, it is not the disrespect for constitutional constraints that increased but rather the number of searchable reports of SOEs.

Table 1 presents numbers of constitutional and unconstitutional SOEs in democracies and autocracies for natural disasters and political turmoil. Whereas in democracies the number of SOEs triggered by political turmoil and natural disasters is almost equally split, autocracies are almost four times as likely to declare an emergency as a consequence of domestic turmoil than of a natural disaster. This may, of course, indicate that autocracies are more likely to experience political turmoil. Yet unconstitutional SOEs are much more likely to be caused by domestic turmoil in both autocracies and democracies, a finding in line with hypothesis 2.

In addition to regime type and causes, Table 2 presents data on the phase(s) during which governments violated constitutional constraints.

Table 1. States of Emergency by Regime Type and Cause

	Democracies		Autocracies	
	All	Unconstitutional	All	Unconstitutional
Natural disaster	271	8	68	6
Domestic turmoil	241	41	245	56

Table 2. Unconstitutional Behavior by Phase

	All	Natural	Political	Democracies	Autocracies
		Disasters	Turmoil		
Phase 1: declaration	19 ^a	1	16	6	13
Phase 2: during	66	4	60	28	38
Phase 3: extension	37 ^a	9	30	20	19
Total	115	14	97	51	64

Note. Phases overlap in several cases, and some totals do not sum because of missing information.

^a Excludes two man-made disasters: economic problems in Sierra Leone in 1988 and crime caused by drug gangs in Trinidad and Tobago in 1990.

The overwhelming majority of noncompliance occurs during the SOE. The phases of unconstitutional behaviors overlap slightly, as we find six cases in which the constitution was violated during both the declaration and under the SOE and three cases in which it was violated during the emergency and by extending it. Finally, in one case—the Central African Republic in 1981—the constitution was violated in all three phases. Table 2 allows a more fine-grained distinction with regard to the events that triggered an SOE and the type of regime.

There are a number of reasons to assume that our data set underestimates the number of unconstitutional SOEs. Quite a few countries rely on long-standing SOEs, lasting many years or even decades; among them are Egypt, Jordan, Sri Lanka, and Syria. For some of these countries, we found no news report claiming that the government's behavior is unconstitutional. This is the case for Jordan and Syria but also for Zimbabwe (which was under an SOE between 1980 and 1990). Moreover, awareness of governments' noncompliance with basic human rights seems to be higher than awareness of the procedural provisions that are also determined by the constitution. It might therefore be that violations of the latter type remain unreported.

3.2. Explanatory Variables

We divide our explanatory variables into economic variables, judicial institutions, political institutions, ideological factors, and variables relating to the emergency constitution. Throughout, we control for two factors: average income and whether the country is a democracy. Information about income, which we capture by purchasing-power-adjusted gross domestic product (GDP) per capita, and the rest of the economic variables derive from the Penn World Tables (Feenstra, Inklaar, and Timmer 2015). The remaining economic variables are trade volume (as a percentage of GDP), a recession variable that equals one if growth in a given year was negative, and the investment price and the cost of government spending, both of which are measured relative to the overall price level. The investment price variable captures the price of capital goods relative to consumer goods, and we think of it as a proxy for the impact of emergency restrictions on capital and business owners; with a higher investment price, capital owners suffer larger losses when being restricted by an SOE. Likewise, the price level of government spending effectively captures the budgetary impact of increasing government spending.

Our source for form of government is Cheibub, Gandhi, and Vreeland (2010) as updated in Bjørnskov and Rode (2020). Cheibub, Gandhi, and Vreeland separate governments into democracies and autocracies and include information about two characteristics of the political institutions: whether the political system is presidential and data to separate unicameral from bicameral legislatures.

We include data on the degree to which the executive complies with the constitution in general. This allows us to ascertain whether governments not complying with the constitution under an SOE are generally low compliers. These data are from the Varieties of Democracy (V-Dem) data set, which is based on countries' expert ratings and is measured the year preceding an SOE. Our two variables capture whether members of the executive branch respect the constitution (*v2exrescon*) and the likelihood that the executive and legislature comply with high court decisions (*v2juhccomp*). Varieties of Democracy creates a continuous latent variable of expert ratings on a scale from "members of the executive never violate the constitution" to they do so "whenever they want to, without legal consequences" (see Coppedge et al. [2021, p. 112] for the construction of the latent variable).

Turning to the ideological data, we ask whether the ideological position of the governing party plays any role (in the case of coalition govern-

ments, the largest party in the government). We retrieve that information from the Database of Political Institutions (Scartascini, Cruz, and Keefer 2018), which contains an indicator for whether the party is right wing (a score of 1), center (score of 2), left wing (score of 3), or not codable (score of 0). In most cases, when the ideological position is not codable, the party is effectively nonprogrammatic, populist, nationalist, or a reflection of pure power politics (compare Cruz and Keefer 2015).⁵

Finally, turning to the constitutional data, we rely on the Index of Emergency Powers (INEP), which contains three benefit and three cost components that indicate the potential benefits of instituting an SOE and the potential costs of declaring it (Bjørnskov and Voigt 2018a). The cost variables reflect how costly the constitution makes it for government to declare an SOE and takes into consideration who has the power to declare it (it is costly if the legislature or other bodies need to consent or have the power to declare it by themselves), who has the power to approve an SOE (it is costly if the government needs the approval of other actors to declare an SOE), and the number of conditions named in the constitution as a legitimate basis for declaring an SOE (the fewer conditions named as justification for declaring an SOE, the more difficult it is to declare). We also use two components of the indices: whether declaring an SOE requires approval from a second chamber and the number of conditions that justify a declaration, as they provide direct information about the conditions that would make an SOE unconstitutional.⁶ The benefit components take into consideration whether, after having declared an SOE, the government has the power to dissolve parliament and suspend some basic rights and the right to expropriate its citizens and censor the media. The INEP is coded as an additive index between 0 and 1, where 1 indicates complete (effectively dictatorial) powers for the executive. A high score for the cost components thus indicates low costs for the executive, whereas a high score for the benefit components indicates a high level of benefits accruing to the executive.

Table 3 presents descriptive statistics for the variables. Given that our dependent variable is binary, we run a set of simple logit estimates to reveal systematic structures in the data that are shown in Table A1. We do

5. In a few cases, parties without an ideology in the Database of Political Institutions are regional or separatist parties. We do not code these parties, as we have no cases in which the party of the executive was regional or separatist.

6. We are able to single out these two elements of the INEP, as they do not conceptually overlap with most other components.

Table 3. Descriptive Statistics

	Mean	SD	N
Unlawful	.063	.244	853
Natural	.400	.490	847
Domestic	.574	.495	847
Man-made disaster	.027	.163	846
Democracy	.628	.483	853
Log gross domestic product per capita	9,931	8,933	783
Recession	.331	.471	782
Government price level	.863	.449	783
Investment price level	1.301	.957	783
Trade volume	.417	.307	783
Presidential	.691	.462	853
Bicameral	1.427	.502	793
Nationalist or populist government	.105	.306	822
Left-wing government	1.451	1.260	822
High court compliance	.416	1.244	815
Executive's respect for the constitution	.421	1.178	814
INEP cost	.494	.116	775
INEP benefit	.436	.225	775
Second chamber approval	.303	.459	782
Conditions index	.339	.215	811

Note. INEP = Index of Emergency Powers.

so for the full sample, for SOEs declared in democracies, which provides information about the degree to which democratic polities are different, and for SOEs declared on the basis of a domestic event (by far the most common type). The Appendix includes a set of simpler tests in which we divide those samples into two equally large subsamples, one representing cases in which the attribute (for example, income per capita) is below the mean and the other representing cases in which it is above the mean. When using dummy variables, the sample is split along the lines of the defining criterion (a country has a presidential form of government or not). We then use the subsamples to calculate the proportion of unlawful SOEs among them. Should the difference in proportion between the samples be significant at the 95 percent level, we show them in the figures. The differences, including the insignificant cases, for the first three cases are presented in Table A1.

Before presenting our main results, we note some challenges regarding causal inference. First, there is surprisingly little systematic structure in

the data, which is why we refrain from employing more advanced econometric models. Second, in analyses of this type, potential endogeneity is always a major concern. Political turmoil is likely to be a consequence of government behavior, while SOEs are often reactions to such turmoil, that is, government reactions to consequences of its decisions. In that sense, we are indeed likely to have endogeneity, and the estimates are likely to be biased.

It nevertheless makes sense to reflect in what ways the estimates are likely to be biased. Governments that have not consistently complied with the constitution all along or governments that plan to behave unconstitutionally after political turmoil might refrain from declaring an SOE. As this, in turn, implies that we would not observe anything with the tools currently employed, the relevant endogeneity works against finding any significant results, and the results we find are rather conservative estimates.

This issue is closely connected with the problem of our nonrandom sample, as governments that did not abide by the constitution while having an SOE are not randomly drawn. Unfortunately, a Heckman two-step model to correct for nonrandom sampling cannot be implemented here because the procedure requires large amounts of data. Moreover, applying the Heckman correction in our case implies estimating the probability of observing an SOE given that a potentially triggering event has been detected. The requirement of such models that one can relatively precisely identify the selection stage defeats our purpose, because some SOEs are declared without a triggering event.

Any attempt to alleviate the problem of nonrandom sampling would yield a biased sample. We therefore aim to describe simpler patterns in the data and in many cases refrain from making causal claims.

4. WHAT IS COMMON TO UNLAWFUL STATES OF EMERGENCY?

We begin by illustrating the overall use of SOEs and the likelihood that they are unlawful in two world maps. Figure 1 shows the density of SOEs across the world and thus illustrates where our 853 events took place, while Figure 2 shows where the 115 unlawful SOEs that we identify typically occurred. As both maps show, most events took place in Africa and Asia, although a substantial number are reported for European and Latin American countries.

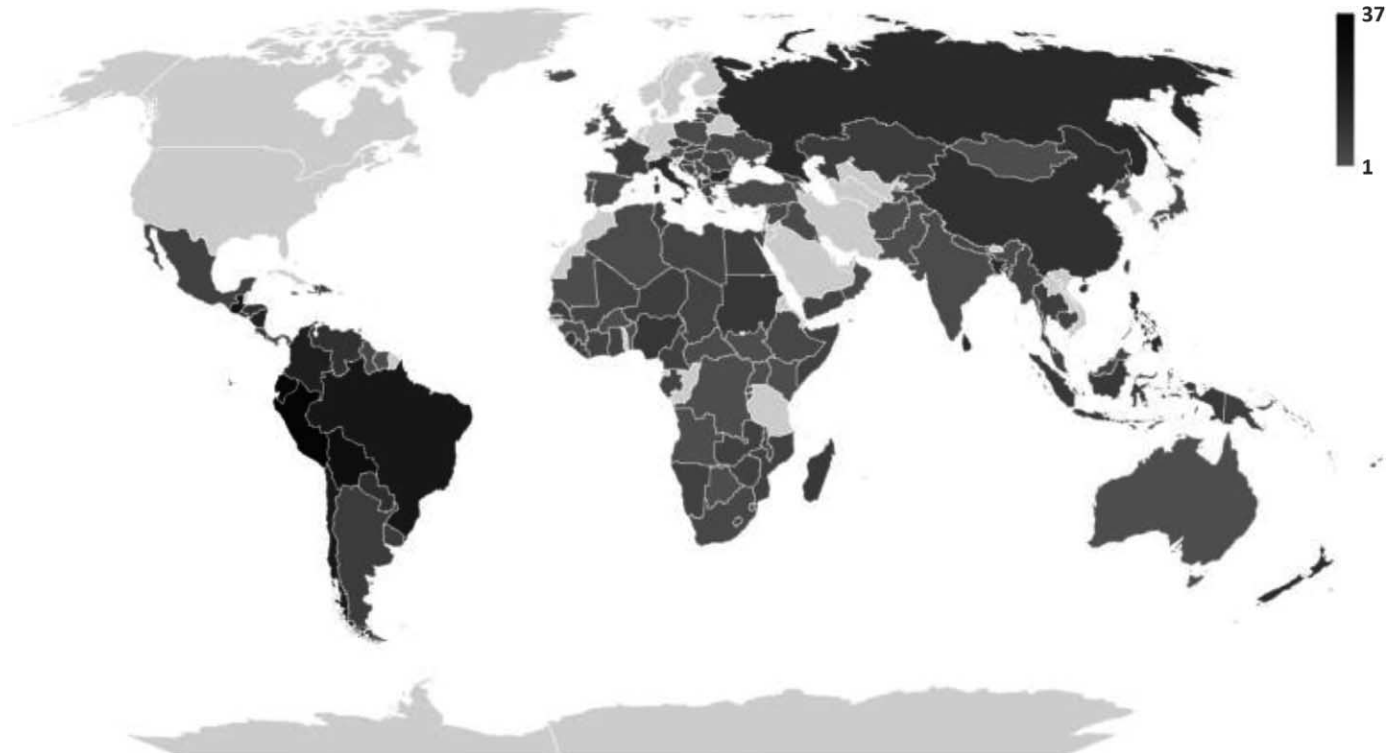


Figure 1. Frequency of states of emergency

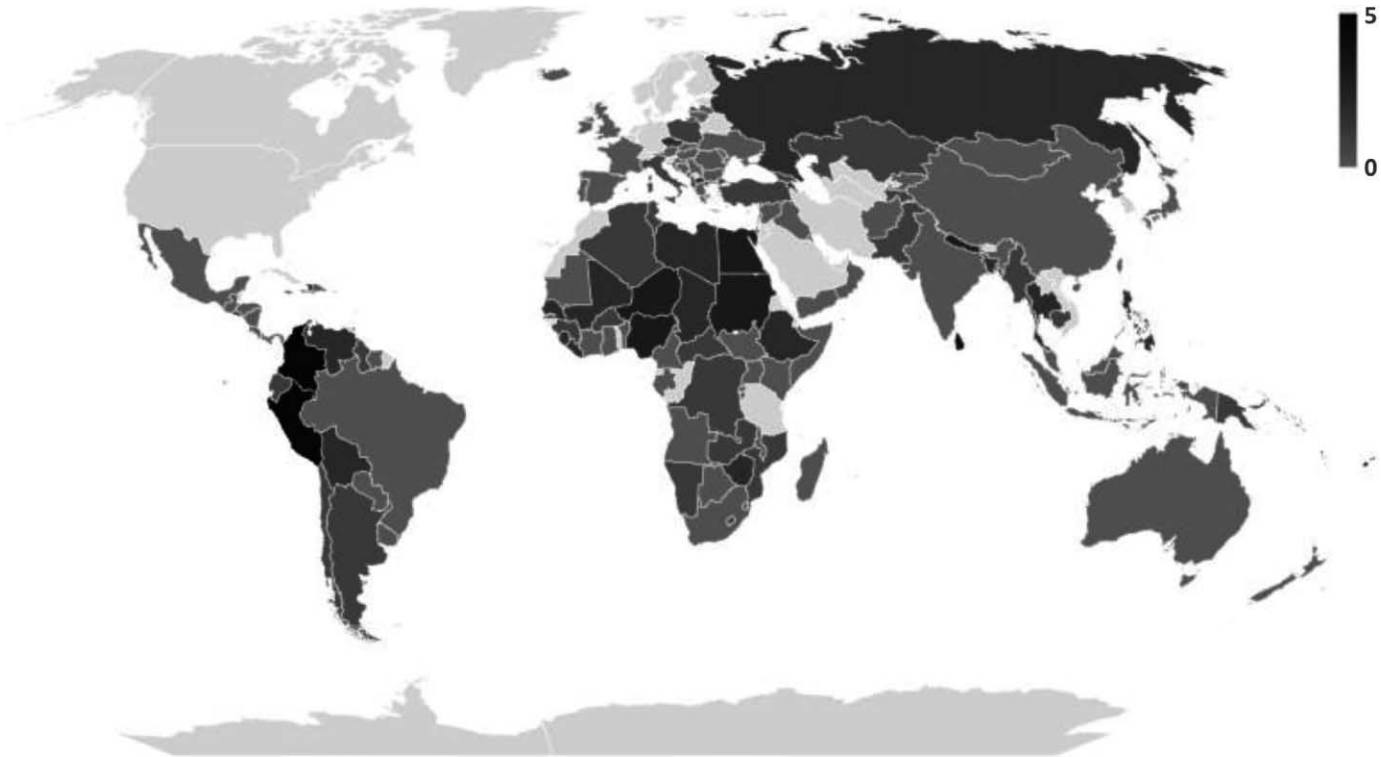


Figure 2. Frequency of unlawful states of emergency

4.1. Descriptive Differences

One of the clearest common features of unlawful SOEs is that the majority of the triggering events are due to political turmoil: 97 of the 115 unlawful SOEs we identify are declared for such reasons. We find only 14 events for which an unlawful emergency declaration was justified by natural disasters and five for which the cause was man-made disasters. With regard to the duration of SOEs, of the observations with full information, 63 percent ended at their maximum allowable duration. Only 15 percent ended before their constitutionally demanded expiry, while 22 percent were lawfully extended beyond that date. For unlawful SOEs, in turn, the corresponding numbers are 13, 21, and 66 percent. Lawful SOEs last 115 days on average, while the average duration of unlawful SOEs is 321 days ($p < .01$).

4.2. Main Results

Findings for the full sample are shown in Table 4. Our results show that democracies are substantially less likely than autocracies to behave unlawfully in the context of an SOE (see hypothesis 6). Calculating the odds ratio from the values in column 1 suggests that the probability of observing an unlawful SOE in a democracy is about 75 percent of the probability in an autocracy. We also find that unlawful SOEs are less likely in richer countries.

We find suggestive evidence for four explanatory variables: relative investment price levels, presidential systems, bicameral political systems, and the need for emergency approval from a second chamber. While investment prices are negatively correlated with the likelihood of observing an unlawful SOE, the remaining variables are positively correlated with this likelihood. However, when tested against each other (not shown), only presidentialism and a bicameral system remain statistically significant. They are also practically meaningful, as the odds ratio of having a presidential system (relative to a parliamentary system) suggests that unlawful SOEs are approximately 70 percent more likely in presidential systems. Likewise, unlawful SOEs are approximately 50 percent more likely in bicameral systems, a finding consistent with hypothesis 3b.

We present comparable results in Table 5, where we focus on domestic turmoil, which gives rise to 97 of the 115 unlawful SOEs. We first note that this change renders income insignificant throughout Table 5, while democracy remains statistically significant and practically important. Of

our explanatory variables, four retain significance: the relative investment price levels, bicameral political systems, the INEP cost measure, and the need for emergency approval from a second chamber. The positive correlation between the difficulty of lawfully declaring an SOE and the likelihood of observing an unlawful one is in line with hypothesis 3a. Testing these variables against each other again, we find robust support for two of the four: the relative investment price level and having a bicameral system. While an unlawful SOE is about 60 percent more likely in bicameral systems, a higher investment price level reduces the likelihood.

Our final tests, in which we repeat the analysis using a sample of democratic countries, are reported in Table 6. We find only fragile evidence for an effect of income, while the main explanatory variables appear to be the relative price level of government spending, the executive's respect for the constitution, the INEP benefit measure, and whether emergency declarations require approval from a second chamber. Higher benefits for the executive under an SOE are hence associated with a lower probability of an unlawful SOE, a finding in line with hypothesis 4.

Repeating our robustness exercise for the democratic-only subsample reveals support for three explanatory variables (not shown). While income remains very far from significance, the cost of government spending appears to substantially reduce the likelihood of unlawful SOEs, as does the executive's respect for the constitution, as assessed by experts in the year preceding the emergency, a finding predicted by hypothesis 1. Conversely, requiring a second chamber's approval more than doubles the likelihood that an SOE is unlawful. As we find this result for the complete sample as well as for two subsamples, we consider it to be robust (and in line with hypothesis 3b).

As such, comparing results across Tables 4 and 6 can provide some information about differences between democracies and autocracies. In Table 4, the effects of relative investment prices and presidentialism are clearly driven by the autocracies in our sample, while the results pertaining to the relative price level of government spending, the executive's respect for the constitution, and requiring a second chamber's approval are exclusively driven by the democracies in our full sample.

Overall, we thus find that, apart from being a full democracy, specific economic and judicial institutional features of an emergency constitution affect the likelihood of observing unlawful SOEs. In all cases, the results can easily be interpreted as consequences of either the economic or political costs of keeping an SOE within constitutional bounds.

Table 4. Empirical Results: Full Sample

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Log gross domestic product per capita	-.275*	-.321*	-.219 ⁺	.217 ⁺	-.273*	-.299*	-.336**
	(.117)	(.129)	(.122)	(.131)	(.117)	(.128)	(.124)
Democracy	-.849**	-.908**	-.752**	-.999**	-.854**	-1.110**	-1.060**
	(.228)	(.233)	(.262)	(.237)	(.237)	(.244)	(.252)
Trade volume		-.180					
		(.403)					
Investment price level		-.322 ⁺					
		(.186)					
Government price level		-.196					
		(.239)					
Recession		-.176					
		(.232)					
High court compliance			.071				
			(.111)				
Executive's respect for the constitution			-.178				
			(.121)				
Presidential				.547 ⁺			
				(.293)			
Bicameral				.398 ⁺			
				(.226)			

Table 5. Empirical Results: Domestic Events

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Log gross domestic product per capita	-.067 (.135)	-.168 (.150)	-.042 (.138)	-.043 (.153)	-.062 (.135)	-.049 (.155)	-.127 (.148)
Democracy	-.520* (.248)	-.662** (.256)	-.629* (.292)	-.717** (.261)	-.469+ (.258)	-.917** (.277)	-.788** (.278)
Trade volume		.146 (.410)					
Investment price level		-.479* (.224)					
Government price level		-.049 (.216)					
Recession		-.409 (.253)					
High court compliance			.141 (.123)				
Executive's respect for the constitution			-.060 (.132)				
Presidential				.236 (.319)			
Bicameral				.532* (.251)			

Left-wing government								-.135 (.099)
Nationalist or populist government								-.206 (.402)
INEP cost								2.688* (1.356)
INEP benefit								-.007 (.554)
Conditions index								.277 (.636)
Second chamber approval								.700** (.273)
<i>N</i>	450	449	446	394	445	392	390	
Pseudo- <i>R</i> ²	.013	.034	.016	.031	.018	.035	.039	
Likelihood ratio χ^2	5.74	15.46	7.20	12.37	7.89	14.51	16.05	

Note. Results are from a logit estimator; all regressions include a constant term. Standard deviations are in parentheses. INEP = Index of Emergency Powers.

⁺ $p < .1$.

* $p < .05$.

** $p < .01$.

Table 6. Empirical Results: Democracies

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Log gross domestic product per capita	-.344 ⁺ (.178)	-.350 (.219)	-.079 (.216)	-.364 ⁺ (.194)	-.329 ⁺ (.185)	-.205 (.194)	-.442* (.189)
Trade volume		.616 (.615)					
Investment price level		.104 (.228)					
Government price level		-1.184* (.587)					
Recession		.154 (.356)					
High court compliance			.228 (.229)				
Executive's respect for the constitution			-.622* (.281)				
Presidential				.129 (.393)			
Bicameral				.441 (.331)			

Left-wing government					.033		
					(.144)		
Nationalist or populist government					.708		
					(.688)		
INEP cost						1.796	
						(1.755)	
INEP benefit						-1.801+	
						(.964)	
Conditions index							-.066
							(.901)
Second chamber approval							.724*
							(.342)
N	491	491	485	489	484	476	475
Pseudo-R ²	.012	.0341	.030	.019	.016	.028	.029
Likelihood ratio χ^2	3.62	9.08	8.76	5.48	4.57	7.95	8.42

Note. Results are from a logit estimator; all regressions include a constant term. Standard deviations are in parentheses. INEP = Index of Emergency Powers.

+ $p < .1$.

* $p < .05$.

5. CONCLUSIONS

This study analyzes the determinants that make executives behave unconstitutionally with regard to an SOE. It distinguishes the types of unconstitutionality that arise between declaring, maintaining, and ending SOEs. Interestingly, the vast majority of unconstitutional SOEs occur subsequent to domestic turmoil and not subsequent to a natural disaster.

We find that autocrats are much less likely to comply with constitutionalized emergency provisions, as are executives who did not respect the constitution before the triggering event. Poor countries are significantly more likely than rich countries to suffer from an unlawful SOEs, even when they are democratic. Following domestic turmoil, countries that are in a recession are particularly prone to experiencing an unconstitutional SOE. Finally, when the focus is exclusively on democracies, executives from nonprogrammatic parties are far more likely to implement an unconstitutional SOE than are nonnationalist executives.

Unfortunately, we are unable to test all our hypotheses because of data constraints. Given the finding in Lührmann and Rooney (2021) that SOEs often lead to democratic backsliding, we suspect that at least in some cases the measures implemented during an SOE survive its end and become standard practice. To ascertain whether this is the case, more fine-grained data are needed. Given that two-thirds of unlawful SOEs remain in place too long, it seems warranted not only to do more research on this aspect but also to ask what means can be implemented to reduce this particular kind of unconstitutional behavior.

APPENDIX: ADDITIONAL TESTS

Table A1. Simple Differences for Split Samples

	Full Sample			Democracy			Domestic		
	Above Mean	Below Mean	<i>p</i> -Value	Above Mean	Below Mean	<i>p</i> -Value	Above Mean	Below Mean	<i>p</i> -Value
Democracy	.20	.09	<.01	.03	.17	<.01	.22	.17	<.12
Presidential	.11	.15	<.10	.09	.09	<.72	.19	.20	<.71
Bicameral	.12	.15	<.29	.09	.10	<.50	.17	.24	<.07
Population	.12	.15	<.35	.08	.09	<.62	.18	.23	<.15
Log gross domestic product per capita	.18	.09	<.01	.11	.07	<.08	.22	.18	<.18
Trade volume	.16	.11	<.03	.12	.06	<.02	.21	.19	<.68
Investment price level	.14	.13	<.74	.09	.09	<.86	.22	.18	<.26
Government price level	.17	.09	<.01	.13	.05	<.01	.22	.18	<.38
Recession	.13	.14	<.79	.08	.10	<.49	.10	.30	<.01
Social trust	.11	.14	<.28	.08	.09	<.87	.16	.21	<.18
Rule of law	.15	.12	<.26	.09	.09	<.88	.18	.22	<.26
High court compliance	.15	.12	<.19	.09	.09	<.81	.22	.16	<.16
Executive's respect for the constitution	.18	.09	<.01	.12	.06	<.02	.22	.17	<.20
Right-wing government	.13	.16	<.40	.09	.2	<.08	.19	.19	<.88
After 1990	.11	.14	<.24	.12	.09	<.49	.11	.26	<.01
State of emergency conditions	.14	.13	<.60	.08	.12	<.11	.16	.25	<.02
INEP cost	.15	.13	<.52	.09	.11	<.55	.23	.21	<.62
INEP benefit	.15	.13	<.29	.09	.09	<.1	.22	.21	<.79

Note. INEP = Index of Emergency Powers.

REFERENCES

- Bjørnskov, Christian, and Martin Rode. 2020. Regime Types and Regime Change: A New Dataset on Democracy, Coups, and Political institutions. *Review of International Organizations* 15:531–51.
- Bjørnskov, Christian, and Stefan Voigt. 2018a. The Architecture of Emergency Constitutions. *International Journal of Constitutional Law* 16:101–27.
- . 2018b. Why Do Governments Call a State of Emergency? On the Determinants of Using Emergency Constitutions. *European Journal of Political Economy* 54:110–23.
- . 2020. When Does Terror Induce a State of Emergency? And What Are the Effects? *Journal of Conflict Resolution* 64:579–613.
- . 2021. Emergencies: On the Misuse of Government Powers. *Public Choice* 190:1–32.
- . 2022. This Time Is Different? On the Use of Emergency Measures during the Corona Pandemic. *European Journal of Law and Economics* 54:63–81.
- Cheibub, José Antonio, Jennifer Gandhi, and James Raymond Vreeland. 2010. Democracy and Dictatorship Revisited. *Public Choice* 143:67–101.
- Chilton, Adam, and Mila Versteeg. 2020. *How Constitutional Rights Matter*. Oxford: Oxford University Press.
- Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, et al. 2021. V-Dem Codebook v11.1. University of Gothenburg, V-Dem Institute, Gothenburg. <https://www.v-dem.net/static/website/img/refs/codebookv111.pdf>.
- Cruz, Cesi, and Philip Keefer. 2015. Political Parties, Clientelism, and Bureaucratic Reform. *Comparative Political Studies* 48:1942–73.
- Escaleras, Monica, Nejat Anbarci, and Charles Register. 2007. Public Sector Corruption and Major Earthquakes: A Potentially Deadly Interaction. *Public Choice* 132:209–30.
- Feenstra, Robert C., Robert Inklaar, and Marcel P. Timmer. 2015. The Next Generation of the Penn World Table. *American Economic Review* 105:3150–82.
- Hafner-Burton, Emilie, Laurence Helfer, and Christopher Fariss. 2011. Emergency and Escape: Explaining Derogations from Human Rights Treaties. *International Organization* 65:673–707.
- Kalhan, Anil. 2010. Constitution and “Extraconstitution”: Colonial Emergency Regimes in Postcolonial India and Pakistan. Pp. 89–120 in: *Emergency Powers in Asia: Exploring the Limits of Legality*, edited by Victor V. Ramraj and Arun K. Thiruvengadam. Cambridge: Cambridge University Press.
- Lührmann, Anna, and Bryan Rooney. 2021. Autocratization by Decree: States of Emergency and Democratic Decline. *Comparative Politics* 53:617–49.
- Ramraj, Victor V. 2010. The Emergency Powers Paradox. Pp. 21–55 in *Emergency Powers in Asia: Exploring the Limits of Legality*, edited by Victor V. Ramraj and Arun K. Thiruvengadam. Cambridge: Cambridge University Press.

- Scartascini, Carlos, Cesi Cruz, and Philip Keefer. 2018. *The Database of Political Institutions 2017*. Washington, DC: World Bank.
- Schelling, Thomas C. 1960. *The Strategy of Conflict*. Cambridge, MA: Harvard University Press.
- Voigt, Stefan. 2021. Mind the Gap: Analyzing the Divergence between Constitutional Text and Constitutional Reality. *International Journal of Constitutional Law* 19:1778–1809.