



Covid and the constitution: unlawful states of emergency during the pandemic

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Abstract

The Covid-19 pandemic in 2020 and 2021 gave rise to an unprecedented number of emergency declarations across the world. Recent research shows that the transfer of substantial discretionary power to the executive branch in an emergency often gives rise to unlawful and unconstitutional political behaviour. In this paper, we explore if the large number of emergencies during the pandemic were special. We document that they were, in the sense that unlawful emergencies were substantially more likely to occur among democracies. We also show that apart from economic variables, better rule of law and more permissive constitutionalised emergency provisions contributed to a higher risk of unlawful behaviour.

Keywords Covid · Unlawful states of emergency · Constitutional emergency provisions · De jure/De facto gap · Constitutional political economy

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1 Introduction

The recent Covid pandemic had huge effects on our lives: firms went bankrupt, people lost their jobs, people were forced to stay at home during most of the day, children were taught online, those hospitalized were not allowed to receive visitors and millions died. This paper neither deals with the macroeconomic effects of the pandemic nor with the social or psychological consequences on individuals. Instead, we are interested in analyzing the behavior of governments around and during emergencies.

We ask to what degree constitutionalized emergency provisions were complied with by governments while handling the pandemic. The paper thus aims at identifying a possible gap between *de jure* provisions and *de facto* reality. Examples abound for cases in which governments did not comply with the underlying constitutional constraints: In Malaysia, the military was involved in enforcing the Movement Control Order although such involvement requires a declaration that was never issued (Balasubramaniam, 2021). In Nigeria, citizens were subjected to degrading and inhuman treatments involving torture in enforcement of the lockdown (Abdulrauf, 2020). In Portugal, fundamental rights were restricted by government although there was no prior delegation from Parliament which is needed to restrict fundamental rights (Violante & Lanceiro, 2021). In Serbia, the government prohibited gatherings of more than 100 persons and based on this decision, it argued that the National Assembly could not convene to support an emergency declaration as required by the constitution (Cavdarevic, 2020). These are just four examples of unlawful government behavior due to the pandemic.

In previous contributions, we described the development of constitutionalized emergency provisions over time (Bjørnskov & Voigt, 2018a), the determinants of their use (Bjørnskov & Voigt, 2018b), but also the conditions under which their unlawful use had occurred (Bjørnskov et al., 2022). During the pandemic, an unprecedented number of emergency declarations were issued. Analyzing governments' answers to a pandemic that hit most countries at almost the same time in almost the same way enables us to compare government behavior quite directly. As the cause for declaring an SOE was the same, this ensures comparability and thus enables additional insights.

Our findings are consistent with previous research. Of the 176 emergency declarations in our dataset, almost one quarter (23%) involved either an unlawful declaration or unlawful government behavior in implementing it. Clearly, the Covid pandemic was not only a difficult time for public health and the economy, it was also a huge challenge for constitutionalism and the rule of law. Some of our findings are not just unexpected but also worrying: it, turns out, for example, that countries with a high level of the rule of law were more likely to suffer from unconstitutional SOEs under the pandemic than those with a low level.

In a previous contribution to this journal (Bjørnskov & Voigt, 2022a), we analyzed the determinants for making such declarations during the first phase of the pandemic and found that arguments based on political economy do well in explaining such declarations. Here, we add to that in a twofold way: we cover all SOEs declared due to the pandemic and analyze which ones were declared and (or) run in an unlawful manner.

The rest of the paper is structured as follows: In Sect. 2, we develop hypotheses regarding the factors that are likely to lead to unlawful government behavior under SOEs. Section 3 contains a description of the data as well as our estimation approach. A first look at the data is provided in Sect. 4 while we present a more systematic analysis of our findings in Sect. 5. Possible ways to interpret our findings are discussed in Sect. 6.

2 Theoretical expectations

In this paper, we are concerned with the use—and the potential misuse—of constitutionalized emergency provisions. We refer to these formal legal provisions that are encoded in most modern constitutions simply as “emergency constitutions.”. These are, in other words, not separate documents but simply those parts of the constitution that refer to emergencies.

Emergency constitutions are, as we stress in Bjørnskov and Voigt (2018a), in many ways “paradoxical documents”. The stated aim of declaring an SOE is to relatively rapidly re-establish the regular constitutional order by temporarily suspending it. Emergency constitutions spell out, often in considerable detail, under which specific conditions the regular application of the constitution may be suspended by the executive. Emergency provisions thereby in principle, although not always in practice, serve to regulate the legally and politically delicate balance between reducing the separation of powers, suspending civil liberties and individual rights, and providing effective monitoring mechanisms to minimize the risk that power-maximizing politicians can misuse an SOE. Conversely, we do not consider decree power, statutory law conferring emergency powers on the executive, or constitutional conventions or political tradition, as all can be changed with relative ease once an emergency arises or may be foreseen.

Today, some 90% of all constitutions currently in force contain such provisions (for more details, see Bjørnskov & Voigt, 2018a). They typically outline which other parts of the constitution—including human rights, democratic institutions, and due process—the executive branch is allowed to ignore during an emergency. While emergencies, which different constitutions refer to using different vocabulary, such as emergency, state of siege, extraordinary conditions, and so forth, can provide governments with the necessary room for manoeuvre and speedier responses to the challenge at hand, they are also highly prone to political misuse. During an SOE, the competences of the executive are, hence, extended to the detriment of the other two government branches and of the citizens whose rights are restricted.

Throughout this study, we assume that all actors try to maximize their utility. With regard to government members, this usually implies that they try to hold on to their government offices. It can also imply that they try to circumvent constitutional constraints if these constraints appear as a hindrance to reach their respective goals. Governments may, hence, be tempted to declare an SOE as that implies additional powers for themselves and less monitoring by both parliament and the judicial branch. Some-

times, natural disasters may, thus, be a welcome pretext to extend their powers.¹ But there are, of course, also governments who respect the constitution and remain within its constraints. This may be the case if governments expect strong opposition against overstepping or consider staying within the confines of the constitution as the right thing to do. In this paper, we are interested in identifying those cases in which the constitutional constraints were reneged upon and the factors that made non-compliance with constitutional constraints more likely.

We define an SOE as unconstitutional if (1) its declaration does not follow the rules spelled out in the constitution, (2) government behavior during an SOE does not conform with the respective constitutional constraints, or (3) if the SOE does not end after the maximum term accorded to SOEs in the constitution. These three possibilities of governments not behaving in line with their constitutions follow a temporal logic. This implies that two or even all three types of non-compliance with the constitution is a possibility.

In our previous study on unconstitutional SOEs (Bjørnskov et al., 2022), we proposed to distinguish between natural disasters on the one hand and man-made domestic crises on the other, the reason being that the first event type can be considered as exogenous whereas domestic crises (such as general strikes or mass demonstrations) are often a response to government policies, are clearly endogenous and, thus, more challenging to analyse. In this paper, the analysis is confined to a single type of emergency—the pandemic—and we thus do not need to disentangle different types. We categorize the pandemic as a type of natural disaster, which also alleviates endogeneity concerns as no one saw the Covid pandemic coming.

An emergency constitution can make it more or less difficult to declare an SOE legally. The emergency constitution can, e.g., require that (both houses of) the legislature consent to a declaration, that a particular court agrees, or—in principle—even a majority of citizens. If government wants to declare an SOE but the emergency constitution makes it politically costly to do so legally, we hypothesize.

Hypothesis 1 The more difficult (“costly”) it is to declare a state of emergency legally, the higher the probability that government will resort to unlawful declarations.

This hypothesis refers to the first of the three aspects that could lead to unconstitutional SOEs named above. Our second hypothesis refers to the second aspect named above, namely the period during which a country is under an SOE. Emergency constitutions can assign different additional competences to the executive under an SOE. We conjecture that the more additional competences the constitution assigns to the executive under an SOE, the less likely the executive is to run the SOE unconstitutionally.

¹ A well-known case along these lines occurred shortly after Rafael Trujillo had become president of the Dominican Republic in 1930. Shortly after his rise to power, the country was struck by a hurricane, which Trujillo used as a pretext to seize bank accounts, levy emergency taxes, and impose martial law on all citizens. This was instrumental in firmly establishing his autocratic rule over the country, which was to last until he was assassinated in 1961.

Hypothesis 2 The fewer additional competences the constitution assigns to the executive under an SOE, the higher the probability that government will resort to unlawful means.

The first two hypotheses focus on the provisions of the emergency constitution itself. But we assume that there are additional factors that may determine whether an executive complies with the constraints laid down in the constitution or not. One of these additional factors refers to the regime type under consideration. Functioning democracies allow the citizens of a country to throw out its government in regular intervals relying on peaceful means. This could imply that executives of democracies have more incentives to cater to the preferences of their citizens (cf. Wittman, 1989). If the constitution of a country is generally accepted or even revered, non-compliance with it is likely to make government less popular. Unfortunately, no cross-country data on the degree to which citizens are loyal to their constitutions exist.² Neither are we aware of data on population preferences regarding SOEs that would be available for a large number of countries.³ This is why we formulate rather generally:

Hypothesis 3 Governments of democratic countries are less likely to behave unlawfully under an SOE than governments of autocratic countries.

In addition to the emergency constitution proper and the type of regime, we conjecture that past behavior of an executive can be a predictor for its future behavior implying that executives that have often overstepped constitutional constraints in “normal times” (i.e. non-emergency times) are also likely to do so under emergencies. One may wonder why they should go through the process of declaring an SOE if they are unlikely to stick with the corresponding constraints in the first place. One possible reason is that they want to signal their opposition—and the population at large—that they are serious about extending their own competences. We thus hypothesize:

Hypothesis 4 Executives frequently overstepping constitutional constraints in non-emergency times are more likely to do so also under SOEs.

Our last hypothesis follows a similar logic as hypothesis 4 but is broader. The rule of law indicates to what degree the laws of a country do not discriminate between people and the degree to which such laws are impartially applied and enforced. High levels in the rule of law thus indicate a general tendency to make decisions following the law and are, therefore, also expected to be accompanied by a high level of

² But see Gutmann et al. (2025) for the notion of constitutional loyalty and some individual level correlates.

³ A referee suggested that we take the sentiments of the population with regard to the state of emergency explicitly into account. Since cross-country data on this issue does not exist, we offer some anecdotal evidence here: The state of emergency declared by Indira Gandhi in India in 1975 had huge repercussions in that country and lives on in the collective mind to this day. This is likely to be one reason why the Indian government decided not to declare an SOE during the pandemic (for more on Gandhi’s SOE, see Bjørnskov & Voigt, 2024). In addition, evidence from the study of terrorism suggests that most populations strongly dislike emergencies (Bjørnskov & Voigt, 2024; Gassebner et al., 2008).

compliance with constitutionalized emergency provisions. This last hypothesis, thus, broadens the focus and takes the degree to which a country has realized the rule of law explicitly into account.

Hypothesis 5 If a country observes low levels in the realized degree of the rule of law, its government is more likely to overstep constitutional constraints with regard to an SOE.

Beyond these hypotheses, we also consider a set of economic factors. In the following, we control for overall income, the size of government, the openness of the economy, and a measure of policy distortion. On the one hand, one might expect that richer countries that are more integrated in the global economy are less likely to experience unlawful SOEs because the economic disruptions associated with partially cancelling the civil rights and regular procedure during an emergency are substantially larger, not least to the government sector. On the other hand, more open and richer economies have more economic and state capacity, allowing governments to achieve more during an SOE, including unlawful purposes. Our expectation of these economic variables is therefore also one of ambiguous effects.

3 Data and empirical approach

To test the hypotheses just developed empirically, two sets of variables are needed. One is concerned with all the SOEs that were declared due to Covid. Among all of these, we need to decide which ones were unconstitutional in the sense of having been declared unconstitutionally or having been run unconstitutionally. This variable reflects the *de facto* situation in a country and will serve as our dependent variable. In this paper, we are also interested to know to what degree the constitutionalized emergency provisions were significantly correlated with government behaviour. We thus need variables in which the most important aspects of the respective emergency constitutions have been coded. We now describe how we constructed these two sets of variables.

The first challenge is how to determine if an SOE was declared and if it was unlawful. We begin our count on all SOEs declared due to Covid by exploring the Oxford Covid-19 government response data, sometimes called the Blavatnik Centre index (Hale et al., 2023). The index gives us an approximate date of the implementation of Covid containment policies, and therefore an indication of when an SOE may have been declared, which we can match to other data sources to obtain a date for a potential SOE declaration. We supplement these data with a search of the IMF website for Covid policies, and through the news archives Factiva and Nexis Uni. In total, this gives us a universe of 176 events across 188 countries in which an SOE was either declared, extended or repeated shortly after a former SOE in 2020 and 2021.

The second step then consists in deciding which of these events were unlawful. To do so, we also use information gathered from Factiva and Nexis Uni. This implies that we effectively depend on reports brought by major newspapers, and among those the overwhelming majority appeared in English and were published in rich, Western

countries of the world. This does not necessarily imply a substantial bias, but means that if there is a bias, information from poorer, non-Western societies without colonial ties may be lacking.

The primary sources of these instances are practically always either the political opposition, parliament, the courts, non-governmental organisations such as Amnesty International, Freedom House and Reporters without Borders, journalists, and international organisations. As in our previous work (Bjørnskov et al., 2022a), we divide unlawful SOEs into three categories. First, we include declarations, i.e. SOEs declared for reasons not considered valid for emergencies, declared by the wrong actor—for example emergencies declared by a prime minister when only the president holds declaration power—and SOEs which were not approved by actors that need to approve a declaration before it enters into power (typically parliament). Our second category consists of SOEs during which the executive branch exercises power or takes decisions that are unlawful. During the Covid pandemic, many governments attempted to censor the press even though neither the constitution per se nor its emergency provisions allowed it to do so. However, many other instances of unlawful behaviour exist in the dataset, such as the illegal postponement of elections in Ethiopia or the introduction of severe restrictions on the freedom of movement in Namibia, which a court deemed unconstitutional. Finally, an SOE can be unlawful if it does not end regularly, for example by being prolonged without approval. However, in the present data, we find no instances in which emergencies were prolonged unlawfully. We next code whether a unique Covid-related SOE was declared or whether the event is an extension of an already declared SOE or a repeat declaration. In the following, we therefore distinguish between the original emergency declaration due to the pandemic, extensions of an SOE, and repeat declarations.

To make the powers that emergency constitutions allocate to governments comparable over time and between countries, we rely on our Index of Emergency Powers (INEP) that was first introduced in Bjørnskov and Voigt (2018a). It explicitly takes into account three cost dimensions as well as three benefit dimensions: the ease of declaration, the ease of having a state of emergency approved, and how comprehensive is the list of events that define a legal emergency from the cost INEP while whether the emergency constitution allows the dissolution of parliament, if some or all basic rights can be suspended, and if the emergency constitution allows expropriation and censorship from the benefit INEP. The INEP is based on constitutional information in the Comparative Constitutions Project (Elkins et al., 2009) and our own updates. In all cases, we code the component as zero if the executive has no influence, 1 if the executive faces no obstacles or vetoes, and 0.5 if the provisions are uncertain. The index is thus coded such that higher values indicate a higher utility for the executive (i.e. less costs, more benefits) on a scale between 0 and 1. We employ the two separate indices of Cost and Benefit INEP in the following.

We combine these data with additional information from a number of sources. We first add two institutional variables from the *Varieties of Democracy* project (Coppedge et al., 2020). The first of these is a composite variable capturing the degree to which the country conforms to the rule of law while the second is a direct expert coding of the degree to which the executive branch respects the constitution. Second, we add a categorical variable from Bjørnskov and Rode's (2020) dataset on regime

types and regime transitions, which allows us to distinguish between single-party regimes, multi-party autocracies, and full electoral democracies. This categorisation is based on a minimal understanding of democracy and does not overlap conceptually with the rule of law or respect for the constitution. Finally, we add a set of economic variables from mark 10 of the Penn World Tables (Feenstra et al., 2015). The set includes the logarithm to real GDP per capita, government spending as percent of GDP, trade volume as percent of GDP, and the investment price level as a share of the consumption price level.

Further, we include a variable called ‘investment price’, which captures the price of capital goods relative to consumer goods, and which we think of as a proxy for the impact of emergency restrictions on capital and business owners; with a higher investment price, capital owners will 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. The source of these variables is the Penn World Tables (Feenstra et al., 2015).

All these data, except for those directly capturing SOE characteristics, are measured in 2019 prior to the pandemic in order to avoid problems of reverse causality; all data are summarised in Table 1. The structure of the dataset is also illustrated in Fig. 1, which shows which countries are included in the data because they had nationwide Covid-related SOEs during 2020 and 2021, and which of these countries had unlawful emergencies.

In the following, we explore the determinants of unlawful SOEs, using both our overall dummy for whether a given SOE was unlawful as well as specific dummies for whether the SOE declaration was unlawful and whether unlawful political decisions were taken or implemented during the SOE. We use a simple logit estimator, pooling all SOE observations in 2020 and 2021, and observe all control variables in 2019, the year prior to the onset of the pandemic. The natural exception is the two dummies capturing whether an SOE is a repeat declaration or an extension.

Table 1 Descriptive statistics

Variable	Mean	SD	Observations
Unlawful emergency	0.233	0.424	176
Unlawful declaration	0.142	0.350	176
Unlawful action	0.091	0.288	176
Extension	0.166	0.373	175
Repeat	0.165	0.372	175
Log GDP per capita	9.102	1.133	176
Gov. spending	0.191	0.061	155
Investment price level	1.229	0.403	155
Trade volume	0.589	0.407	155
Cost INEP	0.467	0.134	168
Benefit INEP	0.398	0.211	168
Rule of law	0.559	0.287	159
Respect for constitution	2.271	0.793	159
Single-party regime	0.051	0.221	176
Multi-party autocracy	0.210	0.409	176
Democracy	0.739	0.441	176

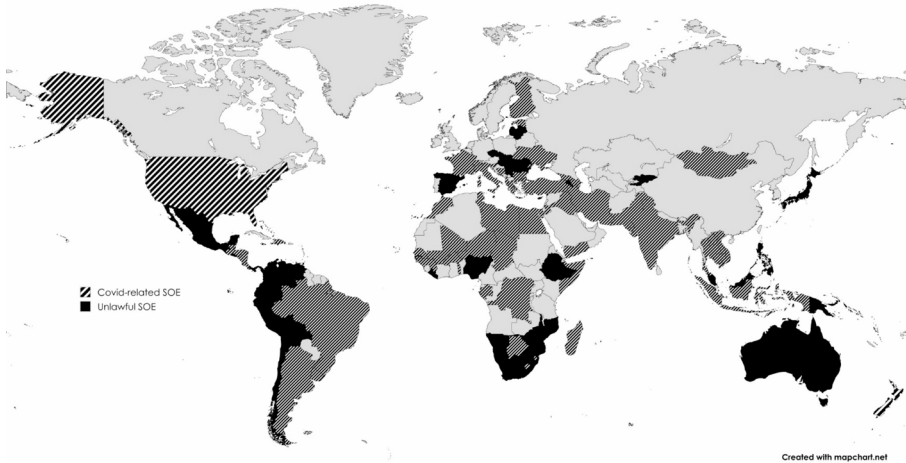


Fig. 1 Covid-related SOEs in the dataset

4 First impressions of the data

Comparing our data to our previous research in Bjørnskov et al. (2022a) documents a dramatic increase in unlawful SOEs. Across 825 SOEs declared due to natural disasters or domestic turmoil between 1949 and 2017, we found that 13.4% were unlawful. Interestingly, a total of 19.8% in autocracies and just 9.8% in democracies were unlawful in one of three possible ways described above. 12% of all declarations were unlawful while unlawful political behaviour occurred in 11.5% of all SOEs. As we do not find any unlawfully prolonged SOEs—all unlawful behavior at the end of an SOE is the result of new declarations, not extensions—we ignore this potential problem.

In the present dataset, across all 176 observations during the Covid pandemic, we find that 23% were unlawful in some way and that unlawful events occurred during SOEs in 31% of all countries. 39% of the unlawful events (9% of all SOEs) were unlawfully declared while 61% (14% of all SOEs) included unlawful actions or decisions. It is thus clear that the pandemic period was different in the sense that substantially more governments violated the constitutional limits to their power than in previous events.⁴ Another difference is that 25% of all declarations in democracies during Covid were unlawful while the same share in autocracies was merely 17%. As such, the main difference between government behaviour during the pandemic and

⁴ As we show in the appendix, Fi. 3, an interesting point here is that while we find a substantial increase in the occurrence of unlawful SOEs, the *Varieties of Democracy* dataset does not register a similar change. In the appendix, we plot executive respect for the constitution between 2016 and 2023 in three groups: Those not declaring an SOE, those declaring an SOE without unlawful behaviour, and our group of unlawful SOEs. Although we see a steady increase in respect in the group of countries not declaring an SOE, if anything the V-Dem data indicate a larger drop in respect for the constitution in countries *without* unlawful behaviour during Covid-related SOEs. Our action-based measures thus tell a somewhat different story than expert coding apparently does (cf., Little & Meng, 2024).

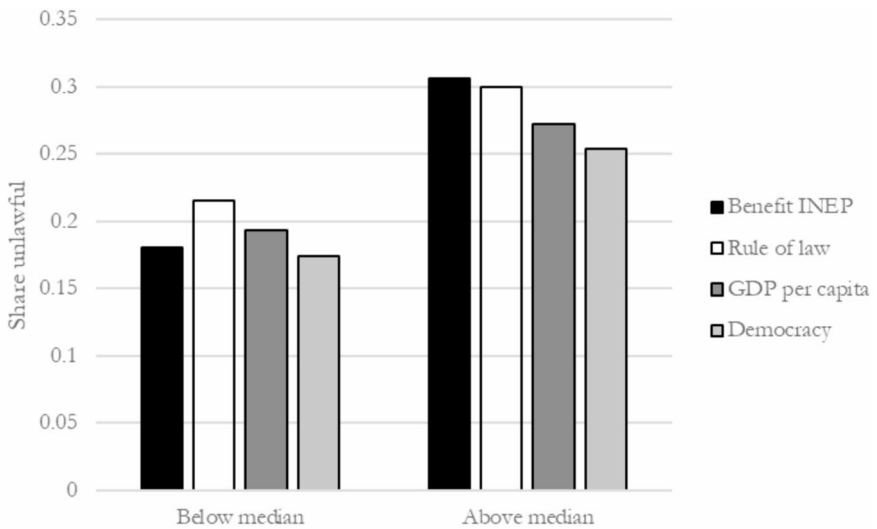


Fig. 2 Probability of unlawful emergency, four variables

government behaviour during previous emergencies occurred in democracies while the world's autocracies more or less appear to have behaved as usual.⁵

This difference is illustrated in Fig. 2 along with three other factors: how wealthy countries are, their state of the rule of law, and how permissive their emergency provisions are. The raw data quite clearly illustrate how countries with democracy, higher national income than the median across the 176 countries, better rule of law (than the median country), and more permissive emergency provisions than the median were more likely to experience unlawful SOEs. However, we must stress that in the raw data, only the latter difference is statistically significant at conventional levels. We therefore proceed with these indications to more formal tests of the determinants of unlawful behaviour during Covid-related emergencies.

5 Empirical results

We now turn to our logit estimates, which we report in Tables 2 and 3; the latter provides results for a sample that only includes electoral democracies. In both tables, we show estimates using our full specification as well as the final result of applying a general-to-specific procedure in which we sequentially drop the most insignificant variable, and only keep variables that are significant at least at the 10% level.

In columns 1–2 in Table 2, we begin by testing the determinants of unlawful SOEs without specifying the way in which they are unlawful. Although the simple compari-

⁵ It, of course, remains an option that biased or missing reporting from autocracies means that we are ignoring unlawful behaviour in autocracies, which we pick up in democracies. However, it must be emphasised that for the percent unlawful SOEs in autocracies to be the same as in democracies, we would need to miss a third of all cases. Although we do not want to overestimate the precision of the data, this appears to be such a large difference that it is unlikely to change our conclusions.

Table 2 Main results

	Unlawful, all		Unlawful declarations		Unlawful actions	
	1	2	3	4	5	6
Extension	0.166 (0.562)		2.474*** (0.828)	1.890*** (0.666)	- 2.026* (1.115)	- 2.007* (1.069)
Repeat	0.036 (0.573)		1.756* (0.965)		-0.508 (0.744)	
Log GDP per capita	0.191 (0.315)		-0.085 (0.537)		0.108 (0.409)	
Gov. spending	- 1.692 (4.183)		- 23.883*** (8.808)	- 13.103** (5.799)	7.587 (5.487)	
Investment price level	1.842** (0.761)	1.440*** (0.557)	3.143** (1.520)	1.754** (0.758)	0.995 (1.018)	
Trade volume	0.506 (0.646)		3.736** (1.378)	1.727* (0.891)	- 0.672 (0.773)	
Cost INEP	0.531 (1.658)		9.430** (4.075)	5.901* (3.319)	- 2.260 (2.102)	
Benefit INEP	2.569** (1.211)	2.522** (1.096)	2.592 (2.099)		3.044** (1.548)	3.505*** (1.337)
Rule of law	3.284* (1.723)	2.008** (0.819)	- 1.579 (2.749)		6.319** (2.564)	4.546** (1.933)
Respect for constitution	- 0.598 (0.627)		1.419 (1.219)		- 1.337* (0.798)	- 1.299* (0.682)
Multi-party autocracy	- 1.298 (1.589)		- 1.856 (1.350)	- 2.023* (1.128)	- 1.629 (1.708)	
Democracy	- 1.361 (1.615)		-		- 2.587 (1.785)	
Observations	143	144	140	147	143	152
Pseudo R sq.	0.099	0.083	0.342	0.264	0.198	0.137
LR Chi sq	16.89	14.17	34.07	26.75	25.63	18.63
Log likelihood	- 76.309	- 77.995	- 32.720	- 37.206	- 51.880	- 58.634

All regressions include a constant term. ***, **, *Significance at $p < .01$, $p < .05$, $p < .10$

sons in Fig. 2 suggest that both democracy and higher income may be associated with a higher likelihood of unlawful SOEs, we find no evidence in favour of these conjectures. Instead, we find statistically strong and robust evidence that the permissiveness of the constitutionalized emergency provisions (the Benefit INEP), the realized levels of the rule of law, and the investment price level are determinants of unlawful behaviour. These results are counterintuitive and, thus, unexpected: we would expect governments of countries that have experienced a high level in the rule of law to stay within the confines of their constitutions, rather than overstep it. However, they fit an alternative theory of the problematic effects of state capacity, which can be used effectively for both purposes in the public interest as well as unlawful behaviour. Regarding the Benefit INEP, a similar reasoning applies: if the executive branch is granted many additional powers during an SOE (indicated by high values of the indicator) by the constitution, we would expect governments to be *less* likely to overstep the constraints—as they legally already enjoy much leeway. Yet, when the constitution grants more discretionary power to the executive, there are also more margins upon which it can overstep its boundaries. The government of Victoria in Australia, for example, used its substantial discretionary emergency powers to implement some

Table 3 Results, only democracies

	Unlawful, all	Unlawful declarations	Unlawful actions
	1	2	3
Extension		2.109*** (0.719)	
Log GDP per capita	0.756** (0.379)		
Gov. spending	- 9.704** (4.725)	- 15.499*** (6.463)	
Investment price level	2.271** (0.969)	1.683** (0.788)	
Trade volume		1.706* (0.933)	
Cost INEP		6.178* (3.626)	
Benefit INEP	3.117** (1.336)		4.348*** (1.495)
Observations	112	111	126
Pseudo R sq.	0.099	0.269	0.096
LR Chi sq	13.16	23.72	9.95
Log likelihood	- 60.426	- 32.101	- 46.701

All regressions include a constant term. ***, **, *Significance at $p < .01$, $p < .05$, $p < .10$

of the world's most wide-ranging restrictions on movement, and subsequently illegally attempted to keep the media from reporting on demonstrations reflecting how unpopular the policies were.

Having identified these unexpected determinants, a closer look at the different ways in which an SOE can be unlawful seems warranted: since we do not find any instances of unlawful extensions of SOEs, we only look at the declaration stage and at the implementation stage. In columns 3–4, we estimate the determinants of unlawful declarations, which provides us with a somewhat different set of estimates. We first find that the investment price level is a consistent determinant of unlawful declarations. Second, we find a large negative estimate of government spending, which on further examination turns out mainly to be driven by a select group of countries dominated by small island states and failed states.⁶ Third, we find that countries with higher trade volumes and thus more economic contact to the rest of the world were more likely to declare unlawfully, as were countries in which the emergency provisions made declarations relatively easy (the Cost INEP). Higher trade volumes imply more personal contacts across borders, and during the pandemic, everybody—and foreigners in particular—were considered as potential spreaders of the virus. So it appears plausible that governments of countries with a high number of cross-border contacts were more likely to overstep constitutional constraints in order to reduce the number of contacts as much as possible. The positive correlation between the Cost INEP and the likelihood of declaring unlawfully is unexpected: higher values of this indicator imply that it is less costly to declare an SOE, unlawful declarations

⁶ All countries in our sample with government spending above 29% of GDP are, with three exceptions, either small island states or failed states (North Korea, Somalia and Yemen). The exceptions are Kyrgyzstan, Moldova and Ukraine.

should therefore occur less frequently. Finally, and not surprisingly, we find weak evidence that multi-party regimes were less likely to declare unlawfully and that de facto extensions of SOEs in the form of new SOEs were substantially more likely to be unlawfully declared.⁷

Focusing instead on unlawful behaviour during the emergency, we find four factors that are significant predictors in the full sample. We first find that unlawful behaviour was somewhat less likely during extensions of SOEs—an interesting result when we consider that declarations were substantially more likely to be unlawful for extensions. Second, we observe that the importance of the Benefit INEP for overall unlawfulness is driven by the (perhaps surprising) result that more permissive emergency provisions were associated with a higher likelihood of unlawful political action during the emergency (see also Bjørnskov & Voigt, 2022a, 2022b). We also find that this was more likely in countries with better rule of law, but somewhat less likely in countries in which the experts at V-Dem deemed that the executive branch had more respect for the constitution prior to the pandemic.

Before turning to a discussion of the results, we repeat our exercise in Table 3 but exclude all non-democratic regimes. The table only reports the eventual result of our general-to-specific procedure, and reveals somewhat different findings.

Overall, the exclusion of the non-democratic regimes changes fairly little in the estimates; our overall results are remarkably similar. First, we find that when focusing on the overall risk of unlawful SOEs that government spending and the investment price level again are significant. In column 2, this overall result turns out to be driven by the effects of the economy on the likelihood that SOE declarations were unlawful. We here also find a positive effect of trade volumes as well as the Cost INEP, and that SOE extensions were much more likely to be unlawful than the first declarations. Conversely, although GDP per capita is significant for the overall risk, this turned out to be a spurious finding as it does not make the cut—and indeed is far from significance—when we focus on the two specific stages of an SOE. Finally, we find that when only exploring determinants across electoral democracies, the *only* robustly significant determinant is the Benefit INEP. In other words, the only consistent influence on democratic regimes' likelihood of unlawful behaviour, such as violations of freedom of speech, movement, or expropriation in 2020 and 2021 was how permissive the emergency provisions were. This effect is nevertheless substantial, as the estimate indicates that going from a country with a Benefit INEP a standard deviation below the mean—such as Switzerland or Uruguay—to one with an INEP a standard deviation above the mean—for example Ecuador or Slovenia—increased the likelihood of unlawful government behaviour by 50%.

In total, except for economic conditions that may have contributed to the costs of declaring an SOE and overstepping institutional boundaries, we find that unlaw-

⁷ Interpreting these differences, it might be worth noting that the rule of law as well as executive respect for the constitution are highly correlated. The correlation between the V-Dem assessments of the rule of law and respect for the constitution is 0.88. Multi-party autocracies in the present dataset have rule of law indices averaging 0.33 and executive respect for the constitution averaging 1.63 (on scales from 0 to 1 and 0–4, respectively). Full electoral democracies have averages of 0.66 and 2.57, respectively. As such, it may be practically difficult to separate the purely political effects of moving to full electoral democracy from the institutional differences between regime types.

ful political behaviour was more likely when the emergency provisions made SOEs easier to declare and provided more discretionary power to the executive branch once declared, and when the rule of law was stronger prior to the pandemic. We also inquired whether specific traits of democratically structured countries had discernible effects on the likelihood of their executive branch behaving unlawfully and found this not to be the case (not shown). The traits analysed, which previous research indicates may be important, were presidential vs. parliamentary regimes and unicameral vs. bicameral legislatures (Bjørnskov et al., 2022a). It is, hence, the rather heterogenous group of democracies that had a higher propensity to behave unlawfully under a Covid-related SOE.⁸ We turn to discussing the importance of what may be counterintuitive results, and results that go against the intention of most thinking about constitutionalised emergencies.

6 Discussion and conclusions

In many countries, the evaluation of the policies chosen during the Covid pandemic is in full swing. The constitutionality of the measures is among them. The results presented in this paper show that this aspect is, indeed, highly relevant. Not only do we show that the pandemic was special in the sense that the proportion of unlawful states of emergency was far higher than during the four decades preceding the Covid pandemic. It was also special in the sense that democratic countries that were reported to achieve high rule of law levels prior to the pandemic were even more likely to be involved in unconstitutional behaviour than autocracies. In that sense, the pandemic was also a period of crisis for constitutionalism and the rule of law.

Constitutions are supposed to channel government behaviour and thus make it more predictable. To capture constitutionalized emergency provisions, we developed two indices, the Benefit INEP and the Cost INEP that indicate the amount of competences an executive enjoys under a state of emergency and how difficult it is to constitutionally declare a state of emergency in the first place (Bjørnskov & Voigt, 2018a). These indices thus capture central aspects of the constitution with regard to emergencies. As we show in Bjørnskov and Voigt (2024), democracies do not in general have less permissive emergency constitutions, which makes their behavior during the Covid pandemic the more problematic.

Our findings with regard to both indices are a priori counterintuitive: higher Benefit INEP values, implying that more discretionary power is allocated to the executive, are correlated with a significantly higher probability of unlawful government behaviour once an SOE is declared while higher Cost INEP values are correlated with a higher probability of an unlawful declaration. These findings thus imply that when it is relatively easy to declare an SOE, it is more likely to be declared in an uncon-

⁸ In addition to the factors explored here, we have explored a further set of characteristics in robustness tests (not shown). One might for example expect, based on reasonable conjectures, that corruption, the strength of civil society, legal origins and broad differences between legal regimes (such as common law, civil law, and alternatives) could affect government behavior during the Covid pandemic. However, we found no indications that these factors are statistically significant or of political relevance around this specific event.

stitutional way and the more benefits the executive enjoys under an SOE, the more likely it is to overstep. These findings are not only counterintuitive but also reason for concern because they indicate the existence of a constitutional slippery slope, which is not merely limited to autocratic countries.

A benevolent way of interpreting these findings would be to assume that many constitutions were simply not fit to deal with the type of challenges caused by the pandemic. Given that pandemics are likely to recur, one implication could be to think hard about how constitutions could be amended allowing governments to stay within the confines of the (amended) constitutions. Such amendments would not simply provide government with more constitutional leeway and allocate more discretionary power to the executive but take into account that a rapidly evolving pandemic is a complex phenomenon with few sources of systematic information (Pennington, 2021).

Another way to interpret these findings, more in line with traditional thinking in the public choice school, is to point out that when under pressure, even governments of rule of law-oriented democracies are ready and willing—and perhaps eager—to renege on constitutional constraints—and thus endanger the rule of law. One could also point out that there has been a general trend of democratic backsliding and this trend was aggravated by governments' Covid policies (Lewkowicz et al., 2022). It is, for example, difficult to make a consistent argument in favour of the most common unlawful behaviour during the pandemic, which was censorship and restrictions on the freedom of expression, not least in a situation in which knowledge was highly uncertain (Bjørnskov & Voigt, 2022a). Taking this approach to interpreting our findings here would not suggest further amendments, but instead tighter constitutional constraints on government behaviour during SOEs.

Regardless of the particular interpretation one prefers, the findings in this paper—however tentative they must be given what can be learnt from an event that although serious only lasted 2 years—should be cause for concern. The prevalence of unlawful SOEs and in particular that a fourth of all democracies exhibited some form of directly unlawful behaviour during the pandemic suggests that emergencies are systematically misused. The questions arising from the situation should occupy scholars in law and economics for a long time.

Appendix

See Fig. 3.

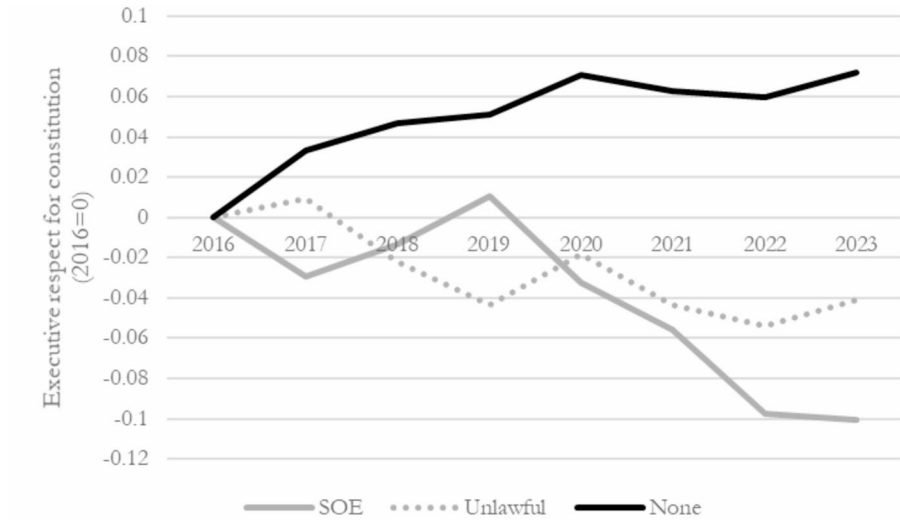


Fig. 3 Executive respect for constitution, three groups

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Data availability Data is available from the authors upon request.

Declarations

Competing interests The authors declare no competing interests.

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