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Unconstitutional States of Emergency¹

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Abstract: Nine out of ten modern constitutions contain explicit emergency provisions, describing who can call a state of emergency (and under which conditions) and the additional powers 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 under what conditions government behavior under a state of emergency deviates from constitutional provisions and a de jure/de facto gap thus emerges. Such a gap can be caused by the unlawful declaration of an emergency, the non-compliance with constitutional provisions in the course of an emergency, or the perpetuation of a state of emergency beyond the constitutionally defined length. Based on a novel dataset comprising 853 emergency declarations, 115 are identified as unlawful. We find that events caused by political

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turmoil are more likely to be followed by an unlawful emergency than natural disasters. Autocratic governments are more likely to renege against the constitution than democratic governments. Focusing on the 97 emergencies declared as reactions to domestic events, we also find that bicameral systems are more likely to suffer from unlawful states of emergencies than unicameral ones, as are countries hit by recessions, and countries where the constitution justifies emergencies under more numerous conditions.

Keywords: Constitutional political economy; constitutional emergency provisions; de jure/de facto gap; emergencies; public choice.

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 et al., 2011; Bjørnskov and Voigt, 2018a), and 99 did so in the spring of 2020 due to the COVID pandemic (Bjørnskov and Voigt, 2021a). Nine out of ten constitutions currently in place include explicit provisions dealing with emergencies (“emergency constitutions” for short). One major cause for declaring an SOE are natural disasters such as hurricanes or earthquakes. Political turmoil is another major cause which can range from peaceful demonstrations to terrorist attacks. All of these situations, 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 formal emergency provisions are actually being complied with by governments. The paper thus aims at identifying a possible gap between *de jure* provisions and *de facto* reality. Based on a novel dataset that identifies 115 out of 853 analyzed SOEs as unconstitutional, we make first steps towards identifying the reasons that lead governments to violate constitutional rules. Due to the particular structure of the data, this analysis 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 to be followed by an unconstitutional emergency than are natural disasters. Autocratic governments are more likely to renege upon the constitution than democratic governments. Finally, bicameral systems are more likely to suffer from unlawful SOEs than unicameral ones. If domestic events induce 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 have analyzed emergency constitutions empirically. Bjørnskov and Voigt have shown that emergency constitutions channel government behavior in various ways. The declaration of an SOE subsequent to some triggering event is influenced by the difficulty of formally calling an SOE: the more costly it is, the less likely is an SOE to be

called (2018a). Regarding the effectiveness of containing the consequences of natural disasters, they find that the more benefits can be enjoyed by 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 the respective disasters (2021b). This is an indication that emergency constitutions are often misused, a result also found by Lührmann and Rooney (2020) who show that governments that declare an SOE have a higher propensity to move towards autocracy. In a study analyzing the relationship between calling an SOE and the likelihood of terrorist events occurring, Bjørnskov and Voigt (2020) find that countries declaring an SOE subsequent to a terrorist attack are more likely to suffer from another attack than those countries not declaring an SOE.

In addition to contributing to the literature on constitutional emergency provisions, this study also contributes to a small but fast-growing literature inquiring into the factors that determine whether governments comply with constitutional provisions or not. Although there is an old tradition claiming that constitutions are nothing but parchment barriers, empirical research inquiring into the factors that make politicians (not) comply with their constitutions is still scarce (Chilton and Versteeg 2020 focus on the likelihood of individual rights being implemented in comparison to group rights; Voigt 2021 is not only a survey of existing studies but also an overview of the underlying research program).

The rest of the paper is organized as follows: in the next section, we develop a number of theoretical conjectures regarding the conditions under which governments are particularly likely not to comply with the respective emergency constitutions. Section three introduces a novel and unique dataset of 853 states of emergency of which we identify 115 as unlawful. In section 4, we provide empirical evidence of when governments choose to declare unlawful SOEs after which we discuss the results and conclude.

2. Framing the issue

We frame this issue by first spelling out possible ways of unconstitutional government behavior related to emergencies and then inquire into possible reasons to do so.

Types of Unlawful Government Behavior

We propose to distinguish three phases during which unlawful behavior can occur: First, the declaration of an SOE can be unconstitutional. Second, the acts chosen by the executive during an SOE can be unconstitutional. And third: the way in which the state of emergency is prolonged can be unconstitutional. It is, of course, possible that two or even all three types of non-compliance with the constitution occur in sequence.

Referring to phase one, i.e. regarding an unlawful declaration, at least four such ways can be distinguished. First, it is possible that the executive calls an SOE without any accompanying event. Second, the executive might declare an SOE due to a reason not mentioned in the constitution. If the constitution does not allow to declare an SOE after such an event, the declaration will be unconstitutional. Third, an SOE may be unconstitutional if it is declared by a government actor who does not have the competence to declare an SOE. Finally, an SOE may be unconstitutional even if it is declared by the ‘correct’ actor, but formal conditions (such as the consent of parliament) stated in a constitution are not complied with.

Referring to the second phase, i.e. regarding unconstitutional behavior of the executive during an SOE, governments can overstep their competences in a variety of ways. They could, possibly even with benevolent intentions, be too active 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 and thus disrespecting private property rights and so forth. A second way in which governments can overstep their competences is in strengthening their own position by weakening the opposition: possible means include the dissolution of parliament, postponing elections, suppressing media freedom etc. A

third possible way is to weaken other veto players such as the judiciary by, for example, suspending judicial review during an SOE or by creating entirely new courts. A fourth possible way – which might be difficult to delineate in practice from the last two ones 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, i.e. in the third phase mentioned above. Many constitutions define a maximum length during which an SOE can be upheld. The most famous of these provisions dates back to republican Rome where the time of the dictator ran automatically out after six months. Should government wish to extend the emergency beyond the maximum length provided for in the constitution, it needs to seek approval by the bodies laid down in the constitution.² Government can therefore behave unconstitutionally by either 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 of the executive branch are the underlying emergency provisions contained in a country's constitution. In this study, we take these provisions as data. But of course, these are not simply given but the consequence of choices made by some constitutional assembly. We analyzed both the factors leading to the inclusion of emergency provisions into a country's constitution and the specific type of emergency constitution chosen in a previous study (Bjørnskov and Voigt 2018a)

² A fourth way in which an SOE can lead to unlawful government behavior is if specific acts of government only pertaining to the emergency and only applicable during an emergency are prolonged after it is over. We only briefly mention this option, as we have no data on this aspect of unlawful emergency behavior.

Theoretical considerations

After having broken down unconstitutional behavior into three phases and discussed various potentially unconstitutional means, we now move on to discuss possible reasons for why the executive might rely on such means. We start from the assumption that the relevant decision-makers act in order to remain in office. In established democracies, this implies seeking re-election and in autocracies it means preventing any potential competitor from becoming too strong. But would-be autocrats might also misuse an emergency as a welcome pretext for getting rid of democratic institutions (as shown by Lührmann and Rooney 2020). Emergency actions by members of the executive not in compliance with constitutional restrictions can be assigned into one of two categories:

- (1) An executive believing that the additional competences allocated to it under the emergency constitution are insufficient to deal effectively with an acute emergency.³
- (2) On the other hand, governments might use the emergency as a welcome pretext to prolong their own term of office by postponing or entirely cancelling elections.⁴

Intermediate steps include such measures as weakening the opposition and (or) civil society. The suspicion is that such behavior is particularly frequent among populist governments and would-be autocrats.

To structure the analysis further, we propose to distinguish between two groups of event types, namely natural disasters on the one hand, and political turmoil on the other. Natural disasters

³ It could be interesting to analyze whether such governments do propose constitutional amendments making their behavior constitutional the next time around.

⁴ Yet another possibility for unconstitutional behavior arises when generally agreed conventions exist that make the *de facto* situation different from the *de jure* constraints. The constitution may, for example, not allow an emergency under condition X but by way of constitutional practice, it is generally accepted that such government behavior is not considered as a transgression of the constitution. But as long as government behavior remains within generally accepted conventions, this will not be called "unconstitutional" by any relevant observer.

include biological events (such as malaria or Ebola epidemics but also the COVID pandemic), geophysical ones (such as earthquakes and volcanic activity), hydrological ones (such as floods and landslides), and climatological events (such as droughts and wildfires). Political turmoil, in turn, encompasses mass demonstrations, general strikes, but also assassination (attempt)s and terrorist acts.

We choose this binary categorization because natural disasters are exogenous events beyond the control of governments.⁵ 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.⁶

We assume that unconstitutional states of emergency conducted by benevolent governments are more likely with regard to natural disasters as their size might, indeed, be non-anticipated and lead such governments to overstep the constitution with the best of intentions. Unconstitutional states of emergency conducted by executives aiming at safeguarding or even extending 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 caused by domestic turmoil. While natural events cannot

⁵ This refers to the events, but not necessarily to the effects of such events. An earthquake in a region with lax construction regulation or underenforced regulation might, for example, cause more fatalities than the same earthquake in a country with strict construction regulation (Escaleras et al., 2007).

⁶ A reviewer pointed out that some events potentially causing the declaration of an SOE are not covered by this binary classification. Such events are, e.g., financial crises, external wars, but also man-made disasters such as the fallout of nuclear power plants or the explosion of chemical factories. In our dataset, there are very few such cases (of man-made disasters), which is why we constrain the analysis to the two categories just described.

reasonably be blamed on the government, and may even give rise to ‘rally around the flag’ effects, domestic events can, giving the incumbents a political incentive to safeguard their position.

We now use this conceptual framework to propose a number of hypotheses. We begin with some fairly general ones that are being followed by hypotheses that pick up the sequence of unlawfulness introduced at the beginning of this section.

Executives not respecting the constraints of the constitution during “normal” times are unlikely to respect the constitution during an SOE (hypothesis 1). Unlawful behavior of the executive branch can refer to any of the three phases sketched above. It might be that their unconstitutional behavior has become a sort of a habit which they will not deviate from after an SOE has been declared. The really tough question here is a different one: why would executives that do not respect the constitution under “normal” circumstances declare an SOE in the first place? After all, states of emergency are declared to legally enjoy additional competences that the executive does not normally enjoy. A possible reason is that declaring an SOE accords an aura of legitimacy to their behavior. They might intend to signal, either to citizens and voters, political opponents or the international community, that they are taking the constitutional constraints seriously. However, we do not have to deal with this question here as we are interested in the question under which conditions executives are likely to breach the constitution given that an SOE has been declared.

Governments’ decision to declare an SOE, no matter whether as a consequence of a natural disaster or political turmoil, is heavily influenced by the institutional setting prevailing in a country. Bjørnskov and Voigt (2018b) analyze the triggers that lead governments to declare an SOE and find that it is crucial to distinguish between natural disasters on the one hand and political turmoil on the other. Countries with a high degree of *de facto* judicial independence are less likely to declare an SOE subsequent to a natural disaster whereas no significant association between *de facto* judicial independence and the decision to declare an SOE to political turmoil exists. The opposite association exists with regard to the degree of parliamentary powers. More

such powers increase the likelihood of an SOE subsequent to a natural disasters whereas no significant association is found for political turmoil.

Whereas the difficulty of declaring an SOE is insignificant for declarations following political turmoil, the difficulty interacted with the degree of conflict reported for a country year is positively correlated with declarations. Finally, autocracies are more likely than democracies to declare an SOE following political turmoil whereas no such association can be uncovered with regard to natural disasters.

Having declared an SOE is a precondition for running it in contravention of the constitution. Precisely because political turmoil is likely a response to government behavior, it is more threatening for the survival of government. This is why we expect governments to exhibit *a higher propensity to renege on constitutional constraints as a consequence of political turmoil than natural disasters* (hypothesis 2).

Moving on to situations under which the declaration of an SOE is unconstitutional (i.e. unconstitutional behavior referring to phase 1 as introduced above), we expect that *the more constraints the constitution contains regarding the issuance of an emergency declaration, the more likely it is that the emergency will be declared in contravention of the constitutional constraints* (hypothesis 3a). Closely related, we expect that *executives in countries with a bicameral legislature are more prone to overstep their competences* in declaring an SOE than executives in countries with an unicameral legislature because getting the consent of two houses is more cumbersome than securing the consent of a single chamber (hypothesis 3b).

Once an SOE has been declared – either in compliance with the constitution or not – the executive chooses the means it wants to use to fight the emergency (we are now, hence, referring to hypotheses of phase 2 as introduced above). And again, it has the choice between relying on means allocated to it under the constitution or to overstep the constitution and to rely on means not in accordance with the constitution. We hypothesize that *the fewer additional competences are allocated to the executive during an SOE, the higher the probability of non-compliance* (hypothesis 4). This

hypothesis refers to both types of government introduced above: “benevolent” governments might overstep the constitution to fight the effects of an emergency, opportunistic governments to reinforce their own position.

We now move on to the third phase of SOEs in which the executive branch can violate the constitution, namely when a decision needs to be taken regarding its ending. There are constitutions previewing *ex post* judicial review of government behavior exercised during the SOE. One might predict that governments subject to such provisions are less likely to overstep constitutional constraints. For this conjecture to hold true, two assumptions appear crucial, however. The judiciary does not only enjoy the *de jure* competence to scrutinize government behavior but also needs to enjoy a high degree of *de facto* independence from government, otherwise the threat of *ex post* sanctions will simply not be credible.

But this may not be sufficient. In addition, we need to assume that members of the executive have a low effective time discount rate. Governments facing domestic political turmoil and seeing their own survival in office threatened may, indeed, discount the future heavily leading them to behave unconstitutionally in what we refer to as phases 1 and 2 of the SOE. Now, given that such governments are aware that they will be subject to serious scrutiny regarding the means applied during the SOE, possibly even backed up by threats of criminal prosecution, we expect them to be more likely to extend the SOE in order to postpone having its own behavior reviewed. The likelihood of unconstitutional temporal extensions increases in the degree to which members of the executive branch have violated the constitution in the first two phases of an SOE.

These considerations point, hence, in opposing directions regarding the effect of *ex post* judicial review. We hypothesize that *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* (hypothesis 5). However, that threat is irrelevant if a process looking into government behavior during the SOE, perhaps as part of a formal *ex post* judicial review, is under the direct *de facto* control of the

executive. It is also less relevant if the incumbent government does not face substantial threats to its survival in office from, e.g., democratic elections or coups. As such, this hypothesis mainly applies to a specific set of regimes.

In addition to these hypotheses, we propose to control for a number of potentially confounding influences. If current economic growth is negative, large parts of the population are likely to be unhappy with their government. A natural disaster can be the focal point (Schelling 1960) to kick off anti-government demonstrations to which government is likely to answer by non-constitutional means.

Finally, we control for whether a constitution is democratic or autocratic. Given that autocrats declare an SOE, we would expect them to renege more frequently than democratic regimes because many monitoring mechanisms relied upon in democracy are weak or entirely absent, such as general elections, a free press, or civil society organizations that might criticize government for its behavior. In principle, many other institutional details could be controlled for, but given that we also control for basic forms of government, we believe that these are the most important ones.

3. Data

The Dependent Variable

To be able to analyze the determinants that make governments overstep their constitutionally determined competences, a complete list of states of emergency – both constitutional and unconstitutional – is needed. The starting point of our analysis is the dataset assembled by Hafner-Burton et al. (2011), which we updated until 2017. Before beginning to collect information on the lawfulness of states of emergency, we tried to find evidence that those instances contained in Hafner-Burton et al. were indeed recognized as states of emergency. In

addition, we made sure that the states of emergency ending up in our dataset were all pertaining to the national level. This gives us a universe of 853 cases that occurred between 1949 and 2017.

We then needed to separate the non-constitutional from the constitutional states of emergency. Now, whether any of the measures just named are unlawful depends on a country's constitution. To identify a *de jure/de facto* gap, government behavior will therefore have to be evaluated on the basis of the constitution in place in the respective country.⁷ To separate lawful from unlawful behavior, we took three steps: We first relied on both legal and journalistic documents provided by two commercial providers of such information, namely Factiva and Lexis/Nexis, combining the search terms “state of emergency” and “unlawful.”⁸

Second, we consulted the annual reports of international NGOs that are concerned with basic human rights and political / civil freedom more generally. The reports provided by Freedom House proved to be particularly useful. Third, to determine unconstitutional behavior in phase three, i.e. overly long SOEs, we calculated the length of an SOE in days and compared it to the maximum length stipulated in the constitution. In case the actual length exceeded the constitutionally stipulated length, we searched for information reporting about extensions passed through parliament etc. In case no such information was found, the respective SOE was coded as unconstitutional.

Decisions on whether a particular behavior of the executive is in line with the constitution or a breach of it are always subjective. The question thus is: whose evaluation to take into

⁷ Some constitutions read as if they were 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, its continued operation, any emergency ordinance and continuation in force of those ordinances non-justiciable (Ramraj, 2010, p. 40). The Pakistani constitution contains a very similar clause (Kalhan 2010, 97).

⁸ Although one of our search terms is “unlawful” we also refer to this behavior as “unconstitutional”. This is warranted since out of a total of 115 identified cases of such behavior, only three involved non-compliance with statutory law.

account and whose evaluation to discard? Our search via both Factiva and Lexis/Nexis does not rely exclusively on court decisions but includes evaluations of law professors, NGOs and journalists reporting on the states of emergency. We deem such a rather broad take to be justified because relying exclusively on courts is likely to give us far too few unlawful states of emergency. Not only would one need to take the various standing provisions into account, but more importantly, courts in many countries are not sufficiently independent from the executive to review its behavior critically. Although decisions on the unconstitutionality of government behavior are always subjective, we point out that the cases qualified as unlawful or unconstitutional here could also be called “suspected to be unlawful.” In order to keep the language simple, we refrain from adding that caveat for the rest of the paper.⁹

Relying on Factiva and Lexis/Nexis essentially means that we rely on reports that ran in major newspapers with the vast majority of them appearing in English and the richest countries of the world. This is likely to have resulted in some underreporting of SOEs – and correspondingly their unlawfulness – in quite a few countries of 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 initial clues for foreign newspapers to report on events. Finally, both the coverage of events taking place in far-away countries as well as the digitization of newspapers – which is a precondition for inclusion in these databases – is subject to a time-trend. According to our dataset, the vast majority of unlawful states of emergency took place post 1990. In all likelihood, it is not the disrespect for constitutional constraints that increased since but rather the degree of searchable reports.

⁹ It also seems worth pointing out that the degree of subjectivity is far lower with regard to the third phase of unconstitutional states of emergency: it refers to the maximum length of an SOE and whether this maximum was complied with or not can be ascertained by comparing the number of days that a specific SOE lasted with the maximum number of days mentioned in the respective constitution.

Table 1 splits both constitutional as well as unconstitutional states of emergency with regard to two dimensions, namely democracies vs. autocracies on the one hand and natural disasters vs. political turmoil on the other. The numbers before the brackets indicate the overall number of SOEs, the numbers in brackets the number of unconstitutional ones. Whereas in democracies, the number of states of emergency triggered by political turmoil and natural disasters are 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 states of emergency are much more likely to be caused by domestic turmoil in both autocracies and democracies, a finding in line with hypothesis 2.

Table 1: (Unconstitutional) States of Emergency according to both regime type and potential causes

| | Democracies | Autocracies |
|------------------|--------------------|--------------------|
| Natural Disaster | 271 (8) | 68 (6) |
| Domestic Turmoil | 241 (41) | 245 (56) |

Note: the first number in each cell indicates the respective number of declared SOEs. In parentheses, we report the number of SOEs that were reported as unconstitutional.

In addition to regime type and potential causes, Table 2 contains information regarding the phase(s) during which government behaved in contravention to constitutional constraints. Regarding the three phases reported above, the overwhelming majority of non-compliance happens during the state of emergency (with 65 reported cases) as the column “All” in Table 2 shows. Constitutional non-compliance in declaring an SOE is reported 19 times, and non-compliance because an emergency was extended violating the constitution occurred 39 times. These categories overlap slightly, as we find six cases where the constitution was violated during

both the declaration and under the state of emergency and three cases where it was violated during the emergency as well as in an extension of it. Finally, in one case – the Central African Republic in 1981 – the constitution was violated in all three phases. The other four columns allow a more fine-grained distinction with regard to the events having triggered an SOE (natural disasters vs. political turmoil) as well as the type of regime (democracies vs. autocracies).

Table 2: Unconstitutional Behavior during the various phases

| | All | Natural Disasters | Political Turmoil | Only Democracies | Only Autocracies |
|--|------------|--------------------------|--------------------------|-------------------------|-------------------------|
| Phase 1 (declaration) | 19* | 1 | 16 | 6 | 13 |
| Phase 2 (behavior during SOE) | 65 | 4 | 60 | 28 | 38 |
| Phase 3 (temporal extension) | 37* | 9 | 30 | 20 | 19 |
| Sum** | 115 | 14 | 97 | 51 | 64 |
| <p>* Two man-made cases are dropped out of analysis (because of low number of observations).¹⁰</p> <p>** These phases overlap in several cases. At times, sums do not add up due to missing information</p> | | | | | |

There are a number of reasons to assume that our dataset rather underestimates the number of unconstitutional states of emergency. Quite a few countries have been relying on long-standing SOEs, lasting many years and in some cases even decades; among them Egypt, Jordan, Sri Lanka, and Syria. Now, with regard to some of them, not a single news report was found in which anybody claimed that government behavior was unconstitutional. This was the case with regard to Jordan and Syria, but also Zimbabwe (which was under an SOE between

¹⁰ The first case refers to economic problems and occurred in Sierra Leone in 1988 and the second one refers to Trinidad and Tobago in 1990 where the official reason for the SOE was to fight crime caused by drug gangs.

1980 and 1990). Moreover, awareness regarding government's non-compliance with basic human rights seems to be higher than with regard to procedural provisions also determined by the constitution. It might therefore be that violations of the latter type remain unreported.

Explanatory Variables

In the following, 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 on income, which we capture by purchasing-power adjusted GDP per capita, as well as the rest of the economic variables, derive from the Penn World Tables, mark 9.1 (Feenstra et al., 2015). The remaining economic variables are trade volumes (as percent of GDP), a recession variable that takes the value 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 thus think of it 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.

Our source for form of government is Cheibub et al. (2010) as updated by Bjørnskov and Rode (2020). A particularly attractive feature of their data is that they do not only separate between democracies and autocracies but also include information on two characteristics of the

political institutions: whether the political system is presidential and data to separate unicameral from bicameral legislatures.¹¹

We include data on the degree to which the constitution is being complied with by the executive in general. This allows us to ascertain whether governments not complying with the constitution under an SOE are general low compliers. These data derive from the Varieties of Democracy (V-DEM) dataset, which is based on country expert ratings and measured the year preceding an SOE. Our two variables capture whether members of the executive respect the constitution (v2exrescon) and the likelihood that the executive and legislature complies with high court decisions (v2juhccomp). V-DEM creates a continuous latent variable out 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 Pemstein et al. 2020 for the construction of the latent variable).¹²

Turning to the ideological data, we are unfortunately not aware of a dataset having coded populist governments on a worldwide scale. Instead, we ask whether the ideological position of the governing party plays any role (in the case of coalition governments the largest party in government). We retrieve that information from the Database of Political Institutions (Scartascini et al., 2017). It contains an indicator, which codes whether the party is right-wing (a score of 1), center (2), left-wing (3) or not codable (0). In most cases where the ideological

¹¹ Alternatively, the data in Bjørnskov and Rode (2020) can also be used to separate civilian autocracies from military dictatorships, and presidential from parliamentary democracies, or separate single-party and multi-party autocracies. We find that it makes no difference to our results and prefer the simple and more easily interpretable scheme.

¹² We have also run tests with a variable from the same dataset indicating the degree of de facto judicial independence and an overall rule of law index (v2x_rule). We do not report these tests as they are similar to those pertaining to the measure of respect for the constitution.

position is not codable, the party is effectively non-programmatic and instead populist, nationalist, or a reflection of pure power politics (cf. Cruz and Keefer, 2015).¹³

Finally, turning to the constitutional data, we have in a previous paper (Bjørnskov and Voigt, 2018a) developed an Index of Emergency Powers (INEP) that contains three benefit as well as three cost components indicating potential benefits of running an SOE and potential costs of declaring it. The cost variables reflect how costly the constitution makes it for government to call an SOE and takes into consideration who has the power to declare an SOE (it is costly if the legislature or other bodies need to consent or have the power to declare it altogether), 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 legitimate basis for declaring an SOE (the fewer conditions are named as justification for declaring an SOE, the more difficult it is to declare). We also use two specific components of the overall indices on their own: Whether declaring an SOE requires approval from a second chamber, and the number of conditions that justify a declaration, as it provides direct information on the conditions that would make an SOE unconstitutional.¹⁴ The benefit components take into consideration whether, after having declared an SOE, government has the power to dissolve parliament, to suspend some basic rights, and the right to expropriate its citizens and censor the media. Most of our constitutional information derives from the Comparative Constitutions Project (Elkins et al., 2009). The INEP is coded as an additive index

¹³ In a few cases, parties without 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.

¹⁴ We are able to single out these two elements of the INEP, as they are not conceptually overlapping with most other components. However, a set of preliminary tests showed that the six subindices making up the Cost and Benefit INEP perform worse than the overall indices. This is a typical situation when some elements are substitutes for other elements – i.e. when some political goal can be reached by different means – and we therefore employ only the overall indices.

between 0 and 1 where 1 indicates complete (effectively dictatorial) powers to the executive. A high coding of the cost component thus indicates low costs for the executive whereas a high coding of the benefit components indicates a high level of benefits accruing to the executive.

Table 3 contains the relevant descriptive statistics of the variables. Given that our dependent variable is binary, we run a set of simple logit estimates to reveal systematic structures in the data. We do so for both the full sample, for all SOEs declared on the basis of a domestic event (by far the most common type), and for all SOEs declared in democracies, which informs about the degree to which democratic polities are different. An appendix also includes a set of simpler tests in which we divide the respective sample into two equally large sub-samples, one representing cases where the attribute (e.g. income per capita) is below the mean, and the other cases where it is above the mean. When using dummy variables, the sample split is along the lines of the defining criterion (a country has a presidential form of government or not). We then use these subsamples and calculate the proportion of unlawful SOEs among them. Should the difference in proportion between the two subsamples be significant at the 95% level, we report them in the figures. All differences, including the insignificant cases, for the first three cases are also listed in Appendix Table A1.

Insert Table 3 about here

Before presenting our main results, a note on challenges regarding causal inference might be apt. First, there is amazingly 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, i.e., government reactions to consequences of government 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 who have not complied with the constitution all along or governments who plan to behave unconstitutionally after political turmoil might refrain from declaring an SOE altogether. As this, in turn, implies that we would not observe anything with the tools currently employed, it would mean that the relevant endogeneity works against finding any significant results and all results found are rather conservative estimates.

This issue is closely connected with the problem of our non-random sample as, after all, governments not having abided by the constitution while running an SOE have not been randomly drawn. Relying on a Heckman two-step model to correct for non-random sampling is the standard way of correcting for a biased sample. Unfortunately, it cannot be applied here for various reasons: First of all, the Heckman procedure requires large amounts of data. Second, applying the Heckman correction in our case implies to estimate 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 any such event ever having taken place.

Any attempt at alleviating the non-random sampling problem because governments rationally decide to declare an SOE for a variety of reasons would therefore itself yield a biased sample. We therefore aim for describing simpler patterns in the data and in many cases must refrain from establishing clear causal claims.

4. What is common to unlawful SOEs?

We begin by illustrating the overall use of SOEs and the likelihood that they are unlawful in two world maps. The first in Figure 1 shows the density of SOEs across the world and thus illustrates where our 853 events took place. Likewise, the map in 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 is reported for European and Latin American countries.

Insert Figure 1 about here

Insert Figure 2 about here

4.1. Descriptive differences

One of the clearest common features in unlawful SOEs is that the majority of the events are due to political turmoil – 97 of the 115 unlawful SOEs we identify are declared for such reasons. We find only 14 cases in which an unlawful emergency declaration was justified by natural disasters and five in which the cause was man-made disasters: Fiji in 2002, the Marshall Islands in 2005, Palau in 2011, Sierra Leone in 1987 and Trinidad and Tobago in 1990. It is similarly rare that unlawful SOEs are declared based on statutory law: 70 of the 115 cases in our data are based on constitutional and only three are (un)justified in statutory law.¹⁵

Turning to when an emergency becomes unconstitutional, 19 (17 percent) of our cases are unlawful because the emergency declaration is unlawful, 65 (57 percent) are coded as unlawful because the executive branch performs unlawful acts during the emergency, and 39 (34 percent) are unlawful because they are either prolonged in an unlawful manner or they extend beyond their constitutionally mandated maximum duration. However, one must be careful in ensuring that an SOE that appears to extend beyond its maximum duration actually did so. Regarding the duration of SOEs that are lawful in this respect, of the observations with full information 63 percent ended exactly at their maximum allowable duration. Only 15 percent are ended before their constitutionally demanded expiry while 22 percent are 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 -value $< .01$).

¹⁵ The numbers do not add up to 115 because there are a few cases for which we lack more detailed information.

4.2. Main results

We begin by presenting our findings for the full sample in Table 4. Throughout, we find that democracies are substantially less likely than autocracies to behave unlawfully in the context of an SOE. Calculating the odds-ratio from the output in column 1 suggests that the probability of observing an unlawful SOE in a democracy is about 75 % of the probability in an autocracy. We also find that unlawful SOEs are less likely in richer countries.

Insert Table 4 about here

Turning to the specific groups of explanatory variables, we find suggestive evidence of four 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 having a bicameral system remain statistically significant. They are also practically meaningful as the odds ratio of having a presidential system (relative to a parliamentary) suggests that unlawful SOEs are approximately 70 % more likely in presidential systems. Likewise, unlawful SOEs are approximately 50 % more likely in bicameral systems.

We present comparable results in Table 5 where we focus only on domestic turmoil, which includes 97 of the 115 unlawful SOEs. We first note that this change renders income insignificant throughout the table while democracy remains statistically significant and practically important. Of our explanatory variables, four retain significance: the relative investment price levels, bicameral political systems, the Cost INEP measure, and the need for emergency approval from a second chamber. 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 appears about 60 % more likely in bicameral systems, having higher investment price level reduces the likelihood.

Insert Table 5 about here

Our final tests in which we repeat the analysis based on a sample of democratic countries only is reported in Table 6. We here find only fragile evidence for an effect of income while the main explanatory variables appear to be the relative price level of government spending, executive respect for the constitution, the Benefit INEP, and whether emergency declarations require approval from a second chamber.

Insert Table 6 about here

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 drive down the likelihood of unlawful SOEs, as does executive respect for the constitution, as assessed by experts in the year preceding the emergency. Conversely, requiring second chamber approval more than doubles the likelihood that an SOE is going to be unlawful.

As such, comparing results across Tables 4 and 6 can provide some information about differences between democracies and autocracies. Of the results 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, executive respect for the constitution and secondary chamber approval are exclusively driven by the democracies in our full sample.

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

5. Conclusions

This study analyzes the determinants that make executives behave unconstitutionally with regard to an SOE. It explicitly distinguishes between an unconstitutional declaration, unconstitutional

behavior during the state of emergency and an unconstitutional ending of the state of emergency, most likely its extension beyond constitutionally defined limits. Interestingly, the vast majority of non-constitutional states of emergencies occur subsequent to domestic turmoil and not subsequent to a natural disaster.

We find that autocrats are a lot more likely not to comply with constitutionalized emergency provisions as are executives that have not respected the constitution even prior to the triggering event. Poor countries are significantly more likely to suffer from an unlawful emergency than rich countries, even when they are democratic. Following domestic turmoil, countries that are in recession are particularly prone to experience a non-constitutional state of emergency. Finally, when the focus is exclusively on democracies, then executives with a nationalist or populist agenda are far more likely to implement an unconstitutional state of emergency than non-nationalist executives.

In the conceptual section, we mentioned that overstepping the constraints of the constitution could not only be done out of a motivation to cling on to power but, at least potentially, to deal with a disaster of unforeseen size. We argued that this was more likely with regard to natural disasters as domestic political turmoil never appears as a completely exogenous event. Among the 115 states of emergency that were classified as unconstitutional, only 14 were caused by natural disasters. We interpret this as a strong indication that in all likelihood, executives overstepping the constitution are doing so not to further some common good but, rather, to safeguard and possibly extend their own power.

Unfortunately, we were not able to test all our hypotheses due to data constraints. Given the finding by Lührmann and Rooney (2020) that states of emergency often open a slippery slope toward 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 really is the case, more fine-grained data are needed. Given that exactly two thirds of all unlawful states of emergency remain in place too long, it seems not only warranted to do more

research on this aspect but also to ask what means can be implemented to reduce this particular kind of unconstitutional behavior.

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Table 3. Descriptive statistics

| | Mean | Standard deviation | Observations |
|---------------------------------------|-------|--------------------|--------------|
| Unlawful | .063 | .244 | 853 |
| Natural | .400 | .490 | 847 |
| Domestic | .574 | .495 | 847 |
| Man-made | .027 | .163 | 846 |
| Democracy | .628 | .483 | 853 |
| GDP per capita | 9,931 | 8,933 | 783 |
| Negative growth | .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/populist government | .105 | .306 | 822 |
| Left-wing government | 1.451 | 1.260 | 822 |
| High court compliance | .416 | 1.244 | 815 |
| Respect of Executive for Constitution | 0.421 | 1.178 | 814 |
| Cost INEP | 0.494 | 0.116 | 775 |
| Benefit INEP | 0.436 | 0.225 | 775 |
| Second chamber approval | .303 | .459 | 782 |
| Conditions index | .339 | .215 | 811 |

Table 4. Empirical results

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|---------------------|---------------------|
| Log GDP per capita | -.275** (.117) | -.321** (.129) | -.219* (.122) | .217* (.131) | -.273** (.117) | -.299** (.128) | -.336*** (.124) |
| Democracy | -.849*** (.228) | -.908*** (.233) | -.752*** (.262) | -.999*** (.237) | -.854*** (.237) | -1.110*** (.244) | -1.060*** (.252) |
| Trade volume | | -.180 (.403) | | | | | |
| Inv. price | | -.322* (.186) | | | | | |
| Gov. price | | -.196 (.239) | | | | | |
| Recession | | -.176 (.232) | | | | | |
| High court compliance | | | .071 (.111) | | | | |
| Executive respect | | | -.178 (.121) | | | | |
| Presidential | | | | .547* (.293) | | | |
| Bicameral | | | | .398* (.226) | | | |
| Leftwing | | | | | -.128 (.087) | | |
| Nationalist / populist | | | | | -.312 (.347) | | |
| Cost INEP | | | | | | 1.467 (1.038) | |
| Benefit INEP | | | | | | .368 (.515) | |
| Conditions index | | | | | | | .089 (.561) |
| Second chb. app. | | | | | | | .593** (.243) |
| Observations | 783 | 782 | 774 | 724 | 776 | 718 | 715 |
| Pseudo R sq. | .047 | .057 | .050 | .062 | .053 | .066 | .070 |
| LR Chi sq | 29.17 | 35.36 | 30.81 | 34.54 | 32.55 | 38.74 | 40.67 |

Note: all results obtained by a logit estimator with all regressions including a constant term. Numbers in parentheses are standard deviations. *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$].

Table 5. Empirical results, only domestic events

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|------------------------|-------------------|--------------------|-------------------|--------------------|------------------|--------------------|--------------------|
| Log GDP 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) | | | | | |
| Inv. price | | -.479** (.224) | | | | | |
| Gov. price | | -.049 (.216) | | | | | |
| Recession | | -.409 (.253) | | | | | |
| High court compliance | | | .141 (.123) | | | | |
| Executive respect | | | -.060 (.132) | | | | |
| Presidential | | | | .236 (.319) | | | |
| Bicameral | | | | .532** (.251) | | | |
| Leftwing | | | | | -.135 (.099) | | |
| Nationalist / populist | | | | | -.206 (.402) | | |
| Cost INEP | | | | | | 2.688** (1.356) | |
| Benefit INEP | | | | | | -.007 (.554) | |
| Conditions index | | | | | | | .277 (.636) |
| Second chb. app. | | | | | | | .700*** (.273) |
| Observations | 450 | 449 | 446 | 394 | 445 | 392 | 390 |
| Pseudo R sq. | .013 | .034 | .016 | .031 | .018 | .035 | .039 |
| LR Chi sq | 5.74 | 15.46 | 7.20 | 12.37 | 7.89 | 14.51 | 16.05 |

Note: all results obtained by a logit estimator with all regressions including a constant term. Numbers in parentheses are standard deviations. *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$].

Table 6. Empirical results, only democracies

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|------------------------|------------------|--------------------|-------------------|------------------|------------------|-------------------|-------------------|
| Log GDP per capita | -.344* (.178) | -.350 (.219) | -.079 (.216) | -.364* (.194) | -.329* (.185) | -.205 (.194) | -.442** (.189) |
| Democracy | - | - | - | - | - | - | - |
| Trade volume | | .616 (.615) | | | | | |
| Inv. price | | .104 (.228) | | | | | |
| Gov. price | | -1.184** (.587) | | | | | |
| Recession | | .154 (.356) | | | | | |
| High court compliance | | | .228 (.229) | | | | |
| Executive respect | | | -.622** (.281) | | | | |
| Presidential | | | | .129 (.393) | | | |
| Bicameral | | | | .441 (.331) | | | |
| Leftwing | | | | | .033 (.144) | | |
| Nationalist / populist | | | | | .708 (.688) | | |
| Cost INEP | | | | | | 1.796 (1.755) | |
| Benefit INEP | | | | | | -1.801* (.964) | |
| Conditions index | | | | | | | -.066 (.901) |
| Second chb. app. | | | | | | | .724** (.342) |
| Observations | 491 | 491 | 485 | 489 | 484 | 476 | 475 |
| Pseudo R sq. | .012 | .0341 | .030 | .019 | .016 | .028 | .029 |
| LR Chi sq | 3.62 | 9.08 | 8.76 | 5.48 | 4.57 | 7.95 | 8.42 |

Note: all results obtained by a logit estimator with all regressions including a constant term. Numbers in parentheses are standard deviations. *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$].

Table A1. All simple differences

| | Full sample | | | Democracies | | | Domestic events | | |
|------------------|-------------|------|-------|-------------|------|-------|-----------------|------|-------|
| Democracy | 0.20 | 0.09 | p<.01 | 0.03 | 0.17 | p<.01 | 0.22 | 0.17 | p<.12 |
| Presidential | 0.11 | 0.15 | p<.10 | 0.09 | 0.09 | p<.72 | 0.19 | 0.20 | p<.71 |
| Bicameral | 0.12 | 0.15 | p<.29 | 0.09 | 0.10 | p<.50 | 0.17 | 0.24 | p<.07 |
| Population | 0.12 | 0.15 | p<.35 | 0.08 | 0.09 | p<.62 | 0.18 | 0.23 | p<.15 |
| GDP per capita | 0.18 | 0.09 | p<.01 | 0.11 | 0.07 | p<.08 | 0.22 | 0.18 | p<.18 |
| Trade | 0.16 | 0.11 | p<.03 | 0.12 | 0.06 | p<.02 | 0.21 | 0.19 | p<.68 |
| Investment price | 0.14 | 0.13 | p<.74 | 0.09 | 0.09 | p<.86 | 0.22 | 0.18 | p<.26 |
| Government costs | 0.17 | 0.09 | p<.01 | 0.13 | 0.05 | p<.01 | 0.22 | 0.18 | p<.38 |
| Recession | 0.13 | 0.14 | p<.79 | 0.08 | 0.10 | p<.49 | 0.10 | 0.30 | p<.01 |
| Social trust | 0.11 | 0.14 | p<.28 | 0.08 | 0.09 | p<.87 | 0.16 | 0.21 | p<.18 |
| Rule of law | 0.15 | 0.12 | p<.26 | 0.09 | 0.09 | p<.88 | 0.18 | 0.22 | p<.26 |
| HC compl. | 0.15 | 0.12 | p<.19 | 0.09 | 0.09 | p<.81 | 0.22 | 0.16 | p<.16 |
| Exec. compl. | 0.18 | 0.09 | p<.01 | 0.12 | 0.06 | p<.02 | 0.22 | 0.17 | p<.20 |
| Rightwing | 0.13 | 0.16 | p<.40 | 0.09 | 0.2 | p<.08 | 0.19 | 0.19 | p<.88 |
| After 1990 | 0.11 | 0.14 | p<.24 | 0.12 | 0.09 | p<.49 | 0.11 | 0.26 | p<.01 |
| SOE conditions | 0.14 | 0.13 | p<.60 | 0.08 | 0.12 | p<.11 | 0.16 | 0.25 | p<.02 |
| Cost INEP | 0.15 | 0.13 | p<.52 | 0.09 | 0.11 | p<.55 | 0.23 | 0.21 | p<.62 |
| Benefit INEP | 0.15 | 0.13 | p<.29 | 0.09 | 0.09 | p<.1 | 0.22 | 0.21 | p<.79 |

Figure 1 : frequency of state of emergency

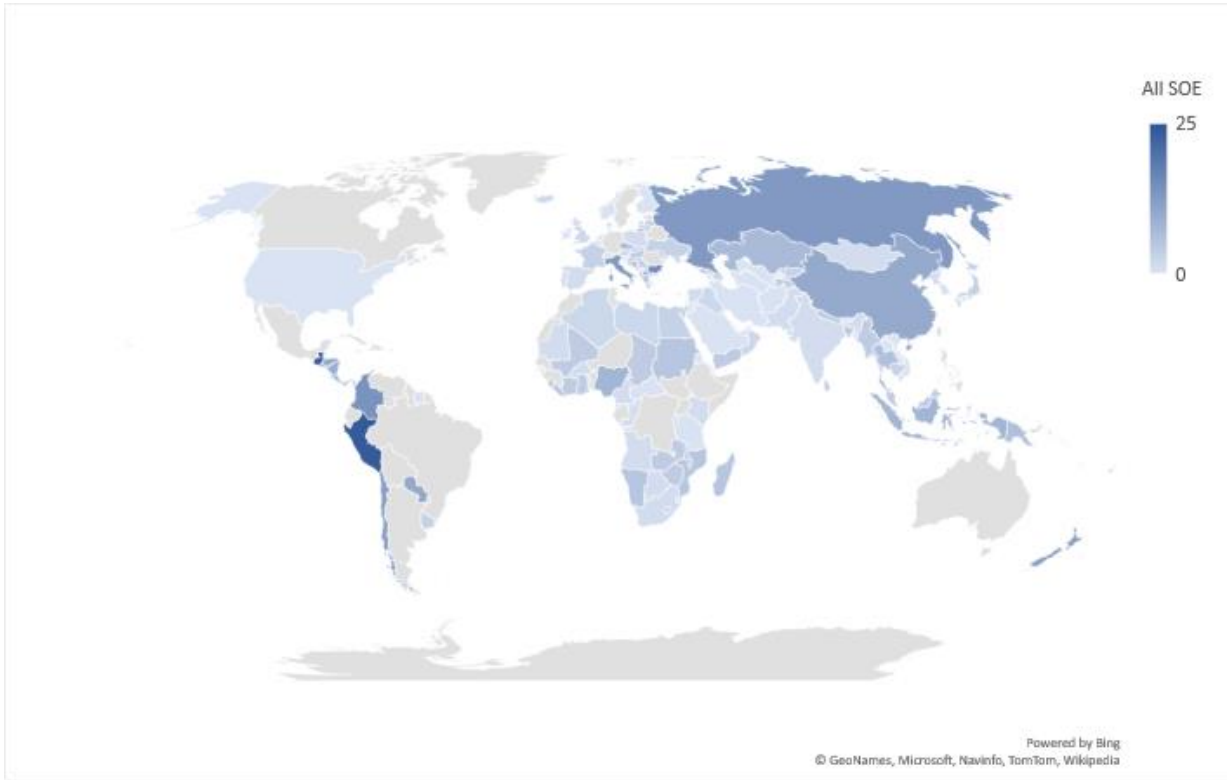


Figure 2: frequency of unlawful state of emergency

