

The Determinants of Emergency Constitutions

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May 17, 2015

Abstract: By now, nine out of ten countries have included emergency provisions into their constitutions. These provisions remain poorly understood. This paper therefore aims at providing first answers to three questions: 1) which particular provisions are most often included in emergency constitutions; 2) how much additional discretionary power do emergency constitutions allow and which political actors are given the additional power; and 3) which political and economic factors cause the inclusion of particular emergency provisions into constitutions. We discuss three theoretical motives possibly leading to the creation of such provisions, namely (1) a pragmatic, (2) a power-maximizing and (3) a commitment motive. We test our theoretical conjectures and find that emergency constitutions in countries with stronger veto institutions, higher average income, and which recently experienced a coup allow more discretionary power while countries that are prone to natural disasters and countries far from the equator allow less power. Our findings are mostly in line with theoretical options 2) and 3).

Keywords: constitutional emergency provisions, state of emergency, *état de siege*, regime transformation

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JEL Codes: K40, Z13

1. Introduction

States of emergency can be crucial moments for the existence of a regime and even for an entire country at large. Under a state of emergency, some individual rights and liberties are usually suspended and the separation of powers is curtailed in favor of the executive or even a single person like the head of state or government and, by implication, to the detriment of parliament and the courts. Yet, states of emergency are used quite frequently. Between 1985 and 2014, at least 137 countries declared a state of emergency at least once.¹ Emergency provisions are those legal rules specifying who can declare an emergency and what actors have what powers once it has been declared. The inclusion of emergency provisions into constitutions has become the norm: Today, some 90 per cent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency (Elkins et al. 2009). Assuming that states of emergency can indeed be crucial moments for the development of entire countries and taking into consideration how frequently they are used, it is amazing how little we know about constitutional emergency provisions. Little is known about (1) the amount of additional powers granted to governments acting under a state of emergency, (2) the trends in their evolution over time, (3) the factors that cause societies to adopt them in the first place and (4) their effects, i.e. the effectiveness in reaching the goals stated in the underlying legislation. Here, we focus on the first three questions, leaving the analysis of the effects of constitutional emergency provisions to a companion paper.

¹ For the period between 1996 and 2004, Richards and Clay (2012) report 35 countries to have declared a state of emergency at least once. According to our search, we found a higher number, namely 49 for the time period analyzed by Richards and Clay (ibid.).

Given that constitutional emergency provisions have never been thoroughly analyzed in a broad cross-country setting² but nine out of ten countries have such provisions, we spend considerable space describing the main components of emergency constitutions as well as their change over time. To make the powers that emergency constitutions allocate to governments comparable over time and countries, we develop an additive Index of Emergency Powers (INEP) that consists of six separate subindices. This leads us to the central question dealt with in this paper, namely what are the factors determining the introduction of constitutional emergency provisions? Given that a country has incorporated emergency provisions into its constitution, we would – as a sequel to the question just framed - like to know the factors that determine the type of emergency constitution chosen. In the theoretical section, we propose to distinguish two simple and straightforward motives from a third one that is a little more elaborate.

The “benevolent” motive assumes that emergency provisions are included into the constitution for purely pragmatic reasons. To save lives after a natural disaster, extraordinary powers might be necessary and this is why they are included into the constitution. The “malevolent” motive assumes politicians to be power-maximizers and observes that ample emergency powers might serve politicians to stabilize or even extend their actual power. The third and more “elaborate” motive is based on the insight that regime transitions often presuppose the capacity of the bargaining partners who negotiate constitutional change to credibly commit themselves to their promises (as extensively described by Acemoglu and Robinson 2006). We argue that the inclusion of emergency provisions into constitutions has frequently served as a commitment device of those who demanded more parliamentary competences or a more universal suffrage: It was easier for the elites to agree to such demands if they received emergency provisions in return. In case of necessity, they could invoke these provisions and prevent more far-reaching demands from endangering their position.

² Loveman (1993) is, however, a thorough analysis of the genesis of the emergency constitutions of many Latin American countries in the 19th century.

We find that countries that have once had an emergency constitution are very unlikely ever to get rid of it, that governments that came to power through coups are more likely to introduce emergency provisions as are post-communist countries, countries belonging to the Islamic law tradition and countries with smaller populations.

We next turn to the question of why some emergency constitutions, when introduced, provide the executive with more discretionary power than others. We find particular evidence for stronger emergency powers in countries with stronger veto institutions in normal times, in countries with a recent history of coups, and in richer countries. Inversely, emergency powers tend to be more constrained in countries that are more prone to natural disasters and in countries in which the constitution-making process was dominated by members of parliament.

As such, this paper adds to two literatures: First, it contributes to the very few studies inquiring into the determinants of both constitutional choice and constitutional change. Robinson and Torvik (2014) have recently contributed to this field by introducing a formal model analyzing the determinants that cause changes in the form of government. Hayo and Voigt (2013) is a more empirical analysis of the same issue also containing a brief survey of other contributions to the field of endogenous constitutions. The second literature that this paper contributes to is the one analyzing regime change. In Acemoglu and Robinson (2006), change is mainly induced by revolutionary threats from the masses. Their theory has been hugely influential but has also been criticized from various angles. Congleton (2011), e.g., describes regime change as a rather evolutionary process consisting of a sequence of various small changes rather than one single event.

The rest of the paper is structured as follows: Section 2 identifies time trends and the main features of typical emergency constitutions. Section 3 presents the three theoretical conjectures dealing with the motive that might lead to the inclusion of emergency provisions into constitutions. In Section 4 attempts are made to identify the determinants that have led to both the first-time inclusion of

emergency provisions into constitutions as well as their marked change over time. Section 5 concludes and spells out a number of follow-up questions.

2. Trends and Emergency Powers

Emergency constitutions are paradoxical documents. Their declared goal is to re-establish constitutional order by temporarily suspending it. They are also paradoxical in the sense that the constitution spells out the conditions under which its regular application can be suspended. Emergency constitutions deal with the delicate balance between suspending individual rights by reducing the separation of powers temporarily but establishing monitoring mechanisms that are to reduce the likelihood that the state of emergency is misused by power-maximizing politicians.

In this section, we give a general overview of quite a few aspects of constitutional emergency provisions. We first look at their emergence and diffusion over time. We then deal with six central components of emergency provisions in detail. Finally, we provide some information on their actual use.

On the Diffusion of Emergency Constitutions

Constitutional emergency provisions do not make sense under absolute monarchy or totalitarian regimes. If the head of the executive is unconstrained, why should there be special provisions allocating to him the powers he has been enjoying all along? This is why the history of constitutional emergency provisions is closely intertwined with the advent of constitutional monarchy or restricted government more generally.

France was the first modern nation state to introduce constitutional emergency provisions in 1795.

From there, emergency constitutions spread into those countries whose legal development was heavily influenced by France. In 1808, Joseph Bonaparte became king of Spain and the corresponding constitution – named after the French city of Bayonne because it was negotiated there – included

explicit emergency provisions. The provisions contained in the Bayonne constitution served as model for many Latin American constitutions. In fact, with the exception of Portugal (1826), all of the subsequent countries to create emergency constitutions were Latin American. In chronological order, these were Argentina (1819), Chile (1822), Brazil (1824), United Provinces of the Rio de la Plata (1824), Bolivia (1826), Peru (1826), Ecuador (1830), Uruguay (1830) and Venezuela (1830; all data from Elkins et al. 2009). Two observations are noteworthy: First, in all of the cases mentioned, the inclusion of emergency provisions into the constitution was part of an entirely new constitution and, hence, not part of a constitutional amendment.³ Second, all of these countries have been coded as belonging to the French legal family. Legal origins should, hence, definitely be included in the set of potential determinants. By 1850, 20 countries had an emergency constitution; today, all of them are coded as "French legal origin."⁴

But the spread of emergency constitutions did not stop in Latin America or countries of French legal origin more generally; its number had increased to 171 by 2013.⁵ This development is clearly illustrated in Figure 1, where we plot the share of independent countries with an emergency constitution, starting

³ It is indeed quite rare to observe emergency provisions entering the constitution by mere amendment. The only clear examples in democratic countries are Ireland in 1931 and Luxembourg in 2004, while only very few other examples exist. These include Comoros (2009), Cuba (1992) and the Soviet Union (1938). Bhutan is a special case in which emergency provisions were introduced in an interim constitution in 2005 that eventually carried over into the new constitution three years later.

⁴ In addition to the countries already mentioned, these are El Salvador (1841), Haiti (1843), Mexico (1843), Dominican Republic (1844), Paraguay (1844), Guatemala (1845), Costa Rica (1848) and Honduras (1848).

⁵ The number of states also increased over this period. Expressed as a proportion, less than 60% of all states had an emergency constitution in 1850 whereas today, some 90% of all countries do. The source for our numbers is the Comparative Constitutions Project. The exact wording of the variable on which the numbers are based is: "Does the constitution have provisions for calling a state of emergency?" In case the question was answered in the affirmative, the country was coded as having an emergency constitution in the respective year.

in 1900. The figure shows the relative stability before 1950 – the variability is mainly due to constitutions being abolished such that countries are coded as having no emergency constitution in the interim between abolishing the old constitution and either implementing a new constitution or reinstating the old. After 1950, two developments have clearly affected the share: the independence of former colonies, starting in the late 1950s, and the de facto independence of countries formerly part of or controlled by the Soviet Union.

Figure 1 about here

A last point to note is that once a country has included emergency provisions into its constitutions, it is unlikely ever to get rid of them.⁶ In almost all countries that did get rid of their emergency constitution, a new one was introduced after a rather short interval. The only exception is Austria which got rid of its 1934 emergency constitution and has not re-introduced another to date.⁷ In all other cases, the abolishment was the consequence of a military or communist take-over that eventually resulted in the re-introduction of emergency provisions.

As just described, the first constitutional emergency provisions in the 19th century were all part of entirely new constitutions. Of all of today's emergency constitutions, virtually all were already included in the last "new" constitution of a country with the 2002 amendment in the Czech Republic as a notable exception in which emergency provisions were included later on.⁸ As such, having an emergency constitution is now the rule more than the exception. Yet, there is considerable variation across the specific details.

⁶ According to the Comparative Constitutions Project, this has been the case for 17 countries.

⁷ While an emergency constitution *per se* has not been re-introduced, the Austrian constitution has at least two clauses that could be called its emergency constitution: (1) Art. 5(2) stipulates that in extraordinary times the President may issue decrees and (2) Art. 79(2).2 that the military is to intervene as a consequence of natural disasters of extraordinary size.

⁸ The distinction between "new" and "amended" constitutions is not watertight. In our attempt to separate the two, we follow the classification of the CCP. In the particular case of the Czech Republic, an amendment in 2009 allowed the parliament to dissolve itself under specific circumstances, which would include drastic emergencies.

Single Components of Emergency Provisions

We suggest that every emergency constitution must, at least implicitly, deal with six different questions, namely (1) What are the necessary conditions for a state of emergency? (2) Who has the power to declare a state of emergency? (3) Who has the power to declare the end of an emergency? (4) Who has the power to monitor the legality of the means used during a state of emergency? (5) Who exercises emergency powers? And finally: (6) What (additional) competences does a state of emergency confer to the emergency government?

Concerning the first dimension, namely the necessary preconditions for a state of emergency to be declared, two trends are noteworthy: First, emergency constitutions have become broader in the enumeration of events that can justify the declaration of an emergency. The variable in the Comparative Constitutions Project which we rely on here lists six possible preconditions for declaration, namely (1) war / aggression, (2) internal security, (3) national disaster, (4) general danger, (5) economic emergency and (6) threat to constitutional system.⁹ Each aspect can be found in a given proportion of constitutions, i.e., can assume a value between 0 and 100% in any year. Adding up the resulting proportion for each of the six categories can, hence, yield a theoretical maximum of 600. For 1950, the actual sum was 97.14 whereas the same exercise for 2011 yields a sum of 167.53. In other words: the possible causes for declaring a state of emergency have been considerably broadened. Second, some preconditions have grown faster in importance than others, as illustrated in Table 1. While in 1950, only 7.14% of all constitutions named any kind of “national disaster” as a potential justification for declaring a state of emergency, this proportion had grown to exactly one third by 2011. Conversely, economic emergencies are rarely mentioned explicitly. They were mentioned in 5.71% of all constitutions with emergency provisions in 1950. Until 2013, this proportion had only increased to

⁹ These six potential justifications for declaring a state of emergency have been coded within the Comparative Constitutions Project. No further explanation on how to interpret them has been offered by those who created the dataset.

7.73%. Finally, a justification not existing in 1950 had made its way into 4.12% of all constitutions with an emergency clause by 2013; this is a “threat to the constitutional system”.

Insert Table 1 about here

The second component of emergency constitutions deals with the question who has the power to declare an emergency? No matter how precisely the necessary preconditions are defined, some actors need to decide whether they are present or not.¹⁰ On the one hand, one can imagine a constitution that allocates the power to declare an emergency to the head of the executive without any other organ needing to approve of this decision. This would be equivalent to very few checks on power. On the other hand, one can imagine that more than one constitutional actor must be involved in the declaration and more than one actor must approve it.¹¹ An intermediate solution could be that some other branch needs to be consulted; if its advice is not followed, this might increase the political costs of declaring an emergency in terms of reduced state legitimacy.¹²

Emergency constitutions typically reduce the degree of the separation of powers for a limited period of time. Yet, there has been a secular trend toward a stricter separation of powers in general, i.e. under normal – non-emergency – situations: the variable CHECKS which proxies the degree of checks and balances and is part of the Database of Political Institutions (Beck et al. 2013), e.g., had a mean score of 1.2 in 1975 which raised to 2.8 in 2012 (around a stable median of 2). Likewise, the mean score of Henisz’s (2010) PolConIII measure of political veto player power approximately doubled from .16 in 1950 to .3 in 2012, the latest year for which data are available. It seems, hence, possible that even

¹⁰ In principle, it is conceivable that states of emergencies are declared automatically after some pre-defined event occurred, such as an earthquake with a power of larger than 6 on the Richter scale. We are, however, not aware of any such automatism.

¹¹ Throughout the paper, we refer to this as separation of powers. Alternatively, one could also refer to the number of veto players, i.e. the number of actors whose consent is needed to take a specific decision.

¹² Additionally, the necessary majorities can be taken into account.

emergency constitutions preview more checks on the emergency government than they used to.

However, in the following, we document that the opposite has in general happened.

Regarding the competence to declare a state of emergency, we observe a double trend: in 1950, in six out of ten ($22/37=59\%$) of all countries with an emergency constitution, the right to declare rested with the head of state. By 2011, this proportion had increased to some 80% ($129/159=81\%$), reflecting the overwhelming importance of a single person, namely the head of state. On the other hand, around ten percent ($16/159=10\%$) of all constitutions currently containing an emergency constitution allocate that competence to the entire cabinet. This is no increase in the separation of powers between legislature and executive, but at least an increase in the number of actors involved in the decision. Keith (2012) goes one step further and asks whether the responsibility for declaring a state of emergency is given explicitly to the legislature. In 1979, the first year of her dataset, this was the case in 4.2% of all countries. By 2010, this proportion had increased to 10%. If legislatures declare a state of emergency and executives are in charge during emergencies, then this change denotes an increase in the separation of powers.

Another way to implement checks in emergency constitutions is to require the declaration of a state of emergency to be approved by an actor other than the one declaring it. In 1950, 44% percent of all emergency constitutions contained such a provision. By 2011, this proportion had increased to 56% percent, again indicating some increase in the level of checks. Today, consent of the following organs is most frequently required: (1) the first (or only) chamber of the legislature (39%); (2) both chambers of the legislature (19%) and (3) the government/cabinet (14%).

States of emergency have often been misused by self-serving politicians. Some of them have simply dissolved the legislature to eliminate a watchdog. As of 2009, 15.5% of all emergency provisions explicitly excluded the possibility that a legislature be dissolved during a state of emergency. In 1979,

the respective number was only 3.9%¹³ According to the CCP, no emergency constitution implemented before 1950 included an explicit ban on dissolving the legislature.

The third important component of emergency constitutions is the power to end a state of emergency. One possibility - famously used by the Romans – is to have it expire automatically (after six months in Republican Rome). Here, too, the separation of powers is central. Acknowledging that every state of emergency entails the danger of misuse and the possibility to develop into permanent autocracy, it seems to make sense to allocate the power to end an emergency to an actor other than the one endowed with the exercise of emergency powers. Ackerman (2004) proposes a “supermajoritarian escalator”: the longer the state of emergency lasts, the more inclusive the parliamentary majority necessary to sustain it. Put differently: over time, ever smaller factions of parliament can end the state of emergency.

Keith (2012) asks whether the emergency is constrained to a set time period *and* whether an extension is subject to legislative approval. In 1979, a little less than 19% of the 153 surveyed constitutions had such provisions, in 2009 the proportion had increased to 35.9%. At least *de jure*, many emergency constitutions try to sustain a high degree in their separation of powers by making extensions dependent on the consent of the legislature.

Fourth, regarding actors who could monitor the legality of the means used under emergencies, the judiciary seems a natural candidate. Yet, many scholars believe that speed is of the essence in emergency situations and that judicial review should be postponed (Locke 1691, §240). Others, such as Ackerman (2004) or Dyzenhaus (2006), point at the dismal record of the judiciary in constraining government action under emergency. Unfortunately, we are not aware of any dataset that would allow us to identify any time trend regarding this aspect.¹⁴

¹³ According to the dataset from Linda Camp Keith which covers up to 181 countries.

¹⁴ In the companion paper on consequences of emergency constitutions, we return to this issue by exploring the risk that emergencies lead to regime change, and in particular to loss of democratic institutions and violations of human rights.

It seems natural to think of the head of the executive as the actor exercising emergency powers. Other provisions are, however, possible. They include the head of the military, but also technocrats. The French version of a state of emergency, the *état de siège*, implies an expansive delegation of powers to the military (Rossiter 2009, Chapter VI gives an excellent account of that concept).¹⁵ Again, we are not aware of any dataset that would allow us to identify any change in this aspect over time.

Finally, one must ask what competences are conferred onto the emergency government. First, emergency governments frequently entail the competence to suspend a number of basic rights. The proportion of countries whose constitutions provide for the suspension of rights during a state of emergency has remained virtually unchanged at 70% (30/43) in 1950 and 69% (118/172) in 2011.¹⁶ The dataset compiled by Keith (2012) analyzes the same issue from the opposite angle: according to her, the proportion of countries that do give a list of non-derogable rights or include a statement that certain rights cannot be infringed has changed from 5.2% in 1979 to almost 26% in 2010. Beyond the suspension of rights, there is a vast heterogeneity in the competences conferred on the emergency governments. Everything from “all powers necessary” to very detailed enumerations exists. Provisions frequently found include (a) measures to keep all government organs broadly conceived in office (vote of no confidence impossible; all elections suspended; terms of constitutional court judges extended), (b) increase the size of the army (including the use of national guards for military purposes), (c) measures to keep the country solvent (introduce new taxes, levy payment of existing taxes in advance) but also more dubious measures such as exempting state servants from all legal liability of state acts committed under martial law or enabling forced labor. Of course, there are also constitutions that expressly limit the competence of government under states of emergency, e.g., spelling out that no constitutional

¹⁵ It would be interesting to see whether the *état de siège* is followed more often by military regimes than other kinds of emergency concepts. Again, however, we delegate this question to a companion paper on consequences of emergency provisions.

¹⁶ These data are from the Comparative Constitutions Project again.

amendment can be passed under a state of emergency or that all decrees issued are only valid until the end of the state of emergency.

A New Power Index

Now, it is interesting to synthesize these different developments into a single dimension. We do so in the following by developing a measure that can be thought of as capturing the difficulty or political cost of calling and maintaining a state of emergency. The simplest way to create an Index of Emergency Powers (INEP) is to rely on variables proxying for the most important aspects just described and add them up. This is exactly what we do, using the extensive information available from the Comparative Constitutions Project.

The INEP takes into account (1) the degree to which the right to declare a state of emergency is concentrated in a single person – or very few; (2) the need to and the degree to which this right is concentrated; (3) how many different situations are explicitly mentioned in the constitution and can be used to justify the declaration of a state of emergency; (4) whether central civil and political rights can be suspended during a state of emergency; (5) whether parliament can be dissolved during a state of emergency; and (6) whether the government can introduce censorship of the media and expropriate property during an emergency. The first three variables are, hence, concerned with the rules for declaring a state of emergency, whereas the last three ones are concerned with the powers that government enjoys under a state of emergency. The first three can also be thought of as “the cost element” of declaring a state of emergency whereas the last three cover “the benefits” of running a state of emergency from the point of view of the incumbent government.

In general, higher coding implies more power to the executive or, in other words, a lower degree of separation of powers. For all elements of the index, no limits on the respective aspect is coded 3, some as 2, uncertainty as 1, and tight limits as 0. As we scale each of the six separate components on a 0-1 scale and subsequently scale the entire INEP on the same 0-1 scale, a coding of 1 would imply that

there are no effective limits to the powers of the executive during emergencies and a coding of 0 that limits are maximally tight. The entire INEP is an additive index of the six separate components, as the different parts all represent different mechanisms allowed by the emergency constitution through which governments and leading political actors can directly affect decisions during emergencies. In other words, there is no clear progression across the six components, which would have necessitated a non-additive construction of an INEP. As such, due to the lack of a fine-grained theory that would inform us about the relative importance of each of those six components and their interplay, it seems straightforward to simply add the components up.

In Table 2, we summarize the construction of the six components of the INEP. The components capture the power to declare a state of emergency and how concentrated it is, approval powers, conditions that are progressively more inclusive or vaguely defined, whether or not the legislature can be dissolved during emergencies, whether or not basic rights can be suspended during emergencies, and whether or not the constitution allows for expropriation of property and censorship.

Insert Table 2 about here

Aggregating such issues into one index shows that emergency powers were quite limited in most constitutions introduced before the Great Depression. A number of constitutions implemented in the 1930s, conversely, gave substantial powers to the executive, not least those of Yugoslavia (1931, INEP = .50), Poland (1935, INEP = .53) and Brazil (1937, INEP = .55). During the post-WWII period, as we illustrate in Figure 2, one can also observe clear developments. Several newly independent countries, for example, introduced emergency constitutions with strongly limited discretionary rights, but rapidly increased those rights in amendments and new constitutions. Ghana's 1957 constitution, with an INEP of .14, did not leave any declaration rights with the government and clearly delimited both approval rights and the conditions under which emergencies could be declared. Based on its 1969 constitution, Ghana's INEP score had increased to .51. The new constitution allocated all declaration powers to the head of government, allowed a long list of conditions under which to declare an emergency, and

allowed basic rights to be suspended during emergencies. The overall Ghanaian development is representative of the general development as more former colonies became independent and implemented constitutions of their own.

Figure 2 about here

While there is a weak tendency for emergency constitutions to be more delimited during the late 1980s and 1990s¹⁷, in the most recent years, a number of constitutions have left substantial unchecked emergency powers to the executive. New constitutions in Kenya (2010, INEP = .55), Guinea (2010, INEP = .66) and Hungary (2011, INEP = .71) all leave very substantial discretionary power to the executive during broadly defined states of emergency. These developments can be clearly seen as an uptick in Figure 2. Although they seem to coincide with the time after the 9/11 attacks, they appear not to be a consequence of the attacks since the uptick in the figure is driven by constitutional changes in countries not clearly affected by terrorist threats.

Separating the six components of the INEP, as we do in Figure 3, reveals that the main development in the early years after WWII was a concentration of declaration rights. Similarly, the figure shows that the new constitutions, implemented in former colonies between 1960 and the late 1970s, also were more likely to allow for the dissolution of the legislature. Conversely, constitutions implemented after the collapse of communism tend clearly to be less likely to allow expropriation and censorship and include more conditions under which a state of emergency can be declared.

Overall, as we show in Table 3, there is no substantial difference between democracies and non-democracies regarding emergency powers – using the DD democracy indicator developed by Cheibub et al. (2010), average INEP is .31 in both groups. The DD data also allow for the separation of three

¹⁷ The dataset by Keith (2012) covers the period from 1979 until 2009. During the first two thirds of this period, there was a slight increase in the separation of powers under states of emergency. However, this tendency is dominated by a change in the opposite direction over the entire period here under consideration, and particularly from 1950 until 1975 when decolonization was effectively through.

types of democracy (parliamentary, presidential and mixed) and three types of dictatorship (civil, military and royal). In the data, only royal dictatorships in our sample have much stronger declaration rights – other autocracies do not – while presidential democracies tend to include more conditions under which a state of emergency can be declared. Historically mixed democracies, i.e. democracies with presidents without actual powers, have been less prone to allow suspension of rights, expropriation and censorship, but in the present emergency constitutions, all types of democracies now appear similar on average.

Insert Table 3 about here

Tracing the development of emergency constitutions over time, we thus find both general patterns and substantial differences across countries. Emergency constitutions have become more prevalent while the discretionary powers that they confer on the executive continue to vary. It is on this background that we theorize in the following.

3. Theory

This section serves to spell out and develop in a little more detail our three possible intentions behind the introduction of emergency constitutions. To recap: we propose a “benevolent”, a “malevolent” and an “elaborate” motive. After briefly describing the three motives, we tease out a number of implications that each of them should have. We do this because motives are impossible to observe directly and, hence, difficult to test empirically. Motives are neither sufficient for the introduction of constitutional emergency provisions nor for the choice of particular provisions.

The “benevolent” motive assumes that emergency provisions are included into the constitution for purely pragmatic reasons. To save lives after a natural disaster has occurred, extraordinary powers might be necessary and this is why they are included into the constitution. If the additional competences that are accorded to government under a state of emergency are elaborated in detail in the

constitution, this is likely to contain the uncertainty triggered by the state of emergency and mitigate the negative consequences that most mainstream economic theory attributes to increased levels of uncertainty from materializing.

If the inclusion of emergency provisions into the constitution is triggered by “benevolent” motives, the respective constitutional provisions should contain mechanisms against their misuse. It should further exclude the possibility that government can “create” the precondition for calling a state of emergency which could then be used for political reasons. These expectations can also be framed as two hypotheses, namely hypothesis #1: *Emergency provisions created out of benevolent motives contain numerous checks that make their misuse more difficult.* And hypothesis #2: *The use of states of emergency is confined to exogenous events such as natural catastrophes.* In other words, we would expect constitutions based on benevolent motives to reflect the actual geographical and climatological risks that a country is subject to.

The “malevolent” motive assumes politicians to be power-maximizers and observes that ample emergency powers might help politicians to stabilize or even extend their actual power. Emergency provisions can be a very handy device to daunt the opposition or even prevent one from forming in the first place. Hitler’s ascendance to power in inter-war Germany provides an obvious example while another is the declaration of a state of emergency in Egypt in 1967, which lasted until 1980 and was re-imposed after the assassination of Anwar Sadat 18 months later. The Egyptian state of emergency only expired in May 2012 after Hosni Mubarak, who took over the presidency after Sadat, had been deposed in a coup. These states of emergency helped the government to suppress the Muslim Brotherhood. Emergency powers can thus be used quite effectively in limiting political competition and suppressing both an opposition and ordinary citizens. The question with regard to the malevolent motive is under what circumstances constitutional assemblies could be ready to grant rights that lend themselves to easy manipulation and misuse. And the presumption is that this will be the case if the constitutional assembly is dominated by the supporters of a would-be autocrat.

If “malevolent” motives prevail, we expect the emergency provisions to be more or less the opposite of what we expect with regard to “benevolent” motives. Hence hypothesis #m1: *Emergency provisions created out of malevolent motives contain few checks on the governing and make their misuse thus easy.* And hypothesis #m2: *The use of states of emergency includes all sorts of endogenous events such as domestic opposition or civil unrest.*

Governments could even induce these events, giving them the possibility to declare a state of emergency which could, in turn, be used to advance their power maximization. Conversely to the benevolent motive, emergency constitutions characterized by malevolent motives would reflect the *political* risks that the incumbent government is subject to at the time that the constitution is drafted.

The third and more “elaborate” motive is based on the insight that regime transitions often presuppose the capacity of the bargaining partners who negotiate constitutional change to credibly commit themselves to their promises (as extensively described by Acemoglu and Robinson 2006). In their account of regime change, they distinguish two groups, namely the powerful elites and the less powerful non-elites. The non-elites demand a distribution of the collective surplus that is more favourable to them. If their threat appears credible, the elites have an incentive to start negotiations and make at least some political concessions to the non-elites. The credibility of threats can change over time, e.g., because the non-elites have learned how to overcome the dilemma of collective action, because of technological progress that makes their input more valuable etc. Acemoglu and Robinson assume that negotiations take place and the two groups agree on a modified constitution that entails a larger share of the collective surplus for the non-elites. At this point, both groups face a commitment problem. Why should the elites actually implement more redistribution and not simply promise it? Why should the non-elites stop threatening revolution?

Acemoglu and Robinson (ibid.) consider the introduction of democracy as a tool of the elites to turn their promises into credible commitments. If a parliament elected by citizens on a relatively encompassing franchise is to decide on both revenues and expenditures, this can be interpreted as a

commitment of the elites to the constitutional bargain. But how can the non-elites commit to the constitutional bargain and convince the elites that they will stop rioting and end the threat to revolt? We hypothesize that the inclusion of emergency provisions into the constitution frequently served as a commitment device of those who demanded more parliamentary competences or a more universal suffrage: It was easier for the elites to agree to such demands if they received emergency provisions in return. In case of necessity, they could invoke these provisions and prevent more far-reaching demands from endangering their position.¹⁸

A slightly different story emerges if we look at a post-military coup situation. Often, the military prefers not to remain in charge of the government itself but to remain in control in case the government becomes too autonomous. To give its behaviour the appearance of being constitutional, the military could insist on including constitutional emergency provisions granting the military the competence to intervene if one or more preconditions are satisfied. Here, emergency provisions have an insurance function.¹⁹

One precondition for the commitment argument to work is that calling a state of emergency must not be costless for the elites. Otherwise, they might resort to states of emergency in perpetuity and

¹⁸ Note that this argument rests on a number of assumptions: (1) the elite gets the power to declare a state of emergency, (2) the respective leader under a state of emergency is a member of the elite.

¹⁹ Ramseyer (1994) and Ginsburg (2003) have described insurance arguments with regard to the judiciary. There, a current government could be willing to agree to an independent judiciary because some of its policies could be saved even after the end of the government's term by the courts. In addition, inclusion of such provisions into the constitution could endow the military with a higher level of legitimacy. Acemoglu et al. (2010) show that an elite that is confronted with a credible threat from the non-elite has essentially three possibilities to cope with that threat, namely (1) give in to the demands and allow a smooth transition toward democracy, (2) rely on a strong army to suppress the demands *and* pay the army efficiency wages to reduce the risk of military takeover or (3) rely on a strong army without paying the soldiers efficiency wages and thus risk to be subject to a military coup.

institutional change would not occur.²⁰ There are, indeed, a number of arguments that point to the costliness of calling a state of emergency in at least some situations. Two considerations in particular might be relevant:

(1) Direct political costs. Before a state of emergency can be called, the consent of other actors is frequently needed. Securing consent can, however, be costly in political terms.

(2) Indirect political costs. States of emergency imply that both members of the legislature and the judiciary are somewhat less powerful. They further imply that citizens do not enjoy their full set of procedural rights. This makes representatives of the legislature and the judiciary as well as all citizens' natural critics of states of emergency. Calling a state of emergency is therefore unlikely to be popular.²¹

Let us now turn to a number of implications the elaborate motive might entail. We formulate in the form of hypotheses again. Hypothesis #e1 reads: *If constitutional emergency provisions are introduced as a commitment of the non-elites to a constitutional bargain, then the non-elites must have been granted something in return.*

This could be (1) the extension of parliamentary powers, (2) higher number of parliamentary sessions²², (3) the broadening of civil rights, (4) an extension of the franchise, and (5) stronger veto and oversight institutions (to keep elite power in check). An extension of this line of reasoning is that if the inclusion of emergency provisions succeeds as a device to make a constitutional bargain credible, then we should not observe any revolutionary activities on the side of the non-elites but neither should we observe any

²⁰ Actually, in the Middle East, relying on states of emergency does not seem to come with a high cost for governments.

Both Syria and Israel have been in a state of emergency ever since their founding. Egypt and Jordan join them with extraordinary long spells of states of emergency.

²¹ The costs of calling a state of emergency will also be determined by the availability of alternative policy measures that can be used to reach the same results. Possible alternatives include the use of executive decrees, the trial of civilians in front of military courts and the like.

²² In the 19th century, parliaments often were in session infrequently for short periods of time. Lovemann (1993, 389) writes that at some point in time the constitutions of Bolivia, Chile, Colombia, Honduras, Mexico, Nicaragua and Peru specified that ordinary parliamentary sessions were held every two years or less frequently.

coup attempts on the side of the elites. Formulated as hypothesis #e2: *If constitutional emergency provisions are more likely and work better as a commitment device after periods of political unrest and coup risk.*

In fact, a number of more encompassing implications can be derived from these considerations. If states of emergency are called on an irregular basis and are predominantly justified by the occurrence of natural disasters, they are likely to serve a pragmatic function. If, however, states of emergency often last for extended spills of time and they are justified by internal disorder, unrest or the like, they are likely to serve power-maximizing politicians. If, finally, emergency provisions explicitly mention internal unrest or similar but states of emergency are never called due to this reason, they are likely to function well as a commitment device. But these are implications that can follow only after countries have adopted an emergency constitution. In this paper, however, we do not ask under what conditions governments decide to declare a state of emergency (for this, see Bjørnskov and Voigt 2015a) but under what conditions emergency provisions are likely to find their way into the constitution.

It is conceivable that the reasons behind the creation of an emergency constitution are different from those to make use of it. When emergency constitutions first developed, their adequacy to reach the formulated goals might have been low whereas the potential for misuse might have been high.

Across countries, the three possible motives for including emergency provisions into constitutions are not mutually exclusive: in some countries the pragmatic motivation might have prevailed, while in others the commitment aspect was dominant. We therefore refrain from putting the hypotheses to a direct test. Instead, we focus on more directly measurable potential determinants. In Appendix Table A1, we match these determinants to the variables used in the following section, as well as their sources while descriptive statistics can be found in Tables A2 and A3.

Frequency of disasters; both natural and man-made

Countries experiencing many natural disasters such as droughts, floods, earthquakes or volcanoes are more likely to establish basic rules for how to deal with such events. We hence hypothesize in #b1 that

the more disaster prone a country is, the more likely it is to include emergency provisions into its constitution. In Section 2 we saw that most emergency provisions do not refer to natural disasters, but to man-made threats to the constitutional order. We thus hypothesize in #e2 that events potentially endangering the constitutional order such as revolutions, riots, guerrilla warfare, general strikes and assassinations increase the likelihood of including emergency provisions into a constitution.

Legal history

In the descriptive section we saw that the constitutionalization of emergency provisions began in France and took off from there to Latin America via the Iberian Peninsula. Historians of emergency constitutions such as Rossiter (2009) or Friedrich (1968) have stressed the differences between the (French) *état de siège* and the (British) martial law tradition. This ties in well with the legal origins literature that separates three civil law origins (French, German, and Scandinavian) from the common law tradition (La Porta et al. 2008 is a summary).²³

Under the British parliamentary sovereignty tradition, parliament has always been authorized to legislate on any matter without any formal constraints. Also under that tradition, only specific liberties or rights were suspended, after parliament had voted on the respective legislation. If we assume that the way the British handled emergencies carried over to their colonies, then we expect (1) a limited number of rights that can be derogated and (2) high parliamentary influence on states of emergency. In terms of the INEP, we would, hence, expect common law countries to score low values, indicating an important role of the legislature. A similar implication holds for former British colonies although they did not clearly follow a common law tradition.

²³ Goderis and Versteeg (2011) are interested in the determinants that lead to a spatial diffusion of constitutional rights. They find that a common legal origin is the most potent single predictor. Other significant predictors include competition for foreign aid, a shared religion and shared colonial ties. Interestingly, a common language, common borders, and the extent of trade relationships do not help to explain the diffusion of constitutional rights.

In addition, Loveman (1993, 23) points out that post-emergency, it was upon the judiciary to decide whether government action had been legal during the state of emergency. The judiciary is, hence, expected to play an important role in common law countries, at least post emergency. Friedrich (1968, 562) interprets this as the main difference between the two models: under the state of siege, the executive and (or) the legislature has the ultimate word, whereas under military rule it is the judiciary. In the legal origins literature, Spain, Portugal, but also the Netherlands and Italy just as the entire Latin American subcontinent are counted as part of French legal origin. An explicit distinction between colonizing powers and the originators of the legal system is frequently not made. We propose to make such a distinction here as marked differences between some of the respective emergency constitutions can be observed that might have been caused by the specific colonization history of a country.

Loveman (1993, 28) observes: “With this tradition of a militarized internal administration and special privileges for military personnel, the role of the military institutions in Spain, and later in Latin America, came to differ significantly from their French, German, or Italian counterparts.”

Some of the more recent literature on legal origins nevertheless distinguishes between two additional types: Islamic law and communist legal systems. Islamic law rests on Shari’a, which provides constitutional context that need not be included in the constitution *per se*, which then leaves both details and central rules unmentioned (Bjørnskov and Voigt, 2014). Conversely, communist traditions often provide detailed constitutions with substantial rules such as the 1936 Soviet constitution, which included meticulous protection of human rights and democratic institutions. In the communist bloc, none of these rights were nevertheless *de facto* enforced.

Neighbouring states often share many of the general living conditions, such as the climate (a potential source for natural disasters) but also the state of development. In addition, citizens are often more familiar with the institutions of a neighbouring than of a distant country. Similarity of living conditions combined with familiarity with the valid institutions of neighbouring countries could make the spread

of emergency constitutions via contagion of this kind more likely. We thus propose to take the geographical diffusion of constitutional emergency provisions explicitly into account.

Composition of constitutional assembly

States of emergency usually imply a broadening of the power of the executive to the detriment of parliamentary and (or) judicial powers. Assuming that all actors are power maximizing, we would, hence, expect an assembly dominated by representatives of the executive to propose an emergency constitution transferring relatively more rights to the executive and, correspondingly, allocating the legislature relatively little monitoring or control rights. If there is agreement that the constitution proposed by the constitutional assembly needs to pass a general referendum, this is likely to affect the contents of the emergency constitution. Assuming that citizens do not appreciate the possibility that their individual rights can be constrained at the will of the executive, this procedure of bringing a new constitution about is conjectured to increase the likelihood that a core of rights will be called non-derogable in the constitution. The degree to which the constitutional assembly represents the entire citizenry is also likely to have an effect on whether emergency provisions are likely to be included into a constitution. If, e.g., there is one dominant group that also dominates the assembly and is likely to dominate the entire political process in the years to come, emergency provisions enabling it to defend its own constitution against possibly competing groups have a high chance of becoming constitutionalized.

Economic and institutional capacity

Finally, we need to stress that emergency constitutions may arguably reflect the economic and institutional capacity of a country at a given point in time. Wealthier countries are, all other things being equal, more likely to have a standing capacity for handling natural disasters as well as countering external and internal threats to both the population and the incumbent government (cf. Andersen and

Aslaksen, 2013). Likewise, countries with relatively better judicial and bureaucratic institutions are also more likely to handle risks and hold threats in check. In all analyses in the following, we therefore proxy for such factors.²⁴

4. Empirics

We organize this section into two subsections. The first starts by asking which factors affect the likelihood that a country introduces an emergency constitution. The second then examines the determinants of the particulars of the emergency constitutions we observe in the data, captured as the INEP and its six components. At the end of the section, we briefly discuss how the findings match up with our theoretical considerations. All data used in this section are summarized in Tables A2 and A3 in the appendix.

4.1. When are emergency constitutions introduced?

We report the results of estimating the determinants of introducing (or re-introducing) an emergency constitution in Table 4. All estimates are obtained by a random effects panel logit estimator including regional fixed effects (for Latin America, Sub-Saharan Africa, the Middle East and North Africa region, the Pacific, and Asia).²⁵ We only include country observations in years in which the constitution was either amended or a new constitution was introduced. Without this sample restriction, we would face two problems. First, we would be estimating the determinants of the existence of emergency constitutions instead of the introduction of one; and second, our estimates would be confounding the

²⁴ We must note that with a large dataset stretching back in time, there are no available measures of institutional quality. In the following, latitude is therefore the only variable likely to pick up differences in non-political institutions.

²⁵ While the data are in principle categorical and therefore call for the use of a dichotomous estimator such as ordered probit, we report GLS estimates. The reason is that the results of using either a probit or a continuous GLS estimator are very similar. We therefore report the GLS results as they, contrary to probit, are immediately interpretable.

introduction of emergency provisions with the introduction or amendment by the entire constitution.

All data used in Table 4 are summarized in the appendix. In columns 1 and 2, we include all countries while we exclude the Western countries in columns 3 and 4.

Table 4 about here

As a first, the results clearly show that countries with constitutions that historically have included emergency provisions are substantially more likely to re-introduce them after a period of either not having an emergency constitution or during which the constitution was suspended. Second, we find no evidence that any regime type, no matter whether democratic (mixed and presidential) or autocratic (civil, military and royal autocracies) is more - or less - likely to introduce emergency provisions than parliamentary systems. This finding seems hard to reconcile with the conjecture that emergency constitutions are always introduced out of malevolent motivations. But, as already mentioned above, it is possible that different countries with different regime characteristics introduce emergency constitutions out of different reasons. Third, we find clear evidence that formerly communist countries are substantially more likely to introduce emergency constitutions in the constitutions they introduced after communism collapsed. A fourth regime characteristic that turns out to be significantly associated with the introduction of emergency provisions is if the government introducing provisions came to power through a coup. We find that such governments are twice as likely to introduce emergency provisions in new or amended constitutions as governments coming to power through peaceful means. This finding seems well compatible with the conjecture that emergency constitutions are introduced out of malevolent concerns.

Fifth, more populous countries have been less likely to introduce emergency constitutions. At least three possible explanations come to mind: (1) Disasters – no matter whether natural or man-made – are less likely to threaten the existence of large countries than small ones. There are, hence, fewer reasons in favour of the constitutionalization of emergency provisions. (2) Very populous countries are likely to be organized as federations and the constitutionalization of emergency provisions might, hence, take

place on the state level and not the federal one. (3) In very populous countries, overcoming the problem of collective action is particularly severe. If the non-elites are less likely to act collectively in these countries than in small ones, they are unlikely to credibly threaten the elites. But if there is no constitutional bargain between elites and non-elites, there is also no necessity to create an emergency constitution as a commitment mechanism as described above.

Finally, while neither veto player institutions, their complete absence (the ‘no constrains’ variable), nor any regular legal origins tend to matter significantly, we find that countries with Islamic legal systems are substantially more likely to include emergency provisions. Yet, as is clear in columns 3 and 4, this is evidently driven by the comparison of relatively rich Islamic oil nations with rich western countries. As we delete the latter, Islamic law ceases to be significant.

4.2. Determinants of the characteristics of emergency provisions

After having analysed the reasons for introducing an emergency constitution as a binary yes / no decision, we now move on to ask what factors lead to an extensive transfer of competences to the executive and what factors inhibit such extensive transfers. We confine the analysis to those emergency provisions that were introduced between 1950 and 2010, as our selection of background data would otherwise be severely restricted. Tables 5a and 5b contain our estimates. Column 1 in both tables reports the results of using the full index while the following columns report the results with the indices of declaration power, approval power and conditions (Table 5a), and dissolution power, rights suspension and expropriation and censorship (Table 5b).

Table 5a about here

Table 5b about here

Starting with regime characteristics, we find that countries with a mixed presidential political system, i.e. a democratic system with a weak president, significantly tend to allow less discretionary power during emergencies. This effect appears driven by mixed democracies listing fewer conditions under which

emergencies can be called, and emergency constitutions that are substantially less likely to allow the suspension of any basic rights. The latter characteristic also tends to be shared by monarchies (but not royal dictatorships) in which a hereditary constitutional monarch may share similar features as a weak president.

We next find that countries with stronger veto institutions, as measured by Henisz's PolConIII index, tend to have a higher INEP, i.e. allow significantly stronger emergency powers. This effect derives from veto strength affecting the power to approve states of emergency, to dissolve the parliament during emergencies and to suspend basic rights. This result seems compatible with all three possible motivations described above for the inclusion of emergency provisions into a country's constitution. The result could be the consequence of constitution-makers' beliefs that government should be constrained in normal times but does need substantial additional powers during states of emergency. But it is also compatible with the malevolent view because it enables the executive to declare an emergency without being seriously restricted by any veto players and even to dissolve the legislature. It is, finally, also compatible with the elaborate motivation. Under that motivation, the emergency constitution serves as an insurance of the elites against possibly revolting non-elites. Since the non-elites are likely to be in the majority, they are also likely to have a majority in parliament. For the emergency constitution to serve its insurance function, the elites can therefore declare an emergency without having the consent of the legislature (no approval powers) and even dissolving the legislature altogether.

Likewise, countries with a recent history of coups d'état allocate more emergency powers to the executive. The specific areas affected by coups are declaration powers and a longer list of conditions under which states of emergency can be called, i.e. such constitutions enable governments to call emergencies more frequently and under more conditions. This finding is entirely in line with our conjecture that emergency constitutions also serve as an insurance device to the military developed above. It is, on the other hand, difficult to reconcile with the benevolent approach.

Turning to more development-related factors, richer countries share the same characteristics, but are also more likely to allow rights suspension during emergencies. However, as richer countries tend to have substantially stronger and more independent judiciaries, rights suspension is likely to be subject to statutory law that is likely to be impartially enforced. As such, although any conclusion would require more detailed case studies, one might speculate that this feature might reflect constitutional negotiations, cf. hypothesis #e1. Larger countries, i.e. countries with larger populations, also tend to include more conditions and allow the suspension of rights. The former feature is shared by countries with a communist past.

We also find some evidence of differences across legal origins. Both French civil and common law countries allow emergencies under more conditions, and are more likely to allow the dissolution of parliament relative to Islamic and communist origins, as well as the baseline category (German and Scandinavian origins). In addition, both French civil and Islamic law countries are more likely to include provisions allowing the suspension of basic rights during emergencies. Notice that common law countries are closer to the baseline German and Scandinavian countries in not allowing significantly more rights to be suspended under an emergency.

In addition, we find substantial evidence that the particular way the constitution was negotiated is reflected in the emergency constitution. Those created by a constituent assembly or by legislative decision allocate fewer approval powers to the executive and are less likely to allow censorship and expropriation during emergencies. Constituent assemblies include significantly more conditions, while those created by legislative decision or by a constituent legislature – i.e. by a regular or special parliament – are substantially less likely to allow for the dissolution of parliament. We also find robust evidence that emergencies negotiated and drafted by a constituent legislature are more likely to protect against rights suspension during emergencies. These results are perfectly in line with the assumption that politicians are utility-maximizers: if members of the legislature dominate the constitution-making process, they tend to allocate more approval powers to themselves and make it impossible for the

executive to dissolve parliament. Conversely, it is difficult to make these findings consistent with any benevolent behavior.

Finally, we turn to environmental factors that could influence constitutional design. Low elevation and the relative coast line capture the risk of floods, the log to latitude captures draught risk while we also include a dummy for countries in volcano areas. We find that countries that are more flood-prone (with areas at very low elevations) list fewer emergency conditions and tend to ban the dissolution of parliament and the suspension of basic rights. Frequent experiences with floods are, hence, correlated with more checks and balances. It seems as if frequent experience with disasters for which there are low-tech solutions – dykes, overflow basins, zoning restrictions and architectural design – makes the allocation of additional powers to the executive superfluous. Surprisingly, those with long coast lines tend to be more likely to allow for censorship and expropriation. Likewise, it seems difficult to explain why countries in volcano areas have weaker executive approval powers. A final finding, that countries further away from the equator tend to allow weaker declaration and approval powers and be substantially less likely to allow expropriation and censorship during emergencies, is less surprising. While there are no good geographical reasons, latitude is known to correlate significantly with the de facto quality of judicial and bureaucratic institutions.

The remaining question is what to make of these differences – what do they tell us about the political process of drafting and implementing emergency constitutions? We devote the final section to addressing this question as well as outlining some of the questions that arise from this paper.

5. Conclusions and Outlook

This paper tries to identify the reasons that lead to the constitutionalization of emergency provisions. This is an important question as not only 90 percent of all countries have constitutional emergency provisions but that these provisions are relied upon very frequently. In the 30 year period between 1985 and 2014, we have counted 137 countries that declared a state of emergency at least once. Given how

frequently emergency powers are invoked, it is amazing how little we know about both their determinants as well as their effects.

We first find that, apart from the obvious choice of having none, the choice of emergency provisions in the constitution can be analysed as a choice of how to allocate the powers to declare and approve emergencies, the conditions under which a state of emergency can be declared, and whether the parliament can be dissolved, basic rights can be suspended and private property can be expropriated.

We use these features to develop an Index of Emergency Powers that effectively measures the degree of discretionary power constitutionally allocated to the executive during emergencies. In our analysis of emergency constitutions introduced by constitutional change or amendment since 1950, we find evidence of only few significant factors: Countries which formerly included emergency provisions in a constitution are more likely to do so in future constitutions, the constitutions of newly independent countries after 1950 were more likely to include an emergency constitution while smaller, formerly communist countries, and countries in which the government came to power through a coup are more likely. With the possible exception of the first result, these findings are difficult to reconcile with purely benevolent or pragmatic motives behind constitutional design.

Secondly, relying on our Index of Emergency Powers, we find that democratic countries with a weak president assign fewer powers to the executive during emergencies. We also find that countries with stronger veto institutions tend to allocate substantially more rights to circumvent regular democratic rights during emergencies. This characteristic is shared by civil law countries while common law countries allow states of emergencies under significantly more conditions, as do countries that are more prone to experience coups. We also show that the negotiation forum for new constitutions – if the constitution is introduced by constituent assemblies, legislative decision, executive decision or by a constituent legislature – clearly shapes the design of emergency constitutions. Conversely, we find only mixed and somewhat confusing differences when focusing on actual, geographical risks.

As such, our empirical evidence is hard to reconcile with any exclusively benevolent or pragmatic motives for constitutional design. Instead, they are consistent with purely malevolent motives that would allow governments to remain in power, and elaborate motives that enabled opposing actors in constitutional negotiations to credibly commit to the constitutional solution. Both the finding that stronger veto institutions are associated with substantially stronger emergency powers, and the finding that democratic institutions are not associated with the likelihood of introducing an emergency constitution in the first place are consistent with these non-benevolent motives.

This paper deals with the determinants of emergency constitutions. At least four follow-up questions come to mind: Firstly, what are the effects of emergency constitutions? Given that we have identified six different components of emergency powers, can one identify one as particularly apt in re-establishing the status quo ante? Or in minimizing the number of dead after a natural disaster has occurred? Or as inadequate in re-establishing ex ante levels of civil rights? How do countries without an explicit emergency constitution fare in comparison? First answers to these questions are given in Bjørnskov and Voigt (2015b).

Secondly, we have seen that emergency provisions do not only exist on paper but are used quite frequently. What are the determinants of actually declaring a state of emergency? Can one show that emergency constitutions entailing more separation of powers are used less frequently? What about the use of states of emergency in countries without explicit emergency provisions? Bjørnskov and Voigt (2015a) deal with these questions.

Thirdly, emergency constitutions are but one tool that can serve the interests of power-maximizing politicians. Other tools include but are not restricted to the frequent use of executive decrees, the creation of special courts, and the role of the military. It is worth looking at the relationship between these tools both on the institutional as well as on the behavioural level.

Fourthly, it is generally accepted that in many countries constitutional text widely diverges from constitutional reality. It is, therefore, unlikely that politicians always meticulously stick to the constraints

laid down in the respective emergency provisions and it would be interesting to analyze differences between the *de jure* and the *de facto* emergency constitution more systematically. Such an analysis could begin by analyzing to what degree the *de jure* provisions have been implemented in practice. For example, some constitutions mention that some "framework structure" is to be introduced. It is straightforward to ask whether it exists and if yes, how many years elapsed between passing the constitution and creating the respective law. One could further compare the constitutionally mentioned maximum length of states of emergency with the length actually realized. Other potentially relevant aspects include: How many special courts have been established? What is the proportion of trials handled via such courts? Has the military been used domestically? Have actors involved in either the declaration or the implementation of a state of emergency been prosecuted later on in case their behavior was not within the confines of legal action?

Appendix

Insert Table A1 about here

Insert Table A2 about here

Insert Table A3 about here

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Table 1: Percent of all emergency constitutions that name the respective topic as possible reason for calling a state of emergency

Topic	1950	2011
War / foreign aggression	31.9	48.6
Internal security	31.9	38.8
National disaster	6.9	26.2
General danger	16.7	25.7
Economic emergency	5.6	7.1
Threat to constitutional system	0.0	2.7

Table 2. Constructing the INEP

Component	Additive coding based on:
Declaration power	2 if declaration rights rest with the head of government or the incumbent government; 1 if they are vaguely defined; 0 if they rest with the legislature or other (mainly courts)
Approval power	3 if emergencies need no approval; 2 if approval rights rest with the head of government or the incumbent government; 1 if they are vaguely defined; 0 if they rest with the legislature or other (mainly courts)
Conditions	3 if conditioned on “internal security” or “general danger”; 2 if they include “economic emergency” or “constitutional threat”; 1 if they include “other” or are vaguely defined; 0 if conditions are only “war” and “natural disasters”
Dissolution power	1 if parliament can be dissolve during emergencies; 0 otherwise
Rights suspension	3 if all rights can be suspended during emergencies; 2 if some can be suspended; 1 if the provisions are vague; 0 if no rights can be suspended
Expropriation and censorship	1 if censorship can either be introduced during emergencies or is constitutionally allowed; 1 if authorities can expropriate without due compensation during emergencies

Table 3. Characteristics of emergency constitutions, regime types

	Parliamentary	Mixed	Presidential	Civil dict.	Military dict.	Royal dict.
Overall INEP	.32	.26	.33	.29	.33	.30
Declaration power	.66	.71	.69	.71	.78	.85
Approval power	.21	.18	.19	.21	.23	.17
Conditions	.29	.24	.44	.23	.30	.21
Dissolution power	.18	.13	.08	.09	.09	.03
Rights suspension	.19	.08	.25	.15	.18	.08
Exprop. and censorship	.39	.25	.32	.36	.43	.46

Table 4. Determinants of introducing emergency constitutions (given constitutional change), 1950-2010

	1	2	3	4
Re-introduction	6.024*** (.549)	6.042*** (.549)	6.473*** (.649)	6.442*** (.648)
First constitution	2.922*** (.413)	2.988*** (.420)	2.938*** (.412)	2.949*** (.419)
Mixed	.137 (.464)	.119 (.459)	.795 (.528)	.788 (.535)
Presidential	-.286 (.594)	-.446 (.562)	-.719 (.685)	-.527 (.715)
Civil auto.	.133 (.444)	.247 (.433)	.324 (.477)	.275 (.483)
Military auto.	.131 (.588)	.116 (.583)	.209 (.622)	.276 (.622)
Royal auto.	-.194 (.699)	.039 (.641)	.152 (.763)	-.003 (.804)
Monarchy	.334 (.449)	.227 (.434)	.081 (.584)	.229 (.617)
Coup government	.826** (.391)	.818** (.388)	.796** (.393)	.807** (.396)
PolConIII	1.026 (1.384)	.672 (1.323)	.845 (1.539)	1.302 (1.584)
No constraints	.685 (.561)	.633 (.544)	.699 (.602)	.799 (.616)
Log GDP per capita	.002 (.141)	-.119 (.113)	-.074 (.125)	.016 (.147)
Log population size	-.207*** (.080)	-.192*** (.071)	-.213*** (.076)	-.241*** (.088)
Postcommunist	1.388*** (.479)	1.136*** (.384)	.855* (.444)	1.414** (.710)
Common law	-.208 (.562)	-.114 (.542)	-1.085 (.796)	-1.305 (.836)
French Civil law	-.234 (.562)	-.083 (.527)	-1.067 (.768)	-1.395 (.847)
Islamic law	1.657** (.786)	1.904*** (.738)	.922 (.931)	.573 (.993)
Communist law	-.105 (.659)	-.170 (.655)	-1.024 (.836)	-.916 (.843)
Regional controls	Yes	No	No	Yes
Observations	1834	1834	1385	1385
Countries	175	175	149	149
Log likelihood	-332.834	-335.136	-277.300	-275.296
Wald Chi squared	214.31	213.56	172.40	173.50

Note: *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$]. With legal origins, the omitted category is German / Scandinavian legal systems; with form of government, the omitted category is parliamentary democracy.

Table 5a. Determinants of constitutional characteristics

	INEP	Declaration power	Approval power	Conditions	
Regime characteristics	Mixed	-.119*** (.042)	.055 (.124)	-.063 (.079)	-.158** (.073)
	Presidential	-.044 (.040)	.088 (.119)	-.122 (.077)	-.039 (.077)
	Civil auto.	-.017 (.033)	.122 (.102)	-.009 (.060)	-.059 (.056)
	Military auto.	-.001 (.035)	.093 (.104)	.015 (.064)	-.056 (.061)
	Royal auto.	-.005 (.045)	.076 (.094)	.067 (.085)	-.044 (.078)
	Monarchy	-.021 (.036)	.113 (.103)	-.046 (.064)	-.042 (.060)
	PolConIII	.072*** (.028)	.049 (.049)	.094** (.040)	-.004 (.029)
	No constraints	.002 (.009)	.027 (.022)	-.001 (.018)	.009 (.014)
	Log coups (10 yrs)	.025* (.014)	.089** (.044)	-.023 (.033)	.064*** (.024)
Development factors	Log GDP per capita	.032*** (.010)	.066** (.027)	.011 (.021)	.054*** (.019)
	Log population size	.014*** (.004)	.013 (.014)	.017 (.011)	.023*** (.009)
	Post-Cold War	.034** (.017)	.016 (.044)	.018 (.039)	.101*** (.034)
	Common law	.085** (.038)	.061 (.102)	.038 (.080)	.152*** (.053)
Legal origins	French Civil law	.076** (.034)	-.001 (.083)	.030 (.067)	.148*** (.041)
	Islamic law	.046 (.045)	-.004 (.107)	-.129 (.0924)	-.063 (.092)
	Communist law	.043 (.039)	.023 (.109)	.044 (.079)	-.042 (.049)
	Constituent assembly	-.001 (.022)	.003 (.061)	-.093** (.038)	.138*** (.046)
Type of introduction	Legislative decision	-.067*** (.017)	-.081* (.049)	-.111*** (.035)	-.046 (.031)
	Executive decision	.016 (.015)	.065 (.042)	.035 (.033)	.008 (.026)
	Constituent legislature	-.074*** (.028)	-.119 (.097)	-.097 (.069)	.030 (.063)
Environmental characteristics	Low elevation	-.069*** (.020)	-.068 (.049)	-.013 (.044)	-.069* (.036)
	Log latitude	-.036*** (.008)	-.083*** (.024)	-.043* (.023)	-.018 (.018)
	Coast line	.016* (.009)	.015 (.019)	.004 (.008)	.009 (.011)
	Volcano area	-.014 (.016)	.048 (.052)	-.103*** (.037)	-.004 (.029)
	Regional controls	Yes	Yes	Yes	Yes
Observations	360	360	360	360	
R squared	.271	.212	.125	.278	
F statistic	5.76	4.33	2.75	6.73	
RMSE	.123	.352	.271	.223	

Note: *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$]. With legal origins, the omitted category is German / Scandinavian legal systems; with form of government, the omitted category is parliamentary democracy.

Table 5b. Determinants of constitutional characteristics

	INEP	Dissolution power	Rights suspension	Expropriation and censorship	
Regime characteristics	Mixed	-.119*** (.042)	-.158 (.116)	-.273*** (.077)	-.115 (.071)
	Presidential	-.044 (.040)	-.102 (.097)	-.089 (.082)	.002 (.065)
	Civil auto.	-.017 (.033)	-.003 (.088)	-.089 (.071)	-.064 (.049)
	Military auto.	-.001 (.035)	-.020 (.088)	-.041 (.080)	.002 (.053)
	Royal auto.	-.005 (.045)	-.098 (.081)	-.011 (.072)	-.022 (.063)
	Monarchy	-.021 (.036)	.008 (.079)	-.137** (.054)	-.019 (.049)
	PolConIII	.072*** (.028)	.218*** (.049)	.132* (.072)	-.054 (.036)
	No constraints	.002 (.009)	.004 (.020)	-.010 (.022)	-.011 (.019)
	Log coups (10 yrs)	.025* (.014)	.017 (.033)	.005 (.024)	.000 (.026)
Development factors	Log GDP per capita	.032*** (.010)	.035 (.025)	.039** (.019)	-.014 (.016)
	Log population size	.014*** (.004)	.017 (.009)	.021*** (.008)	-.006 (.007)
	Post-Cold War	.034** (.017)	.084* (.049)	.038 (.036)	-.052* (.028)
	Common law	.085** (.038)	.103* (.058)	.033 (.049)	.119 (.087)
Legal origins	French Civil law	.076** (.034)	.104** (.043)	.127*** (.042)	.048 (.084)
	Islamic law	.046 (.045)	.126 (.118)	.219* (.119)	.126 (.095)
	Communist law	.043 (.039)	.070 (.046)	.000 (.046)	.162* (.088)
	Constituent assembly	-.001 (.022)	.046 (.050)	-.029 (.042)	-.072* (.041)
Type of introduction	Legislative decision	-.067*** (.017)	-.070** (.035)	-.030 (.032)	-.066** (.030)
	Executive decision	.016 (.015)	.029 (.035)	-.018 (.030)	-.021 (.027)
	Constituent legislature	-.074*** (.028)	-.095** (.042)	-.139*** (.054)	-.021 (.053)
	Low elevation	-.069*** (.020)	-.146*** (.053)	-.094** (.043)	-.024 (.029)
Environmental characteristics	Log latitude	-.036*** (.008)	-.031 (.022)	-.006 (.019)	-.034** (.017)
	Coast line	.016* (.009)	.019 (.022)	.036* (.020)	.015*** (.005)
	Volcano area	-.014 (.016)	-.041 (.033)	.007 (.035)	.009 (.028)
	Regional controls	Yes	Yes	Yes	Yes
Observations	360	360	360	360	
R squared	.271	.212	.125	.278	
F statistic	5.76	4.33	2.75	6.73	
RMSE	.123	.352	.271	.223	

Note: *** (**) [*] denote significance at $p < .01$ ($p < .05$) [$p < .10$]. With legal origins, the omitted category is German / Scandinavian legal systems; with form of government, the omitted category is parliamentary democracy.

Table A1. Variables and sources

Type of explanation	Variables	Source
Regime types	Parliamentary, mixed, presidential, civil autocracy, military autocracy, royal autocracy, monarchy, Post-Cold War	Cheibub et al. (2010)*
	PolConIII, no constraints	Henisz (2010)
Frequency of disasters	Log GDP per capita	
	Low elevation, log latitude, coast line, volcano area	CIA (2014)
	Log coups (10 yrs)	*
Legal history	Common law, civil law, Islamic law, communist law	CIA (2014)
Composition of constitutional assembly	Constituent assembly, legislative decision, executive decision, constituent legislature	Ginsburg (nd)
Economic factors	Log GDP per capita, log population size	Heston et al. (2012),

Note: * refers to the recent update and expansion of the database developed by Cheibub et al. by Bjørnskov and Martin Rode. These data are available upon request from the authors.

Table A2. Descriptive statistics, data used in Table 4a, b and 8a, b

Variable	Mean	Standard deviation	Observations
INEP	.307	.138	411
Declaration power	.729	.392	411
Approval power	.206	.279	411
Conditions	.272	.245	411
Dissolution power	.095	.293	411
Rights suspension	.162	.255	411
Expropriation and censorship	.377	.232	411
Mixed	.058	.235	411
Presidential	.088	.283	411
Civil auto.	.421	.494	411
Military auto.	.226	.419	411
Royal auto.	.083	.276	411
Monarchy	.165	.372	411
PolConIII	.097	.257	402
No constraints	.766	.604	402
Log GDP per capita	7.356	.846	372
Log population size	8.459	1.710	402
Post-Cold War	.260	.439	411
Log coups (10 yrs)	.423	.552	386
Common law	.118	.322	407
Civil law	.747	.435	407
Islamic law	.027	.162	407
Communist law	.074	.262	407
Age	59.871	46.609	411
Low elevation	.791	.407	411
Log latitude	2.798	.960	411
Coast line	.162	.986	409
Volcano area	.299	.458	411
Constituent assembly	.165	.372	411
Legislative decision	.253	.435	411
Executive decision	.391	.489	411
Constituent legislature	.044	.205	411
Length	13,485	12,115	409
Democracy	.270	.445	411
Still in use	.314	.465	411

Table A3. Descriptive statistics, data used in Table 6-7

Variable	Mean	Standard deviation	Observations
Introduction of EC	.106	.307	2084
Re-introduction	.042	.200	2085
First constitution	.039	.193	2085
Mixed	.108	.309	2044
Presidential	.143	.350	2044
Civil auto.	.321	.467	2044
Military auto.	.129	.335	2044
Royal auto.	.042	.201	2044
No constraints	.401	.490	2001
Log GDP per capita	8.430	1.304	1935
Log population size	8.957	1.827	2085
Postcommunist	.058	.252	2085
Common law	.284	.451	2084
Civil law	.538	.499	2084
Islamic law	.012	.111	2084
Communist law	.103	.304	2084

Figure 1. Share of constitutions with emergency provisions, 1900-2013

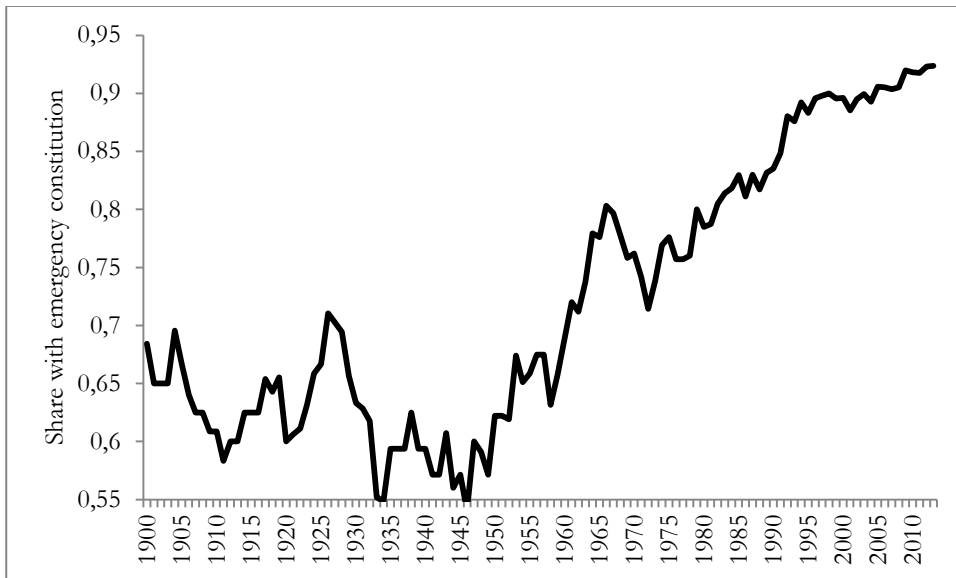


Figure 2. Average INEP, 1950-2010

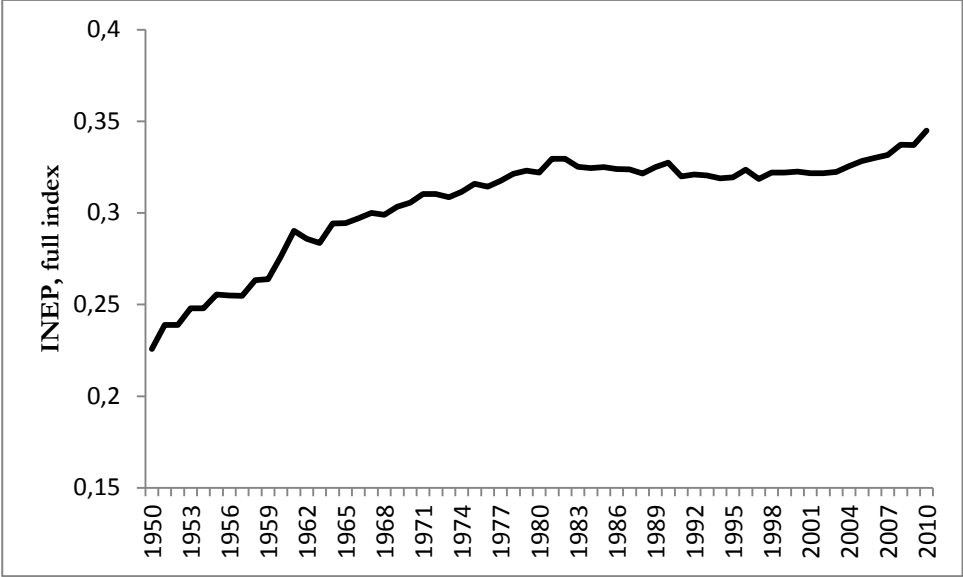


Figure 3. Six separate indices, INEP, 1950-2010

