

# 2

## *The Architecture of Emergency Constitutions*

### **2.1 Introduction**

As already mentioned in Chapter 1, some 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency (Elkins et al. 2009). The inclusion of emergency provisions – those legal rules specifying who can declare a state of emergency (SOE), when they can do so, and what actors have what powers once it has been declared – into constitutions has become the norm. In this book, we refer to these provisions simply as “emergency constitutions.” These are, in other words, not separate documents but simply those parts of the constitution that refer to emergencies. And these provisions are used quite frequently and their use is often far from innocuous. Between 1985 and 2014, at least 137 countries declared an SOE at least once. During the COVID pandemic alone, at least 125 nation-state governments declared an SOE emergency due to health concerns.

Under an SOE, 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 such as the head of state or government and, by implication, to the detriment of parliament and the courts. Assuming that states of emergency can 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 an SOE, (2) the trends in the evolution of emergency provisions over time, (3) the factors that cause societies to adopt them in the first place, and (4) their effects, that is, their effectiveness in reaching the goals stated in the underlying legislation. In this chapter, we focus exclusively on the first two questions. We discuss the third question in Chapter 3 and the fourth question throughout the book; Chapters 4 through 6 in particular are devoted to exploring the fourth question.

International studies analyzing the additional powers that emergency provisions grant to respective governments as well as the development of emergency provisions over time are extremely scarce. There is one important exception though: Loveman (1993) is a very thorough analysis of the genesis of the emergency constitutions of many Latin American countries in the nineteenth century. The existing international studies rather focus on their consequences.

Because of this gap in the literature, we describe the main components of emergency constitutions as well as how they have changed over time. To make the powers that emergency constitutions allocate to governments comparable over time and between countries, we develop an additive Index of Emergency Powers (INEP) that consists of six separate subindices, which we employ throughout the book. Quite often, legal scholars assert that emergency constitutions do not lend themselves to meaningful comparison. If this were true, questions dealing with the effectiveness of emergency constitutions would be almost impossible to answer. In this chapter, we therefore try to prove these scholars wrong by empirically exploring the general architecture of emergency constitutions. We use the indices that we develop in cluster analysis to see whether we can find a limited number of clusters or “families” of constitutions that share a number of traits.

Drawing on 351 constitutions (both current and defunct) for which we have sufficient information available and relying on thirty-one different variables capturing the most important features of emergency constitutions, we identify six such clusters and, hence, show that emergency constitutions often share many features. We find preliminary evidence that the consequences of emergency constitutions differ along the lines of these clusters.

The rest of this chapter is structured as follow. Section 2.2 names the main features of emergency constitutions and identifies time trends in their evolution. Section 2.3 briefly describes the main features of cluster analysis while Section 2.4 reports the results of the cluster analysis and a set of simple descriptive statistics. In Section 2.5, we apply a different approach to analyze emergency constitutions. There, the length in words of emergency constitutions is used to inquire whether longer emergency constitutions create additional restrictions on governments or inversely more additional powers under states of emergency. Section 2.6 concludes and spells out a number of follow-up questions that can be tackled with the INEP and the clusters proposed here.

## 2.2 Defining Constitutional Emergency Provisions

It is necessary first to define emergency provisions, and thus what an “emergency constitution” is. Our definition of an emergency constitution is that it is the set of formal legal provisions encoded in the constitution that specify who can declare an SOE, under which conditions an SOE can be declared, who needs to approve the declaration, and which actors have which special powers once it has been declared. What we refer to as the “emergency constitution” here and throughout the book is, hence, not a document separate from the ordinary constitution but those formal provisions of it that explicitly deal with emergencies. We therefore do not capture decrees promulgated by governments during an SOE, the conferral of emergency powers in statute, or any informal constitutional conventions or political traditions as they are not part of what we define here as a country’s emergency constitution. Consequently, we consider the formal provisions written in the constitution to be the strict outline of a legal maximum of government actions that are constitutionally permitted.

As such, emergency constitutions are paradoxical documents: Their declared goal is to reestablish constitutional order by temporarily suspending it. They are also paradoxical in the sense that a constitution that includes emergency provisions spells out in these provisions the conditions under which its regular application may be suspended. As such, emergency constitutions deal with the delicate balance between suspending individual rights by temporarily reducing the separation of powers, while also typically providing monitoring mechanisms intended to reduce the likelihood of the SOE being misused by power-maximizing politicians.

There are large differences in the additional powers available to the executive during emergencies. Most emergency constitutions give the executive the right to derogate a number of basic rights, including the right to move freely, the right to assemble and to demonstrate or strike; they also give the executive the right to censor the press. They often give the police the right to search private homes without a warrant and allow the executive to use military forces in domestic settings.

But there is more to emergency constitutions. Quite a large number of emergency constitutions give the head of state the authority to issue decrees during an SOE. Such authority is given to heads of government only rarely, but this does occur as, for example, in the

Hungarian constitution. Other provisions deal with the military (the government can be granted, e.g. the authority to enlarge the standing army or to deploy soldiers domestically), public finance (many constitutions enable governments to levy forced loans or to collect taxes prior to their regular due date), measures to keep government in power (the 1995 constitution of Armenia, e.g. excluded the possibility of a vote of no confidence under an SOE), and many others.

## 2.3 Trends in Emergency Powers

In this section, we give a general overview 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.

### 2.3.1 *On the Diffusion of Emergency Constitutions*

Constitutional emergency provisions make little sense under absolute monarchy or totalitarian regimes. If the head of the executive is unconstrained, why should there be special provisions giving him (or her) powers he (or she) already enjoys? This is why the history of constitutional emergency provisions is closely linked with the advent of constitutional monarchy and with restricted government more generally.

France was the first modern nation state to introduce constitutional emergency provisions in 1795. Emergency constitutions have since spread to 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 similar to those of the French model. The provisions contained in the Bayonne constitution, as well as the 1812 Constitution of Cádiz, in turn served as a model for the first constitutions of many Latin American countries emerging out of the Spanish Empire. In fact, with the exception of Portugal (1826), all of the subsequent countries to create emergency constitutions in the following decades were Latin American. In chronological order, these were Argentina (1819), Chile (1822), Brazil (1824), the United Provinces of the Rio de la Plata (1824), Bolivia (1826), Peru (1826), Ecuador (1830), Uruguay (1830), and Venezuela (1830). Two observations are noteworthy: First, in all

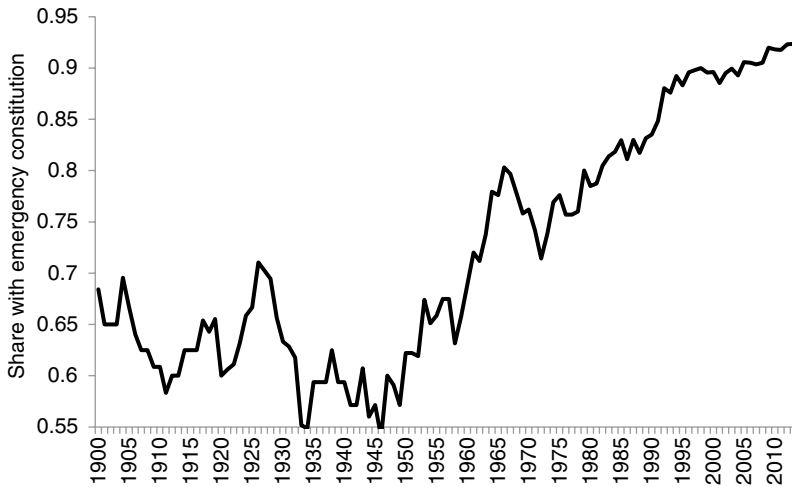


Figure 2.1 Share of constitutions with emergency provisions, 1900–2013

of the cases mentioned, the inclusion of emergency provisions in the constitution was part of an entirely new constitution and hence not part of constitutional amendment; second, all of these countries belong to the French legal family. By 1850, twenty countries had an emergency constitution; today, all of them are coded as “French legal origin.”

But the spread of emergency constitutions did not stop in Latin America or countries of French legal origin. Using the extensive information contained in the Comparative Constitutions Project (CCP), we find that by 2013, 171 countries had in fact adopted emergency constitutions. The number of states also increased over this period. Expressed as a proportion, less than 60 percent of all sovereign states had an emergency constitution in 1850 whereas today, some 90 percent of all countries do. This development is clearly illustrated in Figure 2.1, where we plot the share of independent countries with an emergency constitution, starting in 1900. The figure shows relative stability before 1950. 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.

The data show that once a country has included emergency provisions in its constitution, it is unlikely ever to get rid of them. According to the CCP, only seventeen countries have discarded constitutional

emergency provisions. Most countries that did get rid of their emergency constitution – often as a consequence of abolishing the constitution altogether – introduced a new one after a short interval. The only exception is Austria, which abolished its 1934 emergency constitution and has not reintroduced another to date. In all other cases, the abolition was the consequence of a military or communist takeover that eventually resulted in the reintroduction of emergency provisions.

As described earlier, the first constitutional emergency provisions in the nineteenth century were all part of entirely new constitutions. Virtually all of today's emergency constitutions were already included in the last "new" constitution of a country. The 2002 amendment to the constitution of the Czech Republic is a notable exception in which emergency provisions were included later on. Hence, having an emergency constitution is now the rule rather than the exception. Yet as we outline next, there is considerable variation with regards to specific details and the scope of the provisions.

### *2.3.2 Single Components of Emergency Provisions*

We suggest that every emergency constitution must, at least implicitly, deal with six different questions:

1. What are the necessary conditions for an SOE?
2. Who has the power to declare an SOE?
3. Who has the power to declare the end of an SOE?
4. Who has the power to monitor the legality of the means used during an SOE?
5. Who exercises emergency powers?
6. What (additional) competences does an SOE confer on the emergency government?

#### **(1) Necessary Conditions**

Concerning the first question, the preconditions necessary for an SOE 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 SOE. We rely on the variable in the CCP that lists six possible preconditions for declaration (Elkins et al. 2009): (1) war/aggression, (2) internal security, (3) national disaster, (4) general danger, (5) economic emergency, and (6) threat to constitutional system. Any of these aspects might be found in a given proportion of

**Table 2.1** *Percent of all emergency constitutions that name the respective topic as a possible reason for declaring an SOE*

Topic	1950	2017
War/aggression	31.9	48.6
Internal security	31.9	38.8
National disaster	6.9	37.6
General danger	16.7	25.7
Economic emergency	5.6	7.7
Threat to constitutional system	0.0	4.1

constitutions, that is, the share of constitutions that include them can assume a value between 0 and 100 percent in any year. Adding up the resulting proportions for each of the six categories can, hence, yield a theoretical maximum of 600 (six categories of 100 percent). Although this is a crude measure, it does give an impression of how the preconditions for declaring an SOE evolved over time: For 1950, the actual sum was 97.14, whereas the same exercise for 2011 yields a sum of 167.53. This implies that the possible causes for declaring an SOE have been considerably broadened and the typical, modern emergency constitution mentions two such conditions.

Second, Table 2.1 shows that some preconditions have become more widely included than others. In 1950, 6.9 percent of all constitutions named any kind of “national disaster” as a potential justification for declaring an SOE; this proportion had grown to slightly above one third by 2017. “Economic emergencies,” on the other hand, were explicitly mentioned in 5.6 percent of all constitutions with emergency provisions in 1950. By 2017, this proportion had increased to only 7.7 percent. The sixth precondition in the list given above, “threat to the constitutional system,” did not exist in 1950, but by 2017 it was included in 4.1 percent of all constitutions with emergency provisions.

## (2) Power to Declare

The second component of emergency constitutions deals with the question of who has the power to declare an SOE. No matter how precisely the necessary preconditions are defined, some actors need to decide whether the conditions mentioned in the constitution are present or not. On the one hand, one can imagine a constitution that allocates the power to declare an SOE to the head of the executive

without any other political actor or authority needing to approve this decision. This would be equivalent to very few checks on executive power. On the other hand, an alternative scenario would be that more than one constitutional actor must be involved in the declaration and more than one actor must approve it. A third scenario, located somewhere between the two more extreme approaches just mentioned, 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 SOE in terms of reduced government legitimacy. Ideally, the necessary parliamentary majorities should also be taken into account.

Emergency constitutions typically reduce the degree of the separation of powers for a limited period of time. Yet regarding nonemergency periods, there has been a secular trend toward a stricter separation of powers. The variable CHECKS, which serves as a proxy for the degree of checks and balances and is part of the Database of Political Institutions (Beck et al. 2001), had a mean score of 1.7 in 1975 which had risen to 3.1 by 2020 (around a stable median of 2). Likewise, the mean score of a measure of political veto player power approximately doubled from 0.16 in 1950 to 0.33 in 2016, the latest year for which data are available. It seems possible then, that even emergency constitutions might place more checks on the government operating under an SOE than they used to, if they follow the general constitutional trend. In the following we document that, in fact, the opposite has in general happened.

Regarding the competence to declare an SOE, we observe two somewhat contradictory trends. In 1950, 59 percent of countries (22/37) with an emergency constitution gave the head of state the right to declare an SOE. By 2017, this proportion had increased to 81 percent (129/159) as most constitutions in the countries that achieved independence in the decolonization wave of the 1950s and 1960s gave declaration rights to the head of state. This indicates the overwhelming importance of a single person, namely the head of state. On the other hand, around ten percent (16/159) of all constitutions currently containing an emergency constitution allocate that competence to the entire cabinet. This does not represent an increase in the separation of powers between legislature and executive, but it is 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 an SOE is given explicitly to the legislature. In 1979, the first year of her dataset, this was the case in 4.2 percent of all countries. By 2010,



this proportion had increased to 10 percent. If legislatures declare an SOE 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 an SOE 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 2017 this proportion had increased to 56 percent, again indicating some increase in the level of checks. Today, the consent of the following organs is most frequently required: (1) the first (or only) chamber of the legislature (39 percent); (2) both chambers of the legislature (19 percent); and (3) the government/cabinet (14 percent). Approval provisions are important because SOEs have often been misused by self-serving politicians. In particular, some of them have simply dissolved the legislature to eliminate a watchdog. As of 2017, 15 percent of all emergency provisions explicitly excluded the possibility of dissolving the legislature during an SOE. In 1979, the respective number was only 3.9 percent. According to the CCP, no emergency constitution implemented before 1950 included an explicit ban on dissolving the legislature.

### **(3) Power to End**

The third important component of emergency constitutions is the power to end an SOE. 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 SOE entails the danger of misuse and the possibility of descending into permanent autocracy, it seems reasonable to allocate the power to end an SOE to an actor other than the one endowed with the exercise of emergency powers. Ackerman (2004) proposes a “supermajoritarian escalator”: the longer the SOE lasts, the more inclusive the parliamentary majority necessary to sustain it. In other words, over time, ever smaller factions of parliament can end the SOE.

Keith (2012) asks whether the SOE is constrained to a set time period and whether an extension is subject to legislative approval. In 1979, a little less than 19 percent of the 153 surveyed constitutions had such provisions; in 2017 the proportion had increased to 35.9 percent. At least *de jure*, many emergency constitutions thus try to sustain a high degree in their separation of powers by making extensions dependent on the consent of the legislature.

#### (4) Power to Monitor Legality of Means Used under an SOE

Fourth, regarding actors who could monitor the legality of the means used under SOEs, both the legislature and the judiciary seem natural candidates. Ferejohn and Pasquino (2004, 216ff.) identify a “legislative model” of emergency powers, which they distinguish from the (neo) Roman model. In the legislative model, the legislature “is expected to monitor the use of emergency powers, to investigate abuses, to extend these powers if necessary, and perhaps to suspend them if the emergency ends.” They quote France as an example of a presidential system in which the legislature can impeach the president if it believes he has overstepped his powers (Art. 16 of the French Constitution). As an example of legislative monitoring under a parliamentary system, they mention independent commissions in the United Kingdom installed to monitor the executive in the way it implements anti-terror legislation.

Independent courts are a possible *ex post* monitoring device. The US Supreme Court decisions *ex parte* Milligan (1866) and *Korematsu v United States* (1944) are two (in)famous examples. Yet many scholars traditionally believe that speed is of the essence in emergency situations and that judicial review should be postponed. Contemporaneous scholars, such as Ackerman (2004) or Dyzenhaus (2006), point to the dismal record of the judiciary in constraining government action under SOEs. Unfortunately, we are not aware of any dataset that would allow us to identify any time trend regarding this aspect.

#### (5) Who Exercises Emergency Powers?

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

#### (6) What Additional Competences Des the SOE Confer on the Emergency Government?

Finally, one must ask what competences are conferred on 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 an SOE has remained virtually unchanged: 70 percent (30/43)

in 1950 and 69 percent (118/172) in 2017. 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 nonderogable rights or include a statement that certain rights cannot be infringed changed from 5.2 percent in 1979 to almost 26 percent in 2010.

Beyond the suspension of rights, there is a vast heterogeneity in the competences conferred on 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) increasing the size of the army (including the use of national guards for military purposes), and (c) measures to keep the country solvent (introducing new taxes, levying 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 governments under SOEs, for example, spelling out that no constitutional amendment can be passed under an SOE or that all decrees issued are only valid until the end of the SOE.

### 2.3.3 *Our Workhorse: An INEP*

In order to synthesize these different aspects into a single dimension, we develop a measure that can be thought of as capturing the difficulty – or political cost – of calling and maintaining an SOE as well as its potential benefits. The simplest way to create an Index of Emergency Powers (INEP) is to rely on variables that serve as proxies for the most important aspects just described and add them up. Using the extensive information available from the CCP, this is exactly what we do. In the following, we therefore employ information covering up to 351 current as well as defunct constitutions for which we have been able to obtain sufficient information. Although the CCP naturally covers many more constitutions, central information of specific features in many now defunct constitutions is simply missing, which limits our sample to 351 examples.

The INEP takes into account: (1) the degree to which the right to declare an SOE is concentrated in a single person – or very few people – or limited by multiple veto players; (2) the need to and the degree

to which the right to approve or disapprove the declaration is concentrated; (3) how many different situations are explicitly mentioned in the constitution and can be used to justify the declaration of an SOE; (4) whether fundamental civil and political rights can be suspended during an SOE; (5) whether parliament can be dissolved during an SOE; and (6) whether the government can introduce censorship of the media and expropriate property during an SOE. The first three variables are, hence, concerned with the rules for declaring an SOE, whereas the last three are concerned with the powers that governments enjoy under an SOE. The first three can also be thought of as “the cost element” of declaring an SOE, while the last three cover “the benefits element” of running an SOE from the point of view of the incumbent government. In the cases where the constitution refers to different types and degrees of emergencies and thus allows government a political choice, we code the type that provides government with the most comprehensive power. Throughout the rest of the book, we therefore refer to the two halves of the index as the Cost INEP and the Benefit INEP.

In the INEP, higher codings imply more power to the executive. For the first three components (the cost part of the INEP), high codings imply relative ease in declaring an SOE. Framed differently: higher codings are equivalent to a lower degree in the separation of powers. For the last three components (that is, the benefit part of the INEP), higher codings imply more benefits and discretionary powers allocated to the sitting government. 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 as well as the Cost and Benefit INEPs 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 SOEs 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. As such, a given level of checks and balances can, for example, be achieved by either limiting declaration power, limiting approval power, or perhaps including a sunset clause or a substantial limit on the powers given to the executive during an SOE. In other words, there is no clear progression

Table 2.2 *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 dissolved 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
Censorship and expropriation	1 if censorship can either be introduced during emergencies or is constitutionally allowed; 2 if authorities can expropriate without due compensation during emergencies

across the six components, which would have necessitated a nonadditive construction of an INEP. As such, due to the lack of a fine-grained (and broadly accepted) 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 2.2, we summarize the construction of the six components of the INEP. The components capture: the power to declare an SOE 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 censorship and expropriation of property. The INEP thus broadly consists of two main dimensions: (1) a cost dimension consisting of the

first three components that outline the political costs and the difficulty of declaring an SOE; and (2) a benefit dimension that outlines the particular, discretionary powers that are allocated to the executive (or other government actors) during an SOE. These include the possibility of derogating basic rights, introducing censorship and expropriation without due compensation, and – for the executive – dissolving parliament.

Aggregating such issues into one index shows that emergency powers were quite limited in most constitutions for which we have information that were introduced before the Great Depression. A number of constitutions implemented in the 1930s, conversely, gave substantial powers to the executive, for instance those of Yugoslavia (1931, INEP = 0.50), Poland (1935, INEP = 0.53) and Brazil (1937, INEP = 0.55). During the post-World War II 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 0.14, did not leave any declaration rights with the executive alone and clearly delimited both approval rights and the conditions under which SOEs could be declared. Based on its 1969 constitution, Ghana's INEP score increased to 0.51. The new constitution allocated all declaration powers to the head of government, allowed quite a few conditions under which an SOE could be declared, and allowed basic rights to be suspended during SOEs. The evolution of Ghana's constitution is overall representative of the general development of former colonies as they became independent and implemented constitutions of their own.

While there was a slight tendency for emergency constitutions to be more delimiting during the late 1980s and 1990s, in more recent years a number of new constitutions give the executives substantial unchecked emergency powers. New constitutions in Kenya (2010, INEP = 0.55), Guinea (2010, INEP = 0.66) and Hungary (2011, INEP = 0.71) all leave significant discretionary power to the executive during broadly defined SOEs. In Figure 2.2, these developments can be clearly seen as an uptick. Although they seem to coincide with the time after the 9/11 attacks, it is unclear whether the attacks caused the uptick in the figure as it is driven by constitutional changes in countries not directly affected by terrorist threats. The world map in Figure 2.3 displayed here shows the differences in permissiveness (measured by the overall INEP) that the various emergency constitutions allow for.

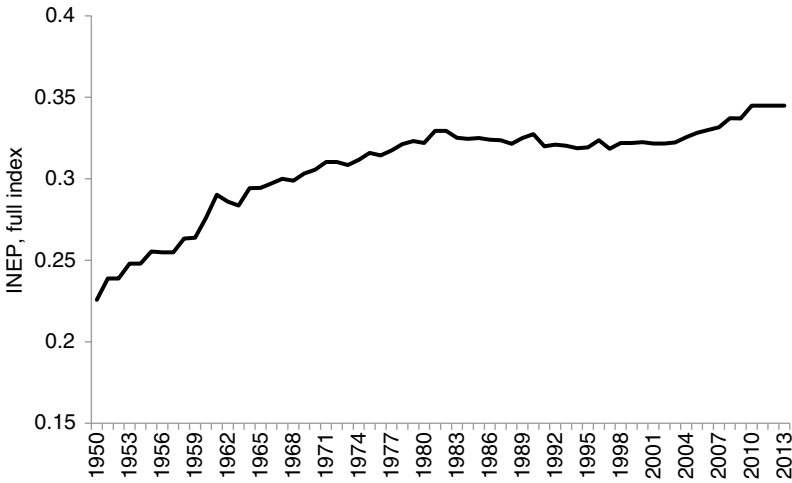


Figure 2.2 Average INEP, 1950–2013

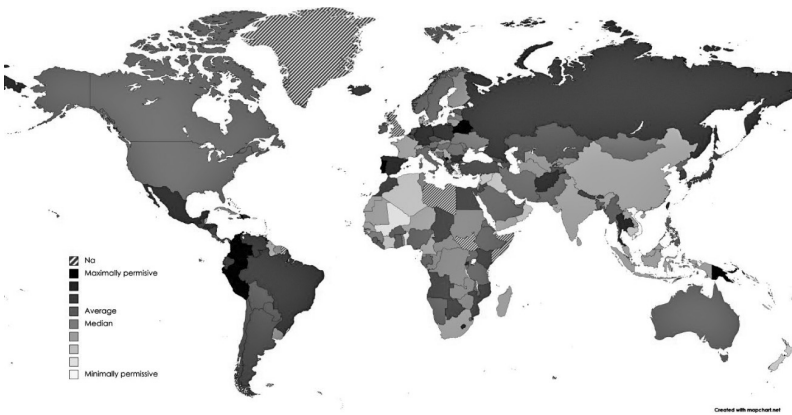


Figure 2.3 Map indicating permissiveness of emergency constitutions  
Note: permissiveness is here measured as the overall INEP.

Separating the six components of the INEP, as we do in Figure 2.4, reveals that the main development in the early years after World War II is a concentration of declaration rights. Similarly, the figure shows that the new constitutions, implemented in former colonies between 1960 and the late 1970s, were also more likely to allow for the dissolution of the legislature. Conversely, constitutions implemented after the

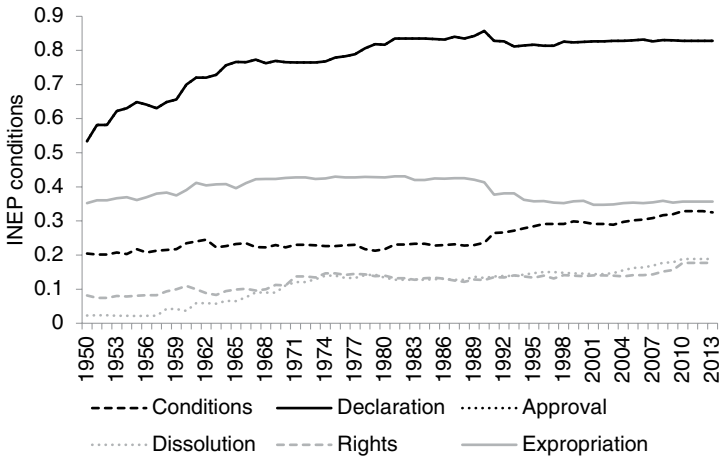


Figure 2.4 Six separate indices, INEP, 1950–2010

collapse of communism clearly tend to be less likely to allow expropriation and censorship but include more conditions under which an SOE can be declared.

Distinguishing between democracies and nondemocracies regarding emergency powers, one could expect democratic governments to be more constrained under emergencies than autocracies. If this expectation holds true, then the INEP values should be smaller for democracies than for autocracies. But this does not seem to be the case. Relying on a democracy indicator developed by Cheibub et al. (2010) and updated in Bjørnskov and Rode (2020), the average INEP value is 0.31 for democracies as well as for autocracies. The democracy indicator also allows for the separation of three 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 an SOE can be declared. Historically mixed democracies, that is, democracies with mostly ceremonial presidents without actual powers, have been less prone to allow expropriation, censorship, and the suspension of rights. But in the contemporaneous emergency constitutions, all types of democracies now appear similar on average.

How would one make sense of the counterintuitive finding that democracies and autocracies are apparently quite similar? Three possible



Table 2.3 *Characteristics of emergency constitutions, regime types*

	Parliamentary	Democracy		Autocracy		
		mixed	Presidential	Civilian	military	Royal
Overall	0.32	0.26	0.33	0.29	0.33	0.30
INEP						
Declaration power	0.66	0.71	0.69	0.71	0.78	0.85
Approval power	0.21	0.18	0.19	0.21	0.23	0.17
Conditions	0.29	0.24	0.44	0.23	0.30	0.21
Dissolution power	0.18	0.13	0.08	0.09	0.09	0.03
Rights suspension	0.19	0.08	0.25	0.15	0.18	0.08
Exprop. and censorship	0.39	0.25	0.32	0.36	0.43	0.46

reasons come to mind: Firstly, it could be that autocrats are given more powers than governments of democratic countries to begin with. In case of extreme situations, there would then be less need to rely on emergency provisions. Previewing Chapter 3, this does not seem to be the case. Secondly, it could be that on paper both autocratic and democratic governments enjoy similar additional powers under an SOE but that, in reality, autocratic governments are simply able to overstep constitutional constraints without political repercussions. The question, therefore, centers on the degree to which emergency constitutions are being complied with by different types of government, a topic we will take up again in Chapter 11. Thirdly, it could be that some general standards of emergency constitutions have evolved over the last couple of decades. This seems to have happened to other parts of the constitution – no country today can do without an elaborate rights section. So it may also have happened with regard to emergency constitutions. We will look into this possibility in the next section, asking whether a limited number of “typical” emergency constitutions can be identified (Table 2.3).

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.

## 2.4 Cluster Analysis

In the previous section, we mentioned that emergency constitutions first evolved in France and then spread across the countries belonging to the French legal family. Some scholars propose that the type of emergency constitution brought about within the French legal family is different from that brought about within the Common law legal family. The French approach is referred to as the state of siege (*état de siège*) whereas the British one would originate from martial law (e.g. Rossiter 2009, in particular chapter X). Two aspects in particular make them distinct from each other, namely: (1) the identity of the actor authorized to monitor the SOE, and (2) the degree of judicialization. Under a state of siege, monitoring would primarily fall to the legislature whereas it would fall on the judiciary, and more precisely the regular courts, under martial law. An important consequence of this difference is that monitoring by the legislature can take place during an SOE while monitoring by the courts will only take place after the SOE has been ended. Other than for the state of siege, martial law could be characterized by “the absence of statutory foresight for its initiation and use” (*ibid.*, 141). This last trait makes the identification of martial law via the analysis of formal constitutions somewhat difficult. We now ask whether this dichotomy regarding types of emergency constitutions is reflected in the data, that is, whether there are clear “families” of emergency constitutions.

In order to assess whether one can identify families of emergency constitutions, we employ cluster analysis. To generate clusters, we rely on exactly the same variables used for creating the INEP. Cluster analysis is a set of methods that, at its most basic, aims at minimizing the distance in *n*-dimensional space between member observations within a cluster while maximizing the distance between clusters. In other words, cluster analysis is a way to identify families of observations that are as similar as possible while being distinctly different from other families.

As we do not have strong priors about the correct or merely reasonable number of clusters, we perform a set of analyses defining between two and ten clusters. Based on this set of analyses, we select what we believe to be the number of clusters that best fits the data. Our criteria are: that intra-cluster distances ought to be relatively small, that is, we require clusters to be fairly coherent; that distances between clusters ought to be comparatively large; and finally, that no single cluster has disproportionately high intra-cluster distances or large outlier members. This last criterion ensures that we do not obtain clusters that are

“residual” clusters only containing observations that do not fit into any other cluster but also do not fit together in any meaningful way. We employ these criteria using graphs similar to standard screen plots in which the gain in identification can be easily observed. We outline later the details of these analyses before describing our preferred solution.

## 2.5 Are There Typical Emergency Constitutions?

We run the analysis on the basis of six clusters. Our criteria for choosing this number are described in detail in the appendix. Table 2.4 reports the full cluster membership of this solution for all 351 constitutions in the dataset.

**Table 2.4** *Cluster memberships, preferred six-cluster solution*

Cluster	Members
1. Domestic security	Afghanistan (2004), Albania (1918, 1998), Angola (2010), Antigua and Barbuda (1981), Argentina (1853), Azerbaijan (1995), Barbados (1966), Belarus (1994), Bolivia (1938, 1947, 1961, 1967, 2009), Brazil (1967), Cambodia (1971), Chile (1833, 1980), Congo (1991, 2001), DR Congo (1964), Costa Rica (1917), Cyprus (1960), Ecuador (1869, 1897, 1946, 1967, 1978, 1984, 1998), Eritrea (1997), Estonia (1991), Ethiopia (1994), Ghana (1979, 1991), Guatemala (1945, 1965), Haiti (1889, 1950, 1964, 1983, 1987), Honduras (1965, 1981), Iran (1979), Kenya (2010), Kosovo (2008), Kyrgyzstan (2010), Liberia (1986), Lithuania (1921), Macedonia (1991), Madagascar (1991), Malawi (1994), Maldives (2008), Mexico (1857, 1917), Mongolia (1991), Mozambique (2004), Myanmar (2008), Namibia (1990), Nepal (1990), Nicaragua (1987), Niger (1960), Nigeria (1989, 1999), Panama (1971), Paraguay (1991), Peru (1979), Philippines (1973), Poland (1921, 1935, 1997), Portugal (1976), Samoa (1961), Saudi Arabia (1991), Seychelles (1993), Spain (1931), St. Kitts and Nevis (1983), St. Vincent and The Grenadines (1979), Swaziland (2005), Syria (1953), Tajikistan (1994), Thailand (1968, 1997, 2007), Turkey (1924, 1945, 1961, 1981), Uganda (1995), Uruguay (1918), Uzbekistan (1991), Vanuatu (1980), Venezuela (1999)

Table 2.4 (cont.)

Cluster	Members
2. Middle of the road	Afghanistan (1964), Albania (1915), Benin (1964), Bolivia (1851), Bulgaria (1991), Burundi (1981, 1991, 2005), Cameroon (1961), Central African Republic (1981, 2004), China (1913, 1954), Colombia (1886), Comoros (1978), Congo (1963), Cote D'Ivoire (2000), East Timor (2001), Egypt (1971), Estonia (1937), Ethiopia (1955, 1987), Fiji (1970, 1990, 1997), Finland (1999), France (1851), Gabon (1961, 1975), Gambia (1970), Greece (1951), Guatemala (1879), Guinea (1981), Haiti (1843, 1946), Kazakhstan (1995), Kenya (1963), Kiribati (1979), Kuwait (1961), Kyrgyzstan (1993), Latvia (1921), Lithuania (1918, 1938), Madagascar (1998), Maldives (1998), Mali (1974), Mauritania (1991), Mongolia (1960), Morocco (1961), Mozambique (1990), Myanmar (1974), Nauru (1968), Nepal (1948, 1959, 1961), Niger (1996, 1999), Pakistan (1961), Peru (1818), Philippines (1987), Poland (1951, 1991), Qatar (2003), Senegal (2001), Sierra Leone (1978), Solomon Islands (1978), Spain (1978), Togo (1963, 1991), Tuvalu (1986), Venezuela (1961), South Vietnam (1956), Zimbabwe (1979)
3. Serious on rights	Albania (1976), Andorra (1993), Bolivia (1816), Bulgaria (1947, 1971), Burkina Faso (1960), Burundi (1974), Central African Republic (1994), Chad (1961), Denmark (1953), Dominican Republic (1947), Equatorial Guinea (1981), Germany (1871), Ghana (1957), Guinea (1990), Honduras (1936), Japan (1889), Jordan (1946), Laos (1991), Madagascar (1975), Mali (1991), Mauritania (1961), Moldova (1994), Mozambique (1975), Nicaragua (1905, 1948, 1950, 1974), Niger (1991), Peru (1867), Somalia (1979), South Africa (1961, 1983), Syria (1950, 1973), Thailand (1949), Togo (1979), Trinidad and Tobago (1961), United States of America (1789), Venezuela (1904, 1947, 1953), Vietnam (1980, 1991), Yugoslavia (1953)
4. Current design	Afghanistan (1977, 1990), Albania (1924), Bahamas (1973), Bahrain (2001), Benin (1990), Botswana (1966), Cambodia (1989), Chile (1811), China (1981), Congo (1979), DR Congo (2003), Costa Rica (1949), Djibouti (1991), Egypt (1923, 2011), Equatorial Guinea (1991), Estonia (1920),

Table 2.4 (cont.)

Cluster	Members
	Fiji (2013), Gambia (1996), Guinea (2010), Guyana (1970), Indonesia (1945), Iraq (2005), Jordan (1951), Kyrgyzstan (2007), Lesotho (1966), Libya (1951), Malawi (1964), Poland (1947), Russia (1993), Rwanda (1961), Senegal (1960, 1963), Seychelles (1979), Soviet Union (1977), Sri Lanka (1978), Sudan (1973, 1998), Surinam (1987), Thailand (1974), Uganda (1967), Ukraine (1996), North Vietnam (1960), Arab Republic of Yemen (1970), Zambia (1964, 1973, 1991), Zimbabwe (1969, 2013)
5. Strong legislature	Argentina (1819, 1826), Austria (1934), Brazil (1891, 1946), Chile (1925), Costa Rica (1869), Cuba (1935, 1940), Dominican Republic (1896, 1908, 1914, 1917, 1955, 1961a, 1961b, 1963, 1966, 1994, 2001), El Salvador (1886, 1939, 1950, 1983), France (1946), West Germany (1949), Haiti (1807), Honduras (1880, 1904, 1914, 1957), Hungary (2011), Lithuania (1991), Montenegro (2007), Nicaragua (1893, 1911), Nigeria (1960, 1963), Panama (1904, 1946), Paraguay (1870), Peru (1860, 1910), Portugal (1933), Serbia and Montenegro (2003, 2006), Sierra Leone (1961), South Africa (1993, 1996), Venezuela (1874, 1881, 1891), Yugoslavia (1921)
6. Rights suspenders	Armenia (1995), Belize (1981); Bhutan (2008), Bolivia (1878, 1880), Brazil (1937), Burkina Faso (1991), Cameroon (1971), Central African Republic (1964, 1976), Chad (1960, 1996), Comoros (1996), DR Congo (1978, 2005), Cuba (1959), Ecuador (1884, 1906, 1993, 1996, 2008), France (1848, 1958), Ghana (1969), Jamaica (1961), Lesotho (1993), Mauritania (1978), Morocco (1970, 2011), Niger (1989), Oman (1996), Paraguay (1940), Rwanda (2003), Sri Lanka (1971), Yugoslavia (1931, 1974)

### 2.5.1 The Cluster Solution

Although cluster analysis can at times yield solutions that are difficult to interpret, the present six-cluster solution in the table indicates that the clusters are all defined by traits common to their specific member constitutions. Cluster 1 thus appears to be defined by a concern for domestic security, cluster 3 by having particularly well-defined rights

protections, while cluster 4 contains many relatively recent constitutions and thus represents what may be termed a current consensus on constitutional design. Cluster 2, on the other hand, is characterized by emergency constitutions that on most counts represent an average constitutional design. Finally, the average within-country distances indicate that clusters 5 and 6 may be less clearly defined than the first four clusters (based on information contained in Table 2.4). We nevertheless find that constitutions allocated to clusters 5 and 6 share particular identifiable features.

Overall, it turns out that most of the differences in the various types of emergency constitutions can be traced back to four variables: (1) legislative declaration, that is, the role of the legislature in declaring an SOE; (2) the specific approval powers; (3) the specific conditions that allow declaration of an SOE; and (4) which rights, if any, can be suspended during emergencies. We therefore interpret these final clusters as defined by having strong legislatures and easy rights suspension, respectively. We proceed with a number of noteworthy observations summarized in Table 2.5.

Let us begin with those constitutions not grouped in any of the six clusters because they do not have emergency constitutions. We identify fifty-eight such constitutions from twenty-one countries. On average, these constitutions are older, shorter, and less likely to belong to a civil law country. Of the twelve constitutions without emergency provisions that remain in use today, five belong to systems coded as democratic according to Bjørnskov and Rode (2020). These democracies are in no way clearly different from democracies in which the constitutions include emergency provisions. The second noteworthy observation is that the mean INEP for clusters 1, 2, and 4 is fairly similar at around 0.35 whereas it is substantially lower in clusters 3 and 5 (around 0.25) and much larger in cluster 6 at 0.49. However, as is evident in Table 2.6, the regular constitutions in countries in cluster 6 also have the strongest veto player institutions, as measured by Henisz's (2012) PolConIII index. As such, regardless of the mix of characteristics, cluster 6 seems to be characterized by a substantially larger difference between the separation of powers in ordinary versus emergency times than other clusters.

We also note that constitutions in cluster 1 are, in general, substantially longer and thus more detailed than in other clusters whereas constitutions in cluster 3 are shorter. Conversely, comparing legal

Table 2.5 Cluster characteristics

	1	2	3	4	5	6
	Domestic security	Middle of the road	Serious on rights	Current design	Strong legislature	Easy rights suspenders
Centroid	Guatemala 1945	Congo 1963	Bulgaria 1947	Zimbabwe 1969	Paraguay 1870	Ecuador 1906
Av. distance	2.81	2.37	2.31	2.11	3.19	3.49
Members	94	73	45	50	53	36
INEP	0.36	0.33	0.26	0.34	0.23	0.49
Declaration power	0.94	0.92	0.64	0.95	0.07	0.94
					Legislative declaration	
Approval power	0.13	0.29	0.24	0.21	0.38	0.29
	Legislative approval		Vague approval prov.			Other approval
Conditions	0.50	0.23	0.15	0.13	0.39	0.39
	Internal security	Nat. disasters not mentioned	War, nat. disasters not mentioned	Vague conditions		
Dissolution power	0.07	0.08	0.04	0.20	0.06	0.31
Rights suspension	0.21	0.07	0.06	0.12	0.23	0.56
	Rights suspension				Rights suspension	Some rights suspension

Table 2.5 (cont.)

	1	2	3	4	5	6
	Domestic security	Middle of the road	Serious on rights	Current design	Strong legislature	Easy rights suspenders
Expropriation and censorship	0.32	0.40	0.40	0.44	0.27	0.44
Age	45	51	62	42	84	48
Length	18,706	13,138	8,727	15,800	13,466	15,226
Legal origin	83% civil	79% civil	67% civil	60% civil	91% civil	81% civil
Democracy	37%	25%	20%	14%	38%	33%
PolConIII	0.10	0.098	0.063	0.065	0.12	0.19
GDP at birth	2905	2565	2062	2443	2361	2268
Still in use	18	6	6	22	8	13
Post-cold war	39%	29%	18%	34%	17%	36%



**Table 2.6** *Determinants of cluster placement, constitutional characteristics*

Cluster	2	3	4	5	6
Declaration	-0.506	-2.682***	0.402	-7.835***	-0.156
power	(0.796)	(0.789)	(0.992)	(1.159)	(0.979)
Approval	2.329***	2.156**	1.329	5.632***	2.515***
power	(0.745)	(0.912)	(0.880)	(1.326)	(0.853)
Conditions	-6.874***	-10.903***	-12.848***	0.528	-2.999***
	(1.169)	(1.716)	(1.774)	(1.682)	(1.131)
Dissolution	-0.427	-1.668*	0.508	-1.366	0.929
power	(0.655)	(0.993)	(0.666)	(1.019)	(0.643)
Rights	2.958***	-4.279***	-1.099	-2.547	3.267***
suspension	(1.058)	(1.545)	(1.045)	(1.617)	(.745)
Expropriation	1.633*	2.292**	2.697**	2.234*	1.964*
and	(0.863)	(1.115)	(1.118)	(1.263)	(1.085)
censorship					
Observations	351				
LR Chi	490.76				
squared					
Pseudo R	0.402				
squared					

origins and national income per inhabitant (PPP-adjusted GDP) at the time when the constitution was introduced, we find no discernible differences in legal origins or GDP, while constitutions in cluster 3 tend to be older and very few constitutions in cluster 4 were written when the country was democratic. This is a rather unexpected finding given the history of emergency powers described in Section 2.2.

Table 2.6 depicts the particular mix of powers in an alternative way by being based on a multinomial logistic regression. In the table, clusters 2 to 6 are compared with cluster 1, which forms the baseline. Emergency provisions grouped in both clusters 3 and 5 make the declaration of an SOE relatively difficult. Regarding approval powers, all depicted clusters – except cluster 4 – show highly significant positive coefficients, implying that clusters 1 and 4 are characterized by weaker approval powers than the rest, although it is also clear that cluster 1 is characterized by having legislative approval while approval in cluster

6 is left to “other,” meaning nonpolitical actors. Regarding the possibility of suspending basic rights, this is strongly circumscribed in cluster 3 and broadly allowed in constitutions in clusters 2 and 6. Finally, clusters 3, 4, and 6 are characterized by allowing censorship and expropriation without ordinary compensation during emergencies.

In this way, a simple cluster analysis reveals that a limited number of “typical” emergency constitutions can be identified. As such, although we do not want to overstate the degree of familiarity within each cluster, the standard claim that each emergency constitution is a unique document that does not lend itself to easy comparison seems at least questionable. To sum up, we observe that emergency constitutions can be separated into six clusters with relative precision. These clusters differ not only in the make-up of the emergency provisions and the specific degree of powers given to the executive, but also in their likelihood of declaring an SOE if an actual emergency arises. It is on this background that we now turn to our theoretical considerations and an intuitive test of whether the distribution of countries within the cluster families is stable over time.

### *2.5.2 How Stable Are Countries’ Cluster Assignments?*

As a final element in describing the six types of emergency constitution, we provide information on how stable a country’s placement in a particular cluster (or constitutional family) is. This exercise requires that we can observe constitutional changes in the emergency provisions within countries. The data include 284 constitutions from eighty-one countries on which we have sufficient information.

The data show, first of all, that eight countries represented by more than one emergency constitution in the data have not changed clusters and therefore constitutional families: El Salvador (4 emergency constitutions), Fiji (3), Gabon (2), Mexico (2), Russia and the Soviet Union (2), Sudan (2), Turkey (4), and Zambia (3). Their constitutional choices of emergency provisions have remained quite consistent over the years due to either political tradition, geographical circumstance, or mere coincidence. In many cases, this is entirely predictable as the emergency constitution remains unchanged even though parts of the rest of the constitution have been substantially rewritten. Emergency constitutions within new constitutions can therefore at times contain language and remnants of political preferences from more than a century of constitution making.

Conversely, of the fifty-three countries with at least three constitutions in the dataset, twenty-three had emergency constitutions represented in three different families. Moreover, Albania, Bolivia, Niger, Peru, and Venezuela have all had emergency constitutions belonging to four different families.

However, many of these constitutional changes occur between families that are not particularly different. We therefore further note that comparing the Euclidean distance between cluster centroids, the largest relative changes occur between clusters 1 and 3, and clusters 4 and 5. Conversely, clusters 1 and 2, and clusters 2 and 6 are more similar than other cluster pairs. One should therefore not overestimate the importance of emergency constitutions changing constitutional types.

The countries with the relatively largest changes are: Albania in clusters 1 (1918 and 1998) and cluster 3 (1976), Bolivia in clusters 3 (1816) and cluster 1 (all twentieth-century constitutions); Chile in clusters 4 (1811) and 5 (1925); Costa Rica in clusters 4 (1949) and 5 (1869); Ghana in clusters 3 (1957) and 1 (subsequent constitutions); Honduras in clusters 3 (1936) and 1 (1965 and 1981); Madagascar in clusters 3 (1975) and 1 (1991); and Mozambique in clusters 1 (2004) and 3 (1975); Nicaragua, whose 1987 constitution in cluster 1 was also substantially different from its other emergency constitutions (all in cluster 3); Niger in clusters 1 (1960) and 3 (1991); Peru in clusters 3 (1867) and 1 (1979); Thailand whose 1949 constitution in cluster 3 was substantially different from its subsequent emergency constitutions; and Venezuela in which Hugo Chavez's 1999 socialist constitution in cluster 1 had very different emergency provisions than previous constitutions (all in cluster 3).

We do not want to delve deeper into the reasons for these changes except to note two regularities. First, in the cases of the 1991 Bulgarian and the 2003 Serbian emergency constitutions, it is evident that they both represented a return to the constitutional family that their constitutions prior to communism had belonged to. The second regularity is that Latin American countries are substantially more likely to have experienced larger changes to their emergency constitutions. While these countries have also had the most constitutional changes, 47 of the 100 emergency constitutions in the 20 Latin American countries with recorded changes have occurred in countries that have changed constitutional family. 11 of the 20 countries have even had constitutions in at least three clusters,

thereby confirming the usual assertion that Latin America for some reason is less institutionally stable than the rest of the world.

To summarize, identifying a limited number of “typical” emergency constitutions seems realistically possible via cluster analysis. Generally, the content of many constitutions changes only marginally even after regime changes (Elkins et al. 2009). This is different with regard to emergency constitutions. Here, shifts between clusters are not at all uncommon.

## 2.6 Conclusions and Outlook of the Chapter

Given that nine out of ten constitutions contain emergency provisions, it is amazing how little we know about them. This chapter is foundational for the rest of the book in trying to reduce our ignorance by doing two things. First, it documents the development of an Index of Emergency Powers (INEP) that measures the degree of discretionary power constitutionally allocated to the executive during emergencies. We have already mentioned that the overall degree in the separation of powers outlined by constitutions has increased over recent decades. Relying on the INEP, we find that this is emphatically not true for emergency constitutions. On the contrary, we observe a clear long-run trend to allocate more, rather than fewer, powers to the executive during times of emergency. Our data suggest that this trend has been a consequence of the relatively weak separation of powers in the constitutions of newly independent countries since the late 1950s, and the particular features of constitutions in the countries that became *de facto* independent after the collapse of the communist bloc in the early 1990s.

Second, this chapter deals with the frequently read presumption that emergency constitutions are unique and do not lend themselves to meaningful comparisons with other emergency constitutions. Drawing on 31 different variables and employing cluster analysis, we are able to identify six clusters in which we group 351 different constitutions for which we have sufficient information. These clusters each define what can be thought of as a “family” of emergency constitutions that are sufficiently similar to be characterized by very comparable constitutional traits. The main features that separate these families of emergency constitutions from each other are: choices regarding the role of the legislature in declaring an SOE; the specific approval powers; the

constitutional conditions that allow an SOE to be declared; and which basic individual rights, if any, can be suspended during an SOE.

Our main interest in this chapter is to pave the way for the rest of the book – and hopefully for future research – by making emergency constitutions empirically comparable. The indicator of emergency powers (the INEP) introduced here is used in subsequent chapters to deal with a number of highly topical follow-up questions. Firstly, what are the factors that determine what kind of emergency constitution a country adopts, given that it adopts one? Is being prone to natural disasters as prominent a factor as one might expect or are other, less salient ones, even more important? This question is taken up in Chapter 3.

Secondly, having an emergency constitution does not imply its use. Can one show that where emergency constitutions make it easy to declare an SOE, governments will tend to do so more frequently? And that emergency constitutions granting more additional powers to the executive are an incentive to make use of those powers more frequently? What about the use of SOEs in countries without explicit emergency provisions or the systematic nonuse of emergency constitutions in countries that have them? Some of these questions are taken up in Chapter 4.

Thirdly, 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 reestablishing the status quo ante? Or as apt in minimizing the number of dead when a natural disaster occurs? Or as inadequate in reestablishing ex ante levels of civil rights? How do countries without an explicit emergency constitution fare in comparison? Chapters 5 and 13 deal with these questions.

Fourthly, 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 use of the military. It appears worthwhile to look at the relationship between these tools on both the institutional and behavioral levels. Reliance on executive decrees as a substitute for SOEs will be dealt with in Chapter 12.

Finally, it is generally accepted that, in many countries, constitutional text diverges widely from constitutional reality. It is, therefore, unlikely that politicians always stick meticulously to the constraints laid down in the respective emergency provisions and it would be interesting to analyze more systematically differences between the de jure and the de facto emergency constitution. Such an analysis would

begin by analyzing to what degree the de jure provisions have been implemented in practice. Chapter 11 will shed some light on the conditions under which politicians are unlikely to stick to the constraints spelt out in the respective emergency constitution.

Generally valid answers to all these questions must rely on some form of comparable operationalization of the features of emergency constitutions. This is why this chapter has laid the groundwork for much of the analysis to be developed in the rest of this book.

## Appendix

### *Data Description*

**Table A2.1** *Variables and sources*

Type of explanation	Variables	Source
Regime types	Parliamentary, mixed, presidential, civil autocracy, military autocracy, royal autocracy, democracy, monarchy, Post-Cold War	Cheibub et al. (2010)*, CIA (2014)
	PolConIII, no constraints	Henisz (2012)
	Log GDP per capita	
Frequency of disasters	Low elevation, log latitude, coastline, volcano area	CIA (2020)
	Log coups (10 yrs)	*
Legal history	Common law, civil law, Islamic law, communist law	CIA (2020)
Composition of constitutional assembly	Constituent assembly, legislative decision, executive decision, constituent legislature, length, age, still in use	Ginsburg et al. (2009)
Economic factors	Log GDP per capita, log population size	Heston et al. (2012), Maddison (2008)

*Note:* \* refers to the recent update and expansion by Bjørnskov and Rode (2020) of the database developed by Cheibub et al. These data are available on request from the authors.

Table A2.2 Descriptive statistics, data used in Tables 4a, b, and 8a, b

Variable	Mean	Standard deviation	Observations
INEP	0.307	0.138	411
Declaration power	0.729	0.392	411
Approval power	0.206	0.279	411
Conditions	0.272	0.245	411
Dissolution power	0.095	0.293	411
Rights suspension	0.162	0.255	411
Expropriation and censorship	0.377	0.232	411
Mixed	0.058	0.235	411
Presidential	0.088	0.283	411
Civil auto.	0.421	0.494	411
Military auto.	0.226	0.419	411
Royal auto.	0.083	0.276	411
Monarchy	0.165	0.372	411
PolConIII	0.097	0.257	402
No constraints	0.766	0.604	402
Log GDP per capita	7.356	0.846	372
Log population size	8.459	1.710	402
Post-Cold War	0.260	0.439	411
Log coups (10 yrs)	0.423	0.552	386
Common law	0.118	0.322	407
Civil law	0.747	0.435	407
Islamic law	0.027	0.162	407
Communist law	0.074	0.262	407
Age	59.871	46.609	411
Low elevation	0.791	0.407	411
Log latitude	2.798	0.960	411
Coastline	0.162	0.986	409
Volcano area	0.299	0.458	411
Constituent assembly	0.165	0.372	411
Legislative decision	0.253	0.435	411
Executive decision	0.391	0.489	411
Constituent legislature	0.044	0.205	411
Length	13,485	12,115	409
Democracy	0.270	0.445	411
Still in use	0.314	0.465	411

Table A2.3 *Descriptive statistics, data used in Tables 6–7*

Variable	Mean	Standard deviation	Observations
Introduction of EC	0.106	0.307	2084
Reintroduction	0.042	0.200	2085
First constitution	0.039	0.193	2085
Mixed	0.108	0.309	2044
Presidential	0.143	0.350	2044
Civil auto.	0.321	0.467	2044
Military auto.	0.129	0.335	2044
Royal auto.	0.042	0.201	2044
No constraints	0.401	0.490	2001
Log GDP per capita	8.430	1.304	1935
Log population size	8.957	1.827	2085
Postcommunist	0.058	0.252	2085
Common law	0.284	0.451	2084
Civil law	0.538	0.499	2084
Islamic law	0.012	0.111	2084
Communist law	0.103	0.304	2084

Table A2.4 *Variable definitions*

Variable	Description
INEP	Defined in text
Declaration power	Defined in text
Approval power	Defined in text
Conditions	Defined in text
Dissolution power	Defined in text
Rights suspension	Defined in text
Expropriation and censorship	Defined in text
Mixed	Democracy with weak / ceremonial president
Presidential	Presidential democracy
Civil auto.	Civilian autocracy, defined as a having a government leader without a military rank
Military auto.	Military dictatorship, defined as a having a government leader with a military rank
Royal auto.	Absolutist monarchy



Table A2.4 (cont.)

Variable	Description
Monarchy	Monarchy, including constitutional monarchies
PolConIII	Measure of veto player strength, defined 0–1
No constraints	Dummy for situations with no veto players
Log GDP per capita	Purchasing-power adjusted GDP per capita in logarithms
Log population size	Logarithm to population size
Post-Cold War	Dummy for the period after 1990
Log coups (10 yrs)	Logarithm to the number of coups the preceding ten years
Common law	Common law legal origins
Civil law	Civil law legal origins
Islamic law	Islamic law
Communist law	Communist law, that is communist regimes
Age	Age of the present constitution
Low elevation	Height above sea level of the lowest point in the country
Log latitude	Logarithm to latitude of country capital
Coastline	Length of coastline relative to country area
Volcano area	Dummy for countries in volcano areas
Constituent assembly	Constitution created by constituent assembly
Legislative decision	Constitution created legislative decision
Executive decision	Constitution created executive decision
Constituent legislature	Constitution created constituent legislature
Length	Length of constitution in English translation
Democracy	Dummy for democracy of any kind
Still in use	Dummy if the constitution is still in use

### *Choosing the Number of Constitutional Clusters*

In Table A2.5, we outline some pertinent features of each of the first nine cluster solutions we obtain. The results, for example, show that the two clusters in a two-cluster solution have intra-cluster distances of 3.05 and 3.33 (in 31-dimensional space), respectively. The average distance is therefore 3.19 with the largest outlier being the 2007 Montenegrin constitution, which was 8 points from its cluster centroid (the central or most typical constitution in a cluster).

Following the results in the table towards the right, it is easy to see that the intra-cluster distance across the solutions decreases until the six-cluster solution, to the right of which it increases again. The minimum distance – indicating the coherence of a cluster – also decreases until the six-cluster solution. Likewise, the largest outlier in the six-cluster solution, that is, the constitution placed the furthest away from other cluster members in 31-dimensional space, is relatively small. Moving beyond a solution with six clusters entails a deterioration in at least one of our goodness of fit measures and in particular leaves larger outliers and, in all cases, at least one comparatively poorly defined cluster, as captured by the average distance. In all cases, we find that three particular constitutions fit any family of constitutions poorly: emergency provisions of the present constitutions of Germany (the 1949 constitution as amended in 1968), Hungary, and Montenegro are structurally different from most other emergency constitutions. The overall intra-cluster coherence on the basis of six clusters is also fairly good in comparison to alternative cluster numbers. This is a final reason for choosing six clusters. Based on the proposed criteria, a solution with six clusters best fits the present data.<sup>1</sup>

<sup>1</sup> Countries without emergency constitutions are left out of this assignment.

**Table A2.5 Cluster solution specifics**

No. of clusters	Average intra-cluster distance								
	2	3	4	5	6	7	8	9	
Cluster 1	3.05	2.92	3.31	3.05	2.81	2.22	2.09	2.58	
Cluster 2	3.33	3.11	2.88	2.88	2.37	2.53	2.74	1.89	
Cluster 3		3.18	2.69	2.24	2.31	3.27	2.29	2.69	
Cluster 4			2.92	2.92	2.11	2.39	2.62	2.65	
Cluster 5				2.97	3.19	3.44	2.22	2.95	
Cluster 6					3.49	2.25	3.46	4.91	
Cluster 7						3.09	2.44	2.11	
Cluster 8							3.05	2.43	
Cluster 9								3.56	

‘Goodness of fit’ measures

Av. distance	3.19	3.07	2.96	2.81	2.72	2.74	2.61	2.83
Min. distance	3.05	2.92	2.69	2.24	2.11	2.22	2.09	1.89
Max distance	3.33	3.18	3.31	3.06	3.49	3.44	3.46	4.91
Largest outlier	8.012	8.34	7.72	7.35	7.13	7.25	7.54	7.36
	Montenegro (2007)	Germany (1949)	Hungary (2011)	Germany (1949)	Germany (1949)	Germany (1949)	Hungary (2011)	Montenegro (2007)

*Note:* average, minimum, and maximum distances reported in the lower panel are inter-cluster distances. The largest outlier is the distance of the given country to the centroid of the cluster in which it is placed.

**Table A2.5a Countries with more than one nonbenevolent emergency provision in 2010**

Country	Emergency provision	Country	Emergency provision
Samoa	Int. security, general danger, ec. emergency	Bolivia	Int. security, general danger
Chad	Int. security, const. threat, nonconst. law	Tajikistan	Int. security, general danger
Cuba	Int. security, general danger, ec. emergency	Chile	Int. security, general danger
Bangladesh	Int. security, general danger, ec. emergency	El Salvador	Int. security, general danger
Uganda	Int. security, general danger, ec. emergency	Guatemala	Int. security, general danger
Ecuador	Int. security, general danger, const. threat	Honduras	Int. security, general danger
Venezuela	Int. security, general danger, ec. emergency	Kenya	Int. security, general danger
Bhutan	Int. security, general danger, const. threat	Korea, Rep.	Int. security, general danger
Thailand	Int. security, general danger, ec. emergency	Mexico	Int. security, general danger
Turkey	Int. security, general danger, const. threat	Peru	Int. security, general danger
Qatar	General danger, nonconst. law	France	Int. security, general danger
Congo, Rep.	Int. security, general danger	Portugal	Int. security, general danger
Tanzania	Int. security, general danger	Lithuania	General danger, const. threat
Cameroon	General danger, const. threat	Taiwan	General danger, const. threat
Eritrea	Int. security, general danger	Albania	Int. security, general danger
Montenegro	General danger, const. threat	Dominican Rep.	Int. security, general danger
Namibia	Int. security, general danger	Estonia	Int. security, general danger
Seychelles	Int. security, general danger	Malta	General danger, const. threat
South Africa	Int. security, general danger	Nepal	Int. security, ec. emergency

Table A2.5b *Countries with one nonbenevolent emergency provision in 2010*

Country	Emergency provision	Country	Emergency provision
Jordan	General danger	Sierra Leone	General danger
Kuwait	Nonconst. law	Uruguay	Int. security
Oman	Nonconst. law	Armenia	Const. threat
Morocco	Int. security	Finland	Nonconst. law
Swaziland	General danger	Kyrgyzstan	General danger
Cen. African Rep.	Int. security	Mali	Nonconst. law
Egypt	Nonconst. law	Mongolia	Int. security
Libya	Int. security	Poland	Int. security
Mauritania	Int. security	Senegal	Nonconst. law
Syria	Nonconst. law	Serbia	General danger
Yemen	Int. security	Antigua	General danger
Afghanistan	Int. security	Barbados	General danger
Angola	Int. security	Greece	Int. security
Azerbaijan	Int. security	Jamaica	General danger
Belarus	Int. security	Latvia	Int. security
Cambodia	General danger	Netherlands	Int. security
Congo, Dem. Rep.	Const. threat	Pakistan	Int. security
Ethiopia	Int. security	Slovenia	General danger
Haiti	Int. security	Spain	Nonconst. law
Mozambique	Const. threat	St. Kitts	General danger
Togo	Nonconst. law	St. Lucia	Int. security
Burundi	Int. security	St. Vincent	General danger
Comoros	Const. threat	Trinidad	General danger
Costa Rica	General danger	Vanuatu	Int. security
Cyprus	General danger	Bosnia	<i>Uncertain status</i>
Ghana	General danger	Somalia	<i>Uncertain status</i>
Indonesia	Nonconst. law	United States	<i>Uncertain status</i>
Liberia	Int. security	Iceland	<i>Uncertain status</i>
Micronesia	Int. security	Ireland	<i>Uncertain status</i>
Palau	Int. security	Australia	<i>Uncertain status</i>
Panama	Int. security	Canada	<i>Uncertain status</i>
Paraguay	Int. security	Japan	<i>Uncertain status</i>
Philippines	Int. security	Marshall Islands	<i>Uncertain status</i>