1 *Introduction*

Nine out of ten constitutions contain explicit emergency provisions (Elkins et al. 2009). These provisions are not dead letters but are regularly invoked by national governments with both honorable and dubious rationales. Between 1985 and 2019, at least 137 countries around the world called a state of emergency (SOE). During the COVID pandemic and lockdowns of 2020–22, a previously unlikely situation arose when every second government in the world made use of constitutional emergency provisions by declaring an SOE: At the beginning of May 2020, 99 countries were simultaneously in a constitutional SOE, and several more were in a de facto although undeclared emergency. The inclusion of emergency provisions – those legal rules specifying who can declare an emergency, when they can do so, and what actors have what powers once it has been declared – in constitutions has become the norm.

This is the first book to analyze the factors that make constitutional conventions include such provisions in newly drafted constitutions, to analyze their use (as well as their misuse), and the effects that using emergency provisions has. Throughout the 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. First, they are particularly important parts of the constitution because they typically outline which other parts of the constitution – including human rights, democratic institutions, and due process – the executive branch is allowed to ignore during an emergency. While emergencies – which different constitutions refer to using different vocabulary, such as emergency, state of siege, extraordinary conditions, and so forth – can provide governments with the necessary room for maneuver and much reduced reaction times, they are therefore also highly prone to political misuse. Second, we explicitly focus on constitutions and constitutional provisions throughout the book and not on statutory law or unwritten

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judicial norms. We do so because statutory law can change rapidly and easily, not least when a real or potential emergency arises, which means that such law does not provide de facto binding constraints for political actors. Constitutional provisions cannot be changed whenever the political situation changes, although it remains an open question whether they work as intended.

States of emergency can indeed be crucial moments in the development of countries. Referring to nineteenth-century Latin America, Loveman (1993) argues that emergency constitutions made the region's numerous populist and military governments of the twentieth century possible. Events in 1930, when Rafael Trujillo became president of the Dominican Republic, provide a pertinent example. Shortly after his rise to power, the country was struck by a hurricane, which Trujillo used as a pretext to seize bank accounts, levy emergency taxes, and impose martial law on all citizens. This was instrumental in firmly establishing his autocratic rule over the country, which was to last decades.

Yet the (mis-)use of emergency declarations is not a thing of the past. Following the failed coup of July 2016, Turkish president Erdogan declared an SOE, which enabled him not only to detain thousands of citizens without trial and dismiss more than 100,000 employees from public service but also to change the constitution such that it now gives even more powers to the president. It seems that no world region is exempt from the misuse of emergency provisions against its citizens, which became evident across locked-down Western societies in 2020 and 2021.

Amnesty International (2017, [6]) calls the years following the Bataclan terrorist attacks in Paris and elsewhere "a profound shift in paradigm across Europe … Individual EU states and regional bodies have responded to the attacks by proposing, adopting and implementing wave after wave of counter-terrorism measures that have eroded the rule of law, enhanced executive powers, peeled away judicial controls, restricted freedom of expression and exposed everyone to government surveillance." Although not all European governments resorted to states of emergency, as Belgium and France did, the report lists no less than 12 problematic measures taken by many European countries. We document in this book that these measures were not isolated events but reflections of a larger and more general pattern of political behavior.

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However, taking these examples – and many more could be named – as well as the frequency with which SOEs are invoked into account, it is amazing how little we know about constitutional emergency provisions, and particularly about the factors that cause societies to adopt them in the first place. 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 achieving the goals stated in the underlying legislation.

Although the first known emergency provisions were part of the constitutional framework of the Roman Republic, and later the Roman Empire, and although the constitutionalization of emergencies is evidently the rule in modern constitution-making, this is the first comprehensive and systematic exploration of the topic, based on empirical evidence as well as case studies.

The book is the result of a research project which we undertook at the University of Hamburg and Aarhus University between 2015 and 2023. Most of the chapters in this book first appeared as journal articles. But for this book, they have been significantly rewritten and updated.

1.1 Outline

Chapter 2 is entitled The Architecture of Emergency Constitutions and first appeared under the same title in the *International Journal of Constitutional Law*, volume 16 (1), 101–127. It provides answers to two of the questions just mentioned, namely the amount of additional powers granted in emergency constitutions to governments acting under an SOE and describes trends in the evolution of emergency provisions over time. Chapter 3 was exclusively written for this book and is entitled The Determinants of Emergency Constitutions. As the headline indicates, it deals with the factors that lead countries to adopt different types of emergency constitutions. However, having an emergency constitution does not imply its actual use. In Chapter 4 – Why do Governments Call a State of Emergency? – we therefore inquire into the conditions that make the declaration of an SOE by governments more likely. The chapter first appeared in the *European Journal of Political Economy*, volume 54, 110–123.

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Chapters 5 through 7 all deal with the consequences of SOEs. Now, not all SOEs are created equal, which is why we devote three chapters to the issue, differentiating between different causes underlying an emergency declaration: In Chapter 5, we analyze the effects that such declarations have subsequent to natural disasters, in Chapter 6 subsequent to terrorist events, and in Chapter 7 subsequent to domestic turmoil such as assassination attempts, insurgencies, and coups.

We propose to distinguish between these events as natural disasters are exogenous to government policies whereas terrorist events and domestic turmoil appear to be highly endogenous to government behavior. Chapter 5 first appeared under the heading "Emergencies: on the misuse of government powers" in *Public Choice*, volume 190(1–2), 1–32, while Chapter 6 emerged out of two papers, namely "When does terror induce a state of emergency? And what are the effects?" in *Journal of Conflict Resolution*, volume 64 (4), 579–613 and "Terrorism and emergency constitutions in the Muslim world" in *Journal of Peace Research*, volume 59 (3), 305–318.

Chapters 8 and 9 focus on the particular challenges that federally constituted countries face with regard to SOEs. It is well known that keeping a sustainable balance between the powers of the states on the one hand and those of the center on the other is no mean feat. In India, the federal government has the so-called "President's rule" at its disposal: If it believes that any state government is unfit for the job, it can substitute it for another. This is a far-ranging power that has been subject to frequent misuse. But balancing the powers between the states and the center is a recurring question for all federally constituted states, which is why numerous other cases are alluded to in Chapter 9. In a sense, Chapter 8 can be read as a prelude to Chapter 9. In it, we compare the emergency constitutions that all the US states have given themselves. It turns out they are very different from each other, with some states granting the executive substantial power while the Texan constitution grants no additional powers during an emergency. Chapter 8 first appeared as "Dealing with Disaster: Analyzing the Emergency Constitutions of the US States" in *Arizona State Law Journal*, volume 49, 883–906.

As other elements of civil liberties, media freedom is important in many respects. It has, for example, been shown that no country with a high degree of realized media freedom has ever suffered from a famine. More generally speaking, media freedom has an important function

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in making governments accountable to the general population. But how does media freedom perform in the wake of an SOE even if it is constitutionalized? Do governments seize the opportunity to reduce it in order to be less tightly controlled? Unfortunately, the answer we provide to this question in Chapter 10 is a clear yes. Chapter 10 first appeared as "Is constitutionalized media freedom only window dressing? Evidence from terrorist attacks" in *Public Choice*, volume 187 (3–4), 321–348.

A low degree of actually realized media freedom, even when the constitution solemnly promises it, is only one dimension in which governments may create a de jure/de facto gap in the sense that constitutional reality does not accord well with constitutional text. We pick up the possibility of unconstitutional SOEs in Chapter 11. We define SOEs as unconstitutional if their declaration does not follow the rules spelled out in the constitution, if government behavior during an SOE is not constrained by the respective emergency provisions, or if the SOE does not end after the maximum term accorded to SOEs in the constitution. After having identified these unconstitutional events, we inquire into the factors that make their occurrence more likely. The original paper was written together with Mahdi Khesali and it first appeared under the title "Unconstitutional states of emergency" in *The Journal of Legal Studies*, volume 51 (2), 455–481.

The recent pandemic was accompanied by the declaration of an SOE in every second country of the world – a number previously perceived as highly unlikely. In our analysis of these SOEs, we ask if it was different on this occasion in the sense that it was not the self-serving arguments of politicians that prevailed but rather concerns for public health. We also use this event to study the use of executive decrees which, strangely enough, has rarely been analyzed in a large N comparative setting. A possible reason for this lacuna may be the very different concrete meaning that executive decrees take on in different legal orders. In Chapter 12, we ask if SOEs and executive decrees can be thought of as substitutes and answer the question in the affirmative. A previous version of this paper entitled "This time is different? – on the use of emergency measures during the corona pandemic" first appeared in the *European Journal of Law and Economics*, volume 54, 63–81.

Many, if not most, scholars of emergency politics claim that the ultimate political aim is to reestablish the status quo ante. But then again, SOEs may be (mis-)used to bring about permanent change such as to

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reduce media freedom or civil liberties more broadly. In Chapter 13, we analyze the question of whether the status quo ante is ever reached again after an SOE and if yes, how long it takes to get there. Also, we ask whether democracies are more likely to return to pre-SOE levels than autocracies. Unfortunately, we find that in situations where the executive can gain substantially more power by declaring an SOE, reestablishing the status quo ante takes longer than when there is less additional power to grab.

Until here, our analyses are almost entirely positive: We are interested in describing trends, uncovering cause–effect relationships, and understanding how emergencies affect political incentives. But how, if at all, could one legitimize emergency constitutions? This is the question dealt with in Chapter 14. It is located at the end of this book to make our approach transparent: Normative questions are best answered taking all the available knowledge explicitly into account. Here, all the results presented in Chapters 2 through 13 serve as a background for our attempt to legitimize emergency constitutions. The paper was originally single authored by Stefan and appeared as "Contracting for catastrophe: Legitimizing emergency constitutions by drawing on social contract theory" in *Res Publica*, volume 28 (1), 149–172.

Chapter 15 spells out a number of important questions that have not received much attention in the book and thus serves as a sort of outlook chapter. One pertinent question is what sort of consequences we can draw from the recent experiences with regard to the COVID-19 pandemic. Should resilience be increased and if so how? Does that imply any modification for the underlying emergency constitutions? Given that the European Union has become a central actor for its 27 member states, should the EU also get an emergency constitution? These are only two of the questions touched upon in Chapter 15.

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