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Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness

Magnus Lundgren^a, Mark Klamberg^{b,c}, Karin Sundström,^a and Julia Dahlqvist^d

^aPolitical Science, University of Gothenburg, Gothenburg, Sweden; ^bInternational Law, Stockholm University, Stockholm, Sweden; ^cStockholm Centre for International Law and Justice, Stockholm, Sweden; ^dConstitutional Law, Stockholm University, Stockholm, Sweden

ABSTRACT

During the COVID-19 pandemic many states have resorted to proclaiming a state of emergency (SOE), expanding executive powers and curtailing civil liberties. Why have some states have declared SOEs when others have not? Our legal analysis suggests that although international law provides states with the option of declaring an SOE and derogating from human rights obligations to ensure the life of the nation, other ways to handle the pandemic without declaring an SOE do exist. Our theoretical analysis leads to three main propositions centred on the impact of regional diffusion, democratic institutions, and pandemic preparedness. Our empirical analysis combines a range of quantitative data sources to analyse the SOE decisions of 180 states during the first half of 2020. The results suggest that states' declarations of SOEs are driven by both external and internal factors. A permissive regional environment, characterised by many simultaneously declared SOEs, may reduce the reputational and political costs of emergency powers, making their employment more palatable. At the same time, internal characteristics, specifically democratic institutions and pandemic preparedness, have shaped governments' decisions. Weak democracies with poor preparedness have been considerably more likely to opt for an SOE than dictatorships and robust democracies with higher preparedness.

Introduction

The COVID-19 pandemic has prompted diverse state responses, spanning what could be described as 'elimination', 'suppression', 'mitigation', and 'inaction'. From an international law perspective, the pandemic raises questions about which state actions are required, permitted, or prohibited. Depending on how they are designed, state responses to combat COVID-19 may affect various human rights, such as the right to life, the right to health, freedom of movement, and freedom of assembly.

CONTACT Magnus Lundgren  magnus.lundgren@gu.se

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One option available to states is to declare a state of emergency (SOE). During times of crisis, derogating from their human rights treaty obligations and declaring an SOE may assist some states to effectively combat the situation. However, while emergency powers can be necessary and legitimate in certain cases, they can also be abused. When public health is seriously imperilled, human rights law is already permissive, allowing for a wide range of measures without declaring an SOE.

In response to the COVID-19 pandemic, many governments have declared SOEs. Indeed, so many governments have declared SOEs that the number is equivalent to all SOEs declared globally since the 1980s.¹ Yet while about half the world's states declared an SOE during the first half of 2020, the other half did not. Why did states facing the same threat follow such different strategies? This article suggests and evaluates three potential explanations for this puzzle. First, states look to their regional peers for inspiration and legitimation, leading to patterns of regional policy diffusion. Second, newer and less robust democracies are more likely to resort to SOEs than mature democracies and dictatorships. Third, states with a higher pandemic preparedness are less likely to resort to an SOE.

This article begins with an account of the applicable legal frameworks, including the World Health Organisation (WHO) International Health Regulations (IHR 2005) and the International Covenant on Civil and Political Rights (ICCPR).² It then presents theoretical arguments for why states may be motivated to declare an SOE in response to the COVID-19 pandemic. This provides the basis for the subsequent data analysis. Based on a statistical analysis of panel data covering 180 countries, the article finds evidence that regional policy diffusion and regime characteristics may explain why states declare an SOE, while preparedness offers a less plausible explanation.

International Law and Pandemics

Various legal frameworks interact in relation to the use of an SOE as a response to the COVID-19 pandemic, and concrete rules may enable, require or restrict, states in their actions. The right to health, like all human rights, imposes three obligations on states parties: the obligations to *respect*, *protect*, and *fulfil*. The obligation to *respect* requires, inter alia, states to refrain from using or testing biological weapons. The obligation to *protect* requires, for example, states to take measures that prevent third parties limiting people's access to health-related information and services. Finally, the obligation to *fulfil* requires states to adopt measures to promote the realisation of the right to health.³ The obligation to *fulfil*, which is the most relevant here, includes preparing the healthcare system for a pandemic, acting during a pandemic, and, if necessary, declaring an SOE. A difficulty with this obligation is that it presupposes knowledge of how situations such as a pandemic can be effectively dealt with – that there is actual evidence of what works. For the purpose of this study, however, IHR 2005 and rules on SOEs could be described as operationalisations of the state obligation to fulfil the right to health.

¹Christian Bjørnskov and Stefan Voigt, 'This Time is Different? On the Use of Emergency Measures During the Corona Pandemic' 36 *Ile Working Paper Series*, 2020.

²International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171.

³CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12) Twenty-Second Session of the Committee on Economic, Social and Cultural Rights, 11 August 2000, E/C12/2000/4, paras 33–36.

WHO and IHR 2005

Global pandemics trigger questions under global health law. Crisis management and public health powers traditionally reside in sovereign states, while international law serves as protection against abuse by states. The prompt identification and control of diseases requires both national and international action. At the centre of the global health regime is the WHO.⁴

The World Health Assembly may, pursuant to Article 21 of the WHO constitution, adopt regulations concerning ‘... sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease’. In 2005 the WHO adopted IHR 2005, which places emergency authority – to the extent that states delegate it to the WHO – in the hands of the Secretariat. IHR 2005 is one of the world’s most widely applicable legal documents, and it requires its 196 parties to build capacity to detect, assess, notify, and respond.⁵ It has provided the guiding regulations behind many of the indicators included in the Global Health Security Index (GHS Index), which this study uses to measure pandemic preparedness, as explained below in section IV. Pursuant to IHR 2005 Article 6 (1), each state party must monitor health hazards arising within its territory and notify the WHO of all events which may constitute a public health emergency of international concern (PHEIC). The WHO Director-General, pursuant to regulation 12, has exclusive power to determine and declare whether an event constitutes a PHEIC.

The legal consequences of declaring a PHEIC are difficult to frame in strict legal terms,⁶ since such a declaration does not create new international law obligations for WHO member states. It only grants the WHO Director-General the power to issue temporary recommendations,⁷ defined as ‘non-binding advice’.⁸ This system has been criticised for its binary approach, with the declaration of a PHEIC as the only level of alert, and for relying on an opaque assessment procedure.⁹ The WHO declared COVID-19 to be a PHEIC on 30 January 2020.

Restrictions of human rights during normal peace-time conditions

Human rights law protects several different rights, not all of which are absolute. Arguably, the functions of society and human interaction require that some human rights may be restricted under certain circumstances. Rights such as freedom of movement, freedom of assembly, and right to property have clauses which allow interference under normal peace-time conditions for public reasons. To restrict such rights, the interference must have a legal basis (a law normally adopted by parliament); pursue a legitimate aim; be necessary in a democratic society, and be proportionate.¹⁰ This means that when a state is faced with a pandemic, such as COVID-19, substantial restrictions

⁴J Benton Heath, ‘Global Emergency Power in the Age of Ebola’ (2016) 57 *Harvard International Law Journal* 1, 1–2, 6–7.

⁵Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014), 182.

⁶Pedro A Villarreal, ‘Public International Law and the 2018–2019 Ebola Outbreak in the Democratic Republic of Congo’ *EJIL: Talk*, 1 August 2019; Gian Luca Burci, ‘The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?’ *EJIL: Talk*, 27 February 2020.

⁷IHR 2005, art 15.

⁸IHR 2005, art 1.

⁹Burci (n 6).

¹⁰See ICCPR arts 17–19, 21–22.

of rights are possible without declaring an SOE. Even though international human rights law allows a state to declare an SOE, this does not necessarily mean that it is legally permissible in all states. National law must also be considered. Several national constitutions, for example the Swedish Constitution, do not contain provisions that permit the proclamation of an SOE in peacetime. The utility of declaring an SOE is that measures may be adopted in a more expeditious way by government. In this regard, Scheinin has argued that it is 'the safe course of action to insist on the principle of normalcy, i.e. to handle the crisis through normally applicable powers and procedures and insist on full compliance with human rights'.¹¹

State of emergency

The rationale for an SOE is to increase a state's ability to safeguard the life of the nation in exceptional situations. The declaration of an SOE may involve modifying ordinary laws, special emergency legislation, or interpretative accommodation (by judges) of the country's constitution and laws.¹²

There are two main approaches to the question of whether such a suspension can be contained within the judicial order. The *rule-or-law approach* holds that measures to counter a crisis must be within the confines of law, while the *sovereignty approach* argues that emergency measures by their nature cannot be reduced to legal norms.¹³

SOEs may be regulated at different levels: the international, national, and sub-national. Through the inclusion of derogation clauses, international human rights law allows SOEs under certain conditions. The purpose is to provide authorities extraordinary powers and resources, and to liberate the sovereign from legal constraints. However, human rights law serves to provide checks on sovereign powers to protect individuals, especially in times of crisis.

The prerequisites for derogation from obligations under the ICCPR are provided by Article 4. In its first paragraph, the article gives that (1) the invoked public emergency must threaten the life of the nation, (2) an SOE must be officially proclaimed, (3) the measures should be limited to what is strictly required, (4) the measures should be consistent with other obligations under international law, and (5) the measures cannot involve discrimination solely based on, for example, race or religion. The second paragraph gives that derogation from certain rights is prohibited. Furthermore, states that invoke Article 4 immediately have to notify other state parties, through the Secretary-General of the United Nations, which provisions it has derogated from, and the reasons for the decision.

Not all public emergencies are grounds for derogation.¹⁴ In relation to COVID-19, it must be asked whether the pandemic can 'threaten the life of the nation' and thereby constitute ground for derogation. This needs to be asked in relation to each individual

¹¹Martin Scheinin, 'To Derogate or Not to Derogate?' *Opinio Juris*, 6 April 2020.

¹²Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice 2* (Cambridge University Press 2006) 66–79.

¹³Giorgio Agamben, *State of Exception* (Kevin Attell tr, The University of Chicago Press 2005) 10, 22–23; Scott P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34 *Michigan Journal of International Law* 491, 500.

¹⁴United Nations Human Rights Committee, CCPR General Comment No 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev1/Add11, para 3.

country. However, guided by previous definitions it is likely that COVID-19, as it has resulted in widespread illness and deaths affecting a significant part of the population, could be a threat within the scope of Article 4.¹⁵ In April 2020, the United Nations Human Rights Office issued a guidance which included, the phrase '[i]f derogations from a State's human rights obligations are needed to prevent the spread of COVID-19', indicating that the pandemic *could* constitute a threat to the life of the nation.¹⁶

On the national level, several constitutions permit SOEs and differentiate between types of emergencies. Some establish a dual structure that distinguishes between a 'state of war' and a 'state of emergency',¹⁷ while others distinguish between a 'state of siege' and a 'state of emergency'.¹⁸ An SOE may also be regulated at a sub-national level, with the United States being one example.¹⁹ In contrast to the federal constitution, many US state constitutions contain more explicit emergency provisions.²⁰

Explaining States of Emergency

In handling pandemics or other emergencies, states have a repertoire of policy choices. From this repertoire, some will be more likely than others to declare an SOE in the face of a pandemic like COVID-19. This propensity, we suggest, is based on a calculation of the costs and benefits of such a declaration. The costs may include unpopularity among the electorate and international critique, while the benefits may include increased powers for the executive and increased capacity for swift action. Our general framework draws on previous research on SOEs and extends it to develop expectations regarding how states employ SOEs during pandemics.²¹

Quantitative research has examined the circumstances that make SOEs more or less likely. Bjørnskov and Voigt find that SOEs have different sources depending on whether they take place in the context of natural disasters or political turmoil.²² Constitutions matter because states lacking entrenched emergency powers declare SOEs more often than those that have them. When it comes to natural disasters, research suggests that executives facing low costs from SOEs are more likely to declare them. If a country is undergoing an economic crisis, an SOE is more likely following political turmoil. An SOE is also more likely after natural disasters when the legislature holds more power.²³ A study on countries with 'Western-style' constitutions finds that terrorist incidents are associated with a higher likelihood of an SOE, but that they are less likely in

¹⁵See e.g. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, II(A) principle 39; Richard B Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 American Journal of International Law 1072, standard A 1(b).

¹⁶OHCHR, Emergency Measures and Covid-19: Guidance, 27 April 2020 <www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf> accessed 25 March 2021.

¹⁷For example, the constitution of the Netherlands.

¹⁸For example, the constitution of Portugal.

¹⁹Henry P Monaghan, 'The Protective Power of the Presidency' (1993) 93 Columbia Law Review 1, 32–38; George Winterton, 'The Concept of Extra-Constitutional Executive Power in Domestic Affairs' (1979) 7 Hastings Constitutional Law Quarterly 1, 24–25; Gross and Ni Aoláin (n 12) 37–38.

²⁰Oren Gross, 'Providing for the Unexpected: Constitutional Emergency Provisions' (2003) 33 Israel Yearbook on Human Rights 13, 19–20 (n 28).

²¹Christian Bjørnskov and Stefan Voigt, 'Why Do Governments Call a State of Emergency? On the Determinants of Using Emergency Constitutions' (2018) 54 European Journal of Political Economy 110.

²²Ibid.

²³Ibid.

election years.²⁴ Next to the quantitative research, case studies have found, for example, that SOEs can evolve from temporary measures to become the routine mode of governance – as has been the case in Egypt – and that, far from always being unpopular, they can be legitimised by certain emotions – such as the deep compassion seen in Venezuela following a devastating landslide.²⁵

We assume that governments' interests in declaring an SOE may shift in response to COVID-19. Such shifts, we suggest, arise primarily as states balance their responsibility to respect, protect, and fulfil the rights of their citizens. Under some circumstances, an SOE may be seen as a necessary tool. An SOE may offer legitimacy for the state to take actions otherwise impossible or far more costly, or the ability to undertake necessary measures, like a lockdown, due to a lack of other alternatives. Populations' granting of legitimacy and support, we suggest, may be particularly pronounced during a pandemic in the face of human suffering. Even during such an exogenous event, however, an SOE comes with costs. These include unpopularity, especially if it is seen as an exaggerated response, and challenges in actually declaring an SOE, for example in securing parliamentary support.

We predict a government's weighing of costs and benefits from an SOE during a pandemic to be shaped by three key factors: the extent of acceptance of SOEs within its surrounding region, the robustness of its democratic institutions, and its pandemic preparedness.

States are often influenced by other states, through emulation and learning, which can lead to processes of diffusion and patterns of convergence as they gravitate towards the same policy solutions.²⁶ Following this logic, we expect a state's deliberation about whether or not to declare an SOE to be shaped by the decisions of other states, in particular by those that are geographically proximate. In a typical diffusion pattern, we expect to see an S-shaped curve, with few early declarations, many declarations in close proximity, and few laggards.²⁷ This motivates the following hypothesis:

Hypothesis 1: The more states with declared SOEs in a region, the more likely other states in the same region are to declare SOEs

Viewing SOEs as an action that may restrict the rights and liberties of citizens leads us to expect that some states will be particularly prone to use this policy.²⁸ Previous research suggests that we may expect more 'in the middle' when it comes to the relationship between the strength of democratic institutions and repression.²⁹ Accordingly, SOEs may be less likely in established democracies and strong autocracies, and most likely in states in between these two extremes. Autocracies may enjoy SOE-equivalent powers without having to declare an actual SOE, and democracies are likely to find SOEs as anathema to central principles of liberal governance and unappealing to

²⁴Christian Bjørnskov and Stefan Voigt, 'When Does Terror Induce a State of Emergency? And What Are the Effects?' (2020) 64 *Journal of Conflict Resolution* 579.

²⁵Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 *New Criminal Law Review* 532. Didier Fassin and Paula Vasquez, 'Humanitarian Exception as the Rule: The Political Theology of the 1999 Tragedia in Venezuela' (2005) 32 *American Ethnologist* 389.

²⁶See e.g. Katharina Holzinger and Christoph Knill, 'Causes and Conditions of Cross-National Policy Convergence' (2005) 12 *Journal of European Public Policy* 775.

²⁷Virginia Gray, 'Innovation in the States: A Diffusion Study' (1973) 67 *American Political Science Review* 1174.

²⁸See e.g. Christian Davenport, 'State Repression and Political Order' (2007) 10 *Annual Review of Political Science* 1.

²⁹Helen Fein, 'Life-Integrity Violations and Democracy in the World, 1987' (1995) 17 *Human Rights Quarterly* 170.

electorates, too costly. This leaves us with the states ‘in the middle’, so called anocracies, which face fewer restraints from electorates than democracies but also lack access to the kind of repressive techniques available to autocracies. This gives us the following hypothesis:

Hypothesis 2: States with weak democratic institutions are more likely to declare an SOE compared to democracies or autocracies

Finally, because state preparedness provides a more resilient health infrastructure, it may obviate the need to declare an SOE. Higher preparedness entails better ability to handle a pandemic before it becomes necessary to respond with an SOE, and involves access to alternative means, such as track-and-trace systems, which may serve as a substitute for an SOE. Tying back to the previous discussion, this suggests that states that have come further in respecting and fulfilling the right to health will be less likely to declare an SOE. This gives us the following hypothesis:

Hypothesis 3: States with stronger pandemic preparedness are less likely to declare an SOE

These theoretical conjectures point to specific expectations regarding SOEs declared during the COVID-19 pandemic. It is important to emphasise that we are not seeking to explain SOEs in general but to focus on factors deemed central to the phenomenon. The observable implications are clear: if our conjectures are correct, we would expect to observe that SOEs are more likely to occur in states that are surrounded by other states with SOEs, in weak democracies, and in states with low pandemic preparedness.

Data and Methods

To attain data on COVID-19-related SOEs, we sourced information from two public datasets and carried out our own supplementary research. The Centre for Civil and Political Rights (CCPR) provides data on 136 parties to the ICCPR.³⁰ A ‘Covid-19 Civic Freedom Tracker’ maintained by the International Center for Not-for-profit Law (ICNL) identifies 87 SOEs declared in response to COVID-19, some of which are not reported in the CCPR dataset.³¹ To address missingness in these two sources, we collected data on 54 states using news and online sources.³² The combined dataset covers 180 states, providing information on whether or not they declared an SOE between 1 January 2020 and 12 June 2020. It is noted that different language is used in various constitutions. Our dataset includes constitutions which use ‘emergency’ as well as ‘crisis’. Our measure of SOEs captures instances in which a state explicitly declares an SOE, even if the name differs between states (e.g. ‘public health emergency’ or ‘state of exception’). It does not therefore capture cases where the cumulative impact of policies may amount to that of an SOE.

Figure 1 illustrates the geographic scope of these data. We observe that 101 states declared SOEs and 79 did not, while a smaller group either had pre-existing SOEs (e.g. Egypt) or could not be determined. We also note signs of spatial clustering, with

³⁰COVID-19 State of Emergency Data <<https://datastudio.google.com/reporting/1sHT8quopdfavCvSDk7t-zvqKIS0Ljiu0/page/dHMKb>> accessed 28 June 2020.

³¹COVID-19 Civic Freedom Tracker <www.icnl.org/covid19tracker/> accessed 28 June 2020.

³²We are grateful to Martin Lundqvist for research assistance.

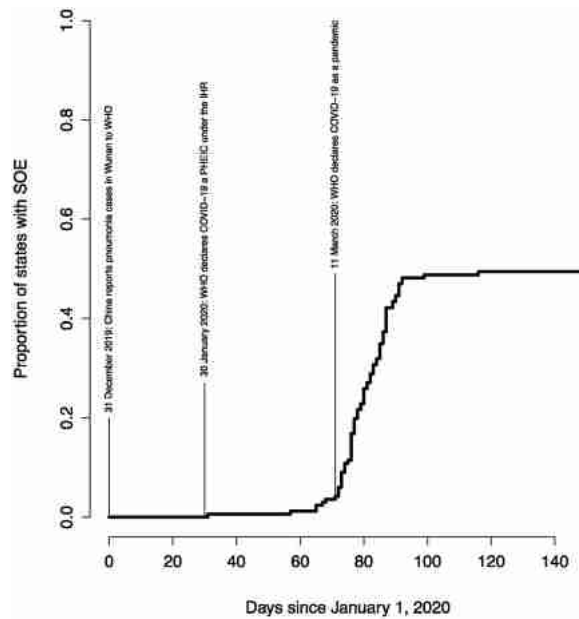


Figure 2. The proportion of states with declared SOEs, by day since 1 January 2020.

To represent our diffusion logic, we create the variable *regional SOE*, operationalised as the cumulative count of SOEs in a given geographic region. We follow World Bank definitions and identify seven main regions (see Figure 4). States in regions where SOEs are prevalent will score high on this variable and vice versa.

We operationalise *democracy* based on the V-Dem liberal democracy index,³³ which judges the quality of democracy by the limits placed on government and the extent to which it protects the rights of individuals and minorities. The index factors in the protection of civil liberties, rule of law, the independence of the judiciary, and limitations on the executive. States with stronger democratic institutions have higher values on this variable. We recognise the possibility that our results may be sensitive to the choice of democracy measures, especially relating to states with weaker democratic institutions,³⁴ and therefore present results using alternative indicators in our robustness tests.

We measure *pandemic preparedness* based on the GHS Index, which summarises information on states' relative capability to prevent and mitigate pandemics.³⁵ IHR 2005 provided the guiding regulations behind many of the indicators included in the GHS Index,³⁶ so the GHS index may be perceived as a measurement of state compliance with their obligations under IHR 2005. States with strong pandemic preparedness score high on this index and vice versa.

We control for key background factors. To reflect countries' varying institutional contexts, we control for democratic durability (years since democratic transition), historical

³³Michael Coppedge and others, *V-Dem Dataset v9* (2019) Varieties of Democracy (V-Dem) Project.

³⁴See James R Vreeland, 'The Effect of Political Regime on Civil War: Unpacking Anocracy' (2008) 52 *Journal of Conflict Resolution*, 401–425.

³⁵Global Health Security Index <www.ghsindex.org> accessed 29 June 2020.

³⁶The Global Health Security Index report October 2019, p 5 (n 2).

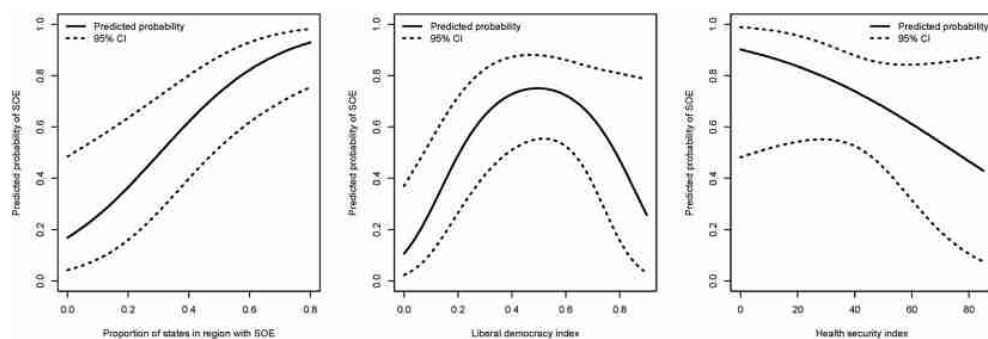


Figure 3. Predicted probabilities of SOEs, as a function of (a) regional SOEs; (b) democracy; and (c) pandemic preparedness. Dashed lines represent 95% confidence intervals.

Note: Calculations based on a logit model with random country effects. All continuous variables held constant at their means and categorical variables set at their reference values.

SOEs, and GDP per capita. To account for immediate anti-COVID-19 measures, we adjust for the stringency of governmental actions using data from the Oxford COVID-19 government response tracker.³⁷ To account for demographic variation that may shape how gravely a government views the threat of the pandemic, we control for population above 65 years of age, life expectancy, and population density. Finally, to account for variation in the pandemic impact, we control for cumulative national deaths from COVID-19.³⁸ In our robustness tests, described further below, we control for additional measures of democracy, indicators of governmental utility from SOE declarations, and decree powers.

We construct a time-series cross-sectional data structure with daily observations on each state between 1 January and 12 June 2020. The dependent variable (SOE or not), regional SOEs, policy stringency, and cumulative deaths vary across both days and states; other variables vary across states. We use a logit estimator, capture temporal effects with a cubic polynomial, and add country random effects to account for unobserved heterogeneity. For presentational purposes, we estimate some models using a cross-sectional structure, with observations on each state on 12 June 2020.

Results

Our key results are summarised in Figure 3.³⁹ The three panels illustrate the predicted probability of SOEs as a function of our three key variables, holding all other factors constant. In other words, for each value of an explanatory variable (plotted on the x-axes), the figures show the probability that a state with such characteristics will have adopted an SOE during the period of study.⁴⁰

³⁷Thomas Hale and others, 2020. Variation in government responses to COVID-19. BSG-WP-2020/32. May 2020.

³⁸Using alternative measures of pandemic impact, such as the total number of infected or hospitalised, do not affect the results.

³⁹Full results and regression tables are reported in the online appendix that can be accessed at <<https://doi.org/10.1080/18918131.2021.1899406>>.

⁴⁰For ease of interpretation, we show results based on a cross-sectional model; equivalent results are attained in the time-series cross-sectional model.

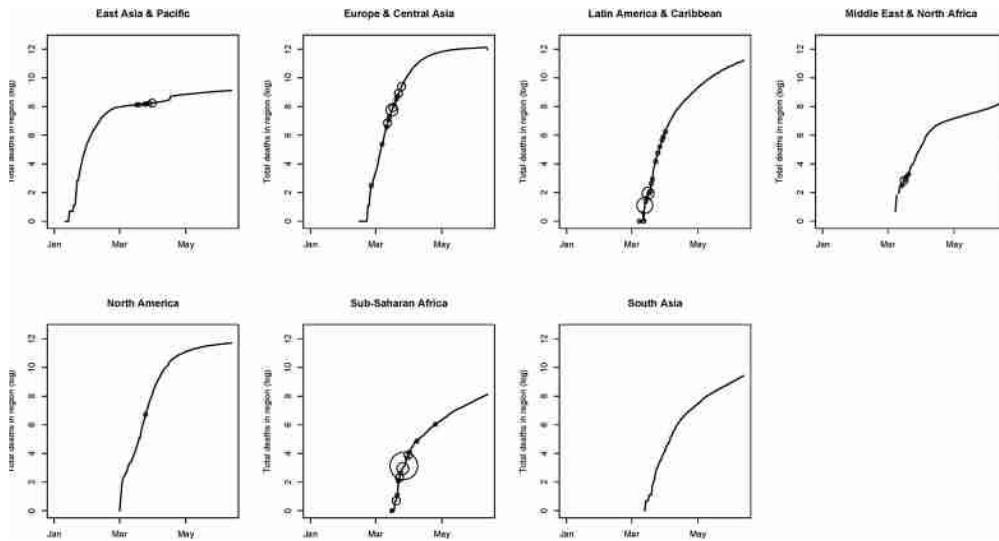


Figure 4. Declaration of SOEs and COVID-19 deaths across geographic regions, January–June 2020. The sizes of the rings are proportional to the number of states in a region declaring an SOE on a given date.

Our first hypothesis was that of a regional diffusion logic: When contemplating the menu of possible policy responses to the onslaught of COVID-19, states would look to their regional peers for inspiration. Our data bear this expectation out. Our regression models indicate that, among countries with comparable characteristics and disease spread, those having a high number of regional peers with declared SOEs are significantly more likely to declare an SOE themselves, and vice versa.

Figure 4 illustrates these dynamics in greater detail. We plot the declaration of SOEs over time and disease spread. Reinforcing the patterns discussed in relation to Figures 1 and 2, we observe that regions exhibit a tendency towards homogeneity in SOE declarations. This is particularly clear for Latin America (especially South America) and South Asia (lacking SOEs). It is also clear that these regional diffusion processes happen around the same time, calendar-wise, but at very different points in time on the pandemic curve. In East Asia, SOEs were declared after the pandemic curve had already started to flatten out, whereas in Latin America, Sub-Saharan Africa, and the Middle East, SOEs were declared at considerably earlier points of the curve, signifying lower levels of pandemic impact, and in many cases before there had been any local impact at all. In no fewer than 50 states, including Lithuania, Kyrgyzstan, and Mozambique, SOEs were declared before a single local death from COVID-19 occurred.

Our second expectation was that states' willingness to declare SOEs would vary with their institutional characteristics: in robust democracies, the costs of SOEs would outweigh the benefits; in autocracies, where governments already enjoy many of the powers that SOEs can enable in liberal societies, an SOE would be redundant. Only in the 'middle', meaning the newer and less robust democracies, would the benefits of SOEs outweigh the costs. As is evidenced by the inverted U-shape pattern in panel (b) of Figure 3, this expectation is born out in the data. Indeed, it is the strongest and

most robust of our findings.⁴¹ One may find individual exceptions to this general pattern. Even though Spain is a mature democracy, for example, it declared a state of alarm on 14 March 2020 and then again on 25 October 2020 as a response to the COVID-19 pandemic.⁴² More generally, the widening confidence intervals for higher values of our democracy variable suggests that there is a high degree of variability among the most robust democracies (Figure 3).

In our third hypothesis, we proposed that states with a higher preparedness in relation to the obligations under the IHR 2005 would be more able to weather COVID-19 without resorting to emergency powers, whereas under-prepared countries would see SOEs as a necessary tool to combat the spread of the disease. This hypothesis receives only weak support in the data. A negative correlation between preparedness and the likelihood of SOEs does exist, in line with theory, but it is not statistically significant at the 95% level. Relatedly, we find that states that have already adopted more stringent policies are also more likely to adopt an SOE.

Our control variables suggest several interesting results. Most importantly, we find no significant association between pandemic impact, measured as national COVID-19-related deaths, and SOEs. Aligning with the descriptive finding that many states proclaimed SOEs before the disease spread locally, this suggests that many states employed emergency powers proactively, seeking to bolster preparedness before the storm of the pandemic arrived. The clearest exception to this pattern is France, which suffered nearly 100 dead to COVID-19 before it declared an SOE on 22 March 2020. An alternative interpretation of this pattern is that some states may have declared SOEs for reasons that had little to do with the pandemic, using the global crisis as a pretext to curtail civil liberties for their own political goals.

Overall, we view the results thus far as favouring hypothesis 1 and 2 while leaving hypothesis 3 uncertain. These results are robust to a number of alternative estimation strategies, including controlling for constitutional emergency powers, defining regions differently (by continent), and excluding states with federal systems or within-state variations in SOEs (e.g. the US). As can be seen in Table A4 of the online appendix, they are also robust to using alternative measures of democracy (Polity IV data) and to modelling democratic features based on more disaggregated indicators of democratic institutions (V-Dem sub-indices and index components).

In our modelling of the costs and benefits that governments expect from declaring an SOE, we have maintained a focus on measures that relate specifically to the pandemic. The key exception is democracy, which we use as a broad indicator of governmental variability. However, scholars have developed more refined measures of the costs and benefits that governments expect from declaring SOEs under more general

⁴¹Trinidad and Tobago (TTO) illustrates how comparatively robust democratic institutions may affect the decision to declare an SOE. Based on our statistical models, TTO was very likely to opt for an SOE: the country is situated in Latin America, suggesting a permissive environment, and its preparedness is below average. Yet it did not. A likely explanation is TTO's democratic institutions, which are stronger than most of its regional peers (its liberal democracy index is 0.63, compared with 0.49 for the region). Qualitative evidence aligns with this interpretation. For example, the prime minister of TTO considered that an SOE was not necessary to handle COVID-19 and '... would only give additional powers to police and a reduction of citizens' rights and privileges', while an opposition leader declared that the '... wide reaching detention powers' of an SOE 'should only be used to restore law and order'.

⁴²Sam Jones and Angela Giuffrida, 'Spain Declares Covid State of Emergency as Italians Urged to Stay Home' *The Guardian* (London, 25 October 2020).

circumstances. Drawing on data from the Comparative Constitutions Project,⁴³ Bjørnskov and Voigt have developed a useful index of emergency powers (INEP), which takes into consideration a range of constitutional features and the degree to which they constrain the executive from declaring SOEs.⁴⁴ In Table A5 in the online appendix, we add the two INEP components, representing benefits and costs respectively. The INEP data cover a smaller range of countries than our main data, so the results are not immediately comparable, but they indicate that governments that can expect higher utility from SOEs, as measured by the INEP variables, are also more likely to declare them. We also note that our results for spatial diffusion are sensitive to the inclusion of this variable. This may be because of differences between the smaller subset of countries covered in the INEP data and our larger dataset,⁴⁵ or because governments with certain constitutional features, lowering or rising the expected utility from SOEs, cluster in certain regions, driving the observed regional patterns.

Conclusions

Using a combination of existing and novel data, we examined empirical patterns in COVID-19-related SOEs, seeking to explain why some states resorted to emergency powers while others did not. The results suggest that states' declarations of SOEs are driven by both external and internal factors. A permissive regional environment, characterised by many simultaneously declared SOEs, may diminish reputational and political costs, making employment of emergency powers more palatable for a wider range of governments. At the same time, internal characteristics, specifically democratic institutions and pandemic preparedness, shaped governments' decisions. Weak democracies with poor pandemic preparedness were considerably more likely to opt for SOEs than dictatorships and robust democracies with higher preparedness. We find no significant association between pandemic impact, measured as national COVID-19-related deaths, and SOEs, suggesting that many states adopted SOEs proactively before the disease spread locally, or that less benevolent governments may have exploited the pandemic as a convenient excuse to gain additional powers, an argument explored in greater detail in recent work by Bjørnskov and Voigt.⁴⁶

These results have several implications for research on international law and SOEs. First, our data indicate that only a small minority of states notified the United Nations Secretary-General of their SOEs, despite ICCPR requirements. This raises important questions for research on the effectiveness of international law. Second, the finding that states with weaker democratic institutions, in between autocracies and democracies, were more likely to declare SOEs speaks to classical debates in the study of democratisation and the rule of law. Most notably, it raises questions for research into whether a constitution can amount to a credible commitment to the protection of liberal rights or whether constitutions serve as legitimisation devices without real bite. Finally, the

⁴³Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

⁴⁴Bjørnskov and Voigt, 'Why Do Governments Call' (n 21).

⁴⁵The INEP data do not cover Africa systematically, for example. Of the countries in our dataset, INEP is missing for more than 80 countries.

⁴⁶Bjørnskov and Voigt, 'This Time is Different' (n 1).

finding that robust democracies and autocracies were less willing to invoke an SOE points to possible variation in the ability of states to handle the pandemic. Although this article has not examined the question of what the most sensible state response to COVID-19 is, it is noteworthy that international human rights law allows very strict measures in response to the COVID-19 pandemic, including lockdowns and stay-at-home orders, without declaring an SOE.

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