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OPTION REPORTS

BANKRUPTCY AND TREATMENT OF DEBTORS

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The following report is one of a series produced by the Constitutional Design Group, a group of scholars dedicated to distributing data and analysis useful to those engaged in constitutional design. The primary intent of the reports is to provide current and historical information about design options in written constitutions as well as representative and illustrative text for important constitutional provisions. Most of the information in these reports comes from data from the Comparative Constitutions Project (CCP), a project sponsored by the National Science Foundation. Interested readers are encouraged to visit constitutionmaking.org for further resources for scholars and practitioners of constitutional design.

Note that the dates provided herein for constitutional texts reflect either the year of initial promulgation *or* of a subsequent amendment, depending on which version was used for analysis. For example, Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

1. INTRODUCTION

Bankruptcy is a legally declared inability or impairment of ability of an individual or organization to pay creditors. Bankruptcy law represents an important element of the economic system, as it provides a mechanism for clearing up bad debts and ensuring that credit markets can continue to function in an orderly manner. We describe below the range of constitutional provisions on bankruptcy law. We also analyze provisions related to treatment of debtors. Many constitutions forbid the detention of debtors, in accordance with international human rights instruments.

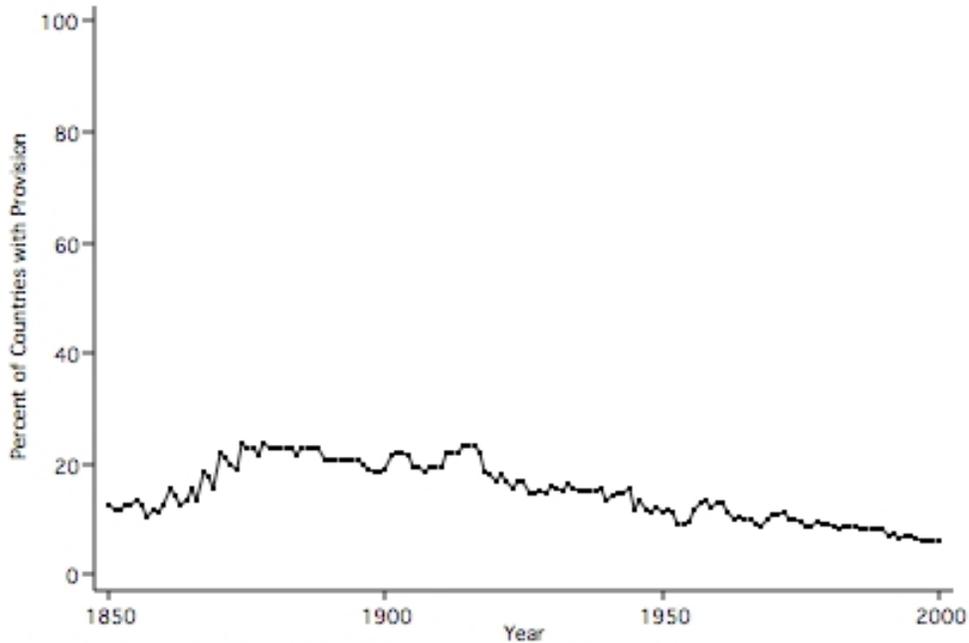
2. DATA SOURCE(S)

The analysis reported below is based on data the Comparative Constitutions Project (please see the appendix for more information on this resource). As of this writing, the project sample includes 550 of the roughly 800 constitutions put in force since 1789, including more than 90% of constitutions written since World War II.

3. CLASSIFICATION AND HISTORICAL TRENDS

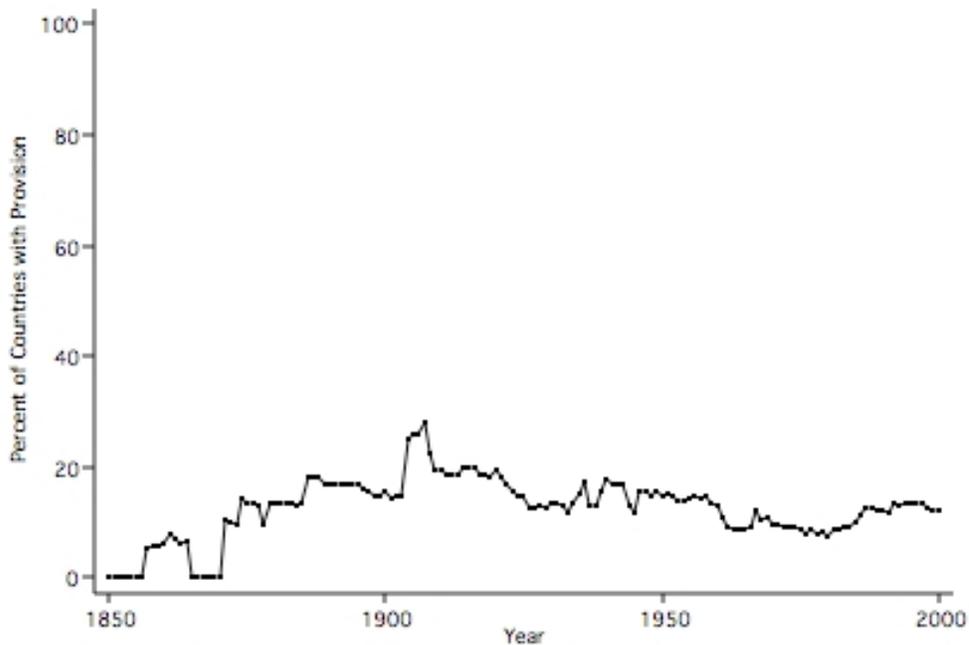
Figure 1 shows the percent of constitutions that mention bankruptcy law over time. As Figure 1 suggests, constitutions rarely incorporate provisions related to bankruptcy law, with only 4.5% of all constitutions in the sample mentioning it. Of constitutions in force in 2000, only 6% mention bankruptcy law. More common are provisions forbidding the detention of debtors. Overall, 13% of constitutions in the sample forbid the detention of debtors. Figure 2 shows the percent of constitutions that forbid the detention of debtors over time, showing that these provisions were most common at the beginning of the 20th century. In 2000, only 11% of constitutions in force forbid the detention of debtors.

Figure 1. Percent of Constitutions That Mention Bankruptcy Law by Year (N=550)



Data from the Comparative Constitutions Project - www.comparativeconstitutionsproject.org

Figure 2. Percent of Constitutions that Forbid the Detention of Debtors by Year (N=550)



Data from the Comparative Constitutions Project - www.comparativeconstitutionsproject.org

4. NOTES ON ATYPICAL CASES

In some constitutions bankruptcy leads to suspension or loss of citizenship (e.g. Uruguay 1830). These provisions are much less common in the 20th century. In other cases, a person who is “undischarged bankrupt” cannot run for office (e.g. Dominica 1984). Most commonly, the legislature is given the power to make laws related to bankruptcy (e.g. United States 1789). All these cases have been coded as providing for bankruptcy in the constitution.

5. SAMPLE CONSTITUTIONAL PROVISIONS

(Note: dates provided reflect the version of the constitution used to obtain sample provisions, and represent either initial year of promulgation or year through which subsequent amendments are included.)

The set of sample provisions is divided into sections on:

1. Restrictions on Rights for Bankrupts
2. Constitutional Regulation of Bankruptcy Proceedings
3. Provisions Authorizing Bankruptcy Legislation
4. Absolute Prohibition of Detention of Debtors
5. Qualified Prohibition of Detention of Debtors

5.1. Restrictions on Rights for Bankrupts

There shall be no interference with the exercise of this right [to secrecy of communications] except in accordance with the law and only in cases of convicted and unconvicted prisoners and business correspondence and communication of bankrupts during the bankruptcy administration.

- *Cyprus 1960, Article 17.2*

Correspondence of every kind is inviolable; if intercepted, it shall not be given credence nor accepted as evidence in any legal action, except in cases of insolvency proceedings and bankruptcy. The interference in and intervention of telephone conversations is prohibited.

- *El Salvador 2003, Article 24*

The exercise of political rights shall be suspended:

1. By the condition of bankruptcy, whether ordinary or fraudulent.

- *Haiti 1889, Article 11.2*

Art. 11. Citizenship is suspended:

...

6. By judicial declaration of bankruptcy.

Art. 12. Citizenship is lost:

...

2. By bankruptcy declared to be fraudulent.

- *Uruguay 1830, Articles 11.6 and 12.2*

Art. 6. Protection from deprivation of property.

...

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

...

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property;

Art. 32. Disqualifications for Representatives and Senators.

(1) A person shall not be qualified to be elected or appointed as a Representative or Senator (hereinafter in this section referred to as a member) if he—

...

(c) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Dominica;

- *Dominica 1984, Articles 6.6.iii and 32.1.c*

Art. 18. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (l) of this section

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including an interest in or a right over property) that is to say:—

...

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property:

Art. 59. (1) No person shall be qualified to be nominated for election or appointed as a voting member of the House of Representatives or to be appointed as a nominated member if, at the date of his nomination for election or, as the case may be, at the date of his appointment

...

(d) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in The Gambia;

- *Gambia 1970, Article 18.2.b.iii and 59.1.d*

5.2. Constitutional Regulation of Bankruptcy Proceedings

Laws governing the relations between employers and workers are of public order. Any provisions or agreements that contravene or restrict the following guarantees shall be null and void:

...

4. The amount of wages, indemnity compensation, and social benefits are a privileged credit in the event of bankruptcy or insolvency of the employer.

- *Honduras 1957, Article 112.4*

Credits in favor of workers for wages or salary earned within the last year and for indemnity compensation shall have preference over all other debts or obligations in the event of receivership or bankruptcy;

- *Mexico 2003, Article 123.A.XXIII*

5.3. Provisions Authorizing Bankruptcy Legislation

The Congress shall have power:

...

12. To enact the Civil, Commercial, Penal, Mining, and Labor and Social Security Codes, in a unified body or separately, without such codes altering local jurisdictions; their application belonging to the federal or provincial courts, depending on which jurisdiction the things or persons [in litigation] come under; and, especially, [to enact] general laws for the whole Nation on naturalization and nationality, in accordance with the principle of nationality by birth and by choice for Argentine citizenship; as well as on bankruptcy, on counterfeiting of currency and public documents of the State; and those general laws that may require the establishment of trial by juries.

- *Argentina 1994, Article 75.12*

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xvii.) Bankruptcy and insolvency:

- *Australia 1977, Article 51.17*

Legislative Authority of Parliament of Canada

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming

within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

...

21. Bankruptcy and Insolvency.

- *Canada 1999, Article 91.21*

The Olbiil Era Kelulau shall have the following powers:

...

5) to establish uniform laws on the subject of bankruptcy;

- *Palau 1992, Article 9.5.5*

The Congress shall have the following powers and duties:

...

10. To enact civil, commercial, penal, and mining codes, and especially general laws of bankruptcy, and laws to punish counterfeiting and forgery of public documents of the State.

- *Paraguay 1870, Article 72.10*

Legislation in regard to the following matters falls within the domain of the Confederation:

Civil capacity;

All matters of law relating to commerce and transactions affecting movable property (law of obligation, including commercial law and the law on bills of exchange);

Literary and artistic property;

The protection of inventions applicable to industry, including designs and models;

Suits for debt and bankruptcy;

- *Switzerland 1931, Article 64*

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

...

4. To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

- *United States of America 1992, Article 1.8.4*

5.4. Absolute Prohibition of Detention of Debtors

Being in debt does not limit a person's freedom or deprive him of his liberties.

- *Afghanistan 2004, Article 32.1*

In no case may there be detention, a prison term, or arrest for debts, nor sanctions or security measures that are not prescribed.

- *Colombia 2005, Article 28*

Imprisonment for debts is forbidden.

- *Honduras 1904, Article 33*

No one may be imprisoned for debts of a purely civil nature.

- *Mexico 2003, Article 17*

Imprisonment for debt is prohibited.

- *Micronesia 1990, Article 4.13*

No one can be detained for indebtedness.

- *Republic of Vietnam 1967, Article 7.10*

5.5. Qualified Prohibition of Detention of Debtors

Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:

...

LXVII - there shall be no civil imprisonment for debt, except for a person who voluntarily and inexcusably defaults on a support obligation and for an unfaithful depository;

- *Brazil 2005, Article 5.67*

No Dominican shall be arrested for debts not arising out of fraud or criminal offense.

- *Dominica Republic 1896, Article 14.1*

No one may be imprisoned for debts, costs, fees, taxes, fines or other obligations, except in instances of compulsory support;

- *Ecuador 1997, Article 19.b*

Imprisonment for debt may not be ordered, except when it is a question of providing food for minor children, destitute parents, incapable spouse or brothers and sisters, when the person responsible has economic possibilities and refuses to fulfill his duty, or, in order to evade his duty, transfers his possessions in favor of third persons.

- *Guatemala 1945, Article 43*

No one will be deprived of his freedom by reason of debt, except in cases when a competent judicial authority issues an arrest warrant against someone who has failed to comply with child support and other sustenance payments or who has to serve time in lieu of fines or judicial bonds.

- *Paraguay 1992, Article 13*

No one may be deprived of his liberty for debts.

- *Uruguay 1996, Article 52*

No one shall be imprisoned or arrested for debts not arising out of fraud or criminal offense.

- *Venezuela 1904, Article 17.14*

6. APPENDIX

This report is based on the following questions from the Comparative Constitution Project's "survey instrument":

[BANKRUPT]-Does the constitution mention bankruptcy law?

1. Yes
2. No
96. other, please specify in the comments section
97. Unable to Determine

[DEBTORS]-Does the constitution forbid the detention of debtors?

1. Yes
2. No
96. other, please specify in the comments section
97. Unable to determine

Instructions: If the constitution has a general prohibition regarding detention of debtors but with some exceptions (such as fraud, criminal law), answer "yes" and make a note in the comment section.

For additional documentation on the Comparative Constitutions Project, (including the full codebook, the sample, the sources of constitutional texts and translation issues related to those texts, coding procedures, publicly available data, etc.) please visit the project website at www.comparativeconstitutionsproject.org.