

CONSTITUTIONMAKING.ORG

OPTION REPORTS

RIGHT TO COUNSEL

May 21, 2008

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 the version used for analysis. For example, Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

1. INTRODUCTION

The right to counsel allows the a criminal defendant to be assisted by the counsel (i.e. lawyer) while in custody and/or during the trial. If one cannot afford a lawyer, the right to counsel at the state's expense requires the government to appoint a counsel or cover legal expenses. Below we describe the evolution of these rights as a constitutional provision.

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

Overall, 44 % of constitutions in the sample provide for the right to counsel. However, only 14% of constitutions specify that counsel is provided at the state's expense. As Figure 1 suggests, the right to counsel was rare among the constitutions written before 1950, but has become increasing common after the 1950s. Figure 2 shows regional variation, and suggests that almost every constitution in force in 2000 in Eastern Europe and Latin America, about 70% of constitutions in force in South and East Asia and about 80% of constitutions in force in Oceania provide for the right to counsel. However, the provision is less common among the constitutions in force in Sub-Saharan Africa, Western Europe and Middle East.

Figure 1. Percent of Constitutions that Provide for the Right to Counsel by Year (N=550)

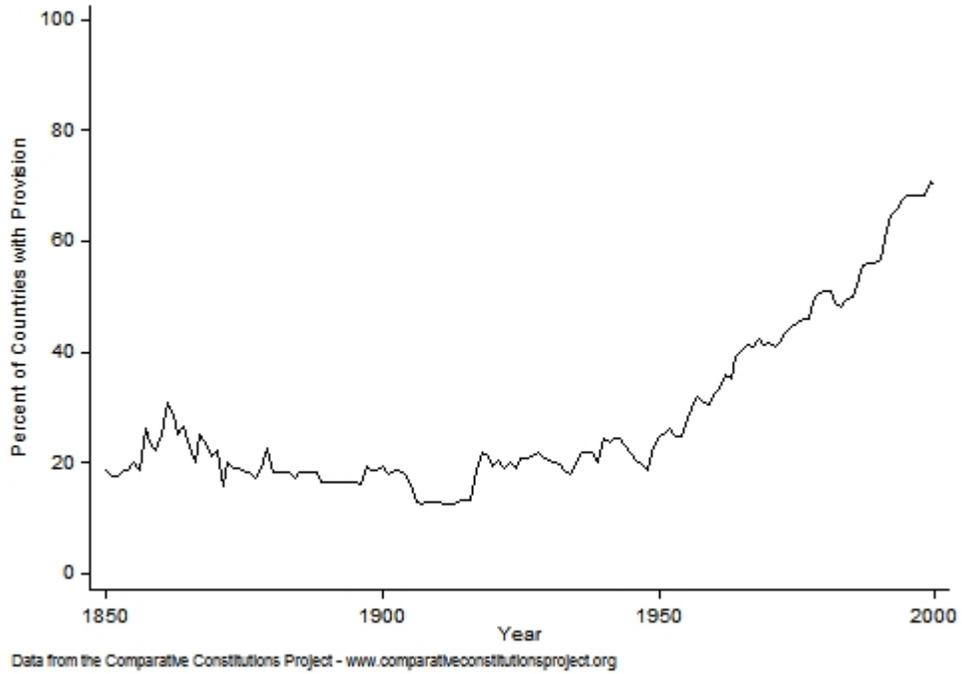
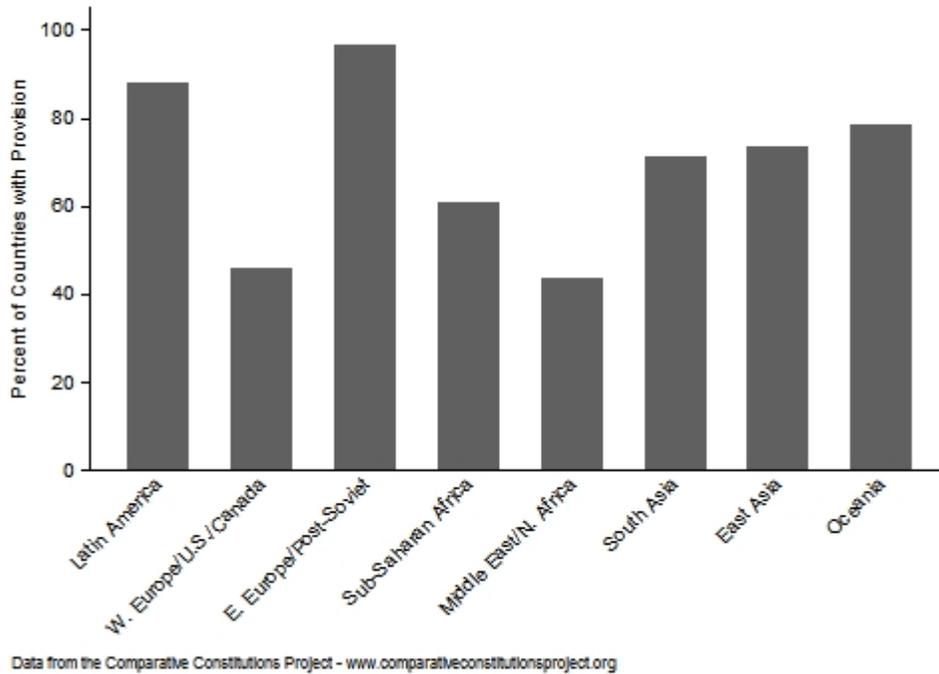


Figure 2. Percent of Constitutions that Provide for the Right to Counsel in 2000 by Region (N=191)



Figures 3 and 4 focus on the right to counsel at state expense. Although the trend has been increasing, only about 30% constitutions in force in 2000 provided for the right to counsel at the state's expense. Although around 70% of constitutions in force in 2000 in South Asia provided for the right to counsel, none of them specify that counsel is at the state's expense. The provision is most likely to be found among the constitutions in Oceania, where about 50% of constitutions provide for the right to counsel at the state's expense.

Figure 3. Percent of Constitutions that Provide for the Right to Counsel at the State's Expense by Year (N=550)

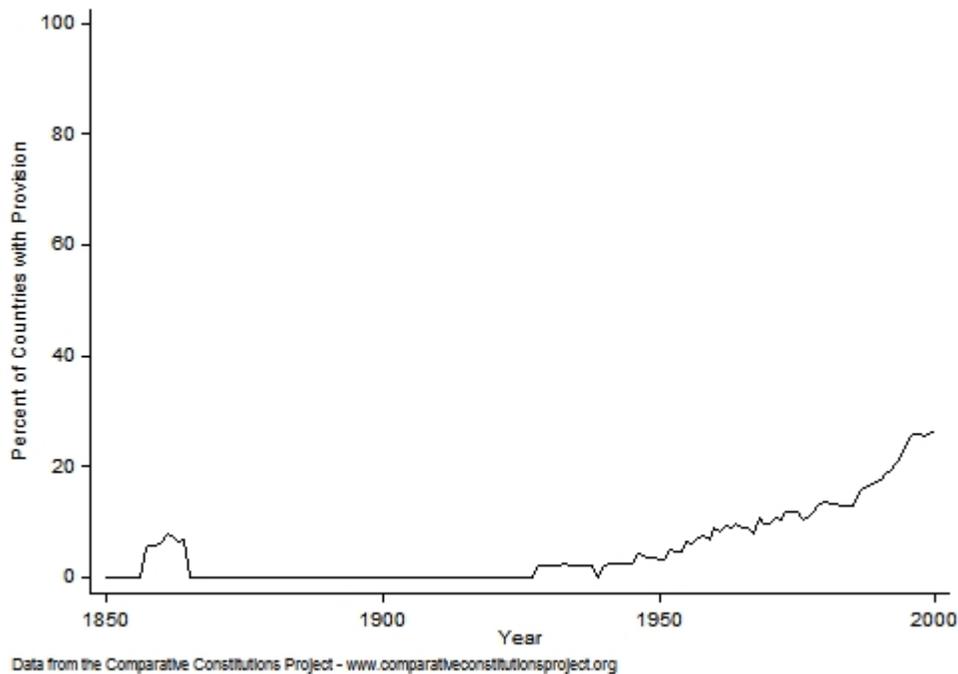
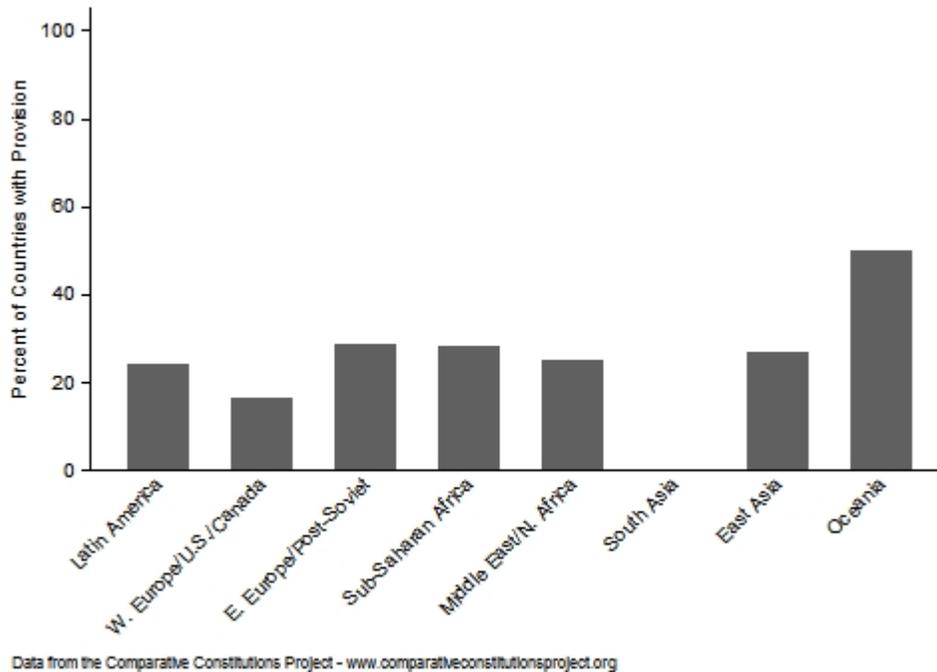


Figure 4. Percent of Constitutions that Provide for the Right to Counsel at the State's Expense in 2000 by Region (N=191)



4. NOTES ON ATYPICAL CASES

Frequently constitutions explicitly mention the right to counsel. However, sometimes the rights of the arrested or indicted are ambiguously specified. This category included cases such as freedom to use all the legal means deemed necessary to the defense, recognition of the rights to defense, guarantees indispensable for defense and inviolability of the right to defense.

The right to counsel at the state's expense is phrased differently in different constitutions. Some state directly that "the indigent person shall have the right to free legal aid in accordance with law". Others specify that "any accused person has the right to defend himself in person or through a lawyer of his own choice and to have legal aid assigned to him by the State where he is unable to defend himself in serious offences."

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. Right to counsel
2. Right to Counsel at the State's Expense

5.1. Right to Counsel

Every person upon arrest can seek an advocate to defend his rights.

- *Afghanistan 2004. Article 31*

Likewise, all have the right to the ordinary judge predetermined by law, to defense and assistance of an attorney, to be informed of the accusation made against them, to a public trial without delays and with all the guarantees, to utilize the means of proof pertinent to their defense, to refrain from self-incrimination, to refrain from pleading guilty and to the presumption of innocence.

- *Spain 1992. Article 24.2*

In a criminal case, an alleged offender or an accused has the right to receive aid from the State by providing an advocate as provided by law. In the case where a person being kept in custody or detained cannot find an advocate, the State shall render assistance by providing an advocate without delay. In a civil case, a person has the right to receive legal aid from the State, as provided by law.

- *Thailand 1997. Article 242*

The accused shall have the right to an adequate defense, either personally or by counsel.

- *Mexico 2003. Article 20.a.ix*

Every accused person shall have the right to choose and be represented by a legal practitioner and to be informed of this right promptly.

- *South Africa 2003. Article 35.3.f*

5.2. Right to Counsel at the State's Expense

Everyone is entitled to receive legal assistance. Legal assistance may be provided free of charge for those who cannot attain it for their own.

- *Russia 1993. Article 48.1*

In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. He shall be permitted full opportunity

to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense. At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

- *Japan 1946. Article 37*

The State shall provide full and gratuitous legal assistance to anyone who proves he has insufficient funds.

- *Brazil 2005. Article 5.74*

If the accused does not wish or is unable to appoint a counsel for his defense, the judge will appoint him.

- *Mexico 2003. Article 20.a.ix*

In criminal cases, the State shall appoint an advocate for a destitute.

- *Afghanistan 2004. Article 31*

Arrested or detained persons:

c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;

- *Fiji 1998. Article 27.1.c*

Every accused person has the right to have a legal practitioner assigned by state and by state expense.

- *South Africa 2003. Article 35.3.g*

6. APPENDIX

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

[COUNS] Does the constitution provide the right to counsel if one is indicted or arrested?

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

Instructions: If the constitution specifies a distinction between indictment or arrest, please make a note in the comments section.

[COUNSCOS] If counsel is provided, is it provided at the state's expense?
(Asked only if COUNS is answered 1)

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

Instructions: Please answer "no" if the constitution explicitly denies the subject of the question and "not specified" if the subject of the question is not mentioned in the constitution.

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.