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OPTION REPORTS

RIGHT TO PRE-TRIAL RELEASE

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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 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 pre-trial release allows those subjected to the criminal process to be freed temporarily, pending trial. It is appropriate for those who are not considered dangerous or likely to flee from the jurisdiction. In many cases, the accused must put up a financial bond guaranteeing their appearance, known as bail. We describe below the range of constitutional provisions for the right to pre-trial release.

2. DATA SOURCE

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, 20% of constitutions in the sample have provided for the right to pre-trial release. As Figure 1 suggests, incorporation of the right to pre-trial release in constitutional texts declined sharply from the mid-1850s to mid-1950's, but started gaining in popularity at the end of the 20th century. Figure 2 shows the percent of constitutions in force as of 2000 that contain an explicit declaration regarding the right to pre-trial release, by region. It shows that these provisions are most common in Latin America, Oceania, and South Asia, and least common the Middle East, East Asia, and Eastern Europe.

Figure 1. Percent of Constitutions That Provide for the Right to Pre-Trial Release by Year (N=550)

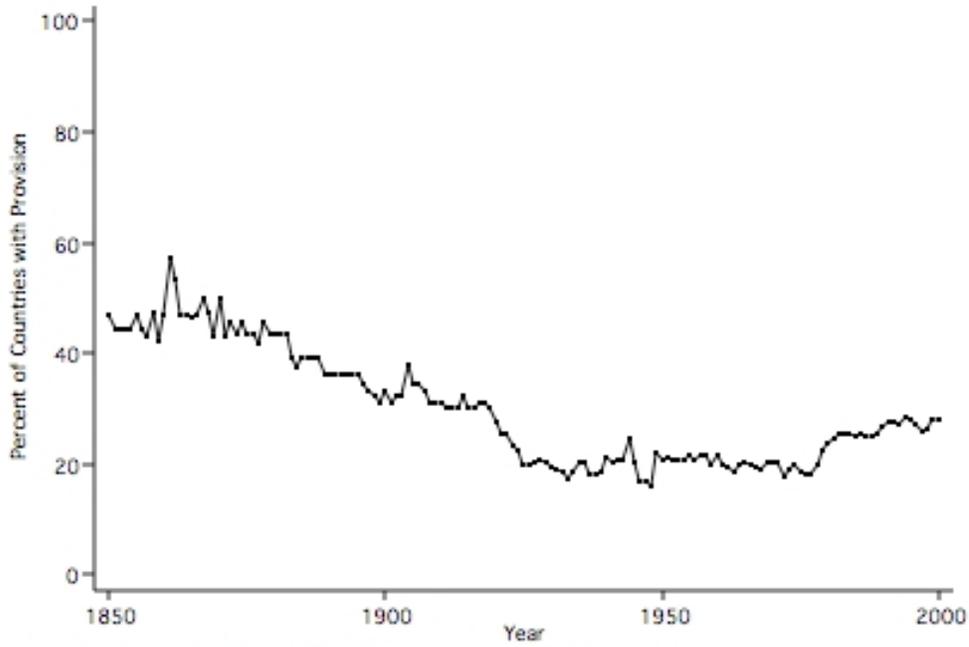
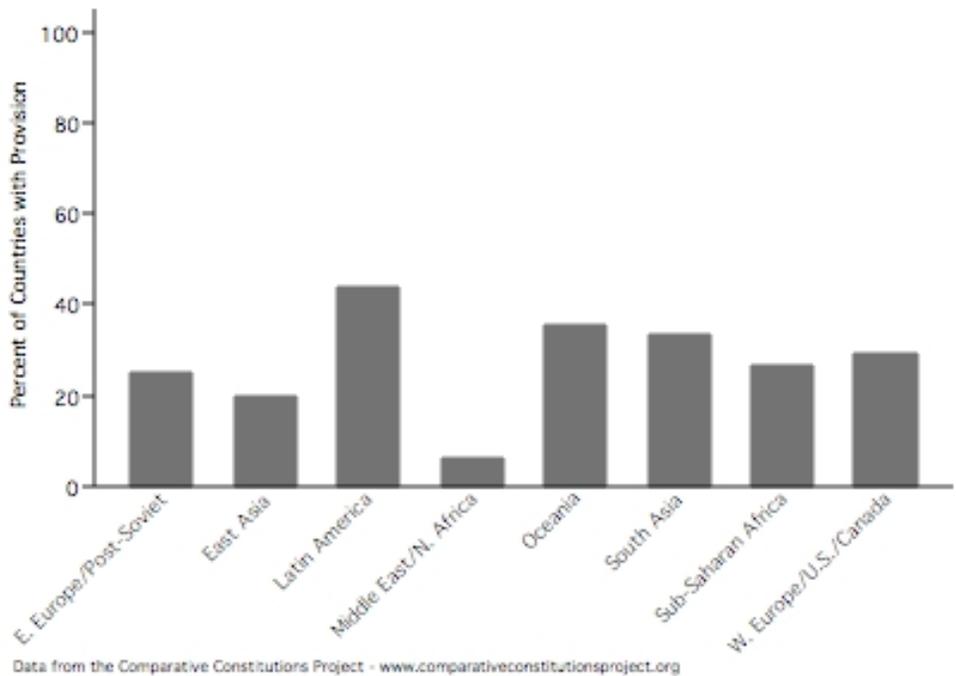


Figure 2. Percent of Constitutions That Provide for Right to Pre-Trial Release in 2000 by Region (N=191)



4. NOTES ON ATYPICAL CASES

A number of constitutional texts specify that details regarding the right to post or be released on bail are left to non-constitutional law. All these cases have been characterized as providing for the right to pre-trial release as long as right to post bail is explicit and only the details are left to non-constitutional law.

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 be Released on Bail is Recognized
2. Prohibition of Excessive Bail
3. Prohibition of Bail for Certain Offenses or Bail Can Be Denied
4. Bail Cannot Be Denied Without Just Cause
5. Details Left to Non-Constitutional Law

5.1. Right to be Released on Bail is Recognized

A person in pre-trial detention has the right to appeal the judge's decision. He has the right to be tried within a reasonable period of time or to be released on bail pursuant to law.

- *Albania 1998, Article 28.3*

A detainee may be released on bail to defend himself.

- *Croatia 2001, Article 25*

Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.

- *Ethiopia 1994, Article 19.6*

No one may be committed to jail, even by a bill of indictment, nor detailed therein, if he furnished sufficient bail in accordance with the Law.

- *Honduras 1991, Article 93*

The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of and proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

- *Pakistan 2002, Article 203DD.1*

Preventive custody is of an exceptional nature and shall not be ordered or maintained where it can be replaced by bail or some other more favorable measure available under the law.

- *Portugal 2004, Article 28.2*

Where a person is arrested in respect of a criminal offence—

(a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable;

- *Uganda 1995, Article 23.6a*

5.2. Prohibition of Excessive Bail

When a person is arrested, excessive bail shall not be required in those cases where bail is being granted.

- *Antigua and Barbuda 1981, Article 5.4*

Excessive bail shall not be required, nor excessive fines imposed, nor excessive punishments inflicted. Nor shall the legislature make law impairing the obligation of contracts; nor any law rendering any act punishable in any manner in which it was not punishable when it was committed.

- *Liberia 1955, Article 1.10*

No one will be forced to pay taxes or to provide personal services that had not been previously and expressly established by law. No one will be forced to post excessive bail bonds or to pay outrageous fines.

- *Paraguay 1992, Article 44*

Excessive bail will not be required nor excessive fines imposed.

- *Paraguay 1940, Article 29*

Release on bail is a right in cases prescribed by law and the sum demanded for release on bail shall not be excessive.

- *Sudan 1973, Article 67*

An application for a bail of the alleged offender or the accused in a criminal case must be accepted for consideration without delay, and an excessive bail shall not be demanded. The refusal of a bail must be based upon the grounds specifically provided by law, and the alleged offender or the accused must be informed of such grounds without delay.

- *Thailand 1997, Article 239*

Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.

- *United States 1992, Article 8*

5.3. Prohibition of Bail for Certain Offenses or Bail Can Be Denied

Release on bail shall apply unless the judge considers the detention or preventive imprisonment necessary for the preliminary investigation or the security of the victim or of the society. The law shall establish the requirements and precedents for obtaining such release; The resolution granting bail to those processed for crimes referred to in Article 9 must always arise in consultation. This and the appeal of the resolution pronounced on the release shall be made known to the corresponding Superior Court integrated exclusively by learned members. The resolution approving or granting bail shall require unanimous consent. While on bail, the defendant shall always be subject to the supervisory measures that the law deems fit;

- *Chile 2001, Article 7.e*

All accused persons shall be bailable upon their personal recognizance or by sufficient sureties, depending upon the gravity of the charge, unless charged for capital offenses or grave offenses as defined by law.

- *Liberia 1986, Article 21.d.i*

The accused:

He [or she] shall be provisionally freed on demand and immediately upon furnishing bail as determined by the judge except for crimes which, because of their gravity, the law expressly prohibits this benefit. In the case of non-serious crimes, upon request from the Public Ministry, the judge may deny bail in instances where the accused has been previously found guilty of a serious crime as classified by law. The judge may also deny bail when the Public Ministry introduces elements establishing that the accused represents, as evidenced by his or her previous conduct or by the circumstances and characteristics of the crime committed, a risk to the victim or to society in general.

The amount and form of bail shall be attainable by the accused. The judicial authority may modify the amount of bail in certain circumstances determined by law. In order to determine the form and the amount of bail, the judge must take into consideration the nature, means, and circumstances of the crime, the characteristics of the accused, and the probability that the accused will comply with his or her procedural obligations, the damages and injuries caused to the victim, as well as the financial penalty which may be imposed to the accused.

The serious cases for which the judge may deny bail shall be determined by law;

- *Mexico 2003. Article 20.a.1*

All persons, except those charged with capital offenses when evidence of guilt is strong shall, before conviction, be bailable by sufficient sureties. Excessive bail shall not be required.

- *Philippines 1973, Article 4.18*

5.4. Bail Cannot Be Denied Without Just Cause

Any person charged with an offence has the right

...

(e) not to be denied reasonable bail without just cause;

- *Canada 1999. Article 11.e*

Without prejudice to subsection (1), but subject to this Chapter and to section 54,

Parliament may not—

...

(f) deprive a person charged with a criminal offence of the right—

- ...
- (iii) to reasonable bail without just cause;
- *Trinidad and Tobago 2000*

5.5. Details Left to Non-Constitutional Law

No one shall be arrested except in the act of committing a crime or by written order issued by a competent authority. The law shall make provision regarding the furnishing of bond. The arrest or detention of any person shall be immediately communicated to the competent judge, who, if it should not be legal, shall release such person.

- *Brazil 1967, Article 150.12*

Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the court including

- ...
- (g) rules as to the granting of bail;
- *India 1992, Article 145.1.g*

6. APPENDIX

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

[EVIDENCE] – Does the constitution provide for the right/possibility of pre-trial release?

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

Instructions: Pre-trial release includes provisions on bail. If "excessive bail is prohibited," or "bail can be refused for certain offences," or "bail cannot be denied without just cause" please code YES and comment on the provision.

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.