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OPTION REPORTS

COLLECTION OF EVIDENCE

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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 rules governing the collection of evidence to be used in criminal trials are essential for ensuring the fairness of the justice system. We describe below the range of constitutional provisions for the collection of evidence.

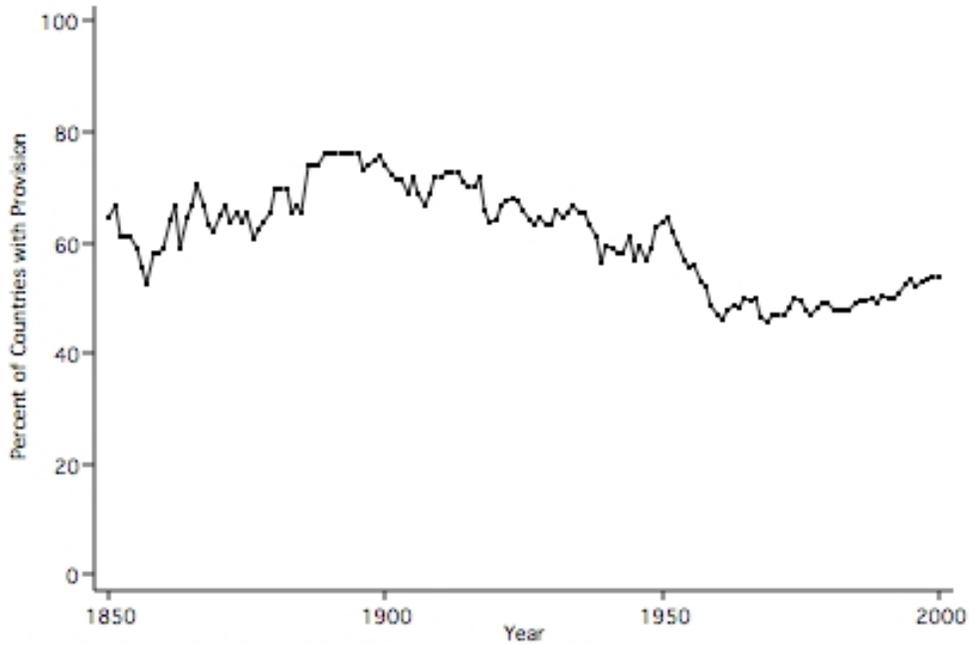
2. DATA SOURCE

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

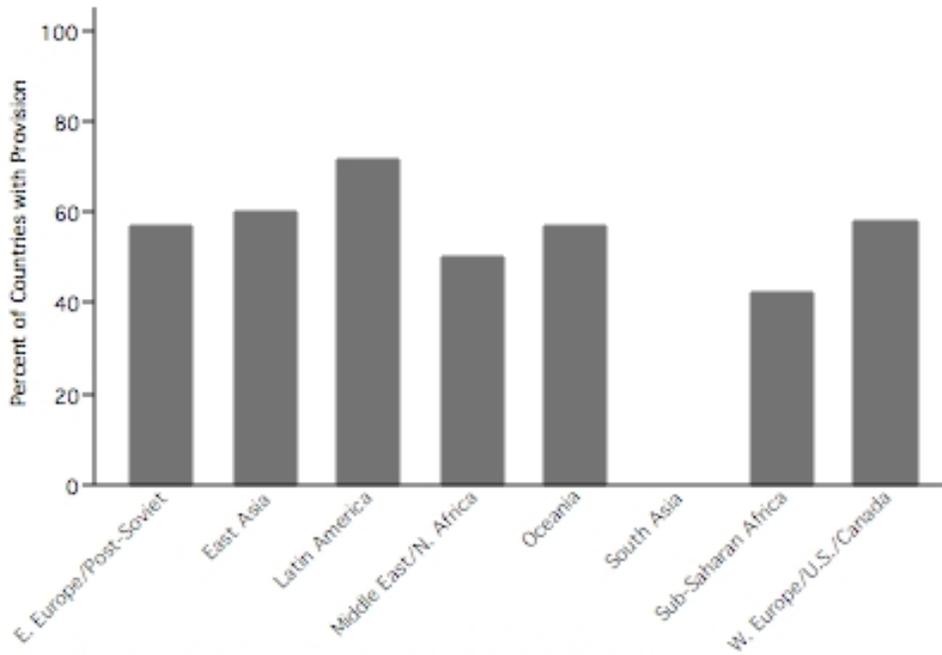
Overall, 54% of constitutions in the sample have provided for collection of evidence. As Figure 1 suggests, incorporation of collection of evidence in constitutional texts has declined gradually throughout the 20th century and regained popularity in the 1980s. Figure 2 shows the percent of constitutions in force as of 2000, by region, that contain an explicit declaration regarding the collection of evidence. These provisions are most common in Latin America, East Asia, and Western Europe, and least common the Middle East and Sub-Saharan Africa.

Figure 1. Percent of Constitutions That Provide for Collection of Evidence by Year (N=550)



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

Figure 2. Percent of Constitutions That Provide for Collection of Evidence in 2000 by Region (N=191)



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

4. NOTES ON ATYPICAL CASES

Constitutional texts contain two main types of provisions regarding the collection of evidence: (1) requirements that entries and searches of residences can take place only with permission or based on a court order, and (2) exclusion of unlawfully obtained evidence from court proceedings. Additionally, a limited number of constitutions stipulate that the “domicile is inviolable” or leave the collection of evidence to be non-constitutional law. These are considered “other” in the coding of the question listed in the Appendix.

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. Entries and Searches
2. Exclusion of Unlawfully Obtained Evidence
 - a. No one may be forced to confess or give evidence against himself or a relative
 - b. Use of illegally obtained evidence is prohibited
 - c. Exclusion of statements or confession obtained by torture, coercion or physical or mental harm or in the absence of a lawyer
 - d. Exclusion of evidence obtained by violating the law
 - e. Searches can be made only with a court order

5.1. Entries and Searches

The residence is inviolable, as are letters and private papers; and a law shall determine in what cases and for what reasons their search and seizure shall be allowed.

- *Argentina 1994, Article 18*

A person’s place of residence is inviolable; no entry into a private home may be made except in those cases established by law and in the manner it prescribes.

- *Belgium 2005, Article 15*

Except in accordance with law, no private houses of the people shall be

subject to forcible entry, search or sealing.

- *China 1931, Article 10*

Except with his own consent, no person shall be subjected to the search of his person or his property or the, entry by others on his premises.

- *Fiji 1990, Article 10*

Domiciliary visits and seizure of papers shall not be made except by virtue of law and in the manner and form provided by it.

- *Haiti 1889, Article 16*

Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

- *Japan 1889, Article 25*

The domicile is inviolable. It cannot be searched except by an order of a judge or by other authorities designated by the law. Searches can only be executed in the forms specified by them. Measures affecting the inviolability of the domicile or restricting it can only be taken to ward off a collective danger or to protect persons in danger of death. These measures may equally be taken, in application of the law, to protect the public order against imminent threats, especially to fight against the risks of epidemic or to protect youth in danger.

- *Senegal 2001, Article 16*

The domicile is inviolable. Entry and search are forbidden except in the cases and manner prescribed by law.

- *Syria 1964, Article 12*

The dwelling of a person is inviolable.

The right of a person to peaceful habitation and possession of his dwelling is guaranteed. Entry into his dwelling without his consent or a search thereof may not be made except by virtue of the power provided by law.

- *Thailand 1952, Article 30*

The papers of private individuals, their correspondence, whether

epistolary, telegraphic, or of any other nature, are inviolable, and they may never be searched, examined, or intercepted except in conformity with laws which may be enacted for reasons of public interest.

- *Uruguay 1952, Article 28*

5.2. Exclusion of Unlawfully Obtained Evidence

5.2.a. No one may be forced to confess or give evidence against himself or a relative

Everyone whose liberty has been taken away has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as the accusation made against him. The person whose liberty has been taken away shall be informed that he has no obligation to make a declaration and has the right to communicate immediately with a lawyer, and he shall also be given the possibility to realize his rights.

- *Albania 1998, Article 28.1*

No person shall be compelled to be a witness against oneself, members of one's family or next of kin. Evidence obtained in violation of the law shall have no legal force.

- *Belarus 2004, Article 27*

Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

- *Ethiopia 1994, Article 19.5*

No person charged with a criminal offence shall be compelled to give evidence at the trial.

- *Gambia 1996, Article 24.8*

No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

- *Kenya 1997, Article 77.7*

1. No one is obligated to give evidence against himself or herself, for his or her spouse and close relatives, the range of which is established by federal law.

2. The federal law may specify other exemptions from the obligation to give evidence.

- *Russia 1993, Article 51*

No one may be forced to testify against himself or his close relatives. Evidence obtained as a result of psychological pressure or use of violence as well as by other unlawful methods is recognized as having no juridical force.

- *Turkmenistan 2003, Article 42*

No person can be obligated to confess guilt or declare against himself, his spouse, consort or relation within the fourth grade of consanguinity and second of affinity.

The confession will only be valid if it is made without coercion of any nature.

- *Venezuela 1999, Article 49.5*

5.2.b. Use of illegally obtained evidence is prohibited

Evidence obtained in violation of due process is null and void by right.

- *Colombia 2005, Article 29*

Evidence obtained by illegal means shall have no juridical force. No person may be sentenced on the basis of his own admission of guilt;

- *Kazakhstan 1998, Article 77.9*

5.2.c. Exclusion of statements or confession obtained by torture, coercion or physical or mental harm or in the absence of a lawyer

(1) Any statement, testimony, or confession obtained from an accused or of another person by means of compulsion, are invalid.

(2) Confession to a crime is: a voluntary confession before an authorized court by an accused in a sound state of mind.

- *Afghanistan 2004, Article 30*

Any statement or confession shall be null and void if it is proved to have been made under duress or enticement or degrading treatment or threat thereof.

- *Bahrain 1973, Article 19.d*

Evidence obtained through torture, mistreatment, coercion, intimidation, deceit, or the violation of the fundamental rights and guarantees of a person, or resulting from information gathered in an illicit procedure or method, shall have no legal consequence.

- *Bolivia 2002, Article 12.2*

All forms of torture for the purpose of extracting confession or acquiring information are forbidden. Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence. Violation of this article is liable to punishment in accordance with the law.

- *Iran 1989, Article 38*

All forms of torture, mental or physical, and inhuman treatment are forbidden. There is no recognition of any confession extracted by force or threats or torture, and the injured party may seek compensation for any physical or mental injury that is inflicted.

- *Iraq 2005, Article 35.c*

In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt nor shall a defendant be punished by reason of such a confession.

- *Korea 1987, Article 12.7*

Any admission or other statements made by the accused in the absence of counsel shall be inadmissible as evidence in a court of law.

- *Liberia 1986. Article 21.c*

Evidence is of no effect if it is obtained by torture, force, infringement of the physical or moral integrity of the individual, or abusive interference with private life, the home, correspondence or telecommunications.

- *Portugal 2004, Article 32.8*

5.2.d. Exclusion of evidence obtained by violating the law

Evidence obtained by violating the law cannot be used when administering justice.

- *Azerbaijan 2002, Article 63.4*

Evidence obtained through unlawful means is inadmissible in proceedings;

- *Brazil 2005, Article 5.56*

Evidence obtained or collected in violation of the Constitution or the law does not have any validity.

- *Ecuador 1998, Article 24.14*

Every person has the right to the inviolability and secrecy of correspondence, especially mail, telegrams and telephone, except by judicial order.

Books and papers of merchants and their personal documents shall be subject only to inspection and supervision by the competent authority, in accordance with the Law.

The correspondence, books, papers and documents referred to in this article, that are violated or seized, shall not serve as evidence in a trial. In any case, the secrecy of strictly private matters which have no bearing on the matter of the action taken shall be maintained.

- *Honduras 1991, Article 100*

Every search warrant, which can be issued only by a competent judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be detained, and the objects sought, and the proceedings shall be limited thereto. At the conclusion of the search warrant, a detailed statement shall be drawn up in the presence of two witnesses designated by the occupant of the place searched or, in his or her absence or refusal, by the official making the search.

Private communications are inviolable. The law shall criminally sanction any act that threatens the liberty and privacy of thereof. Only the federal judicial authority, upon petition by the federal official empowered by the law or the head of the Public Ministry of the corresponding federative entity, may authorize the interception of any private communication. To that effect, the proper authority must first establish and justify in writing

the legal causes motivating the request and also indicate the type of interception, its subjects, and its duration. The federal judicial authority cannot authorize these interceptions when the communications involve electoral, fiscal, trade, civil, labor, or administrative matters, or in the case of private communications between a detained person and defender. Authorized interceptions must conform to the requirements and limits specified in the laws. The product of any interceptions that do not comply with these requirements will lack all evidentiary value.

Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with; and may demand to be shown the books and documents required to prove compliance with fiscal regulations, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for searches.

Sealed correspondence sent through the mail is exempt from search, and any violation of this shall be punishable under the law.

- *Mexico 2003, Article 16*

(1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

- *Philippines 1986, Article 3.3.2*

14. Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

35.5 Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

- *South Africa 2003, Article 14; 35.5*

Dispensing Justice in the National Capital

Without prejudice to the competence of any national institution to promulgate laws, judges and law enforcement agencies shall, in dispensing justice and enforcing law in the National Capital, be guided by the following:—

...

(c) personal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in the court of law,

- *Sudan 2005, Article 156.c*

5.2.e. Searches can be made only with a court order

A search of the house, that is the searching of the apartment or other premises belonging to the household may, as a rule, only be carried out on the basis of a court order with reasons attached. The order has to be served on the person concerned within 24 hours at the latest.

- *Austria 1934, Article 22*

In the case of provisional apprehensions, searches and attachments during preliminary proceedings the sanction of the judge is to be obtained without delay.

- *German Democratic Republic 1960, Article 136*

238. In a criminal case, a search in a private place shall not be made except where an order or a warrant of the Court is obtained or there is a reasonable ground to search without an order or a warrant of the Court as provided by law.

243. A person has the right not to make a statement incriminating himself or herself which may result in criminal prosecution being taken against him or her.

Any statement of a person obtained from inducement, a promise, threat, deceit, torture, physical force, or any other unlawful act shall be inadmissible in evidence.

- *Thailand 1997, Article 238*

6. APPENDIX

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

[EVIDENCE] – Does the constitution regulate the collection of evidence?

1. Yes
2. No

96. other, please specify in the comments section

97. Unable to Determine

Instructions: This might include regulation of search and seizure as well as other evidence collection procedures. Please note in the comments section if there are any provisions for exclusion of evidence from court

proceedings, along with the type of evidence to be excluded (E.g.: exclusion of involuntary confessions). If the text specifies only that the domicile is inviolable (with no additional details regarding entry and searches) please code OTHER and make comment. If collection of evidence is left to non-constitutional law, please code OTHER and make comment.

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.