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OPTION REPORTS

LEVELS OF GOVERNMENT AND LEGAL SUPREMACY

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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.

1. INTRODUCTION

Most constitutions that provide for sub-national legislatures encounter at least the possibility of conflict in jurisdiction between such bodies and those of the national government. A reasonably high proportion of constitutions approach this problem directly by granting supremacy of law to the national government.

2. DATA SOURCE(S)

The analysis reported below is based on data the Comparative Constitutions Project (please see the appendix to view the survey question text). As of this writing, the project's sample includes 569 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

Roughly one quarter of the 569 constitutions in our sample contain clauses suggesting that the laws of the national government are superior to those of subnational governments in the case of conflict. As Figure 1 shows, the percentage of constitutions with such laws has been as high as 40%. In 2000, 23% of constitutions had such national-supremacy provisions.

Figure 1. Percent of Constitutions that provide for National Supremacy, by year (N=569)

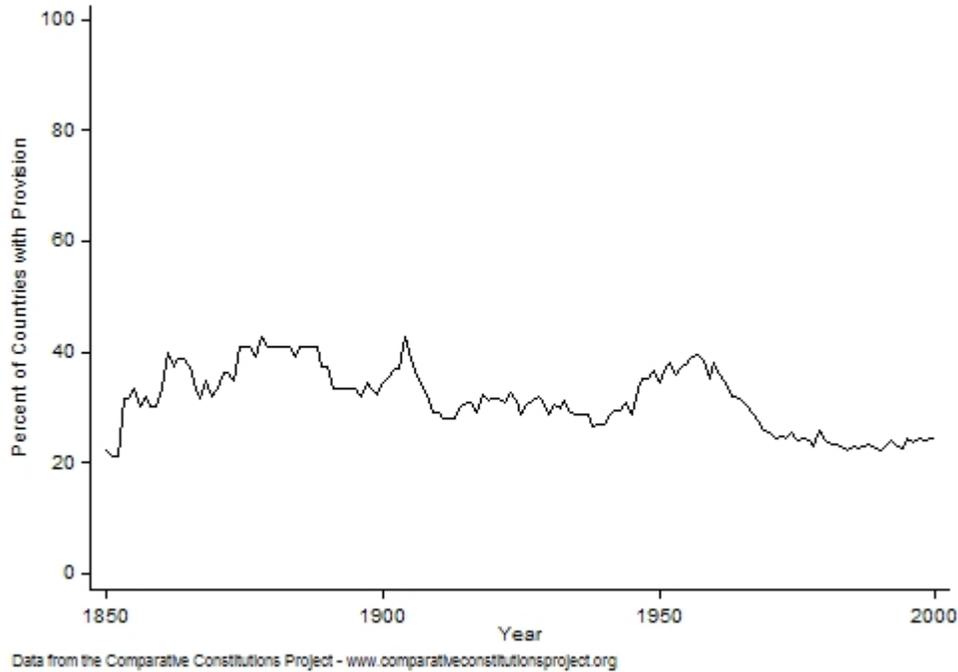
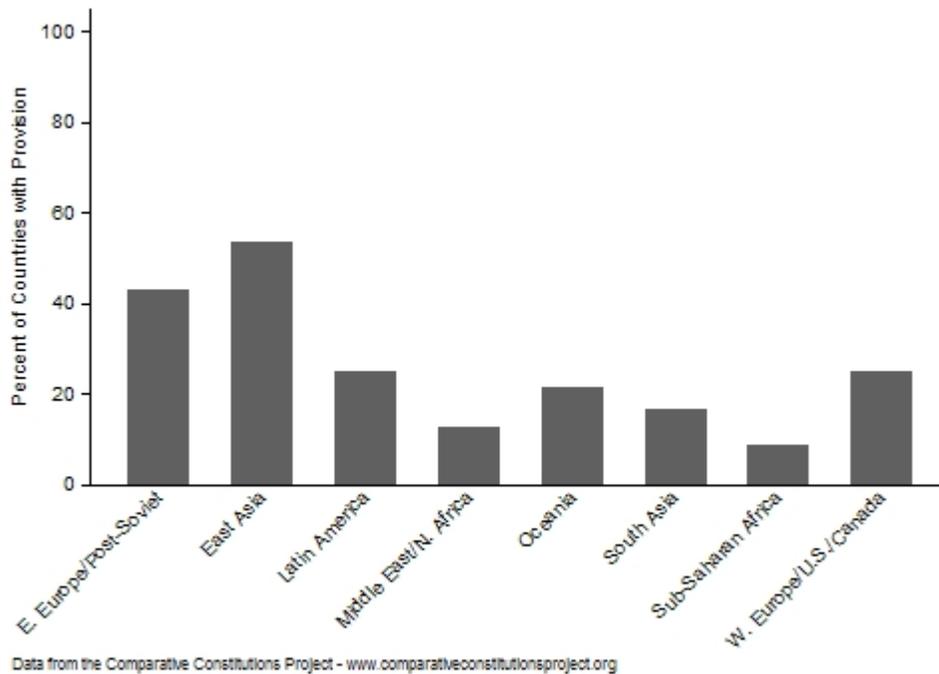


Figure 2. Percent of Constitutions in Force in 2000 that provide for National Supremacy, by region (N=181)



As Figure 2 shows, national supremacy provisions are most common in East Asian and post-Soviet constitutions, where roughly 50% and 40%, respectively, of the regions' constitutions have such provisions. The provision is considerably less common in constitutions of other regions and especially rare in Sub-Saharan Africa and Middle East.

4. NOTES ON ATYPICAL CASES

In the current sample there are several instances in which supremacy depends on the topic (see sample provisions).

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. Laws of the Federal or National Government are Superior
2. Supremacy Varies by Topic

5.1. Laws of the federal or national government are superior

Article 116. Provincial rules and regulations that contravene national laws shall be null and void.

Article 117. In case of doubt as to whether any provincial rule or regulation contravenes national laws, the matter shall be settled by interpretation of the Judicial Yuan.

- *Taiwan 2005. Article 116 and 117*

The King has the right of annulling such Acts of the Administrators of Department, as are contrary to the law, or the orders transmitted to them.

He may, in case of obstinate disobedience, or of their endangering, by their acts, the safety or peace of the public, suspend them from their functions,

- *France 1791, ART. 3.4.2.5*

Each state shall be governed by the constitution and laws which it may adopt, the constitutional principles of the union being respected.

- *Brazil 1891, Article 63*

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

- *Canada 2001, Article 92A*

The Government sees that organs of local autonomy fulfill their duties, and that their activities are not contrary to the laws of the State.

- *Lithuania 1928, Article 73*

Federal law takes precedence over Land law.

- *German Federal Republic 2002, Article 31*

Laws and other regulatory legal acts of the subjects of the Russian Federation cannot contradict federal laws adopted in accordance with parts 1 and 2 of this Article. In the event of a contradiction between a federal law and any other act issued in the Russian Federation, the federal law shall apply.

- *Russian Federation 1993, Article 76.5*

Legislation issued by the federal legislative authority shall supersede any other legislation issued by any other legislative authority in the event that they contradict each other...

- *Iraq 2004, Article 26.B*

On the matters falling within the concurring competence of the Central Authority and the Provinces, any provincial law which is incompatible with the national laws or decrees of implementation is automatically void or abolished, to the extent that an incompatibility exists.

National legislation takes precedence over provincial legislation.

- *Congo, Democratic Republic of 2005, Article 205*

5.2. Supremacy varies by topic

Legislative power is exercised by the State and the Regions with respect to the Constitution, except for the limitations derived from the communitarian order and the international obligations.

The State has exclusive legislative power with respect to the following matters:

Matters of concurrent legislation are those relative to: international relations and relations with the European Union, relations of the Regions; In matters of concurrent legislation, the legislative power belongs to the Regions except that the determination of fundamental principles which are reserved to the legislation of the State. The Regions have the legislative power with respect to any matter not expressly reserved to the legislation of the State.

- *Italy 2003, Article 117*

Conflicts between national and provincial legislation.-

(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

- *South Africa 2003, Article 146*

The exclusive legislative and executive powers of the national level of government shall be as follows:—

...

The exclusive legislative and executive powers of Government of Southern Sudan shall be as follows:—

...

The exclusive executive and legislative powers of a state of the Sudan shall be as follows:—

...

The National Government, the Government of Southern Sudan and state governments, shall have legislative and executive competencies on any of the matters listed below:—

...

If there is a contradiction between the provisions of Southern Sudan law and/or a state law and/or a National law, on the matters referred in Schedule D, the law of the level of government which shall prevail shall be that which most effectively deals with the subject matter of the law, having regard to:—

- (1) The need to recognize the sovereignty of the Nation while accommodating the autonomy of Southern Sudan or of the states;
- (2) Whether there is a need for National or Southern Sudan norms and standards;
- (3) The principle of subsidiarity;
- (4) The need to promote the welfare of the people and to protect each person's human rights and fundamental freedoms.

- *Sudan 2005, Schedule a, b, c, d, e*

6. APPENDIX

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

[FEDSEP] Which level of government has superior legal status in the case of conflict?

1. Laws of the federal or national government are superior
2. Laws of sub national government are superior
3. Depends on topic
96. other, please specify in the comments section
97. Unable to Determine
98. Not Specified

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.