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OPTION REPORTS

HABEAS CORPUS/FREEDOM FROM ARBITRARY DETENTION

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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

Habeas corpus is the name of a legal action, known as a writ in the common law, through which a person can seek relief from unlawful detention of himself or another person. The writ of habeas corpus has historically been an important instrument for the safeguarding of individual freedom against arbitrary state action. It originally referred to judicial supervision of detention by the executive. We describe below the range of constitutional provisions for the writ of habeas corpus, as well as freedoms from arbitrary detention. We include provisions that stipulate that (1) no one may be arbitrarily detained; (2) those arrested must be informed of the accusations against him/her and be presented to a court in a specific timeframe; and (3) arrests can be made only based on a warrant or court order.

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, 61% of constitutions in the sample have provided for some sort of protection from arbitrary detention. As Figure 1 suggests, such protections have been widespread over time and increased in popularity after World War II. In 2000, over 75% of constitutions in force included some such provision. As Figure 2 suggests, provisions regarding habeas corpus are most common in Eastern Europe, Western Europe, and least common in the Middle East, East Asia, and Oceania.

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

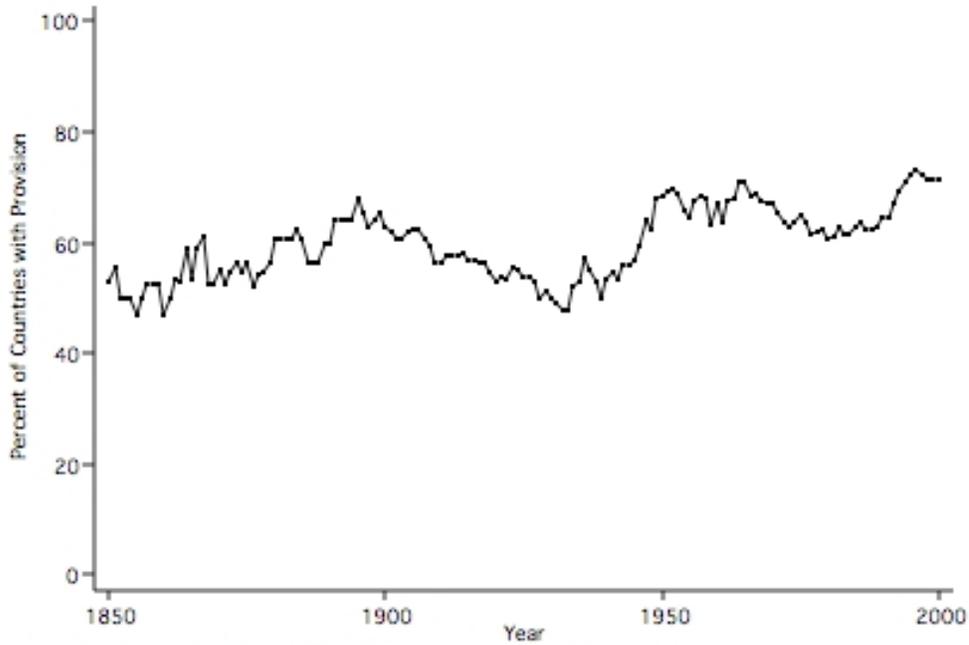
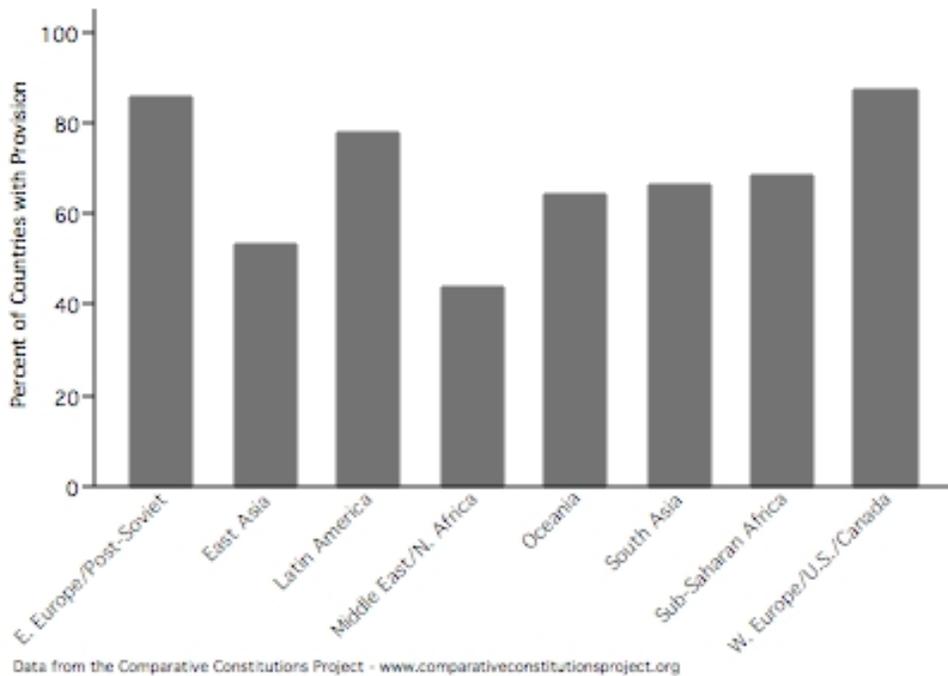


Figure 2. Percent of Constitutions That Provide for Right to Pre-Trial Release in 2000 by Region (N=191)



4. NOTES ON ATYPICAL CASES

A number of constitutional texts specify that “no individual shall be seized or arrested under any other circumstance or manner than that provided by law.” We have coded such cases as “other” in the data underlying this report (see 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. Writ of Habeas Corpus is Recognized
2. Absolute Prohibition on Suspension of Habeas Corpus
3. Qualified Prohibition on Suspension of Habeas Corpus
4. Habeas Corpus Will Be Regulated by Law
5. Protection from Unjustified Restraint

5.1. Writ of Habeas Corpus is Recognized

When the harmed, restricted, altered, or threatened right is that of physical liberty, or in case of illegal worsening in the manner or conditions of detention, or in case of the forced disappearance of persons, the writ of habeas corpus may be filed by the affected person or by anyone else on his behalf and the judge shall immediately resolve it, even while a state of siege is in effect.

- *Argentina 1994, Article 43*

Habeas corpus shall be granted whenever a person suffers or is threatened with suffering violence or coercion in his freedom of movement through illegality or abuse of power

- *Brazil 2005, Article 5.68*

Anyone who is arrested or imprisoned outside the cases or without the formalities and guarantees specified by the Fundamental Law and the laws shall be set free, on his own petition or that of any other person, without the necessity of a power of attorney or the services of a lawyer, by means of summary *habeas corpus* proceedings before the regular courts.

The court cannot decline its jurisdiction or consider questions of competency in any case or for any reason, or defer its decision, which shall have priority over any other matter.

Presentation, before the court which issued the writ of *habeas corpus*, of every arrested or imprisoned person, regardless of the authority, or official, person, or entity holding him, is absolutely compulsory, and no allegation of due obedience can be made.

All provisions that impede or retard the presentation of the person deprived of liberty, as well as those causing any delay in the *habeas corpus* proceedings, shall be null and void and the judicial authority shall so declare on its own initiative.

If the arrested or imprisoned person is not presented before the court hearing the *habeas corpus* proceedings, that court shall order the arrest of the violator, who shall be judged according to law.

Judges or magistrates who refuse to admit an application for a writ of *habeas corpus* or who do not comply with the other provisions of this article, shall be removed from their offices by the Government Section of the Supreme Court.

- *Cuba 1962, Article 29*

Persons have the right to *habeas corpus* when any individual or authority illegally or arbitrarily restricts their liberty. *Habeas corpus* shall also proceed when any authority attacks the dignity or physical, mental or moral integrity of detained persons.

- *El Salvador 2003, Article 11*

(1) Every person who is arrested or detained has the right:

(a) to be informed promptly in a language that he or she understands of the reason for his or her arrest or detention and of the nature of any charge that may be brought;

(b) to be promptly released if not charged;

(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;

(d) to be given the opportunity to communicate with, and to be visited by:

(i) his or her spouse, partner or next-of-kin; and

(ii) a religious counsellor or social worker;

(e) to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful; and

(f) to be treated with humanity and with respect for his or her inherent dignity.

(2) The authorities holding a person who has been arrested or detained must promptly take all reasonable steps to inform his or her spouse, partner or next-of-kin of his or her arrest or detention.

(3) Every person who is arrested for a suspected offence has the right:

(a) to be informed promptly in a language that he or she understands that he or she has the right to refrain from making a statement;

(b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter; and

(c) to be released from detention on reasonable terms and conditions pending trial, unless the interests of justice otherwise require.

- *Fiji 1998, Article 27*

Whoever finds himself illegally imprisoned, detained, or restrained in any other way in the enjoyment of his individual freedom, who is threatened with the loss of same, or suffers ill-treatment, even when his imprisonment or detention is based on the law, has the right to petition for an immediate hearing before the tribunals of justice for the purpose of retrieving his liberty, guaranteeing him his release, bringing his ill-treatment to an end, or terminating the constraint to which he has been subjected.

Should the tribunal decree the freeing of the person illegally confined, the latter will be released at the same hearing and place.

When it is so petitioned or the judge or tribunal deems it pertinent, the requested habeas corpus will occur at the location where the detained person is being held, without previous warning [*avis*] or notification.

The habeas corpus of the detainee in whose favor it may have been requested is unavoidable [*es ineludible*].

- *Guatemala 1993, Article 263*

The State recognizes the writ of Habeas Corpus or Personal Appearance [*Exhibición Personal*]. Consequently, every aggrieved person, or any other in his behalf, has the right to file the petition:

1. When he is imprisoned or detained illegally or restrained in any way in the enjoyment of his personal freedom; and

2. When during his lawful imprisonment or detention, the imprisoned or detained person is subjected to torment, torture, harassment, illegal demands, or any other coercion, restriction, or molestation that is unnecessary for his safety or for the order of the prison.

An action of Habeas Corpus may be exercised without any special power or any formality, either orally or in writing, using any means of

communication, at any time during working or non-working days and free of charge.

Judges or other authorities may not dismiss an action of Habeas Corpus and have the ineludible obligation of proceeding immediately to put an end to the violation of personal liberty or security.

The Tribunals that fail to admit these actions shall incur the corresponding penal and administrative responsibility.

The authorities who order, or agents who execute, the concealment of the detained person, or who in any other way violate this guarantee, shall incur the crime of illegal detention.

- *Honduras 1991, Article 182.1*

1. In the case of unlawful imprisonment or detention, the citizen shall have the right to interpose a writ of *habeas corpus*.

2. The writ of *habeas corpus* shall be interposed before a court, which shall decide on the matter within a period not longer than eight days.

- *Mozambique 2004, Article 66*

The writ of *habeas corpus* may be used by anyone whose liberty, physical integrity or security is being violated or is in danger of being violated.

- *Nicaragua 2005, Article 189*

About Habeas Corpus

This guarantee can be petitioned by the affected party using any tangible means, either personally or through another person, without the need for a power of attorney and before any court of first instance within the respective judicial district.

Habeas corpus may be:

1) Preventive: Whereby any person facing the imminent danger of being illegally deprived of his freedom may request the court to examine the legitimacy of the circumstances that, in his opinion, are threatening his freedom; he may also request the court to halt these restrictions.

2) Restorative: Whereby any person who has been illegally deprived of his freedom may request that the circumstances of the case be corrected.

The judge will order that the detainee be brought before him, as well as a report by the public or private agent who made the detention, within 24 hours of the filing of the habeas corpus petition. If the affected agent failed to comply with the court order, the judge will report to the petitioner's place of detention and, after evaluating the merits of the case, order the release of the petitioner as if he had been brought before the judge and the report had been filed. If there is no legal cause for the deprivation of freedom, the judge will order the petitioner's immediate

release; if there is a written order by a court authority, he will refer the case files to the judge who ordered the detention.

3) Generic: Whereby anyone may demand the correction of circumstances that, despite not falling within the above categories, may restrict freedom or threaten personal security. Similarly, this guarantee may also be applied to cases of physical, psychological, or moral abuse against individuals who have been legally deprived of their freedom. The law will regulate the various types of habeas corpus, which will be applicable even in a state of exception. Habeas corpus proceedings will be brief, summary, and free of charge. A judge may ex-officio begin these proceedings.

- *Paraguay 1992, Article 133.2*

1. The remedy of *habeas corpus* against any wrongful use of power in the form of unlawful arrest or detention shall be available before the competent court.

2. An application for *habeas corpus* may be made by the detainee or by any citizen in the exercise of his or her political rights.

3. The court shall rule on the application for *habeas corpus* within eight days at a hearing in the presence of both parties.

- *Portugal 2004, Article 31*

1. No one can be denied the right to having his or her case reviewed by the court and the judge under whose jurisdiction the given case falls according to law.

2. Anyone charged with a crime has the right to have his or her case reviewed by a court of law with the participation of jurors in cases specified by federal law.

- *Russia 1993, Article 47*

(1) Everyone who is arrested for allegedly committing an offence has the right—

...

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire

outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of

the reason for the detention to continue, or to be released; and
 (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

(a) to be informed promptly of the reason for being detained;

...

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

- *South Africa 2003, Article 35.1.d-f; 35.2.a; 35.2.d*

1. Every person has the right to liberty and security. No one may be deprived of his liberty without observance of the provisions of this article and only in the cases and in the form prescribed by law.

2. Preventive arrest may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours, the person detained must be freed or placed at the disposal of the judicial authority.

3. Every person arrested must be informed immediately, and in a way that is understandable to him, about his rights and the reasons for his arrest, and he may not be forced to make a statement. The assistance of an attorney to the arrested is guaranteed during police and judicial proceedings under the terms established by law.

4. The law will regulate a process of “habeas corpus” so that any person who is illegally arrested may be immediately placed at the disposal of the judiciary. The maximum period of provisional imprisonment shall also be determined by law.

- *Spain 1992, Article 17*

5.2. Absolute Restriction on Suspension of Habeas Corpus

The writ of habeas corpus is hereby recognized and may not be suspended.

- *Palau 1992, Article 4.7*

The following are constitutional guarantees:

1. The Action of *Habeas Corpus* which may be filed against the commission or omission by any authority, functionary, or person of an act that injures or threatens individual liberty or related constitutional rights.

...

6. The exercise of the actions of *Habeas Corpus* and *Amparo* is not suspended during the emergency situations to which Article 137 of the Constitution refers.

- *Peru 2005, Article 200.6*

The right to an order of *habeas corpus* shall be inviolable and shall not be suspended.

- *Uganda 1995, Article 23.9*

5.3. Qualified Restriction on Suspension of Habeas Corpus

That all prisoners shall be bailable by sufficient sureties: unless for capital offences, when the proof is evident, or presumption great: and the privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Republic, in the most free, easy, cheap, expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.

- *Liberia 1955, Article 1.20*

Excessive bail may not be required, excessive fines imposed, or cruel and unusual punishments inflicted. The writ of habeas corpus may not be suspended unless required for public safety in cases of rebellion or invasion.

- *Micronesia 1990, Article 4.8*

The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion when the public safety requires it.

- *Philippines 1986, Article 3.15*

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

- *United States of America 1992, Article 1.9.2*

5.4. Habeas Corpus Will Be Regulated By Law

1. To prevent any abuse of power through imprisonment or illegal detention, a writ of *habeas corpus* may be presented to the competent legal court by the person concerned or any other citizen.

2. The right to *habeas corpus* shall be regulated by law.
 - *Angola 1992, Article 42*

5.5. Protection from Unjustified Restraint

- (1) Personal liberty is guaranteed restriction or deprivation of personal liberty by the public authorities is only allowed on a legal basis.
 (2) A. person may only be arrested on basis of a court order which has to give reasons therefor. In police matters a warrant of arrest issued by the legally competent authorities has the same validity as court order. Orders of arrest must be served on the arrested within 24 hours.
 (3) While public officials who have a right to arrest may, in the Cases provided by law, take a person into custody they must, if doing so, either release such person or deliver him (her) to the competent authorities within 48 hours. The competent authorities are those empowered to take further action in the case, according to the provisions of the law.
 - *Austria 1934, Article 19*

Apart from the case of *flagrante delicto*, no person may be arrested save on a reasoned order by a judge, which must be produced at the time of the arrest or within twenty-four (24) hours at the latest.
 - *Belgium 2005, Article 12*

The freedom of person of citizens of the People's Republic of China is inviolable.

No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ.

Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.

- *China 2004, Article 37*

Every person who is arrested shall be brought before a judge within twenty-four hours. If the prisoner cannot be released immediately, the judge shall order his imprisonment by a decision which states the reasons therefor, and which shall be rendered as soon as possible, within three days at the latest; if he may be released on bail, the judge shall determine its character and amount.

The interested party may immediately appeal from this decision to the higher court.

No one shall be detained in confinement before trial for an offense which can be punished only by a fine or simple imprisonment.

- *Denmark 1866, Article 80*

No one may be arbitrarily detained.

The judicial authority, guardian of individual liberty, ensures the observance of this principle under the conditions specified by law.

- *France 2005, Article 66*

(1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures specified therein. Persons in custody may not be subjected to mental or physical mistreatment.

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision must be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details are regulated by a law.

(3) Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge must, without delay, either issue a written arrest warrant setting forth the reasons therefore or order his release.

(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom.

- *German Federal Republic 2002, Article 104*

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

- *India 1995, Article 22.1; 22.2*

A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

- Kenya 1997, Article 72.2

The warrant for the arrest of a citizen shall be delivered to him within forty-eight hours, and the grounds for the arrest shall be indicated. An arrested person who has not received that warrant shall be released.

- *Lithuania 1938, Article 21*

No one may be disturbed in his [or her] person, family, domicile, papers, or possessions, except by virtue of a written order by a competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention may be issued against any person other than by the competent judicial authority and unless it is preceded by a charge, accusation, or complaint for a specific action determined by the law to constitute a crime for which the accused may be punished by imprisonment and there is evidence to support both the punishment and the probable guilt of the accused.

The authority that carries out a judicial order of apprehension must take the accused before a judge without delay and under the strictest responsibility. Failure to do so is punishable under criminal law...

- *Mexico 2003, Article 16*

When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall inform him and any relative or friend designated by him in writing of the grounds for his arrest or detention, and shall turn him over to a competent court for trial not later than twenty-four hours after his arrest. The arrested person or any other person may petition the competent court to serve a writ on the organ making the arrest to surrender him within twenty-four hours for trial.

- *Taiwan 2005, Article 8*

6. APPENDIX

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

[HABCORP] – Does the constitution provide for the right to protection from unjustified restraint (e.g. habeas corpus)?

1. Yes
2. No
96. other, please specify in the comments section

97. Unable to Determine

Instructions: This includes protection from arbitrary arrest, requirements of formal accusation or arrest based on a warrant or court order. If arrests can be made only in the manner prescribed by the law, please code OTHER.

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.