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OPTION REPORTS

JUDICIAL INDEPENDENCE

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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 which version was used for analysis. EXAMPLE: Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

1. INTRODUCTION

Independence of central judicial organs is an essential part of the development of democratic governance and rule of law. We describe below explicit constitutional provisions guaranteeing judicial independence.

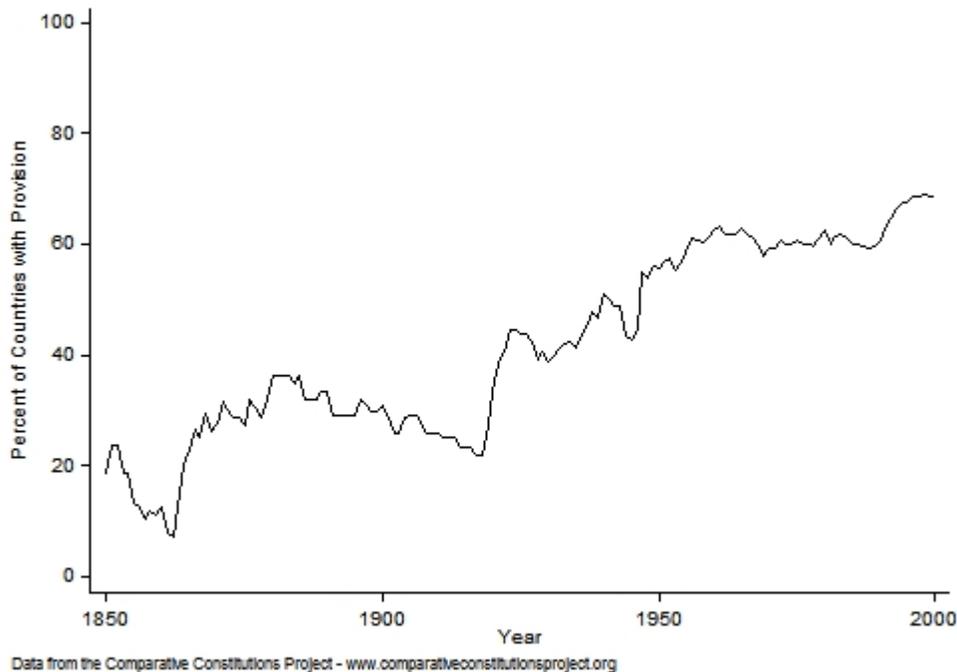
2. DATA SOURCE(S)

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

65% of current constitutions contain an explicit declaration regarding the independence of the central judicial organs. This percentage has generally increased over time.

Figure 1. Percent of Constitutions that contain an Explicit Declaration regarding the Independence of the Central Judicial Organs by Year (N=550)



As Figure 1 suggests the provision has appeared in the constitutional text as early as 1850s and in the end of the 19th century was incorporated in about 40% of constitutions. The percentage declined slightly in the beginning of the 20th century before experiencing a significant increase in the 1920s. Since then the number of constitutions granting independence to judicial organs has grown considerably reaching around 75% in 2000.

Figure 2. Percent of Constitutions that contain an Explicit Declaration regarding the Independence of the Central Judicial Organs in 2000 by Region (N=191)

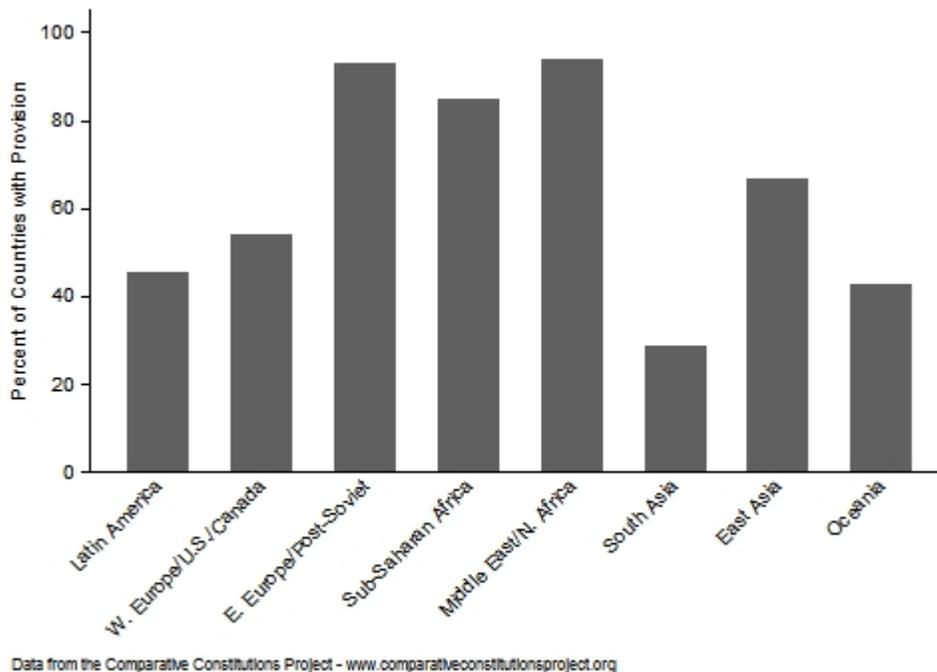


Figure 2 shows the percent of constitutions that contain an explicit declaration regarding the independence of the central judicial organs. As Figure 2 suggests the provision is very common among constitutions in force in 2000 in Eastern Europe, Sub Saharan Africa, and the Middle East. The provision is less likely to be found in constitutions in other regions, Latin America and South Asia in particular.

4. NOTES ON ATYPICAL CASES

Constitutions vary in terms of the way they declare independence of central judicial organs. Some grant it directly to the judicial branch or court i.e. “all courts are free from any interference” (Afghanistan 1931,

art. 91) while others focus on the judge i.e. “judge is independent in the trial and adjudication of the case in accordance with the law” (Thailand 1968, art. 161).

Others conceive of independence of the judicial organs as a part of the rights of the accused i.e. “the case of any person charged with a criminal offence....shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law” (Kenya 1969, art. 77). All the cases above were considered as containing an explicit declaration of judicial independence.

Statements about each power being independent of the two others in its duties (i.e. Haiti 1946, art. 36) and fiscal autonomy of the judicial branch (i.e. Philippines 1986, art. 8.3) were not considered an explicit declaration of judicial independence and thus were coded as OTHER in the CCP data (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 judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan.

- *Afghanistan 2004. Article 116*

The judiciary is an autonomous order and independent of all other powers.

- *Italy 2003. Article 104*

The judicial power is independent. It is exercised within the framework of the law.

- *Algeria 2002. Article 138*

The branches of the union are the legislative, the executive and judiciary, which are independent and harmonious with each other.

- *Brazil 2005. Article 2*

All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

- *Japan 1946. Article 76*

Federal and local laws shall establish the methods necessary to guarantee the independence of the courts and the full function of their decisions.

- *Mexico 2003. Article 17*

The President of the Republic is the guarantor of the independence of the judicial authority.

- *France 2005. Article 64*

Judges are independent and subject only to the law.

- *Germany (Prussia) 1924. Article 102*

The judicial power is independent of the executive power and of the legislative power.

- *Cote D'Ivoire 2000. Article 101*

The judges of the State are independent of the legislative and executive branches of government.

- *Fiji 1998. Article 118*

The judicial authority is independent of the legislative power and of the executive power.

- *Morocco 1996. Article 82*

Judges are independent in the trial and adjudication of cases in accordance with the Constitution and the law.

- *Thailand 1997. Article 249*

6. APPENDIX

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

[JUDIND] Does the constitution contain an explicit declaration regarding the independence of the central judicial organ(s)?

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

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.