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OPTION REPORTS

NULLA POENA SINE LEGE

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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

Nulla poena sine lege refers to the legal principle that one cannot be punished for doing something that is not prohibited by law. The principle is considered to be an essential element of the rule of law, and is accepted and upheld by penal codes in most democracies. We describe below the range of constitutional provisions for *nulla poena sine lege*.

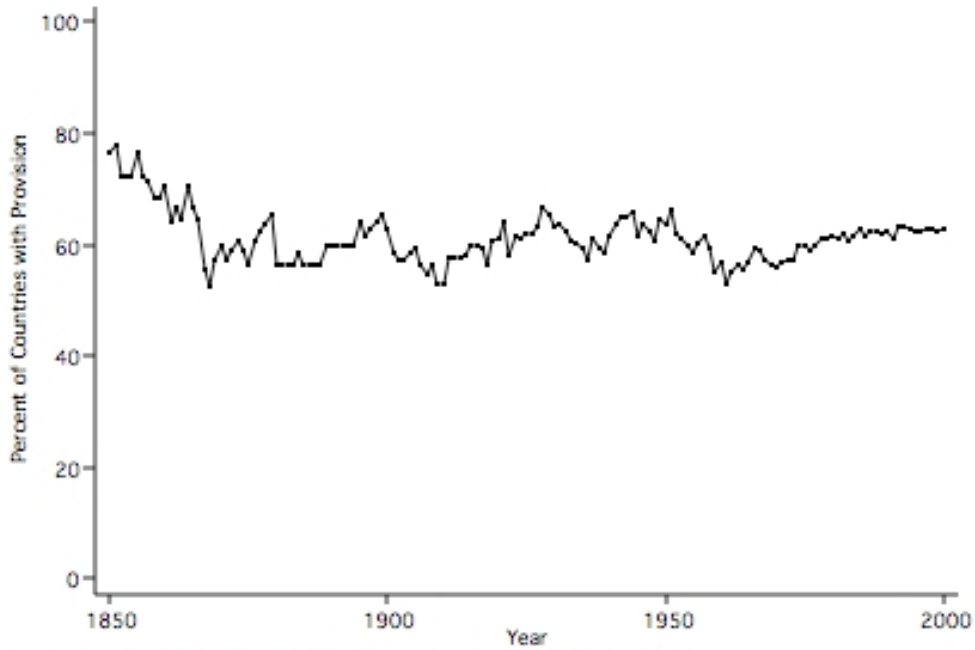
2. DATA SOURCE

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

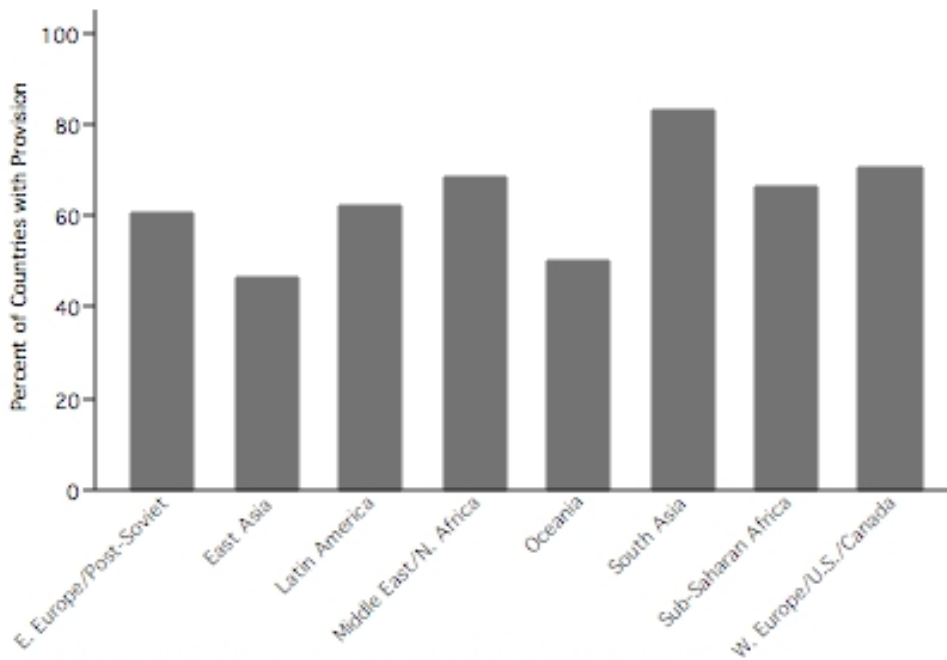
Overall, 59% of constitutions in the sample have provided for *nulla poena sine lege*. As Figure 1 suggests, incorporation of this legal principle in constitutional texts was most popular in the 1850s, when almost 80% of constitutional texts included the principle. In 2000, over 60% of constitutions in force incorporated *nulla poena sine lege*. Figure 2 shows the percent of constitutions in force in 2000 that contain an explicit declaration regarding *nulla poena sine lege*, by region. It shows that provisions regarding this legal principle are most common in South Asia, Western Europe, and the Middle East, and least common in East Asia, Oceania, and Eastern Europe.

Figure 1. Percent of Constitutions That Provide for *Nulla Poena Sine Lege* by Year (N=550)



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

Figure 2. Percent of Constitutions That Provide for *Nulla Poena Sine Lege* in 2000 by Region (N=191)



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

4. NOTES ON ATYPICAL CASES

A number of constitutional texts specify that “personal liberty shall not be restricted or interfered with except as provided by law” or that “no one shall be condemned without a trial in accordance with law and by virtue of a law promulgated before the commission of the act for which he is tried.” We have coded such cases as “other” in the data used as the basis of 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. No Act Is a Crime Unless at the Time It Was Committed the Law Specified So
2. No One Can Be Arrested, Detained, or Punished Except in Cases Determined by the Law or by Court Order

5.1. No Act Is a Crime Unless Specified by Law at the Time Committed

No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed.

- *Afghanistan 2004, Article 27*

No person may be punished for an act which is not in violation of a legal provision and which is not made subject to a legal penalty; nor may any person be punished for an act which was not subject to a legal penalty at the time when it was performed.

- *Austria 1934, Article 21*

There are no crimes unless defined in prior law, nor are there any penalties unless previously imposed by law;

- *Brazil 2005, Article 5.39*

No one can be prosecuted, arrested, detained or charged, except by virtue of a law previously promulgated to the acts of which he is accused.

- *Cote d'Ivoire 2000, Article 21*

(1) Every person charged with an offence has the right:

...

(j) not to be found guilty in respect of an act or omission unless the act or omission constituted an offence at the time it occurred, and not to be sentenced to a more severe punishment than was applicable when the offence was committed;

- *Fiji 1998, Article 28.1.j*

Penalties may be imposed only if they are specified by law at the time of the deed.

No penal law has a retroactive force.

Exceptions are measures and application of decrees aiming at the eradication of nazism, fascism and militarism or deemed necessary for the punishment of crimes against humanity.

- *German Democratic Republic 1960, Article 135*

An act may be punished only if it was defined by a law as a criminal offense before the act was committed.

- *German Federal Republic 2002, Article 103.2*

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

- *India 1995, Article 20.1*

There is no crime and no punishment except by the text (of law). And there is no punishment except for an act that the law considers a crime at the time of its commission. No punishment can be enacted that is heavier than the punishment allowed at the time of the crime's commission.

- *Iraq 2005, Article 19.2*

No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he, in any way, be placed in double jeopardy.

- *Japan 1946, Article 39*

No law shall be given retroactive effect to the detriment of any person whatsoever.

No one can be deprived of life, liberty, property, possessions or rights, except by means of a judicial proceeding before a duly created court in which the essential formalities of procedure are observed and in accordance with laws enacted prior to the act in question. No penalty may be imposed in criminal cases by mere analogy or even by preponderance of the evidence unless such penalty is pronounced in the law and is in every respect applicable to the crime in question.

The final judgment in civil cases must conform to the letter or the judicial interpretation of the law, and, in the absence of the latter, such judgment shall be based on the general principles of law.

- *Mexico 2003, Article 14*

No one may be tried and punished except for criminal offences provided for by penal laws in force at the time they were committed, provided that newly issued laws do not exclude from the category of criminal offences those committed by the culprit.

- *Russia 1905, Article 74*

Only those acts shall be punished that were declared punishable by law prior to their perpetration. None shall be judged but by a competent judge and in accordance with legal procedures

- *Spain 1931, Article 28*

No person shall be inflicted with a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides it to be an offense and imposes a punishment therefor, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of the commission of the offense.

- *Thailand 1997, Article 32*

5.2. No One Can Be Arrested, Detained, or Punished Except in Cases Determined by the Law or by Court Order

No one may be pursued, arrested or defamed except in the cases determined by the law and in accordance with the forms prescribed by it.

- *Algeria 2002, Article 47*

Individual liberty is guaranteed.

No person may be prosecuted except in cases established by the law and in the form it prescribes.

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*

No person may be tried or punished except by a law court in accordance with legal procedure

- *China 1947, Article 8*

No person can be accused, arrested, or confined, but in cases determined by law, and according to the forms which it prescribes.

- *France 1793, Article 10*

No one may be arrested, detained or punished except in, the cases and according to the forms which the law prescribes.

- *Morocco 1960, Article 10*

No one may be punished or imprisoned without due process of law and a legal sentence.

- *Uruguay 1918, Article 12*

The Nation guarantees to Venezuelans:

...

Personal safety, and therefore:

...

Seventh. Nor shall he be condemned to suffer punishment in criminal matters except after having been legally tried and convicted.

- *Venezuela 1904, Article 17.14.7*

Penalty shall be personal.

There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them.

- *Egypt 1980, Article 66*

Crime and punishment will be regulated by Law. Criminal punishment shall not be inflicted on the basis of ex post facto laws.

- *Kuwait 1962, Article 32*

No crime or penalty is cognisable as such except by virtue of a Law, and no punishment except for acts subsequent to coming into force of the Law wherein such acts are provided for. Penalty is personal.

- *Oman 1996, Article 21*

6. APPENDIX

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

[WOLAW] – Does the constitution mention nulla poena sine lege or the principle that no person should be punished without law?

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

Instructions: This includes arrest and detention as well as punishment. If criminal offenses can be established only by law, please code YES.

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.