

CONSTITUTIONMAKING.ORG

OPTION REPORTS

RIGHT TO A PUBLIC TRIAL

August 5, 2008

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

Publicity of court proceedings is considered by some to be an essential element of due process and the rule of law. The right to a public trial is generally not absolute. Trials can be declared closed if the openness of the trial could hard the well being of participants in the legal proceedings. We describe below the range of constitutional provisions for the right to a public trial.

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, 49% of constitutions in the sample have provided for the right to a public trial. As Figure 1 suggests, incorporation of this legal principle in constitutional texts has increased gradually during the 20th century. In 2000, over 60% of constitutions in force incorporated the right to a public trial. As Figure 2 suggests, provisions regarding this legal principle are most common in Eastern Europe, Oceania, and Western Europe, and least common South Asia and the Middle East.

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

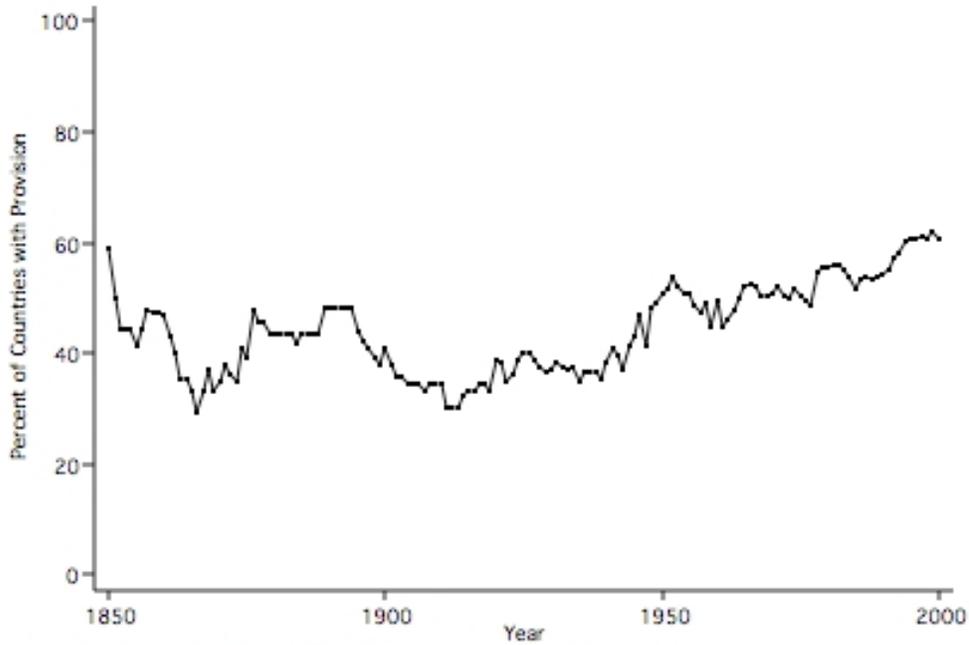
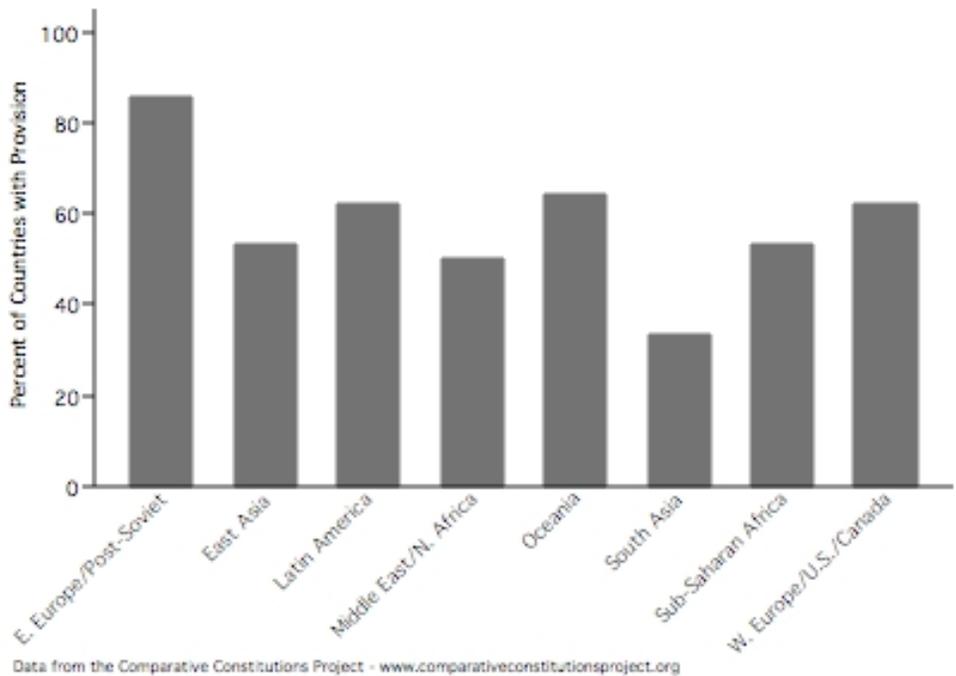


Figure 2. Percent of Constitutions That Provide for the Right to a Public Trial in 2000 by Region (N=191)



4. NOTES ON ATYPICAL PROVISIONS

None.

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. General Public Trial Requirements
2. Public Trial Requirements with Exceptions

5.1. General Public Trial Requirements

Judicial decisions are motivated and pronounced in public audiences.

- *Algeria 2002, Article 144*

All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of defense.

- *China 2004, Article 125*

In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

- *Japan 1946, Article 37*

The accused shall be entitled to a public trial by a judge or a jury of citizens who know how to read and write and are also residents of the place and district where the crime was committed, provided that the penalty for such crime exceeds one year's imprisonment. In all cases, crimes committed by means of the press against the public order or against the domestic or foreign security of the nation shall be subject to trial by jury;

- *Mexico 2003, Article 20.a.vi*

Trials in all law courts shall be open. The hearing of a case can be in camera in cases provided by federal law.

- *Russia 1993, Article 123.1*

Every accused person shall have the right to a fair trial, which shall include the right

(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;

- *South Africa 2003, Article 25.3.a*

Likewise, all have the right to the ordinary judge predetermined by law, to defense and assistance of an attorney, to be informed of the accusation made against them, to a public trial without delays and with all the guarantees, to utilize the means of proof pertinent to their defense, to refrain from self-incrimination, to refrain from pleading guilty and to the presumption of innocence.

- *Spain 1992, Article 24.2*

5.2. Public Trial Requirements with Exceptions

All trials in courts of justice will be public provided that for certain special matters enumerated in the general law on courts (Nizamnamah-Ye-Mohakam), the judge may prescribe a closed trial.

- *Afghanistan 1923, Article 50*

Hearings or proceedings in civil or criminal cases before the court authorized to pass judgment shall be oral and public.

Exceptions may be prescribed by law.

- *Austria 1929, Article 90.1*

Court hearings are open to the public unless public access would jeopardize public order or morals; and, in that instance, the court so decides by a judgment.

In matters involving political offenses and those of the press, a hearing behind closed doors may only be ordered by unanimity.

- *Belgium 2005, Article 148*

Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the

inviolability of the rights to life, liberty, equality, security and property, on the following terms:

60. the law may restrict publicity of procedural acts only if required to defend privacy or the social interest;

- *Brazil 2005, Article 5.60*

(4) The hearings of courts (other than military courts) and tribunals established by law must be open to the public.

(5) Subsection (4) does not prevent:

(a) the making by the Parliament of laws relating to the trial of juveniles, or to the determination of family or domestic disputes, in a closed court; or

(b) the exclusion by a court or tribunal from particular proceedings (except the announcement of the decision of the court or tribunal) of persons other than the parties and their legal representatives if a law empowers it to do so in the interests of justice, public morality, the welfare of persons under the age of 18, personal privacy, national security, public safety or public order.

- *Fiji 1998, Article 29.4; 29.5*

Justice is administered gratuitously in the name of the French people. Trials are public, unless publicity would be dangerous to order or morality ; and in that case the tribunal declares it by a judicial order.

- *France 1848, Article 81*

Court cases are heard in public.

In the event of public security and order or public morality being endangered the public may be excluded by an order of the court.

- *German Democratic Republic 1960, Article 133*

6. APPENDIX

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

[PUBTRI] – Does the constitution generally require public trials?

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

Instructions: If the text specifies "openness" as one of the principles governing judicial proceedings, please code yes 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.