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OPTION REPORTS

PROHIBITION ON EX POST FACTO LAW
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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. For example, Brazil 2005 refers to the Brazilian Constitution of 1988, as amended through 2005.

1. INTRODUCTION

Prohibition of punishment by laws enacted ex post facto prevents punishment is considered to be an essential element of due process and the rule of law. We describe below constitutional provisions regarding punishment by laws enacted ex post facto.

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

Overall, 63% of constitutions in the sample prohibit punishment by law enacted ex post facto. However, the trends vary over time and across regions. Figure 1 suggests the provisions were common as early as 1800s when about 60% of constitutions prohibited punishment by law enacted ex post facto. This percentage, however, declined in the early 1900s to a low of around 40% in 1950. However, since then the number of constitutions prohibiting punishment under ex post facto law has been increasing, so that 80% of constitutions in force in 2000 included such a provision. Figure 2 shows regional variation in this group. Only 40% of constitutions in force in East Asia contained the provision.

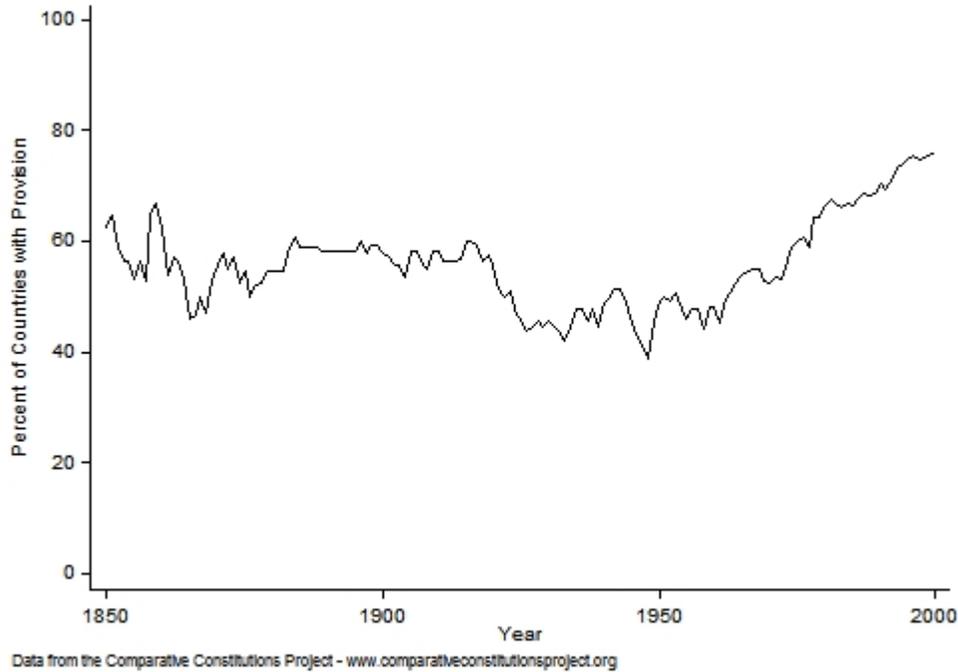**Figure 1. Percentage of Constitutions thatv Prohibit Punishment by Laws Enacted Ex Post Facto by Year (N=550)**

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

Figure 2. Percentage of Constitutions that Prohibit Punishment by Laws Enacted Ex Post Facto in 2000 by Region (N=191)

Data from the Comparative Constitutions Project - www.comparativeconstitutionsproject.org
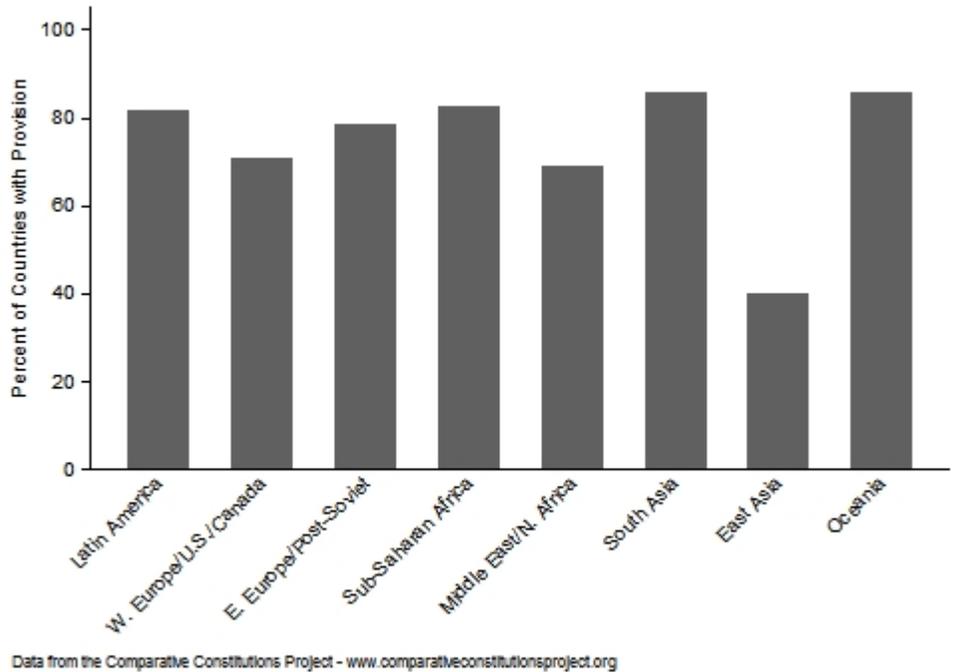
4. NOTES ON ATYPICAL CASES

Constitutional text prohibits punishment by laws enacted ex post facto in a number of different ways. Some of the variations include the following cases:

- Parliament shall have no power to declare acts to be infringements of the law which were not so at the date of their commission
- Penal laws shall not be retroactive against the accused
- No punishment may be laid down except by law and that it may be applied solely to acts previously deemed by law to be so punishable

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.*)

A favorable criminal law has retroactive effect.
- *Albania 1998. Article 29.3*

Criminal law shall not be inflicted on the basis of ex post facto laws sample provisions.
- *Kuwait 1962. Article 32*

An act may be punished only if it was defined by a law as a criminal offense before the act was committed sample provisions.
- *German Federal Republic 2002. Article 103.2*

The laws and other legal acts exacerbating the legal status of an individual shall not be retroactive.
- *Armenia 2005. Article 42*

No law shall be given retroactive effect to the detriment of any person whatsoever.
- *Mexico 2003. Article 14*

The law is the supreme expression of the Nation's will. All must submit to it. Law can have no retroactive effect.
- *Morocco 1996. Article 4*

The law instituting or aggravating the liability of a person cannot have retroactive force.

No one can be held liable for an action which was not recognized as an offense at the time of its commitment. If liability for an offense has been lifted or mitigated after its perpetration, the new law shall apply.
  - *Russia 1993. Article 54*

The law shall provide only for the future and has no retroactive effect, except in social matters when expressly so stated and in criminal matters when it benefits the offender.
  - *Bolivia 2002. Article 33*

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*

Every accused person has a right to a fair trial, which includes the right—
l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - *South Africa 2003. Article 35.l*

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*

6. APPENDIX

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

[EXPOST] Does the constitution prohibit punishment by laws enacted ex post facto?
 1. Yes
 2. No
96. other, please specify in the comments section
97. Unable to Determine
99. Not Applicable

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.