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Methodologies of Comparative Constitutional Law: Functional Approach The Max Planck Encyclopedia of Comparative Constitutional Law (forthcoming)

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A. Varieties of Methodology in CCL

1. The contemporary field of comparative constitutional law dates to the fall of the Berlin Wall and the diffusion of democratic constitutions across the globe. According to one influential map of the field, there are five distinct methodologies—classificatory, contextual, historical, universalist, and functional (Jackson 2012). These methodologies, as well as others that have since been identified, often refer to the different types of inquiry pursued by the different legal, political, and academic actors in the field (Hirschl 2018, 16). Some are typically used by the constitution-drafters and constitutional courts that have driven the field's renaissance and that are principal consumers of CCL knowledge. Others are associated with the university and the scholarly production of CCL knowledge. Before turning to the functional approach, it is helpful to situate it in the broader landscape of CCL's varieties of methodology.

1. Consumption-Side Varieties—Expressivist, Universalist, Functionalist

2. On the consumption side, three approaches to comparative law have emerged. "Expressivist" judges and drafters have relatively little use for CCL since they view constitutions as the expression of a nation (Tushnet, 'The Possibilities', 1269). Constitutions embody national identity--distinctive historical, political, and cultural trajectories. At most, comparisons with other jurisdictions can be "reflective" (Dixon) and illuminate what is distinctive about a

particular constitutional order but they cannot and should not shape the direction taken by that order.

3. By contrast, "universalist" judges and drafters situate their constitutions or parts of their constitutions in the broader sweep of human society (Tushnet, 'Some Reflections', 69). What other jurisdictions have to say on particular issues of constitutional law is relevant because if enough of them share the same view, a moral commitment shared by the rest of human society can be established, or at least an important and growing segment of human society. It is this universalist use of CCL to which the "cherry-picking" critique (Gelter and Siems, 40) applies most forcefully, since universalism requires a certain degree of consensus, either across the entire globe, or among certain regions or other types of country groupings, and to cherry pick undermines the assertion of consensus.

4. "Functionalist" judges and drafters are located somewhere in between (Tushnet, 'Some Reflections', 72). There is enough commonality between the home jurisdiction and the foreign jurisdiction(s) to use the constitutional law of the foreign jurisdiction(s) as a tool for pondering a common problem of constitutional law. Whether the foreign solution is desirable, however, is to be assessed based not on head counting (as for universalists) but on how well the judge or drafter thinks it solves the problem—based on the needs and normative commitments of their particular jurisdiction.

5. These different methodologies can be illustrated with examples from the jurisprudence of the U.S. Supreme Court. In *Roper v. Simmons*, 543 U.S. 551 (2005), (universalist) Justice Kennedy and (expressivist) Justice Scalia spared over the use of comparative law. The case involved the issue of whether the death penalty for juveniles was contrary to the Eight Amendment's prohibition on "cruel and unusual punishments." Justice Kennedy, writing for the majority, held

that it was, and, as part of the reasoning, cited to foreign law. He stated that the United Nations Convention on the Rights of the Child, which contains an express prohibition on the juvenile death penalty, had been ratified by every country in the world with the exception of two (the United States and Somalia) and that, after surveying national law and practice across the world, only the United States continued to approve of the use of the juvenile death penalty. Justice Kennedy thus concluded (578):

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.

Justice Scalia, in his dissenting opinion, scathingly dismissed Justice Kennedy's use of comparative law (624) : "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."

6. As for functionalist methodology, Justice Breyer's dissent in *Printz v. United States*, 521 U.S. 898 (1997) is a well-known illustration. There the issue of how to interpret American federalism was addressed using the experience of a couple of other jurisdictions in dealing with the common (functional) federalism problem of preserving local control at the same time as accommodating the need for central authority. Justice Breyer's functionalist methodology is discussed further below.

3. Production-Side Varieties—Black-Letter, Historical, Contextual, Classificatory, Critical

7. A number of other methodologies are primarily associated with scholars working in the universities. These methodological labels refer either to the types of material and techniques that are used by scholars to compare the constitutional law of different jurisdictions or to certain

academic purposes of knowledge-building that are less driven by the consumption needs of courts and constitution drafters.

8. The types of material and techniques used by CCL are common to all legal scholarship—the only difference being that CCL studies multiple jurisdictions as opposed to a single jurisdiction. There can be black-letter scholarship, which looks to the text of constitutions, court judgments, and scholarly treatises across the many jurisdictions. There can be historical analysis of the emergence and development of constitutional law in two or more jurisdictions. There can be contextual scholarship that looks at how constitutional law works in the practice of the societies of two or more jurisdictions, taking into account the larger institutional, political, economic, and social context of the law. Although the contextual label was initially developed to refer to constitutional analysis that looks beyond black-letter sources, the field has since become so rich that it is possible to identify many different strands. Replicating the methodologies of political science, there is scholarship focused on a small number of cases that seeks to acquire and leverage deep knowledge of a few jurisdictions (Hirschl, 245); there is also large-N scholarship that uses statistical methods and that requires large data sets across many countries (Ginsburg and Melton; Law and Versteeg). More in line with the disciplinary traditions of anthropology and sociology, a number of studies investigate the practices and meanings of constitution law in particular jurisdictions (Scheppele).

9. Production-side labels can also refer to types of scholarly purposes that are pursued in the academy and that are somewhat removed from the constitutional questions posed by judicial and political actors. Classificatory scholarship is designed to formulate categories of constitutions or elements of constitutions, for instance “liberal” and “illiberal” constitutionalism or “abstract” and

"concrete" constitutional review. Critical scholarship brings attention to the cultural biases of CCL (Frankenberg) and the strategic and ideological uses of CCL knowledge (Kennedy).

4. Relationship Between Consumption-Side and Production-Side Varieties

10. The production and consumption labels can overlap in CCL scholarship. Critical producers are skeptical of any type of CCL consumption. By contrast, the relative ease of black-letter production also makes consumption (universalist and functionalist) relatively easy and possible. Otherwise, however, production types do not easily map on to consumption types. Historical approaches can buttress either expressivist, nationalist projects, as tends to be the case in American scholarship, or universalist, cosmopolitan ones, as is often the case in Europe's integrating landscape. Contextual approaches that draw on the social sciences are vulnerable to all of the debates in the social sciences on the validity of descriptive and causal inference (King, Keohane and Verba; Brady and Collier). Therefore scholarly production in this vein does not automatically lead to uptake in constitutional courts and constitutional drafting chambers.

B. Functional Approach

11. As already explained, the functional approach refers to one type of CCL consumption: the legal actors that write and adjudicate constitutions turn to the constitutional law of other jurisdictions to explore alternatives that can assist in devising a normatively desirable textual provision or court judgment. What is considered desirable is defined not by reference to the criterion of universality, which implies a moral consensus among all human society or a like-minded subset of human society. Rather, desirability is defined by reference to the metrics at work within the specific jurisdiction in which the legal actor is situated.

12. The typical steps are as follows. First, a problem that is addressed by a constitution or, more often, a provision of a constitution or element of constitutional doctrine is identified. Second, the constitutional text and judicial decisions of other jurisdictions concerning the problem are canvassed. Third, the variety of constitutional law thus revealed is used as (i) a menu of options and (ii) a technique for assessing how well those legal options have worked in the practice of the different countries. Informed by this comparative experience, the constitution writer or adjudicator decides on the best solution to the problem, based on normative criteria internal to his or her jurisdiction.

1. U.S. Supreme Court and Printz v. United States

13. Justice Breyer's dissent in *Printz v. United States*, mentioned earlier, is a well-known example of the functional approach. The case involved a challenge to a federal gun-control law that required local police—as opposed to federal officers—to conduct background checks on prospective purchasers of handguns. The majority found that this federal "commandeering" of state governments violated the U.S. Constitution's system of dual sovereignty, vested in the states and the federal government. Rather, to survive constitutional scrutiny, the federal law would have to be written to give implementation to a free-standing federal bureaucracy. In arriving at this conclusion, the majority did not rely principally on text, since the U.S. Constitution is largely silent on the issue, but on the Federalist Papers and other evidence of the original intent of the constitutional drafters, as well as the U.S. Supreme Court's prior case law.

14. In his *Printz* dissent, Justice Breyer reached the opposite conclusion. Among the reasons he offered was comparative constitutional law. He began by positing a common "function" or "problem": "the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control." (*Printz,* 967) In

canvassing other federal constitutions, Justice Breyer found that they provided for a legal option that was analogous to commandeering (*Printz,* 977):

> The federal systems of Switzerland, Germany, and the European Union, for example, all provide the constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body.

He saw the foreign experience with this legal option to be favorable—based on the concern in *American* federalism for state sovereignty and individual liberty. And therefore Justice Breyer would have upheld the federal gun-control law.

15. Almost twenty years later, Justice Breyer took up the issue of the role of foreign and international law in U.S. law in his book *The Court and the World.* There he gives this summary of the functional approach (239-40):

> As judges throughout the world undertake to fulfil their responsibilities of reviewing their countries' laws and regulations for constitutional validity, they have all found themselves facing somewhat similar problems. And if someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one I look to, has written a legal opinion about a similar matter, why not read what that judge has said? I might learn from it, whether or not I end up agreeing with it.

2. Australian High Court and McCloy v. New South Wales

16. As reflected by the earlier discussion, the academic debate on the appropriate uses of foreign law in constitutional adjudication is highly developed in the American legal literature. However, in the actual practice of the U.S. Supreme Court, the resort to foreign sources is quite limited. By contrast, the Australian High Court cites frequently to foreign law in constitutional cases (Saunders and Stone 37) and it often does so following a functional approach. For instance, in *McCloy v. New South Wales*, 257 CLR 178 (2015), a majority of the Court borrowed proportionality from Europe to assess a law restricting political donations. The law had been

challenged based on the Australian Constitution's implied freedom of political communication. The prior case law had established a test comprised of the following steps: (1) whether the law effectively burdens this form of speech; (2) whether the law is legitimate, meaning compatible with the constitutionally prescribed system of representative and responsible government; and (3) whether the law is reasonably appropriate and adapted to advance that purpose.

17. The *McCloy* majority, to conduct the third step, adopted the European proportionality framework of suitability, necessity, and balancing (between the importance of the purpose and the restriction on the freedom). The rationale for the borrowing was not the universality of proportionality across the world's constitutional courts. Rather, the borrowing was driven by proportionality's utility as an analytical framework for addressing the common problem of "evaluating legislation which effects a restriction on a right or freedom." (*McCloy,* para. 74) The advantages of proportionality, as articulated by the majority, were "transparency" for the legislative branch (*McCloy,* para.74) and a "structured approach" for the courts that would clarify the different elements of a reasonableness assessment and make value judgments explicit (*McCloy,* paras. 77 and 78). In sum, the Australian High Court's use of comparative law was driven by what it concluded was a successful solution to the common functional problem of assessing legislative burdens on rights—successfully based on the particulars and normative commitments of *Australian* constitutional law.

3. South African Constitutional Court and AmaBhungane Centre for Investigative Journalism NPC v. Minister of Justice and Correctional Services

18. The South African Constitutional Court is widely known for its use of foreign judgments in its reasoning (Rautenbach 2013; Rautenbach 2020). Justice Ackerman, who served on the

Constitutional Court during its first decade (1994-2004) has explained the Court's approach to comparative law in functionalist terms (183-184):

> [F]oreign law is not in any sense binding on the court that refers to it. . . . . One may be seeking information, guidance, stimulation, clarification or even enlightenment but never authority binding on one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, solutions, etc. . . . Recourse to foreign law often helped me (at least) to identify the correct problem, or to identify it properly. . . . It is also useful to see how foreign courts have solved the problem, what methodology has been used to this end, what the competing considerations have been, and whether any potential dangers were identified in the process.

19. One recent example of the Court's functional use of CCL is *AmaBhungane Centre for Investigative Journalism NPC v. Minister of Justice and Correctional Services*, 2021 SACLR LEXIS 2. The Court was called upon to evaluate the constitutionality of South Africa's electronic surveillance law based on the constitutional right to privacy. The facts of the case involved the interception by state authorities of a journalist's communications. The Court found numerous constitutional defects with the privacy guarantees in the law, including the absence of a post-surveillance duty for the state to disclose to the subject of surveillance both the fact of the surveillance and the legal basis for the surveillance. To support the need for post-surveillance notification and the finding of unconstitutionality, the Court relied on the law of the United States, Canada, Denmark, Germany, and the European Court of Human Rights (paras. 46-47). Why exactly, did this support the Court's conclusion? The words of the Court (para. 46):

> While internationally there is no consensus on when and how post-surveillance notification is any absolutely necessary safeguard of the right to privacy, considerable comparative practice supports that some form of notice is crucial to minimizing abuse.

20. Thus we see that the *AmaBhungane* court's reliance on comparative law was not universalist—the court acknowledged that there is no universal standard with respect to notification. Rather, the experience with notification as a vehicle for protecting privacy in a couple of jurisdictions with a similar right to privacy supported the Court's independent and

extensive reasoning advanced earlier in the judgment. That reasoning relied on constitutional text, South Africa's apartheid history, public reports on surveillance abuses by South Africa's police and intelligence services, and the logic relationship between notification and protecting the right to privacy—given that notification would, in the event of illegal surveillance, allow individuals to sue for a remedy and that the prospect of notification would serve to deter illegal surveillance by state actors (paras. 23-28; 38-45).

4. Israeli Supreme Court and Eitan—Israeli Immigration Policy Center v. The Israeli Government

21. The Israeli Supreme Court makes extensive use of comparative law in constitutional adjudication (Hirschl, 'In Search of an Identity,' 553). This has been justified in functionalist terms by Aharon Barak, who served as a member of the Supreme Court for almost thirty years. In his book *The Judge in a Democracy* he explains (197-98):

> [D]ifferent democratic legal systems often encounter similar problems. Examining a foreign solution may help a judge choose the best legal solution. . . .[Comparative law] informs judges about the successes and failures that may result from adopting a particular legal solution. . .Thus, comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Additionally, even when comparative law is consulted, the final decision must always be local. The benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available.

22. A good illustration of the various ways that comparative law is employed, including the functional method, is *Eitan—Israeli Immigration Policy Center v. The Israeli Governmen*t (2014). This judgment involved an Israeli law on mandatory detention and residency centers for undocumented migrants. It was the second of three Supreme Court judgments that struck down successive versions of the law, and that ultimately led to a considerable reduction in the detention period as well as the duration of stay in a residency center (Weill and Kritzman-Amir,

61-62). The majority opinion divided the analysis of the alleged infringements of the rights to liberty and dignity into two parts, the first of which dealt with the mandatory detention period and the second of which dealt with the length of stay and conditions in the residency center. Both parts employed a proportionality test to determine whether the burden on liberty was permissible and both parts included a comprehensive comparative law overview to assist in the proportionality determination. For purposes of this discussion, it is possible to focus on the use of comparative law on first issue of the permissible detention period.

23. The majority opinion's use of comparative law was somewhat ambiguous. On the one hand, the stated rationale rested on Justice Barak's functional logic (para. 72):

> By means of comparative law it is possible to broaden the constitutional horizons and receive interpretive inspiration.. . . In a issue similar to this matter, which occupies many countries throughout the world to find diverse solutions, it is not correct that we overlook the comparative analysis.

On the other hand, the majority's impressive survey of maximum detention periods in fifteen like-minded jurisdictions ("western countries" and democracies) led to the conclusion that Israel's one-year detention period was exceptional compared with the shorter periods in the majority of jurisdictions (para. 72):

> [T]he maximum period of one year for the detainment of detention [sic] of the illegal immigrants who cannot be deported on grounds that are not connected thereto is not acceptable in most countries.

The majority was careful to rest its finding of disproportionality exclusively on Israeli constitutional law (paras. 78-79). However, it is clear that the comparative analysis buttressed its conclusion not because of the superiority of any particular foreign detention scheme, but because the Israeli legislation was out of line with the solution adopted by the overwhelming majority of peer jurisdictions, consistent with a universalist approach.

24. The dissenting opinions also engaged with comparative law. Justice Hendel took issue with the majority's universalist characterization of the dominant approach in other jurisdictions, arguing that a closer look led to a more mixed finding, with detention periods often exceeding one year (para. 4). Justice Amit argued in favor of focusing on the law of a more limited set of jurisdictions (Australia, Greece Malta and Italy), which had adopted longer detention periods and which, in his view, truly shared the same functional problem as Israel--of being front-line countries for migration (para. 15). And Chief Justice Grunis, in arguing against the remedy chosen by the majority (repeal of the one-year legal provision) and in favor of an alternative remedy (a reasonable interpretation that shortened the detention period) buttressed his point with an example taken from the U.S. Supreme Court—*Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), which rather than holding the legal provision on indefinite detention unconstitutional, interpreted it to include a presumption of release after six months (para. 52). In sum, the *Eitan* case affords a good illustration of how the Israeli Supreme Court engages with CCL, either to determine a universalist consensus position among like-minded countries, or to afford helpful alternatives and sources of inspiration for functional problems of constitutional law, variously defined.

5. **Functional Approach's Black-Letter Bias**

25. Functionalist methodology mostly refers to one type of knowledge *consumption*. However, as revealed by the examples of constitutional adjudication discussed above, this methodology is also associated with a particular type of knowledge *production*. That is, black-letter methodology that focus on the text of the law, and the text of the law that is directly on point for the problem at hand. In all of the constitutional cases surveyed above, the foreign law cited was the text of legislation and decisions of other constitutional courts.

26. The black-letter bias of the functional approach has given rise to criticism in the academy. To explore this issue, it is helpful to return to *Printz*. Some of the critical reaction to Justice Breyer's use of comparative law focused not on his assumption that foreign law held functionalist relevance for a question of U.S. constitutional law, but on the way he went about investigating the foreign law. In a widely cited piece, the legal scholar Daniel Halberstam argued that Breyer's analysis of commandeering law was too cursory. Halberstam argued that it was necessary to situate constitutional doctrine on commandeering within the broader institutional and legal context of federalism in each of the jurisdictions considered. He pointed to a number of constitutional rules that existed in the European Union and Germany—but not the United States—that significantly constrain the powers of the central level, to the benefit of the state level. The upshot was that the U.S. constitutional rule *prohibiting* commandeering might, overall, achieve the same federalism effect as a constitutional rule *permitting* commandeering—but embedded in a broad array of institutional arrangements that check federal powers, as in the European Union and Germany.

27. More generally speaking, Halberstam's argument was that black-letter production of comparative knowledge is not enough—to understand the effect of any given constitutional rule on the desired outcome, the institutional and legal *context* matters. This emphasis on understanding the entire institutional and legal context of doctrinal rules before coming to any conclusion on questions of constitutional design and interpretation is what has been called "contextualism" (Tushnet, 'Some Reflections', 67) and "contextualized functionalism" (Jackson, 'Methodological Challenges', 326). It is open to the use of the social scientific methods discussed earlier in this entry.

C. Comparative Law's Functional Method

28. There has been a tendency to conflate the functional approach of constitutional courts and the legal scholarship designed to address their functional inquiries with the functional method in the broader discipline of comparative law (Samuel and Legrand, 373). However, there is a critical difference between CCL and comparative law broadly speaking. What is billed "functionalist" legal and scholarly output in the field of CCL is actually *formalist* from the perspective of comparative law (Bignami). That is, the law included in CCL projects is limited to the law that bears the "constitutional" label: the written law called "constitution"; the "constitutional" court with the power to adjudicate the constitution; the scholarly treatise on "constitutional" law. The small exception to this reliance on formal constitutional labels is scholarship on jurisdictions without written constitutions or without courts without responsibility for judicial review based on their constitutions (Gardbaum). The fact of the matter, however, is that since the end of the Cold War, the number of such jurisdictions has become vanishingly small. Therefore, the vast majority of comparative studies can (and do) look no further than the constitutional labels to determine what to compare in the countries of interest.

29. CCL's formalist approach is problematic because it contains a culturally biased ontology of law and legal systems. It presumes that the supreme law on core issues of constitutional law such as government organization and fundamental rights is to be found in the text of the "constitution" and the adjudication of the "constitutional" court. But depending on the jurisdiction, that might very well not be the case. What are, formally speaking, "constitutional" sources of law might, in a foreign jurisdiction with a different ontology of law and legal system, be sidelined by other sources and legal actors that, in the theory and practice of that legal system, exercise supreme legal authority.

30. Comparative law's functional method (Zweigert and Kötz) was developed originally to overcome this type of cultural bias. In the case of Ernst Rabel, the widely accepted originator of the method, the cultural bias was the doctrinal constructs developed in German Pandectist scholarship, and the need for overcoming the bias was driven by new political and business realities of the post-WWI period (Resta). Like the use of comparative law in the constitutional jurisprudence reviewed above, the functional method contain a problem-solution structure. That, however, is where the similarity begins and ends. In the functional method, the problem is formulated in such a way that it can, in theory, be solved by any part of a legal system, not a single domain of the system such as constitutional law. To take this agnostic approach as to which part of the legal system is triggered by an issue such as federalism or free speech and therefore should be compared, it is necessary to formulate the problem in a particular fashion. The problem cannot be permeated by doctrinal and institutional constructs since those are likely to reflect the legal particularities of one jurisdiction and therefore to be ill-suited to a comparative study that, by definition, seeks to cover multiple jurisdictions. Rather, an effort is made to identify a common social problem, rooted in the practices and needs of many, if not most, human societies. The problem can be formulated at different levels of abstraction. In large group projects, the so-called factual method (Schlesinger; Bussani and Mattei) is common: a series of fact-based hypotheticals are formulated, similar to what one might find in a (common law) case and the national reporters are asked to analyze how such facts would be handled in their jurisdictions.

31. Based on the common social problem, the various legal solutions are identified. Many times they are not handled by the same legal doctrines or in the same branch of law in the jurisdictions under consideration. But since they address the same problem, they are called functional

equivalents. To illustrate with a couple of problems and country examples: the problem of motor vehicle accidents is handled by the functional equivalents of tort law (the United States) and social insurance law (Germany); the problem of ascertaining ownership of land is handled by the functional equivalents of official land registries (Italy) and title insurance (the United States). Thus revealed, the various legal solutions can be compared and the various utilitarian projects of comparative law, including unification and borrowing, can be accomplished.

32. Turning to constitutional law, it is possible to identify a number of substantive, social problems that are commonly addressed by constitutions and constitutional courts. These involve the structure of government and the individual rights that can be invoked against government. Importantly, constitutional law also is defined as the highest law that governs these areas of social and political life and, as such, it is the supreme law that can be invoked in court, above all other sources of law. Based on this functional definition of the domain of constitutional law, it is possible to illustrate the method with two concrete examples.

1. Individual Rights Against Market Regulation—Constitutional Law in Germany and Administrative Law in the United States and France

33. The first illustration is taken from the common functional problem of individual rights against government regulation of markets (Bignami, 455-69). In most jurisdictions, there are complex regulatory schemes, involving both parliamentary law and administrative action, designed to regulate the economy and protect against social harms such as environmental pollution and injury to consumers. These schemes generally burden market actors and their market rights, such as their freedom to engage in various types of business practices. In the United States, the highest law in this domain is found in sources of administrative law, not constitutional law, because market rights largely have been read out of the Constitution in the

post-New Deal era. In France, the highest law is found in the adjudication and advisory powers of the supreme administrative court (Council of State) because the Constitutional Council's remit continues to be limited in light of the traditional republican suspicion of *gouvernement des juges*. Only in Germany is the highest law to found in constitutional law, namely the Basic Law as it has been interpreted by the Federal Constitutional Court. This variation is important to appreciate for comparative investigations concerned with market rights because research only on what is formally identified as constitutional law, or, for that matter, only on what is formally identified as administrative law, would paint a highly misleading picture of the law in the three jurisdictions.

2. Right to Equality Based on Sex—Islamic Law in Jordan

34. The second example of the functional method is drawn from the problem of guaranteeing the right to equality based on sex. In countries that belong to the Islamic law tradition, it is necessary to consider not only the formal constitutional law. Rather, it is also necessary to delve into family and inheritance law, which are generally governed by Islamic law.

35. The example of Jordan illustrates why an inquiry into the right to sex equality cannot only look at constitutional law but must also scrutinize (Islamic) family and inheritance law. Jordan's Constitution guarantees the general right of equality (Article 6). Jordan also has a constitutional court with the power to review laws and regulations for compliance with the Constitution (Nasrawin). At the same time, personal status matters involving Muslims, i.e. family and inheritance law, are entrusted to the "sole jurisdiction of the Sharia courts." (Constitution, Article 103(2)) Although the constitutional court has the power to take references from the Court of Cassation (which has jurisdiction over the civil courts), it does not appear that the same applies to the Sharia courts and there have certainly been no such constitutional cases thus far.

Therefore the supreme law on family and inheritance matters is to be found in the decisional law of the Sharia courts and their legal sources—a mixture of the Jordanian Personal Status Code (inspired by Islamic law) and the traditional sources of Islamic law.

36. Examination of this functional constitutional law (Islamic law) reveals a number of contrasts with the formal constitutional text. For instance, as part of the wife's duty of obedience, she has an obligation to follow her husband wherever he decides to go, provided he ensures her safety. Under Article 62 of the Personal Status Code, if the wife refuses to move with her husband, she is considered disobedient (*nashez*) and loses the right to financial maintenance. Not only does this discriminate based on sex, but it is discrimination with respect to an essential freedom that is generally guaranteed by states and that is indeed contained in Article 9 of the Jordanian Constitution—the freedom of movement and residence. Further, for those constitutional traditions that insist on state action for there to be constitutional rights, there is plenty here: the mandatory and exclusive jurisdiction of Sharia courts, combined with Islamic apostasy law (Hamoudi, 309), makes this not a matter of a woman's religious choice but a state-backed form of discrimination and obstacle to freedom of (non-) movement.

37. In short, a comparative constitutional analysis of the right to sex equality that includes Islamic jurisdictions would fundamentally misrepresent the law of such jurisdictions if it stuck to the formal constitutional law. Rather, a functional method that recognizes that, especially on family and inheritance matters, Islamic legal sources and legal actors take precedence is a more accurate rendition of the supreme law in this substantive nook of constitutional law.

D. Conclusion

38. There is no doubt that CCL's functional approach will remain a fruitful source of inspiration for constitutional courts and constitution drafters. The possibilities of cross-jurisdictional borrowing, illustrated above with judicial decisions from South Africa, Israel, Australia, and the United States, will continue to fuel scholarship in the academy as well as think tanks and other venues. At the same time, by remaining exclusively in the formal realm of constitutional law, the field of CCL risks neglecting what, functionally speaking, *is* constitutional law in many of the world's jurisdictions.

39. Comparative law's functional method draws out the role of other sources of law, besides formal constitutions, and other legal actors, besides the writers, adjudicators, and legal scholars of constitutions, in guaranteeing the liberal rights and democratic principles of the contemporary constitutional template. In the examples explored above, these were administrative law and courts and Sharia law and courts. This is a time when the power and authority of constitutional courts and their constitutions have revealed themselves to be quite precarious in many parts of the world. Appealing to the broader set of legal actors that populate the world's jurisdictions and that make and adjudicate the supreme law of those jurisdictions is a useful addition to the disciplinary agenda of CCL.

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