

LS174: Comparative Constitutional Law: The Case of Israel

Prof. Masua Sagiv

Spring 2024, Mon 3-5:59pm
126 Wheeler

Course Description

The course will provide an introduction to central issues in constitutional law and theory, using a comparative perspective and a focus on the experience of the Israeli constitutional system. Israel is a uniquely instructive source for engagement and reflection on constitutional law: after five decades with no written constitution, it has transitioned in the 1990's towards a formal constitutional regime, albeit an incomplete one, as its contours are still being negotiated. Its legal and political culture is a hybrid of Anglo-American and Continental-European traditions. It defines itself as a "Jewish and democratic state," adopting a non-neutral, ethno-national identity, thereby raising concerns regarding the status – symbolic and tangible – of fifth of its population, while at the same time committing to civic quality and a liberal human rights regime, and engaging the discourse of cultural group rights. Constitutional law has been a central arena in which Israel's response to such challenges is debated and examined.

Issues to be covered include constitutional design, national identity, separation of powers, judicial review, human rights, immigration and membership, and state and religion. We will discuss each in the abstract, surveying the main theoretical frameworks of analysis and evaluation, and the employ the generalized notions to the case of Israel. The class should therefore be of interest both to those with a specific interest in Israeli constitutional politics, as well as to those seeking an introduction to central issues in constitutional theory.

Requirements

Students will be asked to –

- (1) attend all classes and engage in informed discussion based on preparation of assigned readings,
- (2) complete one asynchronous class assignment, and,
- (3) complete a final take-home exam.

Requirements (1)-(2) represent 20% of the final grade, and the final exam (3) accounts for 80%.

Office hours: by appointment.

Prof. Sagiv can be reached at masua.sagiv@berkeley.edu.

SYLLABUS

[Items marked by * are optional reading]

All materials can be found in the course website on bCourses

PART A: THE CHALLENGES OF CONSTITUTIONALISM

I. Introduction: Israel - A Jewish and democratic state

Jan. 22

- 1) Declaration of the Independence of Israel, 1948,
<https://main.knesset.gov.il/en/about/pages/declaration.aspx>
- 2) Basic Law: Human Dignity and Liberty [1992, amended 1994]
- 3) Basic Law: Israel – The Nation State of the Jewish People [2018]
- 4) Alan Dowty, *Democracy in Israel*, THE OXFORD HANDBOOK OF ISRAELI POLITICS AND SOCIETY (2020)
- 5) Status Quo Agreement, June 19, 1947
- 6) Guy Ben Porat, *Religion in Israeli Politics*, THE OXFORD HANDBOOK OF ISRAELI POLITICS AND SOCIETY (2020)
- 7) Former President Reuven Rivlin, *Israeli Hope: Towards a New Israeli Order*, Address to the 15th Annual Herzliya Conference, 7 June 2015,
<https://www.runi.ac.il/media/vtylyqpp/presidentspeech2015.pdf>

Jan. 29 - ASYNCHRONOUS

Watch Legally Speaking with Justice Aharon Barak (Dec. 1, 2011),
https://www.youtube.com/watch?v=kcPOoyb6b4o&ab_channel=UniversityofCaliforniaTelevision%28UCTV%29, and answer questions on bCourses

II. Why Have a Constitution?

Feb. 5

- 1) *Marbury v. Madison*, 5 U.S. 137, 176-180 (1803)
- 2) John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929-1953 (2003)
- 3) David Ben-Gurion, Speech to the Knesset's Committee on Constitution, Law, and Justice, given July 13, 1949, translated by Neil Rogachevsky

- 4) Gregory Mahler, *The “Constitutional” System of Israel*, THE OXFORD HANDBOOK OF ISRAELI POLITICS AND SOCIETY (2020)

III. Judicial Review and Judicial Overhaul

Feb. 12

- 1) THE FEDERALIST No. 51 (James Madison), No. 78 (Alexander Hamilton)
- 2) HCJ 6298/07 *Ressler v. The Knesset* (2012) [Beinisch intro, ¶¶ 1-13, Grunis ¶¶ 1-4]
- 3) Avi Garfinkel, ‘*The Israeli Left Is Used to Fixing Politics via the High Court. It Doesn’t Work.*’, HAARETZ, March 16, 2023
- 4) Peter Lintl, *Israel’s Anti-Liberal Coalition*, SWP COMMENT (Jan. 2023)
- 5) Amichai Cohen and Yuval Shany, *The HCJ Strikes Back: Israel’s Supreme Court Pulls the Plug on “Judicial Reform”*, LAWFARE, Jan 11, 2024, <https://www.lawfaremedia.org/article/the-hcj-strikes-back-israel-s-supreme-court-pulls-the-plug-on-judicial-reform>

Feb. 19 – PRESIDENTS’ DAY – NO CLASS

PART B: MEMBERSHIP/CITIZENSHIP/IMMIGRATION

IV. “Who is a Jew?”

Feb. 26

- 1) The Law of Return, 1950 [as amended, 1970]
- 2) HCJ 72/62 *Oswald Rufeisen v. Minister of the Interior*, Selected Judgments Sup. Ct. Isr. 1 (1962-1969), 1-2, 10-17, 22-23.
- 3) Gidon Sapir, “How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid – The Israeli Controversy over Who Is a Jew as an Illustration” 39 *Vand. J. Transnat’l L.* 1233 (2006), 1233-1243; *1243-1290.
- 4) Liav Orgad, “Cultural Defence” of Nations: Cultural Citizenship in France, Germany and the Netherlands, 15 *EUROPEAN L.J.* 719 (2009)
- 5) HCJ 7146/12 *Adam v. The Knesset* (2013) [summary]

V. *Who is an Israeli?*

Mar. 4

- 1) Basic Law: Israel – the Nation State of the Jewish People
- 2) Barak Corren, Netta and Gidron, Noam and Feldman, Yuval, *Majority Nationalism Laws and the Equal Protection of Minorities: Experimental and Observational Evidence from Israel* (March 31, 2021). Hebrew University of Jerusalem Legal Research Paper No. 21-13, Bar Ilan University Faculty of Law Research Paper No. 21-14
- 3) Yoav Peled, *Nationalist Constitutionalism – Israel’s High Court and the Jewish Nation Law*, H-NATIONALISM, 8/9/2021, <https://networks.h-net.org/node/3911/blog/vistas/8040258/nationalist-constitutionalism-%E2%80%93-israel%E2%80%99s-high-court-and-jewish>
- 4) CA 8573/08 Ornan v. Ministry of Interior (2013) [selected paragraphs]

PART C: RIGHTS

VI. *Freedom of Religion I: Religious Accommodations*

Mar. 11

- 1) John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N. Y. U. L. REV. 233 (1989)
- 2) *Wisconsin v. Yoder* (1972) [selected paragraphs]
- 3) Lotem Perry-Hazan, *Court-Led Educational Reforms in Political Third Rails: Lessons from the Litigation Over Ultrareligious Jewish Schools in Israel*, 30 J. EDU. POLICY 713, (2015), 720-723

VII. *Freedom of Religion II: Freedom to Discriminate?*

Mar. 18

- 1) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) MBL Supplement pp. 1-12
- 2) Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 Harv. C.r.-C.I. L. Rev. 315 (2021)
- 3) Jacob Magid, *Court Rules Against BeerSheba Print Shop that Refused to Serve LGBT Group*, THE TIMES OF ISRAEL, Apr. 21, 2020, <https://www.timesofisrael.com/court-rules-against-print-shop-that-refused-to-serve-lgbt-group/>

- 4) Lotem Perry-Hazan, *Court-Led Educational Reforms in Political Third Rails: Lessons from the Litigation Over Ultrareligious Jewish Schools in Israel*, 30 J. EDU. POLICY 713, (2015), 723-727

Mar. 25 – SPRING BREAK – NO CLASS

VIII. Speech

Apr. 1

TBD

IX. Equality: Gender and Sexual Orientation

Apr. 8

- 1) HCJ 4541/94 Miller v. Minister of Defense (1995)
- 2) HCJ 721/94 El-Al Israel Airlines v. Danielowitz (1994)
- 3) CA 10280/01 Yaros-Hakak v. Attorney General (2005), [Summary]

X. Conclusion

Apr. 15

TBD

Apr. 22 – CLASS CANCELLED