

LS 174: COMPARATIVE CONSTITUTIONAL LAW: THE CASE OF ISRAEL

Prof. Ori Aronson

Spring 2015, TuTh 3:30-5, B51 Hildebrand

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 into a more formal constitutional regime, the contours of which 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 that excludes a 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. Finally, Israel faces familiar challenges of terrorism, immigration, and class disparities, and constitutional law has been central in defining its response to them.

Issues to be covered include constitutional design, national identity, separation of powers, judicial review, human rights, immigration and membership, rule of law and national security, 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.

Students will be asked to:

- (1) Attend all classes and engage in informed discussion based on preparation of assigned readings – 10%
- (2) Submit two response papers, two pages long each, during the term, and be prepared to lead a class discussion based on submitted response papers – 20%
- (3) Write a take-home exam on the issues covered in class – 70%

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SYLLABUS

[Items marked by * are optional reading]

PART A: THE CHALLENGES OF CONSTITUTIONALISM

I. Introduction: Constitutional Challenges in Israel and Beyond

Tues Jan. 19

- HCJ 129/13 Axelrod v. Government of Israel (2014)

II. The Roles and Perils of Constitutionalism

Thurs. Jan. 21, Tues. Jan. 26, Thurs. Jan. 28

- 1) MARK TUSHNET, WHY THE CONSTITUTION MATTERS 1-17 (2010)
- 2) HANS KELSEN, PURE THEORY OF LAW 193-214, 221-224 (Max Knight trans. 1967)
- 3) RONALD DWORKIN, FREEDOM'S LAW 15-35 (1996)
- 4) BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-16 (1991)
- 5) John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1936-1953 (2003)
- 6) Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 19, 19-31, 56-58 (Jon Elster & Rune Slagstad eds., 1988)
- 7) David Ben Gurion in the Knesset, 1949

III. Comparative Constitutional Law

Tues. Feb. 2, Thurs. Feb. 4

- 1) * Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999)
- 2) RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 138-150 (2014)
- 3) Tom Ginsburg, *Constitutional Endurance*, in COMPARATIVE CONSTITUTIONAL LAW 112 (Tom Ginsburg & Rosalind Dixon eds., 2011)
- 4) * Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 Electronic J. Comp. L. (2002)
- 5) Iddo Porat, *The Use of Foreign Law in Israeli Constitutional Adjudication*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 151 (Gideon Sapir et al. eds., 2013)
- 6) * *Roper v. Simmons*, 543 U.S. 551 (2005) [Kennedy § IV, Scalia § III]

IV. Israeli Constitutionalism: an Overview

Tues. Feb 9, Thurs. Feb. 11, Tues. Feb. 16

- 1) Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution*, 33 COMP. POL. 315 (2001)
- 2) Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Israeli Constitution-Making*, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 207 (Dennis J. Galligan & Mila Versteeg eds., 2013)
- 3) Declaration of Establishment of the State of Israel, May 14, 1948
- 4) HCJ 73/53 *Kol Ha'Am v. Minister of the Interior* (1953), **p.18**
- 5) Basic Law: Human Dignity and Liberty (Isr.)
- 6) * CivA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) [Editor's Synopsis pp. 2-4, Barak intro, ¶¶ 1-8, 38-39, 50-82, 89-98, 109]

V. Judicial Review I: Foundations

Thurs. Feb. 18

- 1) THE FEDERALIST No. 51 (James Madison), No. 78 (Alexander Hamilton)
- 2) *Marbury v. Madison*, 5 U.S. 137, 176-180 (1803)
- 3) CivA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) [Barak ¶¶ 77-81]
- 4) Richard Posner, *Enlightened Despot*, THE NEW REPUBLIC, Apr. 23, 2007
- 5) Mark Tushnet, *Marbury v. Madison around the World*, 71 TENN. L. REV. 251 (2004)

VI. Judicial Review II: The Argument

Tues. Feb. 23, Thurs. Feb. 25

- 1) *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)
- 2) ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-28, 235-243 (1962)
- 3) JOHN HART ELY, DEMOCRACY AND DISTRUST 73-88, 101-104 (1980)
- 4) Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 824-837 (2003)
- 5) HCJ 6298/07 *Ressler v. The Knesset* (2012) [Beinisch intro, ¶¶ 1-13, *50-73, Grunis ¶¶ 1-4]
- 6) Draft Basic Law: Legislation (2012)

PART B: STRUCTURAL ISSUES

VII. Boundaries I: Territory

Tues. Mar. 1, Thurs. Mar. 3

- 1) Richard Thompson Ford, *Law and Borders*, 64 ALA. L. REV. 123 (2012)
- 2) OREN YIFTACHEL, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE*, ch. 2 (2006)
- 3) HCJ 6698/95 *Ka'adan v. Israel Land Administration* (2000)
- 4) HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* (2005)
- 5) * HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* (2004) [Barak ¶¶ 1-9, 16-44, 48-49, *50-81, 82-86]

VIII. Boundaries II: Immigration

Tues. Mar. 8, Thurs. Mar. 10

- 1) Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY?* (Joshua Cohen ed., 2002)
- 2) Liav Orgad, "Cultural Defence" of Nations: Cultural Citizenship in France, Germany and the Netherlands, 15 EUROPEAN L.J. 719 (2009)
- 3) The Law of Return, 1950 (Isr.)
- 4) HCJ 7052/03 *Adalah v. Minister of Interior* (2006) [Barak intro, ¶¶ 1-6, 17-23, 39-52, *60-78, 79-94, 114; Cheshin intro, ¶¶ 2-15, 88-97, 109-125; Levi ¶¶ 1-11]
- 5) HCJ 7146/12 *Adam v. The Knesset* (2013)

IX. War, Terrorism, and the Rule of Law

Tues. Mar. 15, Thurs. Mar. 17

- 1) Martha Minow, *Tolerance in an Age of Terror*, 16 S.C. J. INT'L L. & BUS. 453 (2007)
- 2) Daphne Barak-Erez, *The National Security Constitution and the Israeli Condition*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 429 (Gideon Sapir et al. eds., 2013).
- 3) HCJ 5100/94 *Public Committee against Torture in Israel v Government of Israel*, P.D. 53(4) 817 (1999)
- 4) HCJ 8276/05 *Adalah v. Minister of Defense* (2006) [Barak ¶¶ 1-8, 22-25, 36-37, 41]
- 5) HCJ 2722/92 *Alamarin v. IDF Commander in Gaza Strip* (1992)

PART C: RIGHTS

X. Constitutional Rights

Tues. Mar. 29, Thurs. Mar. 31

- 1) Alon Harel, *Theories of Rights*, in BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 191 (Martin P. Golding & William A. Edmundson eds., 2005)
- 2) AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 17-36, 129-74 (2012)
- 3) Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993)
- 4) A Survey of Bills of Rights and Limitation Clauses

XI. Non-discrimination: Gender and Sexual Orientation

Tues. Apr. 5, Thurs. Apr. 7

- 1) Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV 1 (2011)
- 2) HCJ 4541/94 *Miller v. Minister of Defense* (1995)
- 3) HCJ 721/94 *El-Al Israel Airlines v. Danielowitz* (1994)
- 4) *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)

XII. Multicultural Accommodation

Tues. Apr. 12, Thurs. Apr. 14

- 1) JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 155-176 (1994)
- 2) Susan Moller Okin, *Is Multiculturalism Bad for Women?* (1999)
- 3) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- 4) HCJ 746/07 *Ragen v. Ministry of Transport* (2011)

XIII. The Welfare State

Tues. Apr. 19, Thurs. Apr. 21, Tues. Apr. 26

- 1) Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, 1 OXFORD INT'L J. CONST. L. 13 (2003)
- 2) MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW, ch. 8 (2008)

- 3) Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690 (2010)
- 4) * H CJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* (2005) [Barak]
- 5) H CJ 10662/04 *Hassan v. National Insurance Institute* (2012) [Beinisch ¶¶ 1, 23, *26-31, 35-38, 71-73]
- 6) H CJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* (2009) [Beinisch intro, ¶¶ 1, 10-13, 21-43, 52-54, *57-62, 63, 69, *Levi (dissent)]

XIV. Conclusion

Thurs. Apr. 28

- Ruth Gavison, *Constitutional Anchoring of Israel's Vision: Recommendations Submitted to the Minister of Justice* (2015)