

Legal Studies: 174.
Comparative Constitutional Law: The
case of Israel
Spring 2022
TuTh 2PM-3:29PM

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Office hours: by scheduling zoom
meetings

Comparative Constitutional Law: The Case of Israel

Course Description

The course provides an introduction to constitutional law and theory, using a comparative perspective and a focus on the Israeli constitutional system. Israel is a uniquely instructive source for engagement and reflection on constitutional law. Though it has no one formal constitution, after five decades with no written constitution it has transitioned in the 1990's towards a constitutional regime, with the enactment of two basic laws that focused on human rights. Following their enactment, the Israeli Supreme Court declared that all basic laws had normative supremacy over regular laws. Thus, the 13 basic laws in Israel function as a constitution, albeit an incomplete one, as its contours are still being negotiated.

Israel's 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. Finally, Israel faces well-known security threats, as well as immigration challenges and class-and-ethnic-based disparities. These challenges are further compounded by the debates surrounding the legal regime applicable in the West Bank. Constitutional law is one arena in which response to such challenges is debated and examined.

The Course will review the constitutional history of Israel from the Declaration of Independence – which is the first constitutional document – to date. We will analyze the basic principles of Israel's complex constitution, explore its dilemmas, and examine the human rights' questions it raises.

Course Learning Objectives

By the end of the Course students will be able to:

1. Understand the role of a constitution in a democracy
2. Identify basic features of Israeli constitutional law and its normative framework
3. Be able to discuss main theories regarding judicial review
4. Conduct critical reading of the Israeli Supreme Court cases
5. Be able to compare some aspects of constitutional law in Israel and other places

Requirements and Grading

Participation	15%
Two assignments	30%
Final	55%

Participation – attendance, participation and reading. Students’ attendance is necessary to participate at this learning process. Students should come well prepared with a *close reading* of the material. I will monitor and encourage participation *each* class.

Assignments – There will be three assignments. Student can choose between the first two and the third is mandatory for everyone. The two first are written (students will be encouraged to replace it by an oral presentation) and the third is oral. The assignments and their grading are elaborated in Appendix A at the end of the syllabus.

Final – Take home exam. 72 hours. See Appendix B at the end of the Syllabus

Textbook

SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL- A CONTEXTUAL ANALYSIS (HART PUBLISHING, 2014) (hereinafter: NAVOT)

On-Line Sources:

The Benjamin N. Cardozo School of Law of Yeshiva University has launched the Israeli Supreme Court Project (ISCP), the core of which is the translation into English and dissemination of key opinions of the Israeli Supreme Court: <http://versa.cardozo.yu.edu/opinions>

An official English translation of statutes, entitled Laws of the State of Israel (L.S.I.), is published by the Ministry of Justice. Authorized English translations of laws are also available on the Foreign Ministry website: <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/default.aspx> The Basic Laws are published in English on the Knesset website: https://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm

There are several English law reviews in Israel: [Israel Law Review](#), [Israel Yearbook on Human Rights](#), [Tel-Aviv University Studies in Law](#), and [Theoretical Inquiries in Law](#).

Teaching Method and Policies

The course will combine general lectures with students’ discussion. While lectures are necessary to introduce basic concepts and facts about the topic, most of the learning process will be based on the interaction between students and professor, as well as the interaction among students.

This role requires students to be *active learners*. Reading, writing, debating, challenging, thinking critically, doubting the texts and one's own received knowledge are keys to the success of this learning experiment.

Please be on time. You are expected to prepare for each class. Take notes as you read (and in class) and refer to the study questions posted on bCourses. Research shows that you learn more when you take notes on paper and leave your networked devices off, so if you want to make the most of class, take notes on paper. If you want to use social media, send text messages, or communicate with friends, do it outside of class. Drinking coffee, water, etc., in class is fine, but eating is a distraction to your fellow students, so do not eat in class. Basically, we are all adults here, so the expectation is that we will treat one another with respect.

please refer to Berkeley's Academic Integrity policy (<http://sa.berkeley.edu/conduct/integrity>). Integrity and honesty are highly important, and I take them seriously.

Students requiring [accommodation](#) for disability should also make sure that I get the official accommodation notice from DSP *by the third week of the semester*. Make sure to check bCourses daily, since that will be our medium of communication. Note—if problems with food or a place to live are getting in the way of academics, UC Berkeley has a resource, basicneeds.berkeley.edu

Course Readings and Schedule¹

Introduction to the Syllabus and to the Israeli System (Tue 1/18/22; Thu 1/20/22)

By the end of class student will understand why the course is relevant, will get to know the professor and each other and will be familiar with basic data about Israel and about the Israeli legal system

Reading

- Michal Tamir, *A Guide to Legal Research in Israel*, GLOBALEX, <https://www.nyulawglobal.org/globalex/Israel1.html> (Nov/Dec 2019),

Further Reading

- Navot, 49-90

Part I – Constitutions and Judicial Review

The Role of Constitutions (Tue 1/25/22)

By the end of the class students will understand why we need constitution and basic notions regarding constitutionalism

- Ruth Gavison, *What Belongs in a Constitution?* 13 CONST. POL. ECON. 89 (2002)
- *Marbury v. Madison*, 5 U.S. 137, 176-180 (1803)

¹ Readings and schedule are subject to change at instructor's discretion. See bCourses for updates.1q

- CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village (1995) (Justice Barak opinion, para 1-3, 64-77).
<https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>

Judicial Review (Thu 1/27/22)

By the end of the class students will be familiar with the debate regarding judicial review over state actions

- Navot, 198-205
- Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW (2002) 19, 19-54,
https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4694&context=fss_papers

Further Reading

- Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution* COMPARATIVE POLITICS, 33(3), 2001, pp. 315-335.
- Mark Tushnet, *Marbury v. Madison around the World*, 71 TENN. L. REV. 251 (2004)

Constitutional Challenges in Israel and Beyond (Tue 2/1/22)

By the end of the class students will understand what a constitutional dilemma is, identify if a constitutional dilemma is common or unique to a specific state and when should we use comparative constitutional law

- *Korematsu v. United States*, 323 U.S. 214 (1944)
- *Lochner v. New York* 198 U.S. 45 (1905)
- HCJ 129/13 Axelrod v. Government of Israel (2014), [Axelrod v. State | Cardozo Israeli Supreme Court Project \(yu.edu\)](#)
- RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW -54 (2014)

Further Reading

- Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999)

Making Sense of Human Rights (Thu 2/3/22)

By the end of the class students will be familiar with the theory of human rights and with essential distinctions and terms

- Nickel, James, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), Edward N. Zalta (ed.),
<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rights-human>

Part II - Israeli Constitutionalism

The Declaration of Independence (Tue 2/8/22)

By the end of the topic students will be able to analyze the question of whether the Declaration of Independence is a constitutional document

- Israel's Declaration of Independence, May 14, 1948,
<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>
- Michal Tamir, *The Declaration of Independence as a Transitional Constitution: The Case of Israel*, 8 MIDDLE EAST LAW AND GOVERNANCE (University of Toronto) (2016) 57, 57-65.
- Navot, 4-12

Israeli Constitutionalism: An overview (Thu 2/10/22)

By the end of the topic students will be familiar with the Israeli complex constitutional background and development

- Navot 12-46
- Amnon Rubinstein, *Israel's Partial Constitution: The Basic Laws*, in *Israel Studies: An Anthology* (Mitchell G. Bard & David Nachmias eds., 2009),
<http://www.jewishvirtuallibrary.org/jsource/isdf/text/Rubinstein.html>

Further Reading

- Dafna Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUMAN RIGHTS L. REV. (1995) 309.
- Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Israeli Constitution-Making*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 207-238 (Dennis Galligan & Mila Versteeg, eds. 2013).

The Constitutional Situation Before 1992 (Tue 2/15/22; Thu 2/17/22)

By the end of the class students will understand the constitutional situation before 1992 and be able to analyze cases in which the Israeli Supreme Court recognized human rights through interpretation of laws.

- Navot 221-226
- HCJ 73/53 Kol Ha'am v. Minister of Interior (1953),
<https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior>
- HCJ 153/83 Levi v. Commander of the Southern District of the Israeli Police (1984)
<https://versa.cardozo.yu.edu/opinions/levi-v-commander-southern-district-israeli-police>

Further Reading

- HCJ 1/49 Bejerano v. Police Minister (1949),
<https://versa.cardozo.yu.edu/opinions/bejerano-v-police-minister>

The Basic Laws of Human Rights and Judicial Review after the Constitutional Revolution

(Tue 2/22/22)

By the end of the topic students will be familiar with the basics law of human rights and with the way the Supreme Court deals with infringements upon rights entrenched in them.

- Basic Law: Human Dignity and Liberty (1992)
<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/39134/97918/F1548030279/ISR39134.pdf>
- Basic Law: freedom of Occupation (1994)
- https://knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf
- Navot, 227-233
- Michal Tamir & Dalia Cahana-Amitay, *The Hebrew Language Has Not Created A Title for Me': A Legal and Sociolinguistic Analysis of New-Type Families*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW (2009) 545, 551-553.
- HCJ 2887/04 Abu Madigam v. Israel Land Administration (2007), Justice Arbel Decision [Abu-Madigam v. Israel Land Administration | Cardozo Israeli Supreme Court Project \(yu.edu\)](#)

Further Reading

- Mordechai Kremnitzer, *Constitutional Proportionality: (Appropriate) Guidelines in* Gideon Sapir, Daphna Barak-Erez and Aharon Barak (eds), ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Hart 2013) 225-238.

Limitation Clauses and Notwithstanding Clauses (Thu 2/24/22)

By the end of the class students will be familiar with limitations clause in different constitutions and understand the idea of the notwithstanding clause in Canada and Israel

- The Canadian Charter of Rights and Freedoms, Sec 33,
<https://laws-lois.justice.gc.ca/eng/const/page-12.html>
- AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 19-37 (2012)

Due date Assignment # 1 – Analysis of a Supreme Court Decision (Tue 3/1/22)

The class will be dedicated to a mutual discussion of the assignment and presentations of students who choose to replace the written assignment by an oral one

Part III – Human Dignity and Equality

Human Dignity (Thu 3/3/22, Tue 3/8/22)

By the end of the class students will be familiar with the special way the right of human dignity is interpreted in Israel. Comparison will be made with the interpretation of the right in Germany,

South Africa and the United States. Demonstration of judicial review will be made by the case in which the Supreme Court invalidated the privatization of jails in Israel.

- Ariel Bendor & Michal Tamir, *Human Dignity as a Chameleon*, CARDOZO INTERNATIONAL & COMPARATIVE LAW REVIEW (forthcoming)
- HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. Minister of Finance (2009) (Justice Beinisch Opinion)
<https://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance>

Further Reading

- Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (2015) 156-162.
- Ariel L. Bendor and Michael Sacks, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 ISRAEL LAW REVIEW 25 (2011).
- Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8(4) INT'L J. CONST. L. (2010).

Due date of Assignment #2 – Analysis of an Article (Thu 3/10/22)

The class will be dedicated to a mutual discussion of the assignment and presentations of students who choose to replace the written assignment by an oral one

Equality in General (Tue 3/15/22)

By the end of the class students will be familiar with basic distinctions regarding the right to equality

- Stefan Gosepath, *Equality*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011) <http://plato.stanford.edu/entries/equality/>
- Navot, 233-234
- Michal Tamir & Dalia Cahana-Amitay, *The Hebrew Language Has Not Created A Title for Me': A Legal and Sociolinguistic Analysis of New-Type Families*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW (2009) 545, 553-555.

Equality – Gender (Thu 3/17/22)

By the end of the class students will identify the gaps between the right to equality as *law in the book* and the situation in reality (*law in action*) and suggest reasons for the discrepancy

- Women's Equal Rights Law, 1951,
https://www.knesset.gov.il/review/data/eng/law/kns1_women_eng.pdf
- HCJ 104/87 Nevo v. National Labour Court, (1990)
<https://versa.cardozo.yu.edu/opinions/nevo-v-national-labour-court>.
- HCJ 4541/94 Miller v. Minister of Defense, (1995) (Justice Dorner Opinion)
<https://versa.cardozo.yu.edu/opinions/miller-v-minister-defence>
- Navot, 235-238

Spring Break (Tue 3/22/22; Thu 3/24/22)

Gender Gaps in the IDF (Tue 3/29/22, Thu 3/31/22)

Watching the Israeli film "zero motivation" and discussion of the way gender gaps are demonstrated

Equality – Sexual Orientation (Tue 4/5/22)

By the end of the class students will be aware of the achievements the LBGT community in Israel and the challenges they still face

- Michal Tamir & Dalia Cahana-Amitay, *The Hebrew Language Has Not Created a Title for Me': A Legal and Sociolinguistic Analysis of New-Type Families*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW (2009) 545, 555-559.
- HCJ 721/94 EL-AL Airlines v. Danielowitz, (1994) (Justice Barak Opinion) <https://www.psakdin.co.il/Files/psak123.pdf>
- Navot, 238-239

Equality – Minorities (Thu 4/7/22)

By the end of the class students understand the challenge of equality to minorities in a Jewish and Democratic State, including dilemmas of lands allocation and immigration

- HCJ 6698/95 Ka'adan v. Israel Lands Authority (2000) (Justice Barak Opinion) <https://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administratio>
[n](https://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administratio)
- HCJ 7052/03 Adalah v. Minister of Interior (2006) read Justice Barak minority opinion and Justice Cheshin Majority Opinion. <https://www.adalah.org/uploads/oldfiles/eng/features/famuni/unifeng.htm>
- Navot, 239-243

Further reading

- Yousef T. Jabareen, *Constitutional Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26(2) WISC. INT'L L. J. 345 (2008)
- Daphne Barak-Erez, *Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6(1) INT'L J. CONST. L. 184-92 (2008)
- SUZIE NAVOT, CONSTITUTIONAL LAW IN ISRAEL (2nd ed, 2016) 233-240.

Part IV - The effect of Constitutions on the private law

Equality in Private Law (Tue 4/12/22)

By the end of the topic students will understand the special problems regarding the application of equality in the private law and will be familiar with the phenomenon of exclusion

- Aharon Barak, *Constitutional Rights and Private Law* in Gideon Sapir, Daphna Barak-Erez and Aharon Barak (eds), ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Hart 2013) 379-400
- Michal Tamir, 'The Freedom to Exclude: The Case of the Israeli Society', 49 ISRAEL LAW REVIEW (2016) 237, 237-252 http://journals.cambridge.org/abstract_S002122371600008X

Further Reading

- Michal Tamir, 'Human Rights in Private Law: Hybridization of the Balancing Tests' in Gideon Sapir, Daphna Barak-Erez and Aharon Barak (eds), ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Hart 2013) 401.

Assignment #3 – presentations (Thu 4/14/22; Tue 4/19/22; Thu 4/21/22)

The Class will be dedicated to the presentations of the students

Part V - Conclusion – Can United States learn from Israel?

(Tue 4/25/22, Thu 4/28/22)

By the end of the class students will understand how the constitutional revolution effected criminal justice in Israel. Two main examples will be discussed with comparison to the legal situation in the US: the doctrine of fruit of the poisonous tree and the doctrine of selective enforcement,

- Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right (2015) 300-301.
- CrimA 5121/98 Yissacharov v. Chief Military Prosecutor (2006), <https://versa.cardozo.yu.edu/opinions/yissacharov-v-chief-military-prosecutor>
- **Michal Tamir**, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review* 12 TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS 43-99 (2006)

Appendix A – Assignments (30%)

Assignments #1 – Case Analysis

- Course Goal#4: Conduct critical reading of the Israeli Supreme Court cases
- Due Date: 3/1/22
- Length: 1000 words
- Format: word document (or presentation)

- Assignment: Read and analyze the case (appeal to High Court of Justice) according to the following parameters:
 1. What was the legal question and sub legal questions in the case?
 2. What was the right that has been infringed upon?
 3. How did the court balance between the right and interest?
 4. What is your opinion about the decision?

- The Case:

HCJ 5026/04 Design v. Rosenzweig (2005)

<https://versa.cardozo.yu.edu/opinions/design-22-shark-deluxe-furniture-ltd-v-rosenzweig>

- Grading of the assignment

Criteria	Possible Points	Feedback
Student answers the first and second questions fully and correctly	5	
Student answers and applies the third question correctly	6	
Students' opinion – reasoning, clarity, originality and order	4	
TOTAL	15	

Assignment #2 – Article Analysis

- Course goal#2: Identify basic features of Israeli constitutional law and its normative framework
- Course goal#3: Be able to discuss main theories regarding judicial review
 - Due date: 3/10/22
 - Length: 1000 words

- Format: word document (or presentation)
- The Assignment: Read the article and write your reasoned opinion on the arguments presented. You can address sub-claims, examples etc., using the knowledge, tools and examples you learned in the course. You can agree with some arguments and challenge others.
- The article: Tamar Hostrovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters*, in Gideon Sapir, Daphna Barak-Erez and Aharon Barak (eds), *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* (Hart 2013) 267-284 (Can be found under “files” in the bCourse)
- Grading of the assignment:

Criteria	Possible Points	Feedback
The student applies correctly the subjects learned throughout the semester	3	
The student relies on and mentions resources	3	
The student uses convincing arguments	4	
Originality	3	
General impression	2	
Total	15	

Assignment #3 – presentation

- Course goal #5: Be able to compare some aspects of constitutional law in Israel and other place
- Assignment: Find an example that demonstrates minorities' exclusion in Israel or somewhere else, analyze it and suggest solution to cope with the phenomenon.
- Due Date: 4/14/22
- Length: 8 min (maximum)

Grading of the assignment

Criteria	Possible Points	Feedback
Relevance of the item found by the student	4	
The student applies the issue of exclusion and explains how it is demonstrated by the example	6	
Presentation is clear and fluid	2	
Originality	3	
TOTAL	15	

Appendix B – Final Exam (55%)

- Take home exam on the issues covered in class. A thinking question that will require horizontal application of the materials studied throughout the semester.
- 72 hours
- Due date: