Comparison of American and Talmudic Law: Structural Differences

PURPOSE AND SCOPE:

This comparative course is designed to:

1. Introduce students to the concepts, methods and contemporary issues in Comparative Law.
2. Comparatively analyze the origins, processes, structures and codes in the American and Judaic legal systems and traditions.
3. Focus on specific procedural differences between American and Talmudic law, and the ethical and practical considerations underlying them.

The current trend toward globalization has renewed interest in comparative law. The era of legal isolationism is coming to an end, and there has been an increased focus on the similarities between legal systems in forging global discourse across jurisdictions. By comparing the structure of the Jewish legal system with the American one, students will come to understand the foundational concerns that go into creating any legal system, and to better analyze – on an ideological plane – what the law should be.

We will begin the semester by looking at the foundational concerns with any legal system: what is the goal of a legal system and what should it be, what is the role of the central text (the Constitution or the Torah) and who has authority to interpret it, and whether there is room for pluralism within the American or Jewish legal systems. We will then move to procedural issues – including the difference between civil law and criminal law, and rules of evidence - and analyze the difference between the American legal approach and the Talmudic approach. The focus of the independent readings will be on primary sources including several cases and Talmudic excerpts. Through understanding the differences between the American and Jewish legal systems, students will develop a critical understanding – and concomitantly, an appreciation – for the nuances of the law as well as the legal structure as a whole.

REQUIREMENTS:

Students are expected to complete the assigned readings for each class and be prepared to engage in discussion about them. To facilitate the latter, each student should type up a brief (i.e. one or two paragraphs) response to the week’s readings – thoughts, ideas, points of interest, critiques, questions – to be circulated via email before each class to the instructor and other class participants. This is meant to be an informal forum and an opportunity freely to explore and express the ideas raised by the readings, so students will not be graded on the content of these responses. However, the prompt submission of these responses (i.e. prior to every meeting = at least an hour before) is considered to be an important part of participation in the class and will be graded as such.

There will be one final paper, 15 to 20 pages in length, due at the end of the semester, to allow the student to better explore an additional aspect of comparative law in depth. Students will be able to choose from a list of suggested topics, or to come up with one on their own, that deal with
structural or substantive differences between American and Talmudic law. Choice of topic should be determined in consultation with the instructor.

There will also be a final test at the end of the semester, applying the ideas that we discuss in class. Students will be given 4-6 complex fact patterns that they will need to analyze under American law and under Jewish law, and discuss the different ethical considerations that arise under each legal system as applied to these facts.

SYLLABUS:

1. **Legislating Ethics**

   **Does Jewish Law Legislate Ethics?**
   **Does American Law Legislate Ethics?**
   **Should legal systems legislate ethics?**

   Mishna Kiddushin 4:14  
   Babylonian Talmud, Berachot 33b (Mishna and Gemara);  
   Babylonian Talmud, Erabin 100b  
   Babylonian Talmud, Yoma 67b  
   Babylonian Talmud, Sanhedrin 56a-b  
   Maimonides, Guide to the Perplexed 3:48  
   Cleveland v. United States (329 U.S. 14, 16-17) (1946).  

2. **Text as a Foundation**

   **How does Jewish Law Analyze the Text from the Torah?**
   **How does American Law Analyze the Text from the Constitution?**
   **Is having a text a limitation, and how do judicial bodies deal with it?**
   **Should there be a difference between the Torah and the Constitution?**

   Bava Kamma 83b-84a
3. Authority of Interpretation

Who can interpret Jewish law? Who can interpret American law? Is interpreting the same thing as applying? What authority is given to the judges or rabbis to legislate?

Deuteronomy 17:9-11; Rashi there;
Maimonides, Benedictions 11:3
Menachat 29b
Rosh Hashana 25b
Mishna Rosh Hashanah 2:8-10
Babylonian Talmud, Ktuvot 94a-b; 85a-b (Rashi and Toseffot there)
Babylonian Talmud, Sanhedrin, 46a, 27a, 52b, 58b (with Rashi throughout)
Babylonian Talmud, Pesachim 66a
Babylonian Talmud, Bava Kama 96b
Talmud Yerushalmi Chagiga 2:2
Maimonides, Laws of Sanhedrin, 24:4-5
Shulchan Aruch, Choshen Mishpat, 2
Marbury v. Madison (1803).
4. Pluralism in Law

What role is there for the minority opinion in Jewish law and American law? Do rulings need to be unanimous or can there be disagreement?

Mishna, Eduyot 1:6-7
Tosefta Eduyot 1:4
Nidda 6a
Bamidbar Rabbah 15, 22
Yerushalmi Sanhedrin 4:2
Shabbat 88b
Eiruvin 6b-7a, 13b
Yerushalmi Succah 2:8
Yerushalmi Brachot 1:4
Yirmiyahu, Perek 23
Chagiga 3b
Sotah 47b
Gittin 6a
Bava Metzia 59b, 84a, 86a
*Plessy v. Ferguson*, 163 U.S. 537 (1896)


5. Role of the Court

Is the court’s power to enforce the laws optional or mandatory? Is there a difference between American Law and Talmudic Law in the court’s power over individuals? Can someone be compelled to appear in court? Does a person get his choice of courts or is he presumed to submit to the court’s jurisdiction?

Mishna Yevamot 13:1
Yevamot 107b
Yerushalmi Yevamot 13:1
Mishna Bava Batra 8:7
6. Civil and Criminal Procedure

What types of witnesses are allowed in a Jewish court? What types of witnesses are allowed in an American court? How does the presence of a jury affect the legal proceedings? Do American courts and Jewish courts differ in terms of appeals process? Should appeals be allowed? Who should have the burden of proof in a case?

Mishna Sanhedrin 4:1
Mishna Bechorot 4:4
Sanhedrin 33a; 5a
Yerushalmi Ktuovt 9:2
Maimonides, Laws of Sandredrin 6:1-2
Sanhedrin 25a
Ohr Hachayim to Numbers 11:10
Rambam, Laws of Edut, 12:2 Rambam, Hilchot Sanhedrin 18:6
Radbaz (Rabbi David ben Zimra), Commentary on Rambam’s Hilchot Sanhedrin 18:6
U.S. v. Young, 470 U.S. 1, 25 (1985) (Brennan, concurring)
Norman Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53, 56 (Winter 1956)
7. Interaction with Other Legal Systems

How does Jewish law treat choice of law questions? How does American Law deal with choice of law questions? Look specifically at Dina D’malchuta Dina and Jewish attitude toward going to “other” courts.

- Exodus 21:1
- Gittin 88b
- Rambam, Hilchos Sanhedrin, 3:7, 26,7.
- Hoshen Mishpat 26:2.
- Tshuvat Hatashbetz, chelek 4, siman 6
- Netziv (Haamek Sheala, Mishpatim siman 101)
- United States v. Huss, 482 F.2d 38, 51 (2d Cir. 1973)
- Smilow v. United States, 465 F.2d 802 (2 Cir. 1972)
Paper Topics

The following are a list of suggested paper topics comparing American Law and Jewish Law. These are general topics that should be more narrowly defined in your paper. You may also choose another topic in a similar vein with prior approval from the Professor. You must make an appointment to discuss the paper with the Professor, even if you are choosing one of these suggested topics.

The paper must be annotated and 15-20 pages in length.

This paper is due the last day of class.

2. How does the fact that Jewish Law is Divine play out legally? Explore role of the Bat Kol in Jewish Law
4. Tax Law in American Law and Jewish Law
5. Bankruptcy Law: Compare Jewish Law perspective of the propriety of discharging personal debts with the American system.
8. Damages in American Law v. Jewish Law
10. Corporate Law: To what extent is a corporation an independent entity in Jewish and American Law?
11. Employment Law: What are unconscionable terms of employment between Jewish Law and American Law?
12. First Amendment Law: What are the limits of free speech between Jewish Law and American Law?
15. Juvenile Punishment in Jewish Law v. American Law

Topics Must Be Approved by Professor