AMERICAN AND JEWISH LAW IN COMPARATIVE PERSPECTIVE

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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 substantive 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. The second half of the semester will focus on substantive issues – including abortion, capital punishment, and duress – and analyze the difference between the American legal approach and the halachic 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.
Students will have the option of either a) writing a final paper, or b) taking a final exam.

The paper would be 20 to 25 pages in length, due at the end of the semester, and would 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 come up with one on their own, that deals with structural or substantive differences between American and Jewish law. Choice of topic should be determined in consultation with the instructor.

The final exam would involve 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

PART I: STRUCTURAL DIFFERENCES; LAW, FUNCTIONS, AND FUNCTIONARIES

Introduction to Jewish Law

Legislat ing Ethics

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


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?

**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?

- Grey, Thomas, “Do We Have an Unwritten Constitution?” *Stanford Law Review* 27 (1975), 703-18
- Hurd, Heidi, “Interpreting Authorities,” in Marmor (ed.), *Law and Interpretation*, 405-32

**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?


**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?


**PART II: SUBSTANTIVE DIFFERENCES**

**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?

- Norman Lamm, “The Fifth Amendment and Its Equivalent in the Halakhah,” 5 *Judaism* 53, 56 (Winter 1956)
Civil Rights

Is the concept of assigning individual rights unique to American law or is there an equivalent in Jewish law? How have the American courts interpreted or extended these rights? Does Jewish law afford the same types of rights as American law? Does the development of civil rights jurisprudence in American law mirror the development in Jewish law?

Homosexuality (First Case Study)

How does Jewish law view homosexuality? How does American law view homosexuality? Is the dichotomy in American Law religiously grounded or are there other motivations?


Abortion (Second Case Study)

How does Jewish law view abortion? How does American law view abortion? Are the issues the same in both legal systems, or are the issues different?


The Right to Die (Third Case Study)

Does one have the right to die? Should one have the right to die? How do American law and Jewish law view suicide? Is there a difference in conception between completed suicide and attempted suicide? What about assisted suicide? What is the closest legal parallel to assisted suicide that the American courts rely on? What is the closest legal parallel to assisted suicide that the Jewish courts rely on?

Criminal Law

What are the requirements to be criminally liable in American Law? What are the elements of a crime in Jewish law?


Acts and Omissions  (First Case Study)

When can you be guilty for a failure to act in American Law or Jewish Law? What are the different rationales for the differences between the legal systems? Why is there communal responsibility under Jewish law and not under American Law? What are the limits to communal responsibility under Jewish law?


Defenses  (Second Case Study)

What defenses are available in Jewish law? What defenses are available in American law? Does Jewish law account for a “heat of passion” defense? How do the legal systems differ on self defense?


Punishment

What are the different means of punishment under American law and Jewish law? What are the limitations on punishment? How has the Eighth Amendment Against Cruel and Unusual Punishment been applied as to Capital Punishment? How does Judaism view capital punishment? Is there a difference between having capital punishment “on the books” and how it’s applied? What types of punishments are allowed in Talmudic law?

**Family Law**

*What are the Grounds for Divorce in New York? What are the grounds for divorce under Jewish Law? Why does New York not adopt the “irreconcilable differences” that exist in other states? Why is the halachic and constitutional controversy surrounding the New York Get Law?*


**Property Law**

*When is something ownerless according to Jewish Law and American Law? How is something acquired according to Jewish law and American law? What is the principle underlying this distinction?*


**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.*

**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.

1. Exigent Circumstances in Jewish Law v. American Law
2. Tax Law in American Law and Jewish Law
3. Bankruptcy Law: Compare Jewish Law perspective of the propriety of discharging personal debts with the American system.
6. Damages in American Law v. Jewish Law
7. Commercial Law: Economic Competition in Jewish Law and American Law
8. Corporate Law: To what extent is a corporation an independent entity in Jewish and American Law?
9. Employment Law: What are unconscionable terms of employment between Jewish Law and American Law?
10. First Amendment Law: What are the limits of free speech between Jewish Law and American Law?

*Topics Must Be Approved by Professor*