

University of Haifa Faculty of Law
EMLE

An Introduction to the Economic Analysis of Public Law, Fall 2019

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General

The Economic Analysis of Law (or the *Law and Economics* movement) is one of the most important contemporary paradigms to examine law in theoretical and empirical perspectives: on the positive level of analysis - explaining legal and institutional arrangements and judicial decision-making, and on the normative level of analysis - evaluating the institutional, legal and judicial arrangements and advocating reforms of them.

The course will offer an **introduction** to the economic approach to public law, an introduction that will emphasize broad philosophical and theoretical debates, rather than techniques and very specific topics. It will adopt a broad view of Economics, embarking on positive analysis - the explanation of legal norms and institutions, as well as normative analysis - ways of evaluating these norms and institutions. These analyses will be based on various branches of economics, such as neo-classical microeconomics, welfare economics, behavioral economics, but since you will meet those disciplines in your other courses, we will focus on **public choice**, the branch of economics dealing with collective decision-making, which is a key foundation of public law – the law governing the state institutions and the relations among them, as well as the relations between the state and its individuals. In a formal legal categorization public law includes two main branches of law: constitutional law and administrative law. We will touch upon both.

Our class hours are limited (24 academic hours) and therefore you are expected to come well prepared after reading the preparatory materials and giving a thorough thoughts to the preparation questions, some of which we will analyze in class (you are encouraged to answer them in writing, or list the main points of your analysis and bring your notes to class). The limited class hours also mean that we will not be able to cover many important topics. Some of those will be worked through by several groups of students, which will present their collective findings in class.

The last point also bares on the composition of the final grade which will be comprised from a final exam (70%) and a grade for active individual and group participation (30%).

My contact detail is salzberg@law.haifa.ac.il and the teaching assistant for this class is Snir Yehiel, who can be reached at ylichin1@univ.haifa.ac.il

I wish you an interesting and valuable course and a pleasant time in Haifa.

Detailed Syllabus and class schedule:

Class I – 18/11 1215-1600

1. Introduction: Basic concepts & tools

Economic analysis; normative and positive analyses; market and non-market public law

1.1 Eli Salzberger, The Economic Analysis of Law - The Dominant Methodology for Legal Research?!, 4 *Haifa Law Review* (2008) 207-235, can be downloaded from SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1044382

1.2 American Prisons: The Right Choices, *The Economist* (June 20th, 2015)

Full text: <http://www.economist.com/news/briefing/21654578-america-bloated-prison-system-has-stopped-growing-now-it-must-shrink-right-choices>

2. Foundations for normative analysis

2.1 Jules Coleman, *Markets, Morals and the Law* (CUP 1988), Chs. 3 and 4 (the book is available online at Google books)

Preparation questions

- a) Read the article in *The Economist* (item 1.2) and phrase in your own language the main **explicit** and **implicit** arguments of the article, distinguishing between **descriptive**, **positive** and **normative** arguments. Try to phrase these arguments in the framework of the basic premises of Economics. What types of legal norms and from which fields of law are relevant for the issues discussed
- b) Israeli Torts law is based on the Anglo-American/Common Law paradigm, guided by the principle of negligent, phrased in economic terminology already in 1947 by the US Supreme Court (the Learned-Hand formula). It stipulates that liability and compensation should be ordered for damage caused by a person if the avoidance costs are smaller than the damage multiplied by the probability it occurs. This was also the rule regarding the liability of drivers causing accidents.

In the early 1970s the Israeli Minister of Justice appointed a committee to examine legal reform in light of an increasing number of car accidents in which pedestrians are hurt and for various reasons (including the negligence principle, but also due to legal costs of enforcement) are not compensated.

Several empirical studies were placed on the reform committee's table. One study showed that due to high litigation cost many accidents are not brought to judicial resolution at all. A second study showed that in the US no correlation was found between the average compensation ruled by courts for pedestrians hurt in

accidents and the accident rate across the different States in the US. A third study showed that on average the economic situation of car drivers involved in accident is significantly better than that of pedestrians involved in car accidents

- 1) What would be your recommendations for a legal reform?
- 2) Do you think your proposed reform stands a chance to be adopted by the government? By the legislature?
- 3) You are assigned to rule on appeal of a district court decision, which found a car driver not liable for compensation for a pedestrian who was badly injured by the driver when he crossed a road not in a pedestrian crossing. The pedestrian – a blue color worker - lost his work ability. The driver is a wealthy businesswoman. What will be your decision on the appeal?

Class II – 20/11 1600-1945

3. Foundations for positive analysis

3.1 Allan Feldman and Roberto Serrano, *Welfare Economics and Social Choice Theory* (2nd ed. 2006), Chs. 1 (sections 1-5) , 12 (sections 1-5), 13 (sections 1-7)

3.2 Dennis Mueller, *Public Choice III* (2003), Chs. 4, 5, 7. You may skip the technical parts

3.3 Daniel Farber and Philip Frickey, *Law and Public Choice* (1991), Chs. 1-3

Preparation questions

a) Assume that there are 3 positions in the 9 members American Supreme Court with regard to the establishment clause in the constitution: position (A) held by 3 justices who believe that all public acts that directly or indirectly aid religion violate the clause, position (N) held by 3 justices who believe that any public act is constitutional if it is neutral between religious and non-religious associations; and position (B) held by 3 justices who conclude that the clause requires balancing, in which the purpose of the act, its effect on religion, and the extent of entanglement between state and religion all play a role.

Assume also that the judges who hold position N believe that position B reflects more accurately the design of the framers on the Court's cases than does position A. The justices who hold position B believe that A is more nearly correct than N. And the justices who take position A prefer position N to B.

What is the Court's position on the establishment clause?

b) Assume that an appeal on the O. J. Simpson acquittal is launched with the American Supreme Court. 6 justices review the evidence and the California's court proceedings and conclude that Simpson is guilty. 3 of them believe also that he should be punished severely as a first-degree murderer, i.e. he ought to be executed. 3 justices, however, think that since the jury in the California court reached a different verdict, the sentence ought to be lighter - 10 years in prison. They also hold that if the options are death row or acquittal, Simpson ought to be acquitted. The remaining three justices conclude that Simpson is innocent, but they also believe that if Simpson is guilty he deserves the severest possible punishment.

How will the Court decide the case?

c) Think about possible points of criticism against the Social Choice framework adopted to analyze the above cases.

Class III – 25/11 1215-1600

4. The theory of the state and normative constitutional law

4.1 Robert Cooter, *The Strategic Constitution* (2000), Chs. 1, 10, 11

4.2 Dennis Mueller, *Public Choice III* (2003), Chs. 2, 3

4.3 Buchanan and Tullock, *The Calculus of Consent – Logical Foundations of Constitutional Democracy* (1962) pp. 53-84.

4.4 Eli Salzberger, "The Independence of the Judiciary: An Economic Analysis of Law Perspective", in Andras Sajo (ed.), *Judicial Integrity*, Koninklijke Brill NV, 2004, pp. 69-90

4.5 Niva Elkin Koren and Eli Salzberger, *Law, Economics and cyberspace* (2004), Ch. 10

Preparation questions

- a) What are the moral foundations on which the economic theory of the state are based? Examine to what degree the basic structure of government in your country conforms the economic normative theory of the state
- b) Are the main insights and conclusions of Buchanan and Tullock 1962 analysis valid today?
- c) Can liberal democracy as we have practiced in the last 75 years be justified on the bases of the economic theory of the state?

Class IV – 27/11 1600-1945

5. Positive constitutional and administrative law

5.1 Dennis Mueller, *Public Choice III* (2003), Ch, 15. (the book can be found online on Google books)

5.2 Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires* (2000) Chs. 2, 9, 11, 12.

5.3 Eli Salzberger. A Positive Analysis of the Doctrine of Separation of Powers, or Why Do We Have an Independent Judiciary, *13 International Review of Law and Economics* (1993) 349

5.4 Stefan Voigt and Eli Salzberger, Choosing Not to Choose: When Politicians Choose to Delegate Powers, *55 Kyklos* (2002) 289

5.5 Stefan Voigt, *Explaining Constitutional Change* (1999), Chs. 2, 6

Preparation questions

- a) Examine the Damages for Victims of Car Accidents legislation (from class 1) in light of the discussion of preparation kit for this class. How can one analyze the legal arrangement regarding car accidents using the Pletzman's framework?
- b) Can the economic theory explain the current global decline of liberal democracy?

Class V –2/12 1215-1600

6. Normative and positive administrative law and regulation

6.1 Den Hartog, Johan, Review of Economic Theories of Regulation, Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series (2010)

6.2 Bruce Chapman, Economic Analysis of Law and the Value of Efficiency, in Aristides N. Hatzis (ed.), *Economic Analysis of Law: A European Perspective*

(<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.485.167&rep=rep1&type=pdf>)

7. Empirical Analysis

7.1 Eli Salzberger and Paul Fenn, "Judicial Independence: Some Evidence from the English Court of Appeal", *42 The Journal of Law and Economics* (1999), 831-847.

7.2 Stefan Voigt, Empirical Constitutional Economics: Onward and Upward? *Journal of*

Preparation questions

- a) Read carefully Den Hartog's review of the literature about regulation and elaborate points of criticism in light of the concepts about economic analysis discussed in the class
- b) What are the methodological problems with empirical studies in law and economics of public law?

Class VI – 9/12 1600-1945

8. Selected topics – group presentations
 - 8.1 The effects of behavioral analysis on the law and economics of public law
 - 8.2 The effects of technology on the law and economics of public law
 - 8.3 Soft regulation: nudging, expressive law and social norms
 - 8.4 Cost-benefit analysis
 - 8.5 Risk and the economic analysis of public law