Course outline

Taught by lawyers, this is a course targeting public policy doctoral students who do not have a legal background. It aims at familiarizing students with legal aspects which are important to the study and practice of public administration and public policy.

Whilst law imposes constraints on, as well as provide opportunities for policy development and change, legal materials is often difficult to access and comprehend for non-lawyers, and legal institutions, mechanisms and dynamics not always well understood by public policy students and scholars. This course will help students develop a more sophisticated understanding of the context in which public policies are designed and implemented, by equipping them with practical and analytical tools which are necessary to understand the relevance of law in public administration and public policy research and practice.

The seminars will expose students to legal materials, the access and understanding of which may be essential to researchers in public policy; legal perspectives complementary of more traditional approaches to public administration and public policy issues, which draw more on political science or political economy perspectives; and social sciences research which explores legal institutions and dynamics.

The course is designed in a way which encourages students to link in with their own research topic.

The first part of the course will focus more on judicial aspects, ie the role of courts and litigation and their impact on policy making, whilst the second will address more specifically regulatory issues.

Aims

The course aims to

- familiarize students will legal materials;
- expose legal frameworks which impact on policy-making at various governance levels (international law, human rights agreements, constitutions, legislation, case law, soft law, etc);
- present the main legal and judicial processes and mechanisms relevant to policy-making;
- engage with relevant legal scholarship;
- critically study social science scholarship which address legal institutions, mechanisms and dynamics;
- discuss and critical reflect on the role of law and legal scholarship in public policy research and practice.

Learning outcomes

By the end of the course students should be able to:
• identify, find and get an understanding of legal materials (legislation, treaties, cases, codes, scholarly works, etc.)
• draw upon legal materials and legal scholarship to refine their understanding of public policy;
• develop conceptual frameworks for the study of legal dynamics which have an impact on public policy.

Communication and course materials

All core readings are available on the course Moodle e-learning platform.

Seminars organization

Students should prepare for the seminars by reading requested materials and carrying out specific tasks, as specified for each seminar. They are expected to contribute actively to seminars’ discussion.

Assessment (2 x 50%)

• Class participation (2 x 10 %)
• One presentation (including written handouts) which should provide a critical assessment of a legal or social science article, which address legal issues, related to the topic of the student’s own research, where possible (2 x 10 %)
• 2 x 1 research paper (5000 words) (2 x 30%)

Deadlines

• Submission of choice of paper topic : 31 October 2015
• Submission of research paper 1: 31 December 2015
• Seminar presentation: Presenters are required to submit their presentation outline (or draft) to instructor 2 days in advance of the class.
<table>
<thead>
<tr>
<th>Week 1</th>
<th>Law for public policy</th>
<th>Introduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Week 2</td>
<td>‘Legal (re)search’: where and how to find the law</td>
<td>Methods and theories</td>
</tr>
<tr>
<td>Week 3</td>
<td>Legal scholarship – what questions do legal scholars ask, and how do they answer them?</td>
<td></td>
</tr>
<tr>
<td>Week 4</td>
<td>Judicial behavior and legal reasoning – what judges (actually) do?</td>
<td></td>
</tr>
<tr>
<td>Week 5</td>
<td>International Law and International Relations</td>
<td>Sources</td>
</tr>
<tr>
<td>Week 6</td>
<td>Human Rights</td>
<td></td>
</tr>
<tr>
<td>Week 7</td>
<td>Constitutions</td>
<td></td>
</tr>
<tr>
<td>Week 8</td>
<td>Law, Courts and the European Union</td>
<td></td>
</tr>
<tr>
<td>Week 9</td>
<td>Constitutional review &amp; policy-making</td>
<td>Mobilizing the law for policy-change and implementation</td>
</tr>
<tr>
<td>Week 10</td>
<td>Judicial review &amp; compliance</td>
<td></td>
</tr>
<tr>
<td>Week 11</td>
<td>Litigation &amp; policy change</td>
<td></td>
</tr>
<tr>
<td>Week 12</td>
<td>Accountability in a global governance era - Global administrative law</td>
<td></td>
</tr>
</tbody>
</table>

**Week 1 – Law for public policy**

*Task 1*
Check a couple of public policy books and/or journal issues with which you are familiar, and report on the place given to legal aspects, issues or research.

*Task 2*
Based on your previous studies or personal and professional experience, identify three ways in which law matters for public policy.

*Mandatory reading*

Week 2 – ‘Legal (re)search’: where and how to find the law
In this seminar, we will examine the question of the ‘accessibility’ of legal materials and engage with the different sources of law and structure of the legal system. You are encouraged to think about the ways law may matter for your own research.

*Task*
Using legal databases accessible from CEU (e.g. Westlaw or LexisNexis), or publically accessible ones (e.g. governmental, national courts, etc.), try to find a statute, a regulation, or a court case which in any way relates to your doctoral research. If you do not find anything in relation to a specific country you research on, try finding it in relation to another country. Be ready to answer the following questions. What did you look for? Which database did you use? What difficulties did you encounter? Are you sure what you found was the ‘law in force’? How do you know? Will you need to look for legal materials for your own research? What kind?

**Mandatory reading**

- Joseph L. Gastwirth (2013), ‘Should law and public policy adopt ‘practical causality’ as the appropriate criteria for deciding product liability cases and public policy?’ *Law, Probability and Risk* 12: 3-4, 169-188

**Week 3 – Legal scholarship – what legal scholars do, and why it matters for public policy?**

In this seminar, we will discuss the different types of legal scholarship (‘black-letter’, critical, legal theory, law in context, socio-legal, comparative, etc.), and contrast these with social sciences approaches to research. The objective is to assess the benefits and pitfalls of multi- and cross-disciplinary engagement and its relevance to the study and practice of public policy.

**Task**

Using Westlaw or LexisNexis, identify a ‘legal’ article which relates to your research topic: What type of questions does it ask? What is the claim/argument? What methods are used? What is the theoretical framework? What kinds of conclusions are reached? What kind of legal scholarship is it? In what way does it differ from academic literature you are more familiar with (e.g. sociology, political science, IR etc)

**Mandatory reading**


**Week 4 – Judicial decision-making – What judges do?**

Social scientists and legal scholarship tend to think differently about how (well) courts decide. In this class, we will explore these differences, and look for ways of reconciling these approaches, in a way which can help to support legal and policy change.

**Task**

Identify, in your area of research a social science or legal article which seeks to explain or assess the decisions of a particular court. Be ready to summarize the article/chapter during the seminar, emphasizing which factors (‘variables’) are identified as most determinant, and in which of Posner’s nine theories of judicial behaviour this would fit.

**Mandatory reading**

**Week 5 International Law**

International law's increasing relevance in a globalized world is a commonplace in legal scholarship, but it has not always been so. International law has traditionally been looked down for not being ‘real’ law since it largely lacks direct applicability in domestic law, just as it lacks its own enforcement mechanisms. In this sense, its ability to influence domestic policy and lawmaking is also questionable. This session will look into more recent developments which might challenge this traditional assumption.

*Task*

Identify international legal norms (most likely an international treaty) which relates to your topic of research. Check whether the country you work with has ratified it, and whether you find any reference to it in any regulation or in court cases.

You may start there: [https://treaties.un.org/](https://treaties.un.org/)

*Mandatory reading*


**Week 6 Human Rights**

Traditional suspicions towards international law are intensified and multiplied when it comes to human rights, a category which to some might sound inadequate not only in law, but even in philosophy. At the same time, there is much talk in legal scholarship of a ‘rights revolution’. The readings assess to what extent and in what ways these assumptions hold true in practice in view of the certainly mushrooming human rights instruments, and their potential to frame public policies.

*Task 1*

Find the text of the European Convention of Human Rights and Fundamental Freedoms, including its protocols. Do you see it relates in any way to your research? Whether yes or no, do you consider this as a deficiency or a merit? For example, can you think of an issue where human rights considerations precluded rational public policy, or quite to the contrary, human rights promoted it?

*Task 2*

Try finding a case of the European Court of Human Rights (or any other human rights body of your choice) which had policy implications, preferably in your field of interest. Use [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int), which is the search engine for the ECtHR, but you might also use Westlaw or LexisNexis.

*Mandatory reading*


Week 7 Constitutions

The primary and most essential function of a constitution according to legal scholarship is to limit government by separation of powers and by granting individual rights. In order to live up for this “self-limitation of power,” constitutions are normally entrenched in that they are harder to amend than other legal rules. Constitutions therefore might prevent, but also might facilitate -- even mandate -- the realization of a particular public policy more drastically than perhaps any other legal norm.

Task 1
Find online and go through the text of three selected constitutions, and find two provisions in each which -- assuming they are adhered to in practice -- ought to have an impact on the possibilities of public policy making in the given country. Try making a difference between structural norms relating to the state on the one, and norms pertaining to individual rights and liberties on the other hand.

Mandatory reading

Week 8 Law, Courts and the European Union

Law has, and continues to play, a central role in European integration and governance. Scholars however disagree about the dynamics of interactions between law and politics in the EU, as well as on the desirability of integration (or governance) through law. In this seminar, we will engage with scholarly work which explores the relevance of law and courts for policy-making and governance at EU level.

Task
Answer the following questions:
1. Which existing theories of legal integration (see Stone Sweet 2010) or judicial decision-making (see Posner’s theories in Week 4) have a better leverage in explaining the outcome of this case?
2. How much discretion and policy-(un)making power do proportionality testing grant courts?

Mandatory reading

Background
- Those who are not familiar with the EU and EU law may want to read the relevant chapters in classic EU law textbooks (e.g. Chalmers, Davies and Monti ‘EU law’ (2014); TC Hartley ‘The Foundations of EU law (2014), Craig and De Burca, ‘EU Law – Text, cases and materials, 2011) –
Week 9 Constitutional review & policy-making
Constitutional review, where it exists, implies there is an institution vested with the power of annulling or disapplying legal norms produced by democratically legitimated legislatures or governments. In this session, we will discuss the tensions between constitutionalism and majoritarian democracy, using the example of social and economic policy.

Mandatory reading


Task

Assess on the basis of Art 37 (4) of the new constitution, how the Court would deal with the complaint had it arisen in 2013, and not in 1995 (deficit was over 50% in both years).

Week 10 – Judicial review & compliance
In this seminar, we will focus on one particular aspect of administrative justice, which has received prominent attention from legal scholarship, namely judicial review. We will also consider other judicial remedies (eg damages in tort, injunctions, interim relief, etc) and non judicial mechanisms (eg complaints to ombudsman, independent authorities) which can be activated when public authorities or private providers of public services get it wrong. We will assess to what extent legal mechanisms contribute to policy-implementation and compliance.

Task
Find an article, if possible connected to your research area, which explores the use or effectiveness of judicial or non-judicial remedies against public authorities or private actors fulfilling public service functions, or assessing the use of legal mechanisms to ensure policy-implementation and compliance. Be ready to present it during the seminar, and assess its relevance in policy change. These could concern judicial review proceedings, but also state liability, injunctions, interim reliefs, use of ombudsman, complaint to an independent authority, etc.

Mandatory reading

Week 11 - Litigation and policy change

Litigation is one mode of either preventing or triggering policy change. However, the ability of (strategic) litigation in producing actual policy and social change is contested. In this seminar, we will engage with social sciences studies which explore the limits of legal change and the importance of civil society mobilization for effective court-induced policy transformation.

Mandatory reading
- OR

Questions
- Do litigation offer an effective avenues for civil society organizations seeking policy change?
- What are the limits of litigating for policy change?
- How would you square these studies of mobilization around legal norms with public policy theories on policy change?
- Can we study policy change through litigation using the same concepts used to study other modes of policy-making?

Task
Find examples of successful and failed litigation related to your area of research or a matter of personal or professional interests. How would you define success and failure? How would explain success or failure in these cases, drawing on theoretical framework which seek to explain policy-change.

Week 12 Accountability in a global governance era - Global administrative law -
The development of global regulatory regimes, in which public and private actors interact to regulate policy areas beyond the confines of specific states, poses particular challenges for legal systems, which are traditionally organized around territorial lines. These difficulties are explored by a new trend in legal scholarship called ‘global administrative law’, which draws upon comparative administrative law to propose mechanisms and principles aimed at holding global regulatory regimes, whether public or private, accountable.

Mandatory reading

Questions
- What kind of questions scholarship which studies global governance ask? How do they answer them?
Based on the two mandatory readings, what is the contribution of legal scholarship to the global governance literature?
Can law provide for effective means to hold global regulatory bodies accountable?

Selective bibliography

- Ginsburg and Dixon (2011), Comparative Constitutional Law (Edward Elgar)
- Harlow and Rawling (2009), Law and Administration (Cambridge University Press)