C07B3a
The Court of Justice and the Emerging Common Law of Europe
SPRING 2018

Instructors: Prof. Arthur Dyevre, Dr. Nicolas Lampach, Dr. Wessel Wijtvliet

Time and Location: Wednesday, 11am-1pm, room: DV3 01.13
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Overview

The course examines the role of the Court of Justice in the EU legal order from an inter-disciplinary perspective. The focus is on how courts and judges do actually behave rather than how they ought to behave. We use empirical theories and methodology to explore how judges make decisions and how law, ideology, politics and institutions influence their behaviour. The course covers the following topics:

- ECJ’s role in the constitutionalization of European Union law and European integration
- Theories of judicial decision making and legal integration in the European context
- Strategic analysis: basics of game theory applied to law and judicial behaviour
- ECJ’s organization, staffing and ideological leaning
- EU-level constraints on ECJ decision making
- Litigation dynamics in infringements and annulment proceedings
- Relationship between ECJ and domestic courts within the preliminary ruling mechanism
- Relationship between ECJ and domestic courts outside the preliminary ruling mechanism

Along with quantitative analysis of classes will feature simulations, game-theoretic experiments.
Objectives

The course aims to introduce law students to empirical and social-scientific perspectives on the EU legal system. Specifically, the course seeks to give students a solid grasp of the theories and methodologies that inform this research. Upon completing the course requirements, students should possess:

- a solid grasp of the theories and hypotheses informing empirical and interdisciplinary research on the EU legal system.
- a good grasp of the empirical literature on the EU legal system
- the ability to assess and discuss critically the results of empirical studies of the EU judiciary.
- a basic conceptual understanding of quantitative empirical legal research methods.
- basic knowledge of strategic analysis and game theory applied to judicial decision making.

Requirements

Students are required to complete the mandatory readings for the corresponding class, complete short in-class tests, contribute to the classroom discussion and submit a paper of 5000-7000 words (including footnotes and bibliography):

1. Paper: Your paper should fit the context and objectives of the course. It should address a research question from the list provided at the end of the present syllabus or focus on a topic chosen in agreement with the instructors. It is imperative that your paper discusses the literature (required and recommended readings) included in the course materials. While students are encouraged to draw out the normative implications of their argument in the introductory or concluding section of their paper, we strongly advise against choosing a normative/doctrinal approach or research question. Papers must be submitted by 15 JUNE 2019 (11:59pm) at the latest. The course paper accounts for 80/100 of the final grade.

2. In-class tests: Short in-class tests serve to assess the students’ knowledge of the mandatory readings. In-class tests account for 10/100 of the final grade. Students who miss more than one test will see their average test score revised down accordingly.

3. Participation: Students are expected to contribute actively to classroom discussion. Participation accounts for 10/100 of the final grade.

Course Materials

Course materials (readings and slides) are available on Toledo.
Support Sessions

Some of the materials, theories and methodologies discussed in class are challenging. Many students also struggle with academic writing. For that reason, we offer, in addition to the course, separate, non-mandatory support sessions. Students are strongly encouraged to attend them. The sessions on academic writing should be of interest to all students. The topics, dates and venues for the support sessions will be communicated in class.

Practical Issues

1. An attendance list will be circulated at the beginning of every class. Remember to bring your student card for checks.

2. Students should be aware that class participation is graded. So attendance is strongly recommended! If the instructor calls your name and you are not present and this happens on more than one occasion, you will lose all your points for participation. Missed in-class tests cannot be retaken.

3. In order to complete in-class tests and to enable the use of audience response system (Polleverywhere), online survey, statistical software and other apps (Classex) featured in the class, it is imperative that you bring a laptop with an internet connection to the class.

4. Also: be patient with emails.

Grading

Final paper: 80/100.
Class participation: 10/100.
Short in-class tests: 10/100.

Resit: Should you fail to get a pass, you can resubmit your revised paper by 15 August 2019.

Course Outline

13 February: Course Presentation

After a quick overview of the course, students are invited to participate in a judging simulation.

Download

To download and install Zotero go to: https://www.zotero.org/download/
20 February: The Court of Justice and the Judicial Construction of Europe

We trace the broad contours of the ECJ-led transformation of the EU legal system from the inception of the European project in the 1950s to today and flag issues that will be analysed in further depth later in the course such as ideological cleavages within the European Court, relations with domestic courts, strategic judicial behaviour and the emergence of the EU legal system.

Required reading

- Court of Justice, *Van Gend en Loos*, 1963 (advice: read the judgment after reading the above paper)

Recommended reading

- Stone Sweet, A. (2010). The European Court of Justice and the judicialization of EU governance. *Living Reviews in EU Governance*

27 February: The Interdisciplinary Study of the EU Legal System

What methods can be used to study the EU court system? We survey a range of empirical methods, including network analysis, topic modelling, sentiment analysis, experiments and regression analysis, and discuss their application to EU law issues.

Required reading


Recommended reading

- Stone Sweet, A. (2010). The European Court of Justice and the judicialization of EU governance. *Living Reviews in EU Governance*
6 March: Theories of Adjudication I

What drives judicial decision making? Do EU judges only care about legal rules and doctrines? What do judges try to maximize? Reputation? Leisure time? Ideological satisfaction? We examine different models of judicial decision making and how they account for the goals and trade-offs confronting judges.

Required readings


Recommended readings

- Stone Sweet, A. (2010). The European Court of Justice and the judicialization of EU governance. Living Reviews in EU Governance
- Segal, J. and Spaeth, H. (2002). The Supreme Court and the attitudinal model revisited. Cambridge Univ Pr


13 March: Theories of Adjudication II

We continue our overview of theories of judicial behaviour.

**Required readings**


**Recommended reading**

• Knight, J. and Epstein, L. (1997). The Choices Justices Make. CQ Press, 1 edition


20 March: The Court of Justice, Organization and Staffing

We examine the composition, powers and organizational set-up of EU courts.

**Required reading**


• Wijtvliet, W. and Dyevre, A. (2019). measuring judicial ideology in economic cases: a crowdsourcing approach
Recommended reading


- Frankenreiter, J. (2016a). Are advocates general political? policy preferences of eu member state governments and the voting behavior of members of the european court of justice. *SSRN eLibrary*

- Frankenreiter, J. (2016b). Informal judicial hierarchies: Case assignment and chamber composition at the european court of justice. *SSRN eLibrary*

27 March: The Court of Justice’s EU-Level Political Environment

We turn to the broader political environment in which the Court of Justice operates at EU level. We consider the constraints arising from the treaty-amending procedure and legislative politics and the Courts resulting policy-making discretion.

Required reading


Recommended readings


3 April: The Court of Justice and Other Supranational Courts.

We look at how the Court of Justice compares to other international judicial bodies. We discuss the factors accounting for the greater domestic effectiveness and embeddedness of EU law relative to other international legal regimes.

Required readings


Recommended readings


24 April: The Litigation Dynamics of Infringement and Annulment Proceedings.

We discuss litigation dynamics in annulment (Article 263) and infringement (Article 258 TFEU) proceedings.

Required readings:


Recommended readings


8 May: Relations with Domestic Courts and the Preliminary Ruling Mechanism I

This session focuses on the connection between EU judges and domestic courts through the preliminary ruling mechanisms. We discuss cross-national and cross-regional variations in the propensity of domestic judges to refer cases to the Court of Justice.

Required reading

- Lampach, N. and Dyevre, A. (2017). The origins of regional integration: Untangling the effect of trade on judicial cooperation


Recommended readings


15 May: Relations with Domestic Courts and the Preliminary Ruling Mechanism II

We continue the previous theme. We examine selection effect, resubmission behaviour and the impact of formal dismissal across courts.

Required reading


Recommended reading


22 May: Relations with Domestic Courts Outside the Preliminary Ruling Mechanism

We move on to considerations pertaining to relations between EU courts and domestic tribunals outside the preliminary ruling context. We address both the cooperative and the conflictual dimension of inter-court relations in the EU heterarchical judiciary.

Required reading


Recommended reading

List of possible research questions for paper

1. Can game-theoretic analysis help shed light on the power of EU judges within the EU political system?

2. Legal rules, ideology, political constraints: what explains the behaviour of EU courts?

3. To what extent do national governments constrain the powers of the Court of Justice?

4. What can explain regional disparities in the use of the preliminary ruling procedure?

5. Should we expect some courts (e.g. lower courts, constitutional courts, supreme courts) to be more reluctant than others to embrace European integration?

6. Are there limits to the Court of Justice’s power?

7. What incentives and disincentives do domestic courts have to use the preliminary ruling system?

8. Does ideology affect judicial behaviour on the Court of Justice?

9. Who is best positioned to rein the Court of Justice, domestic courts or other EU institutions (Commission, Council, EP)?

10. Participation in the preliminary ruling system is largely voluntary. Can this lead to systematic disparities across courts?

11. Conflict and cooperation in the EU legal order: when are domestic courts more willing to cooperate or to clash with EU courts?