

# JUDICIAL STUDIES

## Fall 2019

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## **Course Description**

The traditional view of courts and administrative tribunals has been that of disinterested neutral arbiters in the policy-making process, whose role was restricted to being called upon to resolve disputes between private citizens and between private citizens and the state. However, these bodies have increasingly been considered and have increasingly considered themselves as more active participants in the policy-making process and that politics in most Western democracies has become more legalized or judicialized. Through a series of seminars, this course will examine the potential causes of this increased legalization or judicialization and consider the impact that this development has had on the policy-making process and politics more generally.

The course will be comparative in nature, with the seminar material focusing mostly on policy-making and the judicial and administrative tribunal institutions in Canada, the United States and the United Kingdom. Students are encouraged to pursue other comparative jurisdictions in relation to their own interests and research for course requirements.

## **Course Objectives**

By the end of the course students should:

- Have a deeper understanding of and engage with on a critical level the various theoretical approaches to understanding the impact of judicial institutions on politics and public policy as set out in the judicial studies literature;
- Have enhanced written and oral communication skills of; and
- Further developed presentation and participation skills.

## **Required Materials and Texts**

- Various readings (as listed below) available through the McMaster University libraries or Google Scholar.

## **Class Format**

The class is scheduled for one three-hour seminar session per week.

As a fourth year seminar, students are expected to play an active role in the teaching and learning process. One of the goals of the course is to prepare students for further study or to be able to work on their presentation skills if they decide to enter the workforce. The role of the instructor will be to help provide the broader context for the material being reviewed and to facilitate the class discussion when it falters. During the semester, discussions will take place on the theoretical foundations of the judicial studies literature and students are expected to participate in the discussions on a weekly basis. The instructor will contribute to the discussion by adding insights and posing or reframing

questions. To have a thoughtful and intellectual discussion, students are required to read the readings each week. All students must be prepared for and attentive in class.

As broad participation in the discussions is essential for deeper learning of course materials, the instructor reserves the right to use the Socratic method of calling on individual students without warning for contributions to the discussions.

In addition to formal class time, students are invited to meet with the instructor during regular office hours or by appointment to discuss course content or any other concerns.

### **Course Evaluation – Overview**

1. Seminar Participation - 30%, weekly beginning September 11, 2019
2. Group Seminar Presentation - 20%,
3. Annotated Bibliography – 20%, due October 09, 2019
4. Literature Review Paper - 20%, due November 27, 2019.
5. Take Home Exam - 10%, due December 06, 2019.

### **Course Evaluation – Details**

#### **Seminar Participation (30%) – Weekly beginning September 11, 2019**

Participation in the seminar will account for thirty percent of the final grade. Students should note that participation is not synonymous with attendance.

Given the course format, it is anticipated that students will actively participate in the discussions each week on a given topic. In this regard, students may participate in the weekly discussion in one of three ways.

First, students may make comments or ask or respond to questions asked during the course of the weekly discussions. This is the preferred method of participation.

Second, students may submit a brief summary of the weekly readings and pose two questions that they have after having completed the readings or that are not fully explained therein. These summaries and questions must be provided to the instructor at the beginning of the seminar for a given week and no submissions will be accepted after the start of class. The instructor may call upon students who submit these summaries during the class discussions on the topic where the instructor believes that their knowledge may be relevant to the class discussion.

Third, students may post comments on a discussion thread on Avenue to Learn for the specific seminar discussion and only within twenty-four after each seminar and certainly before the next scheduled class meeting. Only those students who have attended the seminar will have the option of having this third form of discussion contribute to their participation grade.

Regardless of the manner of participation, students should complete the assigned readings before each class and be prepared to contribute meaningfully to class discussions. Students will be assessed on their ability to make original points, express their own thoughts on the topic, ask meaningful questions, engage with other students' comments and incorporate the readings into their own comments. In this regard, students should, at a minimum, attend class having attempted to answer the following questions in relation to each reading:

1. What is the author's primary purpose in writing the article?
2. What are the main arguments being advanced by the author?
3. What methodology and evidence has been employed in support of the argument?
4. What are the shortcomings or logical contradictions in the arguments advanced, if any?
5. How does the argument relate to the specific topic and or the broader course?

If you are having trouble interpreting the material, it is a good idea to see the instructor for extra help early in the semester. Telling the instructor at the end of the course that you either have difficulty interpreting the material and/or that you are too timid to speak is not an acceptable reason for failing to participate; your mark will reflect negatively as a result. You need to be proactive about the need to complete this task effectively in order to receive a good mark.

### **Group Seminar Presentation (20%), date to be assigned.**

Students, working in groups of two to three, will be responsible for leading one of the seminar sessions throughout the semester.

Students are encouraged to be creative in their structuring of their seminar presentation and should not provide a simple summary of the readings for the week. Rather, the purpose of the presentation is to open up and foster discussion concerning the readings and weekly topic among the class.

Presentations will be assessed on their creativity, comprehensiveness in understanding and coverage of the materials and the level of engagement with and by the other students in the class.

### **Annotated Bibliography (20%), due October 09, 2019**

Students will submit an annotated bibliography based on the relevant literature(s) associated with a topic they have chosen for a major research paper in the broader judicial studies field and to be completed in the winter semester in POLSCI 4LC3. The purpose of an annotated bibliography is to identify and summarize the relevant literature on a particular topic as a precursor to a more in-depth consideration of the academic literature.

The expectations of the annotated bibliography are that, at a minimum, it should consider at least twenty (20) different academic sources associated with the chosen topic.

**Literature Review Paper (20%), due November 27, 2019.**

Students will submit a literature review based on the relevant literature(s) associated with the topic and as identified and summarized in their annotated bibliography.

The purpose of a literature review is to demonstrate that there is a continuing need to explore the chosen topic in question from a theoretical, methodological and/or empirical perspective. As such, it is anticipated that the paper will only briefly summarize much of the existing literature on the subject, and then focus more clearly on its strengths and weaknesses and identify shortcomings in the completed work to date. It should be analytical in nature and attempt to synthesize (not describe) the existing literature on the topic.

Further instructions concerning the completion of a literature review paper will be provided to students early in the semester.

**Take Home Exam (10%), due December 06, 2019.**

Students will submit a six to eight page paper based on a question posed by the instructor that will link both the various conceptual and theoretical issues raised throughout the semester.

The take home exam will be based on all materials covered in the seminars and assigned readings throughout the course. The exam will provide an overall summary of the course for students and an opportunity to apply the material they have learned over the course of the term.

**Weekly Course Schedule and Required Readings**

**Week 1 – September 04, 2019 - Introduction and Course Organization**

No Readings

**Week 2 – September 11, 2019 - Judicialization**

Readings:

Vallinder, Torbjan (1994) 'The Judicialization of Politics. A World Wide Phenomenon: Introduction' *International Political Science Review* vol. 15(2), 91-99.

Hirschl, Ran (2006) 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' in *Fordham Law Review* vol. 75, 721. Actors

## **CAUSES OF JUDICIALIZATION**

### **Week 3 – September 18, 2019 – Culture**

Readings:

Glendon, Mary Ann (1991) Rights Talk: The Impoverishment of Political Discourse. Toronto: Maxwell Macmillan Canada, chapters 1, 2, 3 and 7.

Simpson, Jeffrey (1994) 'Rights Talk: The Effect of the Charter on Canadian Political Discourse' in Bryden, Philip, Steven Davis and John Russell, eds. Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life. Toronto: University of Toronto Press.

Hoover, Dennis R. and Kevin R. den Dulk (2004) 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada' in *International Political Science Review* vol. 25(1), 9-34.

### **Week 4 – September 25, 2019 - Institutions**

Readings:

Clayton, Cornell W. (2002) 'The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be so Positive about the Judicialization of Politics?)' in *Law and Contemporary Problems* vol. 65(3), 69-85.

Malleson, Kate (1999) 'A British Bill of Rights: Incorporating the European Convention on Human Rights' in *Choices* vol. 5(1), 21-39.

Howlett, Michael (1994) 'The Judicialization of Canadian Environmental Policy, 1980-1990: A Test of the Canada-United States Convergence Thesis' in *Canadian Journal of Political Science* vol. 27(1), 99-127.

### **Week 5 – October 02, 2019 – The Judiciary and Judicial Activism**

Readings:

Powers, Stephen P. and Stanley Rothman (2002) The Least Dangerous Branch? Consequences of Judicial Activism. London: Praeger Publishers, chapter 1, 2 and conclusion.

Manfredi, Christopher P. (2002) 'Strategic Behaviour and the Canadian Charter of Rights and Freedoms' in James, Patrick, Donald E. Abelson and Michael Lusztig, eds. The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada. Montreal & Kingston: McGill-Queen's University Press.

Songer, D.R. and Siripurapu, J., 2009. "The unanimous decisions of the supreme court of Canada as a test of the attitudinal model" *Canadian Journal of Political Science* vol. 42(1), 65-92.

### **Week 6 – October 09, 2019 - Interest Groups**

Readings:

Hein, Gregory (2000) 'Interest Group Litigation and Canadian Democracy' in *Choices* vol. 6(2), 3-30.

Brodie, Ian. 2001. "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program" *Canadian Journal of Political Science* vol. 34(2), 357-76.

Smith, Miriam. (1998) 'Social Movements and Equality Seeking: The Case of Gay Liberation in Canada' in *Canadian Journal of Political Science* vol. 31(2), 285-309.

Morton, F.L. and Avril Allen (2001) 'Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada' in *Canadian Journal of Political Science* vol. 34(1), 55-84.

### **Week 7 – October 16, 2019 - Reading Week – No Class**

Readings: None Assigned

### **Week 8 – October 23, 2019 - Resource Mobilization and Legal Effects**

Readings:

Epp, Charles R. (1996) 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms' in *American Political Science Review* vol. 90(4), 765-779.

Songer, Donald R. and Reginald S. Sheehan (1992) 'Who Wins on Appeal? Uppercuts and Underdogs in the United States Courts of Appeals' in *American Journal of Political Science* vol. 36(1), 235-258.

McCormick, Peter (1993) 'Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992' in *Canadian Journal of Political Science* vol. 26(3), 523-540.

### **Week 9 – October 30, 2019 - Globalization**

Readings:

Badenbacher, Carl (2003) 'Judicial Globalization: New Development or Old Wine in New Bottles?' in *Texas International Law Journal* vol. 38, 505.

Slaughter, Anne-Marie (2000) 'Judicial Globalization' in *Virginia Journal of International Law* vol. 40, 1103.

Hansen, Patricia Isela (2003) 'Judicialization and Globalization in the North American Free Trade Agreement' in *Texas International Law Journal* vol. 38, 489.

## **EFFECTS AND OUTCOMES OF JUDICIALIZATION**

### **Week 10 – November 06, 2019 - Democratic Governance**

Readings:

Allan, James (1996) 'Bills of Rights and Judicial Power – A Liberal's Quandary' in *Oxford Journal of Legal Studies* vol. 16(2), 337-352.

Morton, F.L. and Leslie A. Pal (1985) 'The Impact of the Charter of Rights and Freedoms on Public Administration: A Case Study of Sex Discrimination in the Unemployment Insurance Act' in *Canadian Public Administration* (vol. 28(2), 221-44.

Hiebert, Janet L. (1999) 'Wrestling with Rights: Judges, Parliament and the Making of Social Policy' in *Choices* vol. 5(3), 3-32.

Banfield, Andrew C. and Rainer Knopff (2009) 'Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes' in *Australian Journal of Political Science* vol. 44(1), 13-27.

### **Week 11 – November 13, 2019 - Policy Impacts**

Readings:

Mather, Lynn (1998) 'Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation' in *Law & Social Inquiry* vol. 23(4), 897-940.

Albiston, Catherine (1999) 'The Rule of Law and the Litigation Process: The Paradox of Losing by Winning' in *Law & Society Review* vol. 33(4), 869-910.

Rosenberg, Gerald N. 1999. "African-American Rights After *Brown*" *Journal of Supreme Court History* 24(2), 201-225.

### **Week 12 – November 20, 2019 - Winners and Losers**

Readings:

Galanter, Marc (1975) 'Explaining Litigation' in *Law & Society Review* vol. 9(2), 347-368.

Brodie Haire, Susan, Stefanie Lindquist, and Roger Hartley (1999) 'Attorney Expertise, Litigant Success, and Judicial Decision-making in the U.S. Courts of Appeals' in *Law & Society Review* vol. 33(3), 667-685.

Flemming, Roy B. and Glen S. Krutz (2002) 'Repeat Litigators and Agenda Setting on the Supreme Court of Canada' in *Canadian Journal of Political Science* vol. 35(4), 811-833.

Szmer, John, Susan Johnson and Tammy A. Sarver (2007) 'Does the Lawyer Matter? Influencing Outcomes on the Supreme court of Canada' in *Law & Society Review* vol. 41(2), 279-304.

### **Week 13 – November 27, 2019 - Judicial and Judicialization Limitations**

Readings:

Ratner, Steven R. (2003) 'The International Criminal Court and the Limits of Global Judicialization' in *Texas International Law Journal* vol. 38, 445.

Russell, Peter H. (1994) 'Canadian Constraints on Judicialization from without' in *International Political Science Review* vol. 15(2), 165-175.

Scholtz, Christa (2009) 'The Influence of Judicial Uncertainty on Executive Support for Negotiation in Canadian Land Claims Policy' in *Canadian Journal of Political Science* vol. 42(2), 417-442.

### **Week 14 – December 04, 2019 - Conclusions**

Readings: None

## **Course Policies**

### **Submission of Assignments**

Written assignments should be provided to the instructor, either at the beginning of class or during office hours prior to class. As a last resort, assignments can be submitted to the box outside of the political science office after hours (date-stamped for the following day) or to the Department of Political Science Office during regular business hours. Assignments will not be accepted that are slipped under the instructor's or any other door.

Papers received by e-mail or fax will not be accepted without the prior express permission of the instructor on each assignment.

### **Grades**

Grades will be based on the McMaster University grading scale:

<b>MARK</b>	<b>GRADE</b>
90-100	A+

<b>MARK</b>	<b>GRADE</b>
85-90	A
80-84	A-
77-79	B+
73-76	B
70-72	B-
67-69	C+
63-66	C
60-62	C-
57-59	D+
53-56	D
50-52	D-
0-49	F

### **Late Assignments**

Students should make all reasonable attempts to submit papers on the due date. In the event that a legitimate extension is required, students should speak to the instructor ***in advance*** of the due date to make the appropriate arrangements for such an extension. Requests for an extension submitted by e-mail will not be considered – you must speak to the instructor in person.

Examinations and/or assignments related to this and other courses do not constitute or qualify as exceptional circumstances or legitimate excuses.

Late papers may be penalized at the rate of five percentage points per working day for each day of delay, up to a maximum of one week. After one week, the instructor may refuse to accept any late assignments in the absence of proper medical certification justifying an inability to fulfill academic requirements on a prolonged basis. Papers accepted after one week of lateness, in addition to the daily deduction, will be subject to a further deduction of one full letter grade (ie. A to B, B to C) per each week of lateness.

The instructor reserves the right to not provide any comments or feedback on papers submitted after the original deadline, whether an extension is granted or not and whether any other late penalties are applied.

### **Absences, Missed Work, Illness**

Students should make all reasonable efforts to attend and are responsible for the material covered in each and every scheduled class. However, it is understood that some absences are unavoidable and students should make every effort to catch up on missed materials and the instructor will provide reasonable assistance to assist a student. In this regard, students should attempt to obtain lecture notes or other class materials from their colleagues in their tutorial and/or the broader class before seeking assistance from the instructor concerning missed lecture and/or class content.

Requests for the instructor to repeat a lecture or seminar discussion (either during office hours or at any other time) or provide access to the instructor's lecture notes are not reasonable requests for assistance.

In the event that students are unable to attend class or tutorials or complete required assignments, they should avail themselves of the MSAF policy or submit the appropriate medical or other documentation to their faculty office to support an accommodation request based on a prolonged absence. In the absence of either an MSAF or a faculty approved accommodation request, the instructor reserves the sole right to not accept any outstanding work in accordance with the late assignments policy.

If a student has submitted the appropriate documentation to their faculty and been granted an allowance for outstanding work or has received the approval of the instructor for the incomplete work, the instructor reserves the sole right to re-allocate the missed grades to other assignments.

Please note that an MSAF submission, where permitted, provides a three day extension for any assignment. In the event that students require a further period of time to submit their outstanding work, they must discuss any further extension with the instructor prior to the end of the three day MSAF extension. In the absence of a further approved extension, an assignment subject to an MSAF becomes a late submission after three days.

The filing of an MSAF does not relieve a student of the obligation to complete the outstanding assignment.

### **Avenue to Learn**

In this course we will be using Avenue to Learn. Students should be aware that, when they access the electronic components of this course, private information such as first and last names, user names for the McMaster e-mail accounts, and program affiliation may become apparent to all other students in the same course. The available information is dependent on the technology used. Continuation in this course will be deemed consent to this disclosure. If you have any questions or concerns about such disclosure please discuss this with the course instructor.

### **Turnitin.com**

In this course we may be using a web-based service (Turnitin.com) to reveal plagiarism. Students will be expected to submit their work electronically to Turnitin.com and in hard copy so that it can be checked for academic dishonesty. Students who do not wish to submit their work to Turnitin.com must still submit a copy to the instructor. No penalty will be assigned to a student who does not submit work to Turnitin.com. All submitted work is subject to normal verification that standards of academic integrity have been upheld (e.g., on-line search, etc.). For more information please refer to the [Turnitin.com Policy](#).

## **Academic Accommodation for Religious, Indigenous or Spiritual Observances (RISO)**

Students requiring academic accommodation based on religious, indigenous or spiritual observances should follow the procedures set out in the RISO policy. Students requiring a RISO accommodation should submit their request to their Faculty Office normally within 10 working days of the beginning of term in which they anticipate a need for accommodation or to the Registrar's Office prior to their examinations. Students should also contact their instructors as soon as possible to make alternative arrangements for classes, assignments, and tests

## **University Policies**

### **Academic Integrity Statement**

You are expected to exhibit honesty and use ethical behavior in all aspects of the learning process. Academic credentials you earn are rooted in principles of honesty and academic integrity.

Academic dishonesty is to knowingly act or fail to act in a way that results or could result in unearned academic credit or advantage. This behavior can result in serious consequences, e.g. the grade of zero on an assignment, loss of credit with a notation on the transcript (notation reads: "Grade of F assigned for academic dishonesty"), and/or suspension or expulsion from the university.

It is your responsibility to understand what constitutes academic dishonesty. For information on the various types of academic dishonesty please refer to the [Academic Integrity Policy](#).

The following illustrates only three forms of academic dishonesty:

1. Plagiarism, e.g. the submission of work that is not one's own or for which credit has been obtained.
2. Improper collaboration in group work.
3. Copying or using unauthorized aids in tests and examinations.

### **Academic Accommodation of Students with Disabilities**

Students who require academic accommodation must contact Student Accessibility Services (SAS) to make arrangements with a Program Coordinator. Academic accommodations must be arranged for each term of study. Student Accessibility Services can be contacted by phone 905-525-9140 ext. 28652 or e-mail [sas@mcmaster.ca](mailto:sas@mcmaster.ca). For further information, consult McMaster University's Policy for [Academic Accommodation of Students with Disabilities](#).

### **Faculty of Social Sciences E-mail Communication Policy**

Effective September 1, 2010, it is the policy of the Faculty of Social Sciences that all e-mail communication sent from students to instructors (including TAs), and from students to staff, must originate from the student's own McMaster University e-mail account. This policy protects confidentiality and confirms the identity of the student. It is the student's responsibility to ensure that communication is sent to the university from a McMaster account. If an instructor becomes aware that a communication has come from an alternate address, the instructor may not reply at his or her discretion.

### **Course Modification**

The instructor and university reserve the right to modify elements of the course during the term. The university may change the dates and deadlines for any or all courses in extreme circumstances. If either type of modification becomes necessary, reasonable notice and communication with the students will be given with explanation and the opportunity to comment on changes. It is the responsibility of the student to check his/her McMaster email and course websites weekly during the term and to note any changes.