

Definition: **judiciary** from *Merriam-Webster's Dictionary of Law*

1 a

:a system of courts of law

b

:the judges of these courts

2

:a branch of government in which judicial power is vested —compare executive, legislature **judiciary** *adj*



Image from: [The U.S. Supreme Court building in Washington,...](#) in *The American Economy: A Historical Encyclopedia*

Summary Article: **Judiciary**

from *International Encyclopedia of Political Science*

All modern societies tend to entrust the adjudication of disputes arising from the application of recognized norms to a specialized actor, the judge.

Collectively, the judges are designed as the judiciary. In some countries—such as France and Italy—the judiciary also includes public prosecutors since they form a unitary organization together with judges.

Due to the significance of the adjudication, the judiciary tends to enjoy a special position in most political systems and especially so in constitutional democracies. In most political systems, since the middle of the 20th century, the significance of the judiciary has increased, leading to the phenomenon

defined as “the judicialization of politics.”

The Judiciary in Constitutional States

The role of the judiciary in a political system cannot be analyzed without taking into consideration the institutional function of the judge: adjudication. Adjudication is a type of dispute resolution that relies on an externally appointed judge acting as the third party and where the parties to the dispute must comply with the judge's decision, even though they have no control over the choice of judge, who is appointed by the state. Thus, judges are inherently placed in a difficult position. They must resolve cases without the main element that makes the triad an effective means of resolving disputes: the willingness of the participants to submit to both the proceedings and the involvement of the third party. To address this weakness, the judicial process tends to include a number of principles creating the appearance of and reinforcing judicial impartiality. More specifically, the need to guarantee judicial impartiality implies that judges must be independent from the parties in dispute and protected from interference by them. Such independence is a necessary condition as any judge who is dependent in some way on one of the parties cannot be, and cannot appear to be, impartial.

In the political development of Europe, the incorporation of judges into the machinery of the state and the superiority of government-appointed judges over other types of judges—for example, feudal or city judges—have largely guaranteed judicial independence from the parties in dispute. However, the incorporation of the judge into the state organization creates the need to redefine judicial impartiality when one of the parties is the state itself or one of its representatives. Only by defining judicial

independence in relation to the state can the judge act as an impartial third party in disputes between the state and citizens (e.g., in criminal trials). Judges can then become an effective check on the way in which public functions are performed since guarantees of independence allow them to resolve such disputes and interpret the relevant laws without coming under pressure from the state. Thus, the protection of judicial impartiality through strong guarantees of judicial independence has become one of the most important traits of constitutionalism since one of its main objectives is to limit the arbitrary exercise of political power and make it legally accountable.

The strength of the judiciary is influenced by whether it is in a civil law or common law country. In a civil law country, legislative law takes precedence over case law, and judges are bound by civil codes without regard to previous judicial decisions; in contrast, judicial rulings take precedence over civil law (legislation) in common law countries, and judges are bound by previous rulings issued by higher-level courts (*stare decisis*). Historically, judges in civil law countries have enjoyed less independence, and their role has tended to be less politically significant. Mistrust of the judiciary has always been high and judicial power considered an important power to be checked. Traditionally, continental judges tend to act in a subordinate way to the political branches and to the norms they enact. This reflects a historical interpretation of the “separation of powers” principle that assigns a privileged role to the legislature since it represents the popular will. Therefore, for a long period, any form of judicial review of legislation was ruled out.

The situation in England and many of the former British colonies, including the United States, is different. In England, the centralization of political authority resulted in the hegemony of one institution—Parliament—but in a more polycentric setting: The political branches do not monopolize the creation of legal norms. As a result, English judges have been able to maintain some autonomy in relation to parliamentary statutes, and common law principles developed by judges still remain one of the basic elements of English law. In the United States, a written constitution combined with judicial review of legislation has ensured from the outset that the judiciary would not be subordinate to the political branches.

Therefore, in any constitutional state whose main objective is to safeguard the rights of citizens, judicial independence is primarily aimed at guaranteeing and supporting judicial impartiality in the adjudication process. As a consequence, its main point of reference must be the state and its institutions, particularly the executive, which directly or indirectly is most often a party to such adjudication, as in criminal trials where one of the parties is usually the public prosecutor. With the introduction of judicial review of legislation, the legislature also becomes a point of reference for judicial independence. The judiciary is considered a power on the same level as the legislative and the executive: It becomes a veritable third branch of government, as it is often defined in the United States.

This picture emerges even more clearly from a comparison of the status of judges in authoritarian states with that of judges in totalitarian states. As a rule, the judiciary in authoritarian regimes plays a minor role in the political system. Political repression is usually entrusted to special politically appointed courts or dealt with directly by the police or other security forces. The ordinary judiciary is only marginally involved in the policies of the regime and usually retains a modest degree of independence (as in Spain under Franco or in Portugal under Salazar). On the other hand, totalitarian regimes invariably try to enlist the judiciary in their attempts to implement deep social and political changes. In these regimes, judicial independence is extremely low if not nonexistent, with judges appointed and

dismissed at the pleasure of the regime. These judges are part of the state apparatus, and the judiciary is usually a strong hierarchical organization made up of members of the totalitarian party. Judicial elections, when present, only ratify the choice of the political leadership. Hence, the judges are politicized, and their values necessarily mirror those of the regime.

Bureaucratic and Professional Judiciaries

All democratic constitutional systems protect judicial independence, but differences emerge when considering the status that judges enjoy in practice. The most significant elements concern appointments, salary, transfers, disciplinary proceedings, and career patterns, with the last factor being the most important variable characterizing the organizational structure of the judiciary. All of them determine the position of individual judges in relation to their colleagues and those responsible for decisions affecting their professional lives. Taken as a whole, these elements can be used to assess the extent of both internal and external judicial independence. While external independence refers to the relations between the judiciary and other branches of government, internal independence focuses on guarantees aimed at protecting individual judges from undue pressures from within the judiciary: fellow judges and, above all, superiors. The role played by organizational hierarchies is crucial for understanding the internal dynamics of the judiciary, which in turn affect the actual degree of judicial autonomy.

Broadly speaking, two types of judiciary can be distinguished: (1) bureaucratic, to which civil law judiciaries tend to belong, and (2) professional, characteristic of common law judiciaries. This is obviously an “ideal-typical” distinction since actual cases are more complex. But judiciaries in democratic countries can be placed on a continuum defined at either end by these two types. The French judiciary has traditionally represented the bureaucratic model, while the English judiciary has most closely reflected the professional model.

The defining elements of a bureaucratic judiciary include the following:

1. Selection of judges is made on a technical basis through examinations at a young age, usually immediately after university, with little or no emphasis placed on candidates' previous professional experience.
2. Training takes place primarily within the judiciary.
3. A hierarchy of ranks determines organizational roles. Advancement up the career ladder is competitive, and promotions are granted according to formal criteria combining seniority and merit. Hierarchical superiors have wide discretion in determining merit.
4. Judges are supposed to be capable of performing all organizational roles associated with their rank (e.g., to be able to adjudicate criminal, bankruptcy, family law, and fiscal cases, or to act as a public prosecutor). They are therefore recruited not for a specific position but for a wide set of roles and, in the course of their careers, will tend to change jobs often. This makes guarantees of independence more problematic because of the influence hierarchical superiors (or, in some cases, the government itself) have over these moves.
5. Judicial guarantees of independence tend to be weaker, especially because judges tend to enjoy a lower degree of internal independence.

On the other hand, the following are the defining elements of a professional judiciary:

1. Judges are appointed only after having acquired professional legal experience. In some instances, this experience is taken into account in recruitment for specific judicial positions.
2. This experience usually, but not always, involves being a legal advocate. In the United States, for example, legal academics are often appointed to the federal bench.
3. There are no formal provisions for advancement, although higher ranking judges (especially in England) often exert some influence in both the initial appointment process and the promotion of judges from the lower ranks.
4. Judges are recruited for specific positions. Promotions are not widespread, and on the whole, there are much weaker internal controls over judges by their higher ranking colleagues.
5. Stronger guarantees of both internal and external judicial independence exist.

Both civil and common law judiciaries have checks to ensure that their members pursue institutional goals, but the approaches are different. Since Anglo-American judiciaries tend to employ individuals with lengthy legal experience outside the judiciary, there is less emphasis on internal controls. In contrast, because continental judges are recruited without significant professional experience, young judges are placed at the bottom of the judicial pyramid, and their organizational socialization is constantly monitored through a career based on moving up a hierarchical ladder. The organizational setup also affects the “reference group” of judges—those individuals and groups judges take into account when reaching a decision. In bureaucratic judiciaries, the reference group lies mainly inside the judiciary, where judges tend to be professionally socialized. The hierarchical structure enables senior judges to influence the behavior of lower ranking judges since they control promotions, transfers, and discipline. In professional or common law judiciaries, a similar type of hierarchy does not exist, and reference groups tend to lie outside the judiciary. However, there is a difference between the English judiciary, which traditionally had a small professional reference group (the Bar), and the American judiciary, which has a much more diverse composition and a recruitment process that incorporates different types of professional and political influences.

Changes in the Judicial Organization

Since the mid-20th century, significant changes have characterized the judiciaries in several countries. In England, in 2006, the institution of a Judicial Appointing Commission—an independent body in charge of proposing appointments to the Lord Chancellor—has circumscribed the traditional powers of the executive. However, the most important change has been the creation of judicial councils in several civil law countries since it has considerably increased the political significance of the judiciary. Judicial councils are collegiate bodies—composed of judges and lay members—in charge of administering the status of judges. Their impact has been a more or less radical alteration of bureaucratic judiciaries by strengthening judicial independence and, at the same time, fostering new connections with the political system. In this process, the powers and composition of these bodies are critical factors. The more extensive their functions, the stronger their role will be, and judicial independence tends to be stronger when there is a higher ratio of members chosen directly by and from the judiciary.

One of the main consequences of creating judicial councils is to increase the *external* independence of the judiciary by decreasing the traditional power of the executive. But since no judicial council is composed solely of judges, an important role remains for the institution in charge of appointing the nonjudicial members. This is usually assigned to parliament, which allows political parties to bypass the

minister of justice and influence the judiciary directly. The creation of a judicial council also has consequences for the *internal* independence of the judiciary. Entrusting the promotion and appointment of judges to a collegial body where normally all judicial ranks are represented contradicts the traditional hierarchical principle, whereby only higher ranking judges are entitled to evaluate lower ranking colleagues. In this way, the lower ranks acquire a new power since they can participate in the process of choosing higher ranking judges. As a result, challenges to the very idea of a judicial career by the lower ranks have often been successful. It is not coincidental that in countries with judicial councils, the number of judicial ranks has been reduced, and the influence of senior judges' assessments of lower ranking judges seems to be declining.

The erosion of hierarchical links is particularly relevant to the general expansion of judicial power. With the creation of judicial councils, the reference group of judges has become more varied. Traditional members of the reference group, such as legal academics and senior judges, have decreased in importance since they no longer enjoy a monopoly over evaluations for judicial promotion. Thus, the professional criteria of the judiciary have also begun to shift: Technical legal knowledge (and ideological conformity) is no longer the determinative element in promotions. Views of others outside the judicial system (e.g., political parties in parliament and also unions and interest groups) have gained in importance. Similarly, the interests of the media and the judiciary increasingly overlap, as judicial actions provide the media with news. In return, the media are able to support and publicize the actions of judges (and prosecutors). Inside the judiciary itself, judicial councils have increased the role of judicial associations since they organize the electoral participation of judges. On the other hand, since the council is also composed of political appointees, their point of view also has to be taken into account. In fact, as judicial actions gain political significance, the council may become the main institution where the judiciary's elected representatives can meet political representatives. As the experience of Latin European countries suggests, the creation of judicial councils is capable of producing a radical change in the judiciary's traditional setting; this in turn can diversify the judiciary's reference group, which is becoming more horizontal and, at least in part, placed outside the judiciary. As a result, more activist conceptions of the judicial role tend to prevail.

The expansion of judicial guarantees of independence has also involved public prosecutors. This process has been stronger in those countries in which judges and prosecutors form a single professional group. In Italy, prosecutors enjoy the same guarantees as judges and, together with judges, elect the majority of the members of the judicial council. Their autonomy is extremely high: The executive cannot in any way issue instructions to them. Also, in France, where the ministry of justice has been able, at least so far, to keep most of its traditional powers, the autonomy of public prosecutors is growing and the executive has often been unable to exert all its institutional powers on public prosecution.

While these changes have affected the position of the judiciary in several states of Latin and Eastern Europe, other countries have seen little alteration of their judicial setting. In Germany, judges and prosecutors remain organized along hierarchical lines that allow the minister of justice, higher ranking judges, and senior prosecutors to influence their careers. Although the 1949 Basic Law introduced judicial review—entrusted to a politically appointed Constitutional Court—judges still regard their relatively passive role as a professional barrier against possible political interference and carefully protect their reputation as guardians of the law. The role of judicial councils and judicial associations remains limited, at least in comparison with other countries.

The Judiciary in the Political System

In the second part of the 20th century, a trend toward a general expansion of judicial power can be singled out in most democratic regimes, a development often described as the judicialization of politics. The rise of judicial power has involved both the civil and the common law worlds, although it has been stronger in some countries than in others. The reasons behind these developments are several. First of all, the antiauthoritarian backlash has supported a new constitutionalism with the institution of forms of judicial review of legislation as well as the strengthening of guarantees of judicial—and prosecutorial—independence. In this process, the supranational dimension of constitutionalism has to be taken into account: For instance, the increased activism of national judiciaries has often found support in the European Court of Justice and the European Court of Human Rights.

An additional factor of judicialization can be found in the growth of welfare policies. The consequent proliferation of legislation increases judicial significance: Where a legal rule exists, sooner or later a judge will be asked to interpret and apply it. Gaps remain despite, and perhaps because of, the growing number of laws, and judges are called to fill them. Another supporting element has been changes in the legal culture. A new emphasis on citizens' rights and entitlements and the emergence of an instrumental approach to law—understood as a tool for advancing individual or collective goals—have become common traits of contemporary societies. Today, there is virtually no area of social life immune from public regulation, and thus, no area can be excluded from judicial intervention. Thus, the demand for individual and collective rights, fueled by the development of both constitutionalism and welfare policies, has meant that individuals and groups increasingly seek out the judicial system with the aim of obtaining an authoritative decision in their favor.

However, there are significant cross-national differences in the political prominence taken by the judiciary. Bureaucratic judiciaries, when freed from hierarchical and executive influence, have seen a significant increase of their role in the political process. As for the political context, fragmentation tends to support judicialization. In this case, the lower decisional effectiveness of political structures leads to interests having an incentive in putting pressure elsewhere, for instance, on courts. On the other hand, for fragmented political institutions, it is more difficult to confront judicialization—that is, to assemble the political majorities in order to curb judicial power, for example, by overruling unwelcome judicial decisions, reducing judicial independence, or appointing accommodating judges.

Political fragmentation is obviously related to a corresponding institutional setting. Strong separation of powers, making easier the advent of divided government, is a case in point, as is true bicameralism—leading to disalignments between the two chambers—or a proportional electoral law, making a multiparty governing coalition more likely. Also federalism, by pitting the central government against the states, supports fragmentation. In turn, a fragmented setting is likely to be the by-product of a political transition in which no actor is able to impose its preferences, trust tends to be low, and the uncertainty about the future is high. In this case, judicial power offers an insurance policy for prospective losers in the electoral arena.

The judicialization of politics has given new life to the traditional debate on the democratic legitimacy of an independent judiciary. The increasing role of independent judges in the policy process has been criticized. Some critics argue that to the extent to which judges are no longer constrained by law, an irresponsible policymaker seems to emerge. To this view, a different interpretation of the judicial role has been opposed: In a constitutional state, judges are bound to follow the constitution rather than

statutes. Sometimes, it has also been argued that judges have no discretion since there is always one right answer to the case they have to decide. In fact, discretion seems to be an unavoidable trait of judicial decision making. So political power results inevitably from increased judicial independence. However, the expansion of judicial power is also the by-product of specific decisions taken by democratically responsible bodies. The fact that judicial decisions can go against the will of political majorities is inherent in the institutional template of constitutionalism: It is an inevitable price to pay. However, it seems unlikely that the judiciary will remain out of step for long with the political branches. As long as courts become politically significant, politicians become interested in exerting influence on them through judicial appointments (especially in the highest courts), through jurisdictional reforms (e.g., removing politically significant cases from courts), or by influencing judicial careers—through the powers of the ministry of justice or of a politically influenced judicial council. However, although it is not certain whether long-term political influence on judges is likely to succeed, in the short run, the political role of the judiciary has become—and is likely to remain—significant.

See Also:

Constitutionalism, Judicial Decision Making, Judicial Independence, Judicial Review, Judicial Systems, Rule of Law

Further Readings

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