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Judicial Politicization

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Judges, who resolve disputes based on legal norms, in some sense also act politically. They participate in the political function of rule application. Because judges must exercise discretion, they are invariably involved in policy making: They have to make “judgments of social benefit” (Feeley and Rubin 1998: 338) at least in part based on their policy values. Such judicial policy making is at the root of the contemporary phenomenon of the *judicialization of politics*, which is characterized by the expansion of judicial power in the political system.

There are several categories of judicial politicization. First, politicization exists when the policy orientation of judges reflects political party alignments. Second, less politicization occurs when judges simply follow broad legal or political (but not party) doctrines. Third, strong politicization exists when judges form an organized group with a distinct policy stance and act both on and off the bench according to the political priorities of that group.

The nature of judicial politicization depends on the legal tradition and the degree of judicialization in each country. As a rule, there is more likely to be some form of politicization of judges in countries with a stronger judiciary. In general, common law judges are more individualistic and civil law judges are more collectivistic. In England, jurists refer to judicial policy making as interstitial. Even though the judiciary is increasingly significant, judicial policy making has developed only in policy areas left open by the political branches. Judicial appointments, although overseen by the executive branch, have traditionally been heavily influenced by the bench and the bar; English judges are generally cautious in their approach to decision making and keep their distance from party politics.

Conversely, judicial creativity has long been a force in the United States. Because the United States has a high level of judicialization, it is not surprising that politics plays a significant role in judicial appointments. At the state level, especially where voters directly elect judges, interest groups and political parties openly support judicial candidates sympathetic to their views. At the federal level, particularly with the U.S. Supreme Court, the nomination and confirmation process has become a forum in which political interests compete to influence the policy outlook of the federal judiciary. The president usually nominates a judicial candidate associated with his political party;

Senate confirmation usually easily follows when the president's party holds a majority in that congressional body. The result is that “there is a significant political determinant to judicial decision-making” (Cross and Tiller 1998: 2169).

In civil law countries, judges are usually recruited early in their professional life. The judge must pass a competitive examination similar to that for senior civil servants. This results in a propensity for judges to belong to union-like groups. However, the level of judicial politicization varies among civil law countries. In Germany, judges tend to fit the traditional stereotype of the passive executor of the will of the legislature. Judicial review of legislation is entrusted to a Constitutional Court, which is separate from the regular court system and is staffed by judges appointed by Parliament. Therefore, politicization of the ordinary judiciary is relatively slight and union activity is limited to job-related issues such as salaries and pensions.

The situation in Latin European countries such as France, Italy, Portugal, and Spain is different. In these countries, judges are highly organized into numerous unions divided along political party lines. (In France and Italy, judges, along with public prosecutors, are known as *magistrates*.) For example, there are three separate judicial unions in France and Spain and five in Italy, each broadly aligned with one of the main political parties in the country. The creation of judicial self-governing bodies (Higher Councils of the Judiciary) in all of these countries in the postwar period greatly enhanced the role of judicial unions. Higher councils are composed of judges and representatives of political parties. Judges elect fellow judges to the councils and judicial unions play a crucial part in these elections. The unions have strong (but sometimes conflictive) relationships with the political parties. This situation has led to a complex configuration of power relationships inside the judiciary in these countries.

In most developed democracies, the executive has no monopoly over judicial appointments and careers. Therefore, if judicial politicization is present, it tends to be pluralistic and to reflect general political alignments. Judicial politicization in nondemocratic regimes tends to be radically different. As a rule, the judiciary in authoritarian regimes plays a minor role in politics. The government usually entrusts, political repression to special politically appointed courts, or it is carried out 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. The

example of the judiciary in Spain under the Francisco Franco regime (1939–1975) is instructive. However, totalitarian regimes invariably try to enlist the judiciary in their attempts to implement deep social and political changes. There is little, if any, judicial independence. Judges are appointed and dismissed at the pleasure of the executive and are part of the state apparatus. The judiciary is usually a strong hierarchical organization made up of members of the totalitarian party. Judicial elections, if held, merely ratify the choices of the political leadership. Therefore, although judges are politicized, their values necessarily mirror those of the regime.

Judicial politicization in democratic countries is broadly related to the growing expansion of judicial power. Given the increasing political significance of judicial decisions, it is not surprising that political parties and interest groups are increasingly attempting to place judges sympathetic to their interests on the bench. However, judicial politicization could endanger the legitimacy of independent judges. If judicial decisions appear to be controlled not by law or legal doctrine but by political expediency, citizens may call for judges to be held directly and politically accountable, even at the expense of their independence and impartiality.

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See also

- [Authoritarian Regimes and Courts](#)
- [Constitutional Courts](#)
- [Courts, Lawmaking by Judges](#)
- [Judges, Associations of](#)
- [Judicial Activism](#)
- [Judicial Decision Making](#)
- [Judicial Independence](#)
- [Judicial Selection](#)
- [People's Courts](#)
- [Socialist Justice](#)

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