MUCH ADO ABOUT NOTHING? CLAIMS ABOUT
POLITICAL APPOINTMENT TO THE NORWEGIAN
SUPREME COURT – AND WHAT TO DO –
AND NOT TO DO – ABOUT IT

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Should recent reports of political appointments of Norwegian Supreme Court judges give rise to concern and reform of the process, e.g. toward more explicitly politicized hearings or vetting of nominees?1 2

Renewed attention to the patterns of political and ideological leanings among these judges should be welcome, and some observed patterns seem plausible. Insofar as such patterns can be identified, it may seem misplaced to criticize Grendstad et al. for overlooking the differences in procedures for selecting judges and the different judicial cultures, e.g. between the US and Norway3. If there are statistically significant correlations, the appropriate response may well be to explore possible mechanisms – different from those in full view in the US.

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But the recent research findings that allege a politicized appointment process can be improved in at least two ways. I shall argue in section 1 that the evidence Grendstad et al. present for such ‘political’ appointments is weak. Section 2 suggests that more dimensions than political right-left merit more attention partly due to the internationalization of the judiciary. In conclusion, I suggest that these comments should not diminish but rather increase the need for further research on the political and other ideological bias of the Norwegian Supreme Court – as of other parts of the domestic, regional and international judiciary. The appointment process and voting patterns of Supreme Court justices merit more public attention, e.g. as argued by present Chief Justice Schei⁴ – though not for the reasons claimed by Grendstad et al.

1 Against findings of politicized appointments to the Norwegian Supreme Court

Grendstad, Shaffer and Waltenburg have recently brought renewed attention to the impact of political preferences and ideological leanings of the Supreme Court Judges of Norway.⁵ They conclude that, firstly, «…conventional wisdom notwithstanding, Norwegian Supreme Court decisions are explained not so much by precedent or legislative intent, but rather reflect the political and ideological values of the justices.»⁶

Secondly, and even more controversially, they claim to detect a pattern of political appointments. They find a positive correlation between the judges’ political preferences on a left – right dimension and those of the governments that have appointed them. If this is correct, it may seem irrelevant to dismiss such findings because the institutional procedures for selection of judges are different in the US and in Norway.⁷ To the contrary: if there are statistically significant correlations, the appropriate response may be to firstly explore possible mechanisms – different from those in full

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⁶ Grendstad, et al., 2010, 75, my emphasis.
⁷ Sunde, 2012.
view in the US. And secondly, if politically skewed appointments may be unavoidable, the policy implications may be to establish procedures that recognize and handle such biases more explicitly, e.g. by means of Parliamentary hearings or vetting, or by giving different bodies the right to appoint different members of the Supreme Court.

Their findings have received attention and criticism, which in turn has spawned response. I shall argue that close scrutiny of the study by Grendstad et al. reveals several methodological weaknesses that should lead us to question both these findings and hence their implications.

Firstly, consider the claim that judges decide partly for reasons in addition to those based on the clear meaning of the text, of precedent, and legislative intent. They point out that «in non-unanimous Supreme Court decisions, there would be those decisions in which the disagreement was produced by differences in the justices’ attitudes and loyalties, and that there is some set of extra-legal forces that might correlate with the justices’ decisional behavior. It is this «politicization» that remains an empirical question of considerable societal and political interest.» This should of course not come as a surprise: in cases where these factors are not clear enough to yield a unique answer, it is difficult to imagine any other way that judges make their decisions than to rely on their attitudes and loyalties. However, the conclusions of Grendstad et al. do not follow, for two reasons. Only some such resort to personal attitudes and loyalties are incompatible with the sort of neutrality worth defending. For instance, consider a commitment to judge according to professional norms and values in accordance with conceptions of judicial virtues, especially when the ‘meaning of the law’ is underdetermined. Such professional loyalties may command broad consensus if not complete agreement within the profession. They may well be the sort of constraints that the authors overlook.

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10 Grendstad, et al., 2010, 82.
when they claim that «there are few effective decision rules constraining the effect of the justices' attitudinal preferences. And as they make policy, then, it stands to reason they can do so in accordance with their personal politics.»

Secondly, Grendstad et al. do not justify their claim about the relative weight of these factors: that «decisions are explained not so much by precedent or legislative intent, but rather reflect the political and ideological values of the justices.» (my emphasis). This is a much stronger and more worrisome claim than simply holding that such personal attitudes and loyalties supplement the established – yet somewhat contested – interpretations of sources of law. That judges’ ‘own’ norms affect interpretation seems plausible—though many will challenge Grendstad et al’s claim that «Precedent is basically a hollow restriction». This seems to overstretch the point, namely that «precedent fails to remove the justices' attitudinal preferences from affecting their decisions.» (83). That judges’ «personal values» in some sense or other «fill in the remaining gaps» can hardly be doubted; the more worrisome aspects are if these values displace the other standards of interpretation, or if these values are problematic. Of course, to focus on the subset of Supreme Court decisions where there are dissenting opinions make such general claims even less convincing – especially when the proportion of such cases is small. We return to this below. One of the reasons for questioning Grendstad et al’s claim about the relative weight of such personal values compared to other factors when interpreting the law is the limited sample they study: namely all 11 cases of the Supreme Court’s plenary non-unanimous decision making concerning constitutional issues in the period 2000–2007.

This sample size and its coding are central weakness of the second conclusion Grendstad et al. draws, to which I now turn. Not only do they hold that there are patterns among the judges – which by itself would be an interesting finding. Grendstad et al. also hold that such patterns of disagreement as there are among Supreme Court judges can be explained by the
politicianed appointments – by whether the judge was appointed by a Labour or non-socialist governments. Both findings, but in particular the latter, suffer from methodological weaknesses concerning the scoring, which creates particular problems due to the small number of cases.

With regard to the score for ‘Individual freedom’, note first that this is a dimension with only two cases. In the case of Boot boys, a central issue is the balancing between free speech and protection against hate speech. The Court decided that free speech is more important. Grendstad et al. give a high score to decisions that give priority to free speech. It is not easy to see this as an obvious application of an ideological commitment to individual freedom: it would make equal sense to hold that freedom from hate speech should be valued as a freedom. If the score is thus reversed, this obviously affects the ‘revealed’ preferences.

A second example goes more to the core of Grendstad et al’s claims about politicization of appointments. The dimension is labelled «Public vs. Individual: Economic Rights» since it is tied to economic issues of private property and government responsibility. Grendstad et al’s evidence for a pattern is three Supreme Court plenary decisions: Selbudommen vote 9-6 (dissenting judges agreeing with the conclusion but relying on a different interpretation); Dobbeltstraff I, vote 8-5 and Finanger II, vote 9-4. Grendstad et al. score the cases in such a way that decisions in favour of private ownership over indigenous groups’ rights to property are coded high. However, one may reasonably challenge this coding which is done by reference to a vaguely defined ‘ideology’. Arguably, granting certain use of land to a distinct minority without granting such rights to the public at large can be taken as a commitment to private ownership, albeit to a group, over public ownership. The question is thus who’s private ownership. There are ‘ideologies’ on the right that will maintain both strong claims to private ownership and challenge such claims when they violate a Principle of justice in acquisition – instead presumably arguing in favour of the original heirs. This is arguably the case for the Sami indigenous minority. I thus submit that Grendstad et al’s coding of Selbudommen should be reversed. The result will clearly affect the correlations found. It remains to be seen

15 Ibid p. 94.
16 Grendstad, et al., 2010, 94.
17 Rt. 2001 s. 769, Rt. 2002, 557 and Rt. 2005, 1365, respectively.
whether their observations remain. In particular, they observed a polarization between Justice Rieber-Mohn (appointed by social democratic government), on the one hand, and Justice Utgård and Chief Justice Schei on the other (both appointed by non-socialist governments).

I conclude that Grendstad et al’s construction of three dimensions is unconvincing, partly because the dimensions are constructed on the basis of as little as 2 cases. Moreover, the alleged correlation which might support claims of politicized appointments rests on contested scoring of such very few cases.

2 Other ideological dimensions:
Gender, Internationalization

The comments above do not question that there may indeed be patterns of an ‘ideological’ nature in and among the votes of Supreme Court judges— I have only questioned whether a left-right ideology among the judges expressed in subsets of these 11 cases can be correlated with the political persuasion of the governments that appointed them. Grendstad et al. apparently decide that a left-right ideology is most salient for research, citing Norwegian and some international scholarship. Three remarks are appropriate about this choice.

Firstly, one might argue that other biases, one explicitly stated and others less so, should receive greater attention. Several studies indicate that the judges’ professional background correlate with how ‘state friendly’ they tend to judge. This may be a direct causal effect, but may of course both be caused by an underlying personal ‘ideology’ which leads the lawyer to first choose public employment. The powerful statistical tools Grendstad et al. command may help assess such claims better. Other presumed biases are often explicitly acknowledged, namely those pertaining to geographical background and gender. Thus Grendstad et al. do find that women judges are somewhat more radical than male judges. Gender is one cha-

20 Skoghøy, 2010 and studies cited there.
21 as claimed by Skoghøy, ibid, p. 724.
23 Grendstad, et al., 2011, 251.
characteristic that the government explicitly uses in selecting judges to the Supreme Court and to other courts, presumably at least as a tie breaker among otherwise equally qualified applicants. Such a policy of moderate reverse discrimination, if implemented, could – and arguably should – presumably have implications for the judgments of the Supreme Court over time – if not, the policy may merit reevaluation by Parliament.

Studies of Supreme Court cases may thus reveal important gendered patterns. Yet the value of one case is limited – though we do find instances of Supreme Court cases with a clear gender pattern. Consider, for instance, a case concerning whether the new prospects of DNA testing should allow reopening of paternity cases.\(^{24}\) Such tests might count as «the acquisition of new evidence».\(^{25}\) A narrow majority – nine among the 17 Supreme Court justices – rejected this interpretation of ‘acquisition of new evidence’ – with certain exceptions. All five women judges were among the majority. While this case is extreme, and insufficient to claim a pattern, such gendered voting patterns is what one should expect if one of several plausible rationales for moderate affirmative action for women in such appointments is that women in general will vote somewhat differently than their male colleagues. Grindstad et al’s methodology should be suitable for determining such patterns on the basis of a large number of cases.

The final challenge and further opportunity for studies such as Grendstad et al. concern the choice of a left-right ideology. Several scholars argue that the left-right dimension is no longer suited or sufficient to understand political developments. In particular, a tendency toward «de-nationalizations»\(^{26}\) has emerged in Western Europe over the last two decades as a consequence of globalization and Europeanisation. This is especially so with regards to European integration.\(^{27}\) So instead, or at least in addition, scholars detect another dimension, namely a «(regional or international) integration- (national) demarcation» or «cosmopolitan-nationalist».

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\(^{24}\) Rt. 1997-413.
\(^{25}\) Tvistemålsloven § 40, 6.
\(^{26}\) Michael Zurn, Regieren jenseits des Nationalstaates, 1998.
For the study of the Supreme Courts – in Norway and elsewhere – one relevant implication of this trend is to explore whether the judges differ in their preferences or attitudes with regard to how they reconcile national and international law. Thus several of the cases Grendstad et al. study do raise such issues. Note that such studies must draw not only on statistical methods, but also on legal scholarship in order to assess what the judges write – and don’t write – eg. when citing or not citing international conventions or foreign case law.

3 Conclusion: What to do?
The intriguing studies of Grendstad et al. should raise our awareness about possible patterns in decisions by the Norwegian Supreme Court – as well as by regional and international courts. They argue, convincingly albeit not surprisingly, that «political values and attitudes are important determinants of judicial voting behavior in Norway».28

An important issue is whether this research gives us reason to scrutinize the mechanisms of appointment closer. I have argued that the alleged patterns of politicized appointments have not been justified, since there are methodological weaknesses of the research. This is of course not to deny that there are and may be other important correlations and issues worth study, and arguably worth political and media attention. And we may certainly agree for more transparency about the appointment process, in particular that the public should have access to the reasoning behind ranking of applicants. Much of this information is already available, but it has not received much attention since such appointments have not been salient in the public debate. One reason for this is that, at least until fairly recently, few actors have found it important to scrutinize; neither media, political parties nor the political scientists have had much to gain. The many claims of ‘judicialisation’ and ‘internationalisation’, and new political cleavages, should lead us to pay more attention to these matters, if only to determine whether, when and why such claims are sound. The Supreme Court judges merit study – even if their selection is not biased by the political ideology of the appointing government.

28 Grendstad 2010, 75.