**Diversity and Supreme Court Justices’ Voting When Legislative Intent is Known: The Case of Norway**

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Prepared for delivery at the Annual Meeting Western Political Science Association, Hyatt Regency Hotel, San Francisco, CA, March 29-31, 2018

**Abstract**

Although the Norwegian Supreme Court is a political institution, legal scholars, lawyers and justices often argue that a variety of legal, rather than political, principles should be invoked to render good decisions. For example, justices may draw upon the plain meaning of the law, the objectives of the Constitution’s framers, precedence, and legislative intent.

As part of a larger research project on the Norwegian judicial system, this paper is an effort to address the role of legislative meaning of the statute or constitutional provision in the context of an ever-diversifying Court. For each of a series of Supreme Court plenary session decisions where the key dispute is over a parliamentary law, we code the justices’ votes as being consistent with either a socialist or non-socialist position on the statutory provision.

We test whether diversity of the Court, legislative intent, and a justice’s ideology have a significant impact on the justices’ voting behavior in disputes involving the legal model’s partial reliance upon legislative intent in reaching a decision. We find that the Court’s diversity and a socialist legislative intent reduce the likelihood of a justice casting a socialist vote. A socialist ideology, however, raises the likelihood that a justice supports a socialist position in a plenary session case. We conclude that the negative effect of diversity on socialist voting reflects the more liberal views embraced by a younger cohort of justices.

**Diversity and Supreme Court Voting When Legislative Intent Known:**

**The Case of Norway[[1]](#footnote-1)**

Once the essential professional qualifications are met, it would *be to the advantage of the Court* if its composition reflected a wide breadth of experience from different areas of the country, professional backgrounds from different areas of legal practice, and, furthermore, if it had a more balanced proportion of women to men (Smith, 1998: 101, italics added).

Former Chief Justice Carsten Smith actively promoted the diversification of the Høyesterett, the Norwegian Supreme Court. While Norway has a highly egalitarian culture, the High Court was populated exclusively by males well into the 1960s. We hasten to point out that other political institutions also were male bastions, but that is not our concern here. Certainly, by the 1960s women had made significant inroads in winning seats in the parliament and securing positions in the executive departments. In a sense, the Høyesterett was something of a latecomer in the recruitment of women to serve as justices, with one female elevated to the Court in 1968. Gender parity did not emerge rapidly, but a concerted effort to recruit more female justices has increased the presence of women to around one-third of the Court’s composition. Chief Justice Smith’s commitment to diversity was embraced by his successor, Chief Justice Tore Schei, who in turn, was succeeded by a female Chief Justice, Toril Øie.

Recruiting female justices should guarantee that women’s “voices” help inform the Court’s deliberations. After all, the life experiences of women are presumed to differ from those of their male colleagues. Consequently, analyses of judicial behavior have been undertaken to assess the role of diversity by employing a simple dichotomous indicator of gender (Boyd et al., 2010; Peresie, 2005; Grendstad et al., 2015). Focusing on a specific underrepresented group is clearly justified, although a dichotomous indicator offers a highly truncated version of diversity. Thus, we shall attempt to move beyond the “old binaries” (Lewis and Cantor, 2016), such as male-female or urban-rural. After all, any individual has more than one salient group identity, which may influence their opinions and actions.

We contend that heterogeneity might better be conceptualized in a manner a bit more complicated than a dummy variable (Schaeffer, 2013) and have developed a diversity measure incorporating multiple indicators (Shaffer et al., 2015). This approach is in keeping with the official Judicial Appointments Board policy seeking to ensure

… a broad recruitment of justices, such that justices who are appointed have prior knowledge from various areas of community and legal life (Innstillingsrådet, 2012).

If we are to tap into the “breadth of experience from different areas of the country,” in the words of former Chief Justice of the Supreme Court, Carsten Smith, we must consider which, if any, social groupings are salient for a variety of policy questions. For a particular case, one might assume that gender is an especially relevant reference point, and it may, or may not be the case for a specific justice. Nevertheless, to assume that gender informs the values of justices in all manner of cases is highly improbable, to say the least. Therefore, in the present analysis we shall construct a measure of Supreme Court heterogeneity that combines a number of potentially important factors underpinning the value judgments driving the justices’ decisional behavior. The mechanics of our diversity measure are outlined below.

In very general terms we expect the diversification of the Supreme Court to exert an influence on judicial behavior, if for no other reason than the undeniable fact that the concerted efforts to diversify the high Court have had their intended effect – the sociopolitical mix of justices has exhibited substantial change over time. Clearly, diversifying the Court was undertaken by design, as reflected in the Chief Justice Carsten Smith quote included at the outset of this paper, as well as the quote from the Instillingsrådet, cited above. Accordingly, the increase in the number of female justices or those who enjoyed law faculty status might well have affected the decisions handed down by the Court. Later in this paper we shall return to the anticipated impact of diversity on a specific type of court case – namely, those addressing constitutional[[2]](#footnote-2) issues in cases where there is a clear, discernible legislative intent related to the legal conflict being adjudicated. We chose to focus on this type of case because they offer a particularly daunting test for the effect of diversity on the Court’s decisional outputs. With clear legislative intent, these cases present instances where the legal model should prevail and where extra-legal forces (like diversity) should be less likely to provide significant explanatory traction. Thus, if we find a statistically significant effect for diversity, it is all the more remarkable.

Basing a judicial decision, at least in part, on the expressed purpose of a national law is an example of legal reasoning. Although legislative intent is considered to be an appropriate legal basis for a well-reasoned opinion, it is only one option that may be invoked by one or more justices. However, whereas the Supreme Court is an independent branch of government, the Court may not be particularly obliged to adopt the “view of the Storting.”

The fact that there have been dissenting votes within the Supreme Court—even where the Supreme Court is nearly divided—is not in itself sufficient to give precedence to the view of the Storting (Tore Schei, 2014:6).

While we would be hard pressed to claim that decisions are rooted in a legal understanding that is agreed upon by all the justices, legal reasoning is no doubt ever present. One basis for the effort spent on divining the *legislative intent* of a parliamentary statue is to discern its legal meaning so that a decision can be based upon that legal meaning, thereby better insulating the eventual outcome with all the trappings of democratic legitimacy.[[3]](#footnote-3) Justices make a good faith effort to consider seriously what in fact parliament intended to accomplish, rather than simply imposing their policy or value preferences. Once legislative intent is discerned, the Court might defer to a law passed by the elected, lawmaking body.

Nevertheless, how do justices divine a single shared understanding of legislative intent? Surely in some cases, interpretations of the purpose of a statute may vary with the sociopolitical background of justices, a goal implicit in the official, prescribed judicial appointment procedure of Norway’s highest court. *The primary objective of this paper, then, is to undertake an analysis to evaluate the impact of extra-legal forces, primarily the level of Court diversity, on the ideological voting of Norwegian Supreme Court justices in non-unanimous plenary cases in which a parliamentary statute is central to the dispute at hand and legislative intent can be discerned*.

# Invoking a Modified Attitudinal Model

How does the interplay of the extra-legal factor of sociopolitical diversity and legal reasoning revealed in a position grounded in legislative intent help account for the votes cast by justices? In the decisions rendered in cases involving a dispute over a constitutional question, justices can have an especially profound *political* impact upon society. After all, in these cases the justices may – perhaps intrepidly, perhaps blithely – interpose their will, replacing the intent of the nation’s democratically elected representatives with their own. Now, how they arrive at these decisions can be explained by a variety of factors, both legal and extra-legal.

Norway’s Supreme Court justices are required to possess law degrees, and there is the additional informal expectation that they graduated near the top of their law school class. Presumably, then, justices’ professional competence positions them so that they will render decisions based upon careful *legal* reasoning. Yet, these highly trained and proficient jurists do not always arrive at the same legal conclusion. Thus, a fuller understanding of judicial decisional behavior requires a theoretical frame that invokes extra-legal forces that inform a justice’s opinion. In fact, as stated explicitly on the Norwegian Supreme Court (2015) home page, a number of extra-legal factors are to be reflected in the *appointment* of justices, including region, career experience, private background, prior public employment, sex, and variation in the age of justices.[[4]](#footnote-4) The principle of representation is embraced by the Judicial Appointments Board, which has played an important role in evaluating Supreme Court applicants since its start in 2002 (Innstillingsrådet, 2012). To assess the impact of sociopolitical diversity requires the application of the extra-legal models of judicial behavior.

One such extra-legal model is a modified attitudinal representation of judicial outputs, and invoking it is by no means a rejection of fundamental legal reasoning. To the contrary, we are not suggesting that a justice’s law school training was for naught. Indeed, the principles of legal analysis brought to bear in judicial decision making explain a great deal about how the Supreme Court votes (Richards and Kritzer 2002; Kritzer and Richards 2005; Bailey and Maltzman 2011; Epstein et al. 2013). For example, no one would propose that justices ignore the facts of a case, which in turn inform decisional behavior. Likewise, when there is general agreement about what constitutes “settled law,” justices invoke the concept of precedent as a heuristic device, thereby simplifying the processing of a case. In mulling over a case, justices may seek to discern legislative intent when there is a dispute involving a policy grounded in a statute. Similarly, when there is a constitutional precept at stake, justices might seek to divine the meaning of that principle or the intent of the Constitution’s writers. All of these “legal” factors should contribute to more objective decision making than would occur in their absence.

Since most Supreme Court lawsuits result in unanimous decisions, in what might be called “easy” cases, they do not generate highly challenging disputes to settle, ones that might bring the kinds of extra-legal factors, such as gender or ideology, that the Judicial Appointments Board would like to have represented on the High Court into play (on the consequences of “hard” versus “easy” cases for judicial decisions, see Baum 1997). Of course, unanimous decisions may also be handed down in cases addressing vexing legal questions, and after much deliberation, justices conclude that the Court must speak with a single voice (on the perceived weight given to unanimity among U.S. Supreme Court justices, see, for example, Zink, Spriggs II, and Scott 2009). On a smaller, but significant, proportion of cases, major disagreements may arise that are not so easily resolved by pure legal reasoning. Depending upon the sociopolitical values of justices, facts may be interpreted differently, precedents may be “cherry picked,” and legislative or constitutional intent may be construed in strikingly different ways across all justices (see Segal and Spaeth 2002).

# The attitudinal model assigns a major role to non-legal reasoning, but there seems to be a number of variants of the general form (Baum, 1997). The most straightforward usage simply presumes that justices often pursue policy or ideological goals, while some scholars modify this orientation by including strategic behavior as well. Yet other applications incorporate many extra-legal forces, such as career experiences or gender, which may condition policy preferences and inform a justice’s decisional behavior. In the present study we include diversity, ideology, gender, and whether or not there was a pro-public plaintiff, as extra-legal forces hypothesized to explain variation in Norwegian Supreme Court voting. Prior studies of Norwegian judicial behavior have shown each of these to have some explanatory traction (see, for example, Grendstad et al. 2015). While the attitudinal model has been applied widely in the analysis of American judicial behavior, it has only been recently that an effort has been made to transport it across the pond. Previous empirical findings are encouraging as to the application of the attitudinal model in the study of European high courts (e.g., Hönninge, 2009). Here, we employ the extra-legal forces noted above in an effort to measure and explain the degree to which Norwegian Supreme Court Justices hew to the legislative intent underpinning statutes enacted by the Storting.

In an initial effort to gauge the impact of an extremely important principle of legal reasoning, Kisen (2014) identified a set of Supreme Court cases decided in plenary session between 1976 and 2013 that raised issues that were tied to the parliament’s legislative intent. Generally speaking, parliament passed laws during this time period that embraced either a socialist or non-socialist policy position. Consequently, initial bivariate tests were run to determine if the ideological proclivities of the justices matched the left-right coding of relevant statutes. Some support was found for such a relationship, a point we shall return to later in the paper. In the present study, we shall extend the initial effort by undertaking a multivariate analysis designed to test five hypotheses:

**Hypothesis #1: The greater the level of Supreme Court diversity, the less likely a justice will register a socialist vote.**

This hypothesis is grounded in the long-term changes in the larger Norwegian political context and its role in the political socialization of future generations of justices. In the early years after the end of World War II Norway, as well as other Scandinavian nations, functioned pretty much as “consensual democracies” (Elder et al., 1988). A number of scholars argued that the consensual political systems were “frozen” (Lipset and Rokkan, 1967; Rokkan, 1970; Shamir, 1984). However, during the 1960s the social democratic consensus began to crumble, resulting in a gradual shift away from consensus to what has been described as “dissensual” politics (Rommetvedt, 2003). Liberal political preferences, such as the tax cuts favored by parties to the right of center, proved appealing to many Norwegian voters, as reflected in the growing support of both the Conservative and Populist Parties.

When younger citizens are socialized in an environment no longer reflexively committed to socialist democracy, there may be only one direction in which one can move – to a more right-of-center location along the political spectrum, in a manner reminiscent of regression toward the mean. If such a shift occurs during the period in which Court diversity has increased (Shaffer et al., 2015), then we expect a measure of that diversity to exhibit a strong negative influence on the propensity to cast socialist votes. Finding such a pattern would not be a spurious empirical result in our view, particularly given the ever-increasing presence of women and law professors, both of whom have exhibited non-socialist voting patterns in earlier research findings (Skiple et al., 2016).

**Hypothesis #2: If legislative intent is socialist, a justice is more likely to register a socialist vote.**

If justices defer to the legislative intent of a law, presumably they are employing legal reasoning rather than infusing their personal preferences into Court decisions. If this hypothesis enjoys empirical support, then the legal model would at the very minimum temper our reliance upon the attitudinal model to explain decisional behavior.

**Hypothesis #3: Supreme Court justices appointed by socialist governments are more likely to register a socialist vote.**

The most straightforward, fundamental understanding of the attitudinal model argues that justices are policy makers seeking to promote their ideological preferences. A raft of strong empirical evidence has been produced documenting ideological voting in American higher courts (Pritchett, 1948; Schubert, 1965; Segal and Spaeth, 2002; Segal and Cover, 1989; Bailey et al., 2005; Wahlbeck et al., 1998; Rohde and Spaeth, 1976), and very recently ideological position taking has been shown to influence decisional behavior in European courts in general (Hönnege, 2009; Magalhaes, 2003; Hanretty, 2012; Voeten, 2007, 2008). Especially relevant to the immediate research question, Grendstad et al. (2011, 2015) Shaffer et al. (2014) have demonstrated that the Norwegian High Court justices possess ideological or policy preferences that influence the votes they cast in many decisions handed down.

**Hypothesis #4: If a case involves an economic issue, the more likely it is that a justice appointed by a socialist government will vote the socialist position and the more likely it is that a justice appointed by a conservative government is to vote the conservative position.**

Previous research has demonstrated that the appointing government’s ideology is significantly linked to the justices’ votes cast in cases adjudicating a public versus a private economic interest (see Grendstad et al. 2015). Moreover, cases raising economic issues may be more likely to be freighted with clear ideological connotations (see, for example, Epstein and Mershon (1996) on variation in the effectiveness of ideological measures across issue areas). Socialist appointees are more likely to support the public economic interest, while non-socialist appointees lean toward the private party.

However, for the small number of plenary cases in this study we simply consider whether or not an economic issue is at stake. Framed this way, we see no reason to hypothesize that the presence of an economic concern will produce an increased likelihood of a socialist vote. To the contrary, a non-socialist appointee is not predisposed to cast a socialist vote on the matter, but a socialist government appointee could be expected to do so. Therefore, an economic issue is hypothesized to produce a socialist vote among those justices appointed by a socialist government. To reflect such a theoretical expectation requires an interaction between an economic issue and appointing government.

**Hypothesis #5: If a justice is female, she will register a non-socialist vote**

Although little evidence has been produced to date that provides empirical support for a link between gender and a justice’s vote, either in the case of the United States (see Boyd et al. 2010) or for Norway (Bergset 2013; Grendstad et al. 2015), male-female differences may emerge when cases involve a left-right dimension of ideology and legislative intent is discernable. Whether deliberating about welfare policies, family law, and other women’s issues, one might expect that female justices will cast a more socialist vote.[[5]](#footnote-5) Yet, inasmuch as women are relative newcomers to the High Court, they may exhibit an orientation more sympathetic to private interests in economic affairs that is symptomatic of more recent generations. Thus, we hypothesize that women will support a non-socialist position on the plenary cases analyzed herein.

# Data and Methodology

The initial data gathering and processing was a major undertaking reported in Kisen (2014). It involved a two-step process: (1) coding a legislative act as socialist or non-socialist, and (2) coding each participating justice’s vote as socialist or non-socialist. This procedure was performed for Norwegian Supreme Court cases decided in plenary session from 1976 through 2013. There were 62 such cases, 26 of which addressed the legislative intent expressed in parliamentary statutes. A careful reading of Storting documents allowed Kisen (2014) to code legislative intent as either socialist or non-socialist, which could be determined for 22 cases

The number of cases is necessarily limited, because the Court hears a small fraction in plenary session and legislative intent may not be explicitly addressed in many instances. Nonetheless, the finite number of cases provide a window into the impact of legislative intent, addressing a range of crucial matters, including quotas, property regulation, taxation, criminal sentencing, social insurance and expropriation. In 19 of these 22 cases, the individual justice’s vote could be coded as supportive of a socialist or non-socialist stance.[[6]](#footnote-6) (See Table 1 for information on these cases.) With these data, then, it was a simple matter of identifying when a justice voted in a manner that was consistent with a socialist legislative intent,

[Table 1 Goes Here]

Kisen finds some support for the hypothesis that the proportion of socialist votes is correlated with a justice’s ideology, at least for those cases in which legislative intent was critical but not expressly referred to by justices. This is an extremely important finding in that justices’ ideology not only plays a role in judicial behavior, but is also linked to party politics as made manifest in the Storting. In this study, we expand on Kisen’s pioneering effort by undertaking a multivariate analysis of plenary session voting in ten *non-unanimous* decisions (see Table 2) where voting is measured by its ideological direction, as determined by the thrust of the language in the law in question. The number of cases is small, 10 to be precise, reduced significantly from the 22 addressed by Kisen (Table 1). Of course, a slight majority of these cases were excluded because they were unanimous decisions.

[Table 2 Goes Here]

Although our statistical examination concentrates on 10 plenary decisions, our unit of analysis is the individual justice’s vote, resulting in 148 observations. The dependent variable is coded as 0 when the justice’s vote is consistent with a non-socialist legislative intent it is coded 1 when the justice’s vote is in support of a socialist legislative intent.

In the statistical findings reported below we use an indicator for the justices’ ideology that has been employed in earlier research – namely, the political color of the appointing government (see also Dyevre, 2010). In a number of prior studies, this proxy for ideology is significantly associated with decisional behavior, and we suggest that socialist and non-socialist governments may be prone to appointing justices who tend to be located on their side of the left-right continuum. For present purposes, we code socialist government appointees as 1 and non-socialist appointees as 0.[[7]](#footnote-7) We include three dichotomous variables: sex [0 = male, 1 = female], legislative intent [0 = non-socialist, 1 = socialist], and whether the case was brought by a public plaintiff [0 = Private, 1 = Public]. And we estimate the effect of an interaction term, which is the product of the appointing government [0 = non-socialist, 1 = socialist] and whether or not a case dealt primarily with an economic question [0 = non-economic, 1 = economic].[[8]](#footnote-8)

Given our principal interest in estimating the impact of sociopolitical diversity, we employ an index of “fractionalization,” a measure utilized in a number of sociological, political, and economic studies (Annett, 2001; Esteban and Ray, 2008). Naturally, deciding which groups should be included in a diversity score is not always self-evident (Fearon, 2003). We focus on five different salient sociopolitical clusters, beginning with appointing government (socialist or non-socialist), a factor often found to be significantly correlated with Supreme Court votes (Grendstad et al., 2011; Skiple et al., 2016). Clearly, gender must be included, since a great deal of stress has been placed upon recruiting more women to the judiciary. Likewise, region (Oslo- Periphery) has been relevant to secure a representative geographical distribution of justices and has on occasion been found to be pertinent to decisional behavior (Grendstad et al., 2011). A number of scholars have noted a pattern of “government friendliness” among several justices (Kjønstad, 1999; Fleischer, 2006). We use whether or not a justice had prior service in the Legislation Department in an effort to tap government friendliness, a measure often linked to Court voting behavior (Grendstad et al., 2015). Finally, whether or not a justice had toiled in academia can serve to affect his or her decision in a number of cases involving legal reasoning (Grendstad et al., 2015). Thus, our measure of diversity comprises ideological, gender, and socialization differences among justices.

In order to estimate the degree of Supreme Court diversity, we compute the proportion of justices found in each of 32 combinations of five factors (i.e., 25), for which we calculate the proportion in each combination, which presumably captures a unique social, political, and personal experience – specifically, the color of the appointing government, gender, region, service in the Legislative Department, and experience as a law professor. For each year the proportions serve as inputs to the fractionalization measure estimated by the formula 1 – the Herfindahl index (Alesina, et al., 2003):

N

**FRACTj = 1 - ∑ sij2,**

**i=1**

FRACTj = Fractionalization Index for year i, and

sij = Proportion of justices in group j for year i

For any finite population, the fractionalization index ranges from 0 to a value approaching 1.0. Fractionalization scores of 0 would mean that all justices were in only 1 of the 32 combinations (e.g., a male, socialist appointee, born in Oslo, who served in the Legislation Department, and was not a legal academic). If there were two groupings (e.g., males and females but who are similar on all other traits), then fractionalization would be computed as .5 ([1.0 – (.52+ .52)]. As the Court is distributed over a greater number of combinations, the fractionalization index increases at a decreasing rate (Shaffer et al., 2015). During the time period under investigation, the Supreme Court reaches a maximum of 20 justices. If these 20 justices were distributed over 20 different combinations, the maximum possible diversity score would be .950.

Employing the independent variables outlined above, the following logit model will be tested:

[1] = ß1DIVERSITY + ß2 LEGINTENT + ß 3GOVERNMENT + ß4SEX +

+ ß5 LAWPROFESS + ß6OSLOBORN + ß7LEGDRPT

+ ß8 (GOVERNMENT \* ECONOMIC) + ß10PUBPLAINTIFF+ ε,

Where:

Y is the individual justice’s vote in the 10 plenary cases where legislative intent could be

identified. It equals 1 when the justice votes in support of the litigant making the socialist claim, 0 when the justice votes in support of the litigant making the non-socialist claim;

DIVERSITY is the multivariate measure of Court diversity;

LEGINT is the ideologically coded legislative intent (1 = socialist);

GOVERNMENT is the color of the appointing government (socialist =1);

SEX is male or female (female = 1);

LAWPROFESS is law professor experience (law professor = 1);

OSLOBORN is Oslo birth place (Oslo = 1);

LEGDEPT is Legislation Department experience (Legislation Department = 1);

GOVERNMENT \* ECONOMIC is the interaction term;

PUBPLAINTIFF is the case was brought by a public plaintiff (public plaintiff = 1).

We have included as controls the other three constitutive elements of the fractionalization index, namely whether or not the justice served in the Legislation Department [0 = no, 1 = yes], region of birth [0 = not Oslo, 1 = Oslo], and whether or not the justice had been a law professor [0 = no, 1 = yes]. We have also coded type of plaintiff [0 = private, 1 = public].[[9]](#footnote-9) The reader should note that below we report logit results with estimates clustered on the panel of justices, a choice justified on substantive theoretical grounds. Some clarification on this final point is in order. While individual attributes of justices play a role in explaining decisional behavior, there are case-specific effects, as well as the social context impact upon participating justices. By clustering on Supreme Court panels, we also are clustering on unique cases. On this point, the cases presently included span a 39-year period. Consequently, the collection of justices hearing each of these cases is unique. No two panels were composed of the exact same set of justices. In other research, we have found that panel and case effects add explanatory power over and above the values and experiences of individual members (Skiple et al. 2016).[[10]](#footnote-10)

# Findings

To provide an overview of the Norwegian Supreme Court actions on cases where a parliamentary statutory provision was a key element, we have reworked a table reported by Kisen (2014:61). The tabulation of the aggregate Court rulings on these cases is presented in Table 3.[[11]](#footnote-11) Generally speaking, the Court rendered a decision that was ideologically consistent with the Storting’s statutory principle 59.1% (9+4/22) of the time. We suggest that the Supreme Court appears to accede to legislative intent, but departs from that intent frequently. Treating the aggregate Court vote as a dependent variable, knowledge of the Storting’s ideological direction reduces predictive error by10%, as indicated by the lambda (λB) [[12]](#footnote-12) coefficient of .100. The correlation is meaningful, but not powerful when the whole Court is the aggregate unit of analysis.

[Table 3 Goes Here]

While aggregate results for decisions handed down are pertinent, individuals cast votes on the Court. Therefore, we shall attempt to account for the individual justices’ votes by estimating variations of the logit model specified above. Our data comprise 10 non-unanimous, plenary Court cases, but, as noted above, our unit of analysis is the individual justice, resulting in 148 justice-votes. The dichotomous dependent variable is scored 0 (non-socialist vote) or 1 (socialist vote). Univariate descriptive statistics for the variables included in the logit model are reported in Table 4.

[Table 4 Goes Here]

In the logit results reported below, we seek to understand the effect of legislative intent, a component of legal reasoning, while considering simultaneously the impact of Supreme Court diversity, understood best as an extra-legal force. Given the range of hypotheses, we estimate the multivariate logit model formally stated above; the results are presented in Table 5. Overall, the model is significant at the p < .000 level and sports a pseudo R2 of .143. Visually, Figure 1 illustrates a graphic representation of the independent variables empirically linked to justice votes in support of a socialist legislative intent.

[Table 5 Goes Here]

[Figure 1 Goes Here]

Turning first to the test of Hypothesis #1, the diversity of the Supreme Court’s personnel exhibits a powerful influence on casting a socialist vote, in a direction completely in accord with that which we anticipated. As diversity increases, the probability of the voting socialist position declines dramatically. Indeed, traversing the range of the fractionalization index, the probability of a socialist vote plummets by a value of 0.661 (See Figure 2).[[13]](#footnote-13) Consistent with the logic underlying Hypothesis #1, diversifying the Court, thereby making it more representative of the nation’s population, included justices more likely to embrace a more conservative position on these vitally important plenary session decisions. After all, a majority of justices in each and every case had been appointed by a socialist-led government and half of these cases produced socialist vote majorities. Of course, inferences about individual behavior from aggregate outcomes can be highly misleading.

[Figure 2 Goes Here]

As outlined above, a credible interpretation of the negative finding suggests that the political socialization of different generational cohorts equips them with somewhat disparate ideological orientations toward government policies. The gradual shift from a consensual social democracy to one with a more liberal, pro-business sensibility appears to underpin the somewhat more non-socialist values characterizing a more youthful generation. Studies of Norwegian public opinion and voting behavior offer strong empirical evidence of such an alteration of the Norwegian political context. Certainly, future justices, as they grow up, are not impervious to a long-term transformation of national politics. Given the socialist legislative intent of laws relevant to nearly all of the cases under study, the ample number of justices not socialized before or immediately after the end of World War II would not embrace a socialist legislative intent. So, as the Court added younger members, there was a greater likelihood of non-socialist voting, regardless of whether the attendant diversity resulted from adding law professors, women, etc.

Alternatively, one might entertain the notion that the groups that contributed to increased diversification – such as women, Oslo outsiders, and law professors, to name a few – generally found more liberal stances, especially in the area of economic policy, appealing. In any event, the diversity-decisional linkage is not explained by any exercise in legal reasoning, but reflects political values typically associated with the attitudinal model.

The statistical results testing Hypothesis #2 also reveal some cracks in the legal model’s architecture. First, while the coefficient for legislative intent is highly significant (p=.000), the probability of voting counter to a Storting statutory provision turns Hypothesis #2 on its head (See Table 5). If the ideological direction of the law in question were socialist, justices were highly likely to support the *non-socialist* position, a relationship at the root of the outcome illustrated in Figure 3. Note that when legislative intent is non-socialist, there was a .887 probability that the justice would cast a socialist vote, while a socialist legislative intent lowered the probability of a justice voting for the socialist position to .452. On the face of it, this result would appear to undermine claims of legal model devotees. More likely, justices may have been adjudicating dutifully in questioning the constitutionality of a parliamentary statute in an effort to produce better national law. On the other hand, perhaps the Storting law did not square with the justices’ value preferences.[[14]](#footnote-14)

[Figure 3 Goes Here]

Regarding Hypothesis #3, while previous research has found a significant impact of the color of the government appointing a justice, its impact here is non-significant (p=.625). We hesitate to suggest that the Court has risen above ideology, bringing us to Hypothesis #4, which also is grounded in the value preferences of Supreme Court justices. For present purposes, we have specified ideological decisional behavior as the *interaction* between ideology, as measured by the political color of the appointing government and the economic/non-economic nature of a case. Measured this way, ideology exhibits a significant relationship with a justice’s vote (p=.042). There is little doubt that economic issues are central to the ideological divide in Norwegian politics.

These results are graphically displayed in Figure 4, which illustrates the high probability of casting a socialist vote when we focus on socialist government appointees adjudicating cases involving issues of economic import. The interaction raises the probability of a socialist vote by .204. For these particular policy questions, socialist government appointees appear to be more faithful to their presumed policy preferences. To state the relationship most concretely, *the ideological division between socialist and non-socialist government appointees is most pronounced in cases addressing constitutional or statutory matters relating to the economy.*

[Figure 4 Goes Here]

Finally, Hypotheses #5 receives no support in this logit analysis. Female justices were no more likely to register socialist votes than their male colleagues.

# Political Culture and Diversity

The reader may wonder just why diversification of the Norwegian Supreme Court so dramatically depresses the incidence of justices casting socialist votes. Near the outset of the paper we speculated that more recently appointed justices were may have been socialized in a period in which the political culture drifted away from a socialist consensus to a more liberal political posture. In other words, one can imagine two distinct cohorts, one that was born before 1951 and one that was born after 1950. The latter would have been politically socialized during the 1960s when a shift to a bit more non-socialist political culture was emergent. We might also conjecture that as more women and law professors were added to the Court, two groups that were previously linked to a more liberal stance, more decisions of a non-socialist nature would naturally occur.

A peek at the voting patterns in these data set is instructive. In Table 7 we report the percentage of socialist votes cast by gender, professorial status, and cohort, as suggested in the preceding paragraph. First, note that the percentage point difference between males and females is miniscule at 1.1%. Likewise, professorial status appears inconsequential, with a 2.7% difference. However, the apparent effect of cohort is a bit more impressive. Consensus era justices cast socialist votes nearly three times out of five, while 43.8 percent of the votes their post-consensus colleagues were socialist, an observation consistent with the notion that younger justices may be somewhat more receptive to a liberal political understanding of cases heard in plenary session.

[Table 7 Goes Here]

How then do these generational differences feed into the decisional behavior of Supreme Court justices? We offer a tentative and simple model of effects of cohort, diversity legislative intent, and the appointing government-economic issue interaction in Figure 5. The impact of diversity, legislative intent, and the appointing government-economic issue is consistent with the findings reported above. Of considerable interest is the role of the cohort variable, which elevates significantly the diversity of the Court. In other words, the generation of Supreme Court justices born after 1950 elevated diversity, bringing with it a liberal orientation, priming justices to cast votes trending to a more non-socialist position. While not displayed in the figure, justice cohort had no direct effect on voting behavior.

[Figure 5 Goes Here]

Our preferred overall interpretation underscores the pervasive impact of value preferences on individual decision making. The ideological impact of the socialist government appointment-economic issue interaction term is unmistakable. Diversity can be understood from a value preference perspective, as well, primarily because elevated fractionalization scores are generated by the inclusion of appointees who were socialized in the period characterized by a crumbling social democratic consensual politics. Legislative intent, a feature of legal reasoning, may be freighted with ideological content, particularly as the relevant parliamentary action occurred before many of the justices were elevated to the High Court. Indeed, 80 percent of the cases carried with them a socialist-oriented legislative intent. More center-right predilections lead justices away from regularly casting socialist votes.

# Summary and Conclusion

In the recruitment of Norwegian Supreme Court Justices considerable attention has been paid to diversifying along a number of dimensions, with special attention being paid to elevating women to the Bench. Thus, the selection process should increase the likelihood that a variety of societal perspectives will be brought to bear on decisions handed down by the High Court. Of course, increased diversification would steadily bring more and more individuals from the post-consensual political era. Since this cohort was more likely to embrace a more liberal stance on major issues, we hypothesize that recent recruits would more likely cast a non-socialist vote, and the logit results offer strong support for the hypothesis. Indeed, our measure of diversity was statistically significant, with the probability of a socialist vote plummeting from .912 at the lowest level of diversity to .251 at the highest degree of diversity. Naturally, if the goal is to better reflect the broad interests of the larger society, then one should expect the Supreme Court to be a bit more non-socialist in its decisional behavior than it might have been in the past.

Another hypothesis garnering strong support involves the role of legislative intent. Judges the world over subscribe to the view that they rely on legal reasoning in adjudicating policy disputes brought before them. In holding up the facts of a case against the law, justices are, in the words of U.S. Supreme Court Chief Justice John Roberts, only “calling balls and strikes.” While the baseball metaphor does not travel well to the Old World, the logic does. Among the top law school graduates, Norwegian Supreme Court justices are well-trained practitioners of the legal method and attempt to hew faithfully to those principles, with some considerable success. Legal reasoning, however, while powerful, accounts for a great deal, but not all, of the decisional behavior exhibited by the High Court justices.

The logit model confirms the hypothesis that legislative intent displayed a highly significant impact, even while controlling for a variety of extra-legal forces. However, the highly negative effect might not be the sort of finding its proponents might have preferred, especially when the intent was judged to be socialist, in which case the probability of a socialist vote was just a little more than .452. Of course, the negative effect of legislative intent does not necessarily indicate that the justices were not engaged in legal reasoning. Indeed, they may have decided on purely legal grounds that a parliamentary statute was unconstitutional or simply a bad law. Or perhaps they sought to clarify or unify the law. From a contrarian point of view, one might infer that the justices’ value preferences led them to reject the law itself, notwithstanding the intent of the Storting. In any event, we might conclude that the Court does not consistently attend to the view of the Storting, especially given the negative impact of our legislative intent variable.

While the role of diversification and legislative intent may very well be freighted with policy preferences, our general indicator of ideology, specifically the color of the appointing government has no bearing on the justices’ votes. However, a more nuanced ideological measure, based upon the interaction of this ideological measure and whether or not a case reflects economic interests, has a significant impact on voting. Simply stated, on economic issues socialist government appointees were more likely to cast socialist votes than any other collection of justices.

Building on the logit results we estimated a simple generalized structural equation path model to reflect our current thinking about the judicial decision-making process. As depicted in the path model diagram, diversity, legislative intent and the appointing government-economic issue interaction term all have the same direct effects reported in the logit analysis. However, a pre- and post-consensus variable exhibits a significant effect upon diversity. We suggest that the more youthful cohort tended to contribute to a more diverse Court, and therefore one that had drifted toward a more liberal posture.

While the Høyesterett is considered to be politically independent, it is not always ideologically neutral. To the extent that it takes sides on such policy matters, that is the degree to which the Norwegian Supreme Court is a “political organ” (Seip, 1968). Many legal scholars do not embrace Seip’s assertion, but at the very least when the Supreme Court seeks to recruit justices in a manner that includes a variety of value preferences, then legal reasoning, in this case the impact legislative intent, will not diminish the prominent role of extra-legal forces, such as diversity and ideology. For that matter, the decision to embrace legislative intent may certainly smack of ideological proclivities.

**Table 1**

**19 Plenary Decisions and Relevant Law**

**Norwegian Supreme Court**

**1976-2013**

Legislative Court

Relevant Law Case Number Intent Position Vote\*

Quota Rule Rt-2013-1345 Socialist Socialist 9-8

Property Lease Rt-2010-535 Socialist Non-Soc 4-9

Tax Law Rules Rt-2010-143 Socialist Non-Soc 5-6

Property Lease Law Rt-2007-1308 Socialist Non-Soc 1-6

Property Lease Law Rt-2007-1281 Socialist Socialist 7-0

Tax and Fee Law Rt-2006-293 Non-Soc Socialist 11-4

Sentencing Law Rt-2002-1618 Socialist Non-Soc 6-11

Social Insurance Law Rt-1996-1415 Non-Soc Non-Soc 0-17

Social Insurance Law \*\* Rt-1996-1440 Non-Soc Non-Soc 1-16

Expropriation Compensation Rt-1996-547 Non-Soc Socialist 16-0

Expropriation Compensation Rt-1996-521 Non-Soc Socialist 15-0

Agreement Law Rt-1990-284 Socialist Socialist 17-0

Agreement Law Rt-1988-295 Socialist Socialist 17-0

Agreement Law-Property Rt-1988-276 Socialist Socialist 11-6

Conservation Law Rt-1987-80 Non-Soc Non-Soc 0-17

Conscientious Objector Law Rt-1983-477 Non-Soc Non-Soc 0-17

Stock Law Rt-1979-572 Socialist Socialist 13-0

Expropriation Compensation Rt-1977-24 Socialist Socialist 12-5

Expropriation Compensation Rt-1976-1 Socialist Non-Soc 7-10

\* Supreme Court Justices’ aggregate Socialist vs. Non-Socialist vote

\*\* The vote in parliament: Ends-Against-The-Middle Vote (Frp and SV voted together)

**Table 2**

**10 Non-unanimous Plenary Decisions and Relevant Law**

**Norwegian Supreme Court**

**1976-2013**

Legislative Court

Relevant Law Case Number Intent Position Vote\*

Quota Rule Rt-2013-1345 Socialist Socialist 9-8

Property Lease Rt-2010-535 Socialist Non-Soc 4-9

Tax Law Rules Rt-2010-143 Socialist Non-Soc 5-6

Property Lease Law Rt-2007-1308 Socialist Non-Soc 1-6

Tax and Fee Law Rt-2006-293 Non-Soc Socialist 11-4

Sentencing Law Rt-2002-1618 Socialist Non-Soc 6-11

Social Insurance Law \*\* Rt-1996-1440 Non-Soc Non-Soc 16-1

Agreement Law-Property Rt-1988-276 Socialist Socialist 11-6

Expropriation Compensation Rt-1977-24 Socialist Socialist 12-5

Expropriation Compensation Rt-1976-1 Socialist Non-Soc 7-10

\* Supreme Court Justices’ aggregate Socialist vs. Non-Socialist vote

\*\* The vote in parliament: Ends-Against-The-Middle Vote (Frp and SV voted together)

**Table 3**

**Supreme Court Decision by Ideological**

**Direction of Legislative Intent**

Court Decision on Legislative Provision Ideological Direction

Legislative Provision Socialist Non-Socialist Total

Socialist 60.0% (9) 42.9% (3) 54.5% (12)

Non-Socialist 40.0 (6) 57.1 (4) 45.5 (10)

Total 100.0% (15) 100.0% (7) 100.0% (22)

λB = .100

**Table 4. Variables in Logit Equation**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Mean** | **Std, Dev.** | **Min** | **Max** |
| *Dependent Variable* |  |  |  |  |
| Socialist Vote | .554 | .499 | 0 | 1 |
|  |  |  |  |  |
| *Independent Variables* |  |  |  |  |
| Appointing Government | .635 | .483 | 0 | 1 |
| (Diversity (Fractionalization) | .879 | ..041 | .806 | .924 |
| Legislative Intent | .784 | ..413 | 0 | 1 |
| Appointing Govt \* Economic | .459 | .500 | 0 | 1 |
| Female | .224 | .418 | 0 | 1 |
| Public Plaintiff | .318 | .467 | 0 | 1 |
| Legislation Department | .432 | .497 | 0 | 1 |
| Oslo Born | .385 | .498 | 0 | 1 |
| Law Professor | .115 | .320 | 0 | 1 |

**Table 5**

**Probability of Voting the Socialist Storting Position**

**Logit Estimates Clustered on Panel**

|  |  |  |  |
| --- | --- | --- | --- |
| **Variable** | **Coefficient** | **Z-Value** | **P>|z|** |
| H3: Appointing Government | 0.232 | 0.49 | .625 |
| H1: Diversity | -13.566 | -3.02 | **.003** |
| H2: Legislative Intent | -2.506 | -5.16 | **.000** |
| H4: Appointing Govt \* Economic | 0.967 | 2.03 | **.042** |
| H5: Female | 0.188 | 0.41 | .680 |
| Public Plaintiff | 0.421 | 1.10 | .273 |
| Legislation Department | .283 | 0.52 | .606 |
| Oslo Born | -.273 | -0.88 | .377 |
| Law Professor | -.239 | 0.34 | .737 |
| Constant | 13.420 | 3.58 | .000 |

N = 148

Chi2 = 51.77; Probability > Chi2 = .0000; Pseudo R2 = .147

Mean VIF = 1.40

**Table 6**

**Probability of Voting the Non-Socialist Storting Position**

**Logit Estimates Clustered on Panel**

|  |  |  |  |
| --- | --- | --- | --- |
| **Variable** | **Coefficient** | **Z-Value** | **P>|z**| |
| Diversity | -11.446 | -2.77 | .006 |
| Legislative Intent | -2.349 | -5.40 | .000 |
| Appointing Government | 0.850 | 2.14 | .033 |
| Constant | 11.733 | 3.13 | .002 |

N = 148

Chi2 = 40.68; Probability > Chi2 = .0000; Pseudo R2 = .136

Mean VIF = 1.05

**Table 7**

**Socialist Votes Tabulated by Gender, Professor Status and Cohort**

**(in Percent)**

Absolute

Independent Variable Socialist Vote Difference

Gender

Male 55.7%

Female 54.6 1.1%

Professor Status

Not Law Professor 55.7%

Law Professor 54.6 2.7%

Cohort

Consensus Era 58.6%

Post-Consensus Era 43.8% 14.8%

**Figure 1**

****

**Figure 2**



Probability Socialist Vote Range: .912 - .251

**Figure 3**



Probability Socialist Vote Range: .887 - .452

**Figure 4**



Probability Socialist Vote Range: .476 - .680

**Figure 5**



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1. This manuscript is part of a larger project investigating the impact of Norwegian Supreme Court diversity on several aspects of judicial decisional behavior. [↑](#footnote-ref-1)
2. Of course, five-member panels and lower courts can address constitutional issues. [↑](#footnote-ref-2)
3. Consider the perilous course the U.S. Supreme Court has charted over what Congress meant by including “the State” in the ACA (*King v. Burwell* [576 U.S. \_\_\_ (2015)]. [↑](#footnote-ref-3)
4. <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/The-Supreme-Court-of-Norway-/Justices/> (last accessed March 12, 2015). [↑](#footnote-ref-4)
5. Analysis of voting on five-member panels, a significant effect of gender was demonstrated when a majority of the panel was composed of women. In the plenary session cases analyzed here, there were no instances in which a majority of the justices were women. [↑](#footnote-ref-5)
6. For three of the 22 cases, individual justice votes were not available. [↑](#footnote-ref-6)
7. As we noted above, a new nomination procedure was implemented in 2002 that removed the nomination process from the Ministry of Justice. [↑](#footnote-ref-7)
8. We have not included all the constituent elements of the interaction term, primarily because the correlation between interaction term and economic issue is high (.65). The economic issue variable is non-significant when the interaction term is not included in the model. [↑](#footnote-ref-8)
9. We note that the five elements of fractionalization and the fractionalization index were not correlated. [↑](#footnote-ref-9)
10. While beyond the scope of this study, Supreme Court decisions might track public opinion (McGuire and Stimson, 2004; Mishler and Sheehan, 1993; Flemming and Wood, 1997). [↑](#footnote-ref-10)
11. 12 Only 22 cases of the 26 are included, since the parliamentary ideological direction was not determined in 3 cases, and the overall Court ruling was not available in 1 case. The table is based on a cross tabulation reported in Kisen (2014:61). [↑](#footnote-ref-11)
12. The lambda coefficient (λB) formula taken from Hays and Winkler (1970:211):

    “λB = Σ max. fjk – max f.k / N - max f.k

    j k k k

    where,

    fjk is the frequency observed in cell (Aj, Bk),

    max fjk is the largest frequency in column Aj, and

    k

    max f.k is the largest marginal frequency among the rows Bk”

    k [↑](#footnote-ref-12)
13. Given that three independent variables proved to have statistically significant effects on votes cast, we re-estimated the equation, which is reported in Table 6. Figures illustrating the changes in probabilities of casting a socialist vote are based on this estimation. [↑](#footnote-ref-13)
14. In any event, as apparent in the logit results, whether or not there was a public or private plaintiff had no bearing on the votes cast by justices. [↑](#footnote-ref-14)