

THE IDEAL JUSTICE: WHO ARE SELECTED TO SERVE AND WHAT DOES IT SAY ABOUT SWEDISH HIGH COURTS?

JOHAN LINDHOLM

Professor of Law at Umeå University, Department of Law

MATTIAS DERLÉN

Professor of Law at Umeå University, Department of Law

DANIEL NAURIN

Professor of Political Science at Oslo of University and Director of ARENA Centre for European Studies

Abstract: The Swedish Supreme Court ('Högsta domstolen') has existed since 1789 and in 1909 it was joined by the Supreme Administrative Court ('Högsta förvaltningsdomstolen'). The function and role of the high courts in Swedish society have indisputably varied over time, but the nature and extent of those shifts are underexplored. The paper seeks to describe the high court's role over time by studying the professional background of appointed Justices. We argue that the background of those who are selected to serve reflect the prevailing understanding of the proper functioning of the high courts. To achieve this, we cluster all 453 Swedish Justices (1789–2021) based on professional background into six types and study their distribution over time, as well as measure professional diversity. We conclude that the high courts have become more diverse over time: the general mix of backgrounds on the courts have increased and all Justices tend to have a greater range of experiences. Furthermore, the changes in professional background of the Justices indicate more importance being placed on high-level, technical legal reasoning, rather than practical experience of deciding cases. Finally, and perhaps somewhat counterintuitive, the changes in background also indicate a more deferential attitude to the political institutions.

Keywords: Swedish Supreme Court; Swedish Supreme Administrative Court; judicial appointments; professional background; sequence analysis; judicial diversity; judicial independence.

Table of Contents

1. Why Justices' Professional Background Matter	2
2. A Brief Introduction to Swedish High Courts.....	4
3. Connecting High Court Functions and Justices' Professional Background	8
3.1. What Governments Want in Justices and High Courts.....	8
3.2. Pre-Appointment Career Tracks and Positions.....	10
3.3. From the Ideal Justice to the Ideal Court	14
4. Justices' Backgrounds as Sequences	15
5. The Six Justices You Meet in the High Courts.....	18
6. The High Courts Over Time: Diverse, Systemic – and More Deferential?	23

1. WHY JUSTICES' PROFESSIONAL BACKGROUND MATTER

Most Justices on the Supreme Court ('Högsta domstolen', HD) and the Supreme Administrative Court ('Högsta förvaltningsdomstolen', HFD) of Sweden attended law school,¹ but they differ – sometimes quite significantly – in terms of their experiences of working as lawyers between leaving law school and being appointed to what we here refer to as the 'high courts'. Some underwent judicial training and worked their way up through the court hierarchy, holding first-instance and appellate-level judgeships along the way. Others remained in academia, got a doctoral degree and engaged in teaching and research. Some joined a law firm after law school, first as an associate jurist, then became members of the bar ('advokat'), and eventually made law firm partners. Still others went back and forth between working in the courts and in the halls of government ministries.

It is reasonable to expect that Justices' professional background and experiences prior to joining the high courts help shape how they act on the courts,² that they “engender experiences, relationships and

¹ A few Justices without a formal law degree have served on the Swedish Supreme Administrative Court. See also below fn. 76.

² See e.g. Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes' (1995) 24 *Journal of Legal Studies* 257, 257 (“Since the rise of legal realism, it has been axiomatic that the background and worldview of judges influence cases.”); C. Neal Tate and Roger Handberg, 'Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88' (1991) 35(2) *American Journal of Political Science* 460, 470. See also Christine Kexel Chabot, 'Schooling the Supreme Court' (2015) 92 *Denver University Law Review* 217 (showing that differences in formal legal education explains differences in non-unanimous decisions on the US Supreme Court).

memberships in social networks that produce or reinforce worldviews and attitudes.”³ It is also reasonable that Justices, consciously or unconsciously, in part write for an audience that is similar to themselves,⁴ and that professional experiences influence Justices’ normative view of what role they and the Court ought to play in the legal system.⁵ The assumption that “the experiences of the Justices will have an effect on their decision making [...] is intuitively obvious and empirically defensible.”⁶ For example, one early study of professional background and judicial behavior found that Justices on the U.S. Supreme Court that had worked as prosecutors prior to joining the Court were less likely than their non-prosecutor colleagues to support civil rights and liberties claims.⁷ In a Nordic context, studies of the Norwegian Supreme Court suggest that Justices that have worked as law professors are less likely to support public economic interests⁸ and give less deference to public authorities⁹ than other Justices.

Our ongoing research project empirically explores the connection between the professional background of Justices and their decisions on the bench.¹⁰ This article takes a first step towards this goal by exploring the professional background of the Justices of the Swedish high courts. It will answer four main questions. Firstly, it will map the professional background of the Justices, based on a number of different career tracks. Secondly, using sequence analysis, it will identify six communities of judges, based on the most common combination of professional backgrounds. Thirdly, it will examine how the professional background of Justices have developed over time, 1789–2021. Finally, based on a theoretical framework of the connection between professional backgrounds and high court functions, it will discuss what the changes in the Justices’ background over time indicate regarding the appointing government’s view of the high courts.

³ Jon Kåre Skiple, Gunnar Grendstad, William R. Shaffer, and Eric N. Waltenburg, ‘Supreme Court Justices’ Economic Behaviour: A Multilevel Model Analysis’, (2016) 39(1) *Scandinavian Political Studies* 73, 78.

⁴ Cf. Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006) 97.

⁵ Cf. Tracey E. George, ‘Court Fixing’ (2001) 43(1) *Arizona Law Review* 9, 38 (specifically on academics); James L. Gibson, ‘Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model’ (1978) 72(3) *American Political Science Review* 911.

⁶ Benjamin H. Barton, ‘An Empirical Study of Supreme Court Justice Pre-Appointment Experience’ (2012) 64 *Florida Law Review* 1137, 1141.

⁷ C. Neal Tate, ‘Personal Attribute Models of the Voting Behavior of U. S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978’ (1981) 75(2) *American Political Science Review* 355, 362.

⁸ Gunnar Grendstad, William R. Shaffer, and Eric Waltenburg, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (ECPR Press 2015) 114–115.

⁹ Jon Kåre Skiple, Henrik Littleré Bentsen, and Chris Hanretty, ‘The Government Deference Dimension of Judicial Decision Making: Evidence from the Supreme Court of Norway’ (2020) 43(4) *Scandinavian Political Studies* 264.

¹⁰ *Judicial Power and Power over the Judiciary: An Interdisciplinary Study of the Shifting Role of Judges*, financed by the Swedish Research Council.

Consequently, a theoretical assumption underlying the study is that Justices' professional backgrounds are connected to the function of the Court. Without making strong assumptions about the appointment process and the preferences of the actors involved in that process, we expect that Justices are selected with the purpose of fulfilling certain functions perceived as important at the time of their selection. Concretely, we expect the government to select Justices based on them possessing qualifications, knowledge, skills, and other attributes that enable them to do the job well or, differently phrased, to contribute to high courts performing their tasks and filling their roles in the legal system. We do not here mean the courts' function in some objective, formal, or ideal sense, but rather the appointing government's subjective understanding of and ambitions for the high courts. It follows from these two expectations taken together that the professional background of those who are appointed Justices reflects the prevailing views at the time of the high court's function.

We do not claim or seek to identify an objective standard for what professional background Justices ought to have. Instead, we describe the shifts in Justices' professional background over time. For example, Chief Justice Gregow of the Supreme Court declared in 2001 that "[t]he Justices of the Supreme Court have of old to a large extent been recruited among lawyers with court experience but with longer periods of working with legislation, often in the Ministry of Justice[, h]owever, there has consistently been at least some member with a primary background in the first instance courts."¹¹ We will show below that the statement was motivated at the time, but one century earlier hardly any of the Justices appointed to the Supreme Court was the type of Ministry Judge referred to by Chief Justice Gregow.¹² As we expect Justices' professional backgrounds to reflect the Court's function and the appointing government preferences, such significant changes in Justices' professional background suggest significant changes in the appointing government's preferences which, in turn, reflects a shift in the Court's function.

2. A BRIEF INTRODUCTION TO SWEDISH HIGH COURTS

Despite its name, the Swedish Supreme Court is not the sole last-instance court in Sweden. The Supreme Court is Sweden's highest court of general jurisdiction but primarily exercises jurisdiction over civil and criminal law cases. Since 1909, the Supreme Court is supplemented by the Supreme Administrative Court, the last instance court in most administrative law matters.¹³ There are also a number of more specialized last-instance courts, such as the Labour Court. While these specialized

¹¹ Dagens Nyheter, In Memoriam Bertil Freyschuss, 2001-03-16 ("Domarna i Högsta domstolen har sedan gammalt till stor del rekryterats bland jurister med domstolsbakgrund men med längre tids arbete med lagstiftning, ofta i justitiedepartementet. Det har dock alltid brukat finnas åtminstone någon ledamot med huvudsaklig bakgrund som underrättsdomare.").

¹² See below Section 5.

¹³ The court was called 'Regeringsrätten' until 2010 when it changed its name to 'Högsta förvaltningsdomstolen'.

courts are interesting in their own right, this contribution concentrates on the Supreme Court and the Supreme Administrative Court. As we will return to below, the two high courts are also closely connected to the Council on Legislation ('Lagrådet') which performs judicial preview of draft bills from the government, a function exercised by the Supreme Court directly until the Council on Legislation was established in 1909.¹⁴

The Supreme Court was formally established in 1789, entrusted with performing the judicial functions previously vested with the King. In the early years, the Court was indeed closely connected to the executive, as demonstrated for example by the facts that the Minister of Justice was a member of the Supreme Court until 1840 and that the King formally retained a seat and two votes on the Supreme Court until the reform of 1909. The Court moved to its current location, the Bonde Palace in Stockholm, in 1949. The Supreme Administrative Court was established in 1909, as a culmination of a long discussion of the special nature of administrative legal issues and the increasing workload of the government.¹⁵

During most of their history, the high courts served as general last-instance courts, but a reform in 1971 emphasized their roles as courts of precedent. In the last fifty years the two courts' have thus shifted their main focus from deciding individual cases to providing guidance on the interpretation and application of the law, particularly to lower courts but also other government agencies as well as the general public.¹⁶

Today, the Supreme Court and the Supreme Administrative Court are organized in fundamentally the same way. Both courts have 16 Justices, but at any given moment only 14 Justices serve as adjudicating Justices, while two serve on the Council on Legislation. Except for the President of the Courts and one additional Justice, who serve as Division Presidents, the adjudicating Justices are rotated between the Court's two divisions consisting of seven Justices.¹⁷ While the fundamental organizational structure has been consistent, the sizes of the courts have varied over time. For example, the Supreme Court has had up to 25 Justices and three divisions.

¹⁴ See further regarding the Council on Legislation and its history e.g. Karl-Göran Algotsson, 'Lagrådets politiska betydelse' [2009] *Svensk Juristtidning* 165.

¹⁵ See further regarding the history of the Supreme Administrative Court e.g. Carl Kuylenstierna, 'Regeringsrätten 50 år' [1959] *Svensk Juristtidning* 374.

¹⁶ See further regarding the history of the Supreme Court e.g. Stig Jägerskiöld, 'Två sekler med Högsta domstolen' [1989] *Svensk Juristtidning* 245.

¹⁷ See further e.g. Marianne Lundius, 'Verksamheten i Bondeska palatset på 2000-talet' in Anne Ramberg, Tom Knutson and Magnus Andersson (eds), *Sveriges advokatsamfund 125 år* (Sveriges advokatsamfund 2012); Per Henrik Lindblom, 'Smygreform i Högsta domstolen?' [2004] *Svensk Juristtidning* 11.

The high courts exercise strong docket control and in practice only grant leave to cases that contain a legal question of precedential value.¹⁸ In 2020, each of the high courts received around 7,000 cases and granted leave for around 100–125.¹⁹ If a case is granted leave it is assigned to one of its divisions and normally heard and decided on by a panel consisting of five Justices assigned to the division who are effectively randomly selected. All cases are assigned to a clerk (‘justitiessekreterare’) who processes the case. When the preparation is complete, the clerk presents the case and proposes a judgment to the panel. Typically around this time, one of the Justices on the panel is selected to be the reporting judge (‘referent’) who is responsible for writing a first draft for the Court’s opinion.²⁰

Swedish high court Justices have been appointed by the Swedish government and, before the introduction of parliamentarism, the King. Until 2011, the selection process was handled by the Ministry of Justice and appointment by the government without any formal control by other actors.²¹ It is noteworthy that Sweden retained the closed, ministerial system for a relatively long time. When the similar British system was reformed in 2005 Hanretty concluded that it was “grossly antiquated... for it involved two party politicians within the executive deciding unilaterally to make an appointment without any element of open competition or any attempt to solicit applications”.²² The main reason given for the 2011 reform was that the system cast doubt over of the appointed Justices’ independence from government.²³

The government has retained the final power to appoint after 2011 but since then all open judicial positions in Sweden, including those of Justice on a high court, are filled through an open and public call. Applicants are evaluated by an independent committee (‘domarnämnden’) that identifies and ranks the top applicants. The entire process is public, including the applications and the committee’s assessment of the applicants. While the government is technically free to diverge from the

¹⁸ The granting of leave to hear a case is handled separately. Although Justices always make the formal decision, the preparation is conducted by non-Justice employees who in practice thereby exercise considerable influence over the process.

¹⁹ Verksamhetsberättelse (Högsta domstolen 2020) 49; Verksamhetsberättelse (Högsta förvaltningsdomstolen 2020) 16.

²⁰ See further regarding the working methods of the Supreme Court e.g. Lundius (fn 17); Anders Knutsson, ‘Dagligt liv i Bondeska palatset’ [1989] Svensk Juristtidning 272. See regarding the differences between the Supreme Court and the Supreme Administrative Court e.g. Johan Munck, ‘Några skillnader mellan Regeringsrätten och Högsta domstolen’ in Anna-Karin Lundin et al (eds) Regeringsrätten 100 år (Iustus 2009).

²¹ Although they did not have a formal role in the appointment process, the high court concerned could nevertheless informally exercise some influence over the appointment process, e.g. by communicating what competences it saw a need for, by proposing candidates, and by giving its opinion of the candidate that the government intended to appoint. SOU 1994:99, 108–109; prop 2009/10:181, 65–66.

²² Chris Hanretty, ‘The Appointment of Judges by Ministers’ (2015) 3(2) Journal of Law and Courts 305, 310.

²³ See e.g. prop. 2009/10:80, p. 132; prop. 2009/10:181, pp. 68–69.

committee's recommendation, in practice it always follows the recommendation and to diverge would potentially be politically costly.²⁴

We are not suggesting that Swedish governments have used the lack of transparency in the appointment process and their near-absolute power over that process, in particular before the 2011 reform, by appointing ideologically-aligned Justices.²⁵ We do however expect that how governments have used their appointment powers reflect their views of the high courts. For example, in the mid-1900s, leading Social Democratic politicians, including Olof Palme who as Prime Minister presided over 43 high court appointments, strongly and publicly opposed courts using judicial review to overrule parliament on constitutional grounds.²⁶ We find it reasonable that their ideal of a more restrained high court would prompt them to appoint Justices with similar attitudes.²⁷

It is also important to take into account the pool of qualified jurists that the government can draw from when appointing Justices. Both the number and quality of possible Justices reasonably vary over time. For example, we expect that the high courts' prestige has increased over time, thereby making it easier to attract more qualified Justices to serve.²⁸ Also, the qualifications of the potential appointees is arguably inversely related to the total number of high court seats and the latter has varied over time.²⁹ At the same time, the number of Swedish jurists has increased over time and with it the size of the applicant pool. Thus, there are a number of factors that may impact the government's options, but we largely expect the government to be able to have its pick from many highly-qualified jurists with diverse professional backgrounds.

Appointer preferences may in part depend on the ideological preferences of the party or parties in government, but they also depend on the context in which the high courts find themselves and which changes over time. Just like other Swedish constitutional actors, the high courts have arguably been

²⁴ Regarding the appointment procedure, see further SOU 2017:85. For a historical introduction to the committee see Nils O. Wentz, 'Från tjänsteförslagsnämndens verksamhet – erfarenheter och synpunkter' [1983] *Svensk Juristtidning* 31.

²⁵ Although, to be absolutely clear, nor do we claim to rule it out.

²⁶ Riksdagens protokoll 1975/76:149, 135 ("Det är inte så att säga ett Ämbetsmanna- och Domstolssverige vi vill ha. Det var mot detta som folkrörelserna - både arbetarrörelsen och bonderörelsen - en gång reste sig."). See also e.g. Östen Undén, 'Några ord om domstolskontroll över lagars grundlagsenlighet' [1956] *Svensk Juristtidning* 260; Kjell Å. Modéer, 'Jurister som politikernas kontrollanter – Om Högsta domstolen och Lagrådet som laggranskare' [2009] *Svensk Juristtidning* 150.

²⁷ The general idea that the government would prefer candidates who share their preferences is what Hanretty refers to as consensus motive appointments, Hanretty (fn 22) 315. However, Hanretty's focus is on more traditional ideological preferences, which, as he observes, are difficult to examine.

²⁸ See e.g. Lee Epstein & Jack Knight, *The Choices Justices Make* (CQ Press 1998), 36–39 (on the shifting attitudes of U.S. Supreme Court Justices over time). In a future study, we plan to explore whether and how the Swedish high courts' prestige has shifted over time.

²⁹ The complete restructuring of the Supreme Court in 1809 and the establishment of the Supreme Administrative Court in 1909 are examples of events that prompted a large number of appointments in a very short period of time.

affected by the rather special Swedish constitutional history. This issue is beyond the scope of the current paper, but in short it should be mentioned that the legal system in the 20th century was governed by the ideas of popular sovereignty, parliamentary supremacy, and majority rule, against the background of a single political party, the Social Democrats, occupying a dominant position in Swedish politics for most of the era. The consequences for the courts have been significant judicial restraint, reliance on travaux préparatoires, and very rarely exercised judicial review. These attitudes started to change during the late 20th century, understood by many as some form of Europeanisation, connected to the European Convention of Human Rights and the Swedish accession to the European Union in 1995.³⁰

3. CONNECTING HIGH COURT FUNCTIONS AND JUSTICES' PROFESSIONAL BACKGROUND

3.1. What Governments Want in Justices and High Courts

In this section, we theorize on how professional background may be connected to appointer conceptions of judicial behavior on and the function of the high courts. In doing so, we draw from the theoretical and empirical contributions offered by research conducted by lawyers and political scientists, adjusted to the specific context surrounding the Swedish Supreme Court. Many of the connections are generalizable to other contexts, some are more specific to the Nordic states or even to the Swedish high courts.

The core function of the judiciary in a society is to administer justice in individual cases and to settle concrete disputes.³¹ The Swedish high courts indisputably decide individual cases: decisions by the courts conclude with a ruling in the individual case. Delivering just and fair decisions in individual cases is a concrete task conducted in close proximity with facts and the daily lives of ordinary people and we expect that in doing so a high court benefits from Justices with experiences in conducting similar tasks, 'real-life experience', and 'practical wisdom', or, in other words, *practical experience*.

However, this is not the only function of a high court. One of their main functions is to provide guidance to other courts, government agencies, and society at large on the proper interpretation of law through its judgments. In other words, to set precedent. The function of precedent setting, which

³⁰ See further Ran Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9(2) *International Journal of Constitutional Law* 449; Fredrik Wersäll, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' [2014] *Svensk Juristtidning* 1; Mattias Derlén & Johan Lindholm, 'Judiciell aktivism eller prejudikatbildning?' [2016] *Svensk Juristtidning* 143.

³¹ Cf. Instrument of Government, ch. 1, art. 8.

overtime has been increasingly emphasized in the Swedish legal system, requires that a high court and its Justices consider systemic values and engage in abstract, theoretical, and frequently complex reasoning. To perform this task, the high court will benefit from Justices who have experience and skills in high-level, technical legal reasoning.³² This can be summarized as experience in *systemic reasoning*.

A second, possibly more controversial dimension is the high courts' relationship to the legislative and executive branches of government. The Swedish Supreme Court started as an extension of the King's Counsel and it took a long time for the Supreme Court – arguably until 1909 when the Supreme Administrative Court was established – to complete its transition to the judicial branch. While both high courts are now firmly formally independent, their function vis-à-vis those other branches of government is complicated. Along with dispute resolution and precedent setting, one of the main tasks of the high courts is to check the legislative and executive branches of government, for example on the basis of the Constitution and other superior sources of law.

The government can (largely) be trusted to appoint individuals of high integrity to the high courts, who will administer justice in individual cases and provide interpretations and guidance through precedent in accordance with law and in a professional manner, thereby contributing to the rule of law. It is more difficult to say to what extent appointing governments want Justices to challenge the executive and legislative branches of government compared to giving them more deference. A government that takes a long view may worry about upholding rule of law and may use its appointment power to ensure a high court that is capable of standing up to (future) governments.³³ This should generally favor Justices who in their pre-appointment professional background have engaged in critically reviewing or *challenging* the government.

At the same time, even a government that is fully committed to the rule of law and an independent judiciary may seek to avoid creating an 'activist' high court that – in the government's opinion – excessively challenges or overrules the legislative and executive branches or introduces outcomes or interpretations that are inconsistent with their intents and positions. A government that is concerned with a high court acting outside what it perceives to be the proper judicial role would likely favor appointing Justices that are more *deferential* to the political institutions and legislative intent. We imagine that this would favor lawyers that have previously worked in a position where they represent

³² Cf. Benjamin H. Barton, 'An Empirical Study of Supreme Court Justice Pre-Appointment Experience' (2012) 64 Florida Law Review 1137; Timothy P. O. Neill, "'The Stepford Justices': The Need for Experiential Diversity on the Roberts Court' (2007) 60 Oklahoma Law Review 701 (both studying the US Supreme Court and criticizing it for having too little of the former and too much of the latter).

³³ The mean appointment length on the Swedish Supreme Court is 11.2 years.

the Swedish government or the State of Sweden or held another position where they received experience in and demonstrated an ability to respect the positions of political institutions.

On the basis of this reasoning, we imagine that the experiences, skills, and qualities that a potential new Justice might bring to a high court can be captured using two principal dimensions: *practical experience–systemic reasoning* and *challenging–deferential*. These dimensions provide a framework for reasoning about how different professional experiences may relate to the functions and roles of the high courts (see also Table 2).

3.2. Pre-Appointment Career Tracks and Positions

A methodological challenge in coding professional background is that there is a near-endless number of positions that Justices may have held prior to joining the high courts and one must find a model that is neither too narrow nor too broad while being capable of providing insight into our research questions. As presented in Table 1, we identify 27 types of prior positions commonly held by Swedish Justices³⁴ and organize these positions into six major, pre-appointment legal career tracks: (i) academia, (ii) judicial, (iii) ministerial, (iv) political, (v) other public service, and (vi) private practice. These positions and their associated career tracks differ in some, for the purposes of the present research questions, relevant regards.

³⁴ These positions were primarily identified from samples in a pre-study.

Table 1. Coded positions by career track

Track	Positions			
	<i>Pre-career</i>	<i>Early-career</i>	<i>Mid-career</i>	<i>Apex-career</i>
<i>Academia</i>	Licentiate students; doctoral student	Senior lecturer	Associate professor	Professor
<i>Judicial</i>	Judicial training; clerkship	First instance judgeship	Other judgeships	Appellate judgeship; international judgeship
<i>Ministerial</i>	Advisor	First secretary	Deputy director- general	Director-general
<i>Political</i>		Political employees; other political positions		Member of parliament; minister
<i>Public service (other)</i>		Government agency; prosecutor		Ambassador; ombudsman; international organization
<i>Private practice</i>		Law firm associate		Law firm partner; corporate counsel

Academia: It is relatively easy to formulate a theory on how a previous career in academia can be expected to affect behavior on the high courts along the dimensions formulated above. One of the foremost tasks of legal scholars, which distinguishes a career in academia from other legal career tracks, is to analyze and review the law independently and critically. The critical approach requires legal scholars to reason independently of and frequently in opposition of the acts and interests of the legislative and executive branch. This makes academics more likely to challenge government, for example on the grounds of international law and human rights, and more willing to develop the law through case law.³⁵ The scholarly approach to legal reasoning makes it difficult to predict how law professors will rule when appointed Justices.³⁶ Legal academics are also outliers when it comes to prioritizing high-level, systemic reasoning over practical experience.³⁷ As fairly summarized by

³⁵ Skiple et al. (fn 9) 271. See also Barton (fn 32) 1172 (describing legal academia as a job as “notoriously and proudly independent”).

³⁶ Cf. George (fn 5) 38.

³⁷ Cf. Bertil Bengtsson, ‘Ändringsdispens och prejudikatdispens’, in *Högsta domsmakten i Sverige under 200 år*, Del 1 (Nerenius & Santérus 1990), 270.

Barton, legal academics “deal with law in an abstract manner[; does not] involves much contact with the public at large[;] and tend to encounter litigants[...] in the facts of the cases they teach”.³⁸

Judicial: While multiple career tracks can endow a future Justice with real-world practical experience of the law, only Justices that have spent time in trial and appellate courts prior to joining the high courts have any experience in deciding individual cases. Thus, to the extent that the appointing government values and seeks to support a high court’s ability to decide individual cases, this can primarily be achieved by appointing Justices with prior judicial experience.³⁹ Although lower-instance judges take great care that their decisions are in accordance with the law, the systemic development of the law is not their primary responsibility in the way that it is the high courts’. While technically government employees, it is doubtful that Justices with prior judicial experience has a deferential tendency towards the legislator or government. The judge’s imperative to weigh all arguments fairly, the independence of the judicial branch,⁴⁰ and strife for achieving substantively just outcome in individual cases⁴¹ suggest not.⁴²

Ministerial: Working in the government ministries means working directly under the direction of and for the government. Of the different career tracks considered here, ministerial work is therefore most closely associated with an experience of deference to government intents and priorities and least associated with challenging government. Ministry service is also unique in the appointee’s extremely close proximity to the appointer. Until the process opened up in 2011, the government had absolute autonomy over the appointment of Justices and the appointment process was practically handled by the Ministry of Justice. Thus, for lawyers working in the ministries there is a real possibility – and at times a relatively common occurrence – that the employer ‘promotes’ you to the Supreme Court or the Supreme Administrative Court. Moreover, by merit of also being his or her employer, the appointer has an incomparable insight into the qualities and tendencies of future Justices recruited from the ministries. There is consequently a very real possibility that lawyers that rise through the ranks of the ministries and from there to the high courts have been selected for attributes that are favorable to the government. Previous research on the Norwegian Supreme Court empirically supports these expectations.⁴³ Ministerial work involves little interaction with concrete individual

³⁸ Barton (fn 32) 1172.

³⁹ It should be emphasized that we are discussing formal judicial experience, from the court system. Even justices with no formal background in the court system may have extensive experience of conflict resolution, in the form of arbitration. However, as these records are not official, they are not included in the study.

⁴⁰ Tate and Handberg (fn 2) 470.

⁴¹ See Bengtsson (fn 37) 269.

⁴² But see Skiple et al. (fn 9) 279, who found that career judges are more deferential to public authorities than other Justices on the Norwegian Supreme Court.

⁴³ Grendstad et al (fn 8) 152; Skiple et al. (fn 3) 79; Skiple et al. (fn 9) 270–271.

cases. The experience of working in ministries, for example working on legislation, will instead more likely train a future Justice in systemic reasoning.

Political: Researchers studying the United States Supreme Court have argued that Justices that have previously held elected political office are “more sensitive to the claims of common people”⁴⁴ and can provide much-needed practical knowledge and approaches to the world that higher-level, abstract, or technical reasoning about the law cannot.⁴⁵ There are significant relevant differences between the American and Swedish contexts with regard to political offices, the law, and the highest judicial institutions that caution against simple comparisons. While it is not far-fetched to imagine that an appointer that feels that Swedish law has developed away from the will of the people might remedy this by appointing former politicians to the Supreme Court, politicians have no experience in deciding individual cases. If anything, politicians’ power lies in general measures that might favor a systemic approach to the law, but it is difficult to formulate a clear expectation. It is, however, quite likely that Justices who have previously held political offices and can identify with political institutions may be more inclined than their colleagues to defer to those institutions.⁴⁶

Public Service: A well-studied example of public servants are Justices who have previously represented the interest of the State working as prosecutors,⁴⁷ and empirical research on the behaviors of U.S. and Norwegian Justices show that former prosecutors have a tendency to side with the government.⁴⁸ While there is less clear empirical support for such tendencies for other civil servant positions,⁴⁹ all public servants work for the State and public service is therefore more likely associated with greater deference to public interest and to the interests of government. There is similar diversity in practical experience between public servant positions. However, many of them, including serving as a prosecutor, is very closely associated with and confer experience in dealing with individual cases.

Private Practice: Like prosecutors, lawyers in private practice almost exclusively work with individual cases and disputes and a career in this track therefore provides a future Justice with significant practical experience. The private practice lawyers almost exclusively represent private parties and to the extent public parties are involved in cases they will foremost appear on the opposing

⁴⁴ George (fn 5) 30.

⁴⁵ Robert Alleman & Jason Mazzone, ‘The Case for Returning Politicians to the Supreme Court’ (2010) 61 *Hastings Law Journal* 1353, 1385–1389. Similarly, in a British context, Hanretty (fn 22) 315, observes that having held political office might mean that the persons in question have “developed greater social awareness and broader experience”.

⁴⁶ Ashenfelter et al. (fn 2) 274. A possible counterargument would be that they might also be more likely to “legislate from the bench”.

⁴⁷ *Ibid.*; George (fn 5) 29; Tate and Handberg (fn 2) 471.

⁴⁸ Skiple et al. (fn 3) 86; Tate and Handberg (fn 2) 474.

⁴⁹ See Skiple et al. (fn 9) 279.

side. Thus, we expect Justices with a background in private practice to have a strong tendency towards challenging political institutions.⁵⁰

Table 2. Expected associations between dimensions and career tracks

Track	Dimensions			
	<i>Practical-Systemic</i>		<i>Deferential-Challenging</i>	
	<i>Practical</i>	<i>Systemic</i>	<i>Deferential</i>	<i>Challenging</i>
<i>Academia</i>		++		++
<i>Judicial</i>	++			+
<i>Ministerial</i>		+	++	
<i>Political</i>			+	
<i>Public service</i>	+		+	
<i>Private practice</i>	+			+

3.3. From the Ideal Justice to the Ideal Court

In explaining how we expect that Justices’ professional backgrounds relate to the role of high courts – as perceived by appointing governments – we approach professional backgrounds primarily from the perspective of individual Justices. This is for example appropriate if studying the connection between Justice’s professional background and judicial behavior, discussed in Section 1. However, in this study our interest lies primarily in professional backgrounds in the high courts as institutions. Whereas each Justice has a unique and individual background, the high court can be conceived as a mix of the various professional backgrounds of all the men and women that make up the high court at any given moment in time.

As we make the transition from the individual to the institution level, we do not generally expect appointing governments to only prefer and appoint Justices with a professional background from a single track. The high courts hear a broad range of cases involving diverse legal issues and in order to best fulfill their (perceived) roles they need Justices with different experiences, perspectives, and expertise. Thus, even at a single point in time there is no single ideal type of Justice whose fit in the high court can be assessed independent from the composition of the rest of the court. The general idea that a diverse court, with a mix of backgrounds and experiences, adds value does not only make intuitive sense but is supported by research in the management area. Diversity adds a number of

⁵⁰ Skiple et al. (fn 3) 78–79. See also George (fn 5) 30; Tate (fn 7).

different benefits, not only perceiving problems differently (diverse perspectives) but also finding different solutions (different heuristics).⁵¹

Consequently, we examine which types of Justices appointing governments add to the high courts, in what quantities, and to what extent these factors have shifted over time. We are also interested in the relative degree of diversity in professional background on the high courts, in other words how homo- or heterogenous Justices are in terms of professional background, and whether this has shifted over time.

4. JUSTICES' BACKGROUNDS AS SEQUENCES

This section gives a short overview of the data and methods used. For a more detailed discussion, we refer to the Method Appendix.⁵²

We depart from a dataset collected by hand by trained assistants on all 453 unique individuals who have served as Justices on the Swedish Supreme Court or Supreme Administrative Court from 1789 until 2021 and 1909 until 2021, respectively.⁵³ The dataset contains information about each individual's⁵⁴ professional background up until the time of appointment,⁵⁵ including what positions they held prior to joining the Supreme Courts, divided into the six major legal career tracks described above, as well as the order by which the Justices held each position. Additionally, we collected information on whether they left the Court for another position⁵⁶ and, if so, to which career track those other positions belong.

⁵¹ Scott E. Page, 'Making the Difference: Applying a Logic of Diversity' (2007) 21(4) *Academy of Management Perspectives* 6, 8.

⁵² Johan Lindholm, Mattias Derlén & Daniel Naurin, "'The Ideal Justice': Method Appendix' (26 October 2021). The Appendix along with replication data and script is available through Harvard Dataverse <<https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/JAD8CI>> and GitHub <<https://github.com/jojolindholm/Ideal-Justice-Replication>>.

⁵³ For this we relied heavily for more recent appointees on presentations in *Svensk Juristtidning* and, even more recently, government press releases, information in the high courts' annual rapport and on their websites etc. For Justices further back in time we rely *inter alia* on Nils Beckman, 'Högsta domstolens ledamöter – från riksdrotsen Wachtmeister till Justitierådet Birger Wedberg – förteckning 1789–1913' [1941] *Svensk Juristtidning* 349; Lars K. Beckman, 'Ledamöter i Högsta domstolen – Från Eberhard Quensel till Lena Moore' [2009] *Svensk Juristtidning* 854. This is supplemented by additional information, e.g. from media coverage, in memoriams, and encyclopedias.

⁵⁴ The first female Justice was appointed in 1968 for the Supreme Court and in 1972 for the Supreme Administrative Court. Consequently, the female Justices constitute a clear minority of the data set, approximately 8 percent of the total number of Justices.

⁵⁵ Some of individuals were appointed to the same high court multiple times, for example first as an associate Justice and later as President. For these individuals, we only include as professional background experiences before the first appointment. The reason for this is that previous experience as a Justice is a unique type of qualification for working as a Justice and that pre-high court professional background weighs considerably heavier for a first appointment than a re-appointment.

⁵⁶ Compared to retiring on the high court.

Using this information, we created single-dimension, equal-length sequences representing the Justices' professional experiences over time where each value or state correspond to the career tracks of the positions each person held over time.⁵⁷ This creates a matrix with the dimensions of 453 (Justices) by 100 (time). As an example, take Justice Cecilia Renfors who after graduating from Uppsala University in 1986, joined the court system for judicial training. After completing the training, she held multiple positions in the Ministry of Justice. From there she became the Director and head of the Swedish Broadcasting Commission, a public agency. She subsequently served as a senior judge on Svea Court of Appeal and as a Parliamentary ombudsman before she was appointed to the Supreme Court in 2019.⁵⁸ This can be compared to her colleague Johnny Herre who remained in academia. After graduating from Stockholm University in 1988, Herre pursued a career at Stockholm School of Economics where he was, in order, a doctoral student, associate professor, and full professor until he was appointed to the Supreme Court in 2010.⁵⁹ Justices Renfors and Herre's distinguished but quite different professional background are presented as strings in Figure 1.

⁵⁷ Time is here symbolic time of a length of 100 values where each value represents 1% of a Justice's legal career leading up to the event of (first) being appointed to a high court. The sequences accurately capture what career tracks each Justice held, in what order, and the transition between them. However, it is worth pointing out that we lack exact and reliable information about when in time these transitions took place, especially further back in time, and consequently also for exactly how long the Justices held each position. In creating the sequences, we therefore assume that Justices held each prior position for an equal length of time. While this is not accurate, we treat all Justices in the same way. Moreover, as explained below, the approach focuses primarily on the shape of career paths and transitions between career states and this should therefore have limited impact on our findings.

⁵⁸ The Supreme Court, Justices, Cecilia Renfors. <<https://www.domstol.se/en/supreme-court/justices/cecilia-renfors/>> (accessed 18 February 2020).

⁵⁹ The Supreme Court, Justices, Johnny Herre. <<https://www.domstol.se/en/supreme-court/justices/johnny-herre/>> (accessed 18 February 2020).

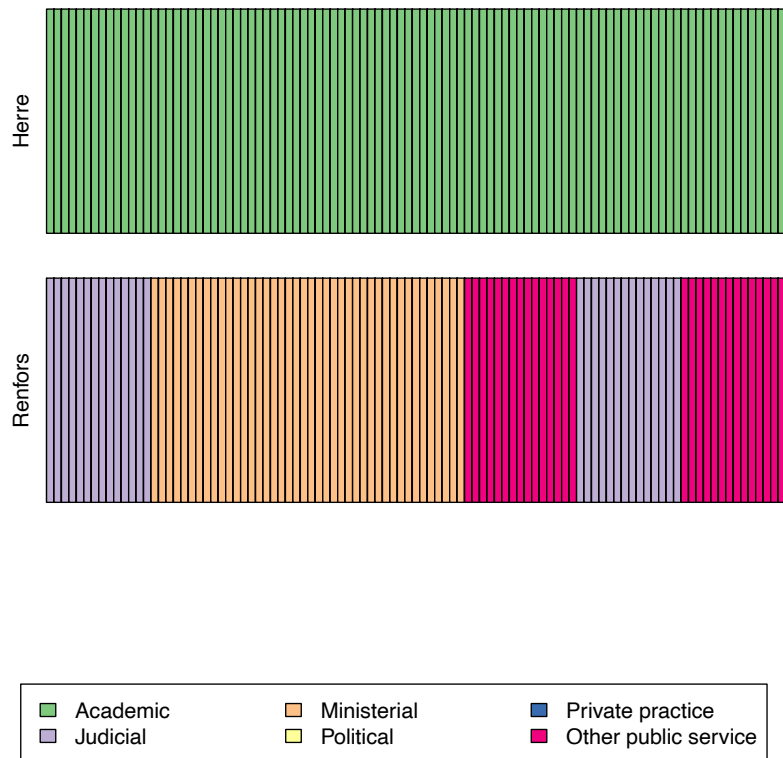


Figure 1. Justices Renfors and Herre’s professional backgrounds visualized as sequences.

We apply Sequence Analysis (SA) to compare these sequences. Adapted from the biological sciences where it was used to analyze DNA molecules, SA allows us to study the sequence of events that led to appointments as a single conceptual unit.⁶⁰ Careers provide an excellent example of a phenomenon that can benefit from being studied using the type of holistic approach offered by SA as “we expect both a fair amount of pattern and a fair amount of fluctuation”.⁶¹ SA provides significant advantages to a study of Supreme Court Justices. Rather than simply focusing on the last position held before appointment it demonstrates the entirety of the Justices’ career, including the order in which the positions were held. For example, claiming that Justice Renfors came to the Supreme Court from a public service position is correct, but only gives us a limited snapshot of her career profile. While the

⁶⁰ Andrew Abbott, ‘Sequence Analysis: New Methods for Old Ideas’ (1995) 21(1) *Annual Review of Sociology* 93, 93; Francesco C. Billari, ‘Life course analysis: two (complementary) cultures? Some reflections with examples from the analysis of the transition to adulthood’ (2005) 10 *Advances in Life Course Research* 261, 273–275.

⁶¹ Andrew Abbott, ‘Conceptions of time and events in social science methods: Causal and narrative approaches’ (1990) 23(4) *Historical Methods* 140, 140.

sequences do not include the specific positions held within each career track,⁶² the distribution of sequences over time does give an indication of how far each Justice advanced within the career track.

The next step is to compare the careers of the Supreme Court Justices in a way that retains the richness of information provided by the SA, and identifies similarities in overall career path. To achieve this, we use Optimal Matching (OM).⁶³ Simply explained, OM determines how similar or different two sequences are by calculating the distance between them. Distance is here understood as the cost of shifting one string (a particular career path) to another (another career path). This cost is, in turn, determined by how common a shift from a particular path to another is historically. For all career tracks, the person will most commonly remain in the same career track, i.e. no shift, whereas shifts between career tracks/states differ in terms of probability. Least common – in fact non-existing in the entire history of the Swedish supreme courts – are shifts from a political office to academia or private practice. Transitions from ministerial positions to private practice are also uncommon, while transitions from ministerial positions to other public service positions are more common.

Using OM, we group the Justices into communities based on how distant they are to each other or, differently phrased, how different their pre-appointment professional backgrounds are. The result is presented in Section 5 below. This approach allows us to identify groups of Justices that share similar professional backgrounds. Just like SA generally enables us to move beyond the focus on occupation immediately before appointment to the Court, OM moves beyond a rigid separation of the pre-determined career tracks, illustrating the actual combination of experiences in the Supreme Courts.

We also use the OM-based distances to measure the level of professional background diversity on the high courts over time. The measurement we use for institutional diversity is simply the mean distance between all pairs of Justices that served on a high court at a particular time. As distance represents difference in professional background, this measurement captures the average professional background diversity on a high court at any given time.⁶⁴

5. THE SIX JUSTICES YOU MEET IN THE HIGH COURTS

Using the method described in Section 4 above, Justices are clustered into six communities based on the similarity of their professional background. These communities, illustrated in Figure 2, can be

⁶² This information, classifying positions as pre, early, mid or apex career, is included in the underlying data, but not used in the SA.

⁶³ This is the most common algorithm used in SA. Gilbert Ritschard & Matthias Studer, ‘Sequence Analysis: Where Are We, Where Are We Going?’ in Gilbert Ritschard & Matthias Studer (eds) *Sequence Analysis and Related Approaches: Innovative Methods and Applications* (Springer Open 2018), 2.

⁶⁴ Larger values imply greater diversity.

thought of as Justice archetypes. In other words, they are types of Supreme Court and Supreme Administrative Court Justices who have professional backgrounds that are similar to each other and that distinguish them from Justices belonging to other communities.⁶⁵

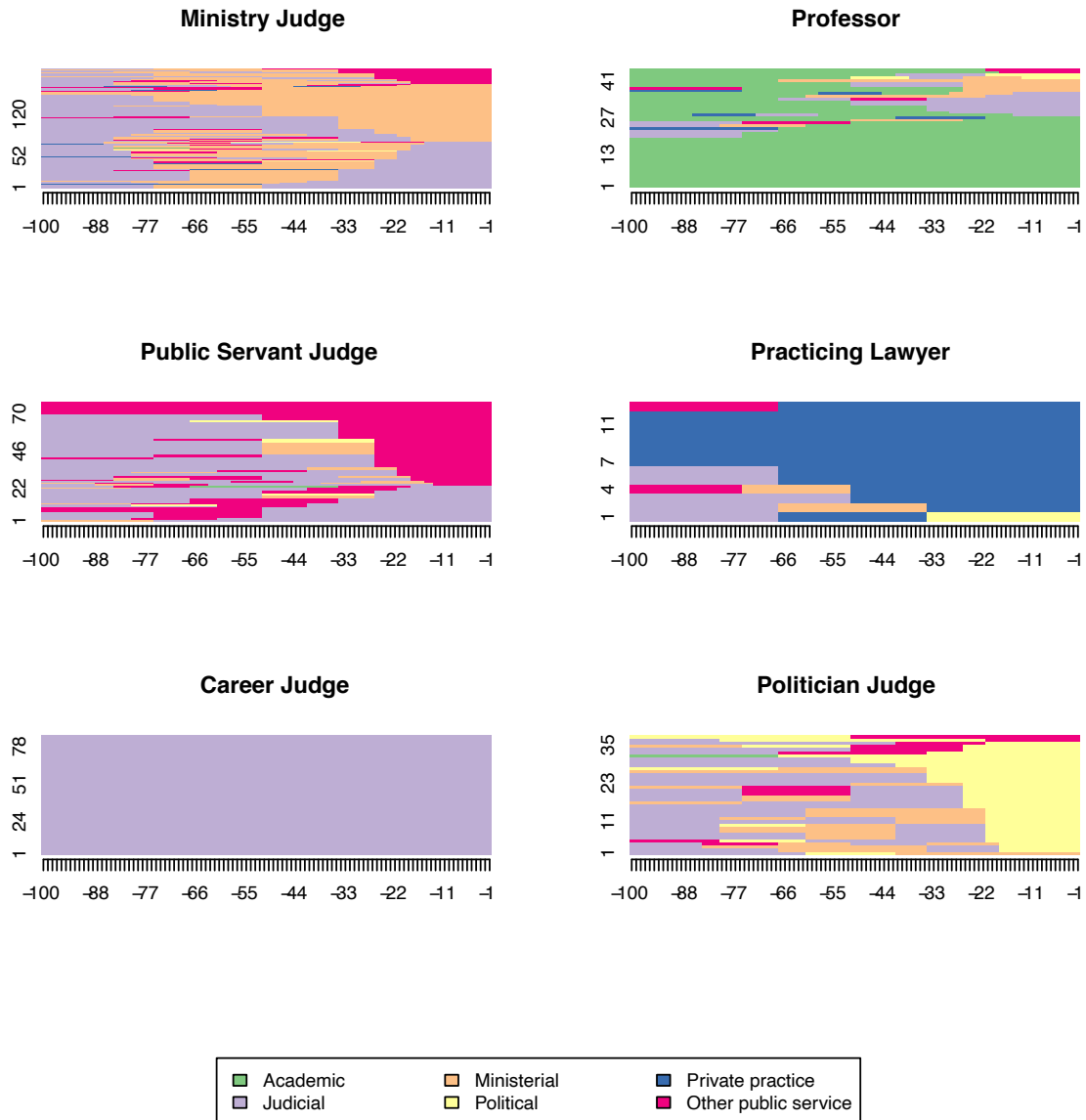


Figure 2. Six communities or types of Justices, clustered on the basis of similarity in background using Optimal Matching. Labels were assigned manually using a qualitative analysis of the sequences belonging to each community.

The most clear-cut types are those which are nearly perfectly internally coherent, as is the case with the relatively uncommon *Practising Lawyer* (n=13), as well as the more common *Career Judge*

⁶⁵ The clustering, which is entirely algorithmic, is described in greater detail in the Method Appendix along with a explanation for the number of clusters.

(n=86). These are Justices that have spent their pre-high court careers entirely or nearly entirely in private practice and the judiciary respectively.

A distinction can also clearly be made, as illustrated in both Figure 2 and Figure 3, between those types of Justices that have significant pre-appointment judicial experience and those who do not. The latter group obviously includes the aforementioned *Practicing Lawyer*, but also the *Professor* (n=45). The *Professor* type includes all Justices that have a professional background in academia, and generally their professional background is dominated by academia. Only some *Professors* have experience from other career tracks and even fewer have more than a little judicial experience.

Four types of Justices have extensive judicial experience and have reached approximately equally far in their judicial career, as we measure it here (see Figure 3 and Section 3.2 above). This most obviously includes *Career Judges* (n=86) who have no professional experience from any other legal career track. However, it also includes the most common type of Justice,⁶⁶ the *Ministry Judge* (n=194). In addition to significant professional experience from the lower courts, the *Ministry Judge* has worked in the hallways of government, generally as civil servants, and less commonly as political appointees. Many *Ministry Judges* were recruited to the Supreme Court and the Supreme Administrative Court directly from a position inside a government ministry, commonly the Ministry of Justice or, for the Supreme Administrative Court, the Ministry of Finance. This type of Justice corresponds well with the one described by Chief Justice Gregow.⁶⁷

Like the *Career Judge* and the *Ministry Judge*, the *Public Servant Judge* (n=77) and the *Politician Judge* (n=38) have generally spent a significant portion of their pre-high court legal careers in judicial institutions. In addition to this judicial experience, the *Politician Judge* has held some political office⁶⁸ and the *Public Servant Judge* has extensive experience in other forms of public service.

⁶⁶ Or, differently phrased, the largest community.

⁶⁷ Section 1 above.

⁶⁸ The most common being serving as a government minister.

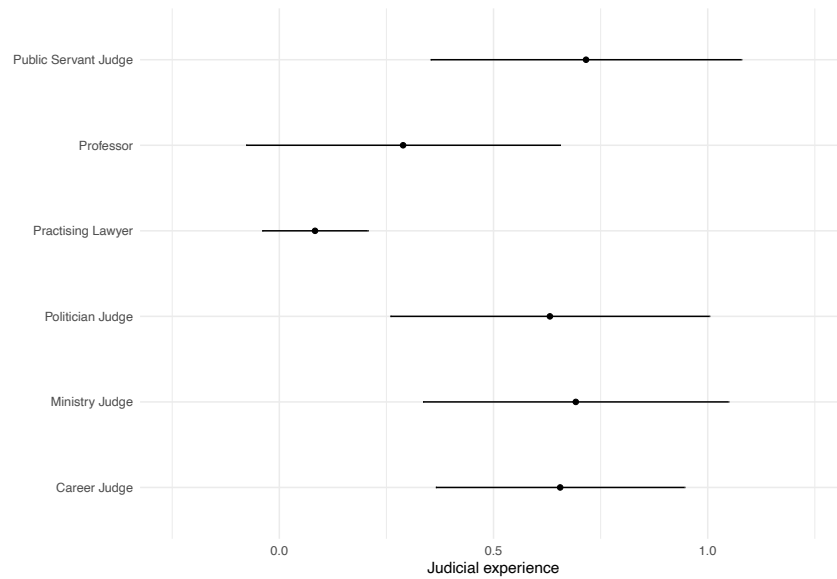


Figure 3. Mean judicial pre-appointment experience with standard deviations by type. Judicial experience is plotted on the x-axis on a scale from no judicial experience (0), judicial training (0.25), permanent first instance judgeship (0.5), to permanent appellate court judgeship (1).

Figure 4 and Figure 5 show the distribution of the six types of Justice among Supreme Court and Supreme Administrative Court appointees over time. More specifically, they show by decade what portion of high court appointees belong to each of the six types. For example, it can be seen that the *Ministry Judge* has dominated both courts in the last decades. It can also be seen that the *Career Judge* for a long time was a strong pillar of the Supreme Court, but that it has almost disappeared – along with the *Politician Judge*. It is difficult to take a normative position regarding the ideal or appropriate portion of the respective types. However, it is possible and for the purposes of this study relevant to consider how the types vary in prevalence over time and between the two courts. We will draw some conclusions from these patterns in the next section.



Figure 4. Prevalence of each type of Justice as a percentage of all appointments to the Supreme Court by decade.



Figure 5. Prevalence of each type of Justice as a percentage of all appointments to the Supreme Administrative Court by decade.

As described in Section 4 above, we also use Optimal Matching (OM) to measure the level of professional background diversity over time. We take pair-wise distances for each pair of Justices that serve on a high court at a particular time and then the means of those distances as a measurement of institutional diversity. The result is presented in Figure 6. As with the prevalence of types, more interesting than the absolute value at any given time are changes in value over time: increases represent a high court becoming more heterogenous in terms of professional background and decreases represent a high court becoming more homogenous.

Figure 6 indicates that the Supreme Court and the Supreme Administrative Court experienced different trends in the first decades of the 20th century, where the former saw an increase in diversity and the latter a strong decrease in diversity. However, drastic shifts are less surprising in the early years of a high court, as it is establishing itself. This is illustrated by the dramatic shifts in diversity for the Supreme Court during the 19th century. More interesting is that the trends converged towards an increase in diversity in the last decades of the 20th century. The figure also shows that the reform of the appointment procedure in 2011 coincided with a break in that trend in the Supreme Court, where there has been a sharp drop in diversity in the last decade.

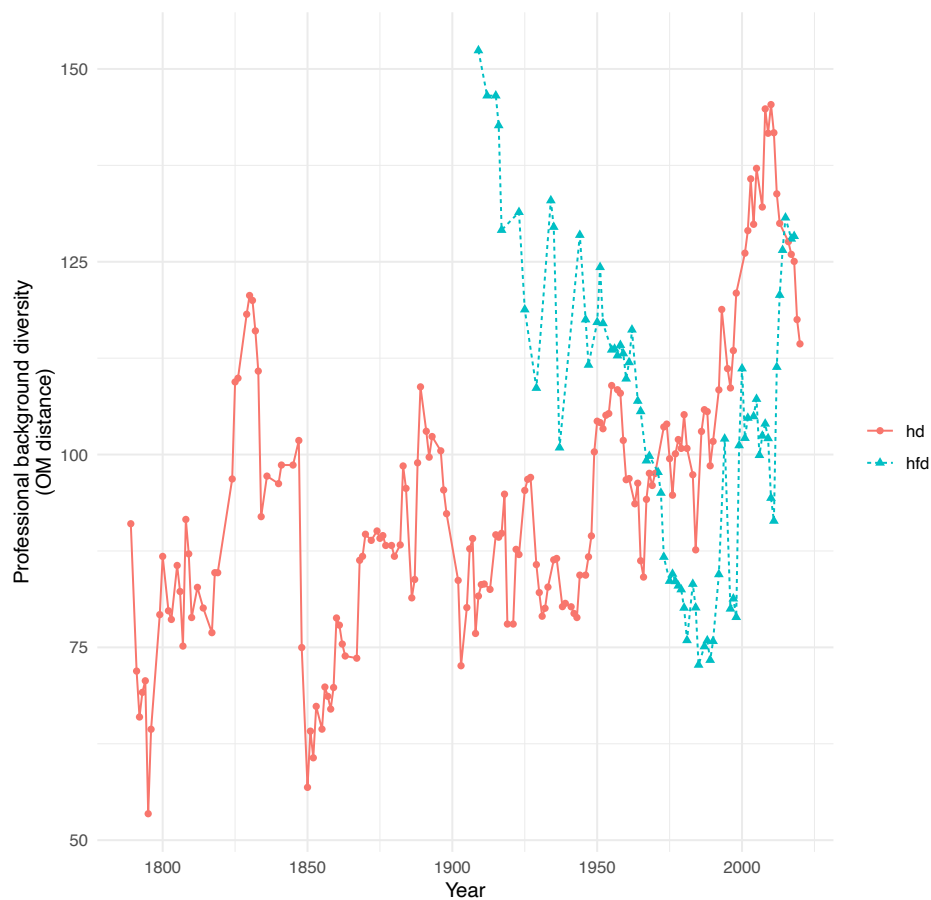


Figure 6. Professional Background Diversity on the Supreme Court and Supreme Administrative Court over time. Diversity is measured as mean pair-wise distance, calculated using Sequence Analysis and Optimal Matching.

6. THE HIGH COURTS OVER TIME: DIVERSE, SYSTEMIC – AND MORE DEFERENTIAL?

The findings presented in Section 5 above enable us to identify changes in the professional background of Justices over time, but also factors that have remained relatively constant despite the

passing of time. These constants and trends, along with their potential consequences for the role of the high courts, will be discussed in this section.⁶⁹

While the professional backgrounds of Supreme Court Justices have undergone many changes in the long history of the Court, some aspects have remained relatively constant over time. One such constant is the presence of academics on the bench. The *Professor* type of Justice, where all members have a professional background in academia, has been a feature of the Supreme Court since the very beginning and all the way until present day. The same largely goes for the Supreme Administrative Court, where a significant portion of both its original members and most recent appointees are *Professors*.⁷⁰ The Swedish high courts in this regard differ from for example the Norwegian Supreme Court where academics were absent for a long time.⁷¹ However, at the same time, *Professors* have never been a numerically dominant force on either high court and do not constitute their core membership. No clear trend can be perceived over time. Rather, the presence of a few Justices with academic backgrounds has been surprisingly stable over time. We take this to mean that academics in the opinion of appointing governments have knowledge or skills that make an important addition to the high courts. We imagine, as theorized above,⁷² that governments may find academics attractive because they are experienced in high-level systematic reasoning, as well as having a challenging attitude.

A second constant is the importance of court experience. As discussed directly below, the relative presence of the four types of Justices with extensive judicial experience – *Career Judge*, *Ministry Judge*, *Politician Judge*, and *Public Servant Judge* – has varied significantly over time. However, having worked in the judicial system, often by holding a permanent position in a first or appellate instance court, has consistently been part of a typical Justice’s background. Only about one in ten Justices, most of which are *Professors* or *Practicing Lawyers*, lack a judicial background.⁷³ It thus appears that some experience from the lower courts is largely necessary to sit on the high courts and one can in this regard speak of a “norm of prior judicial experience”.⁷⁴ This could indicate that

⁶⁹ Explaining why we have seen this development is beyond the scope of this article, as it requires an extensive discussion of Swedish legal and political history. However, we aim to return to this issue in a future publication.

⁷⁰ One could possibly detect a drop in *Professors* in both high courts in the 1950s–1980s.

⁷¹ Grendstad et al. (fn 8) 90–91.

⁷² Section 3.2 above.

⁷³ In addition to Figure 4 and Figure 5, it is evident from Figure 2 how few Justices completely lack prior judicial experience (52 out of 453, 11.5 %). It can however be noted that what types of judicial positions Justices have held prior to being appointed to the high courts have varied over time. As noted above, we are discussing formal judicial experience, from the court system. Even justices with no formal background in the court system may have extensive experience of conflict resolution, in the form of arbitration. However, as these records are not official, they are not included in the study.

⁷⁴ Lee Epstein, Jack Knight & Andrew Martin, ‘The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court’ (2003) 91(4) California Law Review 903 (identifying a clear trend towards appointing Justices from the federal court judges, making prior judicial service all but a prerequisite for

appointing governments regard the function of high courts to be sufficiently similar to that of lower courts. To apply the theoretical framework presented in Section 3, we imagine that it is the practical experience that comes with a judicial background that appointing governments appreciate. It is far from obvious that this would be the case. The high courts' have over time moved away from being a third and final instance for settling disputes and instead increasingly focused on interpreting the law and provide guidance on the application of law to other institutions, especially since 1971 when establishing precedent became their primary function. There are also examples of other apex courts whose members have less judicial experience than on the Swedish Supreme Courts.⁷⁵

A number of trends over time can also be found in the data. The first trend is increased diversity. Until the 1940s, a person who only had a judicial background could be appointed Supreme Court Justice, but since then the *Career Judge* has almost entirely disappeared in the Supreme Court and hardly ever appeared in the Supreme Administrative Court. Thus, from the perspective of an individual candidate that is neither a *Professor* nor a *Practicing Lawyer*, judicial experience is, as stated above, a near necessary requirement for a high court appointment but it is increasingly not a sufficient qualification. We can observe a similar trend on the institutional level as professional background diversity rose steadily in the Supreme Court since the late 1940s and in the Supreme Administrative Court since the 1980s.⁷⁶ The introduction of a new type of Justice, the *Practicing Lawyer*, has contributed to this development. Taken together, these trends point towards high courts whose members over time have a broader range of pre-appointment professional experience, on both an individual and institutional level.

One possible, supply-driven explanation for this trend is a shift in the pool of potential appointees. The number of lawyers in Sweden have increased over time and along with it conceivably also the qualifications of the most qualified lawyers. It is also conceivable that the prestige of the high courts, relative to other legal top jobs, has increased over time, thereby making more of the most qualified applicants available to appointing governments.⁷⁷ However, the observed trends may also at least partially be driven by a shift in demand, i.e. that appointing governments increasingly want high

service on the U.S. Supreme Court). However, as addressed below, unlike Epstein et al. we do not find that the “norm of prior judicial experience” results in career homogeneity on Swedish high courts.

⁷⁵ An example among many is the historical tradition of the Japanese Supreme Court to divide the seats between former judges, lawyers, bureaucrats, prosecutors, and professors: David S. Law, ‘The Anatomy of a Conservative Court: Judicial Review in Japan’ (2009) 87 *Texas Law Review* 1545.

⁷⁶ Although it appears that diversity on the Supreme Court has fallen in the last decade. It is also notable that before diversity on the Supreme Administrative Court started climbing it fell from extremely high levels. The earliest Justices appointed to the Supreme Administrative Court had a particularly diverse background. One example is Anders Lindstedt who was one of six Justices appointed to the Court despite having no legal education or legal professional experience. He was a professor of mathematics and engineering, as well as a vice chancellor, at the Royal Institute of Technology.

⁷⁷ We aim to explore this question in a subsequent study.

courts that are diverse and Justices that have a multitude of pre-appointment professional experiences. Increased diversity in terms of professional backgrounds is consistent with appointing governments taking seriously and actively supporting the reshaping of the high courts as true courts of precedent in an era of increased legal complexity. In general, a greater level of diversity on the high courts could result in the specific composition of the deciding chamber having a greater impact on the decision. Furthermore, increased diversity could result in deliberations taking more time, increase the number of dissenting and concurring opinions, and generally make it more difficult to predict how the Court will resolve a specific issue. However, the increased representation of different perspectives is also valuable and can contribute to more informed and therefore substantively superior decisions.⁷⁸

The second trend is an increased emphasis on backgrounds that would tend to prioritize systemic reasoning, but also more deferential attitudes towards the political institutions. Justices with a political background, having been Members of Parliament, Government Ministers or similar, were not uncommon in the early days of the Supreme Court and even during the earliest days of the Supreme Administrative Court. However, the number of Justices with this background decreases sharply in the mid-20th century, and by the 1990s the *Politician Judge* had completely disappeared. It has now been three decades without Justices with any experience of political office. This is arguably an improvement when it comes to creating a judiciary that is as independent as possible from the other branches of government both in fact and in appearance. While its decline has been slower, especially on the Supreme Administrative Court, the *Public Servant Judge* have also steadily disappeared from the high courts over time. The seats vacated by *Career Judges*, *Politician Judges*, and *Public Servant Judges* have largely been filled by *Ministry Judges*. Whereas all six types of Justices were properly represented on the high courts in the beginning of the 1900s, by the end of the century they were both dominated by the *Ministry Judge*.

What does appointing governments' increased preference for *Ministry Judges* suggest regarding their view of the high courts? As *Ministry Judges* have extensive judicial experience, the gradual replacement of the *Career Judge*, the *Public Servant Judge*, and the *Politician Judge* with the *Ministry Judge* does not necessarily radically diminish the capacity of the high courts to decide individual cases. However, if our theory is correct, this could indicate a slight shift from more practically-oriented to systemically-oriented high courts.⁷⁹ If so, that would not be surprising given that political institutions have instructed the high courts to increasingly focus on precedent setting.

This development also represents appointing governments shifting away from Justices that we expect are only somewhat deferential or even challenging to relatively deferential Justices. This development

⁷⁸ Epstein et al. (fn 74) 956.

⁷⁹ See Table 2 above. The disappearance of the *Career Judge* is a particularly clear sign of this.

is rather surprising considering the seemingly earnest emphasis on judicial independence by recent governments.⁸⁰ While it goes beyond the aim of this article to explain the underlying reasons for the changes in professional background of the Justices this development merits a few comments. To increasingly appoint men and women from the corridors of government may at the very least harm the perceived independence of the high courts. A change in the perceived role of the high courts, focusing more on precedent setting, would intuitively suggest placing greater emphasis on judicial independence, formally as well as practically. However, from a different perspective, the move towards courts of precedent may have created incentives for the government to exercise more caution when appointing Justices. Simply put, the stakes are higher for the political institutions when the high courts take on a greater role in the legal system. In this situation, the government may prefer to appoint Justices that have a greater knowledge of, and thereby also understanding for, the political institutions and the legislative process. Relatedly, the greater role of the high courts might increase the importance of having knowledge about the presumptive Justice and her/his view of the role of the high courts and their relationship with the political institutions. Arguably, having worked directly for the government, often in the very department responsible for the appointment of Justices, provides unique knowledge of the candidate, as compared to a background in the courts or academia.

While the increased importance, even dominance, of the *Ministry Judge* on the high courts is noteworthy, in particular when it comes to the potential consequences for the relationship between the courts and the political institutions, it should not be overstated. For the last ten years of the studied period supply has to be taken into account, in the sense that the government is limited to those applying for an open position on the high courts. However, the increased importance of the *Ministry Judge* can be traced back much further in time, when no such limits were at hand. More importantly, the government continued the long-standing tradition of appointing *Professors* and introduced the *Practicing Lawyer*, even though both can be expected to have a relatively challenging disposition towards political institutions. Consequently, it would be an oversimplification to suggest that Swedish governments have strategically used their appointment power during the latter half of the 1900s to create more deferential high court.

In summary, we have seen significant changes in the professional backgrounds of Justices on the high courts over time. Once important types of Justices, such as the *Politician Judge* and, most notably, the *Career Judge*, are no longer to be found on the high courts. While the *Professor* remains a constant on the courts, it is the *Ministry Judge* that is increasingly dominating the high courts. The potential consequences of these trends and constants in background can be summarized as the high courts becoming more diverse, more focused on systemic, high-level reasoning (while still emphasizing the

⁸⁰ See e.g. prop. 2009/10:80, 119–120.

importance of previous court experience) and, conceivably, more deferential to the political institutions. As the idea of the ideal Justice develops, so will the role and position of the high courts.

Bibliography

Literature

Abbott A, 'Conceptions of time and events in social science methods: Causal and narrative approaches' (1990) 23(4) *Historical Methods* 140. DOI:

<https://doi.org/10.1080/01615440.1990.10594204>

Abbott A, 'Sequence Analysis: New Methods for Old Ideas' (1995) 21(1) *Annual Review of Sociology* 93. DOI: <https://doi.org/10.1146/annurev.so.21.080195.000521>

Algotsson K-G, 'Lagrådets politiska betydelse' [2009] *Svensk Juristtidning* 165

Alleman R & Mazzone J, 'The Case for Returning Politicians to the Supreme Court' (2010) 61 *Hastings Law Journal* 1353

Ashenfelter O, Eisenberg T, and Schwab S, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes' (1995) 24 *Journal of Legal Studies* 257. DOI: <https://doi.org/10.1086/467960>

Barton B, 'An Empirical Study of Supreme Court Justice Pre-Appointment Experience' (2012) 64 *Florida Law Review* 1137. DOI: <https://doi.org/10.2139/ssrn.2010781>

Baum L, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006). DOI: <https://doi.org/10.1515/9781400827541>

Beckman N, 'Högsta domstolens ledamöter – från riksdrotsen Wachtmeister till Justitierådet Birger Wedberg – förteckning 1789–1913' [1941] *Svensk Juristtidning* 349

Beckman L, 'Ledamöter i Högsta domstolen – Från Eberhard Quensel till Lena Moore' [2009] *Svensk Juristtidning* 854

Bengtsson B, 'Ändringsdispens och prejudikatdispens', in *Högsta domsmakten i Sverige under 200 år*, Del 1 (Nerenius & Santérus 1990)

Billari F, 'Life course analysis: two (complementary) cultures? Some reflections with examples from the analysis of the transition to adulthood' (2005) 10 *Advances in Life Course Research* 261. DOI: [https://doi.org/10.1016/s1040-2608\(05\)10010-0](https://doi.org/10.1016/s1040-2608(05)10010-0)

Chabot C.K, 'Schooling the Supreme Court' (2015) 92 *Denver University Law Review* 217. DOI: <https://doi.org/10.2139/ssrn.2237745>

Derlén M & Lindholm J, 'Judiciell aktivism eller prejudikatbildning?' [2016] *Svensk Juristtidning* 143

Epstein L & Knight J, *The Choices Justices Make* (CQ Press 1998)

Epstein L, Knight J & Martin A, 'The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court' (2003) 91(4) *California Law Review* 903. DOI: <https://doi.org/10.2307/3481406>

George T.E, 'Court Fixing' (2001) 43(1) *Arizona Law Review* 9

Gibson J, 'Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model' (1978) 72(3) *American Political Science Review* 911. DOI: <https://doi.org/10.2307/1955111>

Grendstad G, Shaffer W, and Waltenburg E, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (ECPR Press 2015)

Hanretty C, 'The Appointment of Judges by Ministers' (2015) 3(2) *Journal of Law and Courts* 305. DOI: <https://doi.org/10.1086/681543>

Hirschl R, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9(2) *International Journal of Constitutional Law* 449. DOI: <https://doi.org/10.1093/icon/mor034>

Jägerskiöld S, 'Två sekler med Högsta domstolen' [1989] *Svensk Juristtidning* 245

Knutsson A, 'Dagligt liv i Bondeska palatset' [1989] *Svensk Juristtidning* 272

Kuylenstierna C, 'Regeringsrätten 50 år' [1959] *Svensk juristtidning* 374

Law D.S, 'The Anatomy of a Conservative Court: Judicial Review in Japan' (2009) 87 *Texas Law Review* 1545

Lindblom P.H, 'Smygreform i Högsta domstolen?' [2004] *Svensk Juristtidning* 11

Lindholm J, Derlén M & Naurin D, ‘”The Ideal Justice”: Method Appendix’ (26 October 2021)

<<https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/JAD8CI>>,

<<https://github.com/jojolindholm/Ideal-Justice-Replication>>

Lundius M, ‘Verksamheten i Bondeska palatset på 2000-talet’ in Anne Ramberg, Tom Knutson and Magnus Andersson (eds), *Sveriges advokatsamfund 125 år* (Sveriges advokatsamfund 2012)

Modéer K.Å, ‘Jurister som politikernas kontrollanter – Om Högsta domstolen och Lagrådet som laggranskare’ [2009] *Svensk Juristtidning* 150

Munck J, ‘Några skillnader mellan Regeringsrätten och Högsta domstolen’ in Anna-Karin Lundin et al (eds) *Regeringsrätten 100 år* (Iustus 2009)

Neill T, ‘”The Stepford Justices”: The Need for Experiential Diversity on the Roberts Court’ (2007) 60 *Oklahoma Law Review* 701

Page S, ‘Making the Difference: Applying a Logic of Diversity’ (2007) 21(4) *Academy of Management Perspectives* 6. DOI: <https://doi.org/10.5465/amp.2007.27895335>

Ritschard G & Studer M, ‘Sequence Analysis: Where Are We, Where Are We Going?’ in Gilbert Ritschard & Matthias Studer (eds) *Sequence Analysis and Related Approaches: Innovative Methods and Applications* (Springer Open 2018). DOI: https://doi.org/10.1007/978-3-319-95420-2_1

Skiple J.K, Grendstad G, Shaffer W, and Waltenburg E, ‘Supreme Court Justices’ Economic Behaviour: A Multilevel Model Analysis’, (2016) 39(1) *Scandinavian Political Studies* 73. DOI: <https://doi.org/10.1111/1467-9477.12060>

Skiple J.K, Littleré Bentsen H, and Hanretty C, ‘The Government Deference Dimension of Judicial Decision Making: Evidence from the Supreme Court of Norway’ (2020) 43(4) *Scandinavian Political Studies* 264. DOI: <https://doi.org/10.1111/1467-9477.12176>

Tate C, ‘Personal Attribute Models of the Voting Behavior of U. S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978’ (1981) 75(2) *American Political Science Review* 355. DOI: <https://doi.org/10.2307/1961370>

Tate C and Handberg R, ‘Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88’ (1991) 35(2) *American Journal of Political Science* 460. DOI: <https://doi.org/10.2307/2111371>

Undén Ö, ‘Några ord om domstolskontroll över lagars grundlagsenlighet’ [1956] *Svensk Juristtidning* 260

Verksamhetsberättelse (Högsta domstolen 2020)

Verksamhetsberättelse (Högsta förvaltningsdomstolen 2020)

Wentz N.O, 'Från tjänsteförslagsnämndens verksamhet – erfarenheter och synpunkter' [1983] Svensk Juristtidning 31

Wersäll F, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' [2014] Svensk Juristtidning 1

Swedish Preparatory Works and Other Official Documents

Prop. 2009/10:80 En reformerad grundlag

Prop. 2009/10:181 Utnämning av ordinarie domare

Riksdagens protokoll 1975/76:149

SOU 1994:99 Domaren i Sverige inför framtiden