The European Court of Human Rights and the Norwegian Supreme Court – Independence and Democratic Control

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Abstract
The internationalization of law adds new issues to the classical topic of how and when judicial review may be legitimate. We discuss review of national law on the basis of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR) and by the Norwegian Supreme Court. We are concerned both with the possible democratic legitimacy of such review, and other grounds for legitimacy. We finally point to some implications of this internationalization of law for public perceptions of the judges’ functions in society and for their independence – and some implications for the Norwegian selection of judges to the Supreme Court and the ECtHR.

1. Introduction

Judicial review of national legislation is one of the classic themes of constitutional theory.¹ The practice is also frequently in the public eye, not least in relatively well-functioning democracies. How far the courts should go in testing legislation has been highlighted in Norway in recent years by several cases where the Supreme Court has deemed laws unconstitutional. Critics claim that courts thus interfere with democratic decision-making, whilst protecting neither the rule of law nor vulnerable population groups.² The empowerment of courts means that the independence and qualifications of the judges become more important. It furthermore adds to ‘legalization’, which increasingly causes popular and political concern.

The internationalization of law raises further issues for judicial review.³ Norwegian Supreme Court Chief Justice Tore Schei argues that review on the basis of human rights conventions of the laws adopted by the Storting (Norwegian parliament) is in practice

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¹ This article was written under the auspices of ERC Advanced Grant 269841 MultiRights – on the Legitimacy of Multi-Level Human Rights Judiciary; and partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts The Legitimacy of the International Judiciary.


more restrictive than constitutional review. International control is also claimed to be less democratic than constitutional review, since a single parliament cannot change international conventions. These features add urgency to the question of how and when such international judicial review may be legitimate. In this article, we discuss review of national law on the basis of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR) and by the Norwegian Supreme Court. We are concerned both with the possible democratic legitimacy of such review, and other grounds for legitimacy. We finally point to some implications of this internationalization of law for public perceptions of the judges’ functions in society and for their independence – and some implications for the Norwegian selection of judges to the Supreme Court and the ECtHR.

2. The European Court of Human Rights

How can judicial review be legitimate when it is conducted by international bodies that are beyond democratic control, such as the ECtHR? By 'legitimate' we mean here whether such bodies can be justified to all interested parties on grounds no individuals who are political equals can reasonably object to, e.g. on the basis of the bodies’ composition, procedures, practice and impact. This understanding of legitimacy also allows us to address why, and under what circumstances, democratic majority rule is legitimate. The answer to this last question is that democratic forms of government, within certain parameters, to a greater extent than others safeguard the fundamental interests of all parties, including the right to influence decision-making in relevant public institutions as well as other human rights.

But this defence requires that democratic majority decisions occur within certain limits. Firstly, some human rights are essential if democratic arrangements are to protect individuals’ interests. These include political rights and freedom of speech and association. Secondly, we hold that not everything that is democratically decided is thereby normatively legitimate. Human rights should be protected even if they limit the scope for legitimate majority decisions; it is only within such constraints that majority decisions are legitimate and entitled to support. For instance, parliamentary majorities are prone to overlook or discount the interests of small groups of the electorate. Thirdly, democracy is not only what happens in the national parliaments. A politically independent judiciary is also part of the institutional basic structure we call democratic. The sorts of democracy worth respect must include more than majority rule, namely a constitutional democracy that protects human rights and the separation of powers.

Based on this understanding of the relationship between legitimacy, democracy and human rights, we can consider whether and how an international court such as the ECtHR protects and promotes individuals’ interests better than alternative legal arrangements without international judicial review. This normative assessment implies at least three constraints on the Court. Firstly, the human rights protected by the ECtHR must be normatively justifiable. Moreover, the Court must seek to honour two important legitimate requirements: it must both exercise its mandate – i.e. protect human rights enshrined in the ECHR – and respect legitimate democratic decisions. Both claims are grounded in individuals’ fundamental interests. This means that the Court must show

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some – but not unlimited – deference to differences amongst states with a variety of cultures, institutions and legal traditions. Democratic political processes will lead to different laws in different democracies. At the same time, individuals’ interests as protected by human rights may restrict this diversity so that the social order as a whole is justifiable to all. The ECtHR therefore has a complex role: it shall ensure effective protection of the individual while respecting the legitimate diversity among states.

2.1 The Principle of Subsidiarity

This complex role of international courts can be seen as an application of the principle of subsidiarity. This principle requires that decisions be taken as close to the affected parties as possible, consistent with the achievement of stated objectives. The burden of argument rests with those who want more centralized decisions. The principle of subsidiarity also requires decisions to be made by a more central body if necessary to achieve the purposes of the members. The principle of subsidiarity has several historical roots in Europe, and has received considerable attention after being incorporated into the EU’s Maastricht Treaty, and as currently set out in the Lisbon Treaty. States endorsed the principle of subsidiarity to prevent unnecessary power transfer from member states to the EU while ensuring the EU sufficient competence and leeway to perform its tasks. The principle may also be said to be reflected in the ECHR through its requirement of the exhaustion of local remedies, the practice by the ECtHR of allowing member states a certain flexibility by applying the doctrine of a ‘margin of appreciation’ (see below), and the ECtHR’s formulation of ‘remedies’, which grants states freedom to determine how a sentence should be implemented. The principle of subsidiarity is explicitly highlighted in the current discussions on the reform of the ECtHR, as a means of strengthening the Court’s capability to protect human rights while otherwise letting states retain responsibility.

2.2 Dynamic Interpretation

The Court applies a dynamic (‘evolutive’) interpretation of ECHR rights, guided by the object and purpose of the Convention. Dynamic interpretation is not unique to the ECtHR, but a general feature of international law. It is also characteristic of interpretations by domestic courts, including the Norwegian Supreme Court. The ECHR contains vague provisions on fundamental values, such as the freedom of expression and the right to privacy. There can therefore be no doubt that the contracting parties knew that the ECtHR would – and should – interpret the ECHR dynamically. The

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6 Official Journal of the European Communities, 92/C 224/01.
parties should therefore not be surprised that they could not predict what the consequences of the ECHR would be 60 years later.

The Court has referred to the Convention as a ‘living instrument’, and drawn on the practice of the member states as a basis for a dynamic interpretation since the Tyrer case\(^\text{11}\) in 1978, which prohibited corporal punishment by birching:

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. (para. 31)

The ‘living instrument’ coupled with an (emerging) European consensus has since been a common feature of ECtHR practice. The Court has even emphasized an emerging international consensus beyond Europe. In the Goodwin case\(^\text{12}\) on the rights of transsexuals, it stated:

The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals. (para. 85)

In the Demir and Baykara case\(^\text{13}\) (2008), on trade union rights, the Court also referred to international legal instruments the respondent state had not ratified:

In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies. (para. 86)

George Letsas argues that the ECtHR’s consensus practice has evolved beyond determining an actual shared approach among the states, to also refer to some abstract common standard – possibly garnered from non-binding international documents.\(^\text{14}\) This development grants even more discretion to the ECtHR.

While an emerging European and international consensus can provide a certain basis for claiming that states have now accepted a new interpretation of an existing obligation, such a consensus cannot in itself be a sufficient basis for imposing the interpretation on the respondent state. The further the Court goes in its dynamic interpretation, the more need there is for convincing arguments that this follows from a sound international legal

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\(^{11}\) Tyrer v. The United Kingdom, ECHR (1978) Series A, No. 25.

\(^{12}\) Christine Goodwin v. The United Kingdom, ECHR (2002) Reports of Judgments and Decisions, 2002-VI.


interpretation method.

2.3 The Margin of Appreciation

The ECtHR allows national variations through the so-called margin of appreciation. But it is difficult to ascertain the proper limits to such variation. The ECtHR shall ensure that the diversity of cultures and legal provisions present in the Convention states do not violate the human rights specified in the ECHR. The Court can thus not accept anything that may be decided by democratic majority decisions; the diversity of majority decisions must be limited by respect for individuals' human rights. There is simply no guarantee that the same national bodies – including lawmakers – are best qualified to assess whether they have committed violations. On the contrary, the states parties have chosen to submit to ECtHR review with respect to such considerations.

In the Hirst case\(^\text{15}\) (2005), on prisoners' voting rights, the Court thus held:

Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. (para. 82)

On the other hand, there is no guarantee that the judges of the ECtHR can comprehend the local circumstances which may justify the domestic measures.

The application of a margin of appreciation is consistent with the principle of subsidiarity. If necessary to promote certain goals – such as human rights protection – the parties should place the authority to make such decisions with a central body that has defined tasks. On the other hand, it is not part of the ECtHR mission to promote the same laws and institutions in all contracting states: harmonization is not part of the mandate. This distinguishes the ECtHR from the Court of Justice of the European Union, since EU cooperation includes the removal of some constraints dividing Europe and ensuring harmonization of several legal areas.

The ECtHR and its composition, procedures or judgments are not necessarily reasonable and justifiable. Our point is limited to showing that criticism of the ECtHR cannot simply be based upon the fact that the Court interferes with national decisions and that such review is in itself undemocratic and therefore illegitimate. The question is, rather, how the ECtHR 'balances' its objective to protect certain human rights in certain ways, with sufficient deference to national sovereign autonomy. We turn now to the interaction between the ECtHR and the national level in the form of the domestic Norwegian Supreme Court.

3. The Norwegian Supreme Court

Human rights conventions are incorporated into Norwegian law by the Human Rights Act (1999) and other legislation. This entails that international law is to be applied to determine the content of Norwegian law. In principle, the situation is similar to cases where Norwegian private international law requires the application of foreign law in

\(^{15}\) Hirst v. The United Kingdom (No. 2) ECHR (2005) Reports of Judgments and Decisions, 2005-IX.
deciding a dispute for a Norwegian court.

This can be seen as exercising what Georges Scelle called “dédoublement fonctionnel” ("role-splitting function"), namely that in areas where the international law obligations are incorporated into national law, the national courts serve a different legal system, namely international law. In this way the Norwegian Supreme Court acts as an international court.

To what extent is the function of the Supreme Court different from that of the ECtHR? How can we make sense of the two claims that, on the one hand, the Supreme Court is the highest Norwegian court to resolve disputes pursuant to Norwegian law, according to the Norwegian Constitution Article 88, while on the other hand, the ECtHR is to ensure protection of the ECHR rights?

The judgments of the ECtHR against Norway have binding international legal effect (ECHR Art. 46 (1)), and must be applied by the Supreme Court based on the incorporation of the ECHR obligations into Norwegian law. The precedential effects of ECtHR case law in Norwegian law are also determined by international law. The ECtHR itself places considerable emphasis on its own practice. Thus the international legal obligations of the ECHR must be determined on the basis of how the ECtHR interprets the Convention. It is the ECtHR which has the final word when it comes to the content of the ECHR.

The Supreme Court has laid out its attitude towards the ECtHR in the Bøhler judgment (Rt. 2000 p. 996 at 1007-1008) (unofficial translation):

Although the Norwegian courts in the application of the ECHR are to apply the same principles of interpretation as the ECtHR, it is the ECtHR which is primarily tasked to develop the Convention. [...] Insofar as it is a question of balancing the different interests or values against each other, the Norwegian courts must – within the method employed by the ECtHR – also be allowed to build on traditional Norwegian value priorities. This is especially true if the Norwegian legislator has considered the relationship with the ECHR and found that there is no conflict.

This statement raises important questions. What are these traditional Norwegian value priorities which could have implications for the interpretation of the ECHR? And what should the Supreme Court’s role be for dynamic interpretation of the ECHR? Both of these issues can be seen as the application of subsidiarity to the relationship between a national and an international court. We begin with the value priorities.

The ECHR is incorporated into Norwegian law through the Human Rights Act. This implies that solely international legal method is to be applied when the content of Norwegian law shall be determined in this area. This approach gives no role to traditional Norwegian value priorities.

In the Bøhler judgment the Supreme Court took the ECtHR method of interpretation into

account by saying that “Norwegian courts in the application of the ECHR are to apply the same principles of interpretation as the ECtHR” and that the application of the “traditional Norwegian value priorities” must be made “within the method employed by the ECtHR”. It is still unclear how these value priorities come into play: the ECHR method indicates, of course, no emphasis on traditional Norwegian value priorities beyond what may be in the margin of appreciation.

Values are certainly not irrelevant for the interpretation of the ECHR. It is, after all, values that are to be protected. But it has no importance that these values are Norwegian – whatever this might mean. What matters is whether the values are likely to yield what will achieve recognition as an international legal interpretation of the ECHR. This must also be presumed to have been the Storting’s intention in incorporating the ECHR into Norwegian law. The Storting gave no indication that traditional Norwegian value priorities should be used in the interpretation. Thus, it would be contrary to the democratic will if the Supreme Court emphasized values that cannot be internationally recognized as relevant to an interpretation of the ECHR. This can be seen as subsidiarity in the methodological sense, where the objectives require primacy of the international level: it is international law and its method of interpretation that apply. The method of interpretation at the national level is relevant only to the extent it can also be accepted as a permissible interpretation at the international level.

Let us then turn to dynamic interpretation. The Supreme Court also said in the Bøhler judgment that it is the ECtHR that primarily is charged to develop the Convention. However, note that the Supreme Court did not waive its own role in developing the ECHR. The reason for placing the ECtHR in the driver’s seat is credible: namely that Norwegian courts “do not have the same overview as ECtHR over the legislation, legal opinions and practice in other European countries”. This is, again, subsidiarity reasoning in favour of the international level, based on differential access to relevant information.

In the Bøhler judgment the Supreme Court also said that if Norwegian courts were as dynamic as the ECtHR, one would risk going further than necessary in relation to ECHR obligations. “This would add an unnecessary restriction on Norwegian legislative authority. In consideration of the balance between legislative and judicial authority in our constitutional tradition, this could be detrimental.” The Supreme Court concludes that too dynamic an interpretation should not be applied, but that there should be no safety margin to ensure that Norway is not found in breach of the ECHR.

However, it should first be mentioned that the Storting did not warn against too dynamic an interpretation. Moreover, Norway runs the risk of violating the Convention if the Supreme Court applies a less dynamic interpretation than the ECtHR. Finally, dynamic interpretation does not necessarily imply that the rights are extended. The human rights obligations can, in principle, be more restrictively applied in light of new facts and social developments.

The ECtHR has the ultimate responsibility for interpreting the ECHR. But how can a

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domestic Supreme Court – or Constitutional Court – influence the interpretation of the international obligations?

A Supreme Court, like other international and national courts, can seek to influence the ECtHR through well-reasoned judgments, using the method of interpretation applied by the ECtHR. The Norwegian Supreme Court acknowledges this in the Bøhler judgment, where it notes that to the extent that Norwegian courts “in the balancing of different interests or values can use value principles that underlie our legislation and legal opinion” they could “interact with the ECtHR and contribute to influencing the ECtHR practice”. In this way the Court could – and should – seek support for Norwegian legal traditions – to the extent that they can be accepted as a proper interpretation of the ECHR suitable to be recognized by the ECtHR. As stated by former President of the ECtHR, Nicolas Bratza:

Even if it [the ECtHR] is not bound to accept the view of the national courts in their interpretation of Convention rights, it is of untold benefit for the Strasbourg Court that we should have those views.18

In this sense there is a dialogue between national courts and the ECtHR. Respect for democratic decision-making may entail that the Supreme Court should not interpret the ECHR as involving more extensive international obligations than those that follow from a proper treaty interpretation.

The Norwegian Supreme Court still has the last word concerning what the Norwegian Constitution and relevant constitutional principles require. This is a result of the dualism between international law and Norwegian law, and of the lex superior principle in Norwegian law. The ECHR is incorporated by law as superior to other Norwegian legislation, but the ECHR is not granted constitutional status. The Supreme Court has the final say as regards the constitutionality of the ECHR. That is, if the ECtHR were to interpret the ECHR with legal effects contrary to the Constitution – e.g. by giving priority to protection against terrorism over constitutional protection of freedom of speech or freedom of religion – the Supreme Court would give priority to the Constitution. Additional conflicts of this nature may arise with more constitutional rights as contained in current constitutional reform proposals.19 Supremacy of the Constitution can also be seen as an expression of subsidiarity: certain assessments are considered so important at the national level that they are excluded from binding international decision-making. But it is highly unlikely that contradictions between the Constitution and the ECtHR’s judgments will occur, not least because the proposed human rights will presumably be interpreted in the light of ECtHR jurisprudence.

We can thus conclude that the Norwegian Storting, the foremost democratic body in Norway, has required the Supreme Court to apply the ECHR as the Convention is interpreted by the ECtHR. Norwegian values as such have no place in the interpretation of the ECHR, and the Supreme Court must interpret the ECHR as dynamically as the

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ECtHR does – although with the reservation, arguably based on the principle of subsidiarity, that the ECtHR may have a better overview of the legal situation in a European context. The Supreme Court’s only way of influencing the interpretation of the ECHR is through well-reasoned judgments that the ECtHR is likely to find convincing. The caveat is that any conflicting rules arising from the Constitution will prevail over the ECHR, but this is not very practical.

4. The Role of Judges, Their Independence and Their Selection

To the extent that national and international courts have the final say on what should be the applicable law in an increasing number of areas, the role of judges can be affected. Perceptions of increased judicialization in several areas can also fuel calls for more hands-on management and control of the appointment of judges. This development may occur despite the need for both domestic and international judges to appear to be impartial.

We can expect such changes in the role of judges and debates in this area in Norwegian society. Among the key questions is determining what kind of independence merits what kinds of safeguards. Thus it may be necessary to reconsider the nomination and election processes for judges to the Supreme Court and the ECtHR. We conclude by pointing out some issues worth discussion, without wishing to draw conclusions.

4.1 Protection of Norwegian Interests and Values

What Norwegian interests and values are at stake with increased judicialization and internationalization? Of course, these interests and values need not be exclusive to Norwegians – which will also be discussed in the following.

One such set of values concerns the protection of rule of law standards in the sense that the law is properly applied. For the Supreme Court to interpret ECtHR judgments correctly, it needs to have comprehensive knowledge of the ECHR and ECtHR practice. However, it is acknowledged that the Supreme Court, for obvious reasons, is not as familiar with ECHR law and jurisprudence as it is with the Norwegian legal system.20

The Supreme Court must have a high degree of familiarity with the ECHR system for at least three reasons: 1) The Supreme Court needs to be able to see how ECtHR case law can impact on Norwegian law. 2) The ECtHR may have more reasons to award states a margin of appreciation in cases where national authorities have undertaken a thorough and trustworthy ECHR test. The principle of subsidiarity may imply that national authorities have the last word, but only when it is clear that they have made a competent assessment of whether there is a breach of human rights obligations. 3) The Supreme Court must have thorough knowledge of the interpretation of ECtHR judgments to determine the extent of leeway that exists at national level, especially to determine whether responses by the Storting and the government are appropriate and sufficient.

What other national interests are important in the light of internationalization and

judicialization? At least four kinds of interests have been mentioned for which international judicial review is valuable. Firstly, national authorities may have an interest in maintaining a ‘national room for manoeuvre’. There are sometimes conflicts or tensions between national legal obligations and the scope of such an opportunity space for policies. Some argue that domestic ‘resistance’ is appropriate, not least as a means of determining the legal boundaries for such room for manoeuvre. Our discussion above indicates that there is not always conflict, particularly not in the areas where the Storting expressly wanted to limit its scope of action – including respect for human rights. As argued by Chief Justice Schei: “The point of the provision [in the Norwegian Human Rights Act] on superiority can hardly be anything other than that other legislation must defer to the conventions so far as necessary to ensure that these are realized and respected.” The Storting has thus concluded that it is in Norwegian interests that Norway respects ECHR rights.

A further national interest is international recognition and esteem. The standing committee of the Storting which discussed Norway’s ratification of the ECHR without reservations in 1956 mentioned this consideration. Such ratification would require a constitutional amendment to allow Jesuits entry to Norway. A majority in the standing committee supported the government’s desire to lift the ban against Jesuits, in order to avoid “international perceptions of our country in an unflattering light”.

The last two national interests relate to the promotion of other states’ human rights compliance. Thus the standing committee in 1956 noted that the Convention could provide “moral support to peoples that are not party to such rights and freedoms”. There are two reasons for maintaining this objective today: solidarity with others, and a strengthened international legal order: “From the start, the main rationale behind our policy of engagement has been the altruistic desire to improve the lives of people in other parts of the world. However, globalisation and other geopolitical changes are providing a renewed, and stronger rationale for our policy of engagement, as it is helping us in various ways to achieve goals that are in Norway’s interests” and “Norwegian security interests are connected to the development of an international legal order that ensures peace, stability and security, upholds the principles of the rule of law, and safeguards our economic security and living environment as well as key values such as human rights and democracy, within a regional and a global framework.” Furthermore: “In the long term, a stable international legal order can only be developed by countries that respect fundamental human rights. This is also in Norway’s interests.” A preliminary conclusion is that there is no obvious zero-sum game between more power to international human rights bodies and altered opportunities for Norwegian authorities to promote national interests. Some loss of national opportunities can be offset both by the value it represents for Norway that the ECtHR promotes human rights and democracy in Europe, and by the increased room for

21 For similar arguments concerning the EEA, see F. Sejersted, ‘Norges rettslige integrasjon i EU’, Nytt Norsk Tidsskrift, No. 4, 2008.
22 Tore Schei, 2011, p. 327.
23 Recommendation to the Storting No. 224, 1956.
25 Ibid., p. 98.
26 Ibid., p. 116.
manoeuvre conferred on Norway by the reduced opportunities of other states to affect us reciprocally.

4.2 Who Should Control the Selection of Judges?

The classic tripartite division of power entails that the courts and their judicial function should be independent from both the Storting and the government, in order to safeguard the rule of law and prevent the abuse of power. At the same time judges must be elected by bodies that have a sufficiently democratic mandate if the judiciary is to retain its legitimacy. Different states resolve this dichotomy in different ways, for example by requiring that the legislature approve the judge candidates nominated by the executive branch.

A debate that has recently flared up in Norway, concerning election to the Supreme Court, is whether the Storting should play a role in the appointment, either as a consultative body or to approve appointments. Reasons for this discussion may well be judicialization, internationalization, or claims that the selection of judges is politicized. In any case, these developments give rise to several interesting supplementary questions. Should the government and/or the Storting seek to appoint judges to the Supreme Court who are especially skilled at assessing Norway’s action in matters which can be reviewed by the ECtHR? And does internationalization affect how nominations and appointments to the ECtHR should take place?

Supreme Court Chief Justice Tore Schei has recently warned against proposals to expand the role of the Storting in appointing judges. Schei’s comments are based partly on scepticism about findings that suggest a correlation between the party colour of the government and how the judges appointed to the Supreme Court vote. He also points out weaknesses in the system practised in the United States, with its Senate hearings, and the dangers of recruitment on a party political basis.

Other types of influence from the Storting could nevertheless be considered, particularly in the light of internationalization. One reason is that legislators seem less wary of the ECtHR than are the government or the civil service, even when the ECtHR rules against Norway. This may in part be due to the civil service’s desire to safeguard the power of the Storting, but it can also be caused by a desire on the part of certain parts of the civil service to preserve a ‘Yes Minister’ model. The government might hypothetically seek to undermine the Storting’s desire for effective protection of international human rights through its appointments of judges. This, in turn, could justify claims about the Storting’s participation in appointments. However, the Storting can already perform ‘ex post’ control by reviewing the records of the government, cf. the Constitution, Article 75.

27 G. Grendstad et al., ‘Revealed Preferences of Norwegian Supreme Court Justices’. Tidsskrift for rettsvitenskap, 2010, pp. 73-101
30 Similar research on whether some of the Supreme Court judges rule more or less in line with the ECtHR has found no statistically significant pattern, either in terms of professional background or other known variables. A. Follesdal & Høyland, ‘Om avstemningsmønstre i Høyesteretts menneskerettighetsdommer’, unpublished paper, available from the authors.
31 Schei 2011, p. 335.
Does internationalization give grounds to change the appointment process of judges to the ECtHR, so that the nominees will safeguard national interests in the best way? At least four key factors are important in this debate. Firstly, as mentioned above it is unclear what these national interests are that would justify ‘resistance’ by Norwegian authorities toward the ECtHR. Secondly, at any given time the opposition in the Storting might be more committed to using or abusing the legal system than the parties in charge of the executive branch are. Thirdly, the criteria for recruitment and appointment must be clear. For example, research suggests that the judges of the ECtHR recruited from the ministries or with a professional background as judges are more inclined to support the government’s viewpoints than the judges who previously worked as human rights advocates. However, the correlation is weak. Finally, an important consideration is that the Norwegian practice must withstand international scrutiny, and may perhaps even be copied by other countries with different constitutional traditions than our own. It is therefore important to keep in mind that the selection of judges for international courts often has two steps: national nomination and an international selection procedure. Concerning the national nomination process, the European Council Parliamentary Assembly expressed concern over the lack of fairness, transparency and consistency in the nomination of judges for the ECtHR. National recruitment may be appropriate for selection of judges to international courts where each member state has one judge, such as the ECtHR. This is recommended by the Parliamentary Assembly, and is current Norwegian practice.

In the absence of proper national nomination processes, it is difficult to secure the best candidates in the international process. Institut de Droit International suggests that “[n]ominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of candidacy.” This practice is followed in the election of judges to the ECtHR. But this does not guarantee that the most qualified candidates are selected. The Council of Europe Parliamentary Assembly requires that member states nominate three candidates in alphabetical order, and that a subcommittee of the Committee on Legal Affairs and Human Rights conduct interviews with the candidates. The procedure for selecting judges to the ECtHR represents important progress, but there is still no guarantee that the best candidates are selected.

5. Conclusion

The increased use of national and international judicial review has received well-deserved attention. One of the topics that has attracted renewed interest is the independence of judges, who are challenged in new ways in a society where the politicians have chosen to transfer more power to national and regional courts. We have argued that there is no evidence to describe these changes simply as an erosion of

democratic or other forms of legitimacy. We have also emphasized the need to secure other possible grounds for legitimate governance by such courts. In particular, we have pointed out the challenges inherent in appointing and controlling the selection of those judges who must exercise increasing power over elected officials. Judges must be highly skilled, independent and loyal in order to promote a legitimate government – and they must be perceived to be so.