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# Reasoning between Rules and Discretion: A Comparative Study of the Normative Platform for Best Interest Decision-Making on Adoption in England and Norway

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## ABSTRACT

This article examines discretionary reasoning in child's best interest (CBI) assessments in two jurisdictions, England and Norway, in decision concerning adoption from care. The two countries' systems differ in child protection orientations and levels of discretionary autonomy but share the legal and moral yardstick of the CBI. Judgments from the Family Court in England ($n = 29$) and the County Social Welfare Board in Norway ($n = 29$) are analysed through a qualitative content analysis, following the logics of practical reasoning. The analysis provided a rich and detailed testimony of how the CBI decisions were justified and reveal that a similar normative platform was guiding decisions across the countries. There were, however, differences within and between the countries in terms of application and justifications of norms, some of which are likely to be connected to different interpretations of the CBI and others to systemic constructions and discretionary structures. Moreover, having more legislative guidance may have contributed to more explicit and deliberative reasoning in England although it does not appear to ensure consistent or predictable reasoning as inconsistencies and variation were found in both contexts. However, while Norwegian judges' deliberation was found to be less 'balanced', justifications were applied in a similar manner across judgements. Although this contributes to consistency and predictability, the use of non-democratically constituted 'rules' in decision-making poses a challenge for legitimate decision-making.

## I. INTRODUCTION

Discretion is an inevitable and necessary component of child protection decision-making. It allows for professional judgment as well as flexibility and sensitivity to the individuality of cases.[1] While English and Norwegian child protection systems differ in their underlying ideologies and approaches to children at risk, they share the legal

1 A. Falch-Eriksen and M. Skivenes, '3. Right to Protection: An Implementation Paradox?' in M. Langford, M. Skivenes and K.H. Søvig (eds.), *Children's Rights in Norway* (1st edn, Universitetsforlaget, 2019); J.F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation,

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and moral yardstick of the 'child's best interest' (CBI), having implemented the UN Convention on the Rights of the Child (CRC).[2] Article 3(1) of the CRC requires that 'the best interests of the child shall be a primary consideration' in all decisions concerning them, and states party are required to ensure that this right is observed. Applying the CBI standard requires decision-makers to exercise discretion and to make normative evaluations without any clear or objective consensus regarding the values constituting the 'best' or what parameters should be utilised when deciding on the standard.[3] In England, decision-makers are provided with a statutory 'checklist' for applying the standard, but in Norway, any such guidance is scarce. Legal and social science scholars have pointed to the potential detriments of discretion[4] and demonstrated that it leaves room for emotions, presumptions, and individual values to guide decisions regarding children and their families.[5] Essentially, the uncertainty and opacity associated with discretionary practice challenges the principles of predictability and equality before the law while removing democratic control over policy implementation and the enforcement of laws.[6] Political scientist Bo Rothstein[7] has referred to the lack of control and transparency in professionals' execution of discretionary power as the 'black hole of democracy'. In the early 1990s, Stephen Parker[8] urged further inquiry into possible divergent interpretations of the CRC's Article 3(1) on CBI to focus the debate on issues of localised conventions. Thirty years later, his call for more knowledge still applies and little remains known about normative platforms for CBI decisions in different national contexts.

1986); S. Maynard-Moody and M. Musheno, 'State Agent or Citizen Agent: Two Narratives of Discretion' (2000) 10 *Journal of Public Administration Research and Theory* 329.

2 CRC, Convention on the Rights of the Child 1989 [United Nations, Treaty Series, vol. 1577, p. 3]. See also the European Convention on the Adoption of Children (Revised) (2008) Article 4.

3 D. Chambers, 'Rethinking the Substantive Rules for Custody Disputes in Divorce' (1984) 83 *Michigan Law Review* 477; J. Elster, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 *The University of Chicago Law Review* 1.

4 R. Dworkin, 'The Model of Rules' (1967) 35 *The University of Chicago Law Review* 14; J. Elster, *Solomonic Judgements: Studies in the Limitation of Rationality* (Cambridge University Press, 1989); R.E. Goodin, 'Welfare, Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 232.

5 J.E. Artis, 'Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine' (2004) 38 *Law & Society Review* 769; Dworkin (n 4); C. Piper, 'Assumptions about Children's Best Interests' (2000) 22 *Journal of Social Welfare and Family Law* 261; M. Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' (2010) 53 *Acta Sociologica* 339; M. Strasser, 'Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child' (1996) 45 *University of Kansas Law Review* 49; J. Tobin and R. Mcnair, 'Public International Law and the Regulation of Private Spaces: Does The Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 *International Journal of Law, Policy and the Family* 110.

6 R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002); Goodin (n 4); M. Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation, 1980); A. Molander, H. Grimen and E.O. Eriksen, 'Professional Discretion and Accountability in the Welfare State: Professional Discretion and Accountability in the Welfare State' (2012) 29 *Journal of Applied Philosophy* 214; C.E. Schneider, 'Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard' (1991) 89 *Michigan Law Review* 2215.

7 B. Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge University Press, 1998) p. 80.

8 S. Parker, 'The Best Interests of the Child - Principles and Problems' (1994) 8 International Journal of Law, Policy and the Family 26.

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This study aims to tap into the void of discretionary decision-making in welfare states with an empirical analysis of CBI in decisions on adoption from care in England and Norway. Owing to the consequential and normatively complex nature of such decisions, adoptions from care are particularly suitable for studying discretion. The specific objectives are to enhance our understanding of discretionary reasoning in contexts with different child protection orientations and levels of discretionary autonomy and to gain insight into the normative basis of CBI decision-making in child protection. I undertake a text analysis to identify the guiding norms and justifications provided by decision-makers when determining the CBI and aim to explore cross-country similarities and differences. The analysis of the decisions is approached by the logics of practical reasoning,[9] and a qualitative content analysis is used to examine 58 written court judgments about adoption from care (in the years 2016–2017) from the Family Court in England ($n = 29$) and in the court-like administrative decision-making body, the County Social Welfare Board (the Board), in Norway ($n = 29$).[10]

The next section presents the studies' conceptual framework and describes the system characteristics of the two jurisdictions. The third section outlines the theoretical basis for analysis before describing the formal structures for decisions on adoption in England and Norway. Methods and limitations are described next, before the findings are presented and discussed. The final section provides concluding remarks.

## II. DISCRETION AND THE BEST INTERESTS OF THE CHILD

### 1. Discretionary Reasoning and Statutory Constraints

Legal decision-makers are authorised to exercise discretion – to reason using their own judgment – on condition that they can be trusted and held accountable and that their arguments are reasonable and their decisions lawful.[11] Based on ideas from argumentation theory,[12] Eriksen, Grimen, and Molander[13] suggest that discretion may be defined as having an *epistemic* and a *structural* side. The latter designates *the space for discretion*, which constrains or limits discretion, and the former represents the activity of *reasoning* under conditions of indeterminacy or the exercise of professional judgment.[14] This distinction and the assumption of reasoned judgment are important as they provide an analytical premise by which to identify what decision-makers consider 'good reasons' for adoption and acceptable public CBI reasons. Moreover, they serve as a foundation for studying how system context and structural measures in the form of specification of

9 S.E. Toulmin, *The Uses of Argument* (2nd edn, Cambridge University Press, 2003); L. Wallander and A. Molander, 'Disentangling Professional Discretion: A Conceptual and Methodological Approach' (2014) 4 *Professions and Professionalism 1*.

10 The Board operates by the same principles as the courts of law, and I refer to this body as a 'court' hereafter (M. Skivenes and M. Tonheim, 'Deliberative Decision-Making on the Norwegian County Social Welfare Board: The Experiences of Expert and Lay Members' (2017) 11 *Journal of Public Child Welfare* 108). For simplicity, all decision-makers are referred to as 'judges' and all decisions as 'judgements'.

11 Molander, Grimen and Eriksen (n 6); G.C. Christie, 'An Essay on Discretion' (1986) 1986 *Duke Law Journal* 747.

12 Alexy (n 6).

13 (n 6).

14 ibid.

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statutory rules contribute to predictability and to shape and inform discretionary reasoning. Dworkin[15] has described discretion as the 'hole in the doughnut', signifying that the discretion granted to decision-makers is both dependent on and relative to the applicable standards. This understanding corresponds to discretion in the structural sense and can be characterised as either *weak* or *strong*, or as extremities of a continuum where discretion is governed by more or less precise standards set by the relevant authority.[16] Decision-makers in England and Norway are situated at opposite ends of the discretion continuum in best interest decisions, towards the weak and strong ends, respectively.[17] The statutory guidance provided by the Norwegian Child Welfare Act[18] (CWA, s4-1, 1992)[19] consists of substantive assumptions about what is best for a child: participation[20] and 'giving the child stable and good contact with adults and continuity in the care provided'. 'Stability and continuity' may be interpreted as relating both to birth parents (e.g. concerning contact) and to the child's situation of care, which I refer to as the 'stability concern' hereafter. The English welfare checklist (Children Act, 1989 (CA), s1(3); Adoption and Children Act, 2002 (ACA), s1(4)) lists the following 10 key factors that should be taken into consideration in decisions: the wishes and feelings of the child; the child's needs; the child's characteristics; the effects of any change; the likely effects on the child (throughout his life) of becoming an adopted person; the child's relationships with relatives; the ability and willingness of any of the child's relatives to provide a secure environment and meet the child's needs; the wishes and feelings of the child's relatives regarding the child; harm suffered or risk of suffering, and the capability of parents to meet the child's needs.[21] Based on the assumption that rules and guidance constrain discretion,[22] English decision-makers' reasoning may be expected to reflect the content of the checklist and to have greater predictability. Furthermore, legal and street-level bureaucracy scholarship provides a reason to expect that judges at the weak end of the discretion continuum may resort to 'rules of thumb', use their discretion to create rules[23] or exercise discretion in patterned ways.[24]

15 Dworkin (n 4) 32.

16 K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969); C.E. Schneider, 'The Tension Between Rules and Discretion in Family Law: A Report and Reflection ' (1993) 27 *Family Law Quarterly* 229.

17 M. Skivenes and L.M. Sørsdal, 'The Child's Best Interest Principle across Child Protection Jurisdictions' in A. Falch-Eriksen and E. Backe-Hansen (eds.), *Human Rights in Child Protection - Implications for Professional Practice and Policy* (Palgrave Macmillan, 2018).

18 Act of 17 July 1992 no 100 relating to Child Welfare Services 1992.

19 The Norwegian adoption law (Adoption and Children Act 2002) does not include any elements for consideration.

20 The child's right to participate was made a separate provision in 2017 and is no longer a part of 4-1.

21 J. Masson et al., *Principles of Family Law* (Sweet & Maxwell, 2008); J. Thoburn, 'Adoption From Care in England: Learning From Experience' in T. Pösö, M. Skivenes and J. Thoburn, *Adoption From Care: International Perspectives on Children's Rights, Family Preservation and State Intervention* (Policy Press, 2021).

22 Dworkin (n 4).

23 É. Biland and H. Steinmetz, 'Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts' (2017) 42 *Law & Social Inquiry* 298; Schneider (n 16); I. Taylor and J. Kelly, 'Professionals, Discretion and Public Sector Reform in the UK: Re-visiting Lipsky' (2006) 19 *International Journal of Public Sector Management* 629.

24 K. Hawkins, 'Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making' in L. Gelsthorpe and N. Padfield (eds.), *Exercising Discretion* (1st edn, Willand Publishing, 2003); P.

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## 2. Socio-Political Context and Macro-Institutional Structures for Discretion

Research has demonstrated how judicial exercise of discretion varies between national systems with different child protection orientations.[25] Between England and Norway, there are differences in adoption policy[26] as well as child protection orientations and welfare state regimes.[27] Berrick, Gilbert, and Skivenes[28] have classified approaches of child protection systems to adoption into a global typology.[29] The English system's characteristics place it in the *child maltreatment protective system* category, where the system is risk-oriented with regard to the child's original family, focusing narrowly on protection from harm and reflecting a strong family ideology with a high threshold for restricting parental freedom. Regarding adoption, the approach seeks to reduce government responsibility and secure permanence for the child. In the same classification, Norway is categorised as having a *child rights protective system*, where the family life and best interests of the child guide the approach to adoption. These systems are typically characterised by a strong child focus and low thresholds for intervention, with comprehensive sets of services and support aimed at protecting the rights of children. Based on established research knowledge, it is reasonable to assume that decisions on CBI should promote the healthy development of children and ensure that their basic needs are met by 'consistent, safe, and responsive care from parents or parental figures'.[30] However, there is moral disagreement and indeterminacy associated with the standard and there are no universal standards or operational tools for making CBI decisions.[31] Therefore, there is an expectation that not only discretionary space, but also institutional context will influence best interest reasoning,[32] and child protection orientation is anticipated to contribute to variation between countries. However, there are legislative

Mascini, 'Discretion from a Legal Perspective' in T. Evans and P.L. Hupe (eds.), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 2020).

25 J. Krutzinna and M. Skivenes, 'Judging Parental Competence: A Cross-Country Analysis of Judicial Decision Makers' Written Assessment of Mothers' Parenting Capacities in Newborn Removal Cases' (2021) 26 *Child & Family Social Work* 50.

26 T. Pösö, M. Skivenes and J. Thoburn (eds), *Adoption From Care: International Perspectives on Children's Rights, Family Preservation and State Intervention* (Policy Press, 2021).

27 J.D. Berrick, N. Gilbert and M. Skivenes, 'Child Protection Systems: A Global Typology', *International Handbook of Child Protection Systems* (In press); K. Burns, T. Pösö and M. Skivenes (eds.), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press, 2017).

28 Berrick, Gilbert and Skivenes (n 27).

29 This typology builds on and extends the typology previously developed by N. Gilbert, *Combatting Child Abuse: International Perspectives and Trends* (Oxford University Press, 1997), and subsequently, N. Gilbert, N. Parton and M. Skivenes *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011). The three orientations they identify are *child protection*, *family service* and *child-focused*, with England categorized as the former and Norway as a mix of the two latter.

30 S.A. Font and E.T. Gershoff, 'Current Use of the "Best Interests of the Child" Standard in Foster Care Policy and Practice' in S.A. Font and E.T. Gershoff (eds.), *Foster Care and Best Interests of the Child: Integrating Research, Policy, and Practice* (Springer International Publishing, 2020), p. 22.

31 D. Archard and M. Skivenes, 'Deciding Best Interests: General Principles and the Cases of Norway and the UK' (2010) 5 *Journal of Children's Services* 43; M. Banach, 'The Best Interests of the Child: Decision-Making Factors' (1998) 79 *Families in Society: The Journal of Contemporary Social Services* 331; Elster (n 4); R.H. Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

32 K. Hawkins, 'Discretion in Making Legal Decisions' (1986) 43 *Washington and Lee Law Review* 1161; Hawkins (n 24); Mascini (n 24).

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similarities between the two countries' child protection systems in terms of the emphasis placed on family preservation, stability, safety, and the paramountcy of the child's well-being.[33] Moreover, having implemented the CRC, both countries are obligated to recognise the CBI as their primary consideration (CRC, Article 3). In General Comment No. 14[34] on the best interest article (3), the Committee on the Rights of the Child provides party states with guidance for assessing and determining the CBI, including the following seven elements for consideration: the child's views; the child's identity; preservation of the family environment and maintaining relations; the care, protection, and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education. These guidelines are not legally binding but do nonetheless provide an authoritative interpretation of the CRC and could contribute to certain material similarity between countries as to what concerns are taken into consideration in CBI decision-making.

## III. PROCEDURES FOR ADOPTION AND PLACEMENT ORDER DECISIONS

In England and Norway, national child protection legislation emphasises that decisions on adoption shall be made by giving paramount[35] or decisive[36] consideration to the best interests or welfare of the child. In Norway, a decision on the termination of parental rights (TPR) is usually taken together with that of adoption, and while the initial care order may be made together with one on adoption, this rarely happens.[37] Reunification may be a part of the decision, but at the best interest stage of a decision, an application for reunification would already have been rejected. The realistic alternatives in most decisions are thus adoption or continued foster care.[38] Adoption can only be consented to if reunification of the child to his or her parents' care is unlikely, either because the parents are unable to provide proper care *or* the child has become so attached to his or her new environment that removal would lead to serious problems, and if adoption is in the best interests of the child.[39] The child's foster parents are the only eligible adopters, and they must have been proven fit to provide care. Lastly, the conditions of the Adoption Act (2017) must be fulfilled.[40] The decision-making process in the English Family Court has two stages: the threshold stage (CA 1989, s31(2)) and the welfare stage. If the 'threshold test' is considered to have been met, a decision concerning the welfare of the child is

33 M. Skivenes and J. Thoburn, 'Pathways to Permanence in England and Norway: A Critical Analysis of Documents and Data' (2016) 67 *Children and Youth Services Review* 152.

34 UN Committee on the Rights of the Child (CRC), 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)' 29 May 2013, CRC /C/GC/14.

35 s1(1), Children Act 1989 (CA).

36 s4-1, Child Welfare Act.

37 H.S. Helland and M. Skivenes, 'Adopsjon som barneverntiltak' (Centre for Research on Discretion and Paternalism, Bergen 2019).

38 *HR-2020-661-S* (The Norwegian Supreme Court) [92]; BLINDED (n 37).

39 There are no specific conditions for the TPR, but the decision must be in the best interests of the child (CWA 1992, s4-1).

40 CWA Child Welfare Act s4-20. For a comprehensive overview of the decision-making systems in England and Norway, see the respective countries' chapters in Pösö, Skivenes and Thoburn (n 26). See also J. Doughty, '"Where Nothing Else Will Do": Judicial Approaches to Adoption in England and Wales' (2015) 39 *Adoption & Fostering* 105 for a description of the English decision-making system and case law.

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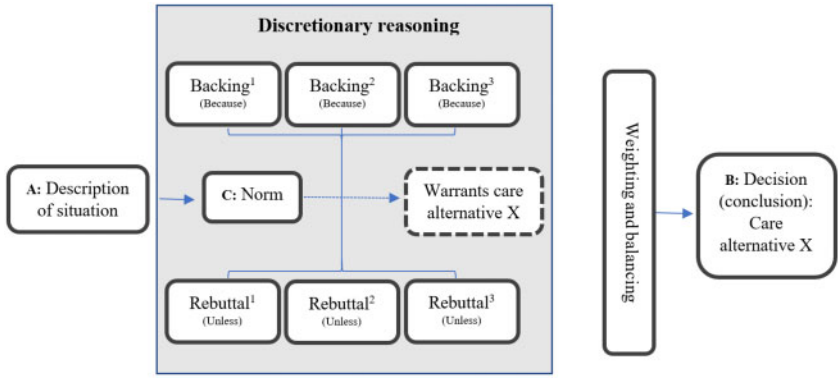


**Figure 1.** The model developed for this study for analysing practical reasoning. The shaded area indicates the subject of study and the stippled borders indicate that the component is provisional.

conducted to determine whether a placement order is in the best interests of the child. The court may make a placement order if it is satisfied that parental consent should be dispensed with (ACA s52), either (i) because the parent(s) cannot be found or lacks capacity to consent, or (ii) because the welfare of the child requires it; all judgments in our sample concern the second alternative. Adopters are usually specially recruited, yet a small proportion of children (10 per cent in 2017–2018) are placed for adoption with their current foster carers.[41] Among the cases in this study ($n = 29$), this applies to two cases (7 per cent).

## IV. EPISTEMIC DISCRETION AS PRACTICAL REASONING

Wallander and Molander[42] suggest that discretionary reasoning should be analysed as a form of practical reasoning that 'aims to reach conclusions about what ought to be done' based on *weak warrants* or *conditions of indeterminacy*. In Toulmin's[43] model, argumentation is composed of three main components: (i) a description of a situation; (ii) the conclusion or course of action drawn upon this description, and (iii) the warrant – the *norm of action* that bridges the first component with the second. The relative strength of a norm of action is found in a continuum from subsumption (if i then ii) to that of an unspecific character regarding interpretation and consideration. In the first instance, there is no discretion, yet along the continuum towards the weak end, where there is reasoning under conditions of indeterminacy, the norm of action should be justified as valid or applicable – or not – given a definite conclusion by providing *backing for* or *rebuttal of* a norm of action. By starting with a theoretical model containing i, ii and iii, as well as the justifications of validity and applicability (backings and rebuttals; see Figure 1), I draw attention to the values and conditions that drive reasoning and the kinds of justifications that are initialised to support or reject the validity of a norm (for a given conclusion) in decisions on

41 Thoburn (n 21).
42 (n 9).
43 (n 9).

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adoption. I refer to the norms as *guiding norms*, which we may understand as norms in a broad sense, with properties similar to those of considerations. In the data material for this study, the justifications provided may be in the form of rebuttals of the norm of family reunification, such as a statement that the parents are unable to take care of their child, so preserving the current legal family constellation is not in the best interests of the child. It could also appear in the form of a rebuttal of the claim that a certain conclusion is supported by a given norm, such as promoting the child's needs and development. Here the norm would not be considered invalid; rather, the justification is concerned with which conclusion (foster care, adoption (placement order), reunification, 'child arrangements order', or special guardianship) is best warranted by the norm and by which means, for example, by claiming that permanence is beneficial for the child's development, and this need would be best met by adoption.

This model provides a useful set of concepts to understand practical discretionary reasoning as a deliberative exercise. The decision-making task differs between England and Norway, and the analysis becomes intricate because several possible outcomes of a decision (e.g. foster care, adoption/placement order, reunification) are explored and compared simultaneously. The choice to focus on norms rather than arguments for or against adoption allows us to overcome this hurdle and be less restrained by the systemic, procedural, and adversarial premises of a judgment. Moreover, as the exercise of discretion is the subject of examination, this approach is beneficial as it focuses our attention on the substantiation of a decision, rather than on the outcome. As noted in previous best interest scholarship, a linear presentation of best interest dimensions involves some form of pragmatism, because:

> . . . there is a fluidity in the decision-making process whereby a factor articulated in one domain or subcategory may dictate certain factors being considered in another domain or subcategory.[44]

Therefore, similar reasoning may subscribe to several norms yet serve different purposes depending on the context and intent of the argument that is advanced. For example, discussions about contact may be relevant for reasoning related to relationships, parental abilities, children's needs, and risk of harm, but depending on how and what aspects of contact are discussed, the argumentation relates to different norms. Moreover, that a norm is not identified does not mean that regard has not been had to the values or considerations relating to it in the case; it merely means that it is not assumed to be part of the best interest analysis.

## V. DATA AND METHODS

### 1. Data Collection

The data material is a part of the larger research project (BLINDED), and detailed descriptions of the collection process as well as ethical considerations and approvals can be found here: BLINDED FOR REVIEW. The English case sample consists of

44 Banach (n 31) 334.

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56 placement order judgments collected from two sources. First, all publicly available decisions on placement orders for 2016 ($n = 29$) were collected through the British and Irish Legal Information Institute (BAILII) database. Second, an additional sample of judgments ($n = 27$) decided in 2016 and 2017 was collected directly from the courts in two large court areas (not publicly available). The BAILII cases are a convenience sample, and the court area cases are representative of their areas but not the country. The case sample from Norway consists of all cases decided by the Board in 2016, 57 in total. The sample is representative, and the judgments were collected directly from the boards (most cases are not publicly available). The 113 case files[45] available across the two countries were renamed to ensure conformity and de-identification. The cases were assigned abbreviated names based on the country (NOR = Norway and ENG = England) and assigned a number by which they were listed randomly. From these 113 cases, 58 ($n = 29$ from each country) were drawn by sampling every other case from the first when listed alphabetically and numerically. See Table 1 for an overview of the characteristics of the cases by full and selection sample.

## 2. Analytical Approach

The data were analysed using qualitative content analysis, applying the logic of Toulmin's model of argumentation in the processes of coding and interpretation. The coded text is presented according to the categories of guiding norms, drawing on common traits of justification and general features of reasoning in judgments in the two systems. This excludes a focus on potential single-case characteristics. The focus was on CBI substance and on the recurring elements of the courts' practical reasoning, highlighting similarities, and differences. In the analysis, two main justification types – backings and rebuttals – are applied to gain an understanding of how discretion is exercised.

### *A. Development of Empirical Categories*

The identification of norms and their associated justifications – the reasoning – was driven by the questions: What is the overarching normative or moral motivation for this line of argumentation and how is it related to the child's welfare? The development of categories and codes for identifying text occurred through an abductive approach. Coding and subsequent content analysis of the reasoning was empirically grounded from reading the judgments and was theoretically informed by sociological knowledge about the nature and dynamics of norms,[46] theories of legal argumentation and empirical research on CBI, and adoption from care[47] and evidence-based

45 The original sample was $n = 118$, but five decisions in total (four from England and one from Norway) were removed from the sample because the harm threshold was not met, because the placement order applications was adjourned, or because a care order was not decided, so the court never assessed whether adoption was in the best interests of the child. One case concerned an application for leave to oppose an adoption order.

46 G. Mackie and F. Moneti, *What Are Social Norms? How Are They Measured? – Prevention Collaborative* (UNICEF/UCSD Center on Global Justice Project Cooperation Agreement, 2015).

47 Banach (n 31); BLINDED (n 37); M. Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' (2010) 53 *Acta Sociologica* 339.

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**Table 1. Overview of the cases by full and selection sample**

| | England | | Norway | |
|---|---|---|---|---|
| | Full sample ($n = 56$) | Study sample ($n = 29$) | Full sample ($n = 57$) | Study sample ($n = 29$) |
| Number of children in cases | 80 | 43 | 59 | 30 |
| Decisions in favour of adoption, $n$ = children (per cent of total number of children) | 73 (91%) | 41 (95%) | 58 (97%) | 30 (100%) |
| Biological parents consent to adoption (number of cases)[a] | Mother: 2 (4%) Father: 2 (4%) | Mother: 1 (3%) Father: 2 (7%) | Mother: 12 (21%) Father: 11 (19%) | Mother: 7 (24%) Father: 7 (24%) |
| Mean age (years) of children at adoption procedure (median age) | 2.4 (1)[b] | 3 (1.2)[c] | 5.6 (4.6) | 5.7 (4.4) |
| Mean age (months) at first entry into care (median age) | 23.4 (7.5)[d] | 24 (13.5)[e] | 6.1 (0) | 7.5 (0) |

Case, parent, and child characteristics.
[a]Of parents present in the case.
[b]Total $n = 75$ due to missing values for $n = 5$ children.
[c]Total $n = 39$ due to missing values for $n = 4$ children.
[d]Total $n = 40$ due to missing values for $n = 37$ children, and three children are still living at home/together with biological parent(s).
[e]Total $n = 16$ due to missing values for $n = 24$ children, and three children are still living at home/together with the birth parent(s).

research and assessment frameworks.[48] Moreover, the law and statutory guidance (such as principles), as well as national and international guidelines promoting children's interests and welfare, were influential in the process. Based on this, a set of norms was developed into empirical categories and guidelines for identifying and codifying the relevant text to reasoning concerning that norm; see Table 2 (see Section IV for reflections on the procedure).

### *B. Coding Process and Reliability Testing*

To analyse the judges' reasoning, the full sample of judgments ($n = 113$) was first read in full to gain an understanding of how the decisions were written and substantiated. Second, the best interest or welfare assessment was identified in the study sample ($n = 58$) by applying a set of rules for delineation. The rules were based on knowledge of legal procedures and frameworks as well as consultation with experts on the English context and the field (legal and social work scholars). Text is

48 J.A. Basarab-Horwath, *The Child's World: Assessing Children in Need* (Jessica Kingsley Publishers, 2001); Department of Health, *Framework for the Assessment of Children in Need and Their Families* (TSO, 2000); H. Ward and R. Brown, *Assessing Parental Capacity to Change When Children Are on the Edge of Care: An Overview of Current Research Evidence* (Centre for Child and Family Research, Loughborough University, 2014).

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**Table 2. A schematic overview of coding text (CBI reasoning) into norm categories**

| | Code descriptions |
|---|---|
| *Family preservation* | *Main category: Reasoning related to family preservation – led by the value of biological bonds.* |
| *Continuing or protecting biological relationships* (Continuing relationships) | Includes reasoning around the child's relationships with biological family members continuing and/or being protected. Including a priori relationships and assumed future value of relationships as well as presumptions of valuable relationships. |
| *Children should be brought up by their parents* (Birth parent preference) | Includes reasoning relating to the possibility of the child being raised by his or her birth parent(s) based on the assumption that growing up with birth parent(s) is preferable and in the child's interest. Includes assessments and statements concerning parental capacity, behaviour, functioning and change capacity, and the value of family membership. |
| *Family and network placement priority* (Kinship priority) | Includes reasoning related to family and network placement and the capacity of such persons to care for the child. |
| Promoting children's needs and development (Child's needs and development) | Includes reasoning related to the status and background of needs and the promotion of the child's emotional, physical, educational, legal, psychological, social, and developmental needs. |
| Safety and protection from harm (Safety and protection) | Includes reasoning around the risk of harm or harm that the child has suffered, where the discussion and argumentation are directed against protection or preventing such harm. |
| Protection of de facto relations and family life (De facto family life) | Includes reasoning related to the relationship the child has with current non-biological carers (foster parents) and the life they live. |
| No delay (No delay) | Includes assessment relating to time and timing of the decision, on delay or the prevention of delay, as well as the time perspective for the child. |

(*Continued*)

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**Table 2. (continued)**

| | Code descriptions |
|---|---|
| Social normality | Includes reasoning of the child as a social individual, includes discussions of having a normal life and normalising the child's situation. Related to the public's role in the child and/or family's life. |
| Respecting the wishes and consent of parent(s) (Parents' voices) | Includes reasoning related to the appreciation of parents' wishes regarding the child's future care (not including their stance on adoption in general yet include the opinions relating to family and network placements) and consent to adoption. |
| Respecting the child's wishes, voice, and opinion (Child participation) | Includes reasoning related to the child's expressed opinion, wishes, and feelings around being their situation, relationships and what should happen next (Guardians' statements are not included unless they convey the child's wishes, voice, or opinions). |
| Respecting the wishes and concerns of surrogate parent(s) (Surrogate parents' voices) | Includes reasoning related to the appreciation of surrogate parents' wishes and concerns relating to the child and their role as parents/family. |

Category short names are in parentheses.

considered relevant in the English judgments if the 'significant harm' threshold is met (the 'threshold test') and when there is a substantive assessment of which order to make (the 'welfare test').[49] In the Norwegian courts, the adoption assessment is usually structured by the four statutory criteria given in section 4-20 (see subsection 3), where each criterion is assessed successively. In most cases, judges are explicit about what criterion they are addressing, and CBI assessments were delineated by identifying the assessment of the 'best interest criteria'.[50] Discussions about care plan technicalities or social workers'/agencies' adherence to duties are not included except when clearly related to the welfare assessment, such as mentions of sibling placements. Discussions and assertions transpiring after a conclusion on an order are not included. Other than this, all text is coded, and text that was considered uncertain or pertaining to other minor discussions was coded as 'other'.[51] Third, all best interest assessments ($n = 58$ cases) were read and reviewed three times before the norms

49 See Doughty (n 40); Thoburn (n 21).

50 When not explicitly stated, which rarely occurs, it is still possible to delineate the best-interest assessment with some discretion based on the judgement style and knowledge of how these decisions are made.

51 In England and Norway, nine and seven cases, respectively, included text that was unclear or other.

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and their reasoning were identified and coded for each assessment based on the schema presented in Table 1. The written text was coded manually by the author using NVivo 12 qualitative data analysis software. The categories and criteria for inclusion and exclusion were reviewed and revised systematically in two rounds, first after three judgments were coded in full, and again after 10. Reliability testing of the coding was conducted by the author in two rounds, first when half of the 58 judgments were coded in full, and then when all were complete, making necessary alterations and adjustments of coding and code descriptions.

## 3. Limitations

For both countries, the analysis of the cases is based on written material. The purpose of legal decisions is to validate the legality of the decision,[52] and there is a chance that the documents do not include all relevant and interesting information from a researcher's point of view, and one must be aware that judicial decisions do not provide a complete picture of the individual case.[53] Nonetheless, the text reflects what the courts define as official argumentation. There are also some limitations to the delineation of the best interest assessments in England, as some judgments are written in a style where the 'welfare analysis' is not explicit. For four of the English decisions, the delineation was characterised as uncertain owing to this 'fluid' judgment style, and a degree of discretion is applied to delineate the relevant text. Moreover, cross-country comparisons and the differences in the nature and format of the decisions may pose a challenge in terms of comparability.[54] As a part of the welfare analysis, the English judgments usually address the question of reunification (or 'no order') in which parental capability to provide care is vital. In the Norwegian judgments, this question is mostly dealt with as a part of the permanence criteria of section 4-20, conducted prior to the best interest assessment. Including the permanence assessment could increase comparability, but studies of the Board's decision-making[55] have shown that the question of reunification rarely concentrates on parental capability, but rather on the child's attachment to his or her foster family, and this does not appear to be a suitable option. Moreover, looking at the case characteristics (Table 2), we know that the English children are younger and placed out of the home later. There are multiple cases, including siblings, and parental opposition is more frequent. Children in the Norwegian adoption cases have been fostered by the same family, often for years, when a decision is made.[56] This is rarely the case for English children, who are usually placed with temporary foster carers

52 T. Eckhoff and J.E. Helgesen, *Rettskildelære* (Tano Aschehoug, 1997).

53 A.-M. Magnussen and M. Skivenes, 'The Child's Opinion and Position in Care Order Proceedings: An Analysis of Judicial Discretion in the County Boards' Decision-Making' (2015) 23 *The International Journal of Children's Rights* 705.

54 D. Collier, 'The Comparative Method: Two Decades of Change' (Social Science Research Network 1991) SSRN Scholarly Paper ID 2905409; A. Meeuwisse and H. Swärd, 'Cross-National Comparisons of Social Work—A Question of Initial Assumptions and Levels of Analysis' (2007) 10 *European Journal of Social Work* 481.

55 BLINDED (n 37).

56 ibid.

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(see Section III). We cannot exclude the possibility that some of the observed differences may emanate from known or unknown systemic or case-based characteristics.

## VI. FINDINGS

The CBI assessments in the English and Norwegian courts are found to be guided by nine norms relating to children's welfare (Table 3).[57] In the following section, I present how the norms are reasoned by introducing the most prominent or recurring justifications provided in each country, focusing on similarities and differences in reasoning. As most decisions end with adoption (see Table 2), the reasoning presented in the table on norms should be seen as what the decision-maker considers normatively important to consider in a CBI decision, not as arguments for or against a conclusion on adoption.

### 1. Family Preservation

The family preservation norm (birth parent preference, continuing relationships, and kinship priority) is found in some form in all but two cases in both England ($n = 27$) and Norway ($n = 27$). While all forms are found in England, family preservation is in all essentials manifested through the notion of continuing relationships in Norway.

#### *A. Family Preservation: Continuing Relationships*

The continuing relationships norm is present in most judgments in both England ($n = 25$) and Norway ($n = 27$). Justifications consist of both backings (relationships should be continued) and rebuttals (relationships should not be continued) in both countries. In Norway, the court often starts by referring to the assumption that contact is good for the child, but quickly departs from that view, and justification consisted mostly of rebuttals, with one exception. In several cases, the likelihood of post-adoption contact is used to back the norm of continuing relationships. Thus, both rebuttals and backings for the norm warrant adoption in Norway. In England, the norm is also backed by reference to post-adoption (indirect) contact, but less often than in Norway. While emphasis was on the mere likelihood of post-adoption contact occurring in Norway, such contact is referred to as a source of knowledge about her family and origins and to preserve valuable relationships, often with siblings, in England. Furthermore, the English backings included references to the negative impact on the child's development of identity and sense of self by losing contact with the birth family, that the child would experience loss and that adoption would deprive the child of the love and devotion from her natural family as well as the possibility of maintaining and forming new bonds with family members. In Figure 2, the model for practical reasoning illustrates the reasoning identified in England.

Common rebuttals across countries are related to weak bonds with parents or lack of attachment and low frequency or quality of contact.[58] Interestingly, although

57 Family preservation has three sub-categories as it was understood through three different dimensions (see Table 2).

58 The child's apparent lack of interest in contact is also found to rebut the norm in some English cases, while the (older) child's opinions regarding ongoing contact were found in a *few* instances included in the Norwegian judgements.

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**Table 3. Guiding norms for CBI decisions by country**

| | $N$ = cases | |
|---|---|---|
| Category | Norway ($n = 29$) | England ($n = 29$) |
| Family preservation (summarised) | 27 | 27 |
| a. *Continuing relationships* | *27* | *25* |
| b. *Birth parent preference* | *3* | *24* |
| c. *Kinship priority* | *0* | *20* |
| Child's needs and development | 29 | 24 |
| Safety and protection | 19 | 26 |
| De facto family life | 27 | 2 |
| No delay | 4 | 16 |
| Social normality | 9 | 10 |
| Parents' voices | 7 | 8 |
| Child participation | 6 | 9 |
| Surrogate parents' interests | 9 | 0 |

Frequency counted per case.

the English court finds that there is parent–child[59] attachment or good or valuable relationships, these are not used to back the norm of continuing relationships. Rebutting the norm based on weak bonds is also less common in England than in Norway. In the latter context, proving that there will be no 'de facto break' between parents and child appears to be a criterion for adoption where it must be justified that the relationship is weak, non-existent, irrelevant or not beneficial for the child:

> It is usually considered beneficial for children to have contact with their parents, . . . In this case, the fact is that there have only been three contact visits between Child and mother since the care order . . .. The Board also points out that in a psychological sense it cannot be considered that there is any attachment between Mother and Child. . . .[60] ANOR41-16

### *B. Family Preservation: Birth Parent Preference*

The birth parent preference norm is present in nearly all English judgments ($n = 24$) and in three judgments in Norway. The validity of the norm is contested in both countries, and justification consists of backings (child should stay/be reunified with parents) and rebuttals (child should not stay/be reunified with parents) in England, whereas only rebuttals are provided in Norway, although reasoning is scarce in the latter context. Rebuttals provided in Norway are based on the improbability of reunification, owing to the parents' lack of potential to change or inability to provide care, or the current care situation of the child. In England, rebuttals are concerned with

59 This includes temporary surrogate parents.

60 Citations are translated from Norwegian to English by the author. All citations were anonymized before transference from the safe desktop where the documents were stored.

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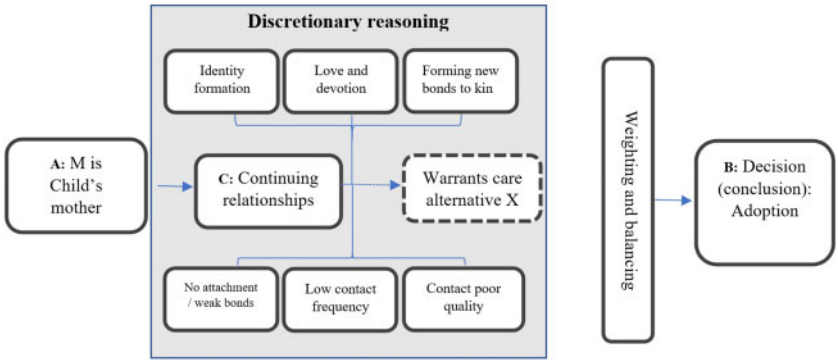


**Figure 2.** Reasoning in England with a selection of rebuttals and backings for illustration.

parental capacities, functioning, and behaviour, as well as parental change. A common denominator is that the factors relating to the above-mentioned areas are assessed negatively and lead to a conclusion of parental inadequacy to protect children or meet their needs, often in a manner that puts them at some risk of harm, as illustrated in the following excerpt:

> The totality of the professional evidence, however, supports the local authority's case that it is unlikely that Mother's improvement will be sustained. The issue is not solely limited to the recurrence of her mental health issues per se, which, by themselves, should be capable of being supported and contained in a way that will protect the children from future harm. AENG37-16

### *C. Family Preservation: Kinship Priority*

The kinship priority norm is only present in England ($n = 20$). Assessments have a pragmatic character of determining whether kinship placement is a realistic or viable option, and both backings (child should be placed with kin) and rebuttals (child should not be placed with kin) are provided. The norm is often rebutted by references to negative assessments[61] of the suggested carers' suitability to provide care for the child or by stating that no suitable carers have been proposed, so it is impossible to meet the expectations under the norm. The likelihood that services could support the placement if the child were in the care of the suggested carers is sometimes considered, but not found relevant. Further rebuttal involves negative assessments of the suggested carer's functioning and ability to protect children and meet their needs, including the capacity to shield children from harmful situations and protect them from the birth parents:

> Aunt and Uncle would not protect Child from the risks arising from the nature of the relationship between his parents as they believe that he should be in

61 These 'viability assessments' determine the likelihood of an identified person or persons being suitable carers for the child. In our sample, these viability assessments are rarely contested and deliberated upon by the court.

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> their care and colluded with the parents in maintaining their relationship. AENG09-16

Backings are less common. Those identified are essentially related to the value of 'natural love' and to remaining in contact with birth family, as well as the perceived ability of services to support the kinship placement adequately.

### 2. Child's Needs and Development

The norm concerning the child's needs and development is present in most English judgments ($n = 24$) and in all judgments from Norway ($n = 29$). Meeting children's needs and promoting their development are the essence of a welfare assessment, so the justifications are intended to rebut (adoption is not the best means to meet needs or promote development) or back (adoption is best means to achieve these aims) the claim that adoption is the conclusion that supports the norm best. That adoption is the best option is contested in both countries, but less so in Norway, as only three judgments include rebuttals.[62] In the English context, rebuttals occur in around half the cases and refer to needs related to the healthy development of identity, self-esteem and knowledge of origins. The ability of different measures (services) to ensure that identity-related needs are met in alternative care is sometimes discussed, and sibling relationships are occasionally included in reasoning that concerns identity. Thus, in England, growing up with or having contact with birth parents would promote a positive sense of identity, and adoption would not be the best means to meet these needs. In Norway, questions related to birth and cultural identity are only occasionally considered and play a minor role in the justifications. Rather, identity formation is closely connected to *belonging* and seen as best met by adoption:

> . . . the safety and identity that an adoption entails is an important factor for best possible development. There are weighty individual elements that speak in favour of adoption. The Child does not know any identity or belonging other than in the foster home. ANOR18-16

In the Norwegian context, backings are presented in a uniform fashion. Stability, predictability and a safe care situation are accentuated as valuable and developmentally beneficial for the child. Preventing insecurity, strengthening the sense of family membership and providing assurance of belonging are also highlighted values. The child is often labelled 'vulnerable', a condition that is seen to induce and enhance needs. Furthermore, the norm is backed by what the judges label 'general knowledge'[63] which is a reference to research stating that for children placed in foster care before they have established any ties (attachment) to biological parents, it is better for their development to be adopted than to remain fostered. In England, stability and permanence are accentuated as valuable conditions of a care situation, and these factors, as well as security and safety, are used to back conclusions on adoption. The

62 The rebuttals are related to identity formation and the view that legal permanence is not necessary to secure practical entitlements, such as inheritance.

63 Often invoked with reference to Supreme Court case law.

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child's characteristics, such as being a baby or having experienced neglect, are commonly cited as relevant for their specific needs.

Generally, backings have many similarities across the two contexts. Needs related to permanence (stability and safety) and attachment are commonly cited and accentuated as valuable for a child's well-being and development.[64] Continuity, commitment, and belonging are also found in both contexts, with the two former aspects being referenced somewhat more often in England than in Norway.[65]

### 3. Safety and Protection

The safety and protection norm is present in most English judgments ($n = 26$) and in two-thirds of Norwegian judgments ($n = 19$). The need to provide children with safety and protect from harm is not contested, and justifications are presented in rebuttal (adoption is not the best means to do this) or backing (adoption is best for these purposes) for the claim that adoption best satisfies the norm. Both backings and rebuttals are given in England, whereas only backings are identified in Norway, as illustrated in Figure 3.

In the Norwegian context, backings in all essentials revolve around two aspects: the prevention of potential harm (destabilisation) related to future litigation (regarding contact or reunification) and shielding the child from contact because of the child's negative experiences and reactions[66] and/or the potentially destabilising effects of continued contact:

> The Board cannot see that the current visitation arrangement has been good for Child. As it appears from the background of the case, the parents have only been able to follow up the contact in some periods of time. This has led to considerable unpredictability for Child . . . The Board [finds] that it is nevertheless probable that even limited visitation will be a cause for concern for the girl's development. ANOR47-16

The English judgments include a wider range of justifications. Backings are generally focused on the risk parents pose to the child's safety by being unable to protect him or her, by posing a threat themselves or by not terminating dysfunctional relationships.[67] Unlike in Norway, there is little focus on harm stemming from ongoing contact. In some judgments, an assumption of 'no risk of harm' at the hands of prospective adopters is also advanced as a backing.[68] In terms of rebuttals, the applicability of the norm in support of adoption is moderated in England by references to the

64 In England, there is also the occasional mention of a child's need for love.

65 Some less prevalent differences between countries are related to the Norwegian courts' mentioning of the child's need to feel equal and seeing legal permanence (understood as legal bonds and rights) as beneficial for development.

66 It is in some cases pointed out that the experienced harm from contact does not necessarily stem from the parents.

67 Reference to current and future risks stemming from foster care instability is also occasionally found and rebuts foster care as an alternative.

68 Having suffered harm in the past is commonly used to back up the relevance of the need for protection from harm in England, yet the risk of future harm is not necessitated by references to having experienced harm.

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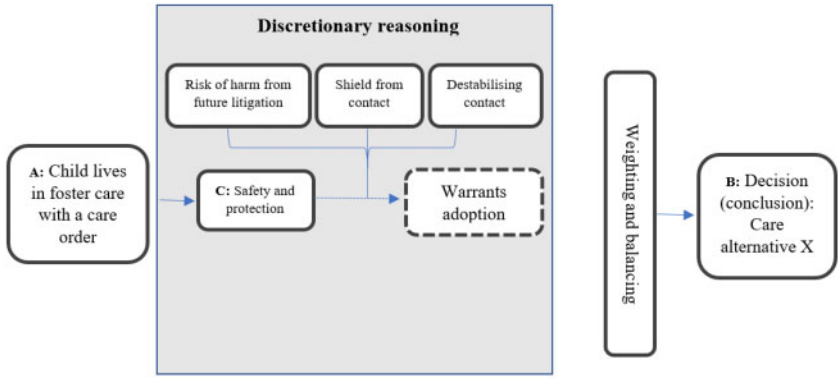


**Figure 3.** Reasoning in Norway with a selection of backings for illustration.

risk of emotional harm associated with adoption, such as loss of family relations, insecurity regarding the ability of public services to mediate the risk of (emotional) harm if adopted, and the risk of adoption breakdown. Two general observations are that reasoning is mainly oriented towards parental capacities and behaviour (though the substance differs) in both countries, while the focus on safety is stronger in England than in Norway.

## 4. De facto Family Life

The *de facto* family life norm is included in the English cases where the adopters are known ($n = 2$) and in nearly all Norwegian judgments ($n = 27$). Only backings are provided, although some references are made to rebutting concerns in one English judgment: potential feelings of guilt in adolescence, ethnic mismatches and the loss of a birth family are considered in relation to discussions of providing the *de facto* family *de jure* responsibility. In Norway, backing of the norm takes a similar form, focusing on attachment and healthy development: the child's attachment is to the foster family and not to the biological parents, so there is a need to consolidate family membership where 'parents will be parents in full value' and furthermore, the court describes the foster parents as 'all the child knows' and the foster home as what he/she sees as 'home'. This should be seen in the context of Norwegian judges' rule-like adherence to proving that there would be 'no *de facto* break' in parent bonds, which is often counterpoised with the existing bonds between the child and his or her foster parents. Occasionally, the court also highlights the need to provide the family with autonomy: to allocate decision-making authority and provide the foster parents with *de jure* parental responsibility.

As the norm is found in only two judgments in England, there is little basis for comparison, but the English backings relate to the child's positive relationships with siblings in the surrogate home and thriving in a stable and loving environment where she or he has received appropriate care since birth and is forming attachments.

## 5. No Delay

The norm of no delay is more often applied in England ($n = 16$) than in Norway ($n = 4$) and is concerned with the relevance of time in the decision. The justification

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consists mostly of backings, and there is general agreement that adoption is warranted by the norm of no delay. However, the backings are somewhat differently framed, revealing different motivations. The focus in England is on avoiding delay, as this is seen to prejudice the child's development and it would be 'unfair' to the child to wait any longer. In Norway, no delay is about the appropriate timing in terms of the child's development and the absence of good reasons to delay a decision. What unites the two courts' reasoning is the notion of realism; given the situation, adoption is the only realistic option. The few rebuttals found were similar across countries and related to the potential for change in parent(s) – and in Norway also the children's – circumstances.[69]

## 6. Social Normality

The norm of social normality is equally prevalent in England ($n = 10$) and Norway ($n = 9$). The need for a normal life without state intrusion is not contested (no rebuttals are given), and there is agreement that social normality warrants adoption. The norm is backed in both countries by assertions that the child should have the ability and opportunity to live a 'normal life', without the involvement of local authorities. Some differences are also found. There is less about stigma in the Norwegian than in the English backings, and more about independence for the family (state involvement is unnatural and not needed as the situation stands) in the former context. Normality is closely connected to the promotion of the child's needs and protection from emotional harm and is seen as grounds for good development and the avoidance of harmful circumstances. The former is more common in Norway and the latter in England:

> The statutory parent in the form of the local authority, regularly visits. It checks up. It summons meetings and restricts what would otherwise be normal family life and so, with the best will in the world, it also comes with a stigma. AENG05-16

## 7. Parents' Voices

The norm of parental voice is found in eight English and seven Norwegian judgments. As it is somewhat dependent on parents' expressing either a positive attitude, consent, or lack of opposition to adoption, this norm usually warrants adoption. In addition, parents' opinions regarding placement details, such as whether to place children together and with whom, are also considered in England without this warranting a particular conclusion. The court describes parents' wishes mostly without any rebuttals or backings, but in some instances, parents' statements are followed by an assessment of the realism of their wishes being met, as well as the potential (dis)advantages and consequences of doing so. In Norway, the norm is occasionally backed by reference to the legality and ethical legitimacy of the parent's expressed views and reasons for consenting, but there is generally little justification provided for the

69 Waiting to see whether siblings may be placed together is found in a few instances in England.

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validity or applicability of the norm. In some cases, parents' wishes concerning post-adoption or name choices are referred to:

> Another important factor is that the biological parents are not negative towards adoption. At the same time, the mother wants visitation, although she does not set this as a condition for her consent to adoption, as the father does. ANOR47-16

### 8. Child's Participation

The norm of child's participation is present in nine English and six Norwegian judgments. No rebuttals are given, but the authenticity and relevance of the child's opinion are deliberated in the latter context. In the Norwegian judgments, the participating children wish to be adopted, and there are some mentions of children's wishes concerning contact. In some instances, the norm is backed by reference to the benefits of meeting the child's wishes and the potential risks of not doing so, but otherwise, there is little justification provided for the validity or applicability of the norm.[70] When the child's opinion is included in the Norwegian CBI assessments, it supports adoption, and the children heard are with one exception (a 5-year-old) over 9 years old.

In eight of the nine English judgments where the norm is invoked, the court finds that the child is too young to express an opinion and assigns the *hypothetical* or *assumed* opinion that he or she would prefer to live (or remain in contact) with their parents if this were safe or in his or her best interests:

> He would no doubt wish to be placed with his family if that is a safe option and would wish to maintain some form of contact with or understanding of his birth family . . .. AENG11-16

In these cases, the child is an infant and the norm is seen as being best met by warranting a reunification or a non-permanent order. The two children (in one case) whose feelings are directly expressed are 5 and 7 years old, and in these cases, the norm warrants adoption.

### 9. Surrogate Parents' Interests

The norm of surrogate parents' interests is only found in Norway, where it is invoked in nine judgments. The norm justifies adoption and the court backs the norm by emphasising that the surrogate parents need assurance the child belongs with them, to provide domestic tranquillity, and to respect their wish to adopt the child. If the foster parents are granted this assurance, it is thought to have positive effects on the child and the care that he/she receives.

> Correspondingly, adoption will provide the foster parents with security that Child belongs to them. The Board believes this is suitable to further strengthen

70 In total, 13 of the 30 children in Norway and 10 of the 43 in England are aged 5 years or older.

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> the relationship between them, and give them reassurance that Child will grow up in their care. ANOR19-16

To some extent, this reasoning also reflects the need to protect surrogate parents against external instability caused by involvement with biological parents through the child protection agencies and litigation.

### 10. Summary of Justifications

For family preservation, the validity of the norms was questioned, while safety and protection and the child's needs and development had its applicability questioned as a norm that warrants adoption. For parents' voices, the validity of the norm as well as its applicability as a norm that warrants adoption was questioned, yet little justification is provided. Child participation is not rebutted but the authenticity and relevance of participation is discussed. The norms on no delay and social normality are usually not contested and are largely accepted as valid norms in favour of adoption. In Norway this also apply to the applicability of surrogate parents' interests and de facto family life as norms that warrant adoption.

## VII. DISCUSSION

This comparative analysis of 58 judgments on adoption from care in England and Norway provides a rich and detailed testimony of how CBI decisions are reasoned. Below, I focus on how judgments are reasoned and on the relevance of discretionary structures by discussing the normative platform for CBI decisions, cross-country differences and approaches to justification.

### 1. The Normative Platform

The nine norms can be divided into three categories depending on their status in the judgments (see Table 4). First, there is a set of *core norms* that are consistently applied in both countries. Second, there are *system-dependent core norms*. Third, *irregular norms* are found in both countries, but are irregularly applied and vary in importance between the two.

**Table 4. Categorisation of norms according to their status in judgments**

| Core norms | System dependent core norms | Irregular norms |
|---|---|---|
| Family preservation: Continuing relationships | Family preservation: Kinship priority | Surrogate parents' voices |
| Child's needs and development | Family preservation: Birth parent preference | Parents' voices |
| Safety and protection | De facto family life | Child's participation |
| | | No delay |
| | | Social normality |

Although system characteristics do not exclude the possibility of this norm arising in Norway, this topic will be mainly discussed as part of the 'reunification criteria' in section 4-20 (para. 3 point a).

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The analysis has identified a common normative platform, whereby the best interests of the child are decided by consideration of family preservation, either through reunification, contact or kinship placements, meeting the child's needs and promoting his or her development, keeping the child safe and protected from harm and protecting the de facto family life. Related themes have also been found to underpin child protection decision-making and understandings of national policy in other contexts,[71] as well as in the two countries studied.[72] Similar traits in the normative platform for reasoning were expected because of the countries' common obligations under the CRC, and their shared legislative emphasis on family preservation, child's well-being, permanence (stability) and safety that are all strongly reflected in the three core norms. The core norms also reflect some of the elements listed in General Comment No. 14,[73] in particular, preservation of the family environment and maintaining relations and the care, protection and safety of the child. However, the outlier is the child's participation, which is only sporadically included despite being explicitly backed by law. Article 12 of the CRC entails that children have the right to be heard, and that their age and maturity is only important in terms of weighting their views or deciding how the child should best participate.[74] The lack of adequate consideration of this norm illustrates the ongoing struggles of securing children's participation in cases that concern them,[75] and particularly in adoption proceedings.[76]

In her analysis of Israeli court judgments on TPR, Ben-David[77] similarly found that the deliberations revolved around issues of family preservation, safety, and normative development, noting that essentially, the dilemma in cases on adoption (TPR) is to decide:

> whether it is in a child's best interests to be raised by his/her biological family or whether it is necessary to violate family intactness and privacy in order to form an adoptive framework for ensuring the child's security and normative development.[78]

The familiar source of tension between family preservation and permanence planning in modern child protection law[79] is thus found to be at the centre of CBI

71 For example, E. Keddell, *Beyond Care versus Control: Decision-Making Discourses and Their Functions in Child Protection Social Work*, Thesis (University of Otago 2013).

72 BLINDED (n 37); K. Križ and M. Skivenes, 'Street-Level Policy Aims of Child Welfare Workers in England, Norway and the United States: An Exploratory Study' (2014) 40 *Children and Youth Services Review* 71.

73 CRC Committee (n 34).

74 C. Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' (2014) 21 *The International Journal of Children's Rights* 590.

75 Magnussen and Skivenes (n 53); G.G. van Bijleveld, C.W.M. Dedding and J.F.G. Bunders-Aelen, 'Children's and Young People's Participation within Child Welfare and Child Protection Services: A State-of-the-Art Review' (2013) 20 *Child & Family Social Work* 129.

76 Fenton-Glynn (n 74); A. McEwan-Strand and M. Skivenes, 'Childreńs Capacities and Role in Matters of Great Significance for Them' (2020) 28 *International Journal of Children's Rights* 632.

77 V. Ben-David, 'Court Considerations in the Termination of Parental Rights: A Comprehensive Analysis of Israeli Court Decisions' (2016) 54 *Family Court Review* 591.

78 ibid 599.

79 P. Parkinson, 'Child Protection, Permanency Planning and Children's Right to Family Life' (2003) 17 *International Journal of Law, Policy and the Family* 147.

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reasoning in both England and Norway, albeit with some differences in the interpretation and use of elements of the two pillars. I elaborate on this point in the next section.

Actualisation of the 'irregular norms' partly depends on case characteristics, inter alia parental consent to adoption or preferences for whom the child should be placed with, and some are closely connected to checklist factors such as the wishes and feelings of the children. Overall, these norms are actualised in addition to the core norms, and the use of the irregular norms involves professional judgment, for example, the norms may be applied supplementary to strengthen the overall argument[80] (cf. Wright, 2002 on cumulative case arguments). It could also be expressions of personal preferences or values. These norms were also less commonly contested and were accepted as valid or applicable in relation to the core norms. The findings suggest that they are either less ethically challenging and socially acceptable or that their theoretical underpinnings are perceived to be less ambiguous.

## 2. Justificatory Differences along the Discretion Continuum

Probing into the justifications reveals signs of not only convergent, but also divergent reasoning across the core norms that nuance the impression of a common normative platform. The findings effectively show a distinctive cross-country difference in how some norms are substantiated in the decision-making process. Moreover, as anticipated, there are indications that the welfare checklist plays a role in informing reasoning in the English context, and the analysis suggests that this could matter in terms of the broader deliberations. However, it does not justify the conclusion that more CBI guidance improves consistency or predictability, or that it grants assurance against factors being excluded, or absorbed or subordinated to other concerns.

First, there were differences in the invocation of core norms. The safety and protection norm was more prevalent in England ($n = 26$ vs. $n = 19$ in Norway), whereas the child's needs and development were more prevalent in Norway ($n = 29$ vs. $n = 24$ in England). Whilst some of the observed differences may stem from country-specific case profiles, the greater focus on safety and protection was expected as the English child protection system's main task is to protect children from harm rather than to promote their development.[81] Conversely, the framing of adoption policy in the child-focused Norwegian system is said to be strongly influenced by therapeutic culture.[82] By revisiting the checklist items, we also see that safety and protection, family preservation, and to some extent, the child's needs and development, are directly reflected in the judgments. At the same time, most of these norms were also found with a similar frequency in Norway and the capacity of the checklist to shape the normative platform appears limited, except perhaps regarding risk, safety and protection and adherence to kin as potential carers. That the core norms

80 See, for example, R.G. Wright, 'Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action' (2002) 23 *Pace Law Review* 1 on cumulative case arguments.

81 Gilbert, Parton and Skivenes (n 29).

82 Berrick, Gilbert and Skivenes (n 27); Ø.S. Tefre, 'The Child's Best Interests and the Politics of Adoptions from Care in Norway' (2020) 28 *The International Journal of Children's Rights* 288.

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are directly backed by law and made explicit in legal documents (GC No. 14, CRC, national legislation) is probably a more relevant observation.

Second, in terms of substantiation, the most notable and relevant differences in the justifications for invoking the common core norms were the English courts' emphasis on the birth family as important for identity development, attention to siblings, focus on the risk of emotional harm arising from becoming an adopted person, inattention to potential harm from ongoing contact, shifting attention from existing attachments/bonds and finally, the absence of discussions on post-adoption contact. This may be explained by (i) the welfare checklist's explicit reference to a broader family, (ii) the risk orientation of the English system, (iii) the influence of checklist factors on the life-long effects of adoption, risk of harm and children's characteristics, (iv) the English system's strong permanence policy, and (v) statutory guidance for continuity and stability in Norway. As an example, let us look closer at identity. This is an explicit right under the CRC (Article 8); furthermore, it is one of the elements listed in GC No. 14. Even though there is a connection to development in both contexts, the two countries use very different conceptions of what contributes to and matters most for identity. Identity development is connected to the adoptive home in Norway and is only rarely mentioned in relation to the birth family.[83] These mentions were essentially related to cultural concerns, and it is possible that identity might be interpreted as applicable only to those with a different ethnic/cultural background, not to ethnic Norwegians. According to Grotevatn,[84] identity 'refers to one's sense of continuity over time, as identity involves construction of linkages across one's past, present, and future'. So while the average child in the Norwegian cases would have been placed at such a young age that his or her identity would be developed as a member of the foster family, the lack of attention to the child's 'birth identity' and potential future problems in relation to being an adopted person could be problematised.[85]

Third, in terms of approaches to discretionary reasoning, the main differences between countries were that on average, more norms were invoked per judgment and justifications included more backings and rebuttals on the weak end of the discretionary continuum (England) than on the strong end (Norway). Possible explanations for this are that: (i) the nature of the decisions generates more reasoning in England as a wider range of care arrangements are up for discussion, or (ii) the checklist engenders broader deliberation. I will return to the country-specific forms of reasoning in Section VII.3.

Fourth, with regard to decision-making consistency within the countries, there are indications that some checklist factors are more influential than others, for example, risk of harm versus children's wishes and feelings. Moreover, irregular applications of (non-core) norms were found in both contexts, and there was inconsistent attention to certain elements included in justifications, as illustrated by the inconsistent application of rebuttals and backings across judgments. However, the inconsistencies do

83 Birth family identity may be embedded in the Norwegian court's emphasis on informal contact post-adoption; yet, this is speculative.

84 H.D. Grotevatn, 'Coming to Terms with Adoption' (1997) 1 *Adoption Quarterly* 3, 5.

85 see also BLINDED (n 37).

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not appear to be greater in Norway than in England. On the contrary, discretionary reasoning relating to the core norms appears to be exercised in a similar manner across judgments, owing partly to a narrower application of justifications, as well as to what is found to be rule-like adherence to reasoning of certain justifications, such as demonstrating weak child–parent bonds or attachment, and inversely, good attachment to the foster parents. There are several possible and potentially coincidental explanations for this. First, it could be related to the Norwegian case profiles: the cases are similar, the care alternatives fewer and the children are often placed as infants with the adoption seekers. Second, there could be something to the expectation that at the strong end of the discretion continuum, rules arise from below and provide patterned reasoning. Third, the stability concern has an obvious influence on reasoning, and while statutory guidance is scarce, there is a possibility that it is precisely this that focuses reasoning on adherence to the existing guidelines – albeit with the obvious caveat that child participation is partly neglected. Fourth, and most importantly, there is an obvious overlap in the courts' reasoning with that of the Supreme Court,[86] suggesting that in the absence of rules, Supreme Court case law has become the main source of substantial discretionary decision-making. This could contribute to consistency across judgments and individual courts.

## 3. Justificatory Approaches

The present analysis revealed that the two countries' courts had different discretionary approaches to building a CBI decision. This suggests that decision-makers exercise discretion in how to proceed with the CBI assessment, not only in how to substantiate it. In the Norwegian context, most norms were either backed or rebutted, meaning that argumentation appeared 'unbalanced' and was mostly – although not exclusively – aimed at rebutting the norms that would reasonably oppose adoption and vice versa, backed the norms that would reasonably support it. On the other hand, English judgments included both rebuttals and backings for most norms. Summers and Taruffo[87] have identified the following three patterns of justification in legal argumentation that may be applied to understand these different approaches: 'single argument', 'cumulative', and 'conflict settling'. The 'conflict settling' approach, where conflicting arguments are provided for each side and deliberated before the 'conflict' is settled by weighting and balancing, is best applied to explain the practices of the English court. The Norwegian court leans more towards a 'cumulative' approach, where different arguments are included but in varying degrees, point to the same conclusion. Although Norwegian judges balance and weight arguments against each other, the reasoning leading up to this is not deliberated in dialectic or open forms. The differences could be related to different legal cultures.[88] Other than this, there are several possible

86 See L.R.L. Bendiksen, *Barn i Langvarige Fosterhjemsplasseringer - Foreldreansvar Og Adopsjon* (Fagbokforlaget, 2008); BLINDED (n 37).

87 R. S. Summers and M. Taruffo, 'Interpretation and Comparative Analysis' in N. MacCormick and R.S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (Aldershot, 1991).

88 See, for example, C.N.K. Franklin, 'A Legal Culture "Take" on the Legal System of England & Wales' in J.Ø. Sunde, S. Koch and K. Skodvin, *Comparing Legal Cultures* (1st edn, Fagbokforlaget, 2017); A.R.C. Simpson, 'An Introduction to Scottish Legal Culture' in J.Ø. Sunde, K. Skodvin and S. Koch, *Comparing Legal Cultures* (1st edn, Fagbokforlaget, 2017).

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explanations with different implications for decision-making quality. First, as a tool for discretionary decision-making, a possible effect of the checklist is that it compels courts to engage in a deliberative discourse and provide explicit reasons relating to the factors in the checklist. Such an activity is believed to increase accountability and rational outcomes,[89] and the lack of reasoning may be seen as reducing the quality of the Norwegian judgments. Second, the difference may stem from the compositions of the courts and judgment-writing practices.[90] In England, decisions are often direct transcriptions of the oral hearing,[91] while decisions in Norway are authored in retrospect. Moreover, while one judge sits on the Family Court, the Norwegian Board is composed of three decision-makers.[92] It is thus possible that the written judgments of the Board are processed more thoroughly and its decision-makers participate in a more deliberative process in which consensus about the decision and its justifying reasons has been reached 'backstage'. In this scenario, the lack of explicit justifications for or against a conclusion do not necessarily have an impact on decision-making quality. Third, the English child protection system's risk orientation may lead judges to consider the potential risks of any given order to a larger extent than is expected in the Norwegian context, thereby stimulating reasoning. Fourth, the difference may stem from the nature of the decision-making task: the Norwegian court's CBI decisions entail determining whether adoption is a better option than foster care, while English judges are expected to undertake 'a holistic evaluation' of each available option and often approach the decision in a hierarchical manner.[93] It is reasonable to believe that the latter approach would require that all possible outcomes, with their associated benefits and disadvantages, are considered more thoroughly.

## VIII. CONCLUDING REMARKS

This article has contributed to filling the void of discretionary reasoning in welfare states and enhancing our knowledge about the normative basis for CBI decision-making in child protection. On the one hand, the analysis has drawn attention to 'localized' interpretations of the CBI principle that Parker[94] urged as a step toward a constructive debate on CBI variation. Different elements were included or emphasised in reasoning, some of which are likely to be connected to systemic constructions and discretionary structures. Moreover, while inter- and cross-country differences can be both desirable and unavoidable, the question nonetheless arises whether England and Norway are adhering to their obligation to guarantee equality of treatment in compliance with human rights.[95] On the other hand, a core normative platform guided by similar values and interests was identified. This indicates some convergence in what are considered good reasons for adoption and that the ethical

89 See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg, First paper back edition 1998, The MIT Press, 1996); Molander, Grimen and Eriksen (n 6).

90 See, for example, J.N. Drobak and D.C. North, 'Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations' (2008) 26 *Journal of Law and Policy* 131.

91 Judgments may also be reserved, and issued in writing at a later date. The oral proceedings are only transcribed if this is requested by any of the parties.

92 Skivenes and Tonheim (n 10).

93 J. Masson, 'What's Wrong with Linear Judgments?' (2014) 44 *Family Law* 1277.

94 (n 8).

95 E. Keddell, 'Current Debates on Variability in Child Welfare Decision-Making: A Selected Literature Review' (2014) 3 *Social Sciences* 916.

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dilemmas facing child protection decision-makers in CBI decisions on adoption from care are cross-national. The state has secondary responsibility for children, and as the tension between the positive and negative obligations of the state is at its pinnacle in decisions on adoption from care, ensuring substantive legitimacy becomes key. An advantage of rules is that they may contribute to legitimising decisions by connecting reasoning to a democratically constituted standard. Although it is not a remedy for the shortcomings of the best interest standard, the checklist is reflected in reasoning, and there are indications that statutory operationalisation of the CBI has benefits for legitimate reasoning. Reasoning in England was more explicit and deliberative; however, its capacity to secure consistency or predictability was still found to be rather limited.

While the justifications for core norms were similarly applied across judgments in the Norwegian context, there are some issues with the court's practice. First, while reasoning appeared patterned and Supreme Court case law is a legitimate legal source, it is not democratically constituted law. Second, while reasoning might arise from acceptable sources and established structures, dearth of deliberation and explicit argumentation is problematic when dealing with normatively intricate questions. The European Court of Human Rights has criticised the Norwegian courts for not adequately debating or reasoning their decisions, and while several possible explanations are presented for the practices that were revealed, transparency in decision-making is nevertheless essential. Explicating the factors considered to constitute the dilemmas facing decision-makers, as well as the argumentation for or against a given action, is necessary for critical evaluation of 'professional acts and the prevention of unthoughtful, arbitrary decisions and acts'.[96]

This study has illustrated what legal decision-makers in two European welfare states invoke as public reasons in CBI decisions on adoption from care. The findings of this study are vital building blocks for further research that should also seek to go beyond explicit argumentation and investigate implicit and subjective reasoning.

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96 R. Osmo and R. Landau, 'The Need for Explicit Argumentation in Ethical Decision-Making in Social Work' (2001) 20 *Social Work Education* 483, 484–485.

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