Discretion and the Demand for Reasons

Justifications for the Child's Best Interests in Decisions on Adoption from Care in England and Norway

Hege Beate Stein Helland

Thesis for the degree of Philosophiae Doctor (PhD)
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Scientific environment

While writing this thesis I have been employed as a PhD candidate at the Centre for Research on Discretion and Paternalism and the Department of Administration and Organization Theory, The Faculty of Social Sciences, University of Bergen. I have been a member of the research group Law, Democracy and Welfare.

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Abstract

This thesis asks how decision-makers with extensive discretionary authority justify strong state interventions on behalf of children in the child protection system. The empirical case under study is adoption from care without parental consent, and the thesis is examining how legal and professional child protection decision-makers in Norway and England exercise discretion and justify a decision regarding adoption by applying the 'child's best interest' standard. The overreaching research question of the thesis is: How do legal and professional decision-makers justify the child's best interest in decisions on adoption from care? With a perspective on legitimacy as procedural and related to the output of government actions, the thesis applies a theoretical framework based on theories of political and democratic legitimacy, deliberative theory, and discretion. The analytical framework is built on the premise of a 'demand for reasons': that providing reasons and justifying one's discretionary actions are conditions for legitimate decision-making. The analyses are qualitatively oriented, and the research question is sought answered by studying written legal decisions and judgments, and survey data from a vignette study.

The thesis consists of four articles. Articles I, II and III focus on the Norwegian context, while Article IV compares the Norwegian context with the English. Decision-making is studied at three levels: in the municipal child protection agencies, in the legal first instance the County Social Welfare Board (the Board), and in the Norwegian Supreme Court, the apex of the judicial system. Additionally, judgments from the Board are compared with judgements from the English Family Court.

Article I focuses on the discretionary reasoning of child protection workers and legal decision-makers in the Board. By presenting decision-makers with a constructed case scenario (a vignette), this article seeks to discern how decision-makers justify their decision on adoption and to locate the pivotal dimensions in their best interest assessment. The results show that although variance in reasoning is located within and between decision-maker groups, the similarities are prevailing. The factors with power to transform a decision are focused on the parents' commitment and capacity to change

as well as the relationship the child has or could have with his parents, suggesting that the child-centered law in Norway is a step ahead of practice. The uniformity in attitudes contributes to some predictability, but it entails the risk that ideology is a force that governs discretion, and the legitimacy of the reasoning can be questioned.

Article II investigates how decision-makers in a legal setting – the Board – understand and make use of the social science concept 'attachment'. By analysing all adoption decisions made by the Board in 2016, decision-makers' use of attachment to inform their decisions is mapped. We find that attachment has a prominent position in decisions on adoption. There is variation in the conceptualization of the concept, and that it is understood both as a 'non-psychological' and 'psychological' concept. Attachment is often applied in a binary manner, where the Board assesses attachment as being either present or absent in parent-child relations. When essential concepts are interpreted and applied differently, the legitimacy of both the responsible institutions and the decisions themselves are challenged.

Article III analyses the Norwegian Supreme Court's best interest argumentation in judgments on adoption. The aim is to assess the legitimacy of the decisions from a deliberative perspective of decision-making and to map and critically analyse the Court's justifications. The findings show that the decisions are reasoned in a similar manner, and that conclusions are guided by norms of biology, vulnerability, and stability for the child. However, discretion is applied differently across decisions, and the reasoning and balancing of individual arguments vary. The critical evaluation displays weaknesses in all judgments: one important blind spot is the failure to include the child's views in the decision-making process. The development over time in terms of delivering rational, well-reasoned and thorough judgments is nonetheless positive.

Article IV examines best interest reasoning of legal decision-makers in the Family Court in England and in the Board in Norway. By studying court decisions, the purpose is to enhance our knowledge on discretionary reasoning and of the normative basis for the best interest principle in child protection decision-making. The analysis shows that

a similar normative platform is guiding decisions across jurisdictions. However, there are inconsistencies and variation found both within and between countries in the application and justification of norms. The findings indicate that having more legislative guidance may contribute to more explicit and deliberative reasoning in England, although it does not appear to ensure consistent or predictable reasoning. Moreover, Norwegian judges' deliberation is found to be less balanced, but justifications are nevertheless applied similarly across judgements. This contributes to consistency and predictability, but the use of non-democratically constituted 'rules' in the decision-making process poses a challenge for legitimate decision-making.

Overall, the discussion concentrates around four main findings. First, the findings indicate informal patterns of behaviour and rule-making practices by decision-makers. Second, the articles have shown variance and inconsistencies in best interest justifications. These two findings point to exercises of discretion that may challenge the legitimacy of decision-making. Third, best interest considerations identified in the four articles are synthesised and mapped and show that best interest reasoning is mainly child-centred, but also vested in the dilemma of liberalism where respect for parental liberty and family autonomy clash with demands to protect the needs and welfare of children. There are also certain trends and caveats identified in decision-makers' substantiation of the child's best interest, related to understandings of the child's identity, sibling relationships and how a child's 'vulnerability' is used in argumentation. The findings furthermore indicate that 'exceptional reasons' for adoption are found when a child is in a placement that he or she experiences as 'home' and when he or she is safely attached to his or her foster parents, in combination with birth parents that are deemed unable to change, commit or represent something positive for the child (through contact). And fourth, the findings show that children's views are often left out of the decision-making process, and most often without any justifications provided that allows us to understand why they are not included. I discuss these shortcomings in relation to the 'child-centered' child protection orientation in Norway. Policy implications of the findings are discussed, and five main areas for further research are suggested.

List of Publications

Article I: Helland, H. S. (2020). Tipping the Scales: The Power of Parental Commitment in Decisions on Adoption from Care. *Children and Youth Services Review*, *119*, 105693. https://doi.org/10.1016/j.childyouth.2020.105693.

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Contents

1. Introduction

The modern welfare state has delegated great discretionary authority to bureaucrats and legal professionals to define the needs and interests of citizens in decisions that affect them. In serious child protection matters, having discretion involves the power to define the border between public and private responsibility for children. Along with this entrustment comes the responsibility to exercise discretionary power in ways that are both legitimate and justified: Decision-makers at all levels of democratic governance are granted with discretion with the expectation that they will pursue the social goals set out in the democratic mandate (Goodin, 1986) and under the condition that they can be trusted and held accountable, that their arguments are reasonable and their decisions lawful (Christie, 1986; Molander et al., 2012). In child protection the social goal is to ensure children's needs and right to protection, and all decisions should be made with the child's best interest in mind. Child protection decision-makers are therefore equipped with discretion to determine what is in the child's best interests in each individual case (Skivenes & Søvig, 2016). The discretionary component is thus necessary to secure justice for children and their families (Handler, 1986; Maynard-Moody & Musheno, 2000), but the latitude it warrants comes at the price of unpredictability and diminishing democratic control (Molander et al., 2012; Rothstein, 1998; Schneider, 1991).

This thesis asks how decision-makers with extensive discretionary authority justify strong state interventions on behalf of children in the child protection system. As child protection is a field of normative and factual complexity and uncertainty (Christensen & Kojan, 2016) the decision-making processes become highly reliant upon professional judgment to identify relevant concerns and to weigh different considerations and principles against each other (Skivenes & Søvig, 2016). And while child protection interventions require discretionary assessments based largely on extra-legal values, there is a scarcity of empirical knowledge about how discretion is exercised and how such strong state interventions are justified (Backe-Hansen, 2001; Burns et al., 2017a; Helland & Skivenes, 2019; Pösö et al., 2021a). Political scientist Bo Rothstein has argued that the main source of political legitimacy is the 'quality of

government' (2009, p. 313). Following this logic, implementation of laws and policy by state officials with discretionary powers becomes a key feature of a state's political legitimacy. What happens at the intersection of public powers and the private sphere, where the exercise of state power has direct consequence for the individual citizen's life, thus becomes decisive for how the state's legitimacy is produced, maintained, and challenged. Child protection has been characterised as a 'perfect exemplar of the difficulty governments face in setting boundaries between public and private life' (Holland & Scourfield, 2004, p. 22) and the demarcation between private and public responsibility for children has been the target of continuous debate since the first child protection laws were established in Norway in 1896 (Ericsson, 1994; Skivenes, 2004). At the core of this discussion is the question of how children's interests should be protected without interfering with the privacy of the family and with parents' rights.[1] In those situations where the interests of the state, the family, parents, and the child do not align, decision-makers must balance the different interests and considerations against each other. The question thus arises when and why children's interests should prevail at the expense of parents' rights and interests.

The empirical focus of this thesis is best interest assessments in decisions on adoption from care without parental consent in two jurisdictions: Norway and England. With its wide-ranging implications for the parties involved (Munro, 2019), adoption from care is the strongest order available in Norwegian (Child Welfare Act (CWA), 1992) and English (Adoption and Children Act (ACA), 2002) child protection legislation. The intervention of adoption entails that parental rights and responsibilities for a child are transferred from the child's birth parents to the adoptive parent(s). And where adoption ordinarily requires parental consent, this may be abandoned if the state authorities consider termination of parental responsibility (TPR) and adoption to be in the best interest of the child. In matters that affect children, the Norwegian Constitution

[1] The right to respect for private and family life is a right held by both children and parents and is protected through The Norwegian Constitution Article 102 and the European Convention on Human Rights (ECHR) Article 8.

(Grunnloven) obligates the State and its authorised agents to take children's right to have their best interests into account as a primary consideration (Sandberg, 2019):

> In actions and decisions affecting children, the best interests of the child shall be a primary consideration. (Grunnloven, Article 104(2)).

This implies that when decisive factors indicate that the best interest of the child is adoption, the parents' interests would have to yield.[2] The best interest standard is by law fundamental to child protection decision-making and obligates decision-makers to seek solutions that produce the best outcomes for children in decisions that concern them. However, best interest assessments are based not only on factual knowledge about children's needs, but also on normative perceptions about what constitutes a sufficiently good childhood. In situations like this, the need for persuasive reasoning and good quality decisions becomes key to sustain legitimacy (Bartelink et al., 2018), but little remains know about the reasons that are given or how decisions are pursued. This thesis aims to contribute to filling this research gap.

1.1. Research Question and Overview of Articles

This thesis addresses the discretionary decision-making of child protection workers and legal decision-makers in Norway and England, with focus on the former context. As discretionary enactment of the law transpires at all levels in the 'chain of democratic governance' (Molander et al., 2012, p. 218), this thesis analyses the exercise of discretion at three decision-making levels: in the municipal child protection agencies responsible for initiating cases for adoption, in the court-like County Social Welfare Board (the Board) with decision-making authority concerning compulsory child protection measures, and in the Norwegian Supreme Court, the apex of the judicial system. Additionally, judgments from the Board are compared with judgements from the English Family Court.

[2] See also Article 3(1) of the UN Convention on the Rights of the Child (CRC).

The overarching research question for the thesis is: *How do legal and professional decision-makers justify the child's best interest in decisions on adoption from care?*

The aim of this thesis is to contribute to an improved understanding of the exercise of discretion in strong state interventions and of the legitimate use of discretionary power in child protection decisions. Furthermore, to add to the literature on best interest justifications and acceptable reasons for adoption without parental consent.

Articles I, II and III focus on the Norwegian context, while Article IV compares the Norwegian context with the English. Article I focuses on the discretionary reasoning of child protection workers and decision-makers in the Board. By presenting decision-makers with a constructed case scenario (a vignette), this article seeks to discern how decision-makers justify their decision on adoption and to locate the pivotal dimensions in their best interest assessment. Article II investigates how decision-makers in a legal setting – the Board – understand and make use of the social science concept 'attachment' in their decisions on adoption. By analysing all decisions made by the Board in 2016, the decision-makers use of attachment to inform their decisions is mapped and the quality and legitimacy of the decisions are discussed. Article III analyses the Norwegian Supreme Court's best interest argumentation in judgments on adoption from care. The aim is to assess the legitimacy of the decisions from a deliberative perspective on decision-making and to map and critically analyse the court's best interest justifications. Article IV examines best interest reasoning of legal decision-makers in the Family Court in England and in the Board in Norway. By studying court judgments from the two jurisdictions, the purpose of the analysis is to enhance our knowledge on discretionary reasoning and on the normative basis for the child's best interest principle in child protection decision-making.

1.2. Definitions and Outline of the Thesis

When talking about child protection in this thesis, I refer to the 'the statutory system that aims to find, investigate and protect children at risk of being abused or neglected, or harming themselves by their asocial behaviour, through specific and targeted

interventions with or without the consent of the children and families involved.' (Pösö et al., 2014, p. 477). In this framing introduction, I use the term 'child protection', but in the individual articles a variation of 'child welfare' and 'child protection' is used. Unless stated otherwise, when mentioning adoption in this thesis, this refers to adoption from care without parental consent. Adoptions from care denotes those adoptions where children are adopted through the child protection system and where the adoption is regulated by child protection legislation. Here I take on the definition of Pösö, Thoburn and Skivenes (2021b, p. 2) who define adoptions from care as:

> (…) adoptions where a child who is currently in public care or is under guardianship of the state, after full or partial removal of custody from the parents, is placed with prospective adopters and/or legally adopted by their foster carers with or without the consent of the parents.

The thesis is concerned with decision-makers from several professional backgrounds and with different institutional affiliations. The units of analysis include both child protection workers (social workers), experts on children (e.g., psychologists, social workers or medical doctors), legal decision-makers that are not officially termed 'judges' but that are qualified as judges, and lastly, judges. In the articles, I have distinguished between decision-maker groups somewhat differently depending on the context, while in this framing introduction I will refer to decision-makers as 'judges' when referring directly to the group of legal decision-makers but will use the term 'decision-makers' if it is not specifically referred to this group.[3] I will also use the more general term 'legal' rather than 'judicial' when referring to either the Board or its decision-makers (as the Board is not a part of the judiciary), and I will also use the term 'legal' when referring to the decision-makers from the Board, the Family Court and the Supreme Court as a group. The child's best interest will sometimes be referred to as merely 'best interest' and the abbreviation CBI is used in the tables (and in Article IV). Unless stated otherwise, the text is concerned with adoptions in the Norwegian child protection context as this is the main unit of observation. While one of the publications

[3] In the article summaries, I aspire to use the same terms and concepts that are applied in the articles.

included in this thesis is a book chapter (Article II), I will for simplicity refer to all publications as articles.

This thesis consists of six chapters, followed by the four thesis articles. In the first chapter, the reader is introduced to the domain of children's rights, discretionary decisions, and the challenges with the child's best interest standard. Thereafter, a brief overview of relevant literature on decision-making in child protection is provided, followed by an outline of the decision-making context. The theoretical framework for the thesis is presented in chapter two before the thesis' research design is discussed in chapter three. In the fourth chapter, summaries of the four articles are provided, before the main findings of the thesis are discussed in chapter five. Lastly, in chapter six, I reflect upon policy implications and make suggestions for future research.

1.3. Children's Rights and Discretion

The idea of children's rights is a rather new one. The notion of children as right's bearing individuals belongs to the twentieth century and largely coincided with the emergence of childhood sociology and a growing appreciation of children as individual persons with agency (Freeman, 1998). Child protection is one of those areas where there is an intrinsic link to children's rights, with the systems' obligations to protect, facilitate and empower children, while securing them entitlement and justice. Within a rights-based public protection of children, the state will enter in loco parentis if a child is exposed to neglect or abuse, and 'intervene to sustain the child's personal integrity and aid the child's development' (Falch-Eriksen & Backe-Hansen, 2018, p. 3). The complexity of child protection decision-making has increased along with the rise of children's rights and acknowledgment of children as independent citizens (Aries, 1962; Burns et al., 2017a) as discussions about children's rights implicate not only the child but also the family unit (the parents) on the one side, and the state on the other (Skivenes & Eriksen, 2001). In cases of adoption from care, foster parents – at least in Norway – are added to the equation thus expanding the adoption 'triad of parties' (Carbone & Cahn, 2003) to constituting a 'tetrad of stakeholders'. These circumstances and the intrusive nature of the intervention imply that the tension between the positive

and negative obligations of the state is at its pinnacle in decisions on adoption from care, and the demand for legitimate and high-quality decision-making is high (see Habermas, 1996; Rothstein, 1998).

In this thesis, children's rights relate to legitimate decision-making and the use of discretion in the sense that discretion is both necessary and potentially detrimental for the promotion of children's rights (Skivenes & Søvig, 2016). Child protection decisions require the knowledge and discretionary competence of professionals, and when decision-makers are carrying out their assessment, they are adhering to their delegated responsibility to provide content to children's rights in a way that reflects and has concern for the situation and the needs of the individual child. Usually, children's and parents' interests coincide, but in cases of conflicting interests, decision-makers also need to balance the rights of children with the rights of parents (and/or others). At the same time, discretionary authority comes with the risk that children's rights are marginalised (for example Lundberg, 2011; McEwan-Strand & Skivenes, 2020; Munro & Ward, 2008; Rejmer, 2003). Decision-making can be influenced by heuristics and bias, personal values and perceptions, conflicting policy demands, and organisational pressure, to mention some, which may in different ways hinder children from having their rights implemented accordingly. This could emanate from poor judgment, unauthorised discretion or misuse of power, but discretion may cause problems even when it is carried out in a wholly conscientious manner (Molander et al., 2012). Discretion may thus challenge the realisation of children's rights. This tension is at the heart of all the thesis articles, though addressed somewhat differently in the individual studies. A common feature is that all articles address the issue through analysis that in some way or another relates to the discretionary substantiation and justification of the child's best interest.

1.3.1. The Child's Best Interest and the Indeterminacy Challenge

Under the UN Convention on the Rights of the Child (CRC) Article 3, children have the right to have their best interest serve as a primary consideration in all actions

concerning them.[45] In respect to adoption, the child's best interest shall be the 'paramount consideration' (CRC Article 21). While the child's best interest is a core right of the CRC and a testament to children's moral and legal status, scholars have argued that the child's best interest is a notoriously ambiguous and normative standard, whose substantial structures and content are indeterminate and hard to pinpoint (Mnookin & Szwed, 1983). The standard has thus been criticised on the grounds of being 'too little a rule and too much an award of discretion' (Schneider, 1991, p. 2219). The sources of this proposed indeterminacy as understood by Robert Mnookin (1973) are: 1) the lack of consensus upon a set of values to apply when determining what is in a best interest of a child in both the short and the long term, 2) the lack of knowledge about the best means to achieve a given outcome and the inability to predict the effects and outcomes of certain means for a given child, and 3) incomplete and/or inadequate information about involved parties. For the latter, evidence may also be conflicting, and it could be difficult to reveal the 'real' facts (Herring, 2007). The implication of this indeterminacy is that decision makers deciding on adoption are required not only to define and interpret children's needs and interests, but more so to attend to questions as those of what a family is, what are valuable parent-child relationships, what biology means for identity and development, to mention some. In a critical study of the best interest standard, Salter (2012, p. 190) describes how the normative element in these decisions brings with it challenges for decision-making:

> Depending on one's particular world view and value set, these questions can be answered in numerous different ways. Courts are notably unpredictable in how widely they cast the net when determining what is 'best' for a child; in some cases even when evaluating the same case, courts disagree when deciding how wide to cast the 'interests' net (i.e., what set of interests to incorporate into a decision).

[4] Since the incorporation into Norwegian legislation through the Human Rights Act in 2003, the convention has the status of statutory law ranking above ordinary legislation (Sandberg, 2019).

[5] According to Norwegian child protection legislation (CWA, section 4-1) the best interest of the child 'shall have decisive importance' when different parties' interests are to be weighed against each other, while in England, the child's welfare shall be the 'paramount consideration'. (Children Act, 1989 (CA) section 1(1)) (Archard & Skivenes, 2010).

This relates to another objection made against the best interest standard, namely that of transparency. As Eekelaar (2002, p. 237) contends, the standard 'might fail to provide sufficient protection to children's interests because its use conceals the fact that the interests of others, or, perhaps, untested assumptions about what is good for children, actually drive the decision'.

In sum, there is indeterminacy associated with a best interest evaluation. Primarily provided that any universal or unitary form of measure to such a standard is difficult, if not impossible, to agree upon. The implication is that discretion is required to determine what is in the individual child's best interest. This does not, however, mean that decision-makers have free reign to decide whatever they want. They are bound by professional ethics and norms as well as legislative and organisational standards and public opinion (expectations) and do not enjoy limitless autonomy (Falch-Eriksen & Skivenes, 2019; Hupe & Krogt, 2013). Nevertheless, Norwegian policy and legislation provide little substantial guidance for the exercise of discretionary reasoning in child's best interest decisions and the formally granted room for discretion is wide. Eriksen (2001) has pointed to the potential problems associated with the exercise of discretion when legal rules do not provide any clear substantive and procedural guidance for how it should be exercised (how to identify and balance relevant concerns). Under these circumstances, decision-makers may resort to normative arguments to justify their decisions, and the risk is that they base their decisions on norms and knowledge that is not regulated by democratically constituted procedures. The use of discretion may thus lead to unpredictable decision-making and threaten the principle of equality before the law. Moreover, when legislators do not provide any standards for reasoning, best interest assessments challenge democratic ideals such as transparency, accountability, responsiveness, and political neutrality (Brodkin, 2020; Magnussen & Skivenes, 2015; Molander et al., 2012) as it becomes the decision-maker's responsibility to decide what is right, fair, good or desirable. The delegation of discretion to government professionals thus challenges legitimacy by removing democratic control over policy implementation and enforcement of laws.

Rothstein's (1998, 2009) approach to political legitimacy can be seen to capture both these challenges. He argues that law and policy implementations in all spheres where state action impacts individual citizens at the 'output' side of the political system should transpire as an 'impartial' exercise. Adoption decision-making based on best interest assessments should thus occur through procedures that are considered fair. The main idea taken from Rothstein's approach in this thesis is anyhow the notion of the exercise of state power as the main parameter for legitimacy. This emphasises the need to examine the discretionary actions of state authorised decision-makers which Rothstein has referred to as the 'black hole of democracy' due to the lack of control and transparency in the implementation process (Rothstein, 1998). I will return to this under section 2.1.1.

From a researcher's point of view, these circumstances make up an interesting empirical case because, regardless of the indeterminacy of the best interest standard and the lack of formal guidance, decision-makers are still obligated and expected to justify an intervention for it to be legitimate and acceptable (Molander et al., 2012). So how do they do it? Grounded in the issues outlined above, making decisions based on the best interest standard is difficult and it has been claimed that it can lead to decisions that are both arbitrary and unjust (Elster, 1989; Mnookin, 1973). For application of the best interest standard in legal arenas there is also the challenge that judicial logic does not apply well with best interest decisions as these require social science facts (King & Piper, 1995; Robertson & Broadhurst, 2019). From a normative standpoint, one way of meeting the demands for legitimate decision-making would be to make sure that decisions on adoption are made in accordance with due process and decision-making processes that fulfil criteria for rational reasoning and critical reflection (Skivenes & Eriksen, 2001). While there is not a scarcity of research focusing on child protection decision-making, there is not much knowledge about how decision-makers exercise discretion in the child protection domain (Burns et al., 2017a; Helland & Skivenes, 2019; Pösö et al., 2021a). In the next section, I briefly discuss the need for more knowledge in light of the existing literature.

1.4. The Empirical Research Field

This thesis's empirical focus is on the justification of adoption as a child protection measure when there is no consent from the child's parents. In both countries under study in the thesis, England and Norway, adoption must be assessed as in 'the child's best interest' before any decision to dispense with parental responsibility and consent to adoption can be made in the parent's place. The amount of research literature that deals with the best interests of the child has gradually grown since the 60's and 70's when the term 'best interest' was first introduced into the research literature by Goldstein, Freud and Solnit (1973) in their seminal 'Beyond the Best Interest of the Child'. As a concept, the best interest of the child was according to Pösö and Skivenes (2017, p. 470) intended to 'emphasize children's point of view instead of that of adults'. The principle was later adopted by child protection systems and legislations around the world, and there is now a wealth of research on the general topic of the child's best interest. However, few have empirically and systematically studied how decisions on child protection interventions guided by the child's best interest principle are justified, and how the child's best interest is substantiated (Burns et al., 2017b).

In the existing literature, decision-making in child protection interventions is seldomly approached through the conceptual lens of discretion, and rarely takes on a critical perspective focusing on the quality of the decisions or on legitimate or rational decision-making (cf. Artis, 2004; Ottosen, 2006; Piper, 2000; Skivenes, 2010; see Burns et al., 2017a). Studies of decision-making in strong child protection interventions are more common (e.g., Backe-Hansen, 2001; Danziger et al., 2011; DeRoma et al., 2006; Juhasz, 2020; Keddell, 2016; Keddell & Hyslop, 2020; Lauritzen et al., 2018; Mosteiro et al., 2018; Munro & Ward, 2008; Osmo & Benbenishty, 2004; Sheehan, 2000, 2018), but only a few adopt a comparative approach (e.g., Berrick et al., 2017; Gold et al., 2001; Krutzinna & Skivenes, 2021). There is only a handful of legal and social science studies that have looked into the decision-making mechanisms and discretionary argumentation in decisions on adoption in a Norwegian context (Bendiksen, 2008; Skivenes, 2010; Skivenes & Tefre, 2012; Young, 2012). There are also few international studies on adoption (and TPR) decision-making (cf. Barr, 2004;

Ben-David, 2011, 2012, 2013, 2015, 2016; Butlinski et al., 2017; Hill et al., 1992; Schetky et al., 1979; Skivenes & Søvig, 2016) or that have looked specifically at best interest substantiation (cf. Artis, 2004; Banach, 1998; Keddell, 2017; Ottosen, 2006; Piper, 2000; Skivenes, 2010). These strands of literature, together with scholarship on street-level bureaucracy and literature on legal decision-making, especially, are used to frame the research approaches and expectations for findings in the individual articles, and I refer the reader to the articles for further review of the literature.

Recent scholarship has urged more research on adoption from care to, among others, fill significant research gaps – such as those relating to decision-making practice, to enhance accountability, and to create updated and contextually sensitive knowledge (Burns et al., 2019; Pösö et al., 2021a). In a recent empirical study of eight European countries (Burns et al., 2019, p. 340), the following question was posed: 'How accountable are decisions about terminating parental rights to ensure an adoption from care?' The findings discouraged the authors who concluded that:

> We cannot in this study say anything about the decision-making quality in these proceedings, they may be excellent, but the problem is that very few are in a position to examine the quality of the decisions. This missing connection between the wider democratic society and this part of the legal systems in the eight democracies we studied is of huge concern, and we have indications that the situation is equally concerning in other European states. (Burns et al., 2019, p. 2)

This citation illustrates the need for more research on adoptions from care and, in particular, for studies that analyse decision-making quality.

1.5. Decision-Making Context

1.5.1. Adoptions from Care – Knowledge, Policy and Practice

While all European countries have legal mechanisms that allow for adoption without parental consent (Fenton-Glynn, 2015), not many countries exercise their power to enforce such adoptions to a notable degree (Berrick et al., In pressb). In England and Norway, two jurisdictions with different approaches to adoption policy and practice,

adoption rates differ. In England, which has had an active policy of encouraging adoption since the early 2000's, 3.820 children were adopted from care in 2018[6] (Thoburn, 2021). This equals 32 per 100.000 children, which despite a steady decline since 2014, is assumed to be among the highest in Europe (Berrick et al., In pressb). The high rates of adoption in England are a result of the 2002 adoption reform (Thoburn, 2021) which was driven forward, among other, by the increasing concern about placement instability and poor outcomes for children in public care (Thomas, 2013). In Norway, 55 children, 4.8 per 100.000 children, were adopted from care in 2018 (see table 1 and Pösö et al., 2021c).[7] While this rate is assumed to be middle range in a European context (Pösö et al., 2021c) it amounts to a yearly rate of less than 1% of the population of children in foster care (Helland & Skivenes, 2019).[8]

Table 1 Adoptions in Norway. Child population, number of children in care at year end, number of adoptions per year, and type of adoption (children 0-17 years). Rates per 100.000 children in parenthesis.[9]

	2000	**2005**	**2006**	**2010**	**2011**	**2015**	**2018**
Child population	1,060,857	1,092,728	1,096,003	1,114,374	1,118,225	1,127,402	1,122,508
Children in care	5,124 (483)	6,002 (549)	6,116 (558)	6,975 (626)	7,270 (650)	9,008 (799)	8,868 (790)
Adoptions from care							
Voluntary			23[a] (2)	16 (1)	6 (< 1)	6 (< 1)	5 (< 1)
Non-voluntary					27 (2)	62 (5)	50 (4)
Other adoptions							
International	657[b]	704[b]	438	343	297	132	77

[6] Measured from March from 2017 to March 2018.
[7] The rate for involuntary adoptions is 4 per 100.000 (Helland & Skivenes, 2021)
[8] For a detailed outline and discussion of the permanence policies in England and Norway, see Skivenes and Thoburn (2016).
[9] See Thoburn (2021) for a corresponding overview for England.

adoptions	(62)	(64)	(40)	(31)	(27)	(12)	(7)
Stepchild adoptions	105[b] (10)	138[b] (13)	79 (7)	88 (8)	85 (8)	90 (8)	72 (6)
Other national adoptions	30[c] (3)	48[c] (4)	8 (< 1)	3 (< 1)	4 (< 1)	8 (< 1)	0 (0)

[a] Not differentiated between voluntary and non- voluntary adoptions from care, [b] Not differentiated by age, the data could possibly include persons aged over 18 years, [c] Including adoptions from care, both voluntary and non- voluntary. Not differentiated by age, the data could include persons aged over 18 years. Source: Helland and Skivenes (2021).

Until recently, little was known about the cases decided by the Board and about what characterises the children involved in decisions on adoption. In a report by Skivenes and myself from 2019[10], where all adoption cases from 2011-2016 (N=283) were studied, we find that the children adopted from care in Norway have a median age of four years, and that most of them (72 per cent) have been under the care of the adopters since they were infants (Helland & Skivenes, 2019). Most children had one or more full or half-sibling(s) (65 per cent), and amongst the children that had siblings, 70 per cent of them had siblings that were either in care or adopted. Most children had two Norwegian-born parents (52 per cent) or (at least) one Norwegian-born parent (27 per cent), while a minority of 16 per cent had two parents born outside of Norway. The frequency of contact with birth parent(s) as decided at the point of the care order varied, but the most common contact frequency was identified as three to six contact visits a year with both mothers (50 per cent) and fathers (30 per cent). Post adoption contact was decided in one quarter of the cases, with either both parents, only the mother, and in a few cases, only the father. We also point out that near a quarter of the cases (23 per cent) are actually decided with the consent from one parent, and in a few cases, both parents. The study also revealed that there were regional differences in the rates of cases decided at each of the Boards during the six-year period, indicating different

[10] This analysis made in this report builds on some of the same case material as the thesis builds on.

adoption practices at the municipal and agency level. Adoption was decided in nearly all cases (96 per cent) and only a few cases were decided with dissenting opinions among the decision-makers on the Board.

As in England, the poor outcomes of children involved with the child protection system has been an ongoing concern in the Norwegian context, and the (risk of) poor outcomes have been illustrated by a range of studies of the Norwegian and Nordic context (Bohman & Sigvardsson, 1985; Dæhlen, 2017; Kääriälää & Hiilamoa, 2017) and from other countries (for example Dubois-Comtois et al., 2021; Goemans et al., 2016; Zlotnick et al., 2012). A large study from 2014 using register data (Backe-Hansen et al., 2014) found that among adolescents who had received child protection measures or had been under state care, 'positive transitions to adulthood' were significantly less common among this group (44 per cent) than among the majority population (88 per cent). Known issues with foster care placements relates to the challenges of providing stability and continuity – as many foster care placements break down, as well as feelings of insecurity and problems related to identity and belonging (Backe-Hansen et al., 2014; Rubin et al., 2007; Sinclair et al., 2005; Triseliotis, 2002; see also Biehal et al., 2010 for an overview of relevant discussions). Several studies have compared the outcomes for adopted and fostered children, and there is a large body of research evidence demonstrating the potential of adoption to generate better outcomes for children in long-term care placements compared to other permanence options such as foster care, reunification and institutional care (Bohman & Sigvardsson, 1985; Christoffersen et al., 2007; Hjern et al., 2018, 2019; Quinton & Selwyn, 2009; Selwyn & Quinton, 2004; Triseliotis, 2002; Triselotis & Hill, 1990; Vinnerljung & Hjern, 2011; see also Palacios et al., 2019). Owing to this research and the expanding evidence base concerning children's development, adoptions have become acknowledged in the Norwegian policy context as a way of providing stability and permanence to children who have entered the foster care system on a long-term basis (Haugli & Havik, 2010; Skivenes, 2010). These views are reflected in the recently arisen political support to promote more adoptions, where children's need for stability and secure attachment relationships have been particularly influential in the policy debates (Tefre, 2020b).

Still, adoptions from care are often considered controversial and questions about the legitimacy of adoption keep remerging in the national and international public discourse, as well as in political, legal, and academic circles (see Pösö et al., 2021a). For example has legal scholar Sloan (2020, p. 216) posed a timely question concerning the legitimacy of the UK's policies on adoption relating to the poor outcomes for children in state care:

> Legitimate questions also remain over whether the state is justified in prioritising a fundamental change in children's legal status because of its own failure to secure better outcomes for those who remain in its care.

Studies from the UK and US context have also pointed to challenges with adoption from care with relation to issues like adoption breakdown (see Ward et al., 2010 for a discussion of the research on outcomes of adoptions).[11]

In a recent interdisciplinary paper, some of the most prominent adoption researchers worldwide asked whether adoption provides a legitimate model for the alternative care of children in the child protection system. The authors conclude positively in favour of the use of adoption on the premise that practice adheres to a rights and ethics framework that emphasise children's best interests. Introducing the reader to their concluding remarks early on, the authors write:

> One of the central arguments of the article is that for children who cannot remain or be reunified in their birth or extended family after the provision of appropriate focused services and interventions to their parents, early placement, stability and legal and relational permanence in a new family in the State of origin must always be prioritized. The child's well-being and lifelong safety, needs and welfare must be the primary focus, including their long-term recovery from maltreatment and relational uncertainty. Exposing the child to high-risk and unstable circumstances while waiting to see if something else would work is not a desirable alternative. (Palacios et al., 2019, p. 58).

[11] The breakdown rates in the UK are nevertheless reported to be low (Selwyn et al., 2014).

This statement also alludes to the core issues activated in the child-centred discourse on adoption: the child's need for protection and permanence when reunification with parents is not considered a realistic option. In the next section, I will briefly discuss the topic of children's needs and well-being in relation to available guidance for decision-making concerning the child's best interest.

1.5.2. Children's Needs and Well-being – Knowledge and Best Interest Guidance

While there is some agreement upon what is harmful for children, such as being exposed to physical violence, and what is good, such as having loving and caring parents, what children need to have a good childhood and to develop into capable and autonomous adults is not fixed and may differ from one context to another (Skivenes & Pösö, 2017). Even when there is agreement upon a set of variables, risk and protective factors need to be balanced against each in a way that is considered to best meet the interest of the particular child. Font and Gershoff (2020, p. 22) explain that a child's well-being would typically reflect factors relating to 'cognitive and socioemotional development, physical health and safety, material or economic security, and supportive relationships.' The latter is particularly relevant to understand discussions on the best interest of the child and is according to the authors exemplified by the emphasis on permanency and adoption in UK legislation. In the UK, the 'Framework for the Assessment of Children in Need and their Families' (Department of Health, 2000) is used to inform judgments relating to child protection matters in a 'holistic manner', listing factors related to a child's developmental needs, parental capacities and family, and the surrounding environment. In terms of the former dimension, children's attachment quality is a particularly relevant factor for decisions on adoption, but according to Forslund and colleagues (2021), this is a concept that has been widely misinterpreted, and in turn misapplied, in family courts. This is the background for Article II, where the Board's understanding and utilisation of 'attachment' in their decisions has been analysed with the aim to critically address the quality and legitimacy of the decisions that are being made.

In General Comment no. 14 on the best interest article (3) (CRC Committee, 2013), the Committee on the Rights of the Child provides CRC party states with guidance for assessing and determining the best interest of a child. The list includes seven elements for consideration: the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education. Despite most countries having implemented the CRC and thus having obligated themselves to give the best interest principle primary consideration in decisions concerning children, Skivenes and Sørsdal (2018) find in their analysis of child protection legislation in 14 high-income countries that there are very different understandings of the best interest standard between countries and that the discretion granted to decision-makers to interpret the standard vary greatly. According to Norwegian child protection legislation, a best interest assessment shall include concern for the child's need to have 'stable and good contact with adults and continuity in the care provided' (CWA, section 4-1). Moreover, Norwegian child protection law also places emphasis on children's participation (see e.g. Skjørten & Sandberg, 2019).

The public justifications provided for the shift in adoption policy was, as previously mentioned, grounded in ideas that aligned with a child-centred knowledge base (Tefre, 2020b). The legislators have not, however, established any statutory guidance for how to interpret and operationalise this knowledge in decision-making, and the ideas remain largely undefined. English child protection legislation provides decision-makers with a 'welfare checklist' (Adoption and Children Act, 2002 (ACA), section 1(4); Children Act, 1989 (CA), section 1) that lists 10 key factors that should be taken into consideration when coming to a decision on adoption. Decision-makers in the two countries are in other words provided with different levels of discretionary autonomy, where the Norwegian decision-makers have less substantive guidance to draw upon in their decisions. This difference is the basis for article IV, where the best interest decisions of legal first instance decision-making bodies are analysed and discussed, among other, in terms of what function and value a checklist might have for increasing quality and legitimacy in decision-making.

1.5.3. Child Protection Orientations

How governments facilitate decision-making through formulation of laws and policy matter for the exercise of discretion, and the study of discretion cannot be decoupled from the context in which it occurs (Hawkins, 1986, 2003; Mascini, 2020). Decision makers are obliged to make decisions according to external, judicial limits, that being national legislation and international treaties and conventions, such as the CRC (Gording-Stang, 2018; Skivenes & Sørsdal, 2018). Moreover, child protection decision-making is context sensitive and formed by current knowledge paradigm(s) and by the social, political, and legal climate (Burns et al., 2017a; Harding, 2014). For example, recent studies have demonstrated how the exercise of discretion in decisions concerning adoption varies between national systems with different child protection orientations (Krutzinna & Skivenes, 2021). With particular concern to adoption, Burns and colleagues (2017b, p. 236) have noted that adoption from care can reflect different motivations or interpretations of leading principles in law and policy in different national contexts, and that legal and political initiatives to promote or facilitate the adoption of children in the care system can be interpreted in numerous ways.

In the literature, the Norwegian child protection system is typically described as 'family-service-oriented' and 'child-centric' (Skivenes, 2011). These characterisations originate from the typology of child protection systems first developed by Neil Gilbert in 1997 and later updated by Gilbert, Parton and Skivenes in 2011 and again by Burns, Pösö and Skivenes in 2017 where a third orientation, the 'child-centric', was added to the typology that already differed between risk-oriented and service-oriented systems. A family-service oriented system refers to a low threshold for intervention in order to mitigate serious risk and prevention of harm based on 'a therapeutic view of rehabilitation in which it is possible for people to revise and improve their lifestyles and behaviours' (Søvig & Skivenes, 2017, p. 45), whereas child-centrism signifies a view of children as independent bearers of individual social and human rights as well as having individual interests, opinions and views that they should be able to express in cases that concern them (Skivenes, 2011). In the same typology, the English system is

categorised as 'risk-oriented' (Burns et al., 2017a) though it is often characterised as approaching a family-service oriented system in law. In risk-oriented systems, the emphasis is primarily to protect children from maltreatment, and the threshold for family service provision and compulsory intervention is relatively high, compared to family-service oriented systems. Jill Berrick, Neil Gilbert and Marit Skivenes (In pressa) has later classified different child protection systems' approaches in a global typology of child protection systems. In this typology, Norway is categorised as a 'child rights protective system', where the approach to adoption is the child´s best interest and child´s family life. The English systems' characteristics place them in a 'child maltreatment protective system',[12] where the approach to adoption is to ease government responsibility and secure permanency for the child.

1.5.4. Legislative Sources and Structures for Discretion

The Norwegian child protection system is based in (at least) four governing principles: the principle of legality, the principle of least intrusive form of intervention, the biological principle and best interest of the child (Lindbo, 2011). The biological principle has a strong standing in Norwegian child protection law (Skivenes, 2002) and have for a long time influenced public policy (Tefre, 2020b) and case law. The principle underlines the importance of biological family ties and signifies that the 'state has a duty to facilitate the child's development, preferably within its own family' (The Norwegian Directorate for Children, Youth and Family Affairs, n.d.). The 'least intrusive measure' entails that any decision made with concern to the wellbeing of a child should seek to limit the level of intrusion into the family.[13]

Adoption without parental consent is regulated by the Child Welfare Act (CWA) (1992), section 4-20 'Deprivation of parental responsibility. Adoption'.[14] For an adoption to be consented to, the child has to be under formal state care by a care order

[12] Though with the 'aspirations to be viewed as a child well-being-oriented system' (Berrick et al., in pressa, p. 1594).
[13] See Helland and Skivenes (2021) for a brief discussion about the guiding principles in relation to decisions on adoption.
[14] As well as the Adoption Act section 12, second paragraph.

(pursuant to the CWA section 4-12 or 4-8 (2)(3)) and four cumulative criteria need to be fulfilled: a) the placement has to be considered permanent, either due to the parents' inability to provide proper care or that removing the child may lead to serious problems because the child has become so attached to persons and the environment where he or she is living; b) adoption has to be in the child's best interests; c) the adoption seekers have fostered the child and shown themselves fit to bring up the child as their own, and d) the adoption act conditions for granting an adoption are satisfied.[15] A decision on TPR is usually taken together with a decision on adoption,[16] but the question of TPR is rarely assessed in depth, and the decision usually concentrates on the question of adoption. The Board's decisions are structured similarly to that found in ordinary court decisions in Norway and consist of four main parts: (1) an introduction to what the case is about, (2) the background of the case (the case facts), (3) the parties' argumentation (divided into the public party and the private party), and (4) the Board's assessment and conclusion.

The formal decision-making authority on adoption is, as previously mentioned, held by the County Social Welfare Board (the Board), a court-like legal decision-making body, that serves as an impartial and independent judiciary body that makes decisions in cases concerning compulsory measures pursuant to the CWA. The Board adheres to the rules of procedures given in the CWA (chapter 7), procedures that are largely based on the Dispute Act (2005), and for all practical purposes, the Board acts as a specialist court (Skivenes & Tonheim, 2017).[17] The Board is headed by a lawyer qualified as a judge and is further composed of an expert (in most cases a psychologist) as well as a layman (The County Social Welfare Boards, n.d.).[18] The child protection agencies are

[15] The Adoption Act also requires that an adoption should be in the child's best interest but like the CWA, the Adoption Act does not list any criteria for what should be taken into consideration, and how, in a best interest assessment.
[16] Section 4-20, first paragraph, regulates termination of parental responsibility, whereas the second and third paragraph regulates adoption.
[17] For example, the Board is legally obligated to justify its decisions (CWA, Section 7-19; Dispute Act, section 19-6).
[18] The Board could also be composed of five members, should the case in question require it. In these cases, the County Board leader is accompanied by two experts and two lay members. The decision could also be made by the judge alone, if consented to by the parties.

the main premise providers for a case as they are responsible for initiating and preparing the case that is brought before the Board. Most cases are treated in a case negotiating meeting including the municipalities as the public party and the parent(s) as the private parties. When the child is 15 years of age or older, she or he can be granted party rights, while a child who has reached the age of 12 years may only be adopted if he or she consents to the adoption (Adoption Act, 2017, section 9). Foster parents (adoption seekers) do not have party rights.[19]

The English child protection law is guided by three main principles under the CA (1989): the welfare principle, the no order principle and the principle of no delay (Masson et al., 2008). According to Masson and colleagues (2008), decision-makers (judges) also apply a set of assumptions to guide their 'welfare assessments'. These include being brought up by birth parent(s), status quo and contact with non-residing parents. The legal first instance is the Family Court, and the Local Authorities (LA) are the responsible organ for ensuring and overseeing the delivery of services to children.

The threshold for state intervention in the English child protection system is set to 'significant harm' (CA, section 31(2)), an assessment often referred to as the 'threshold test'. If the conditions under the 'threshold test' is considered to be satisfied, the court goes on to determine whether a placement order is in the best interest of the child ('the welfare test') (ACA, section 52). The best interest assessment is guided by the previously mentioned 'welfare checklist' (ACA, section 1(4); CA, section 1) that lists 10 factors that the court must take into consideration when making a placement order (or any other order with respect to the care of a child).[20] There are two conditions that needs to be satisfied for a child to be placed for adoption: First, the parent(s) gives their consent (ACA section 19), or the court dispenses with the parents' consent (ACA section 21) on the basis that (a) the parent(s) cannot be found or lacks capacity to consent, or (b) the welfare of the child requires it (ACA section 52). Second, the child

[19] For example, see the Circular for case processing on foster parents' party rights (The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir), 2019).
[20] For other orders under the CA that are not regulated by the ACA, the number of factors is six (seven if 'the range of powers available to the court' is included).

must be subject to a care order (CA, section 31(2)). If these conditions are met, the Family Court may issue a 'placement order' which authorises the LA to place a child with prospective adopters (ACA section 21(1)). For further detail on the English child protection system and approach to adoption and the child's best interest, I refer the reader to Article IV.[21]

[21] See also Fenton-Glynn (2015) and Thoburn (2021) for detailed outlines of the English system's approach to adoption.

2. Theoretical Framework

To approach the thesis research question, a conceptual framework based on theories of political and democratic legitimacy, deliberative theory, and discretion is applied. In the articles I also draw on literature from theories on argumentation and decision-making, as well as street-level bureaucracy, and institutional theory. The analytical framework is built around the idea of reasoning as a communicative and inter-subjective phenomenon and on the premise that providing reasons and justifying one's discretionary actions are conditions for legitimate decision-making. The individual articles have emphasised and utilised different parts of the theoretical framework, which I will return to in the relevant sub-sections and in the summaries in sections 4.1 to 4.4. In the following, I present an outline of the theoretical framework and the assumptions that the study builds on.

2.1. Legitimacy and the Deliberative Approach to Decision-Making

2.1.1. Justifying State Intervention and the Need for Legitimate Decision-Making

In this thesis, the quality of discretionary decision-making by the governments' authorised decision-makers is understood as a core source for political legitimacy (Rothstein, 2009). Rothstein (2009) refers to this as the 'output' side of political systems, as opposed to the 'input' side where the production of legitimacy is seen as reliant on electoral democracy. Included as criteria for democratic legitimacy are accountability, efficiency and procedural fairness (Rothstein & Teorell, 2008) and inherent in this framework is the notion that interactions between citizens and state officials may have direct implications for a government's output legitimacy. In this line of thought, poor quality of state-citizen interactions could have detrimental consequences for trust and support for the state and its institutions. In child protection, securing good quality interactions is particularly important, as the system is highly dependent on the population's trust and support to provide effective services, and to protect and secure children's welfare.

Resting on the assumption that legitimacy is also produced and maintained through the quality of services and the state's ability to serve its citizens, the legitimacy of justifications become a vital condition for a well-functioning child protection practice. A basic understanding of justification is that it entails the responsibility to justify one's actions to those you are responsible to or those that are affected by your actions. Justifying an act involves showing that it is based on a rationally good judgment or that it is morally acceptable – or both (Simmons, 1999). To justify state actions is according to Simmons (1999, p. 740) a defensive act in the sense that justifications are given on a presumption of possible objection:

> (…) we try to justify moral principles by showing them to be true or valid, to defeat the objections of the skeptic or nihilist; we justify coercion against a background general presumption in favor of liberty; we justify our actions in legal settings against concerns about apparent or prima facie illegality; and so on.

When associated with coercive state power in this manner, justifications are intrinsically linked to legitimacy and accountability (Peter, 2017; see also Molander et al., 2012). In the next sections, I will elaborate on the relationship between justifications and legitimate decision-making.

2.1.2. Rational Decision-Making and Normative Assessments

At the fundamental level, this thesis is concerned with communication as it occurs through discretionary reasoning. Writing on child protection systems and decision-making models, Burns and colleagues describe it as a basic premise for child protection decision-making that decisions should be resting on:

> (…) good information regarding the contents of the case and the parties' situations, that possible choices of action and their consequences must be explored, and that possible results should be ranked in relation to overall goals. (Burns et al., 2017a, p. 9).

This view of decision-making can be related to the inter-subjective model for reasoning which is based on the idea that rationality is to be found in the process of argumentation – in the communication between individuals (Alexy, 1989). This furthermore entails that the idea of a subjective decision-making model in the tradition of the 'administrative' or 'rational' man is abandoned (Burns et al., 2017a). In the inter-subjective model decision-makers should strive for rational decisions, meaning that they should justify their actions in a way that also others can understand why they act as they do (Thompson, 2008). To ensure the quality and legitimacy of a decision, it needs to be reasoned. This entails that arguments, as well as the weight that they are assigned in a decision, needs to be justified in a way that is considered acceptable. However, within modern liberal pluralistic democracies such as England and Norway, qualified agreement in public decision-making processes may be limited by 'the burden of judgment' (Rawls, 1993); the reasonable and rational sources of disagreement on moral, ethical, and other philosophical matters, even when people act as rationally as possible (Eriksen, 2003).[22] As discussed previously in this framing introduction, child protection is a particularly normatively charged field, where (most) decisions cannot be solved on an empirical and factual base alone. Values and preferences for what makes a good life differ between individuals and social groups, and it makes little sense to study best interest decision-making practices as a 'bargaining between fixed interests' (Tefre, 2020b, p. 290). Rather, making judgments that aim to protect or promote children's rights necessitates certain value trade-offs amongst the parent(s), the child, and the state, thus demanding a discretionary balancing of interests. The rights of different individuals or actors may conflict, even if all claims are considered legitimate (Franklin, 2001) and very often in child protection, we do not know what the 'right' best interest decision is since the child's best interest standard is indeterminate and decision makers do not have enough information to determine an absolute outcome. As such, we rely heavily on procedural values as our proxy. From a deliberative perspective, where there are different conceptions of good and right, the quality or legitimacy of a decision cannot be based on the substantive outcome of the decision

[22] See also Grimen and Molander (2008) for a discussion of this in relation to discretion.

(Eriksen & Skivenes, 1998). Rather, it should be based on the decision-making process leading up to a conclusion. Drawing on deliberative theory, legitimacy is as such understood as dependent upon substantive quality and procedural values in this thesis (Alexy, 2002; Habermas, 1996; see also Elster, 1987). The latter component is closely related to democratic procedures for decision-making (and rules for argumentation), such as inclusion of all involved parties. In this thesis, a particular focus is put on whether the child is included or not, through direct participation or by having their voice included in the decision. The substantive quality is seen as dependent on the ability to justify a decision through publicly acceptable reasons. This may be referred to as the 'discursive' component and is related to Habermas' concept of communicative rationality. The deliberative model and the idea of communicative rationality are elaborated upon in Article III, and I will not go into details on this framework here.

2.1.3. A Communicative Approach to Child Protection Decision-Making

In the previous sections I have delineated the premises for the theoretical argument that public decisions require justifications. A deliberate framework is chosen to serve as a basis for this thesis as it provides a theoretical foundation for claiming that it is possible to find rational answers to normative questions – if the conflict at hand is solved through a deliberative process. In the following I will provide an epistemological account for this theoretical argument.

Habermas suggests that in order to understand society we need to reconstruct the *know-how* of everyday knowledge, or that which exists in society in order for us to be able to think and act on a day-to-day basis. By expanding Weber's conception of rationality, Habermas proposes a multidimensional understanding of purposive rational action and introduces a new form of social, non-purposive rational action aimed at understanding called communicative action (Eriksen & Weigård, 2014; Habermas, 1984). From this understanding of rationality, there are three main (ideal) types of action which are distinguished by their intention: purposive (instrumental and strategic) (Habermas, 1984, p. 285), norm-oriented, and dramaturgical (Eriksen &

Weigård, 2014). These are distinctive in that they correspond to certain modes of reasoning, specific ethical, philosophical, or intersubjective questions, that they adhere to different dimensions of the experienced world, and have specific consequences for sociocultural reproduction (see Eriksen & Weigård, 2014, p. 51 for a tabular assembly of this). This division of action is traced back to Habermas' ontological foundation for perceiving action and rationality, where he starts with a division of the social world into an objective, a social and a subjective one, each which adhere to different *validity claims*; of truth (of facts) or efficiency, rightfulness (of norms) and truthfulness or sincerity (of expressions), respectively (Eriksen & Weigård, 2014; Habermas, 1984). Communicative action is found if actors are oriented towards understanding and at the same time relate to all three worlds simultaneously, thus are truth of facts, rightness of norms and sincerity of expressions the validity claims assumed by communicative action. The framework of communicative action thus says that normative claims have claim to validity, allowing us to approach norm regulated actions as something that can also be justified rationally. Translated into the topic of this thesis, this implies that the best interest of the child can be made subject to rational evaluation in the same way as pragmatic or fact-based claims (Habermas, 1996). The criteria for communicative action to be perceived rational is that the actors manage to obtain reciprocal understanding, within a conception of rationality as something which as a minimum involves a conformity between intention and action. As a matter of acting according to communicative rationality, a person acts rationally not merely based on instrumental rationality – to choose the correct means to an end – but should also be able to justify one's actions, while others can understand why the actor acts as she does (Eriksen, 2003; Habermas, 1984). In relation to best interest decision-making, a decision 'should be supported by reasoned arguments, and bias or worse prejudice should be eliminated' (Freeman, 2007, p. 28)[23]. To be considered legitimate, a best interest decision should be the result of a qualitatively good discussion in which all

[23] See Archard & Skivenes (2010) for an overview of this discussion.

relevant arguments are considered, and the decision must be able to withstand critique.[24]

In Article II, the aim was to examine how a social science concept ('attachment') was understood and applied within the legal sphere (in the Board). The theoretical framework in this article builds among other on Luhmann's systems theory and his idea of autopoiesis, and intersubjectivity is therefore not presumed in this study. The two theories of communicative rationality and systems theory do nevertheless build on the same idea that communication is key for the function and differentiation of systems in modern society (Sand, 2000).

2.1.4. Approaching Discretionary Decision-Making as the Demand for Reasons

The framework outlined in the previous sections constitutes the epistemological and theoretical foundation for the notion of justification and the 'demand for reasons' as premises for legitimate decision-making in this thesis. The demand for reasons also has a direct link to the practical exercise of discretion as decision-makers are expected to make reasoned judgments in relation to relevant rules and standards when interpreting and applying democratically constituted law and policy, as well as to justify decisions in a way that preserves legislative intention (Lipsky, 1980; Molander et al., 2012). In this sense, the demand for reasons, or the obligation to justify, is related to accountability, which again is seen to yield legitimacy. In essence, reasons are the legitimising factor of public decisions: Decisions demand reasons explaining how views are accepted or rejected, as well as justifications for 'why the decision ultimately reached furthers the public purposes of the statutory scheme being implemented' (Mashaw, 2018, p. 168). The basic assumption in the four articles is therefore that

[24] According to Habermas (1996), the medium of law and the legal arena are considered particularly suitable to mediate issues of decision unanimity of pluralistic societies as these facilitate for deliberation and democratic procedures. Along these lines of thought, the medium of law is seen to hold the potential of consolidating norms and their validity, and to find practical solutions to the problems when dealt with within (practical) discourses (Eriksen & Weigård, 2014; Huttunen & Heikkinen, 1998).

reason-giving is to be expected by those actors holding discretionary decision-making authority. What is seen to constitute legitimate reasons are approached by both descriptive (what is accepted) and normative (what ought to be accepted) standards of evaluation in the articles, and the normative framework of ideal deliberative procedures and the principle of discourse ethics is only utilised in Article III. All thesis elements are nonetheless motivated by the basic assumption of the need for reasons and reasoned communication as laid out in theories of argumentation and deliberative democracy.

In the following sections, I discuss what it means to have discretion and provide an operationalisation of the concept by pointing to relevant dimensions and mechanisms in the context of child protection decision-making.

2.2. Discretion in the Democratic Chain of Command

In this thesis, having discretion means that decision-makers are provided with a certain freedom bound by a set of standards to decide how to interpret and give meaning and form to the law in the individual case (Hawkins, 1986). This involves that professional decision-makers are given the autonomy to exercise choice or judgement within a scope of permitted alternatives (Davis, 1969; Hawkins, 1992; see also Molander et al., 2012) and that discretion is relative to a set of standards. I will return to this shortly.

Along with the expansion of the welfare state and the increased differentiation and professionalisation that has followed, discretion has become an indispensable trait of state authorised decision-making in the democratic chain of command (Eriksen, 2001; Hawkins, 1992). Because legislators cannot pre-determine or foresee the exact outcomes of democratically enacted laws, decision-makers are involved in discretionary decision-making at all levels of government. Hawkins (1986, p. 1164) explains how discretion operates in decision-making:

> Decision-making, in short, is the stuff of the law. Discretion enables legal rules and mandates to be interpreted and given purpose and form. It enables judgments to be

> made about the application, reach, and impact of the law. And it enables the conflicting imperatives of consistency and individualization to be reconciled.

For the child protection decision-makers that have been delegated with discretionary power, there is the expectation that the intent of the law is preserved in the process described by Hawkins in the above citation. As Hupe (2013, p. 429) describes it: 'what has been legitimately decided upon in the institutions of state and democracy, should be implemented accordingly'. For one thing, this refers to the need for legality, but it also means that there is an expectation of how implementation of the law should happen, and as such it also refers to the quality of discretionary decision-making and to the legitimacy of decisions.

This far in the framing introduction, I have approached the concept normatively and focused mostly on the problematic sides of discretion as this is where the practical and ethical problems surface. But there is a two-sided nature to discretion. On the one hand, it is seen as a positive trait of decision-making and as a way to achieve equity, individualised treatment and flexibility in the application of the law. On the other hand, it has negative traits, related to difficulties of transparency, control, consistency and prediction, and it is seen to pose a threat to democratic legitimacy and legality (e.g. Molander et al., 2012). The tension that this two-sidedness creates for practice is essentially related to the relationship between discretion and rules. The conceptual debate on discretion has in large concentrated around the function and meaning of rules and correspondingly about the proper balance between rules and discretion. With reference to the indeterminacy of the best interest standard and use of discretion, Schneider (1991, p. 2217) summarises the difficult and reciprocal relationship between rules and discretion:

> In a modern society, the law regulates the complex behavior of millions of people. To do this efficiently, to do this at all, it must use broadly applicable rules. Yet such rules are bound to be incomplete, to be ambiguous, to fail in some cases, to be unfair in others. Some of these failures can be ameliorated by according discretion to the administrators and judges who apply the rules. Yet doing so dilutes the advantages of

> rules and spawns the risks discretion is heir to. Working out the proper balance between rules and discretion is thus both necessary and perplexing in every area of law.

This statement furthermore alludes to the difficulties of making laws in modern value pluralistic societies. Issues concerning the family pose a particular challenge in terms of creating law as it intends to regulate deeply personal and emotional matters which are usually seen as belonging to the private, viz the traditionally autonomous sphere of family life and child-rearing. Schneider (1990) describes the task of writing clear, just and effective rules in such matters as 'absurdly difficult' and the solution, as suggested in the quote above, is to create rules that have wide scopes.

With reference to the wide discretionary scopes in best interest decision-making and to the standards' indeterminate character and lack of legal material substance, the best interest standard has been characerised as a 'juristic black hole' (van Krieken, 2005). The scope for discretion formally granted through the best interest standard does however differ between countries, because, as discussed in section 1.5.2, it varies how much substantive guidance is given to decision-makers (Skivenes & Sørsdal, 2018). The assumption that rules and formal guidance constrain discretion (Dworkin, 1967) is an important premise for the thesis articles and in the following, I will elaborate on the understanding of discretion as a contextual and relative concept. But first, I will provide a simple conceptual distinction between discretion and decision-making and make a brief introduction to the potential errors of human judgment.

2.2.1. Decision-Making and Discretion

Before I go on to discuss the operationalisation of discretion for this thesis, there is a need to make an analytical distinction between decision-making and discretion. While discretion is innately connected to decision-making, the latter is not conditioned by the former – decisions can be made without discretion being involved. In other words, decision-making is connected to decisions, to rules and making choices, whereas discretion entails the power to reason, to pass judgment and the obligation to justify a decision in accordance with certain standards (see e.g. Molander et al., 2012). Greenawalt's (1975, p. 365) description of discretion is illustrative of the difference:

> When a person's choice is not constrained at all we would not ordinarily use the term 'discretion.' We say an official has 'discretion' to pick employees for a company, but we do not say a child has 'discretion' to choose the flavor of ice cream he wants.

Whereas the first person is constrained by some external structures and will be expected to provide reasons for why he chose to employ a given person, the child is not accountable to any person or authority for his choice of ice cream flavour, and it would not be correct to say that the he or she is exercising discretion. Rather, the child is deciding solely based on his or her preferences and standards.

Decision-making theory may, however, be advantageous in informing studies of discretionary practice. For example, research within psychology has illustrated that both analytical and intuitive processes form how judgments are made (Hastie, 2001). Described as ideal-types we may describe the former process as characterised by formal, explicit and logical reasoning, and the latter as inarticulate, based on rapid decision-making and on a largely unconscious reasoning process (Munro, 2002). Two known problems with intuition is that it is prone to bias and over-reliance in one's own judgments.[25] Human judgment is not perfectly rational, and under uncertain circumstances people may seek to simplify reasoning processes by making use of heuristics, mental shortcuts, approximation or rules of thumb. This may lead to bias and errors in decision-making (Munro, 2002; Tversky & Kahneman, 1974).[26]

2.2.2. Discretion as a Contextual and Relative Concept

While acknowledging that the concept 'discretion' may provoke different kinds of questions and varying forms of definition depending on one's theoretical and epistemological point of departure, in this thesis I understand discretion as a general trait of professional decision-making by 'legal actors', or in other words, as discretion applied by state authorised actors applying the law. Hawkins (2003) proposes a 'socio-legal' perspective on discretion where judicial and social science approaches to

[25] See Munro 1999 and 2002 for discussions on this issue in child protection decision-making contexts.
[26] For example, see Houston (2015) for a review of perspectives on rationality in child protection decision-making.

discretion are bridged by putting the analytical focus on the decision-making processes (rather than outcomes) and by utilising qualitative techniques of research. In this framework, discretion is considered a contextual phenomenon, meaning that discretionary decision-making unfolds as a result of interpretative practices that cannot not, and should not, be decoupled from the context in which it occurs (Hawkins, 1986, 2003; Mascini, 2020). This line of thought promotes an analytical approach where decision-makers' exercise of discretion – the reasoning – rather than the legality of decisions, decision outcomes as well as indicators of outcome, are of interest. This thesis' units of analysis and observation range from decision-makers in child protection agencies to judges in the Supreme Court, and this approach allows us to study discretion as a general phenomenon exercised by 'legal actors' in both legal contexts and bureaucratic organisations (Biland & Steinmetz, 2017; Lens, 2012). According to Mascini (2020), a socio-legal approach waives the basic assumption that there is a fundamental difference in how judges and others, such as street-level bureaucrats, exercise discretion. Judges are also considered by some to share similar traits to street-level bureaucrats (Lipsky, 1980; see also Biland & Steinmetz, 2017 and Lens, 2012) while others have approached judges' decision-making practices through the lens of street-level bureaucracy theory (Cowan & Hitchings, 2007). Nevertheless, I do acknowledge that profession and institutional context, logic, and identity matter, and that there is a difference in the status and practical tasks of the different groups of decision-makers. This will be reflected in the individual articles and in the discussion in this framing introduction in section 5.

As indicated above, discretion denotes an autonomy to reason and give judgment relative to a set of standards. Molander (2016) suggests that discretion is relative in two senses: to the standards denoting its scope and to the authority setting the standards. While this thesis is not wholly embracing the liberal notion of discretion (Pratt, 1999), Dworkin's conceptualisation of discretion as 'the hole in doughnut' is adopted to provide an intuitive illustration of the relative nature of discretion. The analogy refers to the dough as the standards and the hole as the discretion, and its purpose is to illustrate how decision-makers' discretion exist only in the presence of a set of given

standards and furthermore, that the scope of discretion may vary depending on the range and character of such standards. Discretion is thus both dependent on and relative to the standards surrounding it. Within this understanding, discretion may be characterised as either weak or strong (Dworkin, 1967) depending on the precision of the standards set by the relevant authority. For this thesis, I adopt a less binary understanding of discretion and see it as belonging somewhere on a continuum with weak discretion on the one end and strong discretion on the other end (Davis, 1969; Schneider, 1993, p. 232). Moreover, discretion requires interpretation of the rules and standards that set the limits of discretion and is as such seen as being composed of two interrelated aspects: epistemic discretion (discretionary reasoning) and structural discretion (discretionary space). In the following section I will present this distinction in further detail.

2.2.3. Epistemic and Structural Discretion

Based on ideas from argumentation theory (Alexy, 2002), Eriksen, Grimen and Molander (2012) suggest that discretion consists of two aspects and that it may be defined as having an epistemic and a structural side. The latter designates the space for discretion or an area for judgment, and the former represents the activity of reasoning under conditions of indeterminacy or the exercise of professional judgment. One way of making this distinction clearer is to relate it to measures of accountability (that discretion is exercised in a reasoned and justifiable way) (Molander et al., 2012). Measures related to structural discretion are aimed at control, where discretionary space and behaviour is constrained by specifying what decision-makers can be held accountable for.[27] Measures relating to epistemic discretion (reasoning) are aimed at producing 'good reasons' through improvement of the conditions for and the quality of reasoning. Related to the idea that decision-makers are granted discretion on the premise that they are 'capable of passing reasoned judgments' (Molander et al., 2012, p. 219) this distinction is important as it provides an analytical premise for us to identify

[27] The distinction between these forms of measures is not clear cut, and structural measures may have epistemic effects as improving or introducing structural conditions may produce better reasons, for example through review procedures.

what decision-makers consider to be 'good reasons' for adoption, of what is considered acceptable public reasons for such a decision, and how structural measures in the form of specification of legislative rules contribute to shape, inform and constrain discretionary reasoning.

Grimen (2009) describes epistemic discretion as a judging exercise under conditions of indeterminacy, where the aim is to distinguish something from something else. The person exercising discretion is reasoning based on certain premises to find out how to conclude on what should be done in the individual case. The degree of discretion a decision-maker holds relates to the degree of indeterminacy in the reasoning process. If a decision-maker is exercising discretion on the strong end of the discretionary continuum, he or she may be provided with few indications or elements for what should matter in the transition from premise to conclusion, and be free to decide which elements to include and how these elements should be interpreted, emphasised, and in turn balanced (Grimen, 2009). For example, in Article IV, neither Norwegian or English law ascribe weight or provide instructions for the balancing of considerations in assessments of the child's best interests, and there are multiple areas where epistemic discretion may be required in applying the standard in a decision on adoption. First, one might have to weight different and potentially conflicting concerns against each other depending on a certain expectation of outcome or value. Second, one must ask what it means that something is in the best interest of a child, and third what parameters should be actualised in the pursuit to determine what is best for the child.

This thesis is mainly concerned with the epistemic aspect of discretion as the aim is to understand the reasoning of decision-makers and how they justify their decisions in a context of indeterminacy.

3. Research Design

In this section I will present and reflect upon the methodological choices that I have made to answer the research question of this thesis. The data material for the thesis is rich and multifaceted, consisting of both naturally occurring and researcher generated data. The analytical approach is qualitative, and the data is analysed utilising different forms of content and argumentation analysis of written texts. For Article I, II and IV the qualitative data is also quantified through systematic classification and enumeration of categories and the findings are presented in numerical as well as textual form. Details about the data and the methods applied can be found in the individual articles. Table 2 summarises the research design for the four individual studies.

Table 2 Overview of research designs for thesis articles

	Article I	Article II	Article III	Article IV
Analytical approach	Within-country comparative text analysis of open-ended responses to a survey vignette	Text analysis of assessments in written decisions on adoption	Argumentation analysis of written CBI assessments in judgments on adoption	Cross-country comparative text analysis of written CBI assessments in decisions on adoption
Data	Survey data: written responses (n=498) to a vignette	Documents: Decisions on TPR and adoption (n=58)	Documents: Supreme Court judgments on TPR and adoption (n=4)	Documents: Judgments and decisions on TPR and adoption (n=29 in England and n=29 in Norway: total n=58)

Units of analysis	Child protection agencies and the legal first instance decision-making body in Norway	The legal first instance decision-making body in Norway	The Supreme Court in Norway	Legal first instance decision-making bodies in England and Norway
Units of observation	Discretionary assessments of the CBI by child protection workers and legal decision-makers (judges and experts on children) in the Board	Discretionary assessments by legal decision-makers in the Board	CBI argumentation by judges in the Supreme Court	Discretionary reasoning of the CBI by legal decision-makers in the Board and the Family Court
Year(s)	2017	2016	2015-2019	2016-2017

3.1. A Comparative Approach

According to Collier (1991, p. 105), comparative approaches to analysis 'sharpens our powers of description, and plays a central role in concept-formation by bringing into focus suggestive similarities and contrasts among cases'. Comparison is done in two ways in this thesis: cross-country (Article IV), and within-country (Article I). As for the latter, this also applies to the thesis as a whole when bringing the articles together, as I have adopted a cross-level approach where the discretionary practices of decision-makers at different institutional levels in the democratic chain of command are analysed: the front-level decision makers in the child protection agencies (Article I), the legal first instance decision-makers in the Board (Article I, II and IV) and the decision-makers sitting at the apex of the national judicial system in the Supreme Court

(Article III). As for the former, decision-making in legal first instance decision-making bodies in England and Norway is analysed. Only applied in one of the thesis elements, cross-country comparison has a smaller role in this thesis and the study design does not accord with the traditional case study or small-N notion of comparative method. Yet in a sense, most empirical social science do involve some form of comparison (Ragin, 1987) and in this thesis comparison is approached in the general sense as something that 'provides a basis for making statements about empirical regularities and for evaluating and interpreting cases relative to substantive and theoretical criteria' (Ragin, 1987, p. 1). Beyond the within and cross-country comparative analysis, there are also elements of comparison in the thesis that concerns time (Article III) and professional affiliation and training (Article I).

3.1.1. Cross-Country Comparison

The idea behind comparing decisions from two countries is that it enables us to elucidate the particularities and patterns for discretionary reasoning in the respective systems, and moreover to tease out localised and cross-national substantiation practices of the child's best interest. The decision to compare England and Norway in Article IV was based on their seemingly similar legal and moral foundations for decision-making, having legislative similarities and a common obligation to the CRC, combined with their dissimilar structuring of discretion. The two systems are also characterised as belonging to different child protection orientations and welfare state regimes (Berrick et al., In pressa; Burns et al., 2017a). With respect to the former, this concerns how different systems perceive risk and legitimate state intervention and investigating the same empirical phenomenon – adoption best interest assessments – through a lens of national child protection contexts enables inquiries into differences and similarities, as well as weaknesses and strengths of the respective systems (Connolly & Katz, 2019; Duffy & Collins, 2010; Hestbæk et al., in press). As Denters and Mossberger (2006) argue, comparison is a beneficial alternative to experimental methods that allow social scientists to use systemic variation to explain similarities and differences. This facilitates for the '… exchange between countries in order to improve legislation, policy and practice' (Pinkerton, 2008, p. 247) and the comparative method may thus

provide valuable insight into Norwegian conditions that would otherwise remain undiscovered. A number of research studies have both illustrated (see for example Berrick et al., 2017; Dickens et al., 2017; Osmo & Benbenishty, 2004) and urged (Gold et al., 2001) the importance of cross-country comparisons on decision-making processes in child protection and to my knowledge, few studies have analysed decision-making in this field based on actual decisions (cf. Krutzinna & Skivenes, 2021).

3.1.2. Within-Country Comparison

The rationale for within-country comparisons is twofold and the aim is to reveal both general and specific traits of discretionary practices and child's best interest substantiation: First, to uncover the specific and general features of discretionary practice within groups of decision-makers situated within the same political, legal and cultural context, and second, to examine cross-level differences along the democratic chain of command to uncover group level mechanisms and potential inconsistencies and variances in the implementation of the child's best interest. Within-country comparison is made in Article I where the aim is to examine the dynamics of discretionary decision-making in a comparative perspective, as well as in this framing introduction where the findings from all articles are synthesised and discussed in relation to each other in the discussion in section 5.

3.2. Text Analysis – Written Judgments and Decisions on Adoption from Care

The data analysed in Articles II, III and IV consists of written legal documents in the form of legal administrative decisions from the Board and judgments from the Norwegian Supreme Court. These are naturally occurring data that are written by the presiding judges in retrospect of the decision. For the purpose of examining how decisions on adoption are substantiated and how decision-makers exercise discretion, legal decisions on adoption are studied as they provide direct access to the reasoning that is used to formally justify a decision. As such, we are able to obtain what decision-makers consider to be public reasons for and against adoption and thus of factual and normative importance. Only a few of the Boards' decisions are made publicly available

each year (Burns et al., 2019) and analysing large and mostly representative samples[28] of decisons thus pay particular service to opening the black box of discretionary decision-making in child protection. As the Supreme Court judgments constitute the extraordinary cases in a judicial system, these documents also provide insight into the questions that are considered to be of principled or exceptional character.

Inspired by feminist approaches to analysis of legal decisions (Hunter, 2015), a critical approach is applied in the sense that legal reasoning is scrutinised to uncover which and how concepts are used and interpreted, how arguments are constructed and what elements are included, missing or excluded from the text. The idea is that individual or groups of judges 'may reason as well as decide differently' (Hunter, 2015, p. 8). This implies a socio-legal approach to analysis, where the specific professional as well as socio-legal context is seen as relevant for the exercise of discretion (Mascini, 2020).

3.2.1. Data Collection

The written data material in this thesis consists of decisions on termination of parental responsibility (usually) and adoption: 58 decisions from the Board and four judgments from the Norwegian Supreme Court. Moreover, the material includes 29 judgments on placement orders from the English Family Court.

The Supreme Court judgments were collected from the online public database 'Lovdata Pro'.[29] The decisions from the Board were collected in 2017 and consists of all decisions made in 2016, 58 in total. The sample is representative, and the decisions were collected directly from the Board. Only a small proportion of these cases are made publicly available (in anonymised form) at Lovdata (Pro) each year.[30] The data was

[28] For the sample of judgments from the English Family Court, only the decisions that were collected directly from the courts are representative. I will return to this in section 3.2.1.
[29] This is the upgraded version of the database 'Lovdata' where decisions from the Supreme Court are available for four months. After this, judgments are only available at 'LovdataPro' for a yearly fee.
[30] Most decisions from the Board are not publicly available, but each year a small, non-representative, sample of judgments are published online in the public database Lovdata.no. In the years 2011-2016, 36 of the total 283 decisions (13 per cent) on adoption were made publicly available and the cases were distributed among 10 Boards.

collected as a part of a project that started in 2016 (the ADOPTION project, see section 3.4.1) where all decisions made between 2011 and 2016 were collected, N=283 in total, but only the decisions from 2016 are studied in this thesis. As a first step in the collection process, the Central Office for the Boards was contacted with a request for an overview of all judgments on termination of parental rights and adoption made according to the CWA section 4-20 made between the years 2011 and 2016, regardless of outcome. Those decisions that only concerned termination of parental rights by section 4-20 first sentence were not included in the sample. As a next step, we asked for access to the decisions, which was granted in accordance with the ethical approvals that we had obtained. The decisions were obtained in physical format at the premises of the Board located in Bergen. The data were not deidentified at this stage, so stringent procedures for handling of the case documents were established in collaboration with the University in Bergen and approved by the relevant authorities and bodies granting ethical approvals (see section 3.4.1). Only researchers with approval have had access to read the Norwegian adoption decisions.

The judgments from the Family Court were collected in 2018 and 2019 from two different sources and consist of judgments that are publicly available through the BAILII database (British and Irish Legal Information Institute) (n=29) and of unpublished judgments collected directly from court registries in two large court areas in England (n=27). From the total sample consisting of 56 decisions, only 29 are analysed in this thesis and I refer the reader to the methods section in Article IV for details about the selection of cases. We chose to collect decisions from different sources for two reasons: to improve confidentiality and because few judgments result in written judgments. The decisions collected from BAILII were decided in 2016 and those from the court areas were decided in 2016 and 2017. For the unpublished cases, relevant decisions were identified with assistance from Cafcass, from whom we requested an overview of all placement order applications made in 2016 in the relevant court areas. The BAILII cases were identified by searching the database for placement orders.[31]

[31] Filtering the judgments by instance, searching only under the option: 'England and Wales Family Court (Other Judges)'.

From one court the judgments were collected in physical format directly from the court, and from the other courts the documents were collected electronically. All documents were deidentified before removing them from the court premises/extracting them from the electronic storage. The case documents were stored and handled according to the same procedures as the Norwegian cases and only researchers with approval have had access to read the English adoption judgments.

3.2.2. Coding and Analysis

The data for article III consists of four Supreme Court judgments and the analysis was conducted with a qualitative approach, inspired by thematic content analysis and legal argumentation. As the objective in Article III was to conduct a critical analysis of the Court's reasoning based on the normative idea of deliberative decision-making and rational argumentation in the legal context, the analysis was grounded in theories of argumentation from the tradition of Alexy (1989) and Habermas (1996). While the analytical approach builds on the framework developed by Skivenes in her study from 2010, Article III advances the established framework by adding a critical analysis of the Court's substantive justifications of its judgements.

The data for articles II and IV consist of written judgments on adoption from legal first instance decision-making bodies in England (Article IV) and Norway (Article II and IV). For both Article II and IV the methodological approach is best described as abductive and qualitative. The method utilised is content analysis, which according to Graneheim, Lindgren and Lundman (2017) may be seen as a process of evolving from the phenomenological to the hermeneutical and from the concrete to the abstract. The analytical process can be described as comprised by descriptions and categorisation of manifest content with the subsequent interpretation and allocating of categories and search for meaning.

To answer the research questions outlined in Article II, the analysis was aimed at exploring the meaning of attachment as a concept by identifying how the Board makes use of and operationalises attachment in their argumentation. Answering these

questions will in turn provide insight into the discretionary activities of the court and how these would contribute to legitimate decisions. The Boards assessment (not limited to the best interest assessment) was analysed through a content analytical approach where the qualitative analysis was combined with quantitative approaches (counting occurrences of words and references to attachment).

For Article IV, the analysis focused on the English and Norwegian courts' best interest assessments. The differences relating to dissimilar case circumstances and procedural structures was found to constitute an analytical barrier in terms of producing findings that could contribute to answering the research questions. As a measure to overcome these challenges, legal argumentation was defined as a form of practical reasoning. By applying the logics of Toulmin's (2003) model of argumentation I developed an analytical framework that lifted the analysis from a narrow focus on argumentation and decision-making factors and over to focusing on the normative basis of judgments and the discretionary activities of the judges. The details around the analytical model and the coding process are found in the article, so only a summarised description of the applied model is provided here. According to Toulmin, argumentation is comprised by a set of elements: A) a description of the situation, B) a conclusion or course of action drawn upon this description, and C) a norm of action that bridges the first and the second component and warrants action. In addition, the norm of action should be justified as (in)valid or (in)applicable given a certain conclusion by providing backings or rebuttals for the norm of action. To answer the research questions of how decisions on adoption are justified and how discretion is exercised, the analysis focused on what norms of action (C) were invoked in the judgments and on the justifications that were provided to rebut or back an invoked norm. The text was coded and analysed using qualitative content analysis, while applying the logics of Toulmin's model of argumentation in the process of coding and interpretation.

3.2.3. Limitations

The analyses for Articles II, III and IV are based solely on written material. Certain limitations are associated with this. First, the judgements are authored in retrospect and

written to validate the legality of the decision (Eckhoff & Helgesen, 1997). Second, legal decisions do not provide a complete picture of the individual case, and from a researcher point-of-view, relevant and interesting information is not necessarily included in the written text (Magnussen & Skivenes, 2015). As Artis (2004, p. 776) formulates it in her analysis of judges' best interest accounts in custody cases: 'One problem with studying custody rulings is that there is no guarantee that the judges provide their actual reasoning in the written decision; they may simply write the decision to reflect statutory criteria and to protect themselves on appeal'. Nevertheless, decision-makers (in Norway) are required by law to give reasons for their decisions (The Dispute Act, 2005 section 9-6) and the content of a decision will nonetheless reflect the justifications that the Board or the Supreme Court wishes to account for. The justifications are thus given as 'public reasons' or official argumentation, and the written reasoning will have distinctive research value as it illustrates what the decision-makers consider legitimate and acceptable reasons for and against adoption. Third, the decisions from Norway (both the Board and the Supreme Court) and from the English court areas are representative, but the BAILII decisions are a convenience sample and we do not know if they are representative of the decisions made that year (see section 3.2.1). Fourth, a caveat with studying written judgments is that these data provide limited insight into motivational and heuristic mechanisms that operate when decisions are made. However, I find Article I and the vignette study to complement the findings of the text analysis, as this analysis taps into the decision-making mechanisms operating in these decisions.

For Article IV, only the courts assessment of the child's best interest was analysed. In the process of identifying relevant text in the English judgements, a degree of discretion was applied as it was not always obvious from the text where the child's best interest assessment started (or some cases, ended). This may impact the reliability of the data, though only four judgments were characterised as 'uncertain'. In terms of comparability, there are known challenges with cross-country comparisons related to conceptual comparability and context sensitivity (Collier, 1991; Kosmützky et al., 2020). For Article IV this is particularly related to the case profiles, as well as the nature

and format of the decisions. This is described in length in Article IV, and in section 3.2.2 I also describe some of the methodological measures taken to accommodate these challenges. For Article II, there is the caveat that we cannot (and do not) say anything about the quality of the investigations made by experts and other professionals in the cases.

3.3. Vignette Survey

The vignette method was used in Article I to examine how decision-makers approach a decision on adoption and how they justify their choice. A vignette may be described as a short story 'about hypothetical characters in a specified circumstances' (Finch, 1987). Being particularly suitable for exploring sensitive topics and moral dilemmas (Barter & Renold, 1999), the vignette has become a common and recognised research tool in social science for studying normative material and professional decision-making. A number of studies have also demonstrated that assessments made in response to vignettes are similar to those made in reality (see e.g., Peabody et al., 2000). In Article I, the assessments of three different decision-maker groups (at two different decision-making levels) are compared. The vignette methodology is seen as advantageous for studies that seek to elucidate aspects of individual judgment and explore relationships between action and values (Wilks, 2004). It also has benefits for comparative analysis, since the conditions in a vignette are held constant it allows the researcher to analyse how decision-makers decide and make assessments based on the same set of stimuli (Soydan, 1996).

3.3.1. Design and Development

The vignette survey was developed in 2017 and combines a forced choice design with open ended questions. Combining these allows us to categorise and compare respondents based on their choices while also allowing the respondent to 'define the meaning of the situation for her or himself' (Finch, 1987, p. 106). The vignette survey was designed to reveal the 'game changing' variable(s) in the decision-makers' assessment, thus tapping into the discretionary component of decision-making while also pinpointing what best interest component(s) are important.

The vignette was developed based on a systematic reading and registering of characteristics of decisions from the Board, and several versions of the vignette were tested on a panel consisting of experts, end-user organisations and on fellow researchers.[32] These are measures that were applied to ensure realism and the necessary case complexity, where the desired result is engaging scenarios that the respondents can relate to, and thus provide us with assessments that reflect reality. Since the vignette is based largely on observations from the descriptive analysis of the Boards' decisions, the constructed case may be described as mirroring the 'average' adoption case. The constructed case description is about one page long (see the Appendix for the full and translated version of the vignette) and concerns a four-year old boy named David. Before reading about David, the decision-makers were asked to evaluate David's current situation and conclude on a course of action. After reading the case, the respondents were asked to consider the following: 'Based on this short description of the case, in your opinion, would you suggest adoption or continued foster care for David?'. They were given two options: adoption or foster care. Following this, they were asked two open-ended questions that they responded to using their own words. First, 'Which specific features of this case are decisive to your decision?' and, second: 'In which way would this case have to be different for you to make a different decision?'.

3.3.2. Data Collection

The survey was distributed to child protection workers in the municipal child protection agencies and to judges and experts on the Board in June 2017. The child protection workers were recruited from the 15 largest municipalities (> 50 000 inhabitants) in Norway (40 child protection agencies (units) from 21 municipalities[33]: total N = 1444)

[32] A legal decision maker from the Board, two child protection workers and an agency manager, as well as representatives from the Norwegian Foster Care Organization, The National Association for Children in the Child Welfare System (LFB), the Joint Migrant Council (Hordaland), the Norwegian Union of Social Educators and Social Workers (FO) and the Organization for Child Welfare Parents (OBF).

[33] Two of the agencies have agreements on intermunicipal cooperation, adding six additional municipals to the total number of municipalities we have recruited from.

and the County Board members were recruited from all 12 Boards in the country (experts N = 365 and judges N = 79)[34]. Laymen were not included in the study as most of them have very limited experience with decision-making in the County Board. In total, 781 (41 per cent) decision-makers responded to the survey: 556 child protection workers (39 per cent), 183 experts (50 per cent), and 42 judges (53 per cent).

In total, 651 decision-makers – 461 child protection workers, 158 experts and 32 judges – responded to the follow-up question to the vignette on whether they would recommend adoption or continued foster care for the boy. In Article I, only the justifications from those who chose adoption is analysed. [35] The experts that responded to the vignette (n = 158) were mostly psychologists (65 per cent), followed by child protection workers/social workers/child protection officers (26 per cent), other or unknown (5 per cent), and medical doctors (4 per cent).

3.3.3. Coding and Analysis

The analytical approach to the survey data was content analysis, and the aim was to identify which case factors the different groups of decision-makers emphasise and how different considerations are balanced against each other. The initial development of categories and coding scheme for the open-ended text was done by myself in cooperation with my thesis supervisor as a part of the previously mentioned project on adoption (the ADOPTION project, see Helland & Skivenes, 2019, as well as section 3.4.1). As a first step of coding in relation to the ADOPTION project, I carried out the coding, while two scientific assistants contributed with reliability testing. For Article I, the coding framework was further developed. This included the splitting of some categories and collating of others. In this process, I was responsible for all coding, reliability testing and formulations of new categories. The coding was mainly empirically driven, and the codes and the categorisation of responses are reflections of how the respondents formulated their answers.

[34] By January 1st, 2020, the number of County Boards is reduced from 12 to 10 due to a reformation of the municipal system.
[35] In total, 498 respondents responded to the first question about why they chose adoption, while 442 responded to the question of what would have to be different for them to change their decision.

3.3.4. Limitations

The limitations related to Article I and the vignette method is described in the article and only a summary is given here. The main limitations are related to (1) vignette realism and complexity, (2) whether the respondents' answers reflect what they would have actually done, and (3) sample size. Regarding the former, due measures were taken to ensure realism and complexity, though the vignette would necessarily include less information than a real-life case description would. As to the second point, this is a well-known challenge in survey research, but the vignette's capability to address social desirability issues and reduce observer effects is considered to alleviate some of these concerns (Soydan, 1996; Wilks, 2004). For the latter, different sample sizes could cause an increase in the margin of error in interpretation: Yet due to the sampling and representativity of respondents this issue is considered minor.

3.4. Ethical Considerations

Child protection involves some of the most vulnerable groups of individuals in society. Children are by their status as children vulnerable, but children in the child protection system are in a situation of heightened vulnerability as a great deal of these children carry with them a history of exposure to neglect and abuse. Being fostered may also carry stigma and feelings of insecurity. The birth parents also represent a particularly vulnerable group. Studies have recurringly shown that the families that are involved with child protection services are often economically and socially marginalised (Clifford et al., 2015). Moreover, the parents in this study have been deemed unfit to care for their own child(ren) and often find themselves in a hopeless situation characterised by loss and grief. None of the individual studies in this thesis have approached any of these groups directly, but by studying the case documents from the Board a lot of information about the lives of the involved parties and about the case proceedings are exposed. Making sure that these case documents are handled with due care and ethical responsibleness has been a priority in this project. Moreover, those birth- and foster parents, as well as children over the age of 16, that we were able to

securely identify from the case documents were informed that their cases were being researched, I will come back to this in the next section.

3.4.1. Measures to Secure Confidential and Ethical Storing and Handling of Data

All procedures for storage, anonymisation, and deletion of data follow national and EU regulations, and the project has been through a thorough process of ethical approvals. The written case material (the decisions/judgments) has been stored in 'SAFE' (secure access to research data and e-infrastructure) which is the University of Bergen's (UiB) solution for storing sensitive data used in research. This is a secure desktop with stringent security settings, and all processing of the data (reading, coding and analysis) has been carried out in SAFE. All material that has been exported out from the secure desktop is de-identified and case characteristics are only presented at the aggregate level as statistics. The survey data material was collected electronically using the survey tool SurveyXact. UiB has shared licenses for this tool, which is outside of UiB's servers, but is assessed by the UiB to have good safety routines.

Participation in the survey was voluntary and before giving their consent to participate, the participants were informed about the study and handling of the data. All data material from the survey has been de-identified and no identifiable information has been extracted from the survey tool. For analysis, respondents were grouped by decision-making affiliation, and all characteristics are reported at the group or aggregate level. The respondents are not at any point linked to their workplace or geographical location.

This PhD project is a part of a larger research project led by professor Marit Skivenes (ACCEPTABILITY). The project is financed by the Norwegian Research Council (grant no. 262773). The ethical approval process started in 2016 in conjunction with the previously mentioned project on adoption, financed by the Norwegian Ministry of

Children and Family (Bufdir) (the ADOPTION project)[36] and since then, additional ethical approvals and updated approvals are given in conjunction with the ACCEPTABILITY project. The Norwegian part of the ACCEPTABILITY study is reported to the Privacy Ombudsman for Research, NSD. The project has been reported in two parts at the recommendation of the Privacy Ombudsman and has two project numbers 50982 and 52781, relating to the court decisions and survey material, respectively. Parts of the project (the survey) are also submitted to and approved by City Council Department for Health and Care in Bergen Municipality (case number 201712514-2 MSSO). The project has also been granted access to confidential documents in accordance with the CWA (1992), after exemption from confidential information for researchers under the Public Administration Act Section 13d from the Directorate for Children, Youth and Family (Bufdir), with the consent of the Council of Confidentiality and Research (Case No. 2018/50838-2). The initial permissions given in conjunction with the ADOPTION project were extended to include the ACCEPTABILITY project on 20.02.2018, with later updates.[37] The project has also been granted license from The Norwegian Data Protection Authority (DPA) in connection with the analyses of the court documents (years 2011-2016) (ADOPTION/ACCEPTABILITY: Ref. 54904/3/BGH). A condition of the concession from the DPA was that we informed all parents and children over the age of 16 that their cases were being researched. In total, 447 information letters were sent from the University of Bergen (UiB) in February 2018. The 447 people who received the information letters make up about 47 per cent of the persons identified by name in the decisions.[38] The ACCEPTABILITY project was assessed by the Data Protection Officer at the University of Bergen (after the implementation of the new Norwegian Personal Data Act and the EU General Data Protection Regulation in 2018) which confirmed that the project was operating in accordance with current regulations (December 2019).

[36] Professor Marit Skivenes was principal investigator, and I was the main researcher on this project.
[37] See https://www.discretion.uib.no/wp-content/uploads/2019/12/INFORMATION-ABOUT-DATA-PROTECTION-ETHICS-AND-DATA-ACCESS.pdf.
[38] The remaining 53 per cent we were not able to securely identify, either because of insufficient information about the person, duplicate names, or that the person had deceased or moved out of the country.

As discussed above, the English judgments from the Family Court were accessed through the public database BAILII (permission to these cases is not restricted) and directly from the courts of two large court districts (not publicly available and permission restricted). Through the ACCEPTABILITY project, permission to access the judgments from the court districts' non-published judgements was given by the President of the Family Division of the High Court of Justice (on 12.11.2018), the presiding judge of each court studied (in August 2018), and from the Children and Family Court Advisory and Support Service (Cafcass) Research Governance Committee (on 24.10.2018). The case material was collected directly from each court, and de-identified by project researchers before removing the material from the court premises.

4. Results – Article Summaries

Three peer review articles and one book chapter is included in the thesis. In the following, I will provide a summary of the articles and the chapter, concentrating on the motivation, empirical and conceptual approach, research questions, methods, and main results.

4.1. Article I – Tipping the scales: The Power of Parental Commitment in Decisions on Adoption from Care

The first article focuses on the discretionary reasoning of professional decision-makers in child protection matters in Norway. The study targets decision-makers at two levels in the decision-making chain (the front line and the Board), and the aim is to improve our understanding of how the child's best interest is substantiated and how decision-makers exercise discretion when faced with a decision on adoption. The following questions are pursued in the article: Which factors are important when child protection decision-makers decide on adoption? How are different considerations balanced against each other? Are there similarities or differences within and between decision-maker groups and decision-making levels? The data consists of written responses to two open-ended questions to a survey vignette about a four-year old boy in foster care, where only the responses of those who chose adoption when presented with the vignette are analysed. The data are analysed using qualitative content analytical methods.

The starting point for the study is that decision-makers in the front line – in the child protection agencies – and in the Board (judges and experts on children) are granted a wide discretionary scope to assess when adoption is in a child's best interest, as statutory and other formal guidance given to decision-makers are scarce, and the best interest standard normatively and empirically indeterminate. The implication is that these decision-makers occupy the role as interpreters of democratically constituted law and policy, where the freedom to substantiate and interpret the best interest standard and to balance and weight considerations against each other gives room for variation and non-legitimate discretionary decision-making. The study is designed to provide

new insights into the discretionary reasoning exercised by decision-makers when they are given the autonomy to not only assess what are relevant best interest considerations in decisions on adoption, but to judge how certain considerations and values should be weighed against each other.

While policy has moved towards the encouragement of adoptions, the Norwegian child protection apparatus has been under extensive international legal scrutiny during the past years and the threshold for adoptions has been set at the level of requiring 'exceptional circumstances'. The number of adoptions each year is low, and we know little about what reasons decision-makers consider as exceptional enough. From research, the expectation is to find that decision-makers emphasise parent related factors such as parental functioning, capabilities and qualities, and child related factors concerning children's right to family life, such as bonds and contact with parents, as well as well-being and developmental needs (attachment, stability, and permanence). Besides the legal and political context that structures the discretionary space, the wider societal norms, as well as system characteristics (policy, legal principles, and systemic norms) and professional context, is expected to influence the exercise of discretion. As a matter of congruence and variance within and between decision-making levels and groups, expectations of both are outlined based on theoretical and empirical assumptions on how contextual qualities would contribute to influence and shape discretionary reasoning and justifications for adoption.

Results show that when seen as a whole, the decision-makers point to the child's attachment to his new family (foster parents) as the most important factor when choosing adoption (66 per cent), followed by parental inability to change and provide adequate care (61 per cent), the child's age – both at the present and at the time of the placement – as well as the time the child has spent with the foster family (55 per cent), the poor quality of contact (visitation) and negative reactions to this contact (46 per cent) and finally, the needs of the child and that adoption provides permanence and has positive effects (45 per cent). For the second question there is, in all the essentials, two factors that are highlighted as having to be different for the decision-makers to change

their decision from adoption to continued foster care: birth parents' ability and initiative for positive change (86 per cent) and if there were to be bonds or attachment between the child and his parents (24 per cent).

The findings show that formal structures, such as legislation, clearly influence discretion, and that a majority of decision-makers agree upon the same set of determining factors. It is also evident that wider societal norms and system characteristics are reflected in the reasoning. Although the similarities are prevailing, there is also some variance located between and within decision-maker groups. The differences within groups may be an indication of insecurity among decision-makers about what factors should be taken into consideration. This could stem from the lack of formal guidance, but it could also reflect differences in weighting and personal convictions. Between groups, differences follow professional roles rather than decision-making levels and explanations are sought through dimensions of professional autonomy, experience, and knowledge. Besides adding to the knowledge of material best interest justifications, the analysis also sought to uncover how certain values and interests are balanced against each other. In that sense, attachment stands out as the main factor for decision-makers that favour adoption, yet parental capacities and potential for change have pivotal power. These findings are in line with the notion that modern child protection practice relating to adoption is characterised by a tension between family preservation and partnership with permanence planning for children in care, and it furthermore illustrates the strong normative power of parental capability and change. The findings point to a discretionary practice where a decision on adoption is reliant both on children's attachment relationships *and* parental capability and capacity for change, yet with the latter as the factor that tips the scale. Considering that the child's attachment to his foster parents was emphasised as the most important argument for adoption, one could imagine that if this relationship was different – if attachment was weaker – that decision-makers would point to this as a potential game changer. Yet close to none mention this a concern that could change their decision. In other words, if parental change occurrs, the child's attachment to his new family no longer has decisive power. I ask if it could be that decision-makers, in the absence of statutory guidance,

are ‘covering their backs’ by holding that both attachment and parental inability to provide care must be proven for them to opt for adoption. The difficulty of passing judgment in child protection decisions is thought of as reflecting the ‘dilemma of liberalism’ where the respect for parental liberty and family autonomy clash with demands to protect the needs and welfare of children. A possible explanation for the decision-makers’ weighting of change is that they are acting on ideas of negative freedom, where they are reluctant to intervene through adoption if the parents are not exercising their parental rights in harmful ways.

The findings indicate that discretion is patterned and guided by a hierarchy of norms and standards. While the child-centred elements of the law are welcomed by decision-makers, they appear to be difficult to implement because of the normative conflicts that arise. This points to a practice that is lagging in relation to the child-centred legislation. Furthermore, there are contours of a practice where decision-making criteria are produced at the implementation stage, induced either by the need to accommodate contradicting demands or by ideology. While the displayed uniformity may contribute to predictable decision-making, the legitimacy of the judgments is threatened by the lack of democratic control over practice, as well as the risk that ideological forces govern discretion.

4.2. Article II – Understanding Attachment in Decisions on Adoptions from Care in Norway

The second article investigates how decision-makers in a legal setting interpret and make use of social science knowledge in legal decision-making, specifically the concept of ‘attachment’. According to the Norwegian Child Welfare Act (1992), the Board may consent to adoption if the child ‘has become so attached to persons and the environment where he or she is living that (…) removing the child may lead to serious problems for him or her’, but the definition and interpretation of attachment is at large left to the professional judgement of the individual decision-maker. The analysis arrives from premises given in theories of argumentation and institutional theory: when expert knowledge crosses professional fields, the intended meaning and qualities of

applied concepts must be sustained, and concepts must be applied according to their intended purpose. In terms of legitimate decision-making, one is entitled under a democratic rule of law to have an expectation of how the legal text is interpreted and on what basis (predictability), and to receive equal treatment. The discretionary interpretation of attachment and lack of substantial guidance thus challenge the legitimacy of both the decisions and the decision-making institutions. The aim of the study is to explore how attachment is interpreted in decisions on adoption and how decision-makers apply it to inform their decision. More specifically, we ask: Is attachment utilised in congruence with psychological theory or more along the lines of common speech? If the latter is the case, what implications could this have for the quality of the decisions that are made?

Developmental psychology has become an increasingly important supplier of knowledge in legislative processes and decision-making on children. Attachment theory, in particular, has attained a significant position in the Norwegian discourse on children's welfare, and while little is known about the public administration and the courts' use of the concept, research points to issues in terms of appropriate and consistent application on a case-by-case basis. We define two distinctive ideal types of attachment where we see it as originating from either a psychological (attachment theory) or non-psychological ('common-sense') understanding of the concept. The data consists of 58 decisions from the Board, where the assessments made by the Board are analysed to map and reveal how 'attachment' is operationalised and understood by the decision-makers. The data are analysed utilising a qualitative content analytical approach.

The findings were analysed by looking to theories of systems of communication in the tradition of Luhmann, focusing on his concept of autopoiesis and ideas on the logics of the legal system. We adopt the idea about a binary perspective in child protection matters of justice and welfare, and the notion of a closed legal system that is dependent on externally produced knowledge. As a matter of children's welfare,

the legal decision-makers are informed by a psychological discourse of what is beneficial or harmful for children.

Results show that attachment has a prominent position in decisions on adoption and that there is variation in the conceptualisation of the concept. Attachment is understood both as a non-psychological and psychological concept, yet more often as the former than the latter. When interpreted as a non-psychological concept, attachment is mostly used to describe the quality of a relation between the child and his or her parents – both foster parents and birth parents – through dimensions of time (child's age, placement time, length of placement), identity, integration and belonging (feelings of self and safety), and through conditions related to care and contact (frequency of contact, experiences with neglect and or adequate care). When applied as a psychological concept, attachment is mostly used to describe a relation to foster parents and to a lesser degree to birth parents, and the terms applied are 'secure', 'insecure' and 'disorganised' (the former relating to foster parents and the two latter to birth parents). When describing an attachment relation, the Board often use multiple adjectives, describing the strength (quantity) of the relation, such 'weak', 'strong', 'none' or 'complete', or the intensity of the relation with terms as 'primary', 'rooted', 'fundamental'. Non-psychological terms, such as 'safe', are often used in combination with psychological oriented terms, such as 'secure'. Attachment is also found to be highly relevant for best interest assessments, and the child's attachment is considered in relation to foster and/or birth parents as a part of the best interest assessment in 86% of the cases.

The findings show that there is no uniformity in the conceptual understanding of attachment. The inquiry into the epistemic discretion of decision-makers show that there is a clear binary understanding of attachment as being present or absent. While the legal text may contribute to explain some of the findings, the discretionary reasoning decision-makers exercise also hint to a certain approach to argumentation where the strong attachment with foster parents is counterpoised with the weak or non-existing attachment to birth parents. This fits well with the understanding of the binary judicial logic where justice requires the absence or presence of a certain quality.

Simplifications may also appear when uniform understandings are hard to attain. Binary or simplified understandings of a complex concept like attachment are problematic all the time a child may have multiple or multi-layered attachment relationships. Moreover, a tension between welfare and justice is found to emerge in the reasoning process as the judicial discourse on several occasions alludes to a psychological discourse by referring to qualitative properties of the attachment relationships. This may derive from the composition of the Board (often presiding with a psychologist member) or it may come as a result of policy manifesting itself at the decision-making level. Relating to the discretionary space of decision-makers, we find that the decision-makers exercise their discretionary autonomy widely in terms of where in the decision attachment is seen as relevant to include, and of when it is the most relevant and preferred factor to assess. What remains unknown is whether it is understood by decision-makers as an umbrella concept that covers most concerns relevant for an adoption assessment, or whether it is merely considered as pivotal in the balancing of adoption or continued foster care.

Given the comprehensive room for discretion provided to decision-makers, the findings are not surprising. They are, on the other hand, problematic as variance in the interpretation of a key concept could pose a considerable challenge for the quality of decisions. If key concepts are not applied in a consistent manner, similar cases may receive differential treatment, and issues of predictability before the law may arise. To minimise ambiguity and ensure greater consistency, we suggest that legislators consider providing decision-makers with clearer and more substantial guidance as to how to assess and give meaning to attachment in adoption cases.

4.3. Article III – In the Best Interest of the Child? Justifying Decisions on Adoption from Care in the Norwegian Supreme Court

The third article focuses on the best interest argumentation of the Norwegian Supreme Courts in judgments on adoption from care. The Supreme Court's decisions have major impact on the practices of the lower courts and for those making decisions on child

protection matters, and moreover, the court holds the power as secondary lawmaker and policy-influencer. Situated at the apex of the court system, decision-makers in the Court also have strong discretion. In the tradition of deliberative theory, the Court's capacity to produce justified and rational decisions is seen as vital for how they attend to their responsibilities as guardians of the constitution to control, interpret and authorise state action and power. The article pursues the following questions: How does the Supreme Court reason their decisions and are the decisions rational in a deliberative perspective? The data consist of four written Supreme Court judgments delivered between 2015 and 2019. Only the Court's best interest assessments are analysed, and the data is approached using qualitative techniques inspired by thematic and classic legal argumentation analysis.

Since the implementation of the CWA in 1993 the Supreme Court have only delivered a handful of judgments on adoption. Researchers of the Supreme Court have pointed to shortcomings in their decision-making and there is a need to critically examine their use of discretion. The child's best interest standard requires deliberations of a value-based and normative character, and within the theoretical framework for this study the view is adopted that 'conclusions about best interest are best reached through a reasoned deliberative process' (Archard & Skivenes, 2010, p. 51). The theoretical framework builds on the previous work of Skivenes (2010) and the Court's best interest deliberation is evaluated by discourse ethical standards and rules for argumentation. The critical analysis of best interest argumentation also sets out to map the Court's justification practices to call attention to value presuppositions, logics, and normative structures inherent in the decision-making.

The results highlight the complexity of best interest assessments, and the Court's argumentation is categorised into four themes: the right to a 'new' family (the right to remain in the foster family), the right to biological family life, the child's autonomy and development, and time. The number of arguments included in the judgments increases consecutively with time from 2015 to 2019. The findings show some similarities in both argumentation and forms of reasoning between judgments, where

decisions are found to be guided by norms of biology, vulnerability, and stability for the child. Pragmatic arguments are more common than ethical and moral arguments. The critical analysis of the arguments shows that the development over time in terms of delivering rational, well-reasoned, and thorough judgements is positive. The article moreover finds that the child's de facto family life is recognised and protected by the state, something that corresponds to the tendencies observed in European Court of Human Rights (ECtHR) case law as well as in national state policy on adoption.

Nonetheless, weaknesses in terms of rational reasoning are found in all four judgements, with concerns arising about ambiguity, lack of reasoning, coherence, failure to meet the evaluation standards for argumentation, and exclusion of parties and relevant arguments. The most critical issue is the Court's failure to include the child's opinion and the lack of child's perspective in reasoning on risk and valuable relationships. This applies particularly to 2015b, where several significant deficits are identified in the Court's argumentation. There are issues identified with the Court's lack of attention to what is normatively good for children and lack of concern for sibling relationships. Questions are furthermore posed concerning the Court's use of 'vulnerability' as an independent argument and as a variable for determining the relative strength of other arguments. The Court is urged to show caution so that vulnerability does not become a lever or a criterion for adoption. The Court's discretion is applied differently in terms of which arguments are included, the amount and type of evidence that is seen as adequate, and in how considerations are weighted and balanced against each other. Although we cannot dismiss the individuality of circumstances in each case, inconsistencies and deliberative deficiencies are problematic in terms of legitimacy and for providing clarity of the law. Several objections of varying seriousness are raised in the article concerning the rationality of the Supreme Court's judgements on adoption in these past years.

4.4. Article IV – Reasoning Between Rules and Discretion: A Comparative Study of Best Interest Decision-making on Adoption in England and Norway

The fourth article compares discretionary best interest decision-making in the legal first instances for child protection matters in England and Norway. The two countries have similar approaches to child protection legislation and furthermore share the legal and moral yardstick of the child's best interest. At the same time, decision-makers in the two jurisdictions are granted different levels of discretion: weak and strong, respectively. English legislation provides decision-makers with statutory guidance for how to assess the child's best interest in decisions on adoption through a 'welfare checklist', while any such guidance is scarce in the Norwegian context. It is anticipated that the countries' common obligation to the CRC would contribute to similarities in reasoning, while differences in substantiation of the child's best interest is expected due to different child protection orientations and varying levels of discretionary autonomy and statutory guidance.

The article has the following objectives: 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 child's best interest decision-making in child protection. The data consists of written court judgements about adoption from care from the Family Court in England (n=29) and from the Board in Norway (n=29 cases) (years 2016-2017). Only the best interest assessment is subject of analysis. The analytical approach is qualitative content analysis, following the logics of practical reasoning founded in Toulmin's model of argumentation. Through this I identify what norms guide the decisions, and how these norms are justified as either warranting a decision on adoption or not.

The results are discussed in relation to three main findings: a common normative platform of best interest decisions, cross-country variation in justifications and different discretionary approaches to justifications. The findings show that there is a set of 'core norms' that guide decision-making across contexts. In addition, there is a

set of 'system-dependent core norms' that are frequently applied in the respective countries but that are not found in both countries. Together these constitute a common normative platform where concern is made to 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. In addition, a set of 'irregular norms' are found in both contexts. These are applied sporadically and less often. The core norms are found to mirror the common tension in modern child protection practice between family preservation and permanence planning and the findings are furthermore seen to illustrate how the core questions and ethical dilemmas decision-makers are facing in decisions on adoption are cross-national. The normative platform has similarities to the guidance provided by the Committee on the Rights of the Child, but children's participation is a largely neglected area.

Despite obvious cross-country resemblance in reasoning, there are also some differences between countries that nuance the overall impression of a common normative platform. These are related to 1) different invocation of core norms, 2) substantiation of core norms, particularly related to elements concerning identity, understanding of family, risks related to adoption, contact, adherence to attachment (bonds) and post-adoption contact, and 3) degree of reasoning, where there was somewhat more reasoning in England than in Norway. Some of these differences are likely to be related to different interpretations of the child's best interest and others to systemic constructions and discretionary structures. The findings indicate that the welfare checklist play a role in informing reasoning in the English context, and that it could matter in terms of explicating reasoning and inducing broader deliberations. But there are inconsistencies and variation in both contexts and the findings do not justify a conclusion that more best interest guidance secures consistency or predictability, nor that it grants assurance against factors being excluded, or absorbed or subordinated to other concerns. The findings also show that despite having less statutory guidance, Norwegian judges' justifications are applied in a similar manner across judgements, and the lack of legislative guidance in Norway appears to have led to rule-building

based largely on Supreme Court case law. Although this contributes to consistency and predictability, the use of non-democratically constituted 'rules' in decision-making poses a challenge for legitimate decision-making.

Finally, there are cross-country differences in how child's best interest reasoning is constructed. The findings illustrate how Norwegian judges' deliberation is less 'balanced' in the sense that argumentation is mostly – although not exclusively – aimed at rebutting the norms that would reasonably oppose adoption and vice versa, backing the norms that would reasonably support it. The Norwegian approach is characterised as 'cumulative', an approach where different arguments are included but, to varying degree, point to the same conclusion, whereas the English approach is described as 'conflict settling', where arguments are provided for each side and deliberated before the 'conflict' is settled. The implications this could have for the quality of the Norwegiand decisions are discussed, and not all explanations involve that the quality of the decision is compromised.

In the concluding remarks, the question is raised whether England and Norway are adhering to their obligation to guarantee equality of treatment in compliance with human rights considering the variation that is found, a question that is particularly relevant in terms of the lack of attention to children's participation. Moreover, while the analysis of the 58 judgments cannot confirm that a welfare checklist has the capacity to secure consistency or predictability, there are indications that statutory operationalisation of the child's best interest has some benefits for legitimate reasoning. Measures to ensure transparency in decision-making is urged and the article calls attention to the necessity for, and benefits of, explicit justifications for decisions regarding strong state interventions.

5. Main Findings and Implications

In this section I will discuss the main findings from the four articles included in the thesis. This thesis has sought to answer the question of how the child's best interest is justified in decisions on adoption. The aim has been to fill empirical research gaps relating to best interest substantiation, to identify discretionary mechanisms in strong state interventions and improve our understanding of legitimate adoption decision-making. The focus will be on the Norwegian context, and I will concentrate the discussion around four main findings related to the two main pillars of the thesis: discretionary reasoning and the best interest standard. After the discussion, I will reflect upon the implications of the findings and suggest areas for future research.

5.1. Informal Patterns of Behaviour in a Context of Contradicting Demands and Uncertainty

A premise for this thesis has been that the Norwegian decision-makers responsible for the implementation of child protection law and policy have wide discretionary powers, at all levels of the democratic chain of command. The statutory guidance they are given is scarce and there are few instructions or decision-making tools for decision-makers to draw from when making decisions. The theoretical contribution of the thesis is to add to the knowledge of how discretionary mechanisms operate in strong state interventions. The findings, especially those from Articles I and IV, but also to some degree Article II, show that decision-makers are coping with the lack of guidance, as well as the contradicting demands and dilemmas they are faced with, through rule-making and by curtailing their own discretion (see Lipsky, 1980). These activities are manifested in both their epistemic and structural discretion and is visible in two ways: 1) how to substantiate and weight best interest concerns and 2) how to interpret the rules. This does not refer to a rigorous and consistent justifying of adoption by adherence to a common set of arguments or factors in a case, because, as I will return to, the analysis revealed variance in the exercise of discretion in all the articles.

The first point refers to the emergence of a set of informal standards or criteria for the decision-maker to conclude that adoption is in the child's best interests. These 'standards' are attended to in similar ways in a majority of the decisions (Articles II and IV) or mentioned in similar veins (Article I). The most prominent example of this is the decision-makers consistent and similar adherence to the child's bonds or attachment relationships. This apparent 'attachment-standard' consists of two criteria that both must be met: there must be good attachment with foster parents and contrary, no attachment to birth parents. In Article II, where attachment is found to be a key concept in the Board's best interest assessments, we find that discussions about attachment consistently transpire through a binary or adversarial logic where the existing (in positive terms) attachment between the child and the foster parents is counterpoised with the non-existing attachment between the child and his or her birth parents. The comparison with England in Article IV reinforces the impression of rule-like adherence to this element. In the English Family Court, existing attachment or (good) relationships with parents is not found to be a hindrance or decisive counterargument for adoption, and this aspect is generally not given much attention in those cases where it is a topic. Another form of patterned discretionary behaviour is related to the use of Supreme Court case law to inform reasoning as suggested in Article IV. The analysis in this article reveals that certain norms and justifications are applied in a similar manner across judgements. The arguments and the reasoning overlap largely with Supreme Court case law, and the findings indicate that the lack of statutory guidance may be leading to a systematisation of discretionary reasoning based largely on elements from case law. The Supreme Court has a key role in ensuring clarification and development of the law: when legal rules are vague, or not regulated or resolved in case law, the Supreme Court may within the scope provided by law and the Constitution function as lawmaker (Schei, 2015). However, the Supreme Court's role of lawmaker is secondary (Magnussen, 2005). And while case law is a legitimate legal source, it is not democratically constituted and can, as Article III illustrates, include ambiguous reasoning, weak justifications and leave affected persons out of the decision-making process.

The second point about rule-interpretation is found in Article I where the findings effectively show how a decision on adoption is essentially dependent on two factors being present at the same time: the child's attachment to the foster parents and parental inability to change and commit to contact. While attachment is the decisive factor for the decision-makers that chose adoption, this becomes irrelevant when they list what would have them choose foster care instead. Decision-makers are thus adding the requirement that both attachment between the child and his or her foster parents *and* parental incapability needs to be proven for adoption to be consented to. This is not something that the law requires (Lindbo, 2011), and it practically curtails the exercise of discretion in terms of what conditions must be present for a consent to be given. Similar strategies have been found in the area of migration control, where conflicting demands between immigration control and human rights lead decision-makers to construct self-constricting strategies that limit their discretion in best interest decisions (Lundberg, 2011). But this finding also illustrates how decision-makers exercise their epistemic discretion and it reveals certain 'rules for balancing', or a hierarchy of norms, where parental capability carries decisive weight. Norwegian scholar Backe-Hansen (2001) found in her study of justifications of care orders that argumentation was structured largely in two ways. The 'puzzle' cases included a range of factors that, when put together, made up a basis for argumentation. The 'trump card' cases were organised around one determining factor that had the normative power to stand alone as a justifying reason for a care order. In our case, this does not translate directly but the same mechanisms appear to apply where one factor has the normative power to determine a case. The emphasis on parental capability is a strong testimony of the normative power held by the biological principle in Norwegian child protection (Skivenes, 2002, 2010), but an additional explanation is that decision-makers are developing strategies for coping with the lack of guidance that can legally and formally back their decisions. The law does not prohibit or hinder decision-makers to decide on adoption based on the child's attachment alone; decision-makers are permitted to bypass a conclusion on parents' capabilities as caregivers in decisions on adoption. But as I argue in Article I, the findings may indicate that decision-makers find it difficult to determine a decision on adoption based on child-centred factors alone due to the

contradicting expectations of promoting permanence for children while also protecting parental rights and seeking the least intrusive measure. It also bears witness of the strength of norms on negative liberty and the difficulties of restricting the freedom of parents, especially when it includes coercion (Helland et al., 2020; see also Sunstein et al., 2019 and Diepeveen et al., 2013).

It is important to point out that the choice decision-makers were given in the vignette for Article I was not that of adoption or reunification with parents, but of adoption or foster care. We do not have good data on how many children in the Norwegian foster care system stay in foster care throughout their childhood and exit as they reach adulthood, but there is reason to believe that the number is substantial (Helland & Skivenes, 2019; see also Gerdts-Andresen, 2020). Provided what we know about the benefits of adoption (for example Christoffersen et al., 2007; Hjern et al., 2019), it is reasonable to question whether a practice of giving decisive weight to parental commitment and change is legitimate practice in situations where a child is going to grow up under state care and has established a de facto family life in the foster home. The fact that parental capability seemed to carry decisive weight may also conflict with the right for children to have their interest prevail as the decisive factor in decisions concerning them. While parental rights and the child's best interest do not constitute any natural dichotomy (Appell, 1995) and children's interests in having committed and capable parents are obvious, the analysis of the written responses in Article I disclose how the child perspective is largely absent in the argumentation on parental commitment and change.

The uniform approach to the determining concerns of a decision as well as the rule-making tendencies do create some form of predictability and some scholars have also urged such 'rule-building discretion' when applying the best interest standard (Schneider, 1990, p. 2244). And while it would be reasonable from a child-perspective on adoption to accept that children that no longer have a relationship with their parents may be adopted, the problem is that such informal rules are not democratically constituted and might not be in the spirit of the law. Political scientist Brodkin (2020)

points out that the exercise of discretion becomes political, and potentially problematic, at the point where it starts to produce patterned practices. While such practices do not necessarily produce negative outcomes for the citizens, it may have systematic consequences for the delivery of services and for who gets involved in the decision-making process. There is also the risk that implicit norms, values or bias are built into the practice (see e.g., Osmo & Landau, 2001), either through individual morals, values and subjective reasons (e.g., Artis, 2004; Baviskar & Winter, 2017; Keiser, 2010; Sheehan, 2018) or local organisational cultures and structures (e.g., Eisenstein et al., 1988; Lauritzen et al., 2018; Sandfort, 2000). The possibility that ideology is a force that governs discretion challenges the legitimacy of the reasoning, and the risk is that decision-making is not an impartial exercise (see Lipsky, 1980; Rothstein, 2009). The in-depth analysis of the attachment concept in Article II furthermore illustrated that the Board's use of the attachment concept violates fundamental principles of predictability and equal treatment as it is not a consistently or coherently applied concept. The binary approach where it either exists or not, is also problematic as the dichotomization of such a complex concept may conceal aspects of a child's relational reality. Provided the key position that the attachment concept is found to have in decisions on adoption, these are matters of concern in terms of decision-making quality and legitimacy.

5.2. Variance and Inconsistencies in Best Interest Justifications

The exercise of discretion is vested in natural sources of variation (Grimen & Molander, 2008) and some variance is thus expected even when we presume that decision-making has been carried out in an entirely conscientious manner. The findings of all thesis articles have illustrated that discretion does indeed contribute to variance in interpretations of the child's best interest, both between decision-making groups (Article I), countries (Article IV) and decision-makers (Articles I, II and III). This is in line with what previous research has shown when decision-makers give judgment in serious child protection interventions in the Norwegian context (Berrick et al., 2017; Fischer & Sørensen, 2015; Krutzinna & Skivenes, 2021; Skivenes & Tefre, 2012). This means that even though the decision-makers are creating certain informal

standards for practice, variance is far from eliminated. For example, there is variation in the emphasis of different factors both within and across decision-maker groups in Article I, there are different interpretations and applications of 'attachment' by the Board as revealed by Article II, Article III finds that the Supreme Court provides varying degrees of justification and attention to case elements, and there is irregular application of norms and justifications in the best interest assessments as uncovered in Article IV. Under the rule of law, inconsistency poses a challenge to legitimacy in the sense that the decision-making predictability, as well as citizens' entitlement to receive equal treatment, is challenged. This is a particularly critical issue in decisions that concern strong state interventions into the private sphere, such as adoptions from care.

Variance in child protection decision-making could lead to differential treatment (see e.g., Benbenishty et al., 2015; Helland & Skivenes, 2019; Lauritzen et al., 2018; Maguire-Jack & Font, 2015; Sheehan, 2018) and thus threaten the principle of equality. According to Keddell (2014, p. 917), variance also poses an ethical problem as consistency across cases 'represents the universalist duties inherent in human rights and duty-based ethics'. This study has not probed into the reasons for variance, but typical explanatory variables when it comes to understanding variance are related to the individual decision-maker (e.g., individual traits, values, experience, professional affiliation),[39] case characteristic, organisational, and contextual or external factors (see Keddell, 2014) although a great deal of observed variance often remains unexplained.[40] The variance identified between child protection workers in Article I is of particular concern as these decision-makers act as 'gatekeepers': It is at this decision-making level that a child is defined as a potential candidate for adoption, and it is here that the choice to initiate an adoption process is made. Although we do not know if differences in reasoning lead to different practices, there is reason to believe based on the previously mentioned report on adoption from 2019 (Helland & Skivenes, 2019) that there are localised practices and individual conceptions of when an adoption would be

[39] Differences in reasoning based on professional background is explored in Article I where both child protection workers, experts on children and legal decision-makers are surveyed.
[40] See also Molander and Grimen (2008) for a discussion about the sources of discretionary variance.

justified and brought to the Board. This study showed that the relative rate of adoptions being sent to the Boards from the municipalities varies greatly between regions, and to some extent also between local agencies, suggesting that there are both organisational and perhaps also individual determinants for initiating an adoption process. The same study also found that only a third of the surveyed decision-makers in the study reported to have local guidelines on adoption in their organisation. It was found to be some correlation between decision-maker's stance on adoption and their subjective assessments, for example, believing that adoption should only happen when there is parental consent was correlated with favouring foster care over adoption. Moreover, the study shows that gender (women more favourable towards adoption), education (those with a master's degree less favourable towards adoption) and child-centredness (those weighting child's opinion was more favourable towards adoption) mattered for the decision on adoption. Perceived support (focus) for the use of adoption in the municipality's political administration and agency management was also found to be correlated with being more favourable towards adoption.[41]

5.3. The Child's Best Interest – Child-Centred Reasoning and the Dilemma of Liberalism

One of the main aims of this thesis is to add to the literature on best interest justifications. Inherent in this is also the objective to gain knowledge about what is considered acceptable reasons for adoption. All four articles address this, though through different approaches and with distinctive theoretical purposes. Article II does to a lesser extent explore the material substance of the best interest standard but rather focuses on the status and utilisation of attachment, as the child's attachment relationships was identified from Article I to be a core element in best interest decisions, as debated earlier in this discussion. In the sections that follow, I will discuss the main findings in relation to the substantiation and justification of the child's best interests.

[41] In total, n=556 child protection decision-makers from the front line responded to the survey.

5.3.1. The Dilemma of Liberalism and Exceptional Reasons for Adoption

The findings from the four articles are rich and varied but do nonetheless provide a clear whole: child's best interest decisions in Norway, as well as in England, are vested in the dilemma of liberalism where the respect for parental liberty and family autonomy clash with demands to protect the needs and welfare of children (Dingwall et al., 2014; Berrick et al., Under review). This is manifested through the different groups of decision-makers' attention to the child's needs (and de facto family life) on the one hand and preserving familial bonds with the birth family on the other hand. This is in line with what Parkinson (2003) has referred to as the tension in modern child protection discussions on adoption between family preservation and partnership with parents with permanence planning. In the introduction I posed the question of how decision-makers actually attend to the difficult task of adoption decision-making.[42] Given what we know about adoption decision-making from previous research (Ben-David, 2016; Skivenes & Tefre, 2012; Søvig, 2020; Tefre, 2020b), and about societal values and systemic norms and principles in the Norwegian context (see for example Eide, 2020 and; Nordby & Halsa, 2020), it was not surprising to find that a decision is ultimately dependent on the weighting of elements relating to family preservation and permanence. The findings from this thesis do nonetheless contribute with additional insight into the substance of family preservation and permanence reasoning, and furthermore into how decision-makers attend to their delegated responsibility of making these difficult decisions. I will start by discussing two main findings in relation to the latter point.

First, the findings indicate that the judges may be avoiding the difficult moral questions. In Article III on the Supreme Court judgments, arguments are allocated into

[42] This is mostly relevant for legal decision-makers in the Board and in the Supreme Court, as decision-makers in the child protection agencies would rarely be faced with the *need* to take a decision. Since there are no rules, demands or guidelines for if, how and when to consider if adoption is appropriate for a given child in the front line, applications for adoption would be initiated by the child protection worker after an individual assessment (e.g., on the background that the foster parents or the child has expressed a wish for adoption).

either moral, ethical, or pragmatic discourses – or a combination – based on the orientation of the claim that is forwarded. The analysis show that pragmatic arguments dominate, and when ethical values are considered, they often coincide with pragmatic concerns, within predominantly pragmatic discourses. Only one argument – the child's voice – is oriented towards a moral discourse. This suggests that decision-makers may be avoiding the more difficult moral and ethical questions of a best interest decision. Article III also point to traces of what is interpreted to be reframing of ethical considerations, where ethical claims are subjected to truth validation based on expert knowledge. This transformation may be another way to avoid making conclusions on the difficult moral and ethical questions that arise. For a best interest's decision to be considered rational and acceptable, it is from a deliberative perspective on decision-making necessary to deliberate upon the normative good for a child in the given context. The Supreme Court only hears cases where the questions raised are of a principled or exceptional character, and considering the powers of the Supreme Court as a secondary lawmaker and policy-influencer (Magnussen, 2005) it should be possible to capture what values are included in assessments and how they inform judges' acts of balancing. If nothing else, these findings are a reminder for the Supreme Court to pay due attention to the values underlying considerations of the best interests of the child and to make their assessments explicit.

Second, decision-makers seem to have established a hierarchy of norms. With reference to the weight that is afforded to parental commitment and change in Article I, the findings indicate that in such a hierarchy, family preservation and parents' rights are ranked number one, followed by the child's need for permanence and protection of de facto family life. That said, in the studied decisions from the Board, the Family Court and the Supreme Court, permanence and de facto family life usually outrank family preservation and parental rights as near all cases end with a decision in favour of adoption (see Article IV and Helland and Skivenes, 2019).[43] In her analysis of the New Zealand context, Keddell (2013) similarly finds that family preservation works as

[43] In the Board, 96 per cent of the cases decided between 2011-2016 end with a decision in favour of adoption in the years (Helland & Skivenes, 2019).

the default setting in child protection decision-making and suggests, with reference to Sheppard and Ryan (2003), that family preservation can be approached analytically as a general rule to which exceptions can be made. As such, when most court decisions in my study conclude that adoption is in the child's best interest the question becomes what reasons operate as acceptable exceptions from the default rank. In the following, I will probe into the mechanisms behind these justifications.

The findings from all thesis articles are in different ways able to tell us something about how decision-makers justify a departure from family preservation. Article II and IV show how the legal decision-makers are devoting great effort to contrast the child's relationship with his or her birth parents to that which he or she has with his or her foster parents, affording it poor and good quality and value, respectively. Through this exercise, the family preservation norm is directly balanced against the child's need for permanence, where the former loses weight and the latter gains weight. Moreover, although parental capability is not a major topic in the best interest assessments, Article II shows how parents' previous neglect or failure to provide the child with adequate care occur as an indicator for poor attachment in their current relationship. Furthermore, (low) frequency and quality of contact between parents and the child apply as relevant conditions for evaluating the parent-child relationship. These are ways of reasoning that aim to devalue the importance of maintaining a relationship with the parents and that point to parental inadequacy to give the child what she or he needs.[44] On the opposite side I find that the results from Article III illustrate the focal power carried by parent related concerns, and in particular parental commitment and willingness to change: the conclusion in the one case (out of four) that is decided against adoption weigh heavily on an assessment of the father's moral character and prospects for future co-operation. This occurred irrespective of the circumstance that contact visits had been considered so harmful for the child that it had been stopped an indefinite period of time.

[44] At the same time, post adoption contact, either formally or informally arranged, is often a key concern in the decisions, and a factor that appears to carry weight even when the relationship between the child and his or her parents have been assessed as irrelevant, weak or in some cases even harmful.

The European Court of Human Rights has stated that adoptions can only be consented to in 'exceptional circumstances'. Based on the highlighted findings above, this thesis suggests that in the Norwegian context such circumstances are found when a child is safely attached to his or her foster family, in a home that the child experiences as 'home', *in combination* with birth parents that are deemed unable to change, commit or represent something positive for the child (through contact). In most cases, decision-makers appear to be on a pursuit to prove that this is the case at the point of the decision. The findings discussed in section 5.1 (from Article I) underlines this argument.

5.3.2. Justifications for the Child's Best Interests

In figure 1, the findings from Articles I, II, III and IV are synthesised and graphically illustrated to provide an overview of what are – to varying degrees – relevant best interest considerations in the Norwegian context. In total, 32 considerations and six 'justificatory themes' or 'discourses' are identified. The grey circles illustrate the overarching 'justificatory themes' as adopted from Article III. In addition to the themes from Article III, two themes that have been added to the model based on the overall findings from the three other articles: 'Safety and protection' and 'External factors'. The blue circles represent a synthesised set of considerations from the four articles.[45] The lines connecting the circles symbolise the relationships between discourses and considerations, and in some instances, where the interrelatedness is particularly pronounced, lines are also drawn between considerations. For example, 'de jure permanence' is connected to the discourse of child's development and autonomy as it is considered beneficial for the child's development to have legal permanence. De jure permanence is also enrolled in argumentation relating to the foster parents' feelings and wishes regarding the situation, as not only do foster parents express a need for legal permanence, but it is also considered by decision-makers to benefit the foster parents'

[45] As the articles have different theoretical and methodological approaches to analysis, some adjustments and pragmatic choices is made when synthesizing the best interest elements. As such, there will not be total overlap in how the considerations are understood here and in the individual articles. I refer to Article IV for a discussion of the challenges of registering and coding 'best interest argumentation'.

situation. When considerations are connected to a discourse, it stipulates how the concern is used in an argument. For example, ‘continuity’ is connected to both ‘the right to a new family’ and ‘the right to biological family life’ because continuity for the child can and is used as argumentation to say that the child should have contact with his or her biological family and to secure continuity in his or her current situation in the foster home.

The figure is a visual illustration of the key contribution that this thesis is to the empirical best interest literature on child protection decision-making. This ‘map’ also shows how the different considerations are distributed along the different justificatory themes and illustrate how the discussions orbit mainly around the topics of autonomy and development for the child and the right to biological family life. There are also many considerations connected to the right to a ‘new’ family, indicating that decision-makers are taking into concern the family life that the child has established, or is assumed to establish, in a new family environment. While these factors and their interrelations are drawn from the Norwegian context and for a specific empirical phenomenon, they may be a contribution to better understand how child-centric and family service-oriented systems approach adoption. There is a knowledge-void in this area (Pösö et al., 2021a; see also Parker, 1994) and this systematisation of best interest considerations could contribute to filling this gap and to inform policy and future research.

Figure 1 Best interest considerations: a synthesis of the findings from Articles I, II, III and IV.

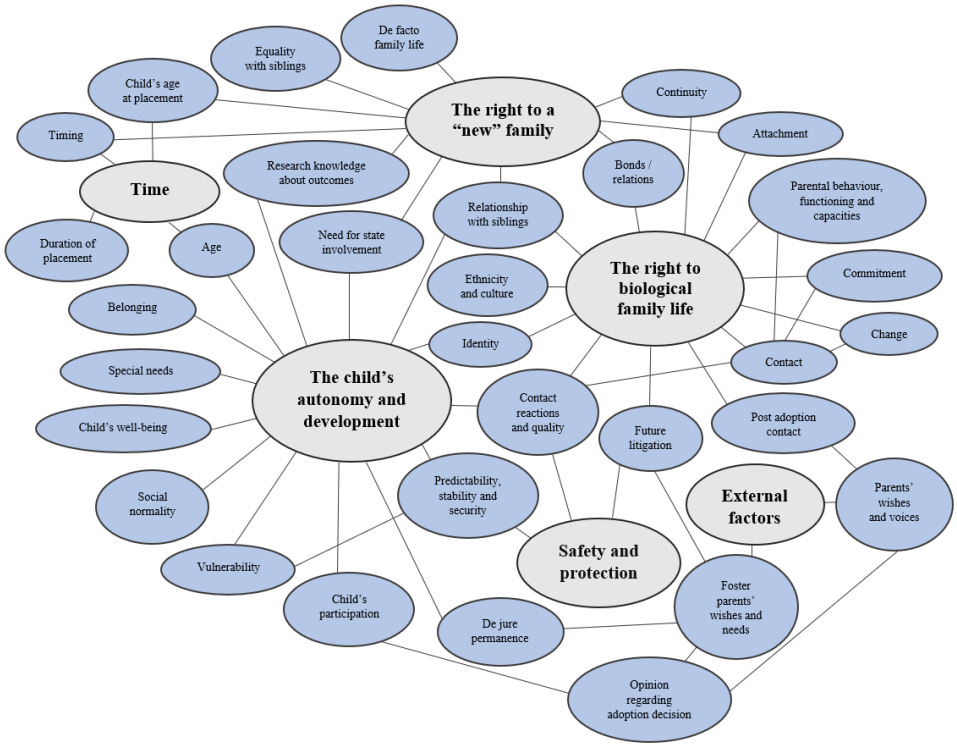

Figure 1 does not differentiate between important and less important considerations and does not denote the weight that is given to the different elements in a decision. The analyses do, however, provide some indications for what the most prevalent concerns are and how the argumentation prevails, such as the balancing of the more general norms on family preservation and permanence for the child, as presented above. The four articles display some differences in how arguments are presented and what considerations are deemed most important between and within decision-making levels, but overall, most considerations that receive weight or occur frequently in the written decisions have a child perspective and relate to the child's bonds or attachment relationships, the child's vulnerability and need for predictability, stability and security, shielding the child from future litigation (placement disturbance) and negative experiences from contact, research knowledge about placement outcomes, consolidating the child's de facto family life, and child's experience of identity and

belonging with and in the foster family. Other than this, argumentation often revolve around contact – the quality, frequency and need for contact – wherein parent related considerations, such as their capacity to contribute to positive contact visits, are actualised. The likelihood of contact continuing after adoption is also continuingly emphasised in the legal decisions (Articles III and IV), but the argumentation does not necessarily include any discussions about the well-being for the child in conjunction with such contact. Occasionally though, there are references to the child's potential wish for contact or knowledge about his or her family in the future. Other considerations are only occasionally found, such as relationships and equality with siblings, the child's opinion, social normality, and the child's ethnic and cultural background, to mention some.

5.3.3. Trends and Caveats in the Substantiation of the Child's Best Interest Standard

The analyses into the substantiation of the child's best interest have exposed several trends as well as caveats in terms of decision-making quality and legitimacy. In the following, I want to highlight some of the main caveats that has been identified in terms justifying the best interest standard, focusing on the material substantiation.

The first caveat relates to a narrow understanding of family and conception of valuable relationships for the child. The findings in Articles III and IV illustrate how decision-makers employ a narrow and vertical understanding of family, where other relationships than those between the child and his or her parent(s), such as those between the child and his or her siblings, are rarely included as a part of an assessment. In England, discussions about sibling relationships are not uncommon to the court's decision-making, but in Norway, references to siblings – both biological and 'social' – are hardly found and are seldomly incorporated as a part of the Board's or the Supreme Court's argumentation. Thus, in Article III I argue that the lack of attention to siblings challenges legitimate decision-making, as leaving this consideration out is neither in line with what the children themselves express as important relationships (Landsforeningen for barnevernsbarn, 2012; Barnevernproffene, 2019) nor what

current research say about the value and benefits of maintaining and investing in sibling relationships (Angel, 2014; Monk & Macarvish, 2018; see also Meakings et al., 2020).

The second caveat concerns the decision-makers' understanding of and lack of reference to the child's birth identity. The findings from Article IV, and to some extent Article II, reveal that the child's development and sense of identity is rarely problematised and appears to be understood through a rather narrow scope: While the child's identity is closely linked to the foster home and to the concept of belonging in the decisions, there is only the exceptional reference to identity as a concern related to the birth family. In article IV I ask whether it could be that identity becomes a relevant concern for the Board only when the child is of minority background. The lack of attention to identity-related aspects is considered to be a gap in the courts' argumentation given the legal expectations to consider this more broadly (e.g., from CRC Article 8 and CRC General Comment no. 14) as well as the knowledge about the complexity of identity formation and development for children that are adopted (see e.g., Doughty et al., 2019 and Grant et al., 2019).

A third concern was raised in Article III and is related to the Supreme Court's use of what I term the 'vulnerability argument'. Vulnerability is an element that carries importance in both the Board's and the Supreme Court's argumentation, both as an independent argument and as a variable for determining the relative strength of others. For instance, the analysis in Article IV shows how vulnerability is used to engender and adjust the needs of the child. A child's vulnerability is among the listed elements in General Comment no. 14 on the child's best interest and children are arguably vulnerable through their dependency on others (adults) to secure their basic needs. As such it is not disputed that a child's vulnerability is something that decision-makers should have concern for. However, according due weight and emphasis to this one factor constitutes a potential hazard for child-centred and legitimate decision-making. First, it is problematic if vulnerability becomes a factor that outweighs other concerns, such as the child's opinion. Second, one should avoid that vulnerability becomes an eligibility criterion for adoption. There are both legal and ethical reasons for suggesting

that a child's situation of vulnerability should not be a hindrance for children having their opinions heard (Archard & Skivenes, 2010; CRC Committee, 2013 point 54) or serving as lever or a benchmark for being considered eligible for adoption. As a general point in terms of decision-making quality and the demand for reason, labelling a child as vulnerable should be justified as true or valid, and be accorded appropriate weight – or lack thereof – relative to the content of the claim and to the circumstances of the case. In Article III, I find deficits in the rational justification relating to the use of vulnerability as an argument, and though it was not discussed beyond mere mention in Article IV, the Board's labelling of children as vulnerable was often carried out without further substantiation. The Norwegian Ministry of Children and Family recently issued all the country's municipalities and county governors with new guidelines relating to practices of justification and documentation in child protection decision-making (Barne- og familiedepartementet, 2020), where they among other exert the need for elaboration when using expert terminology such as 'vulnerability' to justify a measure.[46] The new guidelines were issued as a follow-up to the Norwegian Supreme Court's processing of three child protection cases in the Grand Chamber in March 2020. These judgments were given as a response to the recent years stream of cases communicated to Norway from the European Court of Human Rights (ECtHR) (Sandberg, 2020) where the Court has declared a violation of the European Convention of Human Rights (ECHR) Article 8 on the right to family life in 11 out of a total of 13 judgments (Søvig, 2021).[47] Among other things, the ECtHR has criticised the Norwegian authorities for insufficient reasoning of the child's vulnerability. The Norwegian Supreme Court's Grand Chamber has followed up on this remark, and has urged the relevant authorities (the child protection agencies, the Board and the courts) to 'give a specific description, referring to the factual circumstances, of the cause of the vulnerability, how it manifests itself, whether it may be remedied by support

[46] In the guidelines, the ministry underscores that the requirements for sound decision-making increases relative to the intrusiveness of the measure in question, implying that the demand for assessments and justifications are greater in decisions in adoption than for other, less intrusive measures.

[47] By 1 June 2021, the ECtHR had delivered judgment in 10 cases, whereof eight declare that there has been a violation of Article 8. On 1 July 2021, the court delivered judgment in an additional three cases where a violation of Article 8 was found in all three.

measures, and its significance for the child's care situation.' (HR-2020-661-S, point 169).

The presented caveats point out the nuances or reasons that are lost in the decision-makers justifications for, and to some degree against, adoption. The most critical weakness, however, is the lack of inclusion of the child's views and opinions in the decisions. As seen from figure 1, the child's views and opinions are included as a best interest consideration, but the findings tell us that the child's right to be heard is not adequately met. I will elaborate on this matter in the next section.

5.4. A Child-Centric Approach to Adoption?

The move towards a more active adoption policy in Norway is said to be driven by a normative shift building on child-centric ideas (Tefre, 2020b). The child-centric approach of Norwegian child protection policy entails that children are regarded as persons with individual rights and interests. At the core of the child-centric model is the idea that children's views should be taken into consideration in decisions that concern them (Skivenes, 2011). This is an ideal that accords with the procedural principle of deliberative theory that all involved parties shall be included in the process – and their voices freely expressed – if a decision is to be perceived as good and legitimate (Eriksen & Skivenes, 1998). However, the results from Articles III and IV show that children's voices are often excluded or left out of the decisions. Previous scholarship on children's participation in child protection and adoption proceedings show similar patterns (Magnussen & Skivenes, 2015; McEwan-Strand & Skivenes, 2020) and the many barriers for children's participation in child protection proceedings is well-known (Bijleveld et al., 2015). In accordance with the Norwegian CWA section 6-3,[48] all children over the age of seven, as well as younger children who are considered capable of forming their own opinion, shall be included in the decision-making process and should be given the opportunity to express their opinion.[49] Decision-makers have

[48] As well as the Adoption Act, section 9.
[49] Children over the age of 12 can only be adopted if they give their consent (Adoption Act, section 9) and children over the age of 15 may be given party rights (CWA, section 6-3, second paragraph).

both structural and epistemic discretion when making decisions relating to children's participation (Magnussen & Skivenes, 2015): First, they decide whether a child is capable of forming an opinion and whether a spokesperson should be appointed for the child (CWA, section 7-9), and second, they decide how the child's opinion shall inform the decision and what weight should be accorded to it. There is evidence from both Article III and IV that when children are heard, their opinion is taken into consideration and given weight, but hardly ever is the exclusion of a child's opinion addressed by the decision-makers and we do not know why the opinion of some children are not included. In Article III the opinion of the child is found to be included in one out of four judgments. One child, a five-year-old, is not considered capable of forming an opinion due to his mental capacities, while reasons for exclusion are not given for the children in the two other judgments. These two children are six and a half years old, the same age as the child whose opinion is included in the decision. In Article IV, the children whose opinions are found to inform the decision are all over nine years old, except from one child that is five. There is reason to believe that age is a proxy for being heard (Toros, 2021), but according to CRC Article 12 on the right of the child to be heard*,* the child's age and maturity should only matter in terms of how to weigh their views or for deciding upon the best ways for the child to participate (Fenton-Glynn, 2013). As such, all children have the right to be heard regardless of their age.[50] Considering this, one should expect to find deliberation of the children's capabilities as well as justifications for why the children's views and opinion are not included in the decision.

The child's best interest and the child's right to participation are core rights of the CRC and in General Comment no. 12 (CRC Committee, 2009) the child's right to be heard (Article 12) and the best interest of the child (Article 3) are described as complementary principles of the CRC, and it furthermore reads that:

[50] The right to participate is anchored in a similar manner in the Norwegian Constitution (article 104) where it is stated that children should be heard, regardless of their age, while consideration should be given to their age and development when according their opinion weight.

> (…) there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives (CRC Committee, 2009 para. 74).

A best interest assessment should according to this statement include the child's views.[51] Archard and Skivenes (2009, p. 398)[52] states that it is 'impossible to make legitimate and rational decisions about a child's welfare without taking proper account of the child's view.' This is related to the idea that deliberate processes rest, among other, on the premise that all relevant information regarding the contents of the case and of the parties' situation is known (Skivenes, 2010). Failure to hear the child and including their views in best interest assessments thus appear as a critical detriment in terms of meeting children's rights in decisions on adoption and point to a decision-making practice that is lagging in relation to current legislation and policy. While these matters pose concerns for the legality of decisions (Skjørten & Sandberg, 2019), they also challenge democratic legitimacy and the need for control over implementation of children's rights.

The findings from the articles show that there is a dire need to take children's right to participation seriously, to include children's views in decisions and to justify deviations from including of their views. Nevertheless, Article II do point to a positive development in the Supreme Court in terms of assuming and exploring the perspective of the child in the decisions.[53] Other scholars of the Norwegian context have also pointed to positive trends in terms of hearing children in family law matters, where there appears to be a shift from interpreting children as vulnerable and in need of

[51] See Skjørten and Sandberg (2019) for a discussion on the relationship between the child's best interests and his or her views in Norwegian law and jurisprudence.
[52] Legal scholar Fenton-Glynn (2013) furthermore contends that the child's right to participation is particularly important in decisions on adoption as it helps decision-maker come to a better decision, it affords respect to the child's wishes and helps them understand the process, and it has symbolic value in recognising children's autonomy and status as rights-holders.
[53] The Boards have also recently implemented new guidelines for the involvement of children in the decision-making process (McEwan-Strand & Skivenes, 2020).

protection to seeing them as competent actors, whose voices should matter in decisions that concern them (Skjørten & Sandberg, 2019).

6. Policy Implications and Suggestions for Future Research

This thesis has sought to critically examine the discretionary justifications of the strongest measure in Norwegian child protection law. The findings indicate that there is room for improvement in terms of legitimate decision-making and of implementing children's rights accordingly and in line with international conventions and Norwegian law and policy. From a perspective on legitimacy as procedural and related to the output of government actions, the concerns that are raised in this thesis do not suggest that the outcome in the studied decisions would or should have been any different. While parent related factors appear to have decisive weight, best interest argumentation is still found to consist mostly of child-centred reasoning, and the findings do not give basis to argue that decision-making is not carried out in an overall conscientious manner. It does however point to issues that challenge the legitimacy of the discretionary reasoning, which in turn may impact on the legitimacy enjoyed by the decisions, the decision-makers, the institutions and the government (Rothstein, 1998). Two key findings from this thesis are the need for more explicit reasoning and that the wide discretionary powers held by decision-makers coincide with decision-making variance, rule-making behaviour, and caveats in best interest reasoning.

The need for explicit, inclusive and lucid reasoning is of particular relevance for democratic control and related concerns about transparency and acts of balancing in cases of conflicting interests (Duffy et al., 2006; Osmo & Landau, 2001) and there is a need to further aid decision-makers in this task and to address the issues relating to decision-making quality. The ECtHR has urged the Norwegian national authorities' and its decision-making institutions to make sure that relevant justifications are made explicit in decisions on adoption, including the balancing of conflicting interests (between children and parents) (Norges institusjon for menneskerettigheter, 2020). Referring to the ECtHR Grand Chamber judgment (Strand Lobben and others v. Norway [GC], 2019) where violation of ECHR Article 8 was found, the Norwegian

Supreme Court stated in the Grand Chamber judgment from 2020 (HR-2020-661-S, n.d. points 85-86):

> In Norwegian decisions, the consideration of family ties tends to be more of an understated and partially unspoken precondition, while the consideration of the child's best interests is more prominent, although the Supreme Court has, as mentioned, emphasised the importance of family ties in its rulings.
>
> *Strand Lobben* illustrates the importance of such an underlying precondition like the consideration of family ties – both for the parents and for the child – being clearly visible in the reasons given by the child welfare services, the county boards and the courts. In the individual case, it must be clearly stated that these considerations have been assessed, and which weight they have been given when balanced against factors related to the child.

Potential courses of action to improve decision-makers' reasoning practices could be to provide more guidance to decision-makers, to strengthen or rebuild accountability measures aimed at improving structural and epistemic discretionary reasoning (Molander et al., 2012), and to alleviate decision-makers of some of their discretionary burden by installing less ambiguous policy (Tefre, 2020a). If policy should be respectful of children's rights and be fully child-centric at all stages of implementation, there is a need to take a political stance.

As for the first point, guidance to decision-makers could come in the form of statutory instructions, or a 'checklist' of best interest factors. With reference to the latter point, instructions could also have the effect of reducing some of the responsibility that is currently placed on the decision-makers. While it is in no way found to be a panacea for the challenges associated with the discretionary implementation of the best interest principle, the findings from Article IV indicate that there could be certain benefits associated with statutory operationalisation of the best interest principle, more specifically for explicating argumentation. While there are arguably risks associated with curbing discretion and listing elements for consideration (see e.g., Mnookin, 1975; or Schneider, 1990), this approach has been urged by a number of children's rights and

best interest scholars (e.g., Banach, 1998; Mnookin, 1975; Skivenes & Sørsdal, 2018; Sutherland, 2018; Warshak, 2007; Woodhouse, 1999). Relevant questions for policymakers to ask in the process would be if the list should be formulated as substantive assumptions about what is best for a child or as a list of considerations that should be taken into concerns (as in England) – or a combination, and if elements should be accorded weight or be accompanied by instructions for interpretation.[54] There is also the question of how such guidelines should be established in terms of what accountability mechanisms should apply: should they work merely as an aide memoir for decision-makers or have status as rules? Other options would be to introduce decision-making guidance and tools to the front line, including organisational guidelines, (risk) assessment tools, and procedural standards and instructive material for how a decision should be made and documented.[55]

Statutory instructions, guidelines and other decision-making tools would according to Eriksen, Grimen and Molander (2012), belong to the group of structural accountability measures (to constrain the discretionary space). Although it is not possible to eliminate discretionary related (arbitrary) variation or the occasional negligent decision-maker, accountability measures may contribute to improving the quality and legitimacy of reasoning. Somewhat dependent on the format of the measure, structural measures could also have epistemic effects (improved reasoning), but there are also measures that are aimed specifically at increasing the quality of reasoning. Molander and colleagues (2012) mention the following categories of measures: formative (education), supportive (decision-making systems/evidence-based decision-making), motivational (incentives), deliberative (the possibility of random review/establishing discursive arenas), and participatory (including involved parties as decision-makers). Such measures may also have the potential to contribute to more reasoned, explicit and

[54] See also Martnes (2021) on the different types of best interest elements: rights, interests and factors.
[55] For example, in Denmark, where adoption policies and laws has been reformed throughout the last six years (Socialstyrelsen, 2019), child protection agencies have been issued with guidelines and instructions for adoption decision-making. However, when it comes to decision-making tools in child protection, the literature is not clear on their effectiveness, or for how they affect decision-makers' room for discretion for decision-making quality. For discussions on decision-making tools in child protection decision-making, see for example Gillingham et al. (2017) and Høybye-Mortensen (2015).

inclusive argumentation, for example through training and education (Osmo & Landau, 2001) or by establishing or bettering deliberative procedures (Duffy et al., 2006). Another point is merely awareness of points that need improvement, through critical inquiries and research. I will list five relevant areas for future research that are identified based on the findings from this thesis.

First, there is a need for more research on variance and the role of discretion in best interest assessments. A basic presumption of this thesis has been that the best interest is a factually and normatively complex, ambiguous and indeterminate standard. Inconsistencies and variance are found in decision-makers' reasoning, but there is still a need to know more about the sources for this. The most prominent sources of variance are, according to Molander and Grimen (2008, pp. 192–194): casuistic (analogue reasoning using comparison), indeterminacy of descriptions, first-hand-experience or 'personal knowledge', and ineliminable hazards related to the 'burdens of judgment' (see Rawls, 1993) (related to cognitive factors, such as normative perceptions of a situation). Moreover, individual characteristics and organisational forces may contribute to variance and we do not know much about the mechanisms that affect professional reasoning or how policies and laws are interpreted and implemented at the individual level (see Križ & Skivenes, 2014; May & Winter, 2009), or transformed into routines and practices at the organisational level (e.g., Ottesen & Møller, 2016) in the child protection area. These dimensions should also be included in future research of conditions that contribute to discretionary consistency and variance.

Second, there is a need for more research focusing on the discretionary processes in the front line (the child protection services). Today, nearly all cases that are being brought before the Board end with a decision in favour of adoption (96 per cent in the years 2011-2016) (Helland & Skivenes, 2019). There may be several reasons for this, but one possible explanation is that the threshold for preparing and presenting a case to the

Board is high.[56] From street level-bureaucracy scholarship we know that social workers may choose to prioritise spending time on easy rather than complex cases (Winter, 1986) and on cases where the chances of success are optimised (Lipsky, 1980).[57] The articles also uncovered that decision-makers make use of informal standards for deciding when adoption is considered appropriate, and that there is a bias towards status quo if there is change in parental factors. To get a deeper understanding of the dynamics and normative basis for the use of adoption, future research should study how front line decision-makers assess and identify circumstances where adoption is deemed to be in the best interest of a child, as well as the justifications for choosing to act or not.

Third, and connected to the former points, the data material for this study does not allow for causal explanations of correlation or influences from external sources, nor does it enable us to uncover decision-makers' motivation or heuristics when exercising discretion. Best interest studies have previously pointed to subjectivity in child's best interest interpretation (Banach, 1998; Skivenes, 2010) and the articles provide some indications of possible connections and aspects of decision-making that call for further investigation. For example, how checklists or other decision-making tools are used and understood in the decision-making process, the role of professional context, education and experience, correlations between best interest reasoning and personal values and preferences, and the significance of organisational structures, management, and culture, to mention some.

[56] We do not know if adoption applications sent to the Board stand out as somewhat different from the decision-makers' caseload, and there is also a general lack of knowledge about the children in foster care and about placement characteristics. As such, it is difficult to say anything about how many children would be considered potential candidates for adoption even if the threshold was lower and the formal structures were clearer.

[57] For example, see Helland and Skivenes (2019) where nine managers in 'adoption active' child protection agencies were interviewed. The findings show that there was a common conception among the managers that workers may be reluctant to prepare cases for adoption due to the emotional burden that such a process entails. Some suggested that it was easier to think of a case as 'solved' when the child was placed in foster care and to rather focus on the more pressing cases, as long as there was no external pressure to initiate adoption (e.g., from foster parents that want to adopt).

Fourth, more studies should utilise comparative designs and conduct cross-country studies of child protection decision-making. There is a lack of such studies today, particularly those focusing on legal decision-making and the judiciary. The findings from Article IV illustrate the fruitfulness of comparative approaches as the analysis sheds light not only on similarities across systems, but also on potentially problematic practices within the Norwegian system, such as the 'unspoken' or 'unbalanced' way of reasoning in the Board and the caveats in the substantiation of the best interest.

Fifth, there is a need for more research on courts and judicial decision-makers' use of discretion in child protection matters. There is a lack of studies in this area, and empirical studies of child protection decision-making in legal settings are currently left to borrow many of their theoretical concepts and ideas on mechanisms from other fields, such as criminal law and the sentencing literature, to mention some. In order to advance research on child protection decision-making and discretionary assessments, there is a need to expand the empirical literature and strengthen the conceptual toolbox for researchers to work with and build on.

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Appendix: The Vignette for Article I

Text box A1. The vignette about David.[58]

Case facts

David is four years old. He has lived in the same foster home since he was ten days old. David was placed in care directly from the hospital by an emergency measure. A care order was made when David was five months old.

Background

The Child Welfare Services had received several reports during the mother's pregnancy related to both parents' substance abuse, as well as father's mental health. The father is diagnosed with a serious mental illness for which he is being medicated. Other than this, he does not receive any treatment.

At the time when the care order was decided in the County Social Welfare Board, the parents were considered unable to receive and make use of help measures. Two years later, when the Child Welfare Services adopts a plan for David's future care situation, the situation has not changed, and the parents have not received treatment for their substance abuse problems. The Child Welfare Services makes the assessment that the parents are not likely to be able to provide David with proper care neither now nor in the future. The parents have not filed for reunification with David at any point during the time he has spent in the foster home.

Visitation between David and his mother is set to two hours four times a year and two hours twice a year with his father. Several times, the parents have neglected to show up for visitation. When the parents attend visitation, they have been sober, but their interaction with David has been weak. The foster parents say that David has been uneasy both before and after visitations have taken place, and after the last two visitations he has had negative reactions.

David's placement is assumed to be long-term and now his foster parents want to adopt him as they view him as their own son and believe adoption will secure his position in the family.

Status: David's current situation

[58] The vignette is translated from Norwegian to English by the thesis author.

Today, David is very attached to the foster family and the environment around the family. He attends daycare, which he enjoys. The educational leader there reports that David is developing well, but that he is a vulnerable child in need of stability and security.

The Child Welfare Services are now considering recommending adoption for the boy. They are in the opinion that the foster parents are David's psychological parents. He has no other attachment to his biological origins other than that he knows who his parents are and that they are the ones he has met during visitations.

The parents oppose adoption and do not think that it is in David's best interest to be adopted.

The foster parents do not want to consent to an open adoption (post-adoption visitation), but they are positive about future contact, when David is older, given that he himself expresses a wish for this.

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Tipping the scales: The power of parental commitment in decisions on adoption from care

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ABSTRACT

This article studies how three groups of professional decision-makers – child welfare workers, experts on children and judges – exercise discretion in decisions on adoption from care in the Norwegian child welfare system. The analysis is based on near 500 decision-makers' responses to a vignette about David, a four-year-old boy whose foster parents want to adopt him. After reading the vignette, decision-makers were asked to choose a measure for David: adoption or continued foster care. They were thereupon asked (1) which specific features of the case were decisive to their decision and (2) in which ways the case would have to be different for them to make a different decision. The objective of the study is to examine how the decision-makers who chose adoption for David reason their decision and to locate the pivotal dimensions in their best interest assessment. Results show that although variance is located between and within decision-maker groups, the similarities in discretionary reasoning are prevailing. The justifications for adoption were varied and generally child-centered, while the factors that had power to transform a decision were mainly parent-oriented and focused entirely on the parents' commitment and capabilities as well as the relationship the child has or could have with his parents. The decision-makers' exercise of discretion mirrors the tensions between children's rights and family preservation in modern child welfare practice and the need for measures to guide decision-making behavior and improve the quality of discretionary reasoning is discussed.

1. Introduction

Professional child welfare decision-makers occupy the role as interpreters of democratically constituted law and policy through their power to exercise discretion. With limited political guidance and ambiguous legal criteria, child welfare workers, experts on children and judges are delegated with the authority to make decisions on the strongest measure in the Norwegian Child Welfare Act (1992) (CWA): adoption from care without parental consent (section 4–20). Though all European countries have legal mechanisms that allow for adoption without consent (Fenton-Glynn, 2015), we know very little about the actual decisions. To address this research gap, I examine how nearly 500 professional decision-makers from the County Social Welfare Board (the County Board) and the municipal child welfare services justify their decision for adoption from care when presented with a vignette about a four-year-old boy whose foster parents want to adopt him. The European Court of Human Rights (ECtHR) has stated that adoptions can only be consented to in 'exceptional circumstances' and with an inquiry into the rationales behind adoption recommendations and decisions we are able to shed some light on what circumstances constitutes exceptionality in the eyes of the surveyed decision-makers.

With the objective to understand and explain discretionary decision-making on adoption, three questions are examined: Which factors are important when child welfare decision-makers decide on adoption? How are different considerations balanced against each other? Are there similarities or differences within and between decision-maker groups and decision-making levels? The justifications they provide for their decision to choose adoption is examined to find out how they reason their decision and to locate the pivotal dimensions in the process. Analyzing responses to a vignette not only enables us to elucidate when decision-makers perceive adoption to be in the best interest of the child and why, it also allows for comparison of what decision-makers emphasize when reading and assessing the same set of conditions and to identify variation and congruence in reasoning for adoption.

In the following section the background and context for decision-making on adoption from care is laid out, followed by an outline of previous research and the conditions for discretion in adoption decision-making in the Norwegian context. Next, a presentation of the conceptual

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and theoretical framework for the study is provided before the data material and methodological approach for the study is described together with a discussion of its limitations. Then the findings are presented, followed by a discussion and finally, some concluding comments.

2. Background and context for decision-making

In 2019, the ECtHR Grand Chamber concluded (by 13 votes to four) that the Norwegian state had violated the right to respect for family life on under Article 8 of the European Convention of Human Rights (ECHR) (1950) on procedural grounds in a case where a young boy had been adopted by his foster parents (Strand-Lobben and Others v. Norway [GC] 2019, see Breen et al., 2020).[1,2] The decision quickly became a "showcase for the controversies and the tensions in the field of child protection" (Skivenes, 2019, n.p.) and effectively prompted us of the difficulty of the task decision-makers are faced with when balancing the rights and interests of children and parents in cases on adoption. This balancing act is together with the interpretation of harms and benefits (Munro, 2019) fundamental to child welfare decision-making (Munro, 2011; Ward, Brown, and Westlake, 2012) and it requires professional discretion. This exercise of discretionary reasoning is crucial to examine. While discretion is both necessary and inevitable (Handler, 1986; Maynard-Moody and Musheno, 2000), professionals' exercise of discretion is famously termed 'the black hole of democracy' due to the lack of democratic control and influence over decision-making (Rothstein, 1998, 80). Discretion thus complicates measures of accountability and furthermore threatens the rule of law and its principles of predictability, legality and equal treatment (Molander, Grimen, and Eriksen, 2012; Schneider, 1990). In the Norwegian context, the discretionary scope provided for decision-makers to make decisions on adoption and to assess the child's interests is wide (Tefre, 2020a; Berrick et al., 2015; Skivenes and Sørsdal, 2018). This leaves room for emotions, assumptions and presumptions to guide decisions on the best interest of the child and for professionals themselves to fill in the 'loopholes' left out from the democratically enacted laws and policy (Artis, 2004; Dworkin, 1967; Elster, 1989; Goodin, 1986; Piper, 2000).

Adoption from care is a strong measure with far-reaching implications and it can be considered controversial (see e.g. Sloan, 2015a; 2015b; Ward and Smeeton, 2017). The measure is also rarely used in Norway with less than one percent of the children in foster care being adopted in 2018 (Helland, Pedersen, & Skivenes, 2020)[3]. At the same time, studies into adoption of long-term placed foster children show that adoption produces better outcomes in youth and in adult life compared to continued foster home placements, residential care or reunification with biological families (Brown et al., 2017; Christoffersen et al., 2007; Hjern et al., 2019; Selwyn and Quinton, 2004; Triseliotis, 2002; Vinnerljung and Hjern, 2011; see also Palacios et al., 2019). Though the prospects are generally better for younger placed children, research shows that children that have been in the child welfare system fare worse than their peers in the general population on a range of living conditions both in youth and as adults (Backe-Hansen et al., 2014; Kääriälää and Hiilamoa, 2017). We do not know how many of the children in the Norwegian foster care system remain in long-term placements until adulthood, but there is reason to believe that the number is substantial (see discussion in Gerdts-Andresen, 2020; Helland and Skivenes, 2019). Current adoption policy is somewhat indeterminate, albeit since the early 2000s, there was a shift towards a more active policy to promote adoptions. This has been interpreted as a move towards a more child centric policy (Tefre, 2020b) and it is expected that this will be reflected in the decision-makers' choices and justifications.

3. Research on justifications for adoption

There is a scarcity of research focusing on decision-making practice and the discretion of child welfare professionals, both internationally and in Norway. A study of particular interest for the study at hand is a study from 2012 by Skivenes and Tefre (2012). They use a vignette method to study how Norwegian, as well as American and English, child welfare decision-makers justify their decisions for or against adoption. The authors found that fewer Norwegian child welfare workers suggested adoption (62 percent) than English (98 percent) and American (Californian) (96 percent) child welfare workers and emphasize that the Norwegian decision-makers used their discretion in an evidence-oriented manner and went beyond policy guidelines and instructions. In another study from Norway where 21 adoption agency files (from years 1985 to 2009) are reviewed in order to find out why these cases had ended with adoption, Young (2012) found that there was a lack of attention to the children and that they were generally overshadowed by the social workers' descriptions of the mothers' actions and qualities, particularly concerning failures to act a stable parent in relation to visitation. In an analysis of all decisions on adoption (n = 59[4]) made by the County Board in 2016, Helland and Skivenes (2019) found that the decision-makers paid particular attention to the relation between the child and her parents. Another prominent feature of the decisions was the pursuit to determine whether there were distinctive features related to the individual child that would elucidate whether an adoption should be consented to or not, such as the child's situation of vulnerability. In a recent study of the legitimacy of all judgments on adoption from the Norwegian Supreme Court (four judgments from 2015 to 2019) the court's argumentation was analyzed (Helland, submitted for publication). The author argues that while some arguments were considered consistently across the four judgments (arguments related to the child's right to family life – biological and de facto family – to time and timing, and to the child's autonomy and development) there was variation in court's discretion, inter alia in how considerations were justified and how they were weighted and balanced against each other.

Internationally, two relevant studies are identified. Ben-David (2016) has studied how the court decided in 261 cases on termination of parental rights (TPR) and adoption in Israel where as in Norway, the main assessment criteria underlying both TPR and adoption interventions is the best interest of the child. The author found that the courts referred more to treatment-oriented considerations, such as normative parental functioning, parental readiness to change, parental educational capacity, the influence of adoption on a child's emotional well-being, and parental social normativity, than to legal values in their assessments of whether TPR is in the best interest of the child (Ben-David, 2016). In a smaller study from 2017 (Butlinski et al., 2017) on how decision makers understand the adoption of children from out-of-home care, interviews with 21 professionals (child welfare specialists, adoption and permanent care specialists and judicial officers) from a region in Australia[5] were conducted and the authors identified five common themes as important for the consideration of adoption: parental consent, stability for children, a sense of belonging for children, children's connection to their birth family and children's connection to their cultural heritage.

Some common denominators can be drawn from these studies and the expectation is that we will find justifications that relate particularly to parental functioning, capabilities and qualities and, furthermore, to

[1] On March 10th, 2020 the ECtHR judged violation in the case of Pedersen and Others v. Norway.

[2] At the present, 10 cases on adoption are communicated to the Norwegian state and are pending a decision by the ECtHR.

[3] See Pösö, Skivenes, and Thoburn (2021) for an overview on adoptions from care in Norway, as well as seven other European countries and the US.

[4] The analysis included one decision from 2017.

[5] 143 children were reported adopted by their carers in Australia in the years 2016 and 2017 (Australian Institute of Health and Welfare, 2017).

features that relate to the child's right to a biological family life in terms of bonds to parents and visitation (contact), and to the child's well-being in terms of concern with attachment, stability and permanence.

4. Conditions for discretion

4.1. Legal regulation and case law

An adoption implies that the parental responsibility is transferred from the biological parents to the adoptive parents, thus terminating parental rights for the former. A decision on adoption is as such seen as intervening with the child's and the parents' right to private and family life (Sandberg, 2016) as protected through The Norwegian Constitution (Article 102), the UN Convention on the Rights of the Child (CRC) (1989) (Article 16), and Article 8 of the ECHR. While the ECtHR has set the threshold for the intervention high, they do approve of adoption without parental consent (Skivenes and Søvig, 2016) albeit decisions must be justified according to "an overriding requirement pertaining to the child's best interests" (Aune v. Norway, 2010, para. 66). In Norwegian case law, "particularly weighty reasons" is interpreted as representing the same norm (Sandberg 2020, 151).

Termination of parental responsibility and adoption without parental consent is regulated through the Norwegian Child Welfare Act (CWA) (1992), section 4–20 which sets four cumulative legal conditions for adoption[6]: a) The placement is expected to be permanent based on the consideration of two of the alternative criteria: The parents are permanently unable to provide proper care *or* the child has become so attached to their new environment that removal will lead to serious problems; b) Adoption is in the child's best interest; c) The adoption applicants are the child's foster parents and they have proven fit to care for the child; d) The conditions in the Adoption Act (2017) are fulfilled. According to the Adoption Act, the overriding consideration for undertaking an adoption should be the child́s best interest and in addition to serving as a concrete condition for adoption, the child's best interest is through section 4–1 a general guiding principle for the application of all provisions implemented by the CWA. This implies that the assessments undertaken should reflect the child's best interest, irrespective of what section 4–20 condition is assessed, and the justifications that are studied in the paper will be interpreted accordingly. Contact visits between the child and his or her parents after adoption (open adoption) can be established by the County Board if either of the parties have requested it and if the prospective adopters (foster parents) consent to such contact (CWA section 4-20a).

4.2. System characteristics

The Norwegian child welfare system is characterized as family-service-oriented and child-centered (Skivenes, 2011). Family-service refers to a low threshold for intervention in order to mitigate serious risk and prevention of harm based on 'a therapeutic view of rehabilitation in which it is possible for people to revise and improve their lifestyles and behaviors (Skivenes and Søvig, 2017), whereas child-centrism signifies an elevated focus on children's rights and best interests and the endorsement of children as independent bearers of individual social and human rights (Skivenes, 2011; James and Prout, 1997). There are four governing principles of child welfare practice in Norway which in many ways epitomize the intersection of interests and rights that are at stake in decisions on adoption (Skivenes, 2011; Lindbo, 2011). First, the principle of least intrusive form of intervention entails that any decision to intervene should seek to limit the level of intrusion into the family. Second, the stability principle refers to the promotion of stability in the child's relationships to adults and other important persons and to stable surroundings. Third, the biological principle, which builds on the normative idea that it is in the best interest of children to be brought up with their parents (Skivenes, 2002). And fourth, the best interest of the child.

Proceeding an adoption case to a conclusion is a two-level process. At the first level, the responsibility to initiate a case for adoption lies with the municipalities and the local child welfare authorities (child welfare workers), while the County Board (experts and judges) holds the authority to enforce an actual decision to consent to adoption or not, at the second level. The County Board is a court-like judicial decision-making body which serves as an impartial and independent judiciary body that makes decisions in cases concerning compulsory measures pursuant to the Norwegian Child Welfare Act. The County Board is headed by a lawyer qualified as a judge[7] and is further composed by a layman as well as an expert member (in most cases a psychologist)[8] (The County Social Welfare Board, n.d.) whose role it is to complement the qualities of the judge and the layman. The influence and authority of the members should be equal, and decisions are voted over (Skivenes and Tonheim, 2017). While judges are permanently employed at the County Boards, the laymen and experts are temporary members of two respective panels where they are appointed to the County Board on an individual basis. When referring to County Board decision-makers in the present study, these are judges and experts (see methods and data section).

5. Discretion and the best interest principle

Decision-makers in the County Board and in the child welfare services are authorized with the autonomy to exercise discretion in their application of rules in decision-making. Because of this, it has been argued that these decision-makers, the street-level bureaucrats, are the real policy-makers (Biland and Steinmetz, 2017; Lipsky, 1980; Portillo and Rudes, 2014). Discretion is commonly conceptualized as the choices made in the space between rules (Hawkins, 1992). Discretion is a thus relative concept in the sense that it has meaning only in relation to its context, the rules and standards surrounding a decision (Dworkin, 1967). One should furthermore make the distinction between the space for discretion, the autonomy to judge, and the exercised discretion as a form of reasoning (Molander, Grimen, and Eriksen, 2012). Discretionary reasoning forms the basis for judgements, decisions or choices of actions or inactions that need to be justified (Molander et al., 2012; Feldman, 1992, 164) in order to be perceived legitimate (Feteris and Kloosterhuis, 2009; Alexy, 1989; Habermas, 1996). When decisions-makers are delegated with discretionary powers from the state, he or she is so under the condition that they can be held accountable (Molander, Grimen, and Eriksen, 2012) and Molander (2016, 21) asserts that "judgments and decisions involve reasoning, and we expect agents with discretionary power to act on the basis of their *best* judgment, which means that their actions are supported by *good* reasons". Our expectations should thus be that the reasons the entrusted professional decision-makers give reflect what they are convinced are good reasons.

5.1. Professional discretion and the best interest of the child

By adopting a socio-legal approach to discretion[9], discretion is to be

[6] No conditions are given for termination of parental responsibility, but as for all measures applied by chapter four in the CWA (Section 4–1, 1992), decisive importance shall be attached to the child's best interests.

[7] For this reason and for the sake of simplicity, I will from hereon use the term 'judge' instead of 'County Board leader' which is the official Norwegian term for this position.

[8] The County Boards could be composed of five members, should the case in question require it. In these cases, the County Board leader is accompanied by two experts and two lay members.

[9] According to Mascini (2020), a socio-legal approach furthermore waives the basic assumption that there is a fundamental difference in how judges and others, such as street-level bureaucrats.

understood within a given political, social and professional context and as the manner in which decision-makers apply such standards and general rules to concrete cases (Hawkins, 2003; Mascini, 2020) and make sense of them in practice:

> "Facts do not speak for themselves; they are ordered and arranged by actors for a purpose. Social and ethical commitments, as well as legal principles, also affect 'legal' decision-making" (Evans and Hupe 2020, p. 114).

The legal frames and political guidance for discretionary decision-making include national legislation and case law, policies, and regulations, as well as international conventions and treaties. In decisions on adoption, the best interest of the child is the immediate, concrete legal standard decision-makers face and it is also the most contested and disagreed upon condition in decisions on adoption from care (Helland and Skivenes, 2019; NOU, 2012: 5). It is stated in article 3 of the (CRC 1989) that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The CRC (1989) applies as law in Norway after the incorporation into the Human Rights Act in 2003 (Section 2, with precedence over other laws pursuant to Section 3) (Gording-Stang, 2018; Skivenes and Sørsdal, 2018) and children have a constitutional right to have their best interest considered in matters that concern them (The Norwegian Constitution, Article 104(2)). According to Norwegian child welfare legislation (CWA, 1992 chapter four) the best interest shall have 'decisive importance' in all measures taken for them (Archard and Skivenes, 2010). Determining what is in the best interest of a child is a decision that should be based on scientific and professional knowledge of children's development and needs. In addition, decision-makers are also required to make sense of what is right, good and appropriate for a child in a given situation through a process of reasoning (Skivenes and Pösö, 2017). Following legal scholar Michael Freeman, such best interest decisions "should be supported by reasoned arguments, and bias or worse prejudice should be eliminated" (Freeman, 2007, p. 28). In child welfare matters however, making rational decisions is difficult due to the pressing elements of uncertainty, the balancing of different parties' needs and interests and last but not least, owing to the ambiguous and normative character of the best interest standard (Archard and Skivenes, 2010; Elster, 1989; Mnookin, 1975; Munro, 2019; Banach, 1998).

5.2. Decision-making – hypothesizing variance and congruence

The expectation is that the analysis of the justifications provided by decision-makers will reveal both similarities and variance in the interpretation of the best interest of the child. On the one hand, we expect similarities within and across decision-making groups – child welfare workers, experts and judges – and levels (between child welfare services and the County Board) as their discretionary space is largely structured by the same rules and standards. More so, decision-makers' discretion is influenced by forces relating not only to the structures of law, nor solely to formal policy guidelines and political signals, but to the social and professional context and to the knowledge and experiences nested within the networks they are embedded in (Feldman, 1992; Hawkins, 1992). While acknowledging that this could also be a source of inter-group variation, the expectation is nonetheless that the child welfare field is contributing to control discretion (Hawkins, 1992) or at least providing some normative constraints for how discretion is exercised (Feldman, 1992; Oberfield, 2020). Having in mind that the three decision-maker groups are all either experts or experienced within the field of child welfare (the County Social Welfare Board, 2016; NOU, 2017: 8) there is an expectation that their knowledge about children, their needs and development, is to some degree reflected in their responses and that children's welfare emerge as a common yardstick. On the other hand, variance between decision-making groups and levels, as well as within decision-making groups is anticipated (Skivenes and Tefre, 2012; Banach, 1998; Berrick et al., 2017). The three decision-making groups inhabit different roles and adhere to their assignment to assess and decide based on dissimilar terms. An important premise for studying discretion at the two decision-making levels is that they do not have the same decision-making power and the implications of their decision differ; the child welfare workers merely have the power to *recommend* a case for adoption, the County Board has the power to *decide*. Individuals also bring with them their own identities and dispositions to the social and organizational context that they enter (March, 1994; Oberfield, 2020) which can influence decision-making (Arad-Davidzon and Benbenishty, 2008; Benbenishty et al., 2015; Gambrill, 2005). More importantly, they have different professional backgrounds and belong to different professional cultures and it is expected that their professional knowledge and experience will influence their reasoning. For starters, one would expect that judges' discretion is influenced by legal culture and method. Typically, this would be reflected in a stronger conformity to concrete rules and focus on individual rights (Carnochan et al., 2006; Weinstein, 1997). For child welfare workers, decision-making is better understood as belonging to a social service culture where the individual is viewed through a biopsychosocial perspective, in his or her developmental, social, political, and cultural context (Carnochan et al., 2006). Moreover, where ambiguity and uncertainty is an inherent part of child welfare decision-making, one could argue that such conditions match poorly to the instrumental (see Sheehan, 2018) or binary logics of the law in which resolving a case could require that something must be discarded or reconstructed if the information they are faced with is either ambiguous or contradictory (Weinstein, 1997; King and Piper, 1995). The experts are, as I will return to in the next section, a mixed group of professionals. A quarter of the experts have a professional background from child welfare and their reasoning could come close to what we find in the first line. In most cases however, the expert is a psychologist, and is reasonable to expect that experts as a group would emphasize aspects related to psychological theory, such as attachment.

6. Methods and data[10]

To study how decision-makers justify their recommendations for action a survey vignette design is applied. The vignette is a widely used approach in social science studies (Finch, 1987; Taylor, 2005) and a range of studies has shown that the assessments of respondents resemble those of real-life decisions (see Peabody et al., 2000). While Taylor (2005) asserts that the vignette is generally suitable when researchers want to study how different case factors affect professional assessments, Wilks (2004; see also Soydan, 1996) emphasizes the benefits of the applicability of vignettes to study sensitive topics and ethical decision-making, such as child protection issues, and its capability to address social desirability issues and reduce observer effects. Several measures were undertaken to facilitate for professional assessments that mirror real life decisions and to motivate the decision-makers to engage in the hypothetical decision-making task they were presented with. The vignette was developed by the author and two fellow researchers on the basis of actual decisions on adoption from the County Board (n = 283 decisions from the years 2011–2016) and have been tested on a panel of experts, end-user organizations[11] and on fellow researchers. In the following, a summary of the case description the respondents received, which was about one

[10] Ethical considerations: This study is reported to the Norwegian Centre for Research Data and has received project numbers 52781 and 5490.

[11] A County Board decision maker (a judge), two child welfare workers and a manager, representatives from the Norwegian Foster Care Organization, The National Association for Children in the Child Welfare System (LFB), the Joint Migrant Council (Hordaland), the Norwegian Union of Social Educators and Social Workers (FO) and the Organization for Child Welfare Parents (OBF).

page (see full vignette in Appendix section 1), is provided[12].

David is a four-year-old boy, whose foster parents since he was ten days old want to adopt him. During the time he has spent in the foster home, his parents have not filed for reunification. Both parents struggle with substance abuse and the father with mental illness and they have not been able to make use of the measures provided to them. Neither have they received any treatment for their substance abuse problems. There is limited formal visitation between David and his parents. His parents have on several occasions neglected to show up for these visitations. It has been reported that David has reacted negatively to the latest visitations. Other than that, David is said to be developing well but that he has a vulnerability and a need for stability and security. The CWS assesses that it is not likely that David's parents are to be able to provide him with proper care neither now nor in the future and the placement is assumed long-term. In the CWS's opinion, the foster parents are David's psychological parents and there is no attachment to his biological origins besides an awareness of their relation. David's parents oppose an adoption and his foster parents do not consent to an open adoption.

Before reading about David, the decision-makers were asked to envision that this was a case that they were responsible for and told that they would be asked to evaluate David's current situation and conclude on a course of action. *After* reading the case, the respondents were asked to consider the following question: "Based on this short description of the case, in your opinion, would you suggest adoption or continued foster care for David?" (Q1). They were given two options: adoption or foster care. Following this, they were asked two open-ended questions that they responded to using their own words. First, "Which specific features of this case are decisive to your decision?" (Q2) and then second: "In which way would this case have to be different for you to make a different decision?" (Q3). On average, the decision-makers listed three different case factors for why they chose adoption. The number of factors mentioned varied from one to eight. When asked what would have to be different, they listed one consideration on average. The number of considerations mentioned varied from one to four.

The survey was developed in 2017 and the child welfare workers were recruited from the 15 largest municipalities (>50 000 inhabitants) in Norway (40 child welfare agencies from 21 municipalities: total N = 1444) and the County Board members were recruited from all 12[13] County Boards in the country (experts N = 365 and judges N = 79)[14]. Laymen were not included in the study as most of them have very limited experience with decision-making in the County Board. In total, 781 (41 percent) decision-makers responded to the survey (556 child welfare workers, 183 experts, and 42 judges), whereof 651 (34 percent) responded to Q1 about the vignette (461 child welfare workers, 158 experts and 32 judges). In this study, only the justifications (Q2 and Q3) from those who chose adoption is analyzed (see Tables 2 and 3). The experts that responded to the vignette (n = 158) were mostly psychologists (65 percent), followed by child welfare workers/social workers/child welfare officers (26 percent), other or unknown (5 percent), and medical doctors (4 percent).

The approach to coding the open-ended responses was mainly inductive, but the development of categories was guided by law and jurisprudence, previous research and conceptions of what is considered *reasonable* (descriptions of coding and categorization of the text are provided in the appendix table A1 and A2). As the coding was empirically driven, the codes and the categorization of responses are reflections of how the respondents formulated their answers[15]. All text was coded and excerpts that did not fit into any of the categories, that were ambiguous or unclear, or where the respondent did not respond to the question, were coded as "Other" or "Not applicable", respectively, and excluded from further analysis. If the whole response was coded as not applicable, the respondent was taken out of the sample[16].

Table 1
Adoption or continued foster care for David? Care alternative by percentage and n = per decision-making group.

	Decision-making group			
	Child welfare workers	Judges	Experts	*Total*
Adoption	86.3% (398)	87.5% (28)	93.7% (148)	88.2% (574)
Foster care	13.7% (63)	12.5% (4)	6.3% (10)	11.8% (77)
Total	*100% (461)*	*100% (32)*	*100% (158)*	*100% (651)*

7. Limitations

The vignette method has known limitations related to realism, complexity and whether the respondents' answers reflect what they would have actually done. It is difficult to say if the vignette is perceived as realistic by the respondents, but the measures taken to ensure realism are considered sound. As for the complexity of the situation, the vignette provides little information compared to what decision-makers would have at their disposal in real life, and two potential weaknesses is that respondents may have too little information to engage in the situation and that more detailed information could potentially impact their decision and how they reason their choice. Furthermore, what is expressed in the respondents' answers may not necessarily reflect how they would act in a real situation and respondents may have several reasons for answering in ways that may seem more socially acceptable or more acceptable to the researchers (Barter and Renold, 2000; Finch, 1987; Wilks, 2004). Nonetheless, their responses do reflect how they respond to a scenario that is likely to be a realistic issue and thus provide us with information about their immediate assessment of what are relevant considerations in a decision. Another limitation is related to sample sizes as there are comparatively fewer judges than experts and, especially child welfare workers. While this could cause an increase in the margin of error in interpretation, a strength of this study is that the entire population of judges (n = 79) were approached in the survey and near half of them (n = 32) are included in sample for this article.

8. Findings

The vast majority of decision-makers, irrespective of professional or institutional affiliation, suggest that David should be adopted (see Table 1). The rates are consistently high in all groups and the highest rate in favor of adoption is found with the experts, where 94 percent suggest adoption.

8.1. Why did they choose adoption?

The five factors that are highlighted the most by the decision-makers

[12] The vignette and the citations from decision-makers' responses to the vignette is translated by the author from Norwegian to English.

[13] By January 1st, 2020, the number of County Boards is reduced to 10 due to a reformation of the municipality system.

[14] Information regarding data protection ethics and data access for the ACCEPTABILITY project is found at the following website: https://www.discretion.uib.no/wp-content/uploads/2019/12/INFORMATION-ABOUT-DATA-PROTECTION-ETHICS-AND-DATA-ACCESS.pdf. See also Helland and Skivenes (2019) for an elaboration of the process of obtaining access to the respondents and data material, and for a full description of the process of constructing the vignette.

[15] See appendix section 2 for limitations on the coding of the empirical material.

[16] Two percent of the respondents (only child welfare workers) were omitted from further analysis due to non-applicable responses to Q2. For Q3, five percent of the child welfare workers, seven percent of the judges, and 13 percent of the experts were omitted for the same reason.

as a joint group (see Table 2) are the boy's attachment to his foster parents (66 percent), his parents' inability to change and provide adequate care (61 percent), the boy's age – both in present and at the time of placement – as well as the time he has spent with the foster family (55 percent), the poor quality of visitation (contact) and negative reactions (46 percent) and finally, the needs of the child and that adoption provides permanence and has positive effects (45 percent).[17]

8.1.1. Attachment to foster parents

The child's attachment to his foster parents is the most mentioned factor by child welfare workers (67 percent) and experts (65 percent), while just above half (56 percent) of the judges emphasize this. In addition to references to attachment or bonds to foster parents, which occur most commonly, notions about his foster parents' parentage and the boy's understanding of them as parents are mentioned. An illustrative example is:

> «The boy's attachment to the foster home. They are the ones that are his psychological parents» (Child welfare worker, 308825066).

8.1.2. Parents' inability to change and to provide adequate care

While the parents' inability to change and provide adequate care is a major element in the justifications of child welfare workers (61 percent) and experts (65 percent), judges (37 percent) mention this to a lesser degree. Two interrelated themes are apparent in this category. First, the parents' lack of motivation, ability or potential to change and for not accepting help or treatment and second, they are not in a position to provide care for the child:

> «The biological parents' unwillingness and inability to receive treatment and to change their substance abuse problems and their inability to provide the boy with adequate care in the short and long term» (Expert, 341937893).

These considerations commonly arrive contextualized in terms of time, where the lack of change over time and prospects of future change is emphasized. Some assess reunification as unlikely or refer to the descriptions provided by the child welfare services that it is unlikely that the parents will be able to provide care for the child neither now nor in the future.

8.1.3. Time and age

Time and age is the third most mentioned factor by child welfare workers (56 percent) and experts (49 percent) while it is the most decisive element for judges whereof 63 percent have time and age as a determining factor. References to time and age can be interpreted as reflections of the permanence of the placement and include an array of considerations, such as the early placement, the child's current age, the duration of the stay with his foster parents – and consequently, not having lived with his biological parents – and the assumed long-term character of the placement:

> «Long time in the foster home from a young age. No prospects of reunification. (…)» (Judge, 341937947)

8.1.4. Poor quality of visitations (contact) and negative reactions

This aspect is mentioned less by child welfare workers (48 percent) and experts (38 percent) than judges (59 percent) and relates to the quality of contact, frequency and outcome of visitations between the boy and his parents. On the one hand, this category accommodates child-centered reasoning concerning the child's negative reactions to visitation, poor interaction with his parents, that it is harmful or difficult for the child that parents are not following up on visitation and that the visitations do not provide anything to the child in terms of enriching his life or that he is enjoying the visits:

> «The quality of visitations and the child's reactions before and after [visitation]» (Child welfare worker, 309229488).

On the other hand, the decision-makers refer to the parents' weak "visitation competency" and their apparent lack of interest in the child, particularly with reference to the missed visitations:

> «The parents have not always followed up on visitation as planned (…)» (Judge, 341937971).

There is also the more general argument that there has not been much contact, referring to both the frequency of visitation permitted by the authorities and the lack of follow-up from the parents.

8.1.5. Needs of the child and adoption provides permanence and has positive effects

About half of the child welfare workers (47 percent), 38 percent of the experts and 52 percent of the judges mention aspects which adhere to the needs of the child and the benefits of adoption. First, adoption is seen as providing permanence in terms of clarifying the child's life situation by creating new legal bonds and by hindering future litigation and affirming existing relations between the child and his caregivers:

> «The positives about an adoption; that David would become a full worthy member of the family, have the same family name, same rights as potential siblings in the foster home» (Child welfare worker, 308824833).

Second, they argue that adoption would be beneficial for the social and psychological well-being of the child. They emphasize the benefits in relation to the child's feelings, his vulnerability and possible special needs and assert that adoption would strengthen his sense of belonging and provide safety, stability, and tranquility:

> «The boy's situation – a vulnerable child with a need for stability and safety» (Expert, 341937839).

Third, there are statements based in general knowledge or research about the benefits of adoption in terms of positive and better outcomes for children in care and of its potential to adjust for previous harm:

> «Research show that children who are adopted fare better later in life. Adoption will be in the best interest of the child» (Child welfare worker, 308825063).

Further, some few references to equality, normality and reducing public interference are identified.

8.2. What would have had to be different for them to change their decision to continued foster care?

Biological parents' ability and initiative for positive change (86 percent) is indisputably the most important factor mentioned by all decision-maker groups (see Table 3). Furthermore, one quarter of the respondents (24 percent) would choose differently if there were to be bonds or attachment between the boy and his parents and 17 percent mention considerations related to time and duration of the placement.[18]

8.2.1. Parents show positive change and the quality of visitation (contact) is adequate or good

Most child welfare workers (87 percent), experts (85 percent) and

[17] See appendix section 3 for descriptions of factors "Lack of bonds to parents", "Foster parents wants to adopt and are suited" and "The boy's current situation of care and development".

[18] See appendix section 4 for descriptions of factors "Foster parents (home) not suitable or not wanting adoption" and "The child's needs were different".

Table 2
Determining reasons for choosing adoption. Percentage of respondents with at least one mention of the following consideration, by decision-maker group. Number of respondents in parenthesis.

	First line	The County Board		Total
	Child welfare workers (n = 341)	*Judges (n = 27)*	*Experts (n = 130)*	*Total (n = 498)*
Attachment to foster parents	67% (230)	56% (15)	65% (85)	66% (330)
Parents' inability to change and to provide adequate care	61% (208)	37% (10)	65% (84)	61% (302)
Time and age	56% (192)	63% (17)	49% (64)	55% (273)
Poor quality of visitations (contact) and negative reactions	48% (164)	59% (16)	38% (49)	46% (229)
Needs of the child and adoption provides permanence and has positive effects	47% (159)	52% (14)	38% (49)	45% (222)
Lack of bonds to parents	23% (80)	30% (8)	15% (20)	22% (108)
Foster parents wants to adopt and are suited	14% (48)	0% (0)	9% (12)	12% (60)
The boy's current situation of care and development	7% (24)	4% (1)	5% (6)	6% (31)

judges (88 percent) see parental change and better quality of visitations (contact) as something that could turn their decision. This category is layered as it includes two indistinguishable and partly interdependent considerations concerning parents' capabilities and proven ability to make changes to their life and to improve the quality and attendance to visitation. In sum, commitment and reformation are the key elements to understand what would make the decision-makers change their decision from adoption to continued foster care:

> «That the parents addressed their own drug abuse, showed good interaction during visitation, were stable in their attendance [to visitation]». (Child welfare worker, 308824606).

They emphasize the parents' will and ability to demonstrate change or that they are motivated or willing to take measures to reform themselves, for example by accepting treatment for their problems or guidance from the CWS. In other words, if the prospects or potential for the parents to become good care givers were better and if they were able to demonstrate a positive development, this could change the decision-makers' decision. Some also specify that the parents should receive help and guidance from the CWS in the process. A significant part of these depictions are related to visitation and 54 percent of the child welfare workers, 46 percent of the experts and 72 percent of judges mention aspects directly related to visitation:

> «Parents are sober and manage to follow up on visitation. Treatment of addiction and mental illness». (Expert, 341937784).

The respondents argue that they would choose foster care instead of adoption if the parents were showing up to visitation and if the contact were more frequent. Furthermore, it mattered whether the parents would be able to improve their interaction with the child and carry out visitation that were beneficial to the child, or at least not harmful or negatively affecting the child. The latter point is important, as in one third of the child welfare workers' and experts', and half of the County Board members', mentions of visitation, the contact is not explicitly described in terms of having to be good, meaningful, developmentally supportive or positive for *the child*. Nor do they express as a necessity that the child has a need for or wants to meet his parents:

> «[The parents] showed up for all visitations – That the boy did not have as many reactions». (Child welfare worker, 308824610).

8.2.2. There are bonds to parents

About one fourth of child welfare workers (24 percent), experts (24 percent) and judges (28 percent) say they would change their decision if the reality was that the child had a relation with or an attachment to his parents, or where the parents represented something significant and/or positive in the child's life.

> «That the boy had an attachment to the parents. Now he knows of them» (Child welfare worker, 308824174).

8.2.3. Time and duration of placement

16 percent of child welfare workers, 18 percent of experts and one fifth of the judges (20 percent) mention considerations related to time and duration of the placement as factors that could change their decision. They refer to the timing of the decision and the duration of the placement by mentioning the age of the child at the present or at the time of the placement, and/or if the boy had been placed in the foster home at a later point.

> «(…) if the boy had been considerably older and had lived with his parents longer» (Expert, 341937635)

Table 3
Considerations that had to be different for the decision-makers to have chosen differently. Percentage of respondents with at least one mention of the following consideration, by decision-maker group. Number of respondents in parenthesis.

	First line	The County Board		Total
	Child welfare workers (n = 307)	Judges (n = 25)	Experts (n = 110)	Total (n = 442)
Parents show positive change and the quality of visitation (contact) is adequate or good	87% (267)	88% (22)	85% (94)	86% (382)
There are bonds to parents	24% (75)	28% (7)	24% (26)	24% (108)
Time and duration of placement	16% (48)	20% (5)	18% (20)	17% (73)
Foster parents (home) not suitable or not wanting adoption	13% (40)	24% (6)	11% (12)	13% (58)
The child's needs were different	10% (30)	12% (3)	1% (1)	8% (34)

9. Discussion

In this study, child welfare decision-makers' exercise of discretion when deciding upon a child's best interest is analyzed to find out which factors are important when child welfare decision-makers decide upon adoption, how these factors are balanced against each other and if there are differences between individual decision-makers and between decision-maker groups and levels in how they reason their choice.

The analysis shows that adoption is the preferred alternative for four-year-old David. Some variance is located between decision-maker groups in how different factors are emphasized where child welfare workers and experts follow a similar pattern, and judges on several occasions diverge from the observed order. As expected, there is also variation within decision-maker groups. Nonetheless, the similarities are prevailing. There is agreement in the decision-makers' overall assessments and the support for adoption is high if certain conditions are present. While the formal structures such as legislation and policy clearly guide the best interest justifications, the similarities between groups in the discretionary application of the law in terms of weighting

imply that child welfare context and wider societal norms contribute to shape the exercise of discretion. This is in alignment with previous research from Norway that show high agreement between child welfare workers and judges (as well as the population) in assessments of what is a neglect case (Berrick et al., 2020) and of what is an adoption case (Helland and Skivenes, 2019). The main features of the findings correspond with previous research on how Norwegian decision-makers reason adoption from care (Skivenes and Tefre, 2012). A number of best interest elements emerge, and the child's attachment to his foster family, his parents' inability to change and to provide adequate care and the child's age, as well as the time and length of placement are the main reasons for choosing adoption. However, when collating the findings for how the decisions were justified with the factors that were found potent enough change a decision from adoption to continued foster care, the decision-makers' consensus is striking and it is evident that the decisive factors are parental capabilities and the quality of visitation between the child and his parents. The findings reveal that though attachment, isolated, is the most important factor in a decision, it is *not* in fact a pivotal reason for adoption. While the rationales behind the justifications for adoption were varied and largely child-centered, the considerations that embodied the power to transform a decision was mainly parent-oriented and focused entirely on the parents and/or the relationship the child has or could have with his parents. This mirrors the tension in modern child welfare law between family preservation and partnership with permanence planning for children in alternative care (Parkinson, 2003). It discloses a paradox within the discretionary process where foster family attachment and the permanence of the placement, deemed as the most important considerations in a decision on adoption, essentially become redundant in the occasion where changes in parental behaviour and the quality of visitation occurs or has the potential to occur. This will be discussed in further detail, but before we return to this matter, some of the observed differences and similarities in the decision-makers' reasoning require closer attention.

9.1. Variances and similarities in discretionary assessments

As expected, there is variance in how decision-makers justify their decision. First, there is variation within the three decision-making groups. A majority of the individual decision-makers agree upon the same set of determining factors, yet a considerable proportion of the decision-makers do not include certain factors in their reasoning. For example, while attachment was the most mentioned factor in favor of adoption by child welfare decision-makers, 33 percent of the individual decision-makers did not mention attachment as a reason. This could reflect different weighting of factors by professional judgment. It could also stem from the lack of clear policy and professional guidelines for decision-making, and insecurity about what is considered good reasons for recommending or deciding on an adoption (Skivenes and Tefre, 2012). Variation could also be attributed to the decision-makers' personal values and convictions (Wallander and Blomqvist, 2005; Terum, Torsvik, and Øverbye, 2017; Arad-Davidzon and Benbenishty, 2008) or stem from individual characteristics such as work experience and age (Berrick et al., 2017) but the extent of such influence is not known as it is not controlled for in the analysis. Second, there is variation between the three decision-making groups. The differences are mainly between different professional decision-maker groups rather than decision-making levels as the divergence is generally starker between experts and judges (the County Board members) than that between child welfare workers and experts, and those between child welfare workers and judges. The diversity of the experts' professional backgrounds complicates interpretation of this finding. As previously mentioned, a quarter of the experts included in this study are either social workers, child welfare workers or child welfare officers. A proportion of this group is thus positioned closer professionally to the child welfare worker respondent group than to the judges, something that may explain some of the convergence between experts and child welfare workers.

While attachment, followed by parents' inability to change and to provide adequate care, is the most important considerations for child welfare workers and experts, time and age are mentioned most often by judges, followed by poor quality of visitation (contact) and the child's negative reactions. There are no timelines given for when adoption can and should be decided upon in the Norwegian system (Helland and Skivenes, 2019; cf. Fenton-Glynn, 2016), but determining the permanence of a placement is of vital importance to establish the legality of a non-reversible and permanent measure such as adoption. This could elucidate why judges emphasize this as strongly (see e.g. Breen et al., 2020). According to Breen and colleagues (2020), time is also essential for the ECtHR when they assess the stability of a placement and in R. and H. v. UK (2011) the court emphasize that:

> "when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited …" (para. 88).

The authors of this study analyzed all the ECtHR's judgments on adoption from care and discover that the court finds a considerable period of time to be somewhere between three and four years (Breen et al., 2020), leaving David's placement well within the scope of what is considered as considerable time in care. If we were to accept the assertion that law has an inherent unwillingness to hold ambiguous information (Weinstein, 1997), one could also speculate that the unambiguity of time and age is appealing to legal decision-makers and that it compensates for the lack of clear rules that facilitate for subsumption. Furthermore, concerns about parental capability and contact are strongly interconnected. The judges' comparatively lower focus on parents' inability to change and to provide adequate care should thus be interpreted in light of their comparatively higher focus on the quality of visitation and the negative reactions of the child. The reason why legal decision-makers emphasize this more strongly could be traced to the instrumental method of legal decision-making as broadly informed by principles based on case law (Schön, 1983). In Norwegian and international case law, visitation (contact) is traditionally given a great deal of attention and due weight (see e.g. Prop. 7 L (2009–2010), 2009).

9.2. Discretion and the weight of parental capability

Legally, the decision-makers' discretion is constrained by the fact that either attachment or parental inability to provide care must be proven in order to consent to adoption. When analyzing all decisions made on adoption in the County Board in 2016 (N = 59), Helland and Nygård (2021) furthermore found that attachment was an important consideration in the County Boards' best interest assessment. The emphasis these concerns are given is thus not surprising. The decision-makers' initial focus on attachment, together with their general concern with time and permanence, should be understood in connection with the stability principle in the child welfare system (Kilkelly, 2017). Here, children's interests in stable and continuous relationships to adults and other important persons and surroundings are to be promoted in assessments and decisions concerning them (Barne-, ungdoms- og familiedirektoratet, 2019) and the decision-makers reasoning is assumed to be a reflection of professional knowledge on children's attachment relationships, as its importance for children's development and well-being is well-established scientific knowledge (Rasmussen et al., 2019; Sroufe, 2005)[19]. Skivenes and Tefre (2012) suggested that the emphasis on attachment in adoption assessments could reflect the child-centric orientation of the Norwegian child welfare system. This may well be the case, yet what the present study shows is that parental capabilities

[19] The usage of methods and interpretations of such relations, however, are not agreed upon.

(including visitation quality) is not only highly important in the justifications for adoption, it is also the factor that holds virtually sole transformative power, indicating that there must be more to the story. The research review demonstrated that parental behavior and qualities commonly feature in justifications for and against adoption. It was the most frequently mentioned reason for adoption by Norwegian decision makers in Skivenes and Tefre's study from 2012 and in DeRoma and colleagues' study from 2006 parental motivation was found to be the second most important factor in decision-making regarding the removal of children. In Dingwall, Eekelaar and Murray's (2014 [1983]) seminal work *The Protection of Children: State Intervention and Family Life*, the ascription of moral characteristics to parents was revealed to be a central feature of the practices of child protection workers. They also proposed that the threshold for legal intervention was considered met if parental incorrigibility could be proven (Kettle and Jackson, 2017). When determining whether a placement is considered permanent or not, section 4–20 allows decision-makers to bypass a conclusion on parental capabilities by a discretionary assessment of the individual case and permits them to make the decision based on attachment alone (Lindboe, 2011). Even so, the best interest conclusion appears to be dependent on parents that are permanently unable to provide proper care. This points to a discretionary practice where a decision on adoption is reliant on both attachment *and* parental capability, yet with the latter as the factor that tips the scale. It is thus obvious that the commitment and reformation of the parents and their relationship with the child is a, or maybe *the,* decisive best interest consideration. This raises an interesting question: do decision-makers find it controversial or challenging to conclude that adoption is in the best interest of the child if parents' current and/or future parental capability is considered adequate? Or similarly when parents' predicted capabilities are unclear? If so, this could indicate that decision-makers are safeguarding their decision by holding that both attachment and parental inability to provide care must be proven for them to opt for adoption.

9.3. Liberal ideals and thresholds for intervention

From the perspective of the child, the balancing of considerations essentially becomes a matter of weighting the child's right to a legally established biological family relation and the right to a de facto family life. It is apparent still, that the emphasis on parents' capabilities and ability to change signals that the protection of parents' right to maintain parental responsibility over their biological child is strong, and that legal relations and biology are normatively powerful sentiments that influence decision-makers discretion at the point of tipping the scale in a balancing exercise (Dingwall, Eekelaar, and Murray, 2014; Ward, Brown, and Westlake, 2012; Ward, Brown, and Hyde-Dryden, 2014; Young, 2012). Their focus on visitation indicate that the biological principle in both its 'weak' and 'legal' form, expressed through the valuing of contact (weak) and legal bonds (legal) (Skivenes 2002) holds a particular strong position in adoption decision-making. From this it becomes apparent that the guiding principles of the law, especially the biological principle and the principle of the least intrusive measure, are strongly contributing to shape justifications for and against adoption. Both principles facilitate for decision-making by what Dingwall, Eekelaar and Murray (2014 [1983]) have termed "the rule of optimism". The rule applies as a practical solution to the child welfare systems' inherent task of balancing the respect for family autonomy and parental liberty with the demand to protect the needs and welfare of children – the 'dilemma of liberalism' – where staff become required to think the best of parents (Dingwall, Eekelaar, and Murray, 2014 [1983]). Because operational rules for decision-making are not possible in child welfare, additional assessments of parents' moral character and parental responsibility is applied to determine if a case meets the legal threshold for intervention based on ideas of deviance, assessments that according to Dingwall and his colleagues can be neutralized by cultural relativism and the idea of 'natural love' (Kettle and Jackson, 2017; Dingwall, Eekelaar, and Murray, 2014 [1983]). In other words, concluding that the threshold for intervention is met becomes harder once deviance cannot (longer) be proven. This can be related further to features of the Norwegian child welfare system. Typically, Norwegian child welfare practice is characterized as influenced by the principle of *positive liberty* – to optimize the capabilities and opportunities of citizens (Berrick and Skivenes, submitted for publication) and the parent-oriented focus of the pivotal factors could reflect the family-service-oriented function of the Norwegian child welfare system (Burns, Pösö, and Skivenes, 2017; Skivenes, 2011) where cooperation with parents and their abilities to rehabilitate and improve their parenting skills is valued in order to secure the interests of children. At the same time, we cannot exclude the possibility that the reluctance to go for adoption if parents commit and reform may also have been influenced by a protection of parental rights from the perspective of *negative liberty* – to be protected from outside interference (Holland and Scourfield, 2004) – inherent in among other ECtHR (Article 8) and The Norwegian Constitution (Article 102, cf. 104) (NOU, 2016) on the right to protection of family life. Alongside the best interest standard, interventions in child protection are often legitimated through the activation of some form of the 'harm principle' (Berrick and Skivenes, submitted for publication), entailing that individuals' freedom can only be restricted if there is danger of harm to others (Mill, 1859). Though not particularly characteristic of the Norwegian child welfare system, the harm principle appears to serve as a threshold for intervention for decision-makers. Believing that parents will not exercise their parental rights in harmful ways could mediate the assessment of risk of harm to the child. Intervening with the parents' parental rights may thus appear as less legitimate and necessary.

10. Concluding remarks

From the discretionary exercise child welfare decision-makers carried out when posed with the vignette about David, we see the reflections of a practice where support for adoption is ultimately dependent on the weighting of two decisive norms: the right to biological family life and the right to a de facto family life. The consistency in how these elements are emphasized and balanced indicate that, within the space of discretion, there is a hierarchy of norms and standards guiding the discretionary application of the law on adoption in decision-making. Though one cannot claim that the decision-makers' reactions to the vignette are necessarily representative of real-life actions, their responses suggest that adoption is understood as the appropriate choice for a child whose attachment is to his or her foster parents. It is nonetheless clear that the legal bonds between the child and his or her parents and the value of parent-child contact tips the scale in disfavor of adoption if parents are able to reform and commit to change. While the uniformity in attitudes do create some form of predictability, what appear as near standardized judgment may indicate that ideology is a force that governs discretion, and the legitimacy of the reasoning can be questioned. Adjusting the law and enforcing 'practice produced' criteria for decision-making challenge the legal structures that constrain discretion in the sense that decision-makers construct their own informal standards to accommodate contradicting expectations. The pivotal weight given to parental capabilities and commitment furthermore suggests that the law is a step ahead of practice. While the child-centered elements of the law are welcomed by decision-makers, they are difficult to implement due to the normative conflicts that arise, conflicts that appear to be enhanced by the contradictory forces of the law's guiding principles. This calls for both structural and epistemic measures of accountability to guide decision-making behavior and improve the quality of discretionary reasoning (Molander, Grimen, and Eriksen, 2012).

To further understand and improve decision-making, we need more research that 1) explores the attitudes and practices of decision-makers and aims to unbox the mechanisms that allow for and guide discretionary practices in decisions on adoption and 2) that address

professional decision-makers interpretations of the law and the best interest of the child and how this coincides with popular opinion and policy. This could be achieved through, inter alia, studies of court judgments and by investigating actual decision-making processes at the street-level.

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Appendix A. Supplementary material

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13

Understanding attachment in decisions on adoption from care in Norway

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Introduction

The attachments between a child and their caregivers are of vital importance for the well-being of a child and for their development as a person. In Norwegian child welfare legislation and policy, there are few definitions or substantive descriptions of what is meant by attachment or of how it is supposed to be assessed in decisions concerning adoptions from care without parental consent. This is despite the fact of 'attachment' being one of two alternative basic conditions for consenting to adoption pursuant to Article 4–20 (para 3a) of the Norwegian Child Welfare Act 1992 (CWA), which states that adoption can be consented to if the child 'has become so attached to persons and the environment where he or she is living that, on the basis of an overall assessment, removing the child may lead to serious problems for him or her'. Decision-makers are provided with significant room for discretion to interpret what attachment entails. Even though adoption is considered to be the strongest measure available in the CWA, we know little about how decision-makers' discretion is applied and of how attachment is understood and used as a parameter in actual decisions. By studying decisions from the decision-making body for involuntary measures by the CWA, the County Social Welfare Board (the Board), the aim of this chapter is to explore how the concept of attachment is interpreted in decisions on adoption and how decision-makers apply it to inform their decisions.

In the first part of this chapter, adoption is linked with the concept of attachment via a short introduction on attachment theory from the psychological perspective. This is followed by an overview of the formal decision-making structure for decisions on adoptions from care in Norway. Next, we connect the challenges of knowledge

application by professionals in the decision-making process with questions of legitimate decisions and use of discretion, while utilising perspectives inspired by institutional theory and system-theoretical thinking. Further, we present the methods and limitations of the study before presenting and discussing the findings. Finally, some concluding remarks are made.

Background

From the early 2000s and onwards, the development of policies in the field of adoptions from care in Norway has been increasingly influenced by expert knowledge. In recent years, knowledge from the field of psychology has dominated this expert discourse (Tefre, 2020). Tefre (2020) finds that developmental psychology has become a prominent supplier of terms in justifying state interventions on behalf of children in the Norwegian political discourse and, furthermore, that the psychological concept of attachment has attained an increasingly significant position in the political discourse on adoption. Illustrative of this is the authorities' discussion some years back of introducing the principle of 'developmentally supportive attachment' into the child welfare system (NOU, 2012:5). The recommendation entailed that the quality of attachment between children and their caregivers should be given decisive weight in the decision-making process and, if necessary, should be given precedence over the biological principle. This development is not without challenges, and we do not know to what degree decision-makers in Norwegian child welfare matters rely on a psychological understanding of attachment in their practice. The use of expert knowledge and concepts across professional fields requires that the meaning and inherent qualities of the knowledge and concepts are sustained throughout the process, and that it is applied according to its intended purpose. As decision-makers are provided with considerable room for discretion in their interpretation and application of attachment in assessments of adoption, challenges can arise with regards to the legitimacy of both the institutions responsible for the decisions and the decisions being made.

To our knowledge, no previous studies have analysed how attachment is interpreted and applied in public administration or the court system in Norway. There are, nonetheless, studies that have investigated which considerations different decision-making groups and bodies emphasise in their decisions on adoptions from care (Bendiksen, 2008; Skivenes, 2010; Skivenes and Tefre, 2012; Helland, forthcoming). From these studies, it is apparent that attachment is a significant factor in adoption

assessments and in the considerations of a child's best interests. In research covering other areas of child welfare practice, it is claimed that the employment of attachment theory in professional recommendations for placement practice for smaller children is not nuanced enough (Smeplass, 2009). Internationally, more research exists and the general message is that while attachment theory and knowledge deserve a place in the family court's deliberations, its application remains flawed due to the lack of consistency and common understanding of the concept (McIntosh, 2011[1]; for a discussion, see also Cashmore and Parkinson, 2014). Based on previous research, there is reason to anticipate that we will find variation in the interpretation and application of the concept across, and possibly also within, decisions on adoption.

A concept that can be understood in different ways can mislead reasoning (Copi et al, 2014) and expand the discretionary space in which decisions are made. With few guidelines from the legislators to guide child welfare decision-makers, it becomes pertinent to examine if and how attachment is applied in decision-making by the Board. Is attachment utilised in congruence with psychological theory or more along the lines of common speech? If the latter is the case, what implications could this have for the quality of the decisions that are made?

Formal structures for decisions on adoption from care

The four legal conditions (Art 4–20 para 3 CWA) for an adoption to be consented to are that: (1) the placement is permanent, either due to the parents' inability to provide the child with proper care or the child's attachment to persons and the environment around them (condition a); (2) adoption is in the best interest of the child (condition b); (3) the adoption seekers are the child's foster parents and have proven fit to raise the child as their own (condition c); and (4) the conditions to consent to adoption pursuant to the Adoption Act are fulfilled (condition d). The decision is made by the Board, which is headed by a lawyer qualified as a judge and further composed of an expert (in most cases, a psychologist) and a layman[2] (for a detailed outline of the conditions for decision-making on adoption in Norway, see Helland and Skivenes, this volume).

Few discussions or directives about how to understand attachment are found in the preparatory work for the CWA, in relevant policy or circulars, or in the guidelines for internal quality proceedings in the Board. Yet, some brief descriptions of attachment do exist. In a Bill from the Ministry of Children and Families (Prop. 106,

p 82) from 2013, it was suggested that attachment and relational quality, understood as 'interaction, relational quality and form of attachment seen in relation to the child's age', should be one of several principles on which to base a child's best interest decision.

Adoption and attachment

The concept of attachment appears frequently in discussions regarding children and their development, and stands as a principal element when professionals in the field of child welfare comment on a child's current and future situation of care and well-being (Azar et al, 1998; Kuehnle et al, 2000; Hennum, 2016). Attachment has a specific position in decisions on adoption as it is included as one of two alternative basic conditions for adoption. According to Ofstad and Skar (2015), the child's age, the duration of the placement and the extent of access between the child and her parents are important elements for consideration in an assessment of attachment pursuant to Article 4–20 of the CWA. Based on case law (see, for example, Rt. 2007 s. 561), circulars, international conventions and obligations (CRC, 2013; The Norwegian Directorate for Children, Youth and Family Affairs, 2017), and research on assessments of the child's best interest in decisions on adoption (Skivenes, 2010; Skivenes and Tefre, 2012; Helland, 2020), we expect attachment to be a part of the Board's assessments.

The concept of attachment and attachment theory

Attachment, in the sense of being attached to something, is a term that frequently occurs in everyday speech. We feel connected to persons, things and places, and are able to establish emotional bonds to things and persons that we relate to, as well as with places that feel important to us. This 'common sense' understanding of attachment is reflected in our daily use of the term and is related to the concept of 'belonging' but not directly connected to the psychological understanding of attachment derived from attachment theory. When we say that we feel attached to something or someone, it is implicit in the statement that the subject of our attachment has an emotional value to us. The essential criteria for such an attachment to arise is exposure over time. Quantitative measures, such as duration and intensity of the relation, are important when describing this form of attachment.

Attachment is also understood as a relational concept in psychology. Yet, in attachment theory, it signifies a relationship that develops between young children and caregivers in a specific time period of a

child's development (Ainsworth, 1982). This is a comprehensive and complex theory, and there is not room to go into detail about the theory here. The main sentiment of the theory is that it links attachment patterns (children's behaviour) with conditions of care. Attachment theory, developed by John Bowlby in the 1950s and further elaborated by Mary Ainsworth and others, is a framework that seeks to explain how children develop in relation to their closest caregivers, how a child's relational experiences shape the child's later expectations and the consequences this may have for the development of psychopathology (Wallin, 2007). What constitutes a comprehensive theory of child development today, for Bowlby, started out with a desire to highlight the consequences for children of experiencing separation and loss of a caregiver (primarily maternal) (Rutter, 1981). Assessing children's attachment within the framework of psychological attachment theory is conducted by applying the 'strange situation' procedure, a test developed by Ainsworth and Bell (1970) to identify patterns in children's responses when exposed to a stressful situation and, subsequently, their response when being reunited with the caregiver. Using this procedure, four 'attachment patterns' can be identified: 'secure', 'insecure-ambivalent', 'insecure-avoidant' and 'insecure-disorganised' (Main and Solomon, 1986). For the purpose of analysis, we understand the psychological use of the attachment concept as emphasising aspects related to the *quality* of the relationship over *quantitative* parameters, such as the length of the relationship, and employ the four categories for classifying attachment within the psychological understanding of attachment.

Based on these two understandings of attachment, we make the distinction between a *psychological* and *non-psychological* understanding of attachment in our analysis, where the latter refers to the 'common sense' utilisation of attachment found in everyday speech. This entails descriptions of attachment as, for example, 'strong' or 'weak', or where it is described as 'lacking' or merely as existing or not. These are ideal types and are, accordingly, simplified representations of reality. Nonetheless, they do provide us with a constructive set of concepts for the purpose of our analysis.

Discretion and legitimate decisions

In interaction with rules, discretion is an indispensable component in decisions made by the courts (Dworkin, 1963) and court-like bodies like the Board. That decision-makers have discretion means that they are provided with a certain freedom that is bound by a set of standards to decide how to interpret and give meaning and form to the law in

each specific case (Hawkins, 1986). Under a democratic rule of law, one is entitled to have an expectation of how the legal text is interpreted and on what basis. Discretion challenges fundamental principles of predictability and that equal cases should be treated equally and different cases differently.

From an institutional perspective, it is problematic if essential concepts are interpreted and applied differently as cultural-cognitive consistency is one of several premises for the legitimacy of an institution (Scott, 2001). In this sense, an institution and its practice can only be legitimate as long as the actors within that institution define a situation similarly and within the same frame of reference. The legitimacy of an institution is also dependent on the quality of the decisions that are made and that the decisions are made according to the existing laws and regulations (Scott, 2001). One could also claim that decision-makers should have a consistent use of expressions in order for an argumentation to be logical and rational (see Feteris, 2017: 81).

Professional discourses and the use of psychological expert knowledge in the decision-making process

Our analysis is informed by the system-theoretical tradition of Niklas Luhmann (King and Piper, 1995; Luhmann, 1995; see also King and Thornhill, 2003), which sees the law as an autopoietic system. That is to say, the judicial system is self-referential and substantiates statements about the world by referring back to the system's own internal means and procedures. Even though the Board is not a court, it operates by judicial procedure and is thus situated within the judicial system. The challenge in child welfare cases is that the judicial system has to take into consideration perspectives that follow different logics than the legal. Through the judicial discourse, legal decision-makers operate with two sets of rationalities or ideologies when deciding on child welfare matters: that of *justice* and that of *welfare* (King and Piper, 1995; Ottosen, 2006). Where the binary justice perspective characterises the logic within the judicial system – that something is legal or illegal, right or wrong – child welfare matters demand that one also takes the welfare perspective – of what is good or bad for the child.

Following this line of thought (King and Thornhill, 2003), the judicial system is considered closed in the sense that information tends to be considered valid only when it can be reproduced by the system's own procedures and criteria. At the same time, the judicial system is by its own means unable to produce the necessary knowledge relevant for a child welfare case. The judicial system is therefore dependent on

externally produced knowledge, and here is where the psychological perspective enters the equation. From the psychological discourse, the decisions are informed on matters concerning the child's social and psychological well-being – of what is harmful or beneficial for children. The influence from this discourse can be found both on an individual level, reflected in decision-making and methods for retrieving information, and on a more general or abstract level, such as in laws and policies relating to child welfare matters (Ottosen, 2006), as seen in the earlier discussion about the increasing influence from the psychological field of expert knowledge on Norwegian child welfare policy.

Methods and data

The data for the study underpinning this chapter consist of all the decisions made on adoption by the Board in the year of 2016 – 58 decisions in total, with 56 of them resulting in an adoption order. The Board is obligated to give written reasons for its decision, and these documents are structured as follows: a presentation of the facts of the case; the parties' argumentation, both the public party (the municipality) and the private party (the parent[s] and/or the child); and the Board's assessment and decision. On average, the Board's assessment constitutes six pages. The expert on the Board was a psychologist in 67 per cent of the cases,[3] a psychiatrist in 14 per cent, a (clinical) social worker in 9 per cent, a child welfare officer in 7 per cent and a special education teacher in 3 per cent.

The 58 written documents were analysed in five steps[4]: (1) we started by reading all the decision documents to identify how attachment was described; (2) we thereafter identified all references to attachment and attachment-related terms[5] in the decisions by searching and registering references; (3) we identified to whom and how (non-psychological or psychological character) attachment was described; (4) we registered which terms were used to describe the attachment; and, lastly, (5) we explored the meaning of attachment as a concept by identifying how the Board makes use of and operationalises attachment in their argumentation. We used the analytical tool Nvivo 12 for steps three to five, and only the Board's assessment is analysed. All data were reviewed and registered manually, and, with the exception of step four, the occurrence of references is counted per case and the number of occurrences within each case is not considered. The coding in step five was reviewed in three steps, where the researchers systematically reviewed their own coding, each other's coding and conducted a joint

review. As a reliability measure, strict conditions were set for which parts of the text were eligible for coding. The text had to either: (1) contain direct references to the term; or (2) be an identifiable part of the discussion related to the second alternative of the basic condition (a) given in Article 4–20 (para 3) of the CWA. Direct references to the law and when the term 'attachment' was not used to describe a relation were excluded from analysis.

Limitations

Our analysis is based on written material – authored in retrospect and for a certain purpose – and does not provide a complete representation of the cases. These documents do not contain all the information available to the Board during the negotiation. Still, the Board is required to account for the formal decision, and the content of the decision will thus reflect the justifications that the Board wishes to account for in the official decision (see Magnussen and Skivenes, 2015). Another limitation is that we cannot say anything about the quality of the investigations made by experts and other professionals in the cases.

Findings

Where and how often?

The results reveal that attachment is a significant element in decisions on adoption (see Table 13.1). Given the wording of the law, this was expected. It is furthermore evident that, in most cases, attachment is addressed as part of the public party's argumentation for adoption. In the private parties' argumentation, there are references to attachment in about half the cases.

Table 13.1: Cases with references to one or more attachment-related terms in the decision documents

Part of decision document	Number of cases with references to attachment
I. Public party (the municipality)	55 (95%)
II. Private party (parent[s])	30 (52%)
III. Private party (the child)	2 (3%)[a]
IV. The Board's assessment	57 (98%)

Note: Distributed by the section in the document where the references were identified. Number of cases and percentage of total number of cases (n = 58).[a] For a child to be party to the case, they have to be 15 years or older; thus, the child is rarely party to the case.

Table 13.2: Conditions of Article 4–20 where attachment is assessed/described in the Board's assessment

	Conditions (letter) for adoption (Art 4–20)				
	(a) Permanence	(b) Best interest	(c) Foster parents' fitness	(d) Legality	Other/ unknown
N (%)	55 (95%)	50 (86%)	4 (7%)	1 (2%)	3 (5%)

Note: Number of cases and percentage of total number of cases (*n* = 58)

Table 13.3: Attachment described with relation to persons or environment, differentiated by type of attachment understanding (non-psychological or psychological)

	Non-psychological			Psychological	
	Foster parents (family)	Biological parents (family)	Environment (extended family)	Foster parents (family)	Biological parents (family)
N (%)	54 (93%)	41 (71%)	18 (31%)	22 (38%)	9 (16%)

Note: Number of cases and percentage of total number of cases (*n* = 58)

In relation to the four legal criteria for adoption (see Table 13.2), we find that attachment is mentioned and described in relation to the permanency condition (a) in the law in all cases except three.[6] Attachment is also a highly relevant factor in best interest assessments: 86 per cent of the cases include a description of the child's attachment to persons or environment, related to condition (b). Attachment is rarely mentioned in assessments of the foster parents' fitness (condition c) or of the legality (condition d) of the decision in relation to the adoption law.

To whom is attachment assessed by the Board?

When reviewing to whom the child's attachment is described and if the described attachment is of a 'non-psychological' or 'psychological' character (see earlier definitions and Table 13.3), we find that the non-psychological understanding of attachment is dominant compared to the psychological. Descriptions of attachment between the child and their foster parents occur more often than between the child and their biological parents. Furthermore, our analysis revealed that attachment is assessed in terms of existing or not existing – it either is or is not. Where the Board finds that there *is* an attachment – in positive terms – between the child and their foster parents, no such attachment is found between the child and their biological parents. In about one third of the

Table 13.4: Psychological-oriented terms used to describe attachment

Psychological references	Distribution of the 36 references	The child's attachment to
Secure	29 references	The foster parents (family)
Insecure	6 references	Biological parents
Disorganised	1 reference	Biological parents

Note: Terms used and between whom attachment is described. Number of references by term (*n* = 25 cases)

cases, the child's attachment to their environment or extended family is also described, usually depicting an attachment with extended family (grandparents, aunts, uncles and so on) or the 'environment around the family'. Considering that the law only requires an assessment of foster parents, it is interesting to find that attachment to biological family is assessed in relation to both condition (a) and (b) – in about one third of the cases for the former and just above half for the latter.

How is attachment described by the Board?

When studying the adjectives applied to describe attachment (see Table 13.4), we find that it is less common that notions of attachment occur in the psychological form as described with terms from attachment theory, as previously noted. A further exploration, revealed 225 occurrences of 'attachment' being accompanied by a descriptive adjective (distributed among 40 of the 58 cases). Among these, 36 adjectives (distributed among 25 of the 58 cases) had a distinct reference to a psychological use of the term (secure, insecure and disorganised). The 29 times that 'secure attachment' was mentioned (distributed among 22 cases), it was always as a description of the relation between the child and their foster parents. When 'insecure attachment' (six instances) or 'disorganised attachment' (one instance) were mentioned, they concerned the child's attachment to biological parents.

In contrast, we identified 82 instances (distributed among 34 cases) of attachment being accompanied by an adjective adhering to the non-psychological understanding of the term and that expressed a quantitative evaluation of the attachment, such as 'strong', 'weak', 'lacking', 'complete', 'absence of' or 'none'. Multiple adjectives are sometimes used to describe attachment in the same sentence; non-psychological and psychological descriptions of attachment were combined 32 times (for example, 'safe and secure'). Moreover, the Board frequently describes attachment as 'fundamental', 'basic',

Table 13.5: Assessments and descriptions of all forms of attachment

	Thematic dimension		
	Time	**Identity, integration and belonging**	**Care and contact**
N (%)	52 (90%)	44 (76%)	35 (60%)

Note: Number of cases and percentage of total number of cases (total *n* = 58). *N* = 30 cases also containing a variety of other themes

'rooted', 'real', 'primary' or 'psychological'. When such designations are used, they refer to the assessed intensity of the attachment, and allude to a qualitative property of the attachment.

How does the Board understand attachment?

We explored how the Board understands and operationalises attachment in its argumentation (see Table 13.5), and found that time is the most common parameter for assessing attachment (in 90 per cent of the cases). The age of the child when they were first placed out of home or in the care of the adoption seekers, the length of the placement, and the age of the child at the time of the decision in the Board are factors that are mentioned. Thus, the permanency of the placement appears key. Furthermore, we find that attachment was assessed on conditions related to 'care and contact' in 60 per cent of the cases. Most often, we find this expressed as the lack of attachment to biological parents, where the (low) frequency and quality of contact between parents and the child apply as relevant conditions. Within this category, we also find that parents' previous neglect or failure to provide the child with adequate care is found to inform the assessment as a disadvantaging factor of the attachment between the child and their biological parent(s). In contrast, the foster parents' care is seen to have provided fertile ground for attachment bonds to grow. The child's identity, integration and belonging are referred to in 76 per cent of the cases. Considerations within this category are tightly intertwined, and are interpreted as expressions related to identity and the child's feeling of self and safety (see, for example, Triseliotis, 1983). Mentions include descriptions: of whom the child sees and experiences as their de facto parents (family), and of not knowing any other family; of being a natural part of the family and that it is 'as if the child was the foster parents' biological child'; of being integrated into the family and the environment around it; of calling the foster parents 'mom' and 'dad'; and of wanting to or using the family name of the foster family.

Such considerations are, with two exceptions, only used to describe attachment bonds to the foster family.

Discussion

We find that attachment figures as an important concept in the written statements from the Board when it makes decisions concerning adoption from care. However, a wide range of meanings is prescribed to the attachment concept and there is no obvious common denominator or understanding of what attachment is or how it should be described, as illustrated by the fact that, among other things, attachment was accompanied by a multitude of different adjectives. Although we identified some common practices for where and how attachment is assessed, and were able to describe the parameters that were widely used to inform an assessment – time; identity, integration and belonging; and care and contact – the decisions do not display any apparent convergence on the conceptual understanding of attachment, neither between nor within cases. Even though we cannot claim that there is a single pathway or factor that determines attachment security (see George et al, 2011), or that the variety we have observed would have substantial implications for the outcome of the decision and, in turn, for the parties involved, the unpredictability could pose a considerable challenge for the quality of the decisions. Considering that similar assessments to those analysed here are highly relevant for both decisions on reunification and care orders, the issues identified could potentially have implications for a wider range of decision-making processes.

What primarily characterises how attachment is described in the decisions is the marked binary distinction between the presence and absence of attachment. This could be a consequence of the procedural process. The law requires that the person(s) seeking to adopt have fostered the child and that they have been proven fit to care for the child as their own, and the cases that are tried for adoption are, in all the essentials, cases where reunification is not considered a viable option. This probably explains why attachment is more commonly discussed in relation to the child's foster parents compared to biological parents. It also sheds some light on the fact that the child's identity and belonging were, in all essentials, discussed related to the foster home, though the lack of attention to the child's 'birth identity' and to considerations related to the child's biological origin could be problematised (see, for example, recommendations in 'General comment no. 14' of the CRC Committee [2013]). At the same time, our analysis revealed that in relation to the legal permanence condition (a), the Board assesses

attachment not only in relation to foster parents, which is what the law requires, but also in relation to biological parents. This could be interpreted as an argumentative strategy, where the Board contrasts the child's attachment to their foster parents with the lack of such attachment to their biological parents with the purpose of reinforcing the argument that the attachment between the foster parents and the child is of such a nature that removing the child may lead to serious problems for them. In this perspective, the discretionary reasoning is exercised by applying contrast as an argumentative tool.

The findings hint at an outline of a binary juridical discourse. It is the task of the Board to assess where and whether attachment exists or not in order for the decision to be right or justifiable. In line with a judicial logic, attachment may become a question of presence or absence. Although it is easily imaginable that attachment can be present in one situation and not in another, this binary logic might become problematic if it forces attachment into being or not being present, among other things, because research has shown that children may have several attachment relations (Killén, 2007). It can also pose a problem for the quality of the decision if complex constructs such as attachment are simplified and understood in binary terms. According to Groze and Rosenthal (1993), such dichotomies can appear when it is difficult to gather around a uniform understanding of a concept. This usage of the term can be misleading and it is a question whether attachment, rather than being understood as being or not being, should be seen as a continuum or as having multiple levels.

We also find traces of a tension between welfare and justice. The psychological understanding of attachment has a less explicit position in the assessments. At the same time, it is obvious that the Board combines non-psychological and psychological understandings of the concept; the judicial discourse alludes to the psychological discourse on several occasions. This makes the interpretation of the Board's utilisation of the construct challenging. One explanation for this practice is that the influence from psychological expert knowledge, as seen at the policy level, has manifested itself at the concrete level in the actual decision-making. In addition, it may be a result of the Board's composition given the high prevalence of psychologists acting as members of the Board.

We found that attachment was dominantly discussed in relation to the permanency condition (a). As the basic condition of Article 4–20 provides two alternatives for determining the permanency of a placement, this implies that attachment could be the preferred alternative to be addressed. In practice, because of how the law is outlined, it becomes somewhat redundant to address the often more

complex and difficult question of the likelihood that the parents will be permanently unable to provide the child with proper care if a relocation of the child is already considered to cause serious problems for the child based on an assessment of attachment (Lindboe, 2011). It could also be the (most) relevant alternative to assess, or it could be that attachment is assessed irrespective of which alternative is decisive for the permanence decision. Given that quality of care is understood as an indicator for an attachment bond, it might also be intercorrelated with an assessment of the birth parents' ability to provide care. It is interesting that we also find that attachment is a frequently mentioned factor in best interest assessments. Taking into consideration that the child's identity, integration and belonging, conditions of care, and de facto family situation are provided as parameters for an attachment, it is not surprising that it would also become a part of a best interest assessment. Yet, the question of whether attachment is seen as an umbrella concept that covers most concerns relevant for an adoption assessment, or whether it is merely considered as pivotal in the balancing of adoption or continued foster care, remains unclear.

Conclusion

Our analysis shows that attachment has a prominent position in decisions on adoption, both in terms of determining the permanency of the placement and for assessing if adoption is in the best interest of the child. The quality of the assessments is thus vital for the overall quality of the decisions. At the same time, our analysis shows that there is variation in the conceptualisation of attachment. This was expected given the comprehensive room for discretion that decision-makers are given. Furthermore, while it is beyond the scope of this chapter to consider whether attachment is better understood as a psychological or a non-psychological construct in these decisions, it is clear that problems may arise when predictability is at stake and if the same concept entails different meanings. This begs the question of whether the legislators should provide stronger and more substantial guidance for decision-makers as to how to assess and give meaning to attachment in adoption cases. That could be a useful measure to minimise ambiguity and ensure greater consistency in the understanding and application of attachment by the courts and the Board.

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Notes

[1] Results based on a survey of 298 respondents from the US, Canada, Norway, Australia, New Zealand, South Africa and Israel.

[2] The Board could be composed of five members, should the case in question require it.

[3] In seven cases, there were two experts on the Board, and in another in seven cases, the case was decided by the Board leader alone. In the cases where an expert was actually assigned to the Board, they were a psychologist in 75 per cent of the cases.

[4] A full description of the analytical approach and code descriptions are available at: www.discretion.uib.no/projects/supplementary-documentation/

[5] In Norwegian, '*knyttet til*', '*tilknytning*', '*tilknytningen*', '*tilknyttet*' and '*tilknytningspsykologisk*'.

[6] In one case, such an assessment was not relevant, while in the two other, the permanence condition (a) is only assessed in relation to the birth parents' inability to provide care.

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In the Best Interest of the Child? Justifying Decisions on Adoption from Care in the Norwegian Supreme Court

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Abstract

By utilising theories of deliberation and rational argumentation, this article critically analyses the Norwegian Supreme Court's best interest decisions in four judgments on adoption from care. How does the Supreme Court reason their decisions and are the decisions rational? The findings show that the decisions are reasoned similarly, and conclusions are guided by norms of biology, vulnerability and stability for the child. However, discretion is applied differently across decisions, and the reasoning and balancing of individual arguments vary. The critical evaluation displays weaknesses in all judgments: one important blind spot is the failure to include the child's views in the decision-making process. The development in terms of delivering rational, well-reasoned and thorough judgments is nonetheless positive. Furthermore, the Supreme Court's recognition and protection of the child's *de facto* family situation correspond to observed developments in the European Court of Human Rights as well as in national state policy on adoption.

Keywords

adoption – Supreme Court – legitimacy – best interest – justifications – rational decisions – deliberative democracy – discretion

1. Introduction

Sitting at the apex of the Norwegian judicial system, the Supreme Court has the power to govern citizens in its jurisdiction through its authority, and the responsibility to justify certain orders

or actions. In this case, the court must justify the decision on whether a child should be adopted by his or her foster parents against the will of the biological parents. Under the separation of powers, the Supreme Court is assigned to be the guardian of the constitution. Its task in deciding on adoption from care is that of, on the one hand, controlling the actions of the public administration and, on the other, to interpret democratically constituted law and policy and authorise the exercise of political power (Eriksen and Weigård, 1999). The practices of the Supreme Court are precedential (Bårdsen, 2016), and the Court's judgments have not only a considerable impact on the practices of the lower courts and for actors making decisions on child welfare matters but also the power to influence policy-making outcomes and to create law (Hirschl, 2009; Magnussen, 2006, Schei, 2015). This article studies the Norwegian Supreme Court's decisions concerning the *best interest of a child* in four judgments on adoption from care.[1] In Norway, children have a constitutional right to have their best interests considered in matters that concern them (Sandberg, 2019), yet the principle is notoriously ambiguous and indeterminate (Mnookin and Szwed, 1983; Elster, 1989; Kohm, 2008). To determine what is in the best interest of the child, Norwegian decision makers are provided with extensive discretion (Skivenes and Sørsdal, 2018) and are required to make normative choices concerning what is a good life and to balance different citizens individual rights and interests. Such circumstances leave these decisions open to questions about their legitimacy. Accordingly, we require in-depth and substantive knowledge about the decisions made while being required to acknowledge that the nature of best interest decisions warrants their subjection to democratic control. Researchers of the Supreme Court's decision-making concerning adoption judgments have identified shortcomings or deficits in the Court's reasoning, including its failure to take a child-centric approach (Sandberg, 2016), ambivalence (Helland and Skivenes, 2019), and not meeting the standards of rational decision-making (Skivenes, 2010). In other areas of child and family law, the Court has been criticised for its overly judicial understanding and application of the 'best interest principle' (Jerkø, 2018), its flawed legal approach concerning the need to establish formal contact (Riiber and Syse, 2018), and its failure properly to acknowledge the child's right to be heard (Haugli, 2020).

The objective of this study is twofold. The first aim is to assess the legitimacy of the decisions from a deliberative perspective on decision-making: *Are the best interests decisions rational?* The second is to map and analyse the justifications applied in the practical argumentation concerning the child's best interests: *how does the court justify its decisions?*

[1] Rt. 2015 s. 110; Rt. 2015 s. 1107*;* HR-2018-1720-A*;* HR-2019-1272-A.

In the tradition of deliberative democracy, I consider the Supreme Court's capacity to produce justified and rational decisions through deliberative decision-making procedures to be vital for meeting its responsibilities as the guardian of the constitution. Inherent in the deliberative model is the idea of the "force of the better argument' (Habermas, 1975: 108), meaning that decisions should be supported by good arguments – wherein "good" is premised by the arguments' foundation in a mutual discussion where all involved have an equal and unhindered voice. The argumentation of the Court thus depends on the quality of the procedures in the justification process, and it is considered rational if it occurs through rational discourse guaranteed by certain requirements and standards (Alexy, 1989; Habermas, 1996). I return to this matter in Section 4. Positioned within a Habermasian research programme, I build on a discourse theoretical approach from Skivenes (2010), who developed a vigorous analytical framework critically to analyse the rationality of the Supreme Court's best interests decisions. I advance this framework by including a critical analysis of the court's justifications of its judgments and, thereby, add both to the theoretical framework and to the empirical knowledge of the Supreme Court's decision-making. It should be clarified that this is not a legal analysis, but one premised on social science methods and epistemology.

The following section presents the background and purpose of the study, followed by an outline of the main features and requirements for adoption decision-making in Norway in Section 3. Next, the theoretical and conceptual basis for the analysis of court judgments is provided in Section 4, followed by a methodological outline and limitations presented in Section 5. In Section 6, the findings are presented and the arguments evaluated, and in Section 7, the discussion is presented. Finally, some concluding remarks are made in Section 8.

2. Background

Adoption from care is uncommon in the Norwegian child welfare system, and less than one per cent of children placed in foster care are adopted each year (Helland and Skivenes, 2019).[2] While neither the recent policy development for encouraging adoption (Tefre, 2020) nor the legal conditions for adoption set a particularly high threshold for consenting to the adoption, case law does. The European Court of Human Rights (ECtHR) requires a decision on adoption to be based on, 'an overriding requirement pertaining to the child's best interests' (Appl. no. 17383/90, para. 78). In Norwegian case law, 'particularly weighty reasons for adoption' is

[2] In Norway, adoption and long-term foster care are the only permanent options for children who cannot return to their birth parents.

found to suggest the same norm (Sandberg, 2020). Furthermore, Article 8 of the European Convention of Human Rights (ECHR) requires that in instances where the interests of a child and his or her parents' conflict, a fair balance (Council of Europe, 1950) should be struck between these interests, although those of the child may override those of the parents.[3] Between 2015 and 2019, 13 cases concerning adoptions without parental consent were communicated to Norway by the ECtHR. Of these 13, only one had been tried by the Supreme Court. In September 2019, the ECtHR Grand Chamber ruled that the Norwegian state had violated Article 8 of the ECHR on the right to respect for private and family life when consenting to the adoption of a young boy without the biological mother's consent (*Strand Lobben and Others v. Norway* [GC] 2019).

Since the implementation of the Norwegian Child Welfare Act (CWA) in 1993, the Supreme Court has delivered judgment in no more than seven cases on adoption from care. The four most recent judgments are analysed in this paper, which were all delivered within the short period from 2015 to 2019, when the Norwegian state was subject to comprehensive international legal scrutiny. Skivenes (2010), who studied the three Supreme Court judgments[4] preceding the four analysed in this study, concluded that the first two decisions (1997 and 2001) were not made according to rational standards, whereas the latest decision (2007) was. The objections were aimed particularly at the court's lack of child-centric reasoning, which was interpreted as conflicting with current policy.

3. Adoptions in Norway: Features and Requirements for Decision-making

In the context of child welfare decision-making, interventions are guided by the principle of the least intrusive form of intervention, the biological principle and the best interests principle (Lindbo, 2011). These entail that while the best interest of the child should be decisive in the decision whether to permit adoption, the court should seek to limit intrusion into the family and facilitate continued contact between children and their parents. Adoption from care without parental consent is possible through the CWA (1992) Section 4-20 *Deprival of parental responsibility—Adoption,* which consists of four cumulative conditions, as follows: (a) The biological parents are permanently unable to provide proper care, or the child has become so attached to his/her new environment that removal will lead to serious problems; (b) Adoption is in the child's best interest; (c) The adoption applicants are the child's foster parents, and they

[3] For example, *Strand Lobben and Others v. Norway* [GC] 2019, para. 206, see Sørensen (2020).
[4] Rt-1997-534; Rt-2001-14; Rt-2007-561.

have proven fit to care for the child; (d) The conditions of the Adoption Act are satisfied. If a child is under public care by an official care order, the local child welfare authorities can initiate an adoption and bring it to the court-like decision-making body the County Social Welfare Board (the board), which holds the authority to decide on compulsory measures. A decision from the board can be brought before the ordinary court system (see Table 1), with the Supreme Court as the highest appeal court.

3.1. The Discretion of the Supreme Court and the Best Interests Principle

The Norwegian Supreme Court is a court of general jurisdiction and is usually presided over by 5 out of 20 judges (Grendstad, Shaffer and Waltenburg, 2010). The deliberations are highly proceduralised and take the form of 'formalised discussions', where all five judges are allocated time to present their views (Grendstad *et al*., 2019). The final decision allows for dissenting opinions, and the judges may change their opinion during the deliberations. Opinion writing is a shared responsibility, and decision drafts are circulated among the judges on the panel before the decision is presented and discussed at a minimum of two conferences following the oral hearing. For the court to admit a case, questions must be raised of a principled character beyond the concrete circumstances of the case or for other reasons which are of particular importance to hear.[5] In other words, Supreme Court cases are extraordinary and require deliberation by highly trained decision makers.

Judicial decisions are based on two sources: rule and discretion (Dworkin, 1963). If the court has the discretion to interpret what is in the best interest of a child – the rule – the basic democratic ideal that those subjected to norms must be able to be the author of these norms (Forst, 2016) and the principle of popular sovereignty, which entails that legitimate state power should emanate from the people (Locke, [1698] 1988), are challenged. Discretion further challenges the fundamental democratic principles of predictability that equal cases are treated equally and different cases treated differently. The most commonly contested condition for adoption to be approved in Norway is the best interests of the child (Helland and Skivenes, 2019). Article 3 of the United Nations Convention on the Rights of the Child (CRC) (1989) states that, 'the best interests of the child shall be a primary consideration' in all decisions that concern children. This principle is strongly anchored in Norwegian law, where the CRC applies

[5] The Supreme Court is to review, under section 36-5 subsection 3 of the Dispute Act (Act relating to mediation and procedure in civil disputes (2005)), all aspects of the case, and the review must be based on the situation at the time of the judgment. In cases such as this, the court does not hear witnesses directly in the court, but through written statements or depositions. Court-appointed experts may be examined directly before the court.

as statutory law ranked above ordinary legislation after its incorporation into the Norwegian Human Rights Act in 2003 (Sandberg, 2019). In 2014, the best interests principle was enacted in the Norwegian Constitution in *Grunnloven* ([1814] 2014) (Article 104(2)). Section 4-1 of the CWA requires the best interests of the child to be the guiding consideration in implementing measures and emphasises the importance of providing the child with continuity (permanence) as well as stable and good adult contact (Skivenes and Sørsdal, 2018). In addition, the CWA requires the child's participation to have a decisive position in best interest consideration (Skivenes and Sørsdal, 2018), and through Article 104(1) of the Constitution and CRC Article 12, children have the right to be heard in cases that concern them (Sandberg, 2019). Relating to adoption, in particular, General Comment No. 14 (Committee of the Rights of the Child, 2013) concerning the best interests principle states:

> In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be 'a primary consideration' but '*the* paramount consideration'. Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.

The best interests of the child is also a condition under the Norwegian Adoption Act (2017) and a specific condition under section 4-20 and can be characterised as a rule in cases on adoption (Bendiksen, 2008). In summary, best interests assessments are fundamental to decisions on adoption, but the legal interpretation of the best interests principle is largely founded on vague rules,[6] and there is an indeterminacy associated with a best interests evaluation, provided primarily that any universal or unitary form of measure to such a standard is difficult, if not impossible, to agree upon. Thus, committing to reasoning based on a best interests claim must include either implicit or explicit deliberations of a value-based and normative character. In the tradition of argumentation theory, such factual and normative conflicts should be addressed through rational discourse (Skivenes, 2010), and one approach to securing rational best interests decisions is to ensure that they are reached through a reasoned deliberative process (Archard and Skivenes, 2010).

4. Theoretical and Conceptual Framework

To analyse the judgments, this article builds on Skivenes's (2010) approach to study the rationality of decisions in the legal context. Skivenes's model builds on theories of

[6] See discussion on vague rules in hard cases in Dworkin (1963).

argumentation from the tradition of Alexy (1989) and Habermas (1996) and is based on an evaluation of whether the court's validation of claims meets the discourse ethical standards, adheres to the rules of rational argumentation, and follows the rules for deliberative processes. The understanding of rationality in this context derives from the theory of practical discourse and communicative action, where the idea is that the aim of everyday discourses is that of reaching a common understanding through the exchange of reasons for or against a given claim or assumption. This exchange relates to law through which Habermas (1990, 1996) defines a complementary relationship between rationality in legal discourse and that in everyday discourse, where legal procedures are considered to promote rationality in discourses on moral issues.

To assess how the court resolves a conflict, I distinguish between claims that adhere to pragmatic, ethical or moral discourses (see Feteris, 2017; Habermas, 1996; Skivenes, 2010; Eriksen and Weigård, 1999; Huttunen and Heikkinen, 1998) and link them to their respective standards for evaluation.

Pragmatic discourses concern selecting the option that is more feasible or efficient to reach a given goal and should be substantiated by reference to established and scientific methods and/or empirical observations. Claims within this discourse are oriented towards empirical facts regarding a situation, for example, professional knowledge and evidence, in the context of establishing the most appropriate means to achieve a goal. The standard of evaluation is whether statements are true, documented, reliable and realistic.

Ethical discourses concern which values are worthy of united effort and what a good life is. Claims in this discourse concern the values and interests to pursue, for example, in relation to what constitutes a good childhood. The standard of evaluation is hermeneutical interpretation related to the cultural and social norms and practices in the context of the given community.

Moral discourses concern claims about moral rightness and argumentation is oriented towards universalisation. Claims in this discourse are concerned with respecting normative rights and conceptualisations of what parties are owed in terms of justice and fairness: what is an outcome that can be considered right and fair for everyone? To be perceived as rational, the final outcome must be generalisable in a decontextualised form in such a way that all parties concerned can accept it as their own.[7]

[7] For a presentation of the principle of universalisation (U) as a rule of argumentation, see Habermas (1990).

Following the theory of deliberation, decision-making should be a deliberative process with the premise that it 'rests on good information regarding the contents of the case and the parties' situations, that possible choices of action and their consequences must be explored, and that possible results should be ranked in relation to overall goals' (Skivenes, 2010: 341–342). In addition, the basic rules for process state that all persons can participate, that they can propose any assertion that they wish, that they believe in their assertions, and that they aim to be consistent in their use of words and concepts (Skivenes, 2010; Eriksen and Weigård, 1999).

The presuppositions of rational argumentation can be divided into three levels: the *logical* level of products, the *dialectical* level of procedures, and the *rhetorical* level of processes (Feteris, 2017). At the two first levels, the evaluation is based on the demands that speakers should not contradict themselves, and their arguments should be consistent and logical, their statements must be generalisable, and they should avoid ambiguity. Furthermore, they should be sincere in their assertions and provide reasons for disputing a proposition or norm not under discussion. The third level sets the criteria for our "rules for rationality" and stipulates that all statements (arguments) must be reasoned if a statement is countered or questioned, unless there are reasons not to do so (then such reasons shall be given). Moreover, all persons can participate in the discourse, freely proposing and problematising any assertion they wish to while not being hindered from exercising any of the former actions. In addition, the rational rules for the allocation of the burden of proof state that the principle of universalisability requires justification of all suggestions for treating one person differently from another, and only assertions that are challenged should be justified. Irrelevant utterances and statements should be avoided or at least justified. In principle, decisions that emerge through genuine deliberative processes should be acceptable to all by the standard that the parties cannot reasonably reject them. This further necessitates that we ask whether relevant interests and considerations relevant to the field are included in the deliberation. Based on this conceptual corpus, the analysis of the written judgments aims to:

Evaluate the quality and rationality of the court's argumentation by the standards that:

- the argumentation is logical, relevant, coherent, sincere and unambiguous
- the argumentation is supported by reasons
- the parties are freely included and heard
- claims meet the standards of evaluation and can withstand critical scrutiny.

Expose caveats and weakness in the court's argumentation and deliberation process:

- missing arguments are identified
- the arguments are justified
- the arguments are weighed and balanced against each other.

For a multifaceted approach to the evaluation of legitimacy, I also analyse the court's practice of justification in relation to a broader set of thematic discussions to call attention to value presuppositions, logics and normative structures inherent in the decision-making. In summary, the theoretical framework serves three complementary purposes in our quest to analyse the legitimacy of the decisions. First, it concerns the rational resolution of conflicts about facts and values. Second, it suggests how the decision-making process can be conceived as democratic. Third, it indicates how implementing the law through discretionary decision-making practices takes the form of justifications of dominant perspectives and ideas (Sinclair, 2005). In the analysis, I draw some general lines of argument from the cases and present only the most pressing caveats and interesting findings from the viewpoint of legitimacy. Finally, it is important to point out that even if we conclude that a decision is rational and legitimate, this does not imply that it is necessarily the correct one, as even rational consensuses are fallible and can be provisional (Eriksen and Weigård, 1999). Moreover, in real-world practical discourses, the expectation is that the criteria can only be fulfilled to a certain degree.

5. Methods

The empirical data consist of four written full-length Supreme Court judgments on adoption from care under section 4-20 of the CWS. Two of these were decided in 2015 (hereinafter referred to as 2015a and 2015b), one in 2018, and one in 2019. These four are *all* the judgments made from 2015 to 2019. As the three preceding judgments from 1997, 2001 and 2007 were studied using a similar methodological and theoretical approach by Skivenes in 2010, these are excluded from the analysis. The judgments are publicly available; they were retrieved from the Lovdata.no (PRO) national database. The documents follow a structure where the reasoning of the decision makers is presented in the last section of the judgment, proceeding from a presentation of the facts, a summary of previous decisions in the lower courts (including the board), and the parties' arguments and claims. Within the court's reasoning, only the best interests assessment is subject to analysis. The documents vary in length from 8 to 14 pages, where the court's reasoning constitutes between 4 and 9 pages, respectively.

5.1. Qualitative Text Analysis

The study is based on a qualitative analysis of the judgments, using an approach inspired by thematic and classical legal argumentation analysis (Coffey and Atkinson, 2006; Feteris, 2017). The coding of the arguments was conducted as a back-and-forth process, whereby individual arguments and their reasoning were identified and simultaneously defined as related to clusters of arguments, which will be referred to as "justificatory themes". In the process of developing the categories for the justificatory themes, I used a coding schema that emerged mainly through an inductive approach to the data, although both the schema and the coding were formed by research and previous knowledge. After the first step of categorisation, the arguments were defined by discourse and dissected to identify the reasoning behind them. The systematised data were then analysed and evaluated according to the standards delineated in Section 3.

Depending on the context in which it appears, where the weight of reasoning is placed, and the general construction of the argument, elements or claims that are considered to be arguments in one case are not necessarily given the same status in another. While recognising that such an approach could entail that aspects of interest from a legal point of view will not be discussed, arguments of a legal or procedural nature will not be pursued in the presentations or discussions, and I will not pursue any inquiry into the court's interpretation of national and international law and jurisprudence.

5.2. The Cases – A Brief Overview of the Basic Characteristics

Even though the question of reunification is addressed in 2015a, the best interests of the child is essentially the disputed theme of the decisions in all four decisions. As reunification is not considered to be a feasible option: the decision concerns the choice between continued foster care and adoption. None of the judgments had dissenting opinions, and in three out of four cases, the Supreme Court ruled in favour of adoption (see Table 1). In 2015b, the father acts as the sole party to the case in the Supreme Court as the child's mother passed away in 2014. The children were aged six and a half (2015a, 2015b, and 2019) and five (2018) years at the time of the Supreme Court decision. They had been in out-of-home care since they were two and a half months old (2015a), eighteen months old (2015b), newborn (2018), and nine months old (2019). The reason for removal in all cases was neglect, and the child in the 2019 case was also exposed to abuse.

Table 1. Key features of judicial proceedings in the four decision-making instances: Result of the decision, dissenting opinions and year of decision.

	Instance*	The Board	DC	CA	SC
2015a	***Result***	Adoption	Adoption	No adoption	Adoption
	Dissent	No	No	No	No
	Year	2012	2013	2014	2015
2015b	***Result***	No adoption	Adoption	No adoption	No adoption
	Dissent	No	No	Yes: 2-3	No
	Year	2013	2014	2015	2015
2018	***Result***	Adoption	No adoption	Adoption	Adoption
	Dissent	No	Yes: 2-1	Yes: 4-1	No
	Year	2016	2016	2017	2018
2019	***Result***	Adoption	Adoption	Adoption	Adoption
	Dissent	Yes: 2-1	No	Yes: 3-2	No
	Year	2017	2018	2019	2019

* The Board = the County Social Welfare Board, DC = the District Court, CA = the Court of Appeal, SC = the Supreme Court.

5.3. Limitations

The analysis is based solely on written material, which entails some limitations. First, the judgments are authored in retrospect and for a particular purpose – to validate the legality of the decision (Eckhoff and Helgesen, 1997). Second, the documents do not necessarily include all information that would be considered essential or interesting from a research point of view, and one must be aware that judicial decisions do not provide a complete picture of the individual case (Magnussen, 2006). Nonetheless, the Court is legally obligated to justify its decisions (the Dispute Act, section 9-6), and the arguments will reflect the reasoning that the Court defines as the official argument, which will prevail for later decisions and judgments in the area (Magnussen, 2006).

6. Findings: Presenting and Evaluating the Reasoning on the Best Interests of the Child

Overall, 15 different arguments are included in the decisions (see Table 2). The arguments are linked to four overreaching justificatory themes: *the right to a "new" family* or, in other words, for the child to remain in the foster family, *the right to biological family life*, *the child's autonomy and development*, and *time*. Pragmatic arguments appear most frequently, and if ethical values are considered, they usually coincide with pragmatic concerns, within

predominantly pragmatic discourses. Moral discourses, with one exception, are absent. The number of arguments included in the courts' decisions increases consecutively with time: the 2015a and 2015b judgments included 6, 2018 included 10, and the 2019 judgment included 12 arguments. Five arguments were reiterated in similar form in all four judgments: the child's strong attachment to the foster family, the general knowledge that adoption provides better prospects in life than remaining a foster child, the weak or absent *de facto* relations with the biological parent(s), the child's vulnerability, and the risk of future conflict. Below, I present the 15 arguments and evaluate their quality in terms of rationality, structured by the four thematic dimensions.

Table 2. Arguments divided by justificatory theme and judgment. Discourse types in parenthesis: (E) = Ethical, (M) = Moral, and (P) = Pragmatic. Corresponding arguments are grouped together by matching figures.

	2015a	**2015b**	**2018**	**2019**
The Right to a 'New' Family	1. Strong attachment to foster family (P)	1. Strong attachment to foster family (P)	1. Strong attachment to foster family (P)	1. Strong attachment to foster family (P)
	2. Adoption provides better prospects in life than remaining a foster child (P+E)	2. Adoption provides better prospects in life than remaining a foster child (P+E)	2. Adoption provides better prospects in life than remaining a foster child (P+E)	2. Adoption provides better prospects in life than remaining a foster child (P+E)
			3. De facto situation: child is staying with foster family (P)	5. Adoption provides equality with sibling (E)
			4. Normalize and stabilize (E)	6. Adoption provides stability and a home for life (P+E)
The Right to Biological Family	7. De facto relations: Minimal attachment (P)	7. De facto relations: No close relation to biological father (P)	7. De facto relations: No ordinary family life (P)	7. De facto relations: Poor (P)
	11. Adoption status not significant for ethnic and cultural attachment (P+E)	8. Contact: Access to visitation should be maintained (P+E)	8. Contact: Foster parents will and should regulate potential contact (P+E)	8. Contact: Adoption will not matter for future contact (P+E)
			9. Child's limited understanding of biology (P)	10. Contact with siblings will continue regardless of adoption (P+E)
				11. Adoption status not significant for ethnic and cultural attachment (P+E)

The Right to Autonomy and Development	12. Child is vulnerable and needs stability (P)	12. Child is vulnerable and needs stability (P)	12. Child is vulnerable and needs stability (P)	12. Child is vulnerable and needs stability (P)
	13. Risk of future conflict (P)	13. No risk of future conflict (P)	13. Should exclude the option for disputes (P)	13. Risk of future conflict (P)
				14. The child wants to be adopted (M)
Time			15. Timing is correct (P+E)	15. Timing is correct (P+E)

6.1. The Right to a "New" Family

On the theme of the right to a "new" family, discussions revolve around the situation in the foster home and of the family in the abstract or non-biological sense. Six arguments were identified as pertaining to such discussions. The pragmatic arguments concerned the attachment between the child and the foster parents and the *de facto* situation of the child. Two arguments, the general knowledge that adopted children are generally better off in the end than their peers that remain fostered and that adoption will provide stability and a home for life, adhere to pragmatic *and* ethical discourses. The latter is often seen as a condition for the former, and the arguments are highly interrelated. Another two arguments include claims of an ethical nature, that of normalisation and stabilisation of the child's everyday situation and that of equality.

6.1.1. Argument 1. Strong Attachment to Foster Family

In 2015a, convincing references to the facts of the situation, general knowledge, and expert statements are advanced, and the argument is considered to be reasonably justified. The same elements are present in 2015b, but there is less reasoning, and the descriptions of the current situation could be embellished further. In the 2018 judgment, the argument is also somewhat briefly – but adequately – reasoned:

> The expert has emphasised that [the child][8] has a full and exclusive sense of belonging to the foster home. I assume that all arrangements are made for [the child] to have the best possible development in the foster home (HR 2018-1720-A, para. 78).

In the 2019 judgment, the argument includes descriptions of the previous and current situations, with expert and witness statements, and it is justified in a thorough and reasonable manner. In relation to 2015a and 2019, it should be mentioned that the child's siblings in the foster home, and the extended family in the former case, are included in the reasoning of his

[8] Text provided in brackets has been added by the author for clarification.

attachment. While it is not known whether there were any siblings in the foster home in the 2018 case, we know that the girl in 2015b had a foster brother[9] whose relationship with the girl is not included in the court's reasoning. The child's attachment to his foster family was given considerable weight in 2015a, while no specific weight was given to this argument in the other three cases.

6.1.2. Argument 2. Adoption provides Better Prospects in Life than remaining a Foster Child

A caveat of this argument in 2015a, 2015b, and 2019 is that the general knowledge claim is not substantiated with references to the factors that make adoption a better option for the child, although an official report is cited in 2015a, and in 2019, the argument is supported in part by an expert's statement on the matter. Furthermore, discussion on issues including relevant ethical values is limited. The argument is thus considered to be partly reasoned for 2015a, 2015b, and 2019, yet stronger in the first and third of these cases as the reasoning is more inclusive. In the 2018 judgment, the claim is substantiated with references to a review of the current research undertaken by the appointed expert, whose statement is also cited:

> Children in long-term foster care that are adopted, undergo better psychosocial development than children in a similar situation who are not adopted. It is the durability of the child's sense of belonging that seems to be essential (HR 2018-1720-A, para.64).

Based on this and the brief discussion that followed on the value of a safer and more predictable upbringing in relation to the two options of foster care or adoption, the argument is considered to be justified.

6.1.3. Argument 3. The *De Facto* Situation: Child is staying with Foster Family

The argument is supported by reference to the fact that reunification is not a realistic option, which the biological parents, while not agreeing to adoption, have also accepted. As the justification criterion for pragmatic claims is that of truth and realism, the situation that the child's *de facto* family life is with the foster home is agreed by the parties, and the argument is considered reasonably justified. The biological mother expressed the following view to the appointed expert before the Supreme Court:

[9] Known from the judgment from the Norwegian Court of Appeal (LE-2014-148984).

> I have accepted that I will never have the chance to bring him home, that he stays where he is, but without being adopted. After all, he has been there since he was one … (HR 2018-1720--.A, para. 67).

6.1.4. Argument 4. Normalise and Stabilise

The argument is considered justified, and the claim is that adoption will normalise the child's exceptional situation of being in foster care, with its practical and emotional implications for a child's everyday life. The expert declares:

> By consenting to the foster parents adopting [the child], society may provide him with this protection [from change and insecurity] through the Supreme Court's judgment (HR 2018-1720-A, para. 80).

While the court justifies the argument reasonably based on ethical considerations concerning stabilisation and normalisation of the child's situation, it qualifies the child's need for a stable life situation by referring to the experts' statements about its importance, reframing the ethical considerations to be subjected to truth validation based on expert knowledge.

6.1.5 Argument 5. Adoption provides Equality with Siblings

The argument is that the child should gain equal status and the same name as his adopted sister, labelled his "social sister", as this is considered important to him. With hermeneutical interpretation related to contextual cultural and social norms and practices as the standard of evaluation, the court justifies the argument reasonably based on ethical considerations of why equality matters. As for argument 4, the court qualifies their ethical claim by referring to expert statements.

6.1.6 Argument 6. Adoption provides Stability and a Home for Life

This is a well-reasoned argument about the stability and belonging that adoption would provide. The claim is backed by expert knowledge, alternative outcomes are explored, descriptions of the situation are given, and value-based reflections on the matter are provided in the Court:

> [The child] is in a good and stable situation in a well-functioning foster family that wants to adopt him, and adoption will provide stability and tranquillity to this situation

and give him inner peace. In contrast to a foster care arrangement that generally only last until the child turns 18, an adoption lasts for life (HR-2019-1266-A, para. 101).[10]

6.2. The right to Biological Family

Five arguments were found to adhere to an overarching discussion on the right to biological family life. Three claims adhere to both pragmatic and ethical discourses, and two concern pragmatic arguments. The arguments relating to the child's poor relations and weak attachment to his or her biological origin are juxtaposed with corresponding claims relating to the relations and strong attachment to the foster family and current environment in all decisions, although less so in the 2019 decision. The first of these two arguments receives less attention in terms of the reasoning provided, and one possible explanation for this is that the court views the second argument as explanatory of the first.

6.2.1. Argument 7. *De facto* Relations: None or Weak

In the two 2015 judgments, the consideration of relationships between the children and their biological parents is given little explicit attention. Nonetheless, in 2015a, the argument is considered adequately reasoned, as there are references to empirical facts, such as the child's early placement in out-of-home care and expert evidence, while this cannot be said about the 2015b case. Rather, it revolves around the contact itself and its established and predicted implications. Seen in the context of the overall judgment, one would expect this matter to be the target of particular scrutiny in 2015b as contact and biological ties (as legal bonds) are the decisive factor in the decision. This is not the case, and the only reasoning around the issue is the following:

> She has lived in the foster home for four years, and has no longer a close relationship with her father (Rt. 2015 s. 1107, para. 48).

In 2018, the absence of actual family life and previous and current social bonds is highlighted. The argument is based on the fact that the child was placed in the foster home at birth and had no contact with the biological parents since. In the 2019 judgment, the argument is given considerable weight, and the court emphasises that the limited time he had spent in the care of his biological parents, rather than having contributed to a safe and good relationship

[10] All citations from the 2019 judgment are translated by the author, as no translation is provided through Lovdata.no.

with them, had been detrimental to him owing to the neglect he experienced. In both the 2018 and 2019 cases, the arguments are reasonably justified.

6.2.2. Argument 8. Contact

The argument is thoroughly reasoned with expert evidence and descriptions of the actual situation in the 2015b decision. As for the ethical concerns inherent in the argument, the argument is weakly justified, as the benefits of contact from the perspective of the child are not adequately considered. The reasoning is strongly focused on the father's character and abilities, applied by the court as a measure of credibility of future co-operation. Although one would necessarily agree that it is a good thing for a father to have good qualities and to care about his daughter, the court foregoes a discussion on the child's needs and *her* personal reflections. Furthermore, the statement supporting the argument that the child does not lose out from postponing the decision lacks the necessary resonance:

> Out of concern for the child's secure and stable base at the foster home, I find – like the majority of the court of appeal – that the child does not have much to lose from a postponement of the adoption issue until her needs and relationship with her biological father have been further clarified (Rt.2015: 1107, para. 56).

These unresolved needs are not identified, and it is unclear what matters and needs require further clarification. Moreover, reflections relating to the value of childhood as a temporary state would be expected, as there is no timeline given for re-establishment of contact. The argument contradicts previously endorsed arguments concerning children's development, and there is ambiguity and duality in the reasoning regarding the foster parents' positive outlook of future contact between the child and her father that the court foregoes to address. In the 2018 judgment, the argument is based on a claim that the parents should regulate contact. The argument is given weight and is reasoned with reference to expert statements that the foster parents are receptive to contact – with the rebuttal that this does not provide any legal rights to contact for either the child or the parent – and the presumed implication of heightened tranquillity and safety in the placement. The justifications for the argument are thorough and inclusive, and they include reasoning on the value of contact. In the 2019 judgment, the claim is that adoption will not matter for the extent of contact the child will have with his biological parents. The reasons refer to the previous unsuccessful attempts to sustain contact, mentioning that the child does not have contact with his parents as the case stands and that his foster parents do not exclude future contact if the child expresses such a wish. This appears only partially

reasoned, because it does not address why contact is considered to pose a potential hazard for the child. Moreover, the possible implications for the child's life of not having contact with his parents could have been more explicitly elaborated.

6.2.3. Argument 9. Child's Limited Understanding of Biology

The argument concerns the child's understanding of biology, and the court questions whether the boy, owing to his developmental disabilities, will ever be able to understand what it means to have a "biological" family. It refers to the appointed expert's statement on the matter:

> Today, [the child] is in any case not able to see that he has other parents than his foster parents. Due to his particular vulnerability and need of safety, it would, in the expert's opinion, be detrimental to him if the biological parents were to introduce themselves as "mother" and "father", and a trial arrangement with contact visits 'would be like experimenting with the boy's mental health' (HR 2018-1720-A, para. 86).

The argument is given weight by the court, which assesses whether the statements are considered true, documented and realistic. Given the standard of evaluation for claims of empirical facts, the argument is considered reasonably justified.

6.2.4. Argument 10. Contact with Siblings will Continue regardless of Adoption

The argument is that the boy will continue the contact he has already established with his two biological siblings, who have also been placed in foster care, even if he is adopted. The situation is explained, and the court assesses the probability of breakdown in contact and of the possible damage to the siblings' relationships if one were adopted. They do this by reference to expert statements and current arrangements for maintaining contact:

> [The child] and his two biological sisters live in three different foster homes near each other. The eldest sister's foster father is the brother of [the child's] foster mother. The siblings attend different schools, but meet, among other, on a monthly sibling meeting and stay in contact also in other ways. The foster mother states that it will not matter to the sibling contact if [the child] is adopted (HR-2019-1266-A, para.91).

The argument is considered reasonably justified, although with the caveat that a fourth sibling is not a part of the discussion by virtue of not having met the boy. Similar arguments

relating to biological siblings are not present in the other three judgments, although all the children have one or several (half-) siblings.[11]

6.2.5. Argument 11. Adoption Status is not Significant for Ethnic and Cultural Attachment

In the 2019 judgment, the court concludes that the boy's attachment to the culture of his origins is nonetheless enduring with the break from his parents and that consenting to an adoption is not considered to be of any particular relevance for the boy's cultural connection:

> The expert has pointed out that [the child] lives his everyday life in a Norwegian environment and will necessarily obtain a Norwegian identity. Eritrean culture may interest him as he grows older, and he may miss this connection. However, this applies regardless of whether he is a foster child or an adoptive child (HR-2019-1266-A, para. 94).

Emphasis is put on the foster parents' efforts to maintain bonds with his culture, and his contact with his sister is also considered positive. I find this to be thorough and reasonably justified on this point. Yet, the lack of attention to possible issues that may arise from the child's status as a member of an ethnic minority, in his adoptive family and in the community, is an apparent weakness in terms of the ethical concerns related to such a claim, particularly as the child himself appears to be aware of his ethnicity. With reference to a statement from the expert who had talked to the boy, one of his wishes was reported as follows:

> '[The child] is 6 years old and mature enough to understand the external consequences of adoption. He wants to have the same status as [sister] who is the adoptive daughter in the family and who also has a dark complexion. … (HR-2019-1266-A, para. 87).

In 2015a, the boy's biological mother is of another ethnic background from his foster parents, so contact is considered particularly relevant in terms of maintaining biological bonds. The judges argue that these bonds are safeguarded through the post-adoption contact visits that they trust will function as intended. A weakness is that no reasons are provided for why and how this contact would benefit the child in terms of his biological and ethnic background, or why the allocated degree of contact is considered appropriate for the intended purpose. The argument is considered to be only partly justified considering the lack of support for the claims.

[11] Known from the judgment in the District Court (TROMS-2012-126359) in 2015a and the judgment by the Court of Appeal (LE-2014-148984) in 2015b.

6.3. The Right to Autonomy and Development

Three arguments belonged to this category, and two themes are apparent in all judgments: the child's vulnerability and the risk of future conflict. Both were pragmatically founded and highly interrelated, where the child's vulnerability is highly indicative of the perceived risk. The third argument is moral, relating to the child's opinion, and it is the only argument of its kind.

6.3.1. Argument 12. The Child is Vulnerable and needs Stability

The argument is given considerable weight in 2015a and is reasonably justified by referring to the consistency of previous evaluations of the child's special needs. There are extensive references to empirical facts, expert evidence, reports and statements from the school and the Educational–Psychological Service, as this excerpt illustrates:

> The Educational–Psychological Service has, in their assessment, pointed out 'the need for stability, predictability and security in that he knows who will be taking care of him and who he should go to'. A statement from his teacher of [date] states that he has settled down at school, but that he has trouble concentrating and has very little self-confidence (HR-2019-1266-A, para. 87).

References to empirical facts and expert evidence are also provided in 2015b. The child had been exposed to neglect at a young age and is described as a 'vulnerable child who has had an extremely difficult start in life and who needs stability, security and predictability'. The court accepts the expert's statement that legalising the child's *de facto* relationship with his foster parents through adoption would benefit his development. In the 2018 judgment, the argument is justified by referring to expert evaluations stating that the child is particularly vulnerable and has a special need for protection, with which his biological mother also agrees. In addition, the child is assessed by experts as having developmental disabilities, which together with the vulnerability makes a special case for a care situation that protects him from disturbances and insecurity. In the 2019 judgment, the child is described as a 'normal boy for his age'. Nevertheless, the boy's exposure to serious neglect as well as the fact that his siblings have received serious diagnoses are considered to be grounds for viewing him as a vulnerable boy with risks of delayed impacts of past neglect:

> I assume [the child] has a strong need for tranquillity and stability as a result of his difficult background with a violent father and a mother who, despite her love, has not been able to provide him with the necessary care in his first two years of life. The fact

that [the child] is now a well-functioning child does not change this (Rt.2015 s.1107, paras. 47–48).

While the justifications provided for the pragmatic argument in themselves are considered reasonable in all four judgments, considerable criticism can be made of the 2015b judgment for not considering the established vulnerability argument when addressing questions concerning his future, such as the risk of future litigation (see argument 13) and for postponing the decision on adoption (see argument 8).

6.3.2. Argument 13. Risk of Future Conflict

In 2015a, the claim of risk of future conflict if adoption is not consented to is supported by the placement being characterised by conflicts throughout the child's life. Recurring disputes between the parents and the municipality are seen to disturb placement stability for the child, and adoption is considered appropriate to protect the vulnerable child from future conflicts. Being pragmatically founded, the argument is considered valid. In 2015b, the court concludes that there was no risk that the father would be the cause of any disturbances or conflict. The assessment of the risk of future disturbances to the child's placement is largely based on his statements in evidence and the court's evaluation of the father's moral character. There are some blind spots in the reasoning. The child's perspective is basically absent from the risk assessment. Furthermore, while contact visits are terminated at the point of the judgment to safeguard the child from negative reactions, the father nonetheless expresses an expectation of future contact:

> Nor is there any reason to assume that [the father] otherwise intends to oppose the placement or the access arrangements. This is enforced by [the father's] written statement before the Supreme Court, reading:
>
> 'Although I wish, of all my heart, that [the child] could live with me, I have accepted the placement in foster care with access rights sometime in the future. But I have not accepted adoption' (Rt. 2015: 1107, para.51).

The court could be criticised for not addressing this part of the statement when assessing the possibility of future litigation and disturbance to the placement. In the 2018 judgment, the justification for excluding the possibility of future legal disputes was grounded in a concern for the child's sense of safety and belonging. By deferring to the statements from the appointed expert, the court finds that the child should be protected from future litigation as it is considered

to pose a risk of harm, partly as he would himself become more involved in the process through his right to be heard. The expert asserts that litigation and questions about access may cause emotional distress to this vulnerable child and have an unsettling effect on his feelings of safety and belonging. The argument is clearly anchored in the child's perspective and valid as a pragmatic claim. In the 2019 judgment, the court argues that adoption is a way of protecting the child from disturbances in his daily life. They mention the CWS visits, which appear to upset him, and argue that there is a risk of future litigation and conflict that is also likely to affect the child. This argument is considered reasonably justified, although with the reservation that it is not obvious what substantiates the claim that visits from the CWS upset him.

6.3.3. Argument 14. The Child wants to be Adopted

The only judgment where the child's views are incorporated is the 2019 judgment. In other words, the children are not given the opportunity to voice their opinion in any of the three preceding judgments. In 2019, the child is given the opportunity to express his opinion in accordance with the law (CWA Section 6-3) and is heard by the court-appointed expert, who conveyed his thoughts and wishes to the court. To the expert, the child expressed the wish to be adopted and to receive the same surname as the rest of the family. The argument is given weight by the court, and it adheres to norms of justice and respect for children's rights. It is adequately justified by reference to the child's own wish and that he is considered able to understand what it means.

6.4. Time

One argument is connected to the time dimension. The argument is grounded in both a pragmatic and ethical discourse.

6.4.1. Argument 15. Timing is Correct

In the 2018 decision, the court claims that it is irrelevant to the decision about adoption to wait for further investigation of the child's health status, as this will remain unchanged even with knowledge of the causes of the boy's problems. The fact that he is soon to start school is also seen as a reason that adoption would be beneficial for the child at that time. A blind spot in the court's justification is that the potential implications of adoption for future support from the CWS are not considered. In the 2019 decision, the argument is reasoned merely in a short paragraph stating that:

> The father has argued that it is too early to break the biological bonds now. I do not agree with this. [The child] is six and a half years old and for him to get the full benefit of the adoption, it should take place now (HR-2019-1266-A, para.109).

The reason for this is not explicitly stated. Considering the overall context of the argument, and given the descriptions of his circumstances, such as his vulnerability and that he is unsettled by visits from the CWS, it is possible to make more sense of the argument. Although not particularly grave, there are shortcomings in the pragmatic reasoning of both arguments. Ethical considerations, such as values concerning the particularity and temporality of childhood, are discussed in 2018 and to a certain extent in the 2019 judgment.

7. Discussion

This analysis has studied all the Supreme Court's judgments on adoption from care from 2015 through 2019, with the objective of mapping the court's reasoning concerning its best interests decisions and evaluating the extent to which they can be considered rational. The analysis revealed that the arguments are often of a pragmatic nature and are guided by norms of stability for the child, the value of (mainly) vertical and legal biological relationships, and vulnerability. Furthermore, the development in the delivery of rational, well-reasoned and thorough judgments is positive. The same can be said in regards to assuming and exploring the perspective of the child. The latest judgments – in particular, the 2018 judgment – not only include more arguments but also appear overall to be justified more strongly and rationally. The evaluation of the arguments nonetheless showed weaknesses in terms of rational reasoning in all four judgments, with concerns arising about ambiguity, lack of reasoning, coherence failure to meet the evaluation standards for argumentation, and exclusion of parties and relevant arguments. Some of the weak spots identified in the four cases are significantly more important than others. These include failing to involve the child or to assess the risk and the value of social and biological relationships from the child's perspective. This applies particularly to 2015b, where several significant deficits are identified in the court's argumentation, which allows for subjectivity. While one cannot claim that the decision was erroneous, the rationality of the decision is compromised by the lack of attention to ambiguous or inconsequential elements of the argumentation and weak justification of arguments that are given decisive weight. I will discuss these matters below.

7.1. Lack of Child's Perspective and the Absence of the Child's Own Voice

According to Norwegian law, child participation should have a decisive position in best interests decisions (Skivenes and Sørsdal, 2018), and a prerequisite for the rationality of a decision is that the parties are included and freely heard. Nevertheless, the child is not heard in any of the first three judgments. Owing to the established special needs of the child in the 2018 judgment, this criticism applies mainly to the two judgments in 2015. That said, vulnerability should not be a reason for a default exclusion of his opinion (see, e.g., Archard and Skivenes, 2010). General Comment No. 14 (2013), point 54, relating to Article 12 of the CRC, underlines the point about respecting children's access to influence the determination of their best interests, regardless of their situation:

> The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests.

The four children are all close in age, yet none meets the age threshold of seven years that legally obliges the court to hear the child under Norwegian law. The law, nonetheless, obliges decision makers to hear younger children who are capable of forming their own opinions (CWA, 1992 section 6-3; Adoption Act, 2017 section 9; Grunnloven, 2014 Article 104(1)). Therefore, one should expect to find deliberation of the children's capabilities to understand why they chose not to include their opinions and wishes in the judgments. The child's right to be heard is fundamental in adoption proceedings and has substantial, procedural and symbolic value (Fenton-Glynn, 2013). Nevertheless, the failure to incorporate the child's views and/or to provide independent representation in adoption cases is a recurring objection to both the Supreme Courts' (Skivenes, 2010; Sandberg, 2016) and the ECtHR's decision-making practices (Breen, Krutzinna, Luhamaa and Skivenes, 2020). Our findings highlight the need for continued and strengthened action to secure children's rights to participation.

7.2. Guiding Norms of Stability in Care, Biology and Vulnerability

The systematisation of the arguments into justificatory themes reveals that the court has a particular way of reasoning its decisions, and despite some variation in what arguments are considered and how they are constructed and weighted, there are some key tendencies in the court's reasoning.

First, compared with ethical discourses, there is an excess of arguments relating to pragmatic discourse. For a best interests decision to be considered rational and acceptable

(Piper, 2000), the necessity to deliberate upon the normative good for a child in the given context is fundamental. If nothing else, these findings are a reminder for the Supreme Court to pay due attention to the values underlying considerations of the best interests of the child.

Second, all judgments are characterised by attention to claims relating to the right to family life and the *de facto* or biological relations between the child and his/her parent(s). This finding mirrors the tension in modern child welfare law between family preservation and partnership with permanence planning for children in alternative care (Parkinson, 2003). This implies that attention is given to continuity in the child's care situation as reflected in the stability principle under Norwegian law while also showing that the biological presumption – stemming from the "biological principle" in Norwegian child welfare law (Skivenes, 2002; 2010) – holds a significant position in the Supreme Court's decision-making. For the stability principle, the recognition and protection of the child's *de facto* family by the state correspond to the tendencies observed in the development of ECtHR case law (Breen, Krutzinna, Luhamaa and Skivenes, 2020) and state policy on adoption (Tefre, 2020). I find that the biological presumption appears in what Skivenes (2002) characterises as a "weak version", where the biological relationship has a value in itself, through discussions about contact, and what is termed a "legal version", where biology is interpreted and valued as legal bonds that maintain the legal ties. The court's attention to biological relations pertains mainly to the bonds between children and parents; although biological sibling relationships appear to be gaining more attention in the later decisions,[12] the general lack of consideration given to biological sibling relationships or to social sibling relationships in 2015b, or attention to the children's own perspectives on valuable relationships, is troubling. On several occasions, children with experience of the child welfare system have problematised the lack of attention to sibling relationships in child welfare decisions (Landsforeningen for barnevernsbarn, 2012; Barnevernproffene, 2019), and research shows that both social and biological siblings have significance for the sense of belonging and identity of children in care (Angel, 2014).[13] If decisions are to be legitimate and made from a child's perspective, the lack of attention to sibling relationships is thus highly problematic.

Third, the best interests of the child and the norm of particularly weighty reasons for adoption seem to be conditioned by assessments of the child's vulnerability and specific needs for stability and tranquillity. Apart from the 2015b judgment, where the vulnerability argument is curiously not given weight or significant attention in the court's balancing act, the children's

[12] In 2018 and 2019, the biological parents refer to the child's relationships with siblings in their statements.
[13] For an overview of relevant research, see Jones (2016).

established vulnerability is considered significant in the decision. As both an independent argument and a variable for determining the relative strength of other arguments, such as the risk of conflict, one could speculate that emphasising vulnerability is an intentional move to make the essentially paternalistic intervention more acceptable, given the state's role as *parens patriae.* Children are vulnerable by the mere fact that they are children, and this factor should be taken into consideration when assessing and determining the child's best interests (Committee of the Rights of the Child, 2013). Yet caution should be exercised so that arguments of vulnerability are not used as a lever, and claims of vulnerability are not rationally considered, in terms of applicability, validity and the weight that they are given from the perspective of the case as a whole. Research has shown that adoption can be beneficial for children in long-term foster care placements (c.f., Hjern, Vinnerljung and Brännström, 2019; Christoffersen, 2012). Therefore, it is also ethically questionable whether only children proven to be vulnerable beyond what can be expected from a child in foster care are considered eligible for adoption. Moreover, it is open to question whether vulnerability should outweigh other individual traits and features of a decision, such as the child's opinion.

8. Concluding Remarks

The analysis highlights the complexity of best interests assessments. The arguments provide varying degrees of justification and are of variable quality. The court's discretion is applied differently in terms of which arguments are included, the amount and type of evidence required, and how considerations are weighted and balanced against each other. Although we cannot dismiss the individuality of circumstances in each case, inconsistencies are problematic in terms of providing clarity of the law.[14] Several objections of varying seriousness have been raised concerning the rationality of the Supreme Court's judgments on adoption in these past years. A major lesson for the courts must be to take children's right to participation seriously. Leaving children's voices out of the decision is not in line with the CRC, Norwegian law, or the current theoretical outlook on the best interests of the child. Neither the decisions nor the decision-making process can be conceived as legitimate and democratic as long these issues are unresolved.

Acknowledgments

[14] See, e.g., Helland and Skivenes (2019) on how first instance judges find it challenging to interpret the signals from the Norwegian Supreme Court in matters of adoption

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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 countries. There were, however, differences within and between countries in terms of application and justifications of norms, some of which are likely to be connected to different interpretations of the CBI and other 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.

1. Introduction

Discretion is an inevitable and necessary component of child protection decision-making. It allows for professional judgement as well as flexibility and sensitivity to the individuality of cases[1]. While English

[1] A. Falch-Eriksen and M. Skivenes, '3. Right to Protection: An Implementation Paradox?' in M. Langford, M. Skivenes and K.H. Søvig, *Children's Rights in Norway* (1st edn, Universitetsforlaget 2019); J.F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation 1986); S. Maynard-

and Norwegian child protection systems differ in their underlying ideologies and approaches to children at risk, they share the legal and moral yardstick of the 'child's best interest' (CBI) having implemented the UN Convention on the Rights of the Child (CRC)[2].[3] 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 party states 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 utilized when deciding on the standard[4]. 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[5] and demonstrated that it leaves room for emotions, presumptions and individual values to guide decisions regarding children and their families[6]. 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[7]. Political scientist Bo Rothstein[8] 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[9] urged further inquiry into possible divergent interpretations of the CRC's Article 3(1) on CBI to focus the debate on issues of localized 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.

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].

[3] See also the European Convention on the Adoption of Children (Revised) (2008) Article 4.

[4] 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.

[5] 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.

[6] 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 5); 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.

[7] 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.

[8] *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge University Press 1998) 80.

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

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[10], and a qualitative content analysis is used to examine 58 written court judgements 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).[11]

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.

2. Discretion and the Best Interests of the Child

2.1 Discretionary reasoning and statutory constraints

Legal decision-makers are authorized to exercise discretion – to reason using their own judgement – on condition that they can be trusted and held accountable and that their arguments are reasonable and their decisions lawful[12]. Based on ideas from argumentation theory [13], Eriksen, Grimen and Molander [14] 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 judgement[15]. This distinction and the assumption of reasoned judgement 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

[10] 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.
[11] 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'.
[12] Molander, Grimen and Eriksen (n 5); G.C. Christie, 'An Essay on Discretion' (1986) Duke Law Journal 747.
[13] Alexy (n 7).
[14] (n 7).
[15] ibid.

measures in the form of specification of statutory rules contribute to predictability and to shape and inform discretionary reasoning. Dworkin[16] 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 characterized 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 [17]. 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[18]. The statutory guidance provided by the Norwegian Child Welfare Act[19] (CWA, s4-1, 1992)[20] consists of substantive assumptions about what is best for a child: participation[21] 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; 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[22]. Based on the assumption that rules and guidance constrain discretion[23], 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[24] or exercise discretion in patterned ways[25].

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[16] Dworkin (n 5) 32.
[17] 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).
[18] 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).
[19] Act of 17 July 1992 no 100 relating to Child Welfare Services 1992.
[20] The Norwegian adoption law (Adoption and Children Act 2002) does not include any elements for consideration.
[21] The child's right to participate was made a separate provision in 2017 and is no longer a part of 4-1.
[22] 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).
[23] Dworkin (n 5).
[24] 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 17); 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.
[25] 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. Mascini,

2.2 Socio-political context and macro-institutional structures for discretion

Studies have demonstrated how judicial exercise of discretion varies between national systems with different child protection orientations[26]. Between England and Norway, there are differences in adoption policy[27] as well as child welfare orientations and welfare state regimes[28]. Berrick, Gilbert and Skivenes[29] have classified approaches of child welfare systems to adoption into a global typology.[30] 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 categorized 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 characterized 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'[31]. However, there is moral disagreement and indeterminacy associated with the standard and there are no universal standards or operational tools for making CBI decisions[32]. Therefore, there is an expectation that not only discretionary space, but also institutional context will influence best

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

[26] 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.

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

[28] Jill Duerr Berrick, Neil Gilbert and Marit Skivenes, 'Child Protection Systems: A Global Typology', *International Handbook of Child Protection Systems* (In press); K Burns, Tarja Pösö and Marit Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press 2017).

[29] Berrick, Gilbert and Skivenes (n 28).

[30] This typology builds on and extends the typology previously developed by Gilbert *Combatting Child Abuse : International Perspectives and Trends* (Oxford University Press 1997), and subsequently, Gilbert, Parton and 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.

[31] 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) 22.

[32] 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.

interest reasoning[33], and child protection orientation is anticipated to contribute to variation between countries. However, there are legislative similarities between the two countries' child welfare systems in terms of the emphasis placed on family preservation, stability, safety and the paramountcy of the child's wellbeing[34]. Moreover, having implemented the CRC, both countries are obligated to recognize the CBI as their primary consideration (CRC, Article 3). In General Comment No. 14[35] 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 could contribute to similarity between countries.

3. Procedures for Adoption and Placement Order Decisions

In England and Norway, national child welfare legislation emphasizes that decisions on adoption shall be made by giving paramount[36] or decisive[37] 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[38]. 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[39]. 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.[40] 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[41].[42] 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

[33] K. Hawkins, 'Discretion in Making Legal Decisions' (1986) 43 Washington and Lee Law Review 1161; Hawkins (n 17); Mascini (n 17).
[34] 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.
[35] CRC Committee, 'General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)'.
[36] s1(1), Children Act 1989 (CA).
[37] s4-1, Child Welfare Act.
[38] H.S. Helland and M. Skivenes, 'Adopsjon som barneverntiltak' (Centre for Research on Discretion and Paternalism, Bergen 2019).
[39] *HR-2020-661-S* (The Norwegian Supreme Court) [92]; Helland and Skivenes (n 38).
[40] There are no specific conditions for the TPR, but the decision must be in the best interests of the child (CWA 1992, s4-1).
[41] CWA Child Welfare Act s4-20.
[42] For a comprehensive overview of the decision-making systems in England and Norway, see the respective countries' chapters in Pösö, Skivenes and Thoburn (n 27).. 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.

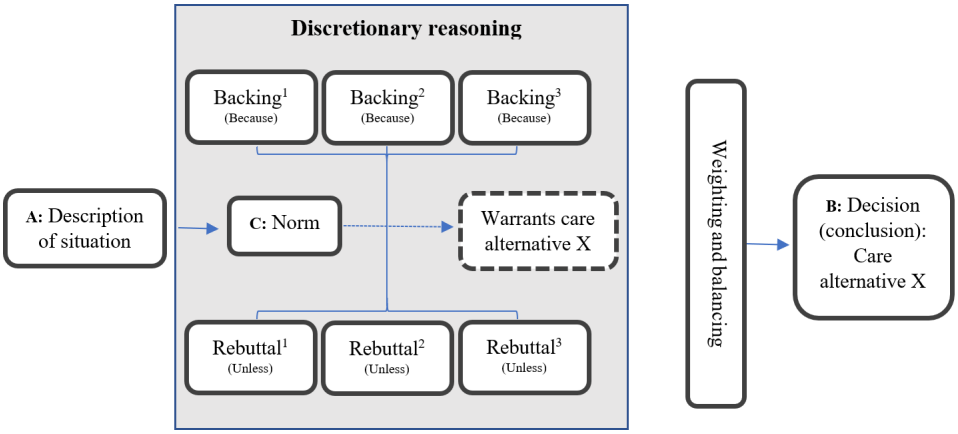
considered to have been met, a decision concerning the welfare of the child is conducted to determine whether a placement order is in the best interests of the child. The court may request a placement order if it is satisfied that parental consent should be dispensed with (ACA s52), either (a) because the parent(s) cannot be found or lacks capacity to consent, or (b) because the welfare of the child requires it; all judgements in our sample concern the second alternative. Adopters are usually specially recruited, yet a small proportion of children (10% in 2017–2018) are placed for adoption with their current foster carers[43]. Among the cases in this study (n = 29), this applies to two cases (7%).

4. Epistemic Discretion as Practical Reasoning

Wallander and Molander[44] 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[45] model, argumentation is composed of three main components: A) a description of a situation; B) the conclusion or course of action drawn upon this description, and C) 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 A then B) 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 A, B and C, 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 initialized to support or reject the validity of a norm (for a given conclusion) in decisions on 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.

[43] 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).
[44] (n 10).
[45] (n 10).

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.



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 judgement. 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.* [46]

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.

5. Data and Methods

[46] Banach (n 32) 334.

5.1 Data collection

The data material is a part of the larger research project (ACCEPTABILITY), and detailed descriptions of the collection process as well as ethical considerations and approvals can be found here: https://discretion.uib.no/projects/supplementary-documentation/. The English case sample consists of 56 placement order judgements collected from two sources. First, all publicly available decisions on placement orders for 2016 (n = 29) were collected through the BAILII (British and Irish Legal Information Institute) database. Second, an additional sample of judgements (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 judgements were collected directly from the boards (most cases are not publicly available). The 113 case files[47] 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.

Table 1. Overview of the cases by full and selection sample. Case, parent and child characteristics.

	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 (percent of total number of children)	73 (91%)	41 (95%)	58 (97%)	30 (100%)
Biological parents consent to adoption (number of cases) *	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) **	3 (1.2) ***	5.6 (4.6)	5.7 (4.4)
Mean age (months) at first entry into care (median age)	23.4 (7.5) ****	24 (13.5) *****	6.1 (0)	7.5 (0)

** Of parents present in the case. ** Total n= 75 due to missing values for n=5 children. *** Total n=39 due to missing values for n=4 children. **** Total n=40 due to missing values for n=37 children, and three children are still living at home/together with biological parent(s). ***** 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).*

[47] 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.

5.2 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 judgements 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.

5.2.1 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 judgements and was theoretically informed by sociological knowledge about the nature and dynamics of norms[48], theories of legal argumentation and empirical research on CBI and adoption from care[49] and evidence-based research and assessment frameworks[50]. 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 4 for reflections on the procedure).

Table 2. A schematic overview of coding text (CBI reasoning) into norm categories. Category short names are in parentheses.

	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

[48] 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).
[49] Banach (n 23); H.S. Helland, 'In the Best Interest of the Child? Justifying Decisions on Adoption from Care in the Norwegian Supreme Court' (Forthcoming) International Journal of Children's Rights; M. Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' (2010) 53 Acta Sociologica 339.
[50] 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).

	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 is 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.
Social normality	Includes reasoning of the child as a social individual, includes discussions of having a normal life and normalizing 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 to surrogate parents' wishes and concerns relating to the child and their role as parents/family.

5.2.2 Coding process and reliability testing

To analyse the judges' reasoning, the full sample of judgements (n = 113) were 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 considered relevant in the English judgements 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') [51]. 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'.[52] 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'.[53] Third, all best interest assessments (n = 58 cases) were read and reviewed three times before the norms and their reasonings were identified and coded for each assessment based on the schema presented in Table 2. 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 judgements 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 judgements were coded in full, and then when all were complete, making necessary alterations and adjustments of coding and code descriptions.

5.3 Limitations

For both countries, the analysis of the cases is based on written material. The purpose of a legal decisions is to validate the legality of the decision [54], 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[55]. 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 judgements 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' judgement 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[56]. As a part of the welfare analysis, the English judgements usually address the question of reunification (or 'no order') in which parental capability to

[51] see Doughty (n 42); Thoburn (n 22).
[52] 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.
[53] In England and Norway, nine and seven cases, respectively, included text that was unclear or other.
[54] T. Eckhoff and J.E. Helgesen, *Rettskildelære* (Tano Aschehoug 1997).
[55] 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.
[56] 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.

provide care is vital. In the Norwegian judgements, 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[57] 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 1), 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[58]. This is rarely the case for English children, who are usually placed with temporary foster carers (see section 3). We cannot exclude the possibility that some of the observed differences may emanate from known or unknown systemic or case-based characteristics.

6. 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).[59] 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 1), 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.

Table 3. Guiding norms for CBI decisions by country. Frequency counted per case.

	N = cases	
Category	**Norway** (n = 29)	**England** (n = 29)
Family preservation (summarized)	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

[57] H.S. Helland and S.H. Nygård, 'Understanding Attachment in Decisions on Adoption from Care in Norway' in M. Skivenes, T. Pösö and J. Thoburn, *Adoption from Care : International Perspectives on Children's Rights, Family Preservation and State Intervention* (Policy Press 2021).
[58] Helland and Skivenes (n 38).
[59] Family preservation has three sub-categories as it was understood through three different dimensions (see Table 2).

Parents' voices	7	8
Child participation	6	9
Surrogate parents' interests	*9*	*0*

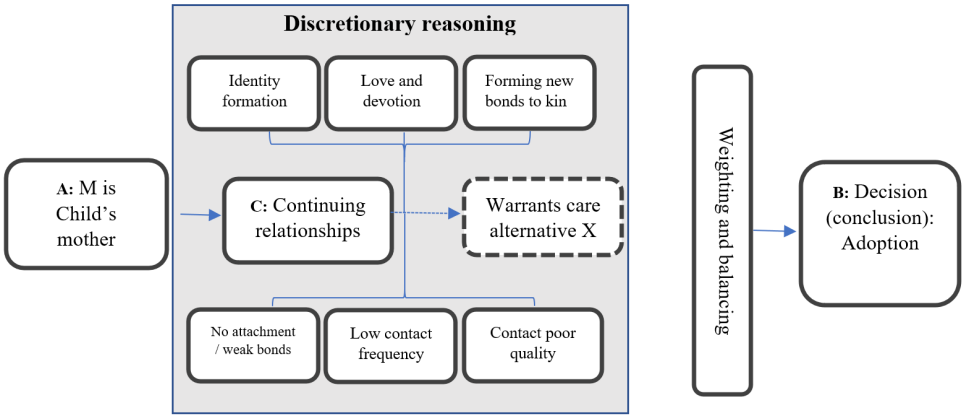
6.1. Family preservation

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.

6.1.1. Family preservation: Continuing relationships

The continuing relationships norm is present in most judgements 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:

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



Common rebuttals across countries are related to weak bonds with parents or lack of attachment and low frequency or quality of contact.[60] Interestingly, although the English court finds that there is parent–child[61] 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. (...)*[62] ANOR41-16

6.1.2. Family preservation: Birth parent preference

The birth parent preference norm is present in nearly all English judgements (n = 24) and in three judgements 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

[60] 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.
[61] This includes temporary surrogate parents.
[62] 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.

of the child. In England, rebuttals are concerned with 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

6.1.3. 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[63] 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 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.

6.2. Child's needs and development

The norm concerning the child's needs and development is present in most English judgements (n = 24) and in all judgements 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

[63] 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.

option is contested in both countries, but less so in Norway, as only three judgements include rebuttals.[64] 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'[65] 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 child's characteristics, such as being a baby or having experienced neglect, are commonly cited as relevant for their specific needs.

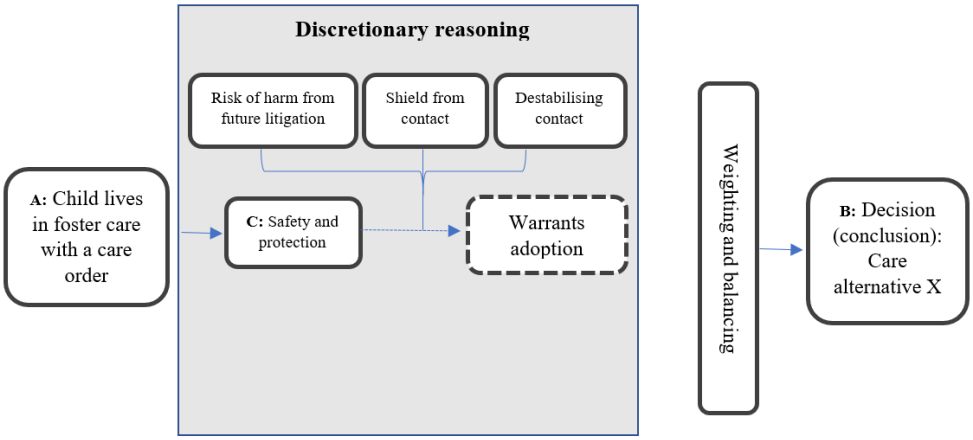
Generally, backings have many similarities across the two contexts. Needs related to permanence (stability and safety) and attachment are commonly cited and accentuated as valuable for a child's well-being and development.[66] Continuity, commitment and belonging are also found in both contexts, with the two former aspects being referenced somewhat more often in England than in Norway.[67]

6.3. Safety and protection

[64] The rebuttals are related to identity formation and the view that legal permanence is not necessary to secure practical entitlements, such as inheritance.
[65] Often invoked with reference to Supreme Court case law.
[66] In England, there is also the occasional mention of a child's need for love.
[67] 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.

The safety and protection norm is present in most English judgements (n = 26) and in two-thirds of Norwegian judgements (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.

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



In the Norwegian context, backings in all essentials revolve around two aspects: the prevention of potential harm (destabilization) related to future litigation (regarding contact or reunification) and shielding the child from contact because of the child's negative experiences and reactions[68] and/or the potentially destabilizing 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 judgements 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.[69] Unlike in Norway, there is little focus on harm stemming from ongoing contact. In some judgements, an assumption of 'no risk of harm' at the hands

[68] It is in some cases pointed out that the experienced harm from contact does not necessarily stem from the parents.
[69] Reference to current and future risks stemming from foster care instability is also occasionally found and rebuts foster care as an alternative.

of prospective adopters is also advanced as a backing.[70] In terms of rebuttals, the applicability of the norm in support of adoption is moderated in England by references to the 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.

6.4. 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 judgements (n = 27). Only backings are provided, although some references are made to rebutting concerns in one English judgement: 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 judgements 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.

6.5. 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 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

[70] 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.

across countries and related to the potential for change in parent(s) – and in Norway also the children's – circumstances.[71]

6.6. 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

6.7. Parents' voices

The norm of parental voice is found in eight English and seven Norwegian judgements. 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 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

6.8. Child's participation

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

The norm of child's participation is present in nine English and six Norwegian judgements. No rebuttals are given, but the authenticity and relevance of the child's opinion are deliberated in the latter context. In the Norwegian judgements, 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.[72] 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 judgements 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.

6.9. Surrogate parents' interests

The norm of surrogate parents' interests is only found in Norway, where it is invoked in nine judgements. The norm justifies adoption and the court backs the norm by emphasizing 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 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.

6.10. 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

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

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.

7. Discussion

This comparative analysis of 58 judgements 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 judgements are reasoned and on the relevance of discretionary structures by discussing the normative platform for CBI decisions, cross-country differences and approaches to justification.

7.1 The normative platform

The nine norms can be divided into three categories depending on their status in the judgements. 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. Categorization of norms according to their status in judgements.

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[73]	Parents' voices
Safety and protection	De facto family life	Child's participation
		No delay
		Social normality

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 [74], as

[73] 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).

[74] e.g., E. Keddell, 'Beyond Care versus Control: Decision-Making Discourses and Their Functions in Child Protection Social Work.' (Thesis, University of Otago 2013).

well as in the two countries studied[75]. 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. An indicator of the CRC's impact is that the core norms reflect some of the elements listed in General Comment No. 14[76], 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[77]. The lack of consideration of this norm illustrates the ongoing struggles of securing children's participation in cases that concern them[78], and particularly in adoption proceedings[79].

In her analysis of Israeli court judgements on TPR, Ben-David[80] 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.*[81]

The familiar source of tension between family preservation and permanence planning in modern child protection law[82] is thus found to be at the centre of CBI 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.

Actualization 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 actualized in addition to the core norms, and the use of the irregular norms involves professional

[75] Helland (n 38); 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.
[76] CRC Committee (n 35).
[77] C. Fenton-Glynn, 'The Child's Voice in Adoption Proceedings: A European Perspective' (2014) 21 The International Journal of Children's Rights 590.
[78] Magnussen and Skivenes (n 44); 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.
[79] Fenton-Glynn (n 66); A. McEwan-Strand and M. Skivenes, 'Children´s Capacities and Role in Matters of Great Significance for Them' (2020) 28 International Journal of Children's Rights 632.
[80] 'Court Considerations in the Termination of Parental Rights: A Comprehensive Analysis of Israeli Court Decisions' (2016) 54 Family Court Review 591.
[81] ibid 599.
[82] P. Parkinson, 'Child Protection, Permanency Planning and Children's Right to Family Life' (2003) 17 International Journal of Law, Policy and the Family 147.

judgement, for example, the norms may be applied supplementary to strengthen the overall argument[83] (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.

7.2 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[84]. Conversely, the framing of adoption policy in the child-focused Norwegian system is said to be strongly influenced by therapeutic culture[85]. 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 judgements. 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 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 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

[83] 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.
[84] Gilbert, Parton and Skivenes (n 30).
[85] Berrick, Gilbert and Skivenes (n 28); 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.

be explained by a) the welfare checklist's explicit reference to a broader family, b) the risk orientation of the English system, c) the influence of checklist factors on the life-long effects of adoption, risk of harm and children's characteristics, d) the English system's strong permanence policy and e) 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.[86] 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[87], 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 problematized [88].

Third, in terms of approaches to discretionary reasoning, the main differences between countries were that on average, more norms were invoked per judgement 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: a) the nature of the decisions generates more reasoning in England as a wider range of care arrangements are up for discussion, or b) the checklist engenders broader deliberation. I will return to the country-specific forms of reasoning in section 7.3.

Fourth, with regard to decision-making consistency within 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 judgements. However, the inconsistencies do 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 judgements, 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

[86] Birth family identity may be embedded in the Norwegian court's emphasis on informal contact post-adoption; yet, this is speculative.
[87] 'Coming to Terms with Adoption' (1997) 1 Adoption Quarterly 3, 5.
[88] see also Helland and Nygård (n 57).

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 [89], 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 judgements and individual courts.

7.3 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 judgements included both rebuttals and backings for most norms. Summers and Taruffo[90] 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[91]. Other than this, there are several possible 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[92], and the lack of reasoning may be seen as reducing the quality of the Norwegian judgements. Second, the difference may stem from the

[89] See L.R.L. Bendiksen, *Barn i Langvarige Fosterhjemsplasseringer - Foreldreansvar Og Adopsjon* (Fagbokforlaget 2008) and; Helland (n 38).
[90] 'Interpretation and Comparative Analysis' in N. MacCormick and R.S. Summers, *Interpreting Statutes: A Comparative Study* (Aldershot 1991).
[91] 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).
[92] 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 5).

compositions of the courts and judgement-writing practices[93]. In England, decisions are direct transcriptions of the oral hearing,[94] 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[95]. It is thus possible that the written judgements 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[96]. 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.

8. 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 [97] urged as a step toward a constructive debate on CBI variation. Different elements were included or emphasized 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[98]. 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 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 legitimizing decisions by connecting reasoning to a democratically constituted standard. Although it is not a remedy for the shortcomings of the best interest standard, the

[93] 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.
[94] The oral proceedings are only transcribed if this is requested by any of the parties.
[95] Skivenes and Tonheim (n 11).
[96] J. Masson, 'What's Wrong with Linear Judgments?' (2014) 44 Family Law 1277.
[97] (n 9).
[98] E. Keddell, 'Current Debates on Variability in Child Welfare Decision-Making: A Selected Literature Review' (2014) 3 Social Sciences 916.

checklist is reflected in reasoning, and there are indications that statutory operationalization 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 judgements 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 criticized 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'[99].

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.

[99] 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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