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Criteria for “good” justifications

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Criteria for “good” justifications[1]

Jan F. Qvigstad[Ψ] Tore Schei[¥]

Abstract

Many institutions in a democratic society wield important power by virtue of the decisions they make. These decisions may concern individuals or have a more general impact on society. It goes without saying today that this exercise of power must be accounted for. A supreme court’s reasoning is given in its judgements. A central bank’s reasoning is given in the decision-making body’s minutes. In this paper, we develop criteria for what constitute good written justifications for a decision, not what makes a good decision *per se*. We look at the two institutions we know best: supreme courts and central banks. Of course, these are not the only institutions that exercise power on behalf of the state, and we also ask whether our criteria could be applied more generally.

We assess a selection of supreme court judgements and monetary policy decisions in various countries qualitatively against our criteria, and find that practice largely conforms to the criteria. There are some common features between supreme courts and central banks. In recent years there has been a development in the way the judgments are written in the UK Supreme Court. Earlier, each judge wrote his votum. Now they are writing a common text. With individual writing, there were many different formulations of the normative text. It is easier for the public to relate to one legislative text. The UK Supreme Court, under the presidency of Lord Neuberger, has therefore gradually moved towards writing a joint text. John Roberts, the US Chief Justice, thought that judges should be worried when they are writing separately about the effect on the court as an institution. What about the minutes of the central banks? Professor Alan Blinder at Princeton argues that a central bank that speaks with a cacophony of voices has no voice at all. Professor Otmar Issing, the former Chief Economist and Member of the Board of the ECB, believes that there is a danger that individual minutes provide an incentive for individual members to put themselves ahead of the institution

We also test empirically whether the institutions’ decisions and the justifications for these decisions are communicated in clear language. Our analysis is inspired by Bank of England chief economist Andrew Haldane’s speech “A little more conversation, a little less action”, and by the report “Bankspeak: The Language of World Bank Reports 1946-2012” by Franco Moretti and Dominique Pestre at Stanford Literary Lab. We analyse more than 6,000 central bank and supreme court decisions from the past decade and find considerable differences in length and readability across countries and institutions. The grand chamber decisions of the European Court of Human Rights are by far the longest, while the European Court of Justice

[1] This Working Paper should not be reported as representing the views of Norges Bank. The views expressed are those of the authors and do not necessarily reflect those of Norges Bank. When it comes to central banks, we benefited greatly from general discussions with Charles Bean and Martin Weale, and had input from Anders Vredin, Harald Bøhn, Øyvind Eitrheim, Marianne Sturød and Helge Brunborg. From the Norwegian Supreme Court we have received useful comments from Arnfinn Bårdsen, Steinar Tjomsland and Georg Fr. Rieber-Mohn. Jens Peter Christensen, Stefan Lindskog and Mats Melin provided important information on the work and judgements of the Danish Supreme Court and Sweden’s Supreme Court and supreme administrative court, respectively. Conversations with Leif Anders Thorsrud gave us the idea of using “big data” and text analysis. Vegard Høghaug Larsen played a key role in the empirical work on readability. Helle Snellingen was responsible for the English translation.
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employs the most complex language. The Danish central bank keeps things briefest and uses the clearest language, but also has the simplest regime to explain. The Swedish central bank's minutes stand out as both long and complex, while the Norwegian central bank is unusually concise. Moretti and Pestre analysed the text of all World Bank reports and found quantitative indications that the language of the reports had moved in the wrong direction in terms of readability. We perform the same tests on central banks and supreme courts and find that these institutions' language has not moved in the same negative direction.

Former Bank of England governor Mervyn King argued that the design of an institution "must reflect history and experience", and there is no doubt that each institution's way of writing is influenced by its own history. This is what economists refer to as "path dependence". We wonder, however, whether there is rather too much path dependence in many cases, and whether the institutions in question might benefit from looking at trends and learning from other institutions both at home and abroad.

In our work on this paper, we have been particularly wary of phrases along the lines of "based on a general assessment". Alarm bells sound whenever we see them, especially with any frequency, as they are liable to conceal rather than illuminate the true rationale.

JEL codes: E580, K10

Keywords: Central Bank Organization, Constitutional Court, Constitutional Law, Constitutional Rights, Supreme Court

Word cloud for the Brexit judgement[2]

[2] The Brexit judgement is discussed in 3.8.4 below.

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1 Introduction

Institutions such as the central bank and the supreme court make important decisions for society. They exercise power in and over society. In a liberal democracy such as Norway, it goes without saying that this exercise of power must be accounted for. There are a number of reasons for this:

- A decision needs to be explained to those affected. A judgement impacts directly on the parties to the case. Rulings on both criminal and civil cases can have far-reaching consequences for those directly involved. The central bank's interest rate decisions have economic consequences and can affect many people's lives.
- Institutions also prepare minutes as a record of why they reached a decision, as similar cases may arise in the future. For the supreme court, key factors here include the normative effect of its judgements and the fundamental principle of equality under the law. For the central bank, they include consistency in economic thinking and economic decisions.
- Decisions influence expectations. An interest rate decision today, and the justifications given for it, will affect expectations of future interest rates. A case will often only be heard by the supreme court if it concerns a matter of principle. The court's judgements have a normative effect – they set a precedent. The precedent established by the court is then to be applied in other cases where similar legal questions arise.
- To some extent, both the supreme court and the central bank compete with, and potentially interfere with, the political decisions of the country's government and parliament. Supreme court judgements have a legislative effect, and the court plays an important role in providing checks and balances for the executive and legislative branches. The central bank's interest rate decisions can be important for the economic policy pursued by the country's government and parliament. Thus, the decisions of both the supreme court and the central bank have political ramifications.[3] This argues in favour of transparent, complete, high-quality justifications for these decisions.

The justifications for a decision need to specify the premises, analyses, assessments and conclusion. The justifications for a decision can be written in different ways according to its purpose. Where a decision concerns an individual, it should if possible be explained in a way that person can understand. But if a decision is to establish a precedent, it is important for it to be written in such a way that its normative intention is clear. The justifications for an interest rate decision should be formulated in such a way that markets form the right interest rate expectations. At the same time, democratic considerations mean that they must be written in a way that is accessible for an informed public. If the justifications are intended exclusively for the institution's internal memory, however, they can most effectively be written in the institution's own technical language. These various factors need to be carefully weighed up when the justifications for a decision are recorded.

Two key institutions in Norway provide our point of departure: the supreme court and the central bank. The reason for this choice lies in the authors' background: these are the institutions we know best. Although these institutions have their peculiarities, we attempt in this paper to develop general criteria for what constitute good written justifications for a decision. The common denominator for these two institutions is that they wield important power in society. The supreme court rules on individual cases with a direct impact on the parties to each case. The central bank's interest rate decisions, on the other hand, have a

[3] See Schei (2011), pages 319-335, and Schei (2015), pages 27-29.

general effect and, unlike supreme court judgements, are repetitive. However, the normative effect of the supreme court's judgements significantly reduces the differences here. While Norges Bank and the Supreme Court of Norway provide our starting point, we believe that our criteria can also be applied to similar institutions in other countries where the supreme court serves as a court of precedent.

The paper begins by formulating our criteria. At heart, these are largely the same for both central banks and supreme courts, but provide slightly different guidance due to differences in the type of decision made. For both types of decision, our criteria can be summed up as follows:

Criterion 1: The justifications should be technically sound
There should be information on who has made the decision, on what legal basis, and whether all procedures have been correctly followed.

Criterion 2: The justifications should be functional
The decision should be explained logically, setting out the premises, analyses, assessments and conclusion. The justifications should be written in a language that can be understood. They need to concentrate on the key points. Less relevant information needs to be cut away.

Criterion 3: The justifications should be open and complete
The justifications should also shed light on the path towards the decision. Which factors led to the decision turning out the way it did, but presented challenges? The need for transparency would indicate that dissenters should be named, but more important is that the arguments of both the majority and the minority are presented.

Criterion 4: The justifications should be formulated with the future in mind
A supreme court judgement generally has a normative effect. The legal precedent established by the decision will also be applied in other cases. The central bank makes decisions on interest rates today, but the decision and the justifications for it will affect expectations of future interest rates. The justifications need to be written with an awareness of the decision's normative effects and impact on expectations.

After formulating our criteria, we assess the minutes of monetary policy decisions at a number of central banks and judgements from supreme courts in a number of countries qualitatively against the criteria. We find that the justifications given largely satisfy our criteria.

One element of our second criterion is that the justifications should be written in clear language. We have undertaken an empirical analysis of more than 6,000 monetary policy decisions and supreme court judgements to assess whether they meet this requirement. It will be no surprise that not all of them do so.

Finally, we discuss whether the criteria formulated for central banks and supreme courts should apply more generally. We find that this is difficult. Different considerations apply. But we would still argue that our criteria can offer guidance for good justifications, in any case for decisions with more far-reaching implications. Many decisions of importance for the individual are made by decision makers other than public bodies. Here too, decisions should be explained, and our criteria may offer some guidance. We look at a number of examples, including the handling of the doping case against Olympic skier Therese Johaug in 2016-2017, particularly the proceedings and decision of the "court of appeal". The International Ski Federation appealed the decision of Anti-Doping Norway's Prosecution Committee to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

There was no external prompt for us to discuss criteria for good written justifications for decisions at this particular point in time. It is a matter that we have been mulling over for a long time. Our careers are simply at a stage where we have been afforded the time and opportunity to work on this topic.

2 Central banks

2.1 Towards greater transparency

Traditionally, central banks were closed institutions, both literally and figuratively. They had an aura of mystery and actively sought to preserve this mystique. Governors the world over went to great lengths not to say too much, and what they did say would often appear cryptic. This reluctance to justify decisions may have been grounded in fears that it would dent confidence in the central bank if people realised that its decision-making body might have doubts and that its decisions were made under uncertainty.

Take the following exchange between Theodore Gregory and John Maynard Keynes of the Macmillan Committee and Bank of England deputy governor Sir Ernest Harvey in the early 1930s:[4]

> Committee member Gregory: *"I should like to ask you, Sir Ernest, whether you have ever considered the possibility of the Bank issuing an Annual Report on the lines of the Annual Report of the Federal Reserve Board, for instance?"*
> Deputy Governor Harvey: *"I confess I am sometimes nervous at the thought of publication unless it is historical. The question is whether, when it is merely historical it is of any particular value, or whether from the fact that it is issued from the central bank undue importance may be attributed to certain things that are stated, more importance than perhaps they merit..."*
> Committee member Keynes: *"Arising from Professor Gregory's questions, is it a practice of the Bank of England never to explain what its policy is?"*
> Harvey: *"Well, I think it has been our practice to leave our actions to explain our policy."*
> Keynes: *"Or the reasons for its policy?"*
> Harvey: *"It is a dangerous thing to start to give reasons."*
> Keynes: *"Or to defend itself against criticism?"*
> Harvey: *"As regards criticism, I am afraid, though the Committee may not all agree, we do not admit there is need for defence; to defend ourselves is somewhat akin to a lady starting to defend her virtue."*

Harvey's comments are very much of another era, while Keynes was clearly ahead of his time. That said, Harvey's remark about undue importance being attributed to information put out by a central bank is still perhaps pertinent today.

Federal Reserve chairman Alan Greenspan told a Senate hearing in 1987:[5]

> "*Since becoming a central banker, I have learned to mumble with great incoherence. If I seem unduly clear to you, you must have misunderstood what I said."*

In Norway too, many probably had the impression that monetary policy was something mysterious and remote. In the Festschrift for former Norges Bank governor Hermod

[4] Quoted in Issing (2005).
[5] Speaking to a senate committee in 1987, as quoted in *The Guardian Weekly*, 4 November 2005.

Skånland, professor Preben Munthe wrote:[6]

> *"There is a certain tradition for central bank governors to be taciturn. This fuelled the mystique in which a man in such a position should be enveloped. He alone had knowledge of the secret black box that was Monetary Policy and how it worked. Without need to consult others, he would adjust the discount rate and thus fine-tune economic developments with great assurance and insight. On only rare occasions would he step down from his ivory tower to explain life's economic truths to the gawping masses."*

It is only in recent years that central banks' view of transparency has changed, both in Norway and abroad. We can safely say that this change has been both rapid and radical. Today, most central banks are open about (i) the objective of monetary policy, (ii) their strategy for achieving this objective, and (iii) the reasoning and processes behind interest rate decisions.

So what is behind this move towards greater transparency?

First, there has been a general trend in society towards more openness. Previously, the question might have been: Are there any compelling reasons to make this information public? Now, the question is whether there are any compelling reasons not to do so. Transparency has an incentive effect as well. If the justifications for a decision are published, the decision makers need to make an effort to ensure that the reasoning bears scrutiny. Open, external justifications also require communication skills. Many teachers and lecturers find that the act of teaching not only imparts knowledge to students, but also gives the teacher a more detailed understanding. The same probably applies to the central bank: external communication of its analyses helps make its economists better experts.

Second, economic thinking has changed considerably. Somewhat simplified, it was previously thought that monetary policy acted by surprising the actors in the economy, whereas now there is a consensus that monetary policy works best if it is predictable. When Norges Bank had a fixed exchange rate as its target, there was very little room for discretion. The bank's job was to keep the krone stable. Monetary policy was more or less on autopilot. From a purely democratic viewpoint, there was little need for greater openness about what was behind its decisions. In fact, it could make sense not to reveal too much of the thinking behind its management of the exchange rate, as this could make it easier for other players to take positions on the basis of assumptions about interest rate changes.

Today, Norges Bank operates a floating exchange rate combined with an inflation target. The bank has to make its decisions on the basis of uncertain and complex considerations – decisions that can have significant economic consequences. This speaks in favour of openness and access. Transparency is the institutional solution to the bank's independence in setting interest rates. Norges Bank must be accountable to its principal. The bank is judged on its performance, but also on its assessments and decisions. The need for transparency is thus dependent on the monetary policy regime. Internationally too, there is a tendency for central banks to be more open in countries with an inflation target than in those with a fixed exchange rate.

A central bank makes decisions of many kinds. We concentrate here on monetary policy decisions and the written justifications given for these decisions by the body with the formal right to make them. The minutes of rate-setting meetings do, however, form only part of a

[6] We are fairly certain that Munthe was not referring to Skånland here, as the latter was famous for speaking his mind.

central bank's monetary policy communication.[7] It also holds press conferences and speeches, gives interviews and writes books.

Central bank communication has evolved over the years. Bank of England chief economist Andrew Haldane (2017) notes:

> *"For its first three centuries, the Bank appears to have kept its public utterances to a minimum. It was effectively mute. The prevailing ethos was well captured by the job description provided to the official who became, in effect, the Bank's first press officer: 'Keep the Bank out of the press and the press out of the Bank'. The Bank was good to its word. During the period 1920 to 1945, the Bank's communications strategy was far from expansive. The Governor gave precisely one speech a year – the annual Mansion House lecture […].This tended not to be rich in content. Nor was it ideally suited to enhancing wider public understanding, being delivered to an audience of around 300 City bankers and merchants, several glasses of wine into the evening."*

Now it gives around 80 speeches a year, as well as publishing reports and public minutes of committee meetings, and making ever greater use of the new social media. Our analysis of a central bank's minutes therefore covers only a small part of the bank's overall communication.

2.2 On decision-making processes

Interest rate decisions are generally made by a board or committee, which needs to decide on a procedure for how it is to vote. A committee's decision-making procedure can be:

- premise-based, or
- conclusion-based.

In a premise-based procedure, the committee first agrees on the premises. It then discusses and weighs up the arguments and counterarguments. In a conclusion-based procedure, the committee again discusses the premises, arguments and counterarguments, but does not seek a consensus on them, instead going straight to a conclusion. Such a committee could conceivably agree on a conclusion but on the basis of completely different assumptions. The two procedures do not always have the same outcome.[8]

We do not take a position on whether it is more appropriate to adopt a conclusion-based or premise-based decision-making procedure, but it should be made clear how a committee reaches its decisions. As the procedure is unlikely to change from meeting to meeting, it should be described in the text setting out the standard framework for decisions but not in the actual minutes.

According to Alan Blinder, the decision-making body or committee can take various forms:[9]

- An individualistic committee where each member is individually accountable. Examples include the Bank of England's Monetary Policy Committee and Sveriges Riksbank's Executive Board.

[7] Fracasso et al. (2003) look at how central banks write, while Blinder et al. (2001) look at how they speak. There is extensive academic literature on monetary policy transparency – see, for example, Geraats (2002), Winkler (2000), Geraats et al. (2006), Dincer and Eichengreen (2014) and Holmes (2013).
[8] Claussen and Røisland (2010).
[9] Blinder (2009).

- A collegial committee where each member has an individual responsibility but there is a strong consensus-seeking ethos. Even on collegial committees, there may be dissension. Norges Bank and the Federal Reserve are examples of institutions with this type of committee.[10]

There is much disagreement about which types of committee make the "best" decisions. We do not take a position on this here. The type of committee that makes the decisions will, however, have implications for how its minutes are written.

On many committees, members are swamped with background material, often far more than they can possibly absorb. If something then goes wrong, and it turns out that the point in question was addressed in a footnote on page 1286 of Annex 4, it could then be argued that this should have been taken into account. We therefore believe that the factors on which the decision-making body is to base its decision should be specified in a briefing note. A well written and succinct briefing note that is easy to absorb can help structure the oral deliberations. If the decision-making body has no comments on the premises, analyses and assessments presented and backs the recommendation, the minutes can then be kept very brief, for example:

> *"With reference to [title of briefing note], the committee reached the following decision: [text of recommendation]."*

Should the decision-making body take a different view of the premises, arguments and counterarguments to that presented in the briefing note, this can be mentioned in the minutes, albeit very briefly. Minutes of this kind are known as *resolution minutes*.

In an organisation where numerous decisions are made at each meeting of the decision-making body, pure resolution minutes are, as a rule, the most efficient option. The decision-making body may have full ownership of the decision through a prior process, possibly with numerous previous rounds of deliberation. For the reader to be able to differentiate between a rubber-stamping body and one that has full ownership of the process, details can be given of what the process actually was. The process should be described and made readily available.

Central banks make a lot of decisions. At its meeting of 27 January 2016, Norges Bank's Executive Board had 33 items on the agenda. Resolution minutes are the most practical kind of minutes for most of the matters considered. In some cases, however, we believe that resolution minutes are not sufficient. This applies particularly to matters of particular importance to society. We concentrate on a type of decision that should be documented by central banks in full minutes: monetary policy decisions.

2.3 Criteria for good justifications for central bank decisions

2.3.1. Introduction

We explained above why it is important for a central bank to provide good justifications for its interest rate decisions, and for these justifications to be presented in a set of minutes of the meeting where the decision was made. We have formulated four criteria:

1. The justifications should be procedurally sound
2. The justifications should be functional
3. The justifications should reflect the path towards the decision

[10] Sometimes it is laid down in law that the committee is to be individualistic, but generally it is the committee itself that decides on its way of working.

4. The justifications should be formulated with expectations in mind

These criteria are presented in more detail below. Some points might be equally at home in more than one category. The classification we have chosen is not absolute but designed to shed light on the intentions behind the four criteria.

2.3.2. Criterion 1: The justifications should be procedurally sound

In order to read and comprehend the justifications for a decision, one needs to know what framework the decision-making body operates under. This framework will be both institutional and historical. The type of committee making the decision may be set out in law or in the committee's own rules of procedure. The frequency and timing of meetings should be made public. Information on any other forms of public communication besides the minutes, such as press conferences and reports, should be readily available.

The Bank of England is an example of where this framework is very clearly set out, for example on its website: www.bankofengland.co.uk/monetarypolicy.

The Danish central bank operates a fixed exchange rate regime where the krone is pegged to the euro. When the key rate changes, it is pretty obvious why. The press releases put out are very brief, but the content is still adequate given the monetary policy regime. It is not easy, however, to find out which members of the Board of Governors actually participated in the decision. Nor do we know whether minutes of the board's decisions are prepared.[11] Every now and again, monetary policy decisions are made that require a little more explanation, such as the measures announced in the press release of 5 February 2015, when the decision was made to suspend the issuance of domestic government bonds in order to slow inflows of capital from abroad. It is impossible to tell whether the press release reflects the views of the whole board.

The process for how decisions are made must be readily available to outsiders. This process must also be adhered to, and it must be clear from the written material that it has indeed been followed. The process is set out in the committee's rules of procedure – see, for example, the "Procedures of the Central Bank of Iceland Monetary Policy Committee".[12]

At the Bank of England, the proceedings of the monetary policy committee are oral. The minutes contain the items mentioned above. The minutes refer to the inflation report as supporting documentation. The inflation report is the committee's responsibility. The committee "notes" the descriptive parts of the report, but takes active ownership of the parts where the different considerations are weighed up.

Norges Bank's Executive Board also makes its interest rate decisions on the basis of oral deliberations.[13] The chairman of the board supplies a briefing note for the meeting.[14] This briefing note, which sets out the premises, the relations between them, the weight given to them, and a recommended conclusion, is intended to facilitate an orderly discussion. The briefing note contains text with a very high degree of precision. If the minutes refer to the briefing note, we have to assume that the Executive Board has read the note and is familiar

[11] The only public information can be found at http://www.nationalbanken.dk/en/monetarypolicy/implementation/Pages/default.aspx.

[12] See https://www.cb.is/library/Skraarsafn---EN/Monetary-Policy-Committee/Procedures/Procedures_of_the_Central_Bank_of_Iceland_Monetary_Policy_Committe .

[13] The Executive Board's rules of procedure require decisions to be taken at a meeting, defined as a physical meeting where an oral discussion can take place.

[14] Practices vary widely from bank to bank as to whether or not there is a briefing note, and who puts forward the resolutions to be voted on.

with its contents. We should also be told whether the Executive Board raised new issues during its oral deliberations, or made a different assessment to the briefing note.

Minutes are not always called minutes. The European Central Bank (ECB) calls them an "Account of the monetary policy meeting".[15] At Norges Bank, the written justifications approved by the Executive Board are referred to as "The Executive Board's assessment". Norges Bank also publishes "minutes" at a later date in the form of resolution minutes stating who was present when each item was considered, what supporting documents were submitted, and what decision was made. These minutes were made public from 2016 except for the item concerning the monetary policy decision, which remained strictly confidential for 12 years. With effect from the meeting of 21 June 2017, however, the minutes of the interest rate decision are also now made public. Given that the decision and the justifications for it are already disclosed in the Executive Board's assessment, it was only any dissension that was withheld from the public.

It may be an end in itself for the decision-making process to be optimised. How the minutes are written can affect the decision-making process. Total transparency is far from ideal – there is a trade-off between openness and good decision-making processes.[16] Detailed minutes specifying who said what can increase accountability and incentivise more thorough work by the individual committee members in the decision-making process. On the other hand, minutes of this kind can inhibit a genuine exchange of opinions at the meeting. Members may arrive with prepared statements that are simply read out, which can impair the quality of the debate. There is also a danger that individual minutes provide an incentive for individual members to put themselves ahead of the institution.[17] On the other hand, collective minutes can provide an opportunity for the individual member to be passive and hide behind the others. Detailed minutes may lead to the real debate and the search for the best solution being transferred to another venue.[18] The feedback loop from minutes to decision-making

[15] The ECB has only published minutes, in the form of its "Account of the monetary policy meeting", since the start of 2015. Previously only the introductory statement to the press conference was published. This statement was discussed, but not endorsed, by the Governing Council. The media had long called for the ECB to publish minutes. Otmar Issing, ECB chief economist and member of its Governing Council from 1998 to 2006, told Jan Qvigstad in the early 2000s that he regretted not calling the introductory statement to the press conference "minutes", because it had all the hallmarks of the criteria normally required of collegial minutes, such as Norges Bank's "The Executive Board's assessment".

[16] An overview of the literature can be found in Qvigstad (2016), see particularly Chapter 3.

[17] Issing (2005).

[18] The Federal Reserve's monetary policy committee – the Federal Open Markets Committee – has long made audio recordings of its meetings which are transcribed verbatim, mostly as an aid for those charged with drafting the edited public minutes. In 1993, it was decided to publish these transcripts back to 1976 with a lag of five years. In 1995, it was decided that this should apply to future transcripts as well, see Danker and Luecke (2005). Transcripts up until the end of 2011 are now in the public domain. There is disagreement over whether or not knowledge of their subsequent publication has impacted on the real discussion. Robert Hetzel, chief economist of the Richmond Federal Reserve since 1975, believes that it has not affected the debate. He wrote in an email to Jan Qvigstad on 21 October 2014: *"Participants in FOMC meetings are desirous of influencing the outcome. They have every incentive to argue forcefully. Publication of transcripts does not change those incentives."* Athanasios Orphanides, a former senior adviser to the Federal Reserve, takes a different view. He wrote in an email to Jan Fredrik Qvigstad on 24 October 2014: *"There was a significant shift in the behavior of SOME members of the committee and many interventions reflected prepared statements that were drafted BEFORE the meeting and read by participants at the meeting."* Orphanides' view is supported by analyses carried out by Meade and Stasavage (2008). These different views are also discussed in Warsh (2014), whose recommendations were behind the Bank of England's decision to publish transcripts of MPC meetings. Hansen et al. (2017) employ advanced text analysis (natural language processing) and find that the quality of discussion does indeed shift: *"The most striking results are that meetings become less interactive, more scripted and more quantitatively oriented."*

process is unclear, but if the decision-making process is indeed impaired, there may be a case for adjusting the level of detail and writing the minutes more collectively.

We can divide minutes into the following main types:

- *Verbatim minutes*, i.e. a word-for-word transcript of what was said at the meeting. The Federal Reserve's monetary policy committee (FOMC) publishes verbatim minutes after five years. The Bank of England has decided to release verbatim minutes in addition to its ordinary minutes with a lag of eight years.[19]
- *Edited minutes presenting the collective position of the decision-making body*
  - Consensus minutes: One example is the account of Norges Bank's interest rate decisions known as "The Executive Board's assessment".
  - Consensus minutes specifying any dissenting views: One example is the minutes of the Bank of England's monetary policy committee.
- *Edited minutes with individual justifications.* Each individual member prepares a rationale explaining his or her own position. One example is the minutes of the meetings of Sveriges Riksbank's Executive Board.

Regardless of the form the minutes take, the public must have access to adequate reasoning for the decision. It is criteria for these justifications that we are after here. Our aim is to design criteria for good justifications that apply whatever type of committee makes the decisions. A committee's form does not change from meeting to meeting, so it is important to state in a readily accessible place what kind of committee is making the decisions. We believe that the criteria for good justifications should apply irrespective of the type of committee (decision-making body) behind the decision.

For society to be able to monitor the decisions made and have an insight into the reasons for them, there must not be too big a gap between a decision being made and the justifications being disclosed. In many countries, there was for many years a considerable delay between the publication of the interest rate decision and the justifications for it, which could create considerable uncertainty in the interim. Today, it is more common for the decision and the justifications to be published simultaneously. At Norges Bank and the Bank of England, this is achieved in practical terms by preparing draft minutes between sessions (each meeting spans a number of days) and approving the minutes at the end of the session on the final day.

For the justifications to be procedurally sound, the following questions need to be answered in the affirmative:

- Are the framework and procedures for the decision-making process readily available?
- Is it possible to check whether the procedures have been followed?
- Is it clear who took part in the decision?
- Has reference been made to supporting documents?
- Is the delay between meeting and publication acceptable?

They find that FOMC members also change their voting patterns as they become more experienced, becoming more likely to challenge the consensus view, and speaking more broadly and less quantitatively. The authors attribute this to the reduced concern each member has over their career later on in their terms.

[19] The first meeting for which a transcript will be released is that of March 2015, in March 2023.

2.3.3. Criterion 2: The justifications should be functional

Most of life's decisions, even the most important ones with serious consequences, are made on impulse and without rational thought. Daniel Kahneman's bestselling book *Thinking, Fast and Slow*, published in 2011, describes how decisions are made in a dichotomy between two modes of thought.[20] One is fast and based on instincts and emotions. The other is slower and more deliberative and logical.

It may be that these two modes of thought follow a pattern where first a decision is made on the basis of instinct and emotion, and then the decision is packaged in a logical explanation that fits with what has already been decided. Montagu Norman, governor of the Bank of England from 1920 to 1944, hired Henry Clay as the bank's chief economist in 1930 with the following message:

> *"Mr Clay, we have appointed you as our economic adviser; let me tell you that you are not here to tell us what to do, but to explain to us why we have done it."*[21]

This may well have been intended as a joke, but there is perhaps more than a grain of truth in it, because Norman also argued that:

> *"…the central bank is a bank, not a study group."*

It may also be the case that decisions are made on the basis of considerations that do not bear scrutiny, such as political motives. The justifications are then developed later, tailored to the decision already made.

We look at decisions made on the basis of a rational, logical process. What needs to be asked of the justifications? For the general public to be able to understand how the decision maker has arrived at its position, the decision maker must account for the underlying premises, assumptions or facts. It must also set out its understanding of the relations between them (the workings of the economy). In monetary policy, there are many relations that need to be agreed on. What is the relation between import prices and domestic inflation? How does the exchange rate impact on firms' export opportunities? Finally, there is a weighing of arguments and counterarguments. Which arguments were given the greatest weight when attempting to find the correct/best solution? In the more technical language of the economist, one could say that the problem is to maximise a welfare function given the workings of the economy under specific constraints. The endnote presents this problem in more mathematical terms.

If the premises, assumptions or facts change, so too will the conclusion. Similarly, the conclusion will change if the relations between them change. It is therefore important for the justifications for a decision to specify all of the key factors relevant to that decision.

Sometimes, most considerations will support a particular decision. Other times, there may be arguments and counterarguments that make the "best" solution only marginally better than another. Navigating to a particular mountaintop may be easier among the jagged peaks of Jotunheimen[22] than the more rounded highlands of Hardangervidda[23], see endnote.

[20] Kahneman (2011).
[21] Kynastone (2017).
[22] Jotunheimen is a mountainous area in southern Norway. The 29 highest mountains in Norway are all in Jotunheimen, including the very highest - Galdhøpiggen (2469 m).
[23] Hardangervidda is a mountain plateau in central southern Norway. It is the largest plateau of its kind in Europe,

If there is a split decision with roughly equal numbers of committee members on each side, this may be a sign that it was a difficult decision and that there was little difference in the weight carried by competing arguments. Of course, a unanimous decision may still be an expression of the same situation, only with everyone reaching the same conclusion.

Similarly, a split decision does not always signify that the two sides found the decision a difficult one. Both may be equally confident of their own case. Another possibility is that there is a minority that stands apart from the rest of the committee and has little chance of influencing the majority view. If so, the disclosure of dissension may give the impression of frailty, while the reality may be that the decision was very robust. The need for transparency would indicate that dissenters should be named, but more important in our opinion is that the arguments of both the majority and the minority are presented in the minutes. All relevant factors should be included, along with how the committee, or the majority and minority, weighed these factors. It is the reasoning given that is most important.

Martin Weale sat on the Bank of England's monetary policy committee from 2010 to 2016 and suggested that each member should be given 100 votes. If there were two alternative proposals up for consideration, members could give all 100 votes to one proposal if they were entirely convinced that this was the right one. If they were very unsure, they could, for example, give 52 votes to one proposal and 48 to the other. This would enable the committee to convey how clear the decision was. His suggestion was not adopted by the committee.[24] It may well have been overly complex to communicate, but we believe that it illustrates our point above.

Most decisions are made under uncertainty. Imagine aiming for a specific mountaintop when there is fog around. It will make a big difference whether you are in Jotunheimen with its clear peaks or Hardangervidda where the top of the hill is often far from obvious. If the shortest way to a particular peak is along a narrow ridge, it may, in foggy conditions, make more sense not to traverse this ridge but to take a longer route and stick to safe ground, see endnote.

Uncertainty can be approached in various ways. Sometimes, it may be best to start from expectations. On other occasions, one might consider what would be best under conditions of complete certainty, but work towards it in small steps. If there is a question mark over credibility, it may be sensible to roll out the rod of iron to show that you mean business. If the committee does not know what is behind the uncertainty, and the uncertainty is difficult to describe with a probability distribution, it may be sensible to adopt a strategy that hedges against the worst possible outcomes, known in game theory as a Minimax strategy.[25]

It is important for the justifications for a decision to describe the uncertainty the decision maker faced and what the decision maker made of it. Norges Bank attempted to do this during the financial crisis in autumn 2008. Here are three examples from the bank's press releases:

- Rate-setting meeting of 24 September 2008: *"There is now an unusually high degree of uncertainty linked to the turbulence in financial markets. There are wide daily swings in money market rates, equity prices, the krone exchange rate and oil and commodity prices. It is difficult to determine how long this pressure will last and the*

[24] *"I have mentioned the inevitable uncertainty which surrounds decision-making. I have often thought that if each member could cast a hundred votes instead of just one, I could represent, at least to some degree, the uncertainty I see about the appropriate policy. If the Committee were to vote in this way, with each member representing the situation as they actually see it, the outcome would, on occasion, be different from that emerging from conventional majority voting."* See Weale (2015).
[25] Von Neumann and Morgenstern (1944).

effects on inflation and activity in the Norwegian economy. It is therefore appropriate to keep the interest rate unchanged now," says Deputy Governor Jan F. Qvigstad.

- Rate-setting meeting of 15 October 2008: *Norges Bank's Executive Board decided today to reduce its key policy rate by 0.5 percentage point [...] "The crisis in international financial markets has deepened […]", says Governor Svein Gjedrem. […] "There is unusually high uncertainty surrounding developments ahead," says Governor Svein Gjedrem. "It is difficult to comment on the likelihood of different outcomes. The most robust approach may therefore now be to implement measures to reduce the uncertainty and stave off particularly adverse outcomes for the economy."*
- Rate-setting meeting of 17 December 2008: *Norges Bank's Executive Board decided today to reduce its key policy rate by 1.75 percentage points to 3.00 per cent with effect from 18 December 2008. […] "The credibility of the inflation target now makes it possible to use monetary policy actively to dampen the impact of the financial crisis on the Norwegian economy," says Deputy Governor Jan F. Qvigstad.*

The justifications for a decision should reflect the complexity of the problem. In a fixed exchange rate regime, it will generally be very easy to explain a decision to raise interest rates. The explanation will be that the currency has weakened, and published statistics show that the central bank has intervened to support the currency. In a floating exchange rate regime with an inflation target, more detailed justifications are required if a decision is made to raise interest rates.

If alternative solutions have been considered, this should be stated:

> *"The Executive Board considered reducing the key rate by 50 basis points but decided to keep the key rate unchanged because…".*

In a floating rate regime with an inflation target, decisions are made on the interest rate today, but the way the decision is formulated will impact on expectations of interest rates tomorrow. It is important that the wording anchors expectations clearly and unambiguously.

Justifications that are logically constructed may still be dense and long-winded rather than short and sweet. It goes without saying that the latter is preferable. Norwegian supreme court justice Arnfinn Bårdsen offers sound guidance on writing clearly in his lecture "Understanding and being understood".[26] In the history of philosophy, this point is known as Occam's razor: only factors relevant to the justifications should be included, and the simplest evidence is the best. In plainest English: Keep it simple, stupid!

A rule of grammar can illustrate this point, namely whether there are commas around a subordinate clause. For example:

> (1) The boy, who had red hair, was made referee. (=*The boy made referee happened to have red hair.)*
> (2) The boy who had red hair was made referee. (=*The boy with brown hair was not made referee*.)

In the first sentence, the subordinate clause is separated off with commas, which means that the red hair is incidental information and not part of the main message being conveyed. In the justifications for this decision, the red hair should therefore be omitted, because this information is not relevant. In the second sentence, there are no commas because the red hair is essential information for identifying which boy was made referee. The red hair should then be included in the justifications.

[26] Bårdsen (2016).

The justifications for a decision can, however, still be very lengthy even with the use of Occam's razor. Do we need to include everything that is relevant? It may be that the crux of the matter gets lost in the details, even though they may in themselves be relevant. We believe that a principle of *materiality* needs to be applied. Start by explaining what is the crux of the matter and mention the most important factors. In the final weighing of the arguments to reach a conclusion, there is often one particular argument that is key. This argument needs to be emphasised, but the minutes should also include other arguments that were material and significant for the decision. Materiality will often be a matter of judgement, but the minutes should in any case be formulated in such a way that individual members can recognise their main arguments in the text.

A summary means a slightly freer hand in terms of the overall length of the text. Without a summary, a stricter materiality criterion for the information to be included will probably be needed.

In 1994, Norges Bank cut its key rate by 25 basis points. The published text ran to just four lines and contained 64 words. But this was under a system with a fixed exchange rate. When, a decade later, the key rate was again lowered by 25 basis points, it was under a system with a floating exchange rate and an inflation target – a more complex regime. The published text extended to three pages and contained 1,895 words.

Justifications in the form of edited minutes can be written either as collective minutes for the group or as individual minutes where each member of the group presents his or her own reasoning. Collective minutes can usefully be written in a way that acknowledges dissenting opinions. For example, it could be stated at the end of the minutes that one member (perhaps mentioned by name) reached another conclusion because that member had a different view of the premises, analyses and/or assessments.

With individual minutes, each member writes his or her own justifications in his or her own words. Individual minutes will, by definition, be longer than collective minutes. Assume that all members take the same view of the premises and how they are related and should be prioritised, and therefore reach the same conclusion. An outsider will have to read a text that is much longer than had the committee prepared collective minutes. Extensive analysis of the text will also be required to determine whether there is indeed a consensus on the premises, analyses and assessments, because the members will express themselves differently. What if a key premise, analysis or assessment is not mentioned by a committee member purely by chance? It may be difficult for outsiders to know whether or not this was deliberate. Individual minutes may, however, paint a more nuanced picture.

It is not the case that individualistic committees necessarily write individual minutes, or that collegial committees produce collective minutes. The Bank of England has an individualistic monetary policy committee but prepares collective minutes, while the Riksbank in Sweden has an individualistic committee and produces individual minutes.

Professor Alan Blinder at Princeton believes that a central bank that speaks with a cacophony of voices may have no voice at all.[27] On the other hand, if it speaks with only one voice but there is actually considerable unease and little real consensus on the decision-making committee, the outcome could be a sudden shift in position that surprises the market. The complex nature of monetary policy demands nuanced minutes. This ensures the best possible information so that the markets can form an expectation of how future decisions will turn out.

[27] Blinder (2009).

An interest rate decision concerns interest rates today, but more important is how the decision and the justifications given for it will impact on expectations of interest rates tomorrow. If the reasoning is not clear, this will create uncertainty in the market. Sometimes a bank will succeed in formulating a clear rationale that is understood by the market, but other times it will not. At its meeting of 17 March 2016, Norges Bank took the market by surprise and did not provide an explanation that the market accepted.[28] This does not necessarily mean that the justifications were not clear and well written. Another possibility is that chief economists had misjudged their assumptions and were shifting the blame onto the central bank. What is certain, however, is that the decision and the justifications had a greater impact on yields and exchange rates than the bank's rate-setting meetings normally would.

Minutes may be written for a variety of reasons. One is that the decision-making body itself needs a record of how it arrived at its decision. In this case, the language can be technical and in a form that is peculiar to the institution in question. But this language may not be suitable for the individual affected by the decision, or for a general public exercising its democratic access rights. It can be argued that "middlemen" in the form of journalists and independent experts can do a good job of translating any technical language in the minutes into something more accessible for the general public. However, these intermediaries can also introduce an undesirable lack of precision. It may be better if the decision-making body itself does the job of adjusting the language so that the general public can more easily grasp the essentials.

The technical language of the individual members of the committee may also be very different. For a group to communicate effectively *inter se*, it needs to develop a "common language". Individual members can usefully keep their own language at the back of their minds as a reference. For example, economists with a theoretical background might possibly think of "finding the best possible solution within given constraints" as a "Lagrangian optimisation".[29] Having this approach at the back of their minds might help them express themselves precisely in everyday terms, but there is no point in talking in this way within the group, or in communicating in this way externally. Even if the group manages to find a common language, this might entail ways of communicating that work well within the group but are less effective externally because outsiders lack the same frame of reference. The common language adopted needs to be reflected in the way the minutes are written. The minutes should endeavour to be "true" in the sense that they reflect the discussion that actually took place, and also the form that the discussion took. But this should not preclude efforts to write in clear language. A variety of readability indices have been developed to gauge how accessible a text is. These indices are generally based on looking at how many difficult words are used (for example, words with more than six letters) and the length of sentences. According to such tests, President Trump's election campaign speeches and Elvis Presley's lyrics are easy to follow, whereas the minutes of the monetary policy

[28] Ahead of the monetary policy meeting of 17 March 2016, senior economist Kyrre Aamdal at DNB commented: *"Norges Bank has previously said that the probability of a cut now in March was 50/50. Since then, things have moved in an even weaker direction. In other words, it would go against expectations and everything the bank has previously communicated if it does not reduce rates now."* After the meeting, he noted: *"The decision to leave the key rate unchanged at 1.25 percent went right against market expectations. I haven't heard of a single person saying they did not expect a rate cut now."* In the market, the krone gained strongly, and there was an equivalent upswing in fixed income. Short money rates as measured by the three-month Nibor climbed 26 basis points to 1.47 percent. Business newspaper *Dagens Næringsliv* reported similar comments from SR-Bank chief economist Kyrre M. Knudsen, DNB Markets economist Kjersti Haugland, and Danske Bank chief economist Frank Jullum.

[29] Joseph-Louis Lagrange (1736-1813) was born in Turin but worked mostly in France. He developed a method for finding extreme values (minima and maxima) for functions with multiple variables that need to satisfy certain constraints, see endnote.

committees of the Bank of England and the Federal Reserve score poorly.[30] But if these minutes were to be written in the language of Trump or Presley, they would almost certainly fail to paint a true picture of the discussions on the monetary policy committee.

As mentioned earlier, the minutes form only part of a central bank's communication. Central banks also give speeches and press conferences, and use the new social media. Having multiple channels makes it easier to tailor communication to different target groups. The minutes are unlikely ever to be written for the "man on the street". The important thing is to give a true picture of the actual discussion that led to the decision.

While a supreme court considers a different case every time, monetary policy decisions are repetitive. Norges Bank makes monetary policy decisions eight times a year, the Riksbank six times, and the Bank of England eight times. These countries have floating exchange rates.[31] The decisions become repetitive. The question, then, is whether to explain the decision solely on the basis of what is new relative to the previous decision, or whether to provide full justifications every time. Should one just look at the change, or justify the level? We think the answer should be both – the justifications need to be sufficiently complete that they could stand alone, but they should also specify what is new since last time and explain any change in monetary policy on the basis of changes in conditions. The decision might have changed because new information has come in, or because the decision maker has made a different assessment. At Norges Bank's press conferences after a rate-setting meeting, both questions will generally be asked: "Why is the interest rate you've now chosen the right one?" and "Why are you now changing the key rate by half a point?" The bank must always be able to explain not only why interest rates are where they are, but also any changes made to them in the light of changing conditions. As mentioned earlier, however, there is a trade-off between completeness and materiality. Even with Occam's razor as a starting point, and so including only factors that are relevant to the decision, not all relevant factors are equally material. We believe that it is important to limit the justifications to the most significant factors. Less is often more.

For the justifications to be functional, the following questions need to be answered in the affirmative:

- Are the justifications logical?
    - Do they set out the premises, analyses, assessments and conclusion?
    - Do they convey whether the decision was hard or easy?
    - Do they state whether alternatives were considered?
    - What was the uncertainty, and what was made of it?
    - Do the justifications reflect the complexity of the issue?
- Is the language used clear?
    - Is it easy to follow the reasoning in the justifications?
    - Is there potential for differing interpretations of the conclusion?
    - Is there a summary?
    - Is the structure tailored to the target group(s)?
- Is the text written efficiently?
    - Will reading and analysing the justifications take an unnecessarily long time?
    - Is there a good balance between presenting "all relevant information" and "the most important information"?

[30] Haldane (2017).
[31] The Danish central bank's monetary policy is based on a fixed exchange rate. There are therefore no set dates for when monetary policy decisions are taken: the bank takes them as the need arises. This happens if the ECB changes its key rates, or if there are large capital flows directly related to conditions in Denmark. Even in countries with a fixed exchange rate, however, the justifications for interest rate changes will be fairly repetitive.

- Are the justifications sufficiently complete that they could stand alone?
- Do the justifications also set out the changes since the previous decision?

2.3.4. Criterion 3: The justifications should reflect the path towards the decision

We believe it is important for the minutes not only to present logical justifications for the decision, but also to describe the process leading to the decision.[32] It is not always the case that everything is already decided and everyone is already agreed at the start of the meeting. There is often a discussion where the arguments evolve. It is important for good decisions that there is an effective form of communication in the group. Kevin Warsh writes in his report on transparency at the Bank of England: [33]

> *"Genuine deliberation is therefore the process by which participants not only share information but also learn from and influence each other. It is the crux of good decision-making processes within both the public and private spheres."*[34]

The monetary policy committee will often reach a common position, but not always. Martin Weale, a member of the Bank of England's monetary policy committee from 2010 to 2016, comments:

> *"In the early days of the Committee there was some press concern that the absence of unanimity would indicate some sort of failure of the policy-making process. The first minority vote came, however, without disaster. And the sky remained resolutely in place when the previous Governor, Mervyn King, was himself out-voted. There are, nevertheless, long periods of unanimity which have, indeed, led some City economists to ask what the point of the Committee is, if there is no dissent. Even the Treasury Committee has been known to ask the Governor why dissent has been limited. Of course the answer is that there is no such thing as too little or too much dissent. The right way for each member to vote is the way that they think appropriate at the time and that in one sense is the end of the matter. While I have voted in a minority at a number of the meetings I have been to, I have not doubted that my colleagues' votes were as correct as my own. The future is, by its nature, uncertain and it does not surprise me in the least that nine people whose job it is to come to*

[32] This can be illustrated with an example from the world of sport. Sports fans are, of course, interested in results. In the Monte-Carlo Masters tennis tournament in April 2017, Scotland's Andy Murray met the Spaniard Albert Ramos-Viñolas in the third round. What was the result? This can be stated very clearly: Murray lost in three sets 6-2, 2-6, 5-7. But those who follow tennis are interested not only in the result, but also in how the match went. What were the turning points? Murray won the first set quite easily 6-2 in 48 minutes. Ramos-Viñolas won the second 6-2 even more quickly (36 minutes). But the pendulum swung the other way again in the third set. Murray moved ahead 4-0, and everyone assumed he would win. Then the match changed again. Ramos-Viñolas pulled back to 4-4 and had momentum on his side. But the battle then became more even again, until eventually Ramos-Viñolas won the set 7-5. The third set lasted no less than 67 minutes.

[33] Warsh (2014).

[34] Andersen, Baustad and Sørsveen (1995) write about different levels of communication in a group. They define four levels. At level 1, the individual imparts information and does not feel a need to hold anything back. This level is necessary in order to share information. At level 2, the members of the group accept the others' views as meaningful even if they do not share them. Views are exchanged efficiently. At level 3, members listen to the others' views and build on them in their own reasoning. They make use of one another's views. At level 4, something new is achieved together with the others. This highest level sees the group create something that did not exist at the start of the meeting. This is when two plus two makes five! Andersen, Baustad and Sørsveen believe that groups very rarely reach level 4, and that surprisingly many remain at levels 1 and 2. Committees tasked with complex decisions should aim for at least level 3.

their own conclusions about economic prospects do not always come to the same conclusions."[35]

How much of this internal process should be included in the justifications? Here, we draw inspiration from Wim Duisenberg, president of the ECB from 1998 to 2003:

"Transparency requires that our communication closely reflects our internal decision-making process."[36]

He believed that the ECB should say the same thing everywhere, and that what was said should reflect what actually happened. The fallibility of memory is something we are all familiar with. The best script for being consistent and saying the same thing all the time is to stick to what actually took place. Externally too, members must be able to stand behind what they said at the meeting. Pretexts are to be avoided at all costs. Duisenberg's principle should be normative.

The requirement of absolute transparency does, however, need to be refined. The decision-making body's deliberations must, as stated earlier, be a process where the idea is for members to be open and responsive to arguments from the others. We do not think that it should be included in the minutes that one or more members changed their position during this internal process. The important thing is to clearly communicate the source of this doubt. Which elements of the decision were particularly challenging? If the internal discussions, including any changes of opinion, were to be included, this might in itself stifle the deliberative process that the meeting should be. How long it took to reach agreement (or to agree to disagree) is not relevant *per se*, but saying something about the path towards the decision may give an indication of which factors required special consideration and proved difficult. If the committee openly acknowledges that some items were challenging, this can reassure the public that the process has been thorough, and this in itself can inspire confidence.

All committee members must be able to find their own main arguments in the minutes. If the minutes take the form of a collective edited protocol, and there was dissent at the meeting, the dissenters should not feel a need to write a lengthy addendum justifying their position. The collective minutes should reflect the uncertainty. If, for example, the disagreement centres on how to prioritise factors A and B, with the majority believing that A should be given priority over B, it could be stated in the minutes that it was a difficult balance that the committee spent time discussing thoroughly, and that opinions were divided, but that the majority ended up concluding that A should take precedence. At the end of the minutes, it could be stated that one or more members (named or unnamed) reached a different conclusion because they believed that more weight should be attached to B.

In practice, minutes generally follow a set format and have a standardised structure. Even if, for example, the committee did not spend much time discussing oil prices, developments in this market will be described in a standardised form. There are two reasons for this:

- There will be a degree of similarity from time to time, partly because many of the same matters are being discussed, and partly with a view to consistency in the analyses and assessments.
- Outsiders will find it easier to navigate a relatively long set of minutes if they follow a standard pattern. They can then, for example, head straight to what is written about developments in the money market or the housing market.

[35] Weale (2015).
[36] Duisenberg (2001).

However, this approach may mean that the minutes will only to a limited extent reflect how the deliberations actually proceeded. Whether the committee spent a lot of time or only a little time on a topic, its mention will be fairly similar from time to time. A trained eye is needed to identify the nuances. Often only an adjective is changed. When Jean-Claude Trichet was president of the ECB, attention centred on the adjective preceding the word “vigilance”. “Strong vigilance” was code for a rate increase at the next meeting. If the adjective was dropped, this was interpreted as signalling no increase at the next meeting.[37] This way of writing the minutes may offer earnings opportunities for experts who specialise in identifying and interpreting subtle nuances, but we do not believe that this is a desirable approach. It would have been better to state in more words which topics had been debated at particular length. Was it developments in the oil market that the committee spent much of its time discussing because it was hard to understand what was behind them? Do interest rates act differently on the real economy and prices when they are extremely low than when they are more normal? Was it difficult to reach agreement on the degree to which the bank should “lean against the wind” and address not only the objective of price stability in its rate setting, but also financial stability?[38] What, then, were the arguments? Did the committee reach a consensus? Did it agree on which factors were relevant, but not on how they should be prioritised? How strong was the disagreement? Did the committee arrive at a consensus but find it difficult?

We are looking here at institutions that exercise autonomous responsibility independently of political authorities, but within frameworks set by those authorities. These institutions nevertheless inhabit a political reality. In very special and complex situations, one might wonder whether the real decision was made by the institution’s principal.[39] It is in difficult situations like this that honesty in the minutes, while perhaps very taxing, breeds the greatest long-term credibility.

Former Norwegian prime minister Jens Stoltenberg writes in his autobiography[40] that the real decisions on many matters in his second government were made not by the cabinet but by a cabinet subcommittee made up mainly of the party leaders from the ruling coalition. The cabinet minutes are confidential, but one can speculate as to whether they refer to the subcommittee or whether the real rationale from the subcommittee has simply been cut-and-pasted.

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[37] See https://ftalphaville.ft.com/2011/03/03/504101/trichet-calls-for-a-quantum-leap-amid-strong-vigilance/?ft_site=falcon&desktop=true and http://www.reuters.com/article/ecb-rates-trichet-iduslde7441jn20110505.

[38] See, for example, Filardo and Rungcharoenkitkul (2016), Svensson (2016) or Vredin (2015) for a discussion of “leaning against the wind”.

[39] The financial crisis that erupted in August 2008 transmuted into a sovereign debt crisis in early 2010. There was great pressure on the ECB to make purchases of government bonds, but the legislation governing the ECB prevents it from buying them directly from member states. It is, however, permitted to make purchases in the secondary market as a market-maker, and this could be stretched so that the economic realities between the two approaches would not be that different. ECB president Jean-Claude Trichet repeatedly ruled out the ECB making such purchases. But then the sovereign debt crisis worsened, and European leaders held an emergency summit over a weekend in early May. Trichet was called before the meeting. On the Sunday evening, he put out a press release stating that he would be recommending to the Governing Council that the ECB should commence purchases of government bonds in a way that did not break the laws applying to the bank. For now, we can only speculate as to whether Trichet reached this decision independently or whether it was made by the politicians. We will doubtless find out when they publish their autobiographies. What form should the minutes and justifications take in such a situation? If they are written as though the decision was taken totally independently by the ECB, they will lack credibility. If they state that the decision was made under pressure from the highest political levels, this would be admitting to breaking the law. The reality, one hopes, is that Trichet was swayed by material new arguments, which can be stated in the minutes.

[40] Jens Stoltenberg (2016).

If the minutes do not mention any dissent, does this go against the “Duisenberg principle”? With collegial committees, the rules of procedure may mean that dissension is not disclosed for many years. Can the justifications then still be sound? We consider it most important that all of the relevant factors taken up at the meeting are mentioned. The breadth and every nuance of the debate must be communicated. So the minutes should also state that there were differences of opinion, and that not all members prioritised these factors in the same way. The justifications must be inherently clear and authoritative. But naturally it is important to communicate any formal dissent. But how does one get the media to focus on the issues rather than the personalities? The Icelandic central bank has resolved this dilemma as follows: The bank publishes the main justifications for its decision the same day that the decision is announced. It then publishes minutes a fortnight later which detail any dissenting opinions, but the names of dissenters are not disclosed until the following year in the bank’s annual report.

Besides the written justifications for a decision, the modern world often requires the decision to be explained at a press conference or in the media. This form of communication may be more oral, but it is important that it does not introduce information and arguments that are not included in the justifications in the minutes. Different words can be used, tailored to the audience, but the actual substance needs to be conveyed in full in the minutes. This applies whether it is a collegial committee, where it is generally the chair who speaks in public, or an individualistic committee, where the individual members all have to explain themselves publicly.

As mentioned earlier, the “Duisenberg principle” sets a standard that we believe should be followed. But it can be difficult to tell whether or not this happens. In countries where a verbatim transcript of committee meetings is published at a later stage, as is now the case at the Bank of England and has long been the case at the Federal Reserve, a comparison can be made between the minutes published in real time and the subsequent transcript. Even then, we cannot be entirely sure whether the “Duisenberg principle” has been followed to the letter. Some of the discussion may have taken place elsewhere.

For the justifications to reflect the path towards the decision, the following questions need to be answered in the affirmative:

- Do the external justifications reflect the internal decision-making process (the “Duisenberg principle”)?
- Did the process leading to the decision comply with applicable principles? Do the justifications state which items proved a challenge?
- Is there anything mentioned in press conferences or speeches that is not covered by the text of the minutes?

2.3.5. Criterion 4: The justifications should be formulated with expectations in mind

The interest rate decided on today is important, of course, but how the decision affects expectations of future interest rates is more important still. Professor Michael Woodford from Columbia University commented at a conference at Sveriges Riksbank in May 2005:[41]

> *“For not only do expectations about policy matter, but, at least under current conditions, very little else matters.”*

The justifications for monetary policy decisions must therefore be written with an awareness of the effect on interest rate expectations. But does the central bank actually know more

[41] Woodford (2005).

about the future than private actors do? Does it have anything to contribute? Does it know more than large companies and private banks about global growth prospects, demographic developments, oil prices and the economic behaviour of households and firms? Central banks have substantial analytical resources at their disposal, including many skilled economists. They may perhaps think that they are better at analysing developments than others, but this is not certain. The best contribution they can make to “accurate” interest rate expectations is to explain the basis for their decisions and clarify their reaction pattern. If outsiders understand how the central bank thinks and how it will react to news, this will provide the best foundation for interest rate expectations. The minutes should therefore be written in a way that sheds light on the bank’s reaction pattern.

Assume that the central bank bases its decision on a long-term real interest rate of 3 percent, while private actors have it at just 1 percent. The private actors will then base their actions on their own assumption, and assume that the central bank will eventually change its position to the “correct” real interest rate. When the central bank changes its position, it will follow an established reaction pattern, which ought to be familiar.

To reap the rewards of expectations channels, the central bank’s reaction pattern needs to be well known, both in terms of how it will respond to shocks in “normal” periods and how it can be expected to behave in more “abnormal” periods. When it comes to the latter, the central bank may perhaps be expected to manage knowledge and experience of previous “abnormal” periods at least as well as private actors. In “abnormal” periods, the balance between completeness and materiality in the justifications may shift in favour of the latter.

For the justifications to be formulated with expectations in mind, the following question needs to be answered in the affirmative:

- Are the minutes written in a way that sheds light on the bank’s reaction pattern?

Summary of the four criteria for central banks

Criterion 1: The justifications should be procedurally sound

- Are the formal framework and procedures for rate setting readily available?
- Is it possible to check whether the decision-making process has been followed?
- Is it clear who took part in the decision?
- Has reference been made to supporting documents?
- Is there a long delay between meeting and publication?

Criterion 2: The justifications should be functional

- Are the justifications logical?
    - Do they set out the premises, analyses, assessments and conclusion?
    - Do they convey whether the decision was hard or easy?
    - Do they state whether alternatives were considered?
    - What was the uncertainty, and what was made of it?
    - Do the justifications reflect the complexity of the issue?
    - Is there potential for differing interpretations of the conclusion?
- Is the language used clear?
    - Is it easy to follow the reasoning in the justifications?
    - Is there a summary?
    - Is the structure tailored to the target group(s)?
- Is the text written efficiently?
    - Will reading and analysing the justifications take an unnecessarily long time?
    - Is there a good balance between presenting "all relevant information" and "the most important information"?
    - Are the justifications sufficiently complete that they could stand alone?
    - Is there also an explanation of changes from the previous decision?

Criterion 3: The justifications should reflect the path towards the decision

- Do the external minutes reflect the internal decision-making process (the "Duisenberg principle")?
- What was the process leading to the final outcome? Which items proved a challenge?
- Is there anything mentioned in press conferences or speeches that is not covered by the text of the minutes?

Criterion 4: The justifications should be formulated with expectations in mind

- Are the minutes written in a way that sheds light on the bank's reaction pattern?

2.4 Illustration of the criteria with examples from selected central banks

In the following, we conduct a qualitative assessment of whether the minutes of a number of central banks satisfy the criteria defined above. The sample is somewhat arbitrary. Besides Norges Bank, we look at the Bank of England, Sveriges Riksbank, Danmarks Nationalbank, Seðlabanki Íslands (Iceland) and the European Central Bank. With criteria 1, 2 and 4, we can check whether the minutes satisfy the criteria. With criterion 3, the situation is different. It can be difficult to know whether or not the "Duisenberg principle" is observed. No outsiders are present, so it is impossible to check whether the external communication does actually reflect the internal deliberations.

2.4.1. Norges Bank

The decision-making body at Norges Bank is the Executive Board, which has eight members. The governor and two deputy governors are full-time employees, while the other five members are not employed by the bank. The governor chairs the Executive Board. This is a consensus-seeking collegial committee where the chairman provides a written recommendation. The number of rate-setting meetings has varied over time. There were nine a year until 2008, when there was an extra meeting on 15 October. There were then eight meetings a year from 2009 to 2011, and six from 2012 to 2017. From 2018, there will once again be eight meetings a year.[42]

The justifications for the interest rate decision – the "minutes" – are found in a document called "The Executive Board's assessment".[43] Resolution minutes have also been published since 2016. These originally excluded the interest rate decision, but the minutes of this decision too have been made public with effect from the meeting of 21 June 2017.

In June 2016, "The Executive Board's assessment" ran to almost 850 words. In 2017, the length varied between 650 and 675 words. At four of the year's rate-setting meetings, this assessment is published as part of a detailed monetary policy report. At the remaining meetings, the assessment takes the form of a press release. The amount of text is then only half that in the printed reports.

The "meeting" at Norges Bank is divided into two parts. The first formal session is preceded by a seminar (cf. the Bank of England's "pre-MPC meeting") lasting two to three hours. Here, the Bank's staff presents changes in conditions since the previous meeting and their projections. The Executive Board then holds the first part of its formal meeting, discussing the interest rate but without drawing conclusions. The Bank's staff prepares a draft version of "The Executive Board's assessment", which is circulated among the committee members for comment. One week later, the Executive Board meets for the second part of its formal meeting, at which it makes its interest rate decision and adopts "The Executive Board's assessment". The interest rate decision, justifications and monetary policy report are all published the following day. The governor is responsible for the monetary policy report, not the Executive Board.

The governor speaks on behalf of the Executive Board.[44]

Criterion 1: The justifications should be procedurally sound

[42] Press release of 4 May 2017.
[43] "The Executive Board's assessment" was first published on 16 March 2011.
[44] See the rules of procedure for Norges Bank's Executive Board, first adopted on 14 September 1994 and most recently amended on 16 December 2015: http://www.norges-bank.no/Om-Norges-Bank/Organisering-og-styring/Hovudstyret/Forretningsorden-for-hovedstyret/.

“The Executive Board’s assessment” makes clear reference to the underlying document that is the monetary policy report. This is printed in the same volume and is therefore readily available. The procedures, mandate and formal framework are clearly set out in the monetary policy report. The Executive Board’s rules of procedure are available online. At meetings where there is no monetary policy report, supporting documentation in the form of charts and tables is readily available on the same webpage. The decision and justifications are published simultaneously. “The Executive Board’s assessment” is signed by the chairman on behalf of the entire board. The resolution minutes state who attended the meeting. Criterion 1 is satisfied.

Criterion 2: The justifications should be functional

The text is constructed *logically*. The text can be broken down into premises, analyses, assessments and conclusion. Compared to other central banks, the justifications are very concise.

An interest rate decision forms part of a continuum of decisions and is therefore rather different to a supreme court judgement, which stands alone. With an interest rate decision, the focus can either be on an analysis of whether a change should be made to the decision made at the previous meeting, or on explaining why it is appropriate to set the interest rate at the level that will apply after the present meeting. The issue here is whether to justify the level considered to be “correct” at this point in time, or to justify the change from last time. “The Executive Board’s assessment” is structured as an explanation of the change in relation to the previous decision, but also as a decision on the interest rate level.

The uncertainties to which the Executive Board attached most importance are mentioned, and their implications for monetary policy are described.

Clear language is used. The text is very compact. Readers must turn to the monetary policy report – which the Executive Board does not approve but merely “takes note of” – for a more detailed explanation. There is a “head” but no “body”. The decision is stated precisely at both the beginning and the end of the document. This meets the needs of two groups: the media, who want the conclusion first and the reasoning afterwards, and more academically oriented readers, who prefer the analytical structure of premises, analyses, assessments and conclusion.

The text is *efficient*. The text is common to the whole committee.

Criterion 3: The justifications should reflect the path towards the decision

We have looked for wordings such as “The Executive Board paid particular attention to…” and “The Executive Board made a difficult choice…”, but failed to find any.

It was long a tradition at Norges Bank that the matter of whether a decision was “hard” or “easy”, and whether alternatives were considered, was broached at the press conference if questions were asked, but was not mentioned in the text adopted by the Executive Board. Thus the subsequent oral communication added flesh to the bones of the written justifications. This practice was not entirely in keeping with our principle of “nothing added, nothing taken away”. But such a principle can be hard to adhere to in practice.

Criterion 4: The justifications should be formulated with expectations in mind

Norges Bank publishes projections for the interest rate trajectory that the bank believes will result in the “best possible” development in prices and output. Economists might refer to this as the “optimal path” for interest rates. The bank has published these projections since 2005.

The interest rate path is, of course, dependent on many different factors, including developments in the global economy.

The text is written with a view to anchoring market participants' expectations, but as it is so compact, they need to refer to the text of the monetary policy report to find satisfactory detail. The Executive Board refers to the analyses in the report, but does not approve it. Market participants read the monetary policy report when performing their analyses. The report explains both the interest rate level and the change from the previous meeting.

2.4.2. Bank of England

The decision-making body at the Bank of England is the monetary policy committee (MPC). Its nine members consist of the governor, three deputy governors, the bank's chief economist and four external members. The external members are paid to work three days a week. It is an individualistic committee.

The committee holds eight rate-setting meetings a year. The bank prepares minutes of each meeting and publishes them at the same time as the interest rate decision. The minutes include a summary.

The MPC meets for longer than the Executive Board in Norway. The meeting is spread across three days. Before the formal meeting sequence begins, there is a half-day seminar ("pre-MPC meeting") where changes to conditions since the previous rate-setting meeting are presented by the bank's staff. This runs for two to three hours.

The first formal part of the meeting is normally held on the Thursday of the week before the actual interest rate decision. Here, the committee discusses how new data should be interpreted – a meeting on the "premises". The second part of the formal meeting is held the following Monday. The topic now is what is the right monetary policy stance given these new premises. Each of the nine members of the MPC prepares an assessment of around 1,250 words (about ten minutes) where they argue their case.[45] On Monday afternoon, the bank's staff distributes draft minutes based on what was said at the meeting on Thursday (premises) and earlier that day (justifications and conclusion). The third part of the formal meeting is held on the Wednesday. This is where the final vote takes place. Generally speaking, there are no changes from what the members said on Monday. Once the formal meeting on Wednesday is over, a revised draft of the minutes is distributed, and this is approved on Wednesday afternoon. The total time taken by the formal process is around five hours.

[45] It was decided in December 2014 to publish a verbatim transcript of this part of the meeting with a lag of eight years. The decision came in response to an independent review of the MPC's processes led by Kevin Warsh, a former board member at the Federal Reserve. The reasoning for publishing a transcript was as follows:

> *"It is […] responding to the independent Review of the MPC's processes by Kevin Warsh, a former Governor of the Federal Reserve, published today. […]As recommended by Governor Warsh, the MPC will publish, with an appropriate delay, written transcripts of those meetings at which policy is decided. The MPC believes that an 8-year delay for transcript publication would strike the right balance between preserving what Governor Warsh describes as a 'safe space' for Committee deliberation and bolstering the transparency and accountability of its policy decisions. The choice of this delay falls within Governor Warsh's recommended time-frame and, as he explains, balances the length of business and financial cycles with increased accountability, while also ensuring that MPC members are not constrained in their ability to make sound policy decisions. Such a deferral period will, he notes, put the Bank in high standing among developed economy central banks. The Bank will also publish, alongside those written transcripts, key staff inputs that informed the policy decision."*

See Warsh (2014).

The minutes and the monetary policy decision are published on Thursdays at noon. The bank also produces an inflation report four times a year (February, May, August and November), which is published together with the monetary policy decision and the minutes of the MPC meeting. The MPC takes more responsibility for the inflation report than the Executive Board does for the equivalent report in Norway. The inflation report is prepared by the bank's staff under the guidance of the MPC.[46] Although not all members of the MPC necessarily agree with all of the assumptions on which the projections are based, the projections and fan charts represent the MPC's best collective judgement of the outlook for inflation, output and unemployment, and the uncertainty surrounding the projections. The committee sits for a total of around eight hours including work on the projections published in the quarterly inflation reports.

All members of the MPC are expected to give speeches and argue their positions in public.

Criterion 1: The justifications should be procedurally sound

There is a list of who participated in the decision. Reference is made to the supporting documentation, and the justifications are at the heart of the minutes. The procedural framework is described in a readily accessible form. The bank's website provides an excellent overview of its procedures.

Criterion 2: The justifications should be functional

The justifications are constructed *logically*. It is clear that the committee discussed the premises and the associated uncertainty. The most important new data that the committee received ahead of the decision are mentioned, along with the committee's expectations for how they will affect GDP. They discuss the workings of the economy, the uncertainty in this regard, and what the committee concludes. The crux is the balance between how quickly inflation should return to the target level, and pressures in the economy. A good overview is provided of revisions to the projections in the previous inflation report. There is also an overview of external commentators' forecasts for GDP, inflation and the bank's key rate and monetary policy measures.

Clear language is used. The writing is elegant. But the text is long, and one wonders whether less might be more. However, readers are helped by dividing the text into two parts: a summary and the minutes proper.

The text is written *efficiently*. These are collective, edited minutes, even though the MPC is an individualistic committee. The minutes are written as an edited text that is common to the committee reaching the decision. All relevant arguments from the discussion are included. If

[46] The MPC takes ownership of the inflation report, which states: "The Inflation Report is produced quarterly by Bank staff under the guidance of the members of the Monetary Policy Committee. It serves two purposes. First, its preparation provides a comprehensive and forward-looking framework for discussion among MPC members as an aid to our decision-making. Second, its publication allows us to share our thinking and explain the reasons for our decisions to those whom they affect. Although not every member will agree with every assumption on which our projections are based, the fan charts represent the MPC's best collective judgement about the most likely paths for inflation, output and unemployment, as well as the uncertainties surrounding those central projections." The inflation report has five sections. The first four sections look at developments in financial markets; demand and output; the labour market; and costs and prices. The MPC largely just takes note of these sections and has only a few comments. Section 5 presents the prospects for the target variable for monetary policy: inflation. What is the outlook for inflation, and how is it performing against the target? The MPC discusses this section in great detail, and deals with it in the same way as the minutes. Section 5 and the minutes of MPC meetings complement one another. Section 5 of the inflation report analyses developments in the target variable, while the MPC meetings decide on the use of monetary policy instruments to bring inflation to the target level.

there is disagreement on the MPC, only the arguments behind the dissenting view are presented. Individual members do not write individual justifications from scratch.

Criterion 3: The justifications should reflect the path towards the decision

Even if all members of the MPC were in agreement and it was a unanimous decision, the decision may still have been difficult. They may have spent a great deal of time reaching a consensus, and alternatives may have been considered. This is not clear from the minutes. As at the other central banks, there will doubtless have been a weighing-up of different arguments. The secretariat that produces the draft minutes will, for practical reasons, often start from the previous set of minutes and make only necessary adjustments. The markets and other outsiders studying the minutes will also look for specific text and find it easiest if it follows a set structure. The nuances that are there tend to be very subtly formulated.

The information provided in press conferences and speeches is the same as that in the minutes – no more and no less. But there is no mention of what proved difficult or what required lengthy discussion.

Criterion 4: The justifications should be formulated with expectations in mind

The MPC does not publish an "optimal path" for interest rates, but presents projections for inflation, GDP and unemployment in the bank's inflation report based on the market's interest rate expectations and the continuation of other announced monetary policy measures. This is a different way of communicating with market participants to that of Norges Bank and the Riksbank in Sweden. It is not our place in this paper to comment on which form of communication is "best". But all central banks are acutely aware that market participants' interest rate expectations are crucial, and that the bank can influence these expectations through its communication.

The Chancellor of the Exchequer sends an annual letter to the Bank of England setting out the remit for monetary policy. In the 2013 letter, the chancellor referred to the special economic situation and asked whether the bank could, in the circumstances, provide even more explicit guidance than its traditional projections. The bank responded in the minutes published in August 2013:

> *"The Committee intends not to raise Bank Rate from its current level of 0.5% at least until […] the unemployment rate has fallen to a threshold of 7% […].The MPC stands ready to undertake further asset purchases while […] the unemployment rate remains above 7% […]."*

2.4.3. Sveriges Riksbank

The Riksbank's decision-making body is the Executive Board, which has six members who work full-time at the bank. It is an individualistic committee. The monetary policy decision is published the day after the meeting. The minutes are released around a fortnight after the decision. There are six rate-setting meetings each year. The Executive Board approves the monetary policy report at the same time as the interest rate decision.

The minutes of the Executive Board's meeting of 14 February 2017 comprised:

- A summary (501 words)
- Information on recent market developments and a summary of the economic outlook based on the "optimal path" for interest rates that the Executive Board discussed at the preceding meetings:

  - 26 January: Meeting of the “full monetary policy group”, full-day meeting with Executive Board and staff, around six hours
  - 30 January: Around three hours
  - 6 February: Around two hours
  - 14 February: Executive Board, around two hours

  The information is produced by the Bank’s staff and not by board members, but the text is approved by the Executive Board. (1,617 words)

- Each of the six board members’ justifications for their position (average of 1,139 words)
- The governor’s summary (415 words)

All board members give speeches and publicly argue for their voting position.

Criterion 1: The justifications should be procedurally sound

The Riksbank’s website provides a very full and clear description of the framework and procedures for monetary policy decisions. The minutes contain a list of who participated in the decision.

Criterion 2: The justifications should be functional

The justifications for monetary policy decisions are *logically* constructed. The analysis is described in the monetary policy report, which is approved by the Executive Board. There is a very detailed account of the premises, analyses, assessments and conclusion. Uncertainties are discussed.

The minutes are in *clear language*, but score worse on readability than all the other central banks bar the ECB, see 4.2 below.

The minutes include a brief summary.

Staff members provide information on the economic situation and forecasts for economic developments. This text forms part of the minutes, and the minutes are approved by the Executive Board.[47] The text can be interpreted as the Executive Board’s common understanding of the analysis. At other central banks, such as Norges Bank and the Bank of England, briefings of this kind form part of a seminar ahead of the formal meeting, rather than part of the actual meeting. The Riksbank’s minutes consist of a sequence of submissions from the various board members. The governor then summarises the discussion. Each submission is an independent justification of the individual member’s viewpoint. The individual members highlight what they placed most importance on when forming their view. It is unlikely to be the case that each member will mention all relevant factors. They probably pick out those that they believe to be the most significant. The minutes are individually written, contrasting with those of the Bank of England MPC, for example. They are *not written efficiently* in the sense that detailed study is required to ascertain whether all members are working from the same premises, analyses and assessments.[48]

[47] This is the result of a recommendation in Goodhart and Rochet (2011).
[48] Marvin Goodfriend and Mervyn King also believe that the minutes should record the differing points made at the meeting, rather than a sequence of individual formal presentations, see Goodfriend and King (2015).

Criterion 3: The justifications should reflect the path towards the decision

The minutes do not provide an insight into the process leading to the decision. Presumably there was some discussion, testing of arguments, and learning, but this is not clear from the minutes. If the minutes are read literally, it might appear that the meeting consisted of a series of monologues. This is unlikely to have been the case. But it may be that these submissions emphasise what members attached particular importance to this time around. As such, the minutes may help to shed light on the path towards the decision.

Criterion 4: The justifications should be formulated with expectations in mind

Like Norges Bank, the Riksbank publishes an "optimal path" for interest rates. This path illustrates what the board considers the "best" way to return to the inflation target. The monetary policy report presents arguments for the path presented, but we do not find a breakdown of the factors behind changes from the previous report as published by Norges Bank. It is, however, the Executive Board that is behind the monetary policy report.

2.4.4. Danmarks Nationalbank

The Danish central bank pursues a fixed exchange rate policy against the euro. The Board of Governors has three members who meet daily. If the ECB changes its key rate, the Nationalbank will normally change its key rate immediately afterwards, but not always. If the bank needs to buy or sell currency to keep the krone stable against the euro, it will eventually also change its key rate.

Occasionally, the Nationalbank takes extraordinary action. On 5 February 2015, it published such an unscheduled press release. The Swiss National Bank's decision to abandon its floor for how far the franc was permitted to rise against other currencies sparked major international capital movements and upward pressure on the Danish krone. As well as a reduction in Danish interest rates, extraordinary measures were introduced such as suspending the issuance of Danish domestic government bonds.

All board members may speak publicly, but it is a collegial committee. It is not inconceivable that differing views on monetary policy might be expressed.

Criterion 1: The justifications should be procedurally sound

The Board of Governors' procedures for making monetary policy decisions are described in general terms on the bank's website. It is not, however, possible for the public to see which members were present for each decision.

Criterion 2: The justifications should be functional

The justifications are *logical*. Given the monetary policy regime, decisions do not require lengthy explanation.

Clear language is used. With such a straightforward regime, there is no need for detailed reasoning for decisions. When more extraordinary measures are announced, such as the decision of 5 February 2015 to suspend the issuance of domestic government bonds, a clear explanation is given, but in a press release.

The text is *efficient*. The text is collectively written.

Criterion 3: The justifications should reflect the path towards the decision

There is no public information that reflects the board's deliberations.

Criterion 4: The justifications should be formulated with expectations in mind

Market participants' expectations under this regime depend primarily on expectations for euro interest rates and communications from the ECB, but also on the credibility of fiscal policy in supporting this regime.

2.4.5. Seðlabanki Íslands

Iceland has a floating exchange rate, and monetary policy is geared towards an inflation target of 2½ percent. The formal regime was introduced on 27 March 2001. The law was adjusted in February 2009.[49] A monetary policy committee makes interest rate decisions. The committee comprises the bank's governor, deputy governor and chief economist, and two external experts appointed by the government for a term of five years. The committee holds eight rate-setting meetings a year. The interest rate decision is published the morning after it is made, along with a "statement" of almost 300 words explaining the decision. The text is approved by the committee. Actual minutes are published 14 days after the meeting. If there are any dissenting opinions on the committee, this will be stated in the minutes, but the dissenters are not named until the bank's annual report is published at the end of the first quarter of the following year.

Rate-setting meetings are divided into three sessions. The first comprises a review of new data and an assessment of the economic situation. In the second, there is a review of monetary policy, and the interest rate decision is made. In the third, the monetary policy statement is prepared. The committee works together on the statement and aims to reach a consensus on both the message and the text.

All committee members may express themselves publicly on monetary policy, but they may not comment on other members' views. They are not permitted to speak in the week leading up to a rate-setting meeting. Only the governor may speak publicly on the days a rate-setting meeting is held.

Four times a year, when the bank publishes its economic forecasts, the monetary policy committee holds meetings stretching over two days. Otherwise, the meetings normally last 1 ½ day.

Criterion 1: The justifications should be procedurally sound

The procedures for making interest rate decisions are described. Minutes and documentation are readily available. This criterion is clearly satisfied.

Criterion 2: The justifications should be functional

The justifications are constructed *logically*. *Clear language* is used, and the justifications are written *efficiently*. The minutes are in a collective, collegial form. The views of the minority are presented "relative" to the collective text. This criterion is satisfied.

Criterion 3: The justifications should reflect the path towards the decision

[49] The law was revised again in July 2013, when the central bank was given an explicit mandate to promote financial stability, and a financial stability council was created.

The minutes follow the same pattern as most other central banks. They have a fairly similar structure. It is clear what the committee spent particular time on, and which deliberations were difficult.

Criterion 4: The justifications should be formulated with expectations in mind

The analyses are forward-looking. The central bank publishes forecasts of economic developments four times a year. The horizon for these forecasts is three years. It is the bank that "owns" these forecasts, rather than the monetary policy committee. The bank explains this as follows:

> "*The structure here is such that the ownership of the forecast lies with the Bank, not the MPC. More specifically, the forecast is generated by the Economics and Monetary Policy Department and presented to the Governor and Deputy Governor, who would sometimes make specific comments on the forecast and its assumptions. The final forecast is then presented to the MPC along with alternative scenarios and a risk assessment. Individual MPC members can therefore have different views on the economic outlook, but with three of five MPC members coming from the Bank (two are external), one can say that the forecast reflects the majority view."*[50]

On the other hand, much of the prospective analysis is discussed in the minutes. So this criterion is definitely satisfied.

2.4.6. European Central Bank

The ECB's primary objective is to maintain price stability, defined as inflation below, but close to, 2 percent in the medium term. The decision-making body is the Governing Council, which consists of six full-time employees who work at headquarters in Frankfurt plus the euro area's 19 national central bank governors. In principle, a monetary policy committee with 25 members may seem a very large body if there is to be a form of communication where members listen to one another and develop their arguments. In the research world, the jury is still out on what is the ideal size of a committee. Anne Sibert, Professor of Economics at the University of London, is one of the leading experts in the field. In a conversation with one of the authors of this paper, she suggested that her conclusion is based not on research but on her own experience of dinner parties. This indicates that a group of between six and eight people is the ideal size for a meaningful conversation around the table.[51] The ECB's 25-strong committee clearly would not squeeze into Sibert's dining room.[52]

The ECB holds eight rate-setting meetings a year. The Governing Council considers and approves the introductory statement to the press conference that the president holds the following day. This explains the decision, but does not mention what any minority may have opined. Any dissension is shown in the minutes published around a month later. The minutes published in January 2017, for example, state:

> *"A few members voiced an initial preference for the first option presented by Mr Praet, whereby purchases would be continued at a monthly pace of €80 billion for an intended horizon of six months, while expressing readiness to join a consensus*

[50] E-mail from Rannveig Sigurðardóttir to Jan Qvigstad of 12 April 2017.
[51] Sibert (2006).
[52] At no supreme court are decisions reached by as many justices as there are members of the ECB's Governing Council. A plenary session of the Norwegian Supreme Court can involve up to 19 justices. In Sweden, the maximum is 14 (two of the 16 justices will always be assigned to the Council on Legislation). The Danish Supreme Court does not hold plenary sessions, while the Finnish Supreme Court has 19 justices including the president, and may hold plenary sessions.

forming on the second option […]. "A few members could not support either of the two options […]."

All members of the Governing Council (the six full-time employees in Frankfurt and the 19 national central bank governors) may speak publicly on monetary policy.

Criterion 1: The minutes should be procedurally sound

The regime and the system are explained well on the ECB's website. Criterion 1 is satisfied.

Criterion 2: The minutes should be functional

The decision is constructed *logically*, but the language is *awkward and long-winded*. On the other hand, this is a collective edited text where dissenting opinions are disclosed and related to the arguments in the collective text. In this sense, it is *efficient* writing.

Criterion 3: The minutes should reflect the path towards the decision

As at other central banks, the minutes follow a standard format that changes little from meeting to meeting. Many of the same words are repeated time and time again, and variations in adjectives can be the only subtle differences. Classic examples include:

- "vigilance", where the adjective preceding this word reflected the probability of a rate increase at a subsequent meeting
- "monitor closely" versus "monitor very closely"
- "measured pace"

This kind of "central bank speak" is aimed at a small group of external experts (ECB watchers, Fed watchers, Bank of England watchers, etc.). We think it would be better for the ECB to move away somewhat from a standard template where it simply adjusts a few code words, and increasingly allow the minutes to reflect better what points in the process leading to the decision caused the greatest difficulties, what these difficulties actually consisted of, and why the Governing Council eventually decided the way it did.

Criterion 4: The minutes should be formulated with expectations in mind

ECB president Mario Draghi commented in a speech in London on 26 July 2012:

"*But there is another message I want to tell you. Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough."*

The market reacted immediately to the president's "whatever it takes" speech, and yields fell. This formulation is still the cornerstone of the ECB's forward guidance.

At the bank's meeting of 4 July 2013, it also gave a longer account of its forward guidance:

"The Governing Council expects the key ECB interest rates to remain at present or lower levels for an extended period of time. This expectation is based on the overall subdued outlook for inflation extending into the medium term, given the broad-based weakness in the real economy and subdued monetary dynamics."

We consider that criterion 4 is satisfied.

3. Supreme courts[53]

3.1. Introduction and scope

This chapter looks at the justifications given for supreme court judgements. Our point of departure is our own supreme court in Norway, but much of what we single out as characteristic of this court will also apply to those in other countries. Where there are differences that may be of relevance for what make good justifications for a judgement, we will endeavour to point them out.

As discussed in the opening chapter, the exercise of authority must be reasoned. It goes without saying that a supreme court must give justifications for its decisions. We look at this further in 3.5 below.

We do not formulate criteria for reaching the right decisions. Our interest is in criteria for the justifications given for a decision. There is, however, reason to believe that the two are related, with good justifications supporting sound and correct decisions.

The Norwegian Supreme Court hands down some 2,500 legal decisions each year. These fall into various categories. The requirements and traditions for explaining these decisions vary widely according to the type of ruling – whether it takes the form of a judgement, interlocutory order or procedural decision. It may also be important which part of the supreme court makes the decision – plenary session, grand chamber, chamber, appeals selection committee, preparatory judge or presiding justice.[54]

We look exclusively at decisions reached following oral proceedings in chamber, grand chamber or plenary session – altogether around 100-120 cases a year. These are generally decisions on cases that have been referred to the court because they raise an important matter of legal principle.[55] Normally these will take the form of an appeal against a judgement – a ruling on a civil dispute or a criminal conviction. Exceptionally, the court may also rule on an appeal against an interlocutory order settling a procedural issue. An example of this is its judgement on the legality of the police's seizure of video material from a documentary filmmaker.[56]

3.2. A word on procedures and terminology

The starting point for the court's decision will be the oral appeal proceedings. The parties will have made factual and legal submissions ahead of the appeal proceedings. These make up the factual and legal material that the parties may wish to call on in the proceedings. If the

[53] This chapter makes numerous references to the journal *Norsk Retstidende*, normally abbreviated to *Rt.*, in which Norwegian Supreme Court judgements were published up until 2015. Each reference is to the year and opening page number, e.g. *Rt. 2015 p. 1286*. *Norsk Retstidende* is electronically searchable. Judgements from 2016 onwards are available via the legal website www.lovdata.no or the court's own website www.hoyesterett.no.

[54] The laws of procedure set out detailed rules on how judicial rulings are to be made, including judgements, interlocutory orders and procedural decisions – see Section 30 of the Criminal Procedure Act and Section 19-1 of the Dispute Act. The required composition of the Supreme Court when making different kinds of decisions is set out in the Courts of Justice Act, the Criminal Procedure Act and the Dispute Act, see in particular Sections 5 to 8 of the Courts of Justice Act, Section 54 of the Criminal Procedure Act and Section 19-2 of the Dispute Act.

[55] For appeals against judgements, see Section 323 of the Criminal Procedure Act and Section 30-4 of the Dispute Act. Note that leave to appeal may be limited to parts of a case or to specific justifications for appeal.

[56] *Rt. 2015 p. 1286*.

court is to decide a factual issue in the case, the procedural rules permit the court only to consider evidence that the parties have invoked in the oral appeal proceedings.[57] There is no equivalent restriction when deciding legal issues. Correct application of the law is entirely the responsibility of the court.

Once the oral appeal proceedings are completed, and the case closed for judgement, the members of the court meet for deliberations. This normally takes place on the day after the appeal proceedings are concluded. It is a structured discussion. The presiding justice – the chief justice or otherwise the most senior justice – begins by reviewing the case and the arguments, and presenting and justifying his or her view of the factual and legal issues in the case. The other justices then speak in order of seniority. There are normally two rounds of presentation and discussion, and often also a couple of more informal rounds concerning specific problems. It is assumed that the justices will be open and responsive to the opinions and arguments of their colleagues in this process. They must not go into the deliberations with fixed opinions. It is not uncommon for a justice to abandon his or her original position during the deliberations and concur instead with that of other members of the panel.

Once the discussions are complete, one of the justices is appointed to draft the leading opinion on behalf of the court. Where there is disagreement over the conclusion, a second justice is appointed to prepare a dissenting opinion on behalf of the minority. The draft opinions are then distributed to the other justices in the case, who provide written feedback. The justices who prepared the opinions adjust their drafts accordingly, and the revised drafts are distributed to the others. The justices then meet for a conference where they review the revised drafts in depth. Some further changes may be made, and the written justifications are then final. The judgement is handed down by means of an oral vote. The justice delivering the leading opinion votes for the conclusion he or she reached, implicitly referring to the justifications drawn up. The justice delivering the minority opinion does the same. The other justices then agree with either the justice delivering the leading opinion or the justice delivering the minority opinion "in all material aspects and with his or her conclusion". This entails an endorsement of both the conclusion and the key aspects of the justifications. The presiding justice votes last and formulates the wording of the final judgement. The outcome of the vote is the outcome of the appeal case.

The legal rule is thus that cases are decided by an oral vote. Each justice votes for the conclusion he or she has arrived at and justifies his or her vote. Under the law, each justice may submit his or her own full justifications, but they generally concur with the reasoning presented by the author of the leading or dissenting opinion as described above. There are, however, exceptions where a number of justices depart from the leading or dissenting opinion on certain aspects of the conclusion.[58]

The outcome of the deliberations will generally also be the outcome of the final judgement, but again there are exceptions. A great deal of work goes into the case in the preparation of the judgements and the justices' review of the draft judgements. It may be that this work convinces one or more members of the panel that the conclusion he or she championed in the deliberations does not hold, and so votes differently. Writing's important and formative role in the thought process is described well by Toril Moi in her article "Å skrive er å tenke" [Writing is thinking].[59]

In Norwegian law, it is the oral vote of the supreme court that settles a case. The decision is made and is binding once the last of the justices – the presiding justice – casts his or her

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[57] There are a few exceptions to this which we will not go into here.
[58] See, for example, *Rt. 2015 p. 1388*.
[59] See article in *Dagens Næringsliv*, 10 August 2013. For a more general discussion of language and awareness, see Moi (2017), Chapter 10.

vote. However, the written text is viewed as the final judgement and is referred to as such. With a central bank's interest rate decisions, the term "minutes" is often used for the written record of the decision and the justifications for it. When it comes to supreme court judgements, it is more natural to refer to the explanation of the decision as the "justifications". "Minutes" might nevertheless be an appropriate formal designation, since the decision and the justifications given for it are arrived at in an oral procedure.

3.3. Public reasoning – a brief historical review

It has not always gone without saying that the supreme court as an instrument of authority must explain its decisions. From the foundation of the Norwegian supreme court in 1815 until 1863, only the outcome of its judgements was made public. Each justice presented and explained his opinion of how the case should be resolved and why, but this was not made public. The judgement did not disclose the justifications for the court's conclusion or any dissension.

As early as 1821, Christian Magnus Falsen, the father of the Norwegian Constitution, proposed to the Storting – the Norwegian parliament – that the supreme court should publish each justice's opinion and reasoning. His proposal was not heard. The battle for public disclosure continued for more than 40 years, and was particularly intense in the 15 years leading up to 1863 with a long series of bills being defeated.[60] But in 1863 one such bill was finally passed. Its main provision was: *"The Supreme Court shall in orally transacted cases vote in public."*

As noted by Langeland,[61] this new regime with the publication of the supreme court's opinions was radical for its time. Few countries had similar levels of openness about their highest courts' voting and reasoning. Today, the supreme court's fight against transparency seems bizarre. It is hard to conceive of the court operating under a cloak of secrecy about its opinions and its justifications. It would then lack the necessary legitimacy and credibility. It would not be able to function as a court of precedent. For the supreme court's application of the law to be reflected in other cases, it is essential for the legal rationale to be made publicly available.

3.4. The right to an explanation under national and international law

Even under the secretive regime at the Norwegian supreme court up until the act of 11 April 1863 entered into force in 1864, voting had to be justified, albeit behind closed doors. The justices argued their opinions, which were recorded, but the justifications for the decision were not made available to either the parties or the public. When looking at the criteria for good justifications in this paper, it is exclusively the information that is made public that we have in mind. The considerations that make written justifications necessary in the first place also dictate that they should be made publicly available.

For both criminal and civil cases in Norway, including cases testing the exercise of administrative authority, the laws of procedure contain detailed legal rules on disclosing the justifications for decisions.[62] Similar requirements are set out in Article 95 of the Norwegian Constitution and in the European Convention on Human Rights (ECHR)[63] and International

[60] The battle is described in Hallager (1915), pages 131-136, 218-221, 318-322 and 344-351, and Langeland (2015), pages 69-374.
[61] Langeland (2015), page 372.
[62] Sections 39 to 41 of the Criminal Procedure Act and Section 19-6 of the Dispute Act.
[63] Article 6(1).

Covenant on Civil and Political Rights (ICCPR)[64], which give the individual the right to a "fair trial".

All of these rules on explaining decisions naturally also apply to supreme court judgements. We see no reason to look in detail at the requirements for explanations in national and international law, but our review of how the Norwegian supreme court accounts for its decisions will touch on some aspects of these requirements. Very generally, it can be said that the court, the justices, the parties, their representatives and the nature of the case must be identified. There must also be an account of the parties' claims and the basis and key features of their arguments; the court's position on the claims presented; and the facts and application of the law that the court has relied on in reaching its conclusion.[65]

3.5. Considerations that the justifications for supreme court judgements must address

In a liberal democracy such as Norway, it goes without saying that the exercise of authority must be transparent and reasoned. This self-evident starting point must also apply to supreme court judgements. The court's exercise of authority may have far-reaching consequences for the parties to the case, not only in serious criminal cases, but also in civil disputes. Those directly affected by the decision naturally have a right to know why the court ruled the way it did.

In 2009, the Norwegian Supreme Court considered the issue of whether it contravened the right to a fair trial for the matter of guilt to be decided in the district court by a jury without explanation.[66] In the leading opinion, Justice Indreberg summed up the considerations that the convention bodies had emphasised concerning the duty to give reasons under the ECHR's rules on the right to a fair trial.[67] She noted:

> *"To sum up, one might say that the requirement that judicial decisions must be adequately reasoned is intended to ensure rigorous assessment, permit scrutiny and provide an effective right of appeal."*[68]

This is also an appropriate summary of the considerations that the justifications for supreme court judgements must address in respect of the parties. The supreme court is the court of final instance under Article 88 of the Norwegian Constitution, and so its judgements cannot normally be appealed to a higher court. One important exception in practice is cases concerning the application of international conventions, where there is an individual right to appeal to the convention bodies, first and foremost the European Court of Human Rights (ECtHR) and the UN's Human Rights Council (UNHRC). Even where the supreme court's judgements cannot be appealed, this does not take anything away from the need for the parties to be able to scrutinise its decision – quite the opposite.

The Supreme Court's exercise of authority in society extends beyond the parties to its cases. It also has more general social implications. One fundamental social effect of supreme and other court rulings is that they make it clear that the rule of law is to be respected and

[64] Article 14(1).
[65] For the requirements in national law, see in particular Sections 39 to 41 of the Criminal Procedure Act and Section 19-6 of the Dispute Act. The most important provisions of international law concerning the content of judgements are those on the right to a fair trial in ECHR Article 6(1) and ICCPR Article 14(1) as interpreted by the convention bodies.
[66] *Rt. 2009 p. 750.*
[67] ECHR Article 6(1) and ICCPR Article 14(1).
[68] How the apparent dichotomy between jury decisions and public explanation is resolved is explored further in the discussion of the judgement in 2.7.3 below.

observed. It is in these social effects that there are similarities – but naturally also differences – between a central bank's exercise of authority through its interest rate decisions and a supreme court's exercise of authority through its judgements.

It is essential for the liberal democracy we wish to be that the supreme court's exercise of authority takes the form of decisions that are – and are also perceived to be – scrupulous and entirely adequate. Openness and transparency are prerequisites for scrutiny. Openness, transparency and scrutiny are also clear prerequisites for the supreme court to inspire the confidence in society that is necessary for the court to adequately discharge its social role.

One important social implication of supreme court judgements is that they set a precedent. This means that the court's application of the law is to be reflected in other cases where similar legal issues arise. A judgement will thus have legal implications for others besides the parties to the case in question. The decision has a kind of "legislative" effect through the clarification and possible development of the law that it entails. It is evident that this effect needs to be explained, at least insofar that the application of the law that is to serve as a precedent needs to be highlighted and made clear.

The Supreme Court's interpretation of the law may be fairly obvious. It may entail a broadening or narrowing of a legal rule. This can be seen as a pure clarification of the law. Other applications of the law can entail a development of the law which establishes an important principle. It is important that the application of the law on which a decision is based is clearly described. This will form the starting point for establishing the decision's precedential effect.

The "legislative" effect of supreme court judgements also has implications for the Storting as the legislature. That supreme court judgements have a precedential effect and thus a legislative effect is intentional and entirely legitimate. But one important aspect of its decisions is that this effect must be made loud and clear in the minutes. This gives the Storting the opportunity to take corrective action if it disagrees with the legal principle on which a decision is based. Decisions and their justifications may also uncover weaknesses in the system that need to be addressed.[69] One historically important example is a series of cases on the constitutionality of legislation that the supreme court decided in the early decades of the 20th century. A number of these cases were decided by a narrow majority of 4-3. This clearly illustrated that chance in the composition of the court could be critical in the most important cases of all for society, and also the risk that a law could be set aside as unconstitutional even where only a minority of the full supreme court agreed. This was the background to the law of 1926 establishing that the supreme court may only set aside legislation as unconstitutional if it sits in plenary session.

Aspects of the Supreme Court's business may challenge other public institutions by overruling political decisions. This is clear in the supreme court's control function over these institutions. The Supreme Court ensures that legislation does not contravene the Norwegian Constitution; that there is no conflict between legislation and human rights conventions that have been incorporated into Norwegian law to rank above other legislation; that the requirements of EEA law and guidance on its application are respected; and that administrative decisions cannot be rejected as invalid under the relevant rules.

The discharge of these control functions is important for Norway as a liberal democracy. But the fact that the courts – in practice the supreme court – can intervene in the exercise of authority by democratically elected bodies warrants strict requirements for the justification of such intervention by the supreme court. Unsurprisingly, the Supreme Court's exercise of this supervisory authority – and in particular its overseeing of the constitutionality of legislation –

[69] The Storting can take corrective action by amending existing laws or passing new ones.

has been and remains subject to debate. This debate is not the topic of this paper, but confirms the need for detailed and clear justifications for its decisions.

The application of the law often involves an element of discretion. The interpretation or priority given to a legal rule, judicial decision or other legal source may be uncertain and depend on subjective assessments. This exercise of discretion in the application of the law is not a matter of the judge having a free hand to do as he or she personally sees fit. The exercise of discretion will be constrained by traditional legal sources such as the purpose of the legislation, the *travaux préparatoires* and related legal practice. Despite these constraints, the justices may take different views.

Take the Norwegian concept of *reelle hensyn*, which may well be involved in a judge's exercise of discretion. Translating literally as "real considerations", but perhaps more meaningfully as "equitable considerations", they are difficult to define precisely. Torstein Eckhoff calls them "assessments of the quality of the conclusion",[70] and this can provide a good starting point. Equitable considerations may vary in nature. For example, they might be the need for a simple legal rule that brings predictability, or the need to find a reasonable solution in the specific case. Equitable considerations may be anchored in statements in the *travaux préparatoires*, but they may also to a greater extent be the judge's more personal, subjective assessments. The lie detector ruling is an example of a judgement where equitable considerations – due process and personal security – were crucial in the outcome, and where these considerations could partly – and only partly – be anchored in legislation and *travaux préparatoires*.[71]

Which equitable considerations can and should be taken into account, and the importance placed on them, may be assessed differently by the supreme court justices. In the theory on legal sources, this is dealt with only generally, and there is no consensus.[72] The framework for what can be called on as equitable considerations, and the weight given to these considerations, are not, however, our topic here. What matters to us is that the judgement clarifies what the justice relies on in his or her exercise of discretion. There will be a particular need for this when the judgement could interfere with decisions made by political authorities. The more a decision relies on discretionary considerations on which opinions may be divided, the more challenging the decision will be. And the more important it will then be to provide an open and full account of the discretion exercised.

3.6. Criteria for good justifications for supreme court judgements

3.6.1. Introduction

We established above that decisions by public authorities need to be reasoned. This includes supreme court judgements. The criteria we believe to be important for the justifications for supreme court judgements are:

1. The justifications should be professionally sound
2. The justifications should be functional
3. The justifications should be open, honest and complete
4. The justifications should be formulated with the judgement's normative effects in mind

These criteria are discussed in more detail below. To some extent, they overlap. Aspects we assign to one criterion may be equally at home under others. For example, for the minutes to be "professionally sound", they must naturally also be "clear" and "honest" and reflect the

[70] Torstein Eckhoff (2001).
[71] *Rt. 1996 p. 114*. See more detailed discussion of the judgement in 3.7.2 below.
[72] Torstein Eckhoff (2001), pages 371 ff.

decision's role as a precedent. The classification into criteria could thus be performed in numerous ways.

We have opted to use the modal verb "should" in our criteria, primarily to indicate that they are a matter of opinion. The criteria we define are not objective truths and are not being proffered as the only possible way of expressing how judgements should be reasoned. We believe that the four criteria suitably reflect the principles behind the requirement in national and international law that decisions should be explained. But it is not hard to see the modal verb "must" as being equally appropriate for the most part. If, for example, in our third criterion we take "open" as the opposite of "concealed", and "honest" as the opposite of "untrue", few would object to a requirement that the justifications *must* be open and honest.

We would also stress that it cannot be taken for granted that the criteria will be universally applicable to all national supreme courts. Conceptually, they have been formulated to suit the judgements of our own supreme court and those of the other Nordic countries that serve as courts of precedent, and also with common law supreme courts, such as that of the UK, in mind. The criteria as they stand will not necessarily suit other types of supreme court, such as courts of cassation that do not screen appeals in order to hear only a small number concerning matters of principle, but instead hand down judgements on thousands of appeals. With decisions of that kind, there will be little discussion beyond a very specific assessment of whether there are errors in the lower court's judgement that indicate that it should be overruled. Good justifications in these cases will inevitably be rather different to those of courts that cherry-pick cases specifically to make a material contribution to the clarification and development of the law. What constitute good justifications will also to some extent reflect the judgement-writing tradition in each particular country.

3.6.2. Criterion 1: The justifications should be professionally sound

It almost goes without saying that a supreme court judgement must be (and be perceived to be) professionally produced with a logical structure. There is an implicit requirement for linguistic clarity and legal quality. The judgement must quite simply be (and be perceived to be) entirely adequate and technically sound – a good piece of legal craftsmanship.

As mentioned earlier, there are requirements for the formulation of judgements in the Norwegian Constitution, the European Convention on Human Rights (ECHR) and International Covenant on Civil and Political Rights (ICCPR), and, not least, Norway's laws of procedure. These requirements must naturally be satisfied by supreme court rulings. Within the bounds of national and international law, the court's judgements follow a set pattern. With the exception of some more technical requirements (such as identifying the court, justices, parties and so on), the requirements are relatively discretionary. The considerations underlying the very need for written justifications are key when we look at what make good justifications.

Judgements should follow a set format. This signals that there is a framework for how cases are to be heard, and decisions reached. For the most part, this framework is provided by the laws of procedure setting out rules for civil and criminal cases. Like other legal rules, these are, of course, publicly available, but they are not necessarily well known among the general public, at least not in any detail.

It is important that the framework and procedures are readily accessible so that decisions are understood. The actual format of Norwegian supreme court judgements will largely be clear to anyone who reads a few. The court's judgements are published on its website: www.hoyesterett.no. The court's formal framework and procedures are also presented on its website for the most part. In addition, there is information on the kinds of cases heard by the

court, and on aspects of their consideration. It is harder, however, to find information on the important part of the process that takes place between the conclusion of the oral appeal hearing and the final vote and pronouncement of the judgement. While information on this is provided in annual reports and speeches which can be accessed via links from the website, it has to be actively tracked down and could therefore be made easier to find.

The judgement always begins by specifying the case, the court's case number, the parties and any interveners, and – in cases concerning the constitution or international obligations – whether the State is participating as set out in the Dispute Act.[73] The identification of the parties is important for who the decision will be directly binding on. The judgement must also specify the claim(s) being reviewed. The judgement will normally preclude any further cases between the same parties concerning the same claims.

This is followed by an account of the vote. The minutes make it clear which justices heard the case. There is therefore no ambiguity about who was involved in making the decision. As mentioned above, the judgement is handed down by means of an oral vote, and once the parties etc. have been specified, the results of this vote are presented, beginning with the justice delivering the leading opinion. He or she normally starts by presenting the main subject of the case and the background to the case. There is then a brief account of the history of the case, i.e. the judgements of the district court and high court, changes to the case along the way, the appeal to the supreme court, any restrictions imposed by the appeals selection committee in its approval, and any important aspects of the preparation for the appeal, such as the appointment of experts.

The next topic for the justice delivering the leading opinion is to set out what the parties are claiming. This part of the minutes is also important. It needs to show the parties that their claims have been understood, which is important in turn for the losing party to accept the decision made. The record of the parties' claims is also important because it may have implications for the precedential effect of the judgement. The judgement is required by law to state each party's claims ("prayer for relief") and the justifications given for them. The justifications for the "prayer for relief" are the facts on which the party's claim is based – for example, that he has used the property as his own for 20 years believing in good faith that he was the owner and has therefore now asserted title to it.

If the appeal concerns a dispute over the facts of the case, the disagreement should be presented here. The same applies when there is a dispute over the application of the law. This is followed by the most important part of the judgement, namely the justice's justifications for his or her opinion and the conclusion for which he or she is voting.[74] The other justices' reasoning and votes follow.[75]

If there is any dissent, this will, in practice, be captured by a second opinion. Previously it was common for the dissenting opinion to be structured in largely the same way as the leading opinion, as a complete stand-alone rationale, with the difference that there was no separate presentation of the facts and the parties' claims. Today, it is much more common for the dissenting opinion to concentrate on the reasons why the author is unable to concur with the leading opinion's reasoning or conclusion. The emphasis is on the differences between the two opinions. This makes the judgement easier to read, and the differences between the two opinions clearer and easier to see. This, in turn, may have implications for the scope of the precedent set by the majority opinion. In some extraordinarily important decisions, however, dissenting opinions are still largely structured as stand-alone opinions. This is natural, because it gives the justice delivering the dissenting opinion an opportunity to

[73] Section 30-13.
[74] See 3.6.3 and 3.6.4 below.
[75] Described in 3.2 above.

build and justify his or her arguments in more detail. The shipping tax judgement of 2010 provides an example of a minority opinion of this kind.[76]

The description above has been written with civil cases in mind. The statutory requirements for the design of judgements in criminal cases are slightly different. There are certain aspects of the district court's judgement that the supreme court cannot test, first and foremost the factual basis for the decision on whether or not the accused is guilty as charged. What the Supreme Court can test is the application of the law, the case procedures and the sentence, so long as the appeals selection committee has approved this in the specific appeal case. In general, there are only limited statutory requirements for the supreme court judgement to reproduce the claims of the parties in criminal cases. The justifications should nevertheless reflect the key aspects of these claims. The judgement must also, of course, specify the defendant, and the leading opinion should set out the history of the case, the nature of the appeal to the Supreme Court, and the justice's position on the appeal and reasoning for his or her conclusion. The other justices then vote as described above for civil cases.

3.6.3. Criterion 2: The justifications should be functional

If the justifications for a supreme court judgement are to be functional, they must be sufficient, efficient, clearly formulated and logically constructed.

For the justifications to be *sufficient*, the decision must be fully explained. There must be reasoned answers to the factual and legal questions raised by the case. The justifications must, of course, state the conclusion drawn by the court, and at the very least what was particularly important to the author in reaching that conclusion.

The justifications should also be *efficient*. With the proviso that key points and issues must not be omitted, it should not take the reader any longer than necessary to pick up the arguments and outcome. This also means that decisions need to follow a set format. We looked at Occam's razor in 2.3.3 above on central banks. Only factors relevant to the justifications should be included. This – and the need to restrict the discussion for reasons of materiality – applies equally to court judgements. There is, however, one important exception which does not apply in the same way to interest rate decisions: supreme court judgements must discuss the parties' claims even if they have no bearing on the decision made. This needs to be explained. Sometimes there may also be a need to put to bed counterarguments that carry little weight in reality, but where there is a need to explain why this is so.

The justifications must be *clear*. They must be written in a way that can be understood and cannot be misunderstood. It is important that the decision is well written. The language and sentence structure must be as simple as possible. The text must be digestible, and ideally without this being a long and difficult task. Some judicial decisions will, however, need to include discussion of complex factual or legal issues. The discussion will need to reflect this complexity. It is important that the complexities are discussed and assessed, and that there is no "dumbing down" to the point that key points and qualifications are omitted. In general, however, the discussion should not be any more complicated than is necessary to throw light on the factual and legal issues raised by the case. Good language is always important, however. Simple sentence structures, without an excess of qualifying clauses and foreign words, will generally be possible and very much desirable even when discussing complex issues.

The justifications must also be *logically* constructed, and the conclusion must emerge as a logical consequence of the discussion. This requires an account of the premises, analyses,

[76] *Rt. 2010 p. 143*. See more detailed discussion of the judgement in 3.7.3 below.

assessments and conclusion in a structure where none of these elements is left hanging in the air.

While the justifications must be clear, for whom must they be clear? Formulations of legal issues and discussions may be clear to readers with legal expertise, but lead to questions and doubts for others. This can cause problems when formulating supreme court judgements that have not only consequences for the parties, but also wider social implications.

One important aspect of a supreme court judgement is its precedential effect. In essence, this means that the chosen application of the law is also to be applied in other cases raising equivalent legal issues. The judgement should therefore be designed with a view to creating clarity for those who will need to apply the principle that the judgement establishes. Often this means other lawyers, which means that legally precise formulations are particularly important. But the precedent may also be of interest to a wider cross-section of the public – for example a decision that draws the line between a custodial sentence and community service, or between a custodial sentence and a suspended sentence, or rulings on breaches of traffic rules or benefit fraud. It is important that motorists and benefit recipients are made aware of these decisions, which, in practice, will often be through the media. The essence of the sentence should then be formulated simply enough for it to be understood by these groups. The more general role of supreme court judgements in underlining the importance of respecting and observing the law also points to a need for plain and simple language in decisions on areas of the law that affect large parts of the population, such as traffic rules.

As mentioned earlier, supreme court judgements may challenge other public institutions. Here, the need for clarity will generally mean that legal precision is more important than simple, and certainly oversimplified, language. The political authorities have plenty of legal advisers who can analyse the implications.

The needs of the parties are important when formulating the justifications. They are the direct addressees of the decision. They need to understand the decision – not only the outcome, but also, where possible, the reasons. However, the parties to cases heard by the supreme court are a broad and heterogeneous group. Large companies will often have staff in key positions with legal expertise or the ability to digest legal material. This may also go for some individuals who are parties to a case. But there will also be others, in both criminal and civil cases, who have little or no legal expertise. If possible, this needs to be taken into account in the formulation of the justifications. Again, however, the parties will have representatives who can explain the decision in more detail.

At least in cases that are complex (as very many of those heard by the supreme court will be), it will rarely be possible to make the justifications clear and readily comprehensible to all conceivable target groups – parties, lawyers, legislature, general public, media, etc. What must be ensured, however, is that the precedent established is made very clear. The needs of other groups can then be met through assistance from lawyers or through separate reports, summaries, etc.[77]

The key part of the justifications for supreme court rulings will be the discussion of the case's legal issues. It is not uncommon for the justice writing the opinion to look at relevant legal issues in a wider context and clarify the legal "landscape" before positioning the case in hand within this landscape.[78] Such an approach must be clear from the judgement. Other times, the justice will look less at the legal landscape and focus more directly on the specific application of the law. It is then this argument that must be presented. The application of the

[77] See Jens Peder Christensen's article "Kan domme skrives, så de kan forstås?" [Can judgements be written so that can be understood?] in *Jyllands-Posten*, 2 December 2012.
[78] See, for example, *Rt. 2013 p. 374* and *Rt. 2015 p. 1467*.

law may be complex. The relevant statutory provision may be unclear in its formulation and scope, and the legal source material may be extensive, complex and perhaps unclear. Good written justifications will set out the justice's understanding of this material.

As mentioned earlier, the application of the law underlying the justice's conclusion may, to varying degrees, involve an element of discretion. It is important that this exercise of discretion and the basis for it are described. Was this exercise of discretion guided by the purpose of the legislation or statements in the *travaux préparatoires*, or did it rely on equitable considerations of a more subjective nature? This needs to be stated in the justifications.[79]

When considering central bank interest rate decisions, we noted that there may be a need for a summary where the minutes are individual and each member of the decision-making body presents his or her own justifications. In principle, this is not relevant for judgements of the Norwegian supreme court, where, in practice if not formally, the justifications are collectively written. A summary may still be useful to make the arguments underlying the decision easier to identify, or to highlight the key aspects of the justifications. In particularly complex cases, there may sometimes be summarising paragraphs precisely for this reason.[80]

The Supreme Court's secretariat prepares summaries of all of the court's decisions. This summary does not form part of the judgement and has no independent authority as any part of the judgement. The aim of these summaries is to increase awareness of the decisions and to assist in identifying what is important in them. One natural question here is whether the summary should be made part of the judgement. In the Norwegian system, it would then have to form part of the leading opinion, perhaps supplemented with a summary of a dissenting opinion. There may well be reason to consider doing so much more often than today. One objection might be that, as part of the leading opinion, the summary will gain authoritative weight. The necessary qualifications of the main points covered by the summary will, however, normally be clear from the full discussion that is being summed up. If there is still potential for misunderstanding, reference could be made to these qualifications.

3.6.4. Criterion 3: The justifications should be open, honest and complete

As stated above, the justifications must be sufficient. Everything necessary to justify or explain the decision must be included. Even if the information included is sufficient to explain the decision, there must also be an account of all factors that had a bearing on the decision. Of course, that which is marginal and peripheral can and should be omitted, but anything of any real weight needs to be included.

We have previously discussed the exercise of discretion and the basis for it. It needs to be made clear what was important in the specific exercise of discretion, whether there was any

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[79] It is not uncommon for discretionary decisions to be "explained" simply with reference to the exercise of discretion. This is normally rather self-evident and does not say anything about the basis for the exercise of discretion or the weighting of the key factors in it. One example of such an uninformative explanation, from a very different field to law, is that given for the decision made by the Bislet Alliance in 2003 on where the Bislet Games should be held in 2004 while a new stadium was being built in Bislet. The choice was between Drammen and Bergen. The chairman of the Bislet Alliance told news agency NTB: "I've been here almost 20 years, and this has been the hardest decision I've been involved in. At the end of the day, the decision was taken on the basis of a general assessment." (See Qvigstad (2016), Chapter 2). This explanation says nothing about the reasons for the decision or why it was difficult. In short, it is meaningless. Based on our criteria, it should have mentioned which venues were considered, what made Drammen and Bergen stand out, the factors that led to the choice of Bergen, and the reasons why the decision was difficult.
[80] See, for example, the summary section in *Rt. 1996 p. 1114*, page 1122.

guidance in *travaux préparatoires* or other rules, and whether equitable considerations were addressed – and, if so, which were prioritised, and why. If possible, the priority of the individual discretionary considerations should be specified. For there to be confidence not only in each specific decision having been reached in an acceptable and sufficiently thorough way, but also more generally in the court, it is essential that the justifications for decisions are (and are perceived to be) open, honest and complete.

The decision made may be seen by the justices involved as uncertain or difficult. As with interest rate decisions, it may be difficult to know whether one is atop an obvious peak of the kind found in Jotunheimen or the flatter highlands of Hardangervidda. With a collegial body such as the Norwegian supreme court, it is tempting to take the presence or absence of dissent as an indicator of how hard or easy a decision was. But this is not necessarily the case. There are instances where the court has handed down a judgement in plenary session with only a very narrow majority of one or two justices, and yet neither the majority opinion nor the minority opinion reflects any real doubts. On the other hand, there are instances where the court has reached a unanimous decision even though some or even all of the justices were in considerable doubt about the correct outcome. For the justifications to be open, honest and complete, it is important that any doubt is acknowledged. If the court has had doubts, this may have implications for the precedential effect of the judgement, especially when applied to cases that differ to some extent from the one in question. The expression of doubt may also be important for acceptance of the judgement by the parties, especially the losing party.

In both central banking and the legal system, decisions are made under uncertainty. In the chapter on central bank decisions, we presented the following analogy: “If the shortest way to a particular peak is along a narrow ridge, it may, in foggy conditions, make more sense not to traverse this ridge but to take a longer route and stick to safe ground”, see endnote and 2.3.3 above. This may also be a fitting analogy for judicial decisions. An example would be deciding guilt in a criminal case, not least when it comes to whether or not the accused committed the alleged crime. This must be established beyond reasonable doubt for the decision on guilt to go against the accused. Such a picture, however, will rarely be fitting for decisions of the supreme court. The Supreme Court does not rule on the factual basis for guilt in criminal cases, and the presence of uncertainty about the facts or the correct application of the law will not give it any extra room to manoeuvre and step back from the precipice. A decision must normally be reached on the basis of a version of the facts that seems most probable, and an application of the law that seems most correct in spite of uncertainty. What is important in terms of the need for open, honest and complete justifications is that this uncertainty is reflected in the justifications. This means that counterarguments that are (or could be) considered relevant need to be presented, along with an explanation of why they did not lead to a different conclusion.

In his doctoral thesis “Begrunnelse av Rettsavgjørelser” [Justifications for Judicial Decisions],[81] Jussi Erik Pedersen writes:

> *“There is a widely held view in Norwegian jurisprudence that the justifications presented often do not correspond to the real motives (the debate about pretexts).”*[82]

He discusses the legal theory in this area at length and analyses the problems with distinguishing between the real motives and the text of a judgement.[83] This issue is considered partly in the light of *reelle hensyn* – equitable considerations.[84] It may be correct

[81] Pedersen (2016).
[82] Page 32.
[83] From page 31.
[84] From page 37.

that the text of a judgement – the justifications – does not always fully capture the motives and thoughts behind the decision. It may simply be difficult to formulate a clear explanation, and the legal discussion may also be very demanding technically. In some instances, it may also be that rather than accounting for individual elements in the justifications, the judge uses more general characteristics that may appear trustworthy, but that shed little light on the motivations. An example of this is mentioned below in 3.8.3. But for a practitioner who has spent decades writing and reviewing draft judgements in the high court and the Supreme Court, and has also seen what the actual writing process can mean for the conclusion and the assessments leading to it, it is hard to accept the idea of the justifications for decisions deliberately being written in such a way as to obfuscate the true motives. But the existence and extent of differences between the real and stated reasons for judicial decisions is not our focus here, other than it being of fundamental importance, as Pedersen also points out, that:[85]

> *"The justifications given must correspond to the judge's real motives for his or her position."*

In 2.3.4 above, we discussed the "Duisenberg principle" – that the external communication of central bank decisions must reflect the internal decision-making process. This principle of "honesty" naturally also applies to supreme court judgements. But it does not mean that the development of the arguments in the deliberations needs to be recorded. This could prove problematic where the aim is a process where the justices are open and responsive to the views and thoughts of others. What is important is that any counterarguments that give rise to doubts are mentioned and discussed.

With central bank decisions, we noted that the minutes should mention whether alternative decisions were considered. This may also be relevant with supreme court judgements, for example when choosing between community service and a custodial sentence. In many cases, however, alternatives of this kind simply do not arise. Where a claim is upheld, this means that it is this claim, and not any alternatives, that it is correct to rule in favour of.

With central bank decisions, we asked whether anything should be added in press conferences or speeches that is not included in the text of the minutes. For court judgements, the answer to this question is a clear no. Judicial ethics mean that the justices must not supplement the justifications for a judgement with anything not found in the judgement itself. The Supreme Court has also yet to hold a press conference in connection with handing down a judgement.

3.6.5. Criterion 4: The justifications should be formulated with the judgement's normative effects in mind

One important effect of supreme court judgements is that they establish a precedent. They have a normative effect over and above settling the dispute or criminal charge that is the immediate subject of the case. Rather imprecisely, this means that the principle underlying the Supreme Court's application of the law is to be applied in subsequent cases where an equivalent legal issue arises. This normative effect is assumed in the legislation. Under the Criminal Procedure Act and the Dispute Act, high court judgements may normally only be appealed to the supreme court "if the appeal concerns issues with a significance that extends beyond the scope of the current case". As to whether the supreme court should hear a case in grand chamber or plenary session rather than chamber, "emphasis shall be placed on

[85] Page 33.

considerations such as whether a question arises concerning the setting aside of a legal interpretation that the Supreme Court has used as a basis in another case".[86]

It may be unclear how far the precedential effect of a supreme court judgement extends, and it may also be uncertain whether there is scope to disregard the precedent in concrete cases. But the theory of precedent is not our topic. What is important to us is that the minutes must be formulated with the normative effects of the decision in mind. This requires the court to clarify the interpretation of the law on which its conclusion rests.

One factor that has implications for the precedential effect and needs to be reflected in the justifications is the careful screening of appeals that takes place so that the court generally only hears cases that can make a substantial contribution to the clarification and development of the law. If the justifications given do not provide guidance for the resolution of cases not wholly identical to the one in question, the legislative intentions behind the screening rules will not be realised. There has been a debate in Norway about "broad" and "narrow" justifications for judicial decisions.[87] Two considerations in particular need to be weighed up: the need to provide guidance and clarification versus the need for the precedent to stand up as a sound and correct application of the law in the cases to which it is intended to apply. There have been instances where the supreme court has been unable to observe the legal precedent established by its earlier decisions. There will probably also be precedents that are so broad and all-encompassing in their formulation that it is doubtful whether the intended legal principle will always be followed. In such cases, the judgements fail to provide the intended clarification of the law.

[86] Section 5, fourth paragraph, of the Courts of Justice Act.
[87] See, for example, Tore Schei (2015), page 11.

Summary of the four criteria for supreme courts

Criterion 1: The justifications should be professionally sound

- Good legal craftsmanship is required
- The justifications should satisfy the requirements of national and international law for the design of judgements
- The justifications should be formulated within a set framework and follow a set format
- The requirements for this framework and format should be readily available

Criterion 2: The justifications should be functional

- The justifications should set out the premises, analyses, assessments and conclusion
- The discussion should be sufficient and efficient
- The outcome – the judgement's conclusion – should be stated unambiguously
- The judgement should be well written and clear
- The judgement should be logically constructed

Criterion 3: The justifications should be open, honest and complete

- All matters material to the decision should be included
- Any exercise of discretion should also be presented openly and fully
- The discussion of issues and assessments that were difficult and uncertain should convey what was difficult and uncertain
- The "Duisenberg principle" and the principle of truth apply entirely to supreme court judgements

Criterion 4: The justifications should be formulated with the judgement's normative effects in mind

- The judgement should be formulated as a precedent
- The justifications should facilitate the application of this precedent

3.7. Selected judgements assessed against our criteria

3.7.1. What are we assessing?

We attempted above to define criteria for good justifications with the Norwegian Supreme Court as our starting point. The division into criteria could, as mentioned above, be done differently. Our choice of criteria is intended chiefly to emphasise the aspects of the justifications that we consider most important.

In the following, we look at selected judgements in Norway and assess them against the criteria we have defined. A very large number of decisions could be candidates for our review. Given the criteria we have defined, quality will doubtless vary. We have chosen a small sample from the last couple of decades, the oldest decision dating from 1996 and the most recent from 2015. We have chosen decisions that shed light on the quality criteria that we believe good justifications should satisfy. We then assess supreme court judgements in a number of other countries against our criteria. The aim is not to produce some international ranking of the quality of supreme court judgements, but first and foremost to see whether there are aspects of the justifications for decisions in different countries that might usefully be adopted elsewhere.

Concerning the concrete application of the criteria in our assessment of the decisions, we would point out the following:

Criterion 1: The justifications should be professionally sound

There must be a requirement for legal quality. The judgement must be (and be perceived to be) entirely adequate and technically sound. It must come across as a good piece of legal craftsmanship. Our role is not (and cannot be) to take a position on whether each specific decision was “correct” and whether all legally and factually relevant material has been addressed and correctly interpreted. Our assessment can go no further than to consider superficially whether the justifications appear to be of a good legal standard.

A judgement’s design and reasoning need to meet requirements set out in laws and incorporated conventions. It goes without saying that Norwegian supreme court judgements generally satisfy these requirements. What it may be worth looking at is whether there may exceptionally be clear shortcomings in their design relative to the requirements of national and international law. As noted above, supreme court judgements should follow a set format. Any departures from that format are worth noting.

We also emphasised above the importance of the framework and format for the preparation of judgements being readily available. This should not form part of each individual decision, but be included in more general information, principally on the Supreme Court’s website, see also 3.6.2 above where we noted that the information provided online by our own supreme court could be made somewhat easier to find.

Criterion 2: The justifications should be functional

When it comes to the underlying requirements that justifications should “set out the premises, analyses, assessments and conclusion”, “be sufficient and efficient” and “be logically constructed”, it should be noted that we do not take a position on whether the decisions in question are correct in terms of their conclusion or the legal and factual justifications for the decision. This imposes significant limitations on our assessments and analyses. What we can first and foremost point out is if the decision casts doubt on whether these underlying requirements have been adequately addressed. Even this more limited assessment will naturally be largely subjective, so there will also be scope for differences of opinion.

The conclusion of a judgement must be unambiguous. This will rarely be an issue, but we will point out if the conclusion is unclear.

The judgement must be “well written and clear”. What makes good language is, of course, very much a subjective consideration – in the eyes of the beholder. We will pass some comments here, well aware that others may look at the language differently. We have also attempted to shed light on “readability” through empirical analyses in 4.3 below.

Criterion 3: The justifications should be open, honest and complete

This criterion touches on various aspects of the justifications needing to be complete in terms of the factors that were material for the decision, and devoid of pretext. Any exercise of discretion must also be presented openly and fully. The same applies to equitable considerations, see 3.5 above. In a nutshell, the third criterion requires transparency and truthfulness. Whether the justifications are true, are devoid of pretext and omit no material factors may be impossible to test. But what we can and do consider to a degree is whether the exercise of discretion is explained to a reasonable extent, and whether there is anything that casts doubt on what was relied on and why. It goes without saying that this too will involve subjective assessments on which opinions may be divided.

Criterion 4: The justifications should be formulated with the judgement’s normative effects in mind

If the Supreme Court is to fulfil its role as a court of precedent, its judgements must be designed to convey their normative effects. We look at whether the judgements make clear the principle underlying the court’s application of the law, and thus the essence of the precedent being established.

3.7.2. Assessment of selected decisions

The lie detector ruling[88]

Can an assessment of credibility based on a polygraph (lie detector) test be used as evidence in a criminal case?[89]

A was accused of having set fire to his home in order to claim on insurance. He admitted the arson in a police interview, but then withdrew his confession, claiming that it was made under duress. He considered it important to document his credibility and so agreed to undergo a lie detector test. A professor with expertise and experience in such tests performed the examination and used it to produce an assessment of A’s credibility.

A requested leave to submit the test results to the district court in the criminal case against him. The prosecuting authority opposed this, and the court decided not to admit them as evidence. The district court’s explanation was that it had a certain right to reject evidence as too unreliable, and that lie detector tests were too unreliable to be admitted as evidence. This procedural issue was brought before the high court, which decided that this evidence should be admitted. The key factor in the high court’s reasoning was the principle of free assessment of evidence. The court did not find any legal provision preventing or restricting the admission of polygraph tests as evidence. It was up to the competent court to take a

[88] *Rt. 1996 p. 1114*.

[89] Note that the leading opinion in this case was written by one of the authors of this paper. This judgement is mentioned here nonetheless because it is a good example of a case where equitable considerations were crucial to the justifications for the decision. A discussion of what equitable considerations are can be found in 3.5 above.

position on the evidentiary value to be attributed to such evidence in the case. The high court's ruling was then brought before the supreme court, and it was decided that although such a decision would normally have been made by the court's interlocutory appeals committee on the basis of written proceedings, the case would be considered orally and decided in chamber.

In the justifications for his conclusion, the author of the leading opinion (Justice Schei) starts with the Supreme Court's competence to review the high court's decision. Referring to the relevant procedural rules, he argues that the supreme court could:

> *"…take a position on whether a general proscription against defendants submitting this type of evidence can be deduced from the rules in the Criminal Procedure Act or from the principles and premises underlying those rules."*[90]

The leading opinion provides a relatively broad account of what polygraphs and polygraph tests are and entail. This account is important for assessing how close the case comes to various rules on excluding evidence to which the opinion subsequently refers. It is also needed to shed light on the personal security considerations that Justice Schei attaches considerable importance to in his assessment of whether there are justifications to issue a blanket ban on the use of polygraph tests as evidence.

Justice Schei then notes that the parties had explored the reliability of polygraph tests. He does not provide an account of this, however, because "these tests' reliability or lack of reliability cannot be pivotal in whether they may be admitted as evidence." He then refers to varying practices internationally for whether or not polygraph tests may be used in evidence. He nevertheless notes that:

> *"…in relation to the equitable considerations that I will present later, it is not inconsequential that polygraph tests as evidence in criminal cases are considered problematic in other countries."*[91]

In his more detailed legal discussion, Justice Schei takes as his point of departure (as did the high court) the principle of freedom of evidence and the parties' right to submit the evidence of their choice in a case. But he notes that this does not apply without exception. Referring to a decision specifically concerning unlawfully acquired evidence, he writes: "In my opinion, however, it is conceivable that evidence may quite exceptionally have to be rejected without a basis in law, even where the evidence has been acquired lawfully and it is the defendant who wishes to submit it. It is clear that very strong and compelling reasons will be required for such a refusal. The weaker the refusal's basis in or connection with the rules of the Criminal Procedure Act in terms of both their wording and the *travaux préparatoires*, the stronger these reasons will need to be. Factors that could conceivably support such a refusal might be compelling general due process or personal security considerations that more than outweigh the due process complications of refusing the submission of the type of evidence in question."[92] Hence there is a clear principle under the law that the accused may submit the evidence of his choice in order to establish his innocence. If the accused is to be refused the right to submit evidence, the law must provide a basis for the rejection of the evidence in question. But evidence may exceptionally also be rejected for compelling due process or personal security reasons without there being specific provision for this in law.

The leading opinion then discusses whether, from this point of departure, there are justifications here to establish such an exception from the principle of freedom of evidence.

[90] Page 1116.
[91] Page 1118.
[92] Pages 1119 and 1120.

Justice Schei refers to the prohibition in Section 92, second paragraph, second sentence, of the Criminal Procedure Act on the use of any means that reduce the level of consciousness of the person charged or his ability to make up his own mind freely. This provision is not directly applicable, but similarities are noted between the use of narcoanalysis, which this provision prohibits, and the use of a polygraph test.

In the *travaux préparatoires* concerning Section 92 of the Criminal Procedure Act, the committee discusses polygraph tests and misgivings about such tests, and concludes its discussion by stating that:

> *"…we assume that such methods will not be taken into use except where provided for by rules on their use."*

The leading opinion thus looks collectively at the considerations behind the prohibition in Section 92, second paragraph, second sentence, of the Criminal Procedure Act, the statement in the *travaux préparatoires* that polygraph tests may not be used without provision in law, and the compelling personal security considerations that weigh against the use of polygraph tests as evidence. Weighing up these arguments, Justice Schei concludes that such evidence should not be admitted.

When the minutes are assessed against our four criteria, we believe that criteria 1 and 2 are satisfied. The decision's main target group is legal professionals and the legislature. The case was heard in chamber in order to establish a principle and provide general clarification on whether polygraph tests may be admitted as evidence.

When it comes to criterion 3, the impression is that the leading opinion endeavours to draw in the legal strands relevant to the assessment. An attempt is made to quantify the weight of the key arguments. The opinion communicates that it has been necessary to weigh up the intentions behind the legal rule in Section 92, second paragraph, second sentence, the *travaux préparatoires* and compelling personal protection considerations. Although personal protection was among the considerations behind Section 92, second paragraph, second sentence, the discussion shows that in this case the personal protection considerations went beyond this, based on the personal view of the author. This exercise of discretion is made clear. We also believe that it is natural to understand from the minutes that it was a difficult – and in any case by no means an obvious – decision, but that through its discussions the court came to be convinced that not admitting such evidence must be the correct conclusion. Our view, therefore, is that the third criterion is also satisfied.

Criterion 4 is clearly satisfied. The decision is written with a view to clarifying whether polygraph tests and analyses of these tests may be admitted as evidence, and the answer is an unequivocal no.

Audio recordings in the Treholt case[93]

Did the press have a right of access to audio recordings from the main proceedings in the criminal case against Arne Treholt in 1985? Was the prosecuting authority's denial of access to the recordings a violation of the right to freedom of expression in Article 1 of the European Convention on Human Rights (ECHR)?

On 20 June 1985, Eidsivating Court of Appeal sentenced Arne Treholt to 20 years in prison for spying for the Soviet Union and Iraq. The main proceedings in the case were held in the period from 25 February to 9 May 1985. Around three-quarters of these proceedings were held *in camera*. Almost the whole of the main proceedings, both those held behind closed

[93] *Rt. 2013 p. 374*.

doors and those in open court, were recorded on audio tape. These recordings were made on the court's initiative and without any statutory requirement for such recordings. After the main proceedings, the court decided that the recordings should be preserved for the future. The most important reason given was that:

> *"…the recordings may in the future, when there is no longer good reason to protect their content, have historical value to which access should be granted."*[94]

The recordings were then archived by the Police Surveillance Agency (PST).

A number of media companies, referred to in the judgement as "the press", submitted a request for access to the recordings in 2011. The request was turned down and was subsequently brought before the courts. After several rounds in the court system, the Borgarting Court of Appeal ruled in 2012 that the request should not be granted. The high court found that denial of access to the recordings did not constitute a violation of Article 10(1) of the ECHR:

> *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]"*

The decision was appealed to the Supreme Court on multiple justifications. The appeal was admitted by the Supreme Court for hearing in chamber and in oral proceedings when it came to the claim that denial of press access to the audio recordings constituted interference under the aforementioned article of the ECHR. The other claims in the appeal were rejected by the Supreme Court's Appeals Selection Committee.

In his discussion, the judge delivering the leading opinion (Justice Falkanger) quotes the provision in question. He notes that there is no doubt that Article 10 protects the right to receive and impart information and ideas without interference by public authority. The question, however, is whether Article 10 also gives the right to demand that a public authority releases information that is in its possession.

The judgement provides a broad account of the practice of the European Court of Human Rights (ECtHR). It starts from practice indicating that it is not interference under Article 10(1) to deny access to material held by a public authority. But it then looks at practice that, at least to some extent, appears to support a right of access to such material. Also included is a statement from the UN Human Rights Committee in a case on the parallel provision of the International Covenant on Civil and Political Rights (ICCPR). This case concerned the denial of a request from a human rights organisation for information on how many death penalties had been issued in Kyrgyzstan. The Human Rights Committee found that the government authorities' failure to provide the information requested constituted interference under that provision.

In his analysis, Justice Falkanger refers to the press's recognised and important function as a watchdog over bodies and individuals that exercise public authority, including courts and other players in the administration of justice. He notes that this function is emphasised in one of the decisions that to some extent supports a right of access, and that it is also given importance in other judgements concerning journalists' right to conduct investigations.

The leading opinion concludes as follows in the general legal discussion:

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[94] *Rt. 2013 p. 374*, paragraph 5.

“The greater society’s interest in a case, the greater the need for the press to be given an opportunity to fulfil its role in a satisfactory manner. The question must, however, be considered on a case-by-case basis.”[95]

In the light of the rest of the discussion, this has to be interpreted as meaning that denial of access to information under the circumstances may constitute interference under Article 10(1) of the ECHR. This could be a situation where there are particularly compelling reasons to grant access to the material.

In his concrete weighing of the arguments,[96] Justice Falkanger finds that in this case there were particularly compelling reasons, and that the denial of access to the audio recordings constituted interference with the right to freedom of expression and information under Article 10(1).

When the minutes are assessed against our four criteria, we believe that criteria 1 and 2 are satisfied. In our opinion, the decision is well written and clear. It is aimed first and foremost at legal professionals.

The discussion in the leading opinion gives the impression that the author endeavoured to include relevant judicial decisions. He has analysed and explained them. He has included equitable considerations, most notably the press’s watchdog role. He also points out that the considerations underlying the protection of sources are relevant to the assessment to be made, endeavouring to anchor these considerations in ECtHR practice. The arguments appear to be presented openly, honestly and completely. Our view, therefore, is that criterion 3 is also satisfied.

The judgement is intended to establish a precedent and is formulated as such. The case was heard specifically to clarify whether Article 10(1) of the ECHR also provides a right to demand that a public authority releases information in its possession.[97] The answer, based on this decision, is a clear yes. Equally clear, however, is that the right to disclosure or access does not apply as a general rule. The strength of society’s interest in a case will be crucial for whether access must be granted or may be denied without violating Article 10(1). One might wonder whether the rule that is to apply here could have been formulated more precisely. But this would probably be difficult. The more practicable option is to have the line drawn more firmly by subsequent judicial practice. The next decision we look at illustrates this to some degree. Criterion 4 is considered to be reasonably well addressed.

NRK’s request for access to CCTV recordings from a closed criminal case[98]

A man arrived at the central police station in Oslo. He appeared psychotic, and two female police officers escorted him to the city’s emergency department. The police officers contacted their operations centre and learned that the name given by the man could belong to a person with a history of violence. The emergency department considered admitting him to a closed hospital ward, and asked the police to assist with transport there if necessary. After a while, the man asked to leave the emergency department. The two police officers attempted to restrain him. There was a scuffle. The police officers had problems bringing the situation under control. They were assisted by an ambulance worker who had seen the situation escalate. He attempted to force the man to the ground. When this did not succeed, he placed an arm around the man’s throat, forced him to bend double, and used his own bodyweight to keep the man under control. When the ambulance worker released his grip

[95] Paragraph 53.
[96] Paragraphs 54 to 56.
[97] As formulated in paragraph 10 of the decision.
[98] *Rt. 2015 p. 1467*.

around the man's throat after about a minute, the man was limp and lifeless, and medical staff were called. After unsuccessful attempts at resuscitation, the man was declared dead almost half an hour later. The autopsy report revealed that death was caused by suffocation from pressure on the throat.

The Norwegian Bureau for the Investigation of Police Affairs looked into the death. It assessed whether the two police officers were guilty of causing bodily harm resulting in death, or of gross misconduct. The cases against the officers were dropped, because it was considered that there was no evidence of any criminal act. The ambulance worker was also investigated for bodily harm resulting in death, and again the case was dropped. The decisions to drop these cases were appealed to the Director of Public Prosecutions, who upheld them, finding no evidence of a criminal act in the case of the ambulance worker either.

The emergency department's CCTV cameras captured these events over a period of around 1 hour and 40 minutes, and the recordings were submitted in evidence. The case sparked considerable public interest with extensive media coverage. The Norwegian Broadcasting Corporation (NRK) requested access to the recordings on a number of occasions. The prosecuting authority denied these requests. The case was then brought before the courts. The district court found that refusal to release the material was not interference under Article 10(1) of the ECHR, and that the prosecuting authority therefore had the right to deny the request. The high court agreed, and also argued that denial of access to the recordings had in any case to be considered "necessary" under Article 10(2) of the ECHR, such that there was no violation of the right to freedom of expression on such justifications either.

The high court's decision was appealed to the supreme court, and accepted for hearing in chamber in oral proceedings. Two central press organisations appeared as interveners in the appeal case.

The justice delivering the leading opinion (Justice Arntzen) presents a relatively broad discussion of the interpretation of Article 10(1) of the ECHR. She points out that ECtHR practice was previously based on Article 10(1) providing protection against censorship rather than a right of access to material held by public authorities. She then notes that ECtHR practice since 2006 implies that Article 10(1) may also under the circumstances entail an obligation to make information available to the press in cases of particular public interest. Reference is made to the discussion in the supreme court's decision on the audio recordings from the Treholt case, and to the conclusion there that Article 10(1) *may* provide a right of access in cases of particular public interest. She then looks at the question of whether ECtHR practice in the period since the Norwegian supreme court's decision on the audio recordings in 2013 had changed this, and finds that this subsequent practice also provides support for this provision providing a right of access.

Justice Arntzen's point of departure[99] is the decisions on the audio recordings in the Treholt case. She refers to considerations that make it problematic for the press to be given a right of access to documents in an ongoing criminal case, and argues that these must also largely apply to a closed criminal case. She points out that public oversight of the judicial system must first and foremost be assured through a right to attend the actual court proceedings. In the case in point, however, there had been no court proceedings. The cases had been dropped. The key evidence was the recordings. These were readily available. The case was of great public interest. The case raised important matters of principle concerning the state's use of force. This was a case where the use of force proved fatal. This complex of problems lay at the heart of the press's watchdog function. Failure to provide access to the recordings was therefore a violation of Article 10(1).

[99] Paragraph 53.

There is also a discussion, again broad, thorough and open, of whether the prosecuting authority's denial was nevertheless lawful because it came under the exceptions set out in Article 10(2) of the ECHR.[100] Personal security – first and foremost that of the police officers and the ambulance worker – is cited here as an important consideration. It is argued that personal security considerations can be addressed adequately through anonymisation and by releasing only those parts of the recordings showing the use of force.

Two justices dissented. The author of the dissenting opinion (Justice Noer) also presents a broad, thorough and open discussion. Based on an analysis of practice, she argues that the potential provision of a right of access in Article 10(1) is substantially narrower than assumed by the majority. She also argues that the public interest in access in the case in question is far weaker than it was for access to the audio recordings in the Treholt case.

Assessed against our four criteria, it is clear that criteria 1 and 2 are satisfied. Again, while a decision is to be clear and well written, this decision is aimed at legal professionals. The legal discussion may be extensive and rather complex, but this is due largely to the sources being complex and far from unambiguous.

Criterion 3 can also be considered satisfied. There is a broad legal discussion. Key legal material is reviewed and analysed. Various equitable considerations are also emphasised. The justifications – for both the majority and the minority – appear to be open, honest and complete.

The decision sets a precedent. It was clearly heard by the Supreme Court in order to provide clarification of the degree to which Article 10(1) of the ECHR provides a right of access to material in criminal cases. This is discussed broadly in the decision, not only to justify the conclusion reached in this case, but also to provide guidance for future cases. The limits for what is protected under Article 10(1) are made clearer by this decision. The majority opinion also indicates that the case in point – criminal case documents – was a borderline case for where access might be demanded. This impression is confirmed by the dissent. The discussions also make significant contributions to understanding of Article 10(2) of the ECHR. Criterion 4 is considered to be reasonably well addressed.

The traffic roundabout judgement[101]

This case concerned the interpretation of the rules on the right of way at a traffic roundabout. A collision occurred on a roundabout between cars A and B. Three roads joined the roundabout. Roundabout and give-way signs had been erected on all three approaches, and all three had give-way lines marking the transition to the roundabout. Car B crossed its give-way line first. Immediately afterwards, car A crossed the give-way line on the road to the left of the road from which car B had entered the roundabout. A argued that the traffic rules on the right of way had to be interpreted as meaning that vehicles approaching a roundabout must always give way to those coming from the left regardless of which vehicle crossed the give-way line first. It was therefore B, he argued, who should have given way. The Supreme Court disagreed.

The judge delivering the leading opinion (Justice Tjomsland) started from the following application of the law:

> *"Section 6 of the Traffic Sign Regulations clearly states that sign number 202 'Give Way' requires a driver to 'give way to moving traffic in both directions at a junction'.*

[100] Such restrictions "as are prescribed by law and are necessary in a democratic society".
[101] *Rt. 2002 p. 1704*.

The way the traffic rules are formulated, a roundabout in its entirety must to my mind be considered a junction in this context. The natural understanding of this signage is that the vehicle entering a roundabout where there is a give-way sign must give way to vehicles already on the roundabout. As I understand the rules, this must apply regardless of the direction from which the other driver has entered the roundabout."

The judgement also referred to an annotated edition of the traffic rules which states:

"If there is little traffic or there are large gaps in the queue, the first onto the roundabout, without blocking anyone or causing danger, has the right of way. [...] This is logical, because anyone who has yet to enter the roundabout still faces a give-way sign requiring them to give way at a junction, not to give way to traffic from the left as many incorrectly claim."

The conclusion was thus that the traffic rules had to be interpreted such that car A should have given way because it crossed its give-way line after car B had crossed its give-way line. Criteria 1 and 2 are clearly satisfied.

What is special about this decision is that its audience is "the man on the street" – quite literally. By the standards of a court judgement, the reasoning is straightforward, and the presentation of the facts should be reasonably easy for drivers more generally to understand. The legal discussion is also straightforward. The legal rule that all motorists need to apply is, quite simply, that where there is a give-way sign, a vehicle entering a roundabout must give way to vehicles that have already entered the roundabout. Although the legal discussion is relatively straightforward, it is also a straightforward rule that is to be applied, and the discussion seems to be complete.

The judgement is designed to set a precedent. It is intended to provide unambiguous instruction on the rule that is to apply. In our opinion, therefore, this judgement therefore also satisfies criteria 3 and 4.

The stiletto judgement[102]

Six weeks after the purchase of a pair of stilettos, the heel fell off one of the shoes. Could the customer demand a replacement, or could the seller get away with repairing the original pair? The repair cost was around NOK 65, while a new pair would cost the seller around NOK 450.

The key statutory provision to be applied was Section 29 of the Consumer Purchases Act. The first and second sentences read as follows:

"The consumer may choose whether to demand that the seller has the defect rectified or supplies an equivalent item (redelivery). This does not apply if complying with the demand is impossible or would cause the seller to incur unreasonable costs.

"When determining whether the costs are unreasonable pursuant to paragraph 1 (ii) above, particular emphasis shall be placed on the value of a defect-free item, the defect's significance, and whether other remedies can be implemented without material inconvenience to the consumer."

The question that ended up in the judicial system was thus whether the difference between NOK 450 and NOK 65 constituted "unreasonable costs".

[102] *Rt. 2006 p. 179*.

The main rule in the first paragraph of Section 29 gives the buyer the right to choose between the repair of the stiletto and a new pair. But there is then an exception to this right to choose if redelivery is impossible or would cause the seller unreasonable costs. It is the latter possibility that might apply here. The second paragraph provides more detailed instructions on what is to be taken into account when assessing "unreasonable costs". Three factors are listed, but the list is not to be considered exhaustive for what might be included in the assessment, hence the formulation using the word "particular".

The buyer asked for a new pair of stilettos. The seller instead demanded the right to rectify the defect. The Consumer Disputes Commission found in favour of the buyer. The seller took the matter to the district court and won. The buyer then appealed to the high court, which found in his favour, and the seller then appealed to the Supreme Court, which found in favour of the seller by a majority of 3-2.

The judgement establishes that:

> *"…repair in this case would not in any way impair the stilettos, either functionally or aesthetically. The heel would be screwed firmly to the shoe, and this would probably make it stronger than a new one."*[103]

On the matter of whether redelivery would result in unreasonable costs under the second sentence, the leading opinion states:

> *"The parties expressed different views on this point. The seller claims that the costs of redelivery and repair need to be compared. The cost of redelivery would be unreasonable, because it is several times higher than the cost of repair, and this must apply even though the amounts are small. The buyer, for his part, claims that it is the absolute difference between the two costs that is important, and that the difference of a few hundred kroner in this case does not meet the law's criterion for unreasonability. This is the central issue in this case."*[104]

The author of the leading opinion (Justice Flock) then discusses what he refers to as the "central issue in this case". He includes what can be taken from the EU's Consumer Sales Directive, and notes here that "disproportionate" in this directive clearly points towards an assessment of relative cost and not an assessment of the nominal additional cost of choosing one solution over another. But he stresses that there are limits to what can be concluded from this, as the directive expresses only minimum rights.

Statements made in the *travaux préparatoires* on the Norwegian act are included in the legal interpretation. Reference is made to a statement that has to be understood such that an assessment of unreasonability cannot exclusively be based on a ratio between the two alternative types of cost. More significant, however, to Justice Flock is a statement that it was important to take account of the environmental consequences of the proposed act. The legislature considered it important not to encourage a "throwaway mentality" in society. He raises the issue of whether invoking such an environmental consideration would conflict with the Consumer Sales Directive, but finds that it would not. He concludes that, in this case, the seller has the right to repair. Upholding the right of the buyer to demand redelivery would cause the seller unreasonable costs.

Finally, the leading opinion outlines how similar disputes over the purchase of mass-produced consumer goods should be handled where adequate repairs can be made without appreciable drawbacks for the buyer. Justice Flock concludes as follows:

[103] Paragraph 25.
[104] Paragraph 27.

"When the act makes it a condition that the seller is caused unreasonable costs, there is an implicit requirement that the redelivery cost must be materially higher than the repair cost. In this case, as mentioned above, there is a ratio of 7 to 1, or even slightly more once value-added tax is deducted from the price of the repair. I believe that the materiality requirement should be met even where the ratio is much smaller and down towards levels of 2 to 1 or 3 to 1 as the appellant has argued."[105]

Two justices dissented. They placed more weight on Section 29 expressing a clear rule of freedom of choice, understood from the *travaux préparatoires* that the absolute amount was more significant than argued in the majority opinion, and did not find the environmental considerations compelling.

Our assessment is that criteria 1 and 2 are satisfied. When it comes to clarity, it should be noted that this judgement, like the previous one, is aimed at the "man on the street" – the average consumer. This naturally indicates that the text should be made as simple as possible. However, in this case the interpretation of the law had to involve statements from the *travaux préparatoires* and EU law. The interpretation of this could be uncertain, which sets clear limits for how simple the discussion can be made. Perhaps more significant, however, is that the conclusion – redelivery cannot be demanded for defects in mass-produced consumer goods if adequate repairs can be made without appreciable drawbacks for the consumer – is what was important for the consumer (and the seller) to have cleared up, not the detailed legal explanation of why the law should be interpreted in that way.

Both the majority and the minority clarify their arguments, including their exercise of discretion. The arguments appear to be presented openly, honestly and completely. Criterion 3 must be considered satisfied.

This case directly concerned a dispute over an amount of less than NOK 400. It was submitted to the supreme court to obtain a precedent for the interpretation of an important rule in practice on the implications of defects in consumer purchases. Paragraph 43 of the judgement quoted above seeks to clarify the precedential effect that the judgement is intended to have. Criterion 4 is satisfied.

3.7.3. Cases heard in plenary session and grand chamber

In particularly important cases, the Supreme Court can sit in an enlarged form, either in grand chamber with 11 justices or in plenary session with all justices who are neither recused nor absent for other valid reasons.[106] The standard rules for the justifications for judgements also apply to those handed down in an enlarged court. But precisely because the cases heard in an enlarged court are particularly important, a great deal of work goes into the judgements, and the justifications are generally even more thorough and detailed than is normal for cases heard in chamber. This applies particularly to cases where the supreme court tests whether the law that is otherwise to be applied contravenes the Norwegian Constitution and must therefore be set aside or curtailed. A judgement finding legislation unconstitutional interferes directly with the Storting's exercise of authority. This means, as mentioned above in 3.5 above, that special demands are made of the justifications for such decisions. We look at the minutes of three cases heard in plenary session where setting aside or curtailing the legal rules in question would particularly collide with a strong political will.

[105] Paragraph 43.
[106] See Section 5, fourth paragraph, of the Courts of Justice Act.

The fact that the Supreme Court considers cases heard in plenary session and grand chamber to require special explanation, on account of their nature and importance, is clearly reflected in our empirical analyses of supreme court judgements. Plenary session and grand chamber judgements are much longer than supreme court judgements in general – some three to four times the average. Readability is also somewhat poorer than for the court's judgements in general, but the difference in readability is smaller than the difference in length, see 4.3 below.

The jury case[107]

This case concerned an appeal against a high court ruling on a criminal case that included attempted murder. One key question was whether it contravened the right to a fair trial under the ECHR and ICCPR[108] for the matter of guilt to be decided by a jury without giving reasons.

The case was heard in plenary session. The jury system in Norway came about following a fierce political battle in the late 19th century and, despite attacks, had since been championed by the political authorities. If the Supreme Court found that the decision had to be set aside because the jury's failure to give reasons violated international law, it would have major implications for the criminal law system in Norway and be in direct conflict with the legislature's choice of procedural arrangements. The issue arose because the Human Rights Act of 1999 ruled that if there were any conflict between fundamental human rights conventions and other Norwegian laws, the conventions were to take precedence.

The judgement was unanimous. All of the justices concurred with the leading opinion delivered by Justice Indreberg, who argued that it was not a violation of the human rights conventions for the jury to find the defendant guilty of attempted murder without giving reasons. She nevertheless concluded that the high court's decision had to be set aside, because the high court's justifications for the sentence handed down gave rise to doubts about whether the jury's verdict was based on a correct legal understanding of the requirement for subjective guilt on the part of the accused.

The crux of the case was thus: Do the human rights conventions require a jury's verdict to be explained? Justice Indreberg first undertakes a more general analysis of what the convention bodies' practice says about the intentions behind the duty to give reasons. She concludes:[109]

> *"To sum up, one might say that the requirement that judicial decisions must be adequately reasoned is intended to ensure rigorous assessment, permit scrutiny and provide an effective right of appeal."*

She then looks at how the convention bodies have applied the requirement that criminal judgements must be adequately reasoned, and in particular how they have approached this in jury cases. There is a very detailed and thorough analysis of key ECtHR judgements, ending with a review and analysis of the chamber's decision on the Taxquet case.[110] Through her analysis, she expresses the key considerations that the court had to address in its deliberations. Article 14(5) of the ICCPR is discussed specifically, but relatively briefly. This needs to be seen in the light of her conclusion that the right of appeal under the ICCPR comes under that provided for in Article 6(1) of the ECHR.

[107] *Rt. 2009 p. 750.*
[108] ECHR Article 6(1) and ICCPR Article 14(1).
[109] Paragraph 35.
[110] EMD-2005-926-1.

Justice Indreberg moves on to assess whether the high court's handling of the case complied with Article 6(1) of the ECHR. The starting point for her analysis is:[111]

> *"According to ECtHR practice, the absence of reasoning for the jury's decision is compensated by other mechanisms that adequately serve the same purpose. The requirements made depend to some extent on the specific circumstances in the individual case.*
>
> *"The high court's consideration of the criminal case against A complied with the procedural rules in the Criminal Procedure Act. I therefore find it appropriate to explore whether there are such compensating mechanisms in Norwegian criminal procedure in general, and in A's case in particular. The question is whether the Norwegian jury system adequately addresses the intentions behind the requirement for reasons to be given. As mentioned earlier, these are threefold: to ensure rigorous assessment, permit scrutiny and provide an effective right of appeal."*

The three main issues outlined at the end of this quotation are then discussed. First, Justice Indreberg looks at the mechanisms to ensure that the jury reaches its verdict following rigorous testing of the evidence on the basis of a correct understanding of the law. She then discusses how the Criminal Procedure Act ensures that the person convicted and the general public can scrutinise the assessment made. Finally, she looks at the degree to which the Criminal Procedure Act provides an effective right of appeal against the high court's judgement.

The discussion and analysis of whether Norway's Criminal Procedure Act and the proceedings in this particular case satisfy the requirements of Article 6(1) of the ECHR are very thorough. The discussion states openly and clearly which are the key considerations.

Finally, Justice Indreberg tests the application of the law by the high court in this case. Based on the court's remarks on the question of guilt in its sentencing decision, she concludes that there is a risk that the jury's understanding of the question of guilt may have been incorrect, and so the judgement should be set aside.

We believe that the judgement satisfies our first two criteria, with the exception of one aspect of criterion 1. When it comes to whether the decision is well written, we would say that it is aimed first and foremost at professionals in the legal system and the legislature. Some of the discussion concerns relatively complex assessments of ECtHR practice. Some of these decisions are not straightforward and unambiguous, and this complexity could probably only have been avoided by simplifying the ECtHR judgements to a point where important nuances and qualifications would have to be omitted.

Our reservation concerning criterion 1 relates to one aspect of the decision not corresponding to the normal pattern for plenary judgements. In a plenary case, all supreme court justices are required to participate unless recused or granted leave of absence. At the time the case was heard, the supreme court had 19 justices, yet only 17 were involved in handing down the judgement. Although a simple question to the Supreme Court's staff would reveal why these two justices did not take part, this ought to have been stated in the judgement itself.

Criterion 3 is satisfied. The discussion is open and thorough. It is clear what the justice delivering the leading opinion has attached most importance to.

[111] Paragraphs 61 and 62.

The case was heard in plenary session in order to clarify whether the Norwegian system where a jury can pronounce guilt in serious criminal cases without explanation might contravene the requirement to give reasons under Article 6(1) of the ECHR. The leading opinion sums up the court's clarification of the law – and hence the precedential effect – as follows:[112]

> *"It cannot be concluded from the convention bodies' practice that a criminal judgement based on an unreasoned verdict from the jury is incompatible with Article 6(1) of the ECHR. The crux is whether the intentions behind the requirement to give reasons are adequately addressed in another way. The Norwegian jury system has mechanisms to address these intentions, and cases considered in accordance with the requirements of the Criminal Procedure Act will normally satisfy the requirement for a fair trial. Some cases, however, may be such that the need for an effective right of appeal to the supreme court indicates that the court should record or minute the president's summing up and/or set out in its sentencing decision how the law has been understood."*

Criterion 4 – that the justifications should be formulated with the judgement's normative effects in mind – is clearly satisfied in this case.

The shipping tax case[113]

The Norwegian tax scheme for shipping companies was overhauled in 2007. Under rules issued in 1996, shipping revenue was "exempt from tax" until such time as the untaxed revenue was distributed or the company left the scheme. In 2007, shipping revenue was made tax-free for good. Under the new rules, shipowners were to pay only a small tonnage tax. In the transitional rules from the 1996 to the 2007 arrangements, it was decided that shipowners would now have to pay parts of the deferred tax on income that had not been taxed because it had not been taken out of the business. The question was whether these transition rules contravened Article 97 of the Norwegian Constitution or the rules on the protection of property in the ECHR.

There was a fierce political battle over the transitional rules. A substantial parliamentary minority had wanted far more favourable transitional arrangements for the shipping companies, and argued that the rules introduced contravened Article 97 of the Norwegian Constitution. The political tension over the rules was not helped by the Supreme Court, sitting in plenary session, being split virtually down the middle, with six justices voting in favour of the shipping companies and five in favour of the tax authorities. The majority and the minority united around their respective positions. The judgement is very lengthy. The political aspect of the case warranted particularly thorough and transparent reasoning.

In view of the subsequent legal assessment of the question of possible contravention of the constitution or international law, the justice delivering the leading opinion (Justice Utgård) begins with a broad account of the key features of the 1996 and 2007 tax schemes and the transitional rules. He also provides a detailed account of the Storting's reasoning for the new tax rules and the disagreement in the Storting on the choices made. In the more detailed justification of his opinion, Justice Utgård initially goes back to the tax schemes, the changes that had been made, and their consequences for shipowners. He then takes a thorough look at the constitutionality consideration, including a wide-ranging assessment of the norm for testing constitutionality. This norm is compared with the consequences of the scheme. The significance of the parliamentary majority's view and assessment of the constitutionality issue is discussed specifically. The leading opinion contains a number of discretionary arguments

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[112] Paragraph 83.
[113] *Rt. 2010 p. 143*.

– arguments that the dissenters show can be viewed differently. Take, for example, what the leading opinion writes[114] about the "package argument" – that the consequences of the retroactive effect need to be seen in the light of the benefits of the 2007 scheme – compared to what the dissenting opinion has to say on the matter.[115]

Justice Utgård in the leading opinion argues openly and widely for his viewpoint. Justice Matningsdal in the dissenting opinion, with whom the rest of the minority concurred, also provides a broad, thorough and open discussion. Often when there is dissension, the dissenting opinion will concentrate on areas where the dissenting judge disagrees with the leading opinion. Although it naturally does not provide a separate account of the background to the case, the procedural history or the parties' claims, the dissenting opinion here is otherwise constructed as a standalone opinion. Given how differently the leading and dissenting opinions view the constitutional norm and the significance of the Storting's view of the constitutionality issue, this was natural and necessary.

In our opinion, criteria 1 and 2 are satisfied. It may seem that there was a departure from the usual rule that the supreme court sitting in plenary session should comprise all justices who are neither recused nor on leave, as only 11 justices voted in this case. This is because five justices were recused. The court handed down a separate decision on this – with reasons, of course – and the judgement refers to this decision. In addition, two were on leave and so did not take part, and the youngest (by seniority) stood down from the vote as required by law so that an uneven number of judges voted. These aspects of the composition of the court are mentioned in the judgement. Whether the judgement is well written and clear has to be seen in the light of the main target audience for the decision being the legislature. The legal issues are complex, and there is very limited scope to simplify the discussion without losing important nuances and qualifications. We have assessed the length and readability of this judgement in isolation. It runs to 22,511 words, which is five times longer than the average supreme court judgement. It has a Flesch-Kincaid Reading Grade of 13.3, which is much higher than normal, see 4.3 below.

The discussions in the leading and dissenting opinions go to show that positions on legal issues and interpretations of judgements and other legal material can vary considerably. But both justices attempt to make their arguments complete and open. One can agree or disagree with their arguments, but it is difficult to see how either set of justifications suggests that the principles of honesty and completeness are not satisfied. In our view, criterion 3 is satisfied.

The case concerned the validity of the tax assessment for the shipping companies in question. The outcome of the case is very clear. The tax assessment was overruled. Before a new tax assessment could be issued by the tax authorities, new transitional rules would need to be drawn up. The position on constitutionality adopted by the majority of the supreme court would need to be addressed in their design. Criterion 4 is also satisfied. The judgement sets a clear precedent for taxpayers in the same position as the parties in the two cases considered by the supreme court. In addition, the judgement provides guidance for the application of the constitutional norm in future instances of measures with retroactive effects on economic rights.

The war criminal case[116]

New provisions on crimes against humanity and war crimes were laid down in 2005 and entered into force in 2008. Could these provisions be applied to acts committed in Bosnia-

[114] Paragraphs 167 ff.
[115] Paragraphs 264 ff.
[116] *Rt. 2010 p. 1445.*

Herzegovina in 1992? Would this contravene the proscription against retroactive laws in Article 97 of the Norwegian Constitution?

The case was heard in plenary session. The supreme court was split 11-7 on the main question. The majority found that applying the rules on crimes against humanity and war crimes in this case would entail a retroactive effect as proscribed by the constitution, while the minority found that this would not be unconstitutional. The majority and the minority united around their respective positions. It should be added that there was strong and unanimous political support for the new legislative provisions. There was also a general political consensus that the new rules should also, with certain restrictions, apply to crimes committed before they were laid down, including during the conflict in the Balkans in the 1990s.

The justice delivering the leading opinion (Justice Møse) first outlines the factual background to the case, with the breakup of Yugoslavia, developments in Bosnia-Herzegovina, and the war there between Serbian, Bosnian and Croatian forces. The accused's role and duties in a paramilitary Croatian unit are outlined. The acts he is accused of are presented mainly by reproducing the indictment brought against him in Norway in 2008.

The procedural history following the issue of the indictment is then described. The district court found that it would contravene Article 97 of the Norwegian Constitution to apply Section 102 of the Penal Code on crimes against humanity and acquitted the accused on this charge, but found that the proscription against retroactive effects did not affect the charge concerning war crimes under Section 103 of the Penal Code. The case was appealed to the high court, which made the same interpretation of the Constitution. The high court found it hard to see how applying Section 103 of the 2005 Penal Code, rather than Section 102, could be considered less favourable for the accused than had the relevant provisions of the 1902 Penal Code been applied.

In the Supreme Court's judgement, Justice Møse begins his review of the case by considering a different issue to the main issue of unconstitutionality, namely whether any criminal liability would nevertheless be time-barred. For the case not to be time-barred, the particular contravention of the Penal Code must be adequately identified or specified. The assessment is discretionary, and the text[117] provides good examples of such discretion and how it is explained. The discussion is broad and open. Where it is possible to "objectivise" the assessment, this is done, partly by referring to elements of the assessment that have been crucial in other judicial decisions on such identification or specification. The leading opinion concludes that the case is not time-barred. The dissenting justices largely share the leading opinion's view of this matter.

The majority found that it would contravene Article 97 of the Norwegian Constitution to apply Sections 102 and 103 of the 2005 Penal Code, while the minority found that this would not be unconstitutional. The constitutional discussion is very broad, in both the majority and the minority opinions.

One key difference between the majority and the minority[118] on the constitutionality of *ex post facto* application of the new legal provisions is opposing views of the relevance to the interpretation of the constitution in this case that the deprivation of liberty in question had long been punishable under international rules on war crimes and could have been prosecuted under those rules in the international criminal courts.[119] The validity of these

[117] Paragraphs 59 and 60.
[118] The dissenting opinion was authored by Justice Skoghøy.
[119] The majority disagreed with the view taken by a majority of the Supreme Court in the Klinge judgement, *Rt. 1946 p. 198*.

opposing views is not our focus. The point for us is that the record of these opinions attempts to provide complete and open justifications for both the majority and the minority position. This also applies to the more discretionary considerations.[120] The outcome of the case is very clear. The matters that the high court had decided with reference to the 2005 Penal Code[121] should have been heard under the 1902 Penal Code.[122] In the subsequent Supreme Court proceedings in chamber, a sentence was handed down based on correct application of the law. The sentence was eight years' imprisonment.[123]

To our mind, our four criteria are all satisfied. As to whether the judgement is well written and clear, it is again significant that the legislature is the main target audience. The arguments presented by both the majority and the minority appear to be open, honest and complete. The precedential effect is clear: Sections 102 and 103 of the 2005 Penal Code may not be applied to crimes committed before the law was passed.

3.7.4. Brief summary of the Norwegian judgements

In our opinion, the judgements we have reviewed are thorough, with open discussions and assessments. The judgements include some fairly complex discussions. It will always be possible to simplify such discussions, but the question then is whether this means that important nuances and qualifications are omitted. We have not analysed the judgements with a view to whether the arguments should have been made shorter or more focused. That would require us to take a position on the questions raised by each case and to analyse the factual and legal material. Essentially, we would then have needed to analyse the validity of the conclusion and the arguments – in other words, take a position on whether the decisions were "correct". As pointed out before, such an analysis is outside the scope of our work. But what we can attempt to say something about is the quality of the language. We have done this by subjecting the judgements to analyses of length and readability. We have touched on this already and will return to it in 4.3 below.

Some lawyers in Norway believe that Supreme Court judgements are too long, and the discussion too detailed. It is quite clear that the court's judgements have become more detailed and extensive over the past couple of decades than was normally the case before. This applies particularly to the legal discussion. This is especially clear in comparison with judgements from the 1920s and the 1930s, and also many of those from the first 10-15 years after the Second World War. Back then, the decisions were relatively short, and often the legal principle was presented in just a few sentences, more or less without analysis or explanation. This naturally made it easy to get to the crux of the matter, but these very brief justifications were unsatisfactory both in explaining why the court decided the way it did, and in defining the scope of the precedent set.

3.8. International comparisons

3.8.1. The importance of considering practice in other countries

When considering criteria for good written justifications for Norges Bank's interest rate decisions and the Supreme Court of Norway's judgements, there is also reason to look at equivalent institutions in other countries as a potential source of ideas for improvements. The tasks assigned to supreme courts vary. There are countries like Norway where the Supreme Court is a court of precedent, but there are also supreme courts that look only, and very

[120] See, for example, paragraphs 116, 143 and 144.
[121] Sections 102 and 103.
[122] Section 223, second paragraph, cf. first paragraph, on unlawful deprivation of liberty.
[123] *Rt. 2011 p. 514*.

specifically, at whether there have been errors in the application of the law or in the judicial process – a court of cassation. It is self-evident that a court of precedent and a court of cassation will need to formulate their justifications differently, see 3.6.1 above. For the purposes of this paper, it is natural for us to look at the justifications of supreme courts which, like our own, serve as a court of precedent.

With the exception of the Finnish Supreme Administrative Court, the supreme courts of the other Nordic countries are by and large courts of precedent. The Icelandic supreme court too is now almost entirely a court of precedent, following the introduction in 2018 of an appeal court between the supreme court and the courts of first instance. The Supreme Court will now screen appeals along the same lines as in Norway and hear only those that concern matters of principle. Despite different institutional arrangements (Finland and Sweden have separate administrative courts, including a separate supreme administrative court), a relatively similar judicial culture makes comparisons with these countries particularly natural. For practical reasons, we have not looked at the judgements of the Finnish and Icelandic supreme courts. The Finnish Supreme Court rarely writes judgements in Swedish these days, and very few of its judgements are translated into English. In Iceland too, very few judgements are translated into English. Translated summaries and excerpts are not enough for us to be able to analyse and assess the actual judgements. We have not therefore had sufficient material to assess the minutes of the Finnish and Icelandic supreme courts. We have, however, looked at the judgements handed down by the Sweden's Supreme Court and the Supreme Administrative Court, and by the Danish Supreme Court, as those countries' languages are so closely related to our own. We have also looked at the judgements of the UK Supreme Court. The British legal tradition has much in common with the Nordic countries, and the UK Supreme Court and its predecessor (the Appellate Committee of the House of Lords) have a particularly long and unique tradition as courts of precedent in the common law system. We have selected a number of judgements from these four supreme courts and assessed them against the quality criteria summarised in 3.6.6 above.

Again, we have analysed the length and readability of the judgements, as discussed further in 4.3 below. Without otherwise looking at the court or individual judgements, we have also included judgements from the European Court of Justice, the EFTA Court and the European Court of Human Rights in our analyses of length and readability.

3.8.2. The Danish Supreme Court

The Danish Supreme Court is the one that is most similar to our own.[124] The two courts have a common origin: the Danish court is a direct continuation of the former Supreme Court of Denmark and Norway from when Norway was part of the Kingdom of Denmark, and this court was also the model when Norway created its own supreme court after independence in 1814. Both courts have retained oral proceedings as a key element in their consideration of the most important decisions.

Today, the Danish Supreme Court is largely a court of precedent like that in Norway. Most cases concern issues of legal principle, and the premises are designed to fulfil this precedential function. Looking back a few years, however, the situation was rather different. Back then, there was in very many cases a right to bring an appeal to the Supreme Court without requiring leave to have the appeal heard. The Supreme Court handed down a vast number of judgements. The justifications were often very short, even in many of the cases concerning matters of legal principle. Following various legislative changes, however, the

[124] A brief and instructive description of the Danish Supreme Court is provided in Dahl and Christensen (2015), pages 43-58.

situation today is that the volume of cases heard by the Supreme Court has been greatly reduced, precisely so that it can concentrate on the most important ones.[125]

The handling of cases at the Danish Supreme Court has today many similarities with the system in Norway, but there are also differences. Before the main hearing, the parties' lawyers – in criminal cases the prosecutor and the defence counsel – each submit a brief with the claims, arguments and legal sources they plan to refer to.[126] The lawyers also submit simultaneously a factual extract and a legal extract. The first contains copies of the key documents in the case, while the latter includes relevant legal sources such as judgements, *travaux préparatoires* and legal literature.

The brief sets out the main points – the bare bones – of what they will argue in the oral proceedings. The oral proceedings are similar to Norway, but more concentrated. Immediately after the main hearing, the lawyers leave the court and the doors are closed. The process now largely corresponds to the deliberations that take place in Norway, see 3.2 above. The justice delivering the leading opinion, who will be the least senior justice, announces and justifies the conclusion he or she has come to, and then reads out a draft judgement. The other justices then vote in rising order of seniority. This voting process does, however, include an exchange of opinions where the justices are required to be open to the others' arguments. A justice may change his or her position based on what emerges during the voting process. The conclusions and reasoning expressed by each of the justices during the voting process are recorded by an assistant judge. The minutes are archived, but are not publicly available.

Immediately after the vote, the justices meet to draw up a judgement setting out collectively the justifications for the conclusion that all or the majority have reached. If there is any dissent, the justifications for the minority view are also drawn up. These concentrate on the arguments that led the minority to a different conclusion to the majority. It is these justifications that are to be assessed against the criteria we have defined.

We need to pause for a moment here, as each judge's reasoning is recorded, but *the justifications are not made publicly available*. Back when the Danish Supreme Court had an excessive caseload and the collective justifications were very brief and often not very informative (as in the first case discussed below on the "spousal discount"), it is difficult to understand how the voting process could have been kept secret. This is actually somewhat reminiscent of the Norwegian system as it was before voting was made public in 1863, and largely presents the same problems. Judgements of this kind do not satisfy any of the criteria we have drawn up for good justifications. The voting process is largely similar to that in Norway. It forms part of the process that leads to the conclusion and justifications.

In Norway, Supreme Court judgements are designed to stand on their own two legs. They can be read independently of the judgements in the lower courts. A couple of decades ago, however, it was common in Norway to refer extensively to the judgements of the lower courts. This applied not only to the facts of the case and the parties' pleadings and arguments, but also very much to the reasons for the conclusion. Judgements at the Danish Supreme Court largely follow this pattern previously found in Norway. They are intended to be viewed together with the judgement of the high court, which in turn needs to be viewed together with the judgement of the district court. The Supreme Court's judgements are now more detailed than before, however, which means that the key points are clear without the reader having to refer to the high court's judgement.

[125] For further information, see Dahl and Christensen (2015), pages 49-52.
[126] For further information on these briefs, see Christensen (2016), pages 28-29.

Our general impression from more recent Danish Supreme Court judgements is that they largely satisfy our criteria. Our discussion of this focuses on two judgements on sentencing for the murder of a spouse or common-law partner: those of 2 June 1993 (*U.1993.742H*) and 5 October 2009 (*U.2010.119H*).[127] These judgements also provide a good illustration of the changes that have been made to how the Danish Supreme Court writes its judgements. Both judgements, as stated above, concern the murder of a spouse or partner.

The 1993 case was first heard by the Vestre Landsret high court. Key parts of the high court's judgement are included in the Supreme Court's judgement, but relatively briefly. The killing is described briefly. The accused and a psychological examination of him are mentioned, along with an opinion from the Danish Medico-Legal Council concerning release on probation. It is stated that the accused and three witnesses made statements, but there is no information on what they said. The question of guilt was decided by a jury. When it came to sentencing, the majority voted for ten years' imprisonment. No detailed explanation of this sentence is given. The Supreme Court's judgement is very brief. The justices are named. Concerning the case, it notes that the accused was born in 1946, that he and the victim had been living together for four years at the time of the murder, and that the murder was committed in their shared home. The prosecuting authority had appealed the high court judgement in order to obtain a tougher sentence, but it is stated that the prosecuting authority told the Supreme Court that consideration should be given to limiting the sentence somewhat with reference to the penalties for murder in the other Nordic countries.

A majority of the Supreme Court – nine justices – backed the high court's sentence, commenting that they:

> *"…find the sentence appropriate as there are no special circumstances that warrant a decrease or increase in the sentence."*

A minority – four justices – voted for a sentence of 12 years in prison. They argued that this sentence reflected practice and found no reason to deviate from that. The Supreme Court's judgement differed from the standard sentence for murder because it was the murder of a partner. This judgement thus introduced what Danish lawyers came to call the "spousal discount" in murder cases. This consequence of the judgement was not expressly stated in the decision, but was referred to in another Supreme Court judgement later the same year.[128] The spousal discount was thus entirely unexplained in the judgement that introduced it, even though this position set an important principle and is hard to see as anything other than controversial. It should be borne in mind, however, that this judgement was handed down at a time when the Supreme Court had a very high caseload.

The Supreme Court judgement of 5 October 2009 abolished this spousal discount. This follows a relatively detailed discussion of the legal principle. As usual, the Supreme Court's judgement is based on the high court's judgement, which builds in turn on the district court's judgement. Both of these earlier judgements are relatively detailed. The high court conducts a thorough review of the factual and legal aspects of the case. The Supreme Court's judgement concentrates on the case's legal side. It looks at the 1993 judgement and the material available to the Supreme Court when making that decision. It cites a judgement from 2008 when the Supreme Court stated that the different basis for sentencing for the murder of a spouse or partner:

> *"…is explained by the murder of a partner typically being committed under the influence of particular emotional stress."*[129]

[127] For further information on these judgements, see Dahl (2013), pages 319-321.
[128] *UfR 1993 p. 847.*
[129] *UfR 1993 p. 742.*

It is noted that the prosecuting authority's sentencing recommendations had reflected this, but that the matter of whether or not a distinction should be made between murder of a partner and other murders is once again up for discussion. There is then extensive reference to a paper submitted by the Director of Public Prosecutions to the Ministry of Justice on sentencing for violence against a spouse or partner, including murder. This paper concluded that there was no basis to retain a spousal discount. Relevant considerations could be addressed instead through the general sentencing rules. After quoting the DPP's report, the judgement sets out the parties' claims and arguments. The Supreme Court's nine justices agreed that there was no basis for retaining a spousal discount. This is explained. The majority – five justices – voted in line with the high court for a penalty of 12 years, which is the "standard" sentence for murder. A minority – four justices – voted for a sentence of 13 years. The difference was due to differing views on the importance of various aggravating circumstances.

Measured against the criteria we have defined for good justifications for supreme court judgements,[130] the 1993 judgement fell short on all four criteria. But this judgement hails from a different era and was written under different circumstances to today, and any further critique is of limited relevance.

When assessing the 2009 judgement against our first criterion (the justifications should be professionally sound), it is important to note that the format of Danish Supreme Court judgements differs from that in Norway. The supreme court's judgement needs to be read in the context of the high court's judgement. Norwegian Supreme Court judgements are intended to stand alone and be read independently of the judgements of the lower courts. Neither format can be said to be better than the other. There are benefits to being able to read a judgement completely independently of those of the lower courts, but this needs to be weighed against the advantage of a judgement being more concise if it refers to the lower courts. The format for the Supreme Court's judgements is largely made available through the decisions and information on its website.

Criterion 2 (the justifications should be functional) is satisfied. Note that the structure differs slightly from that which is the norm in Norway, with broad reference often being made to government reports or, in this case, a report from the DPP.

There is nothing in the judgement to suggest that criterion 3 (the justifications should be open, honest and complete) is not satisfied.

Criterion 4 (the justifications should be formulated with the judgement's normative effects in mind) is clearly satisfied. The judgement puts an unambiguous end to the spousal discount.

Danish and Norwegian Supreme Court judgements have many similarities today, but the structure is slightly different. Both ways of structuring a judgement have their pros and cons. Danish judgements are generally somewhat scanter and more concentrated in their reasoning than those in Norway. But there are some exceptions. One is the court's decision of 6 December 2016 on a key matter of principle, namely whether it would contravene the law on Denmark's accession to the EU for an unwritten principle established by the European Court of Justice to take precedence over a provision of Danish law in a case between private parties. A majority of the court found that this unwritten principle was outside the bounds of the authority transferred to the EU as part of the Accession Act, and that this principle could not therefore be applied by the Danish courts. The judgement provides a very detailed account of the relevant legal material and a broad and thorough legal discussion by both the majority (eight justices) and one dissenting justice. In general, however, Danish Supreme Court judgement's justifications will be more concise than in Norway. This too has

[130] See summary in 2.6.6 above.

both pros and cons. It will often be easier to find the key point in the legal discussion in a Danish judgement than in a Norwegian one. The more detailed legal reasoning often found in a Norwegian judgement may, however, make it easier to assess the precedential effect of the judgement, including whether the precedent may be applied more broadly. It is also our impression – and this is relevant in relation to our third criterion – that any exercise of discretion and the reasons for this are often clearer in Norwegian judgements than in Danish ones, and that the Norwegian judgements spend more time on counterarguments than Danish ones. This impression is confirmed by what Børge Dahl and Jens Peter Christensen write in their article in *Lov Sannhet Rett* (page 54):

> *"Although the Supreme Court's reasoning today is much more detailed than before, it provides only concentrated support for the conclusion. It may well be that, during the voting process, the justices had different views of how the conclusion should be explained, and attached differing levels of importance to the various considerations, but the writing of the judgement generally succeeds in bringing together these views into a common argument, such that the crux of the case and its resolution are clearly and adequately presented. Hence the judgements do not usually present all of the many different factors that the case may have raised, and which the justices may have discussed during the voting process. It is probably on this point that Danish Supreme Court judgements, insofar as the justifications are concerned, currently differ from those in Norway, which are presented as a single justice's thoughts and views. In a way, a Norwegian Supreme Court judgement is reminiscent of what the justice delivering the leading opinion in the Danish Supreme Court sets out in his or her oral presentation. This presentation is not, however, made public after deliberations and revisions as the Supreme Court's judgement. In Denmark, the focus in the subsequent, concentrated voting and judgement-writing process is what it actually is that justifies the conclusion, and the judgement attempts to express this in a comprehensible and convincing manner."*

That the judgement concentrates on "what it actually is that justifies the conclusion", and less on counterarguments and further information on any exercise of discretion, is natural to consider in the light of how the justifications are formulated in practice and the time available for this. The basic principle is that the justices should, where practically feasible, finalise the judgement collectively before the main proceedings in the next case commence.[131] This method necessitates more concentrated work on the formulation of the judgement than is the case with Norwegian Supreme Court judgements.

3.8.3. Sweden

The Swedish court system differs from that in Norway. Judicial authority is divided between separate administrative courts that consider disputes between private legal subjects and public bodies, and general courts that handle other civil disputes and criminal cases. This division of authority also applies at the highest level. There is a separate supreme administrative court, Högsta förvaltningsdomstolen (HFD), and general supreme court, Högsta domstolen (HD). We look here at both of these courts.

The Supreme Court

The Swedish Supreme Court has a longer tradition than its Norwegian and Danish counterparts as a more specialised court of precedent. Since 1971, the court has been what

[131] Christensen (2016), pages 27-28.

it itself calls a “pure setter of precedents”.[132] Some cases, however, are also brought before the court for reasons other than the importance of clarifying a key legal issue. These include cases on deportation. Each year, the Supreme Court receives more than 5,000 applications for leave to appeal judgements of the appeal courts. Leave to appeal is now granted in around 100-120 cases a year.[133] There is thus an extensive screening process.

The procedure in Sweden differs in several important ways from that in Norway.[134] One main difference is that there are oral proceedings in only relatively few cases – around 30 a year.[135] Many of these 30 are also cases that have not been referred in order to obtain a precedent. In most instances, therefore, the basis for the decision in cases heard with a view to establishing a precedent consists largely or entirely of written material.

Where leave to appeal is granted, the case is heard by a panel of five justices. It is first and foremost the court itself – a legal assistant and the reporting judge – that ensures reasonable and necessary preparation of the case for the divisional hearing where the case will be discussed. For this hearing, the legal assistant prepares a detailed assessment of the case and a draft judgement. This draft judgement is a public document and is printed together with the final judgement in the journal *Nytt Juridiskt Arkiv (NJA)*. At the hearing, the legal assistant presents the case briefly and justifies his or her proposed solution. The reporting judge speaks next, running through relevant legal source material, including legislation, *travaux préparatoires*, judicial decisions and theory. The reporting judge then states and explains the conclusion that he or she has reached. Next, the other justices speak in reverse order of seniority to state and explain their conclusion. There is then an open discussion. If no major changes are proposed to the draft judgement prepared by the legal assistant, this will become the final judgement with any revisions required by the justices, provided that the judge referee accepts the changes. If there are major changes, the reporting judge draws up a draft judgement after the meeting which is distributed to the other judges. In recent times, it has become usual for the other judges to e-mail the reporting judge with proposed changes to his or her text. In some cases, this exchange of proposed revisions can become quite intense. The justices then meet again, normally a week after the initial meeting. If there is any dissent, the dissenting judge presents his or her position very briefly. The reporting judge then presents his or her draft judgement and view of the proposed changes. The others then speak in reverse order of seniority. Once all have spoken, the chairman of the division leads a review of the draft judgement. Changes to the formulations are discussed, and the text is finalised. The prior e-mail exchanges mean that this review is now normally easier and much shorter than in the past. In important cases, a press release is also produced. The justices formulate this press release jointly. After checking, proofreading and so on, the judgement is circulated to the justices for signature. The judgement is deemed handed down once all of the justices have signed it.[136]

Norwegian Supreme Court judgements are intended to be read independently of the judgements of the lower courts. The same applies to Swedish Supreme Court judgements, but the facts of the case are generally presented in somewhat less detail than in Norway. The parties’ claims are generally stated very briefly. This is unlikely to be a problem, however. The parties will already have the judgements from the lower courts, and the judgements are published not only on the Supreme Court’s website but also in the journal

[132] See the history of the court provided on its website: http://www.hogstadomstolen.se.
[133] http://www.hogstadomstolen.se.
[134] An overview of the procedures and business of the Supreme Court is provided in former president Marianne Lundius’ article “Verksamheten i Bondeska palatset på 2000-talet” [The Swedish Supreme Court in the 21st Century], available from http://www.hogstadomstolen.se.
[135] Marianne Lundius, op. cit, page 5.
[136] Marianne Lundius, op. cit. pages 5-6, supplemented with information sent by email on 30 March 2017 by current Supreme Court president Stefan Lindskog to Tore Schei.

NJA, where the judgements of the district court and the appeal court are included with that of the Supreme Court.

We have looked at Swedish Supreme Court judgements from the past decade. There is no doubt that they generally satisfy our criteria for good justifications. As mentioned above, the Swedish Supreme Court has a longer tradition as a court of precedent than its Norwegian and Danish counterparts, and its judgements are clearly designed to clarify the precedent – the legal principle that is to be observed – rather than more specifically why the case in question was decided the way it was. This is a natural consequence of how the Swedish Supreme Court views its role in society.[137]

The current president of the court, Stefan Lindskog, has expressed the following fundamental views on how it presents the justifications for its decisions:

> *"For a state governed by the rule of law to be functional, the general public must trust the legal system. In today's societies, trust does not follow automatically from formal authority. Trust is earned. This applies for a society's highest court of law as well. And trust is based on legitimacy.*
>
> *"One consequence of the above is that a precedent must, to the greatest extent possible, be convincing. A prerequisite for this is that the court gives an open and honest account of its reasonings. And this involves the court highlighting not just arguments that support the conclusion which the court has ultimately reached, but also the objections that can be made against it. A position that was reached with difficulty does not gain anything from being presented as simple."*[138]

As we will return to later, our general impression is that the Swedish Supreme Court's rulings do indeed present its reasoning in this way.

The court's judgements follow a format that emerges very clearly from reading a handful of them. Judgements are published on the court's website as soon as they are handed down. The judgements normally begin by stating the conclusion that the court has reached. The parties' claims are then presented, normally in a single sentence. This is followed by a brief description of the background to the case. The legal material is then reviewed. The precedential value of the case is highlighted, and there is a concrete legal assessment based on the facts of the case, leading to a conclusion.

We look more closely at four decisions. The first is the judgement of 18 August 2015*, NJA 2015 p. 631.* Newspaper *Aftonbladet* published photos sent in by a person who wished to remain anonymous. The photos showed two men. Their faces were obscured by the newspaper. The photo might have been evidence in a case of armed robbery. The police wanted access to the photos without the faces obscured and applied for a warrant to search the newspaper's offices and seize "the IT unit(s) that contain unmasked images of suspected perpetrators".[139] The district court agreed to this, and the appeal court did not vary the decision. The newspaper pled before the Supreme Court that the images in question were in an electronic image file. The information transferred contained not only the images, but also metadata – information that could reveal who had taken or transferred the images. Granting access to this information would contravene the rules on protection of sources in the Freedom of the Press Act. It would therefore be against the law to permit a search and seizure.

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[137] See Stefan Lindskog on page 4 of the Supreme Court's Activity Report 2016, available from http://www.hogstadomstolen.se.

[138] The supreme court's *Activity Report 2016*, pages 4-5.

[139] Paragraph 3 of the judgement.

There is a very broad review and discussion, with an overview of the legal rules, an outline of the legal principles and issues that the case raises, and an in-depth discussion of this. One of the many issues raised by this case was whether rules designed for the seizure of written material could also be applied to information stored electronically. The Supreme Court answered in the affirmative in this case. The intentions behind the rules are at the heart of the justifications (paragraphs 22-25). The court formulates the legal principle as follows:

> *"The rules thus mean that a search and seizure to access certain information found on an electronic information carrier at a newspaper office is not generally permitted. Only if it is possible in the specific case to very clearly and narrowly confine a search of the information carrier, and so minimise the risk of privileged information being disclosed, can such a search be compatible with the rule of proportionality."*[140]

After summing up the legal position,[141] the court concludes that the requirement for proportionality precludes a search of the premises in this particular case.[142]

The Supreme Court's judgement of 21 February 2017*, NJA 2017 p. 75*, concerned a photograph with copyright protection that was used as a key element in a painting. The question in this case was whether the painting was to be seen as an adaptation of the photograph, such that the use of the work in its adapted form required the consent of the originator of the original work (the photographer), or whether this was a new and independent work. The underlying facts are outlined, and there is a general account of relevant copyright rules and issues. The precedent set out in paragraphs 14 and 15 is formulated as follows:

> *"The key to the question of whether the new work has original value is how it is likely to be perceived by those viewing it. An overall assessment must therefore be made, based on the subjective perception that can be assumed to be shared by the majority. In this assessment, as in the matter of travesties, it is important whether the new work can be considered to have a different meaning to the work used as a model. The new work will not necessarily refer – like a travesty – to the first work but may in some other way express a meaning that is foreign to that work. The stronger the original work, the harder it may be to achieve a new work modelled on it.*
>
> *"It is in the nature of the matter that the line between an adaptation and a new creation will often be difficult to draw. Different factors may come into play for different literary and artistic forms of expression and techniques. In practice, it is a question of assessing the individual case on the basis of the literary or artistic impression that each work makes, and taking account of copyright's fundamental purpose of providing a basis for creative endeavour."*

Paragraphs 16 and 17, which look specifically at the case in hand, flesh out this precedent. The conclusion is that the painting constituted a new and independent work of art.

The Supreme Court's judgement of 25 March 2015*, NJA 2015 p. 141*, ponders the issue of what significance a judgement in a criminal case should have for the decision in a subsequent criminal case against another defendant in the same complex of cases. In 2013, a person was found guilty of having smuggled 7 kg of amphetamines into Sweden. After this ruling, another person was accused of having participated in this smuggling together with the first.

[140] Paragraph 39.
[141] Paragraph 40.
[142] Paragraphs 41 and 42.

The Supreme Court found that the first judgement did not have any so-called positive legal force in the second case – in other words, it was not binding on the court in the second case. The court then asked whether the judgement in the first case could have any evidentiary value in the second case, and concluded as follows in paragraph 13:

> *"Due process considerations in a criminal trial mean, however, that the implications for a subsequent criminal trial must be very limited, above all when it comes to assessing the facts of the case."*

The Supreme Court then looks specifically at whether evidence presented in the first case could be used in the second, and, if so, what significance might be attached to it. There is a broad legal discussion which is summarised as follows in paragraph 18:

> *"In summary, it can thus be said that the presentation of evidence in the previous trial has significance primarily when a person examined in that trial cannot be examined in the subsequent trial, and when a person examined again in the subsequent criminal trial answers differently from the previous trial."*

The general significance – or lack of significance – of the evidence presented in the first case given the precedent set by this judgement is set out as follows in paragraph 19:

> *"In the subsequent criminal trial, the court must assess the evidence presented in that trial. This also applies to the evidence presented in the previous trial, to the extent that it may be invoked in the second. It follows from this that the court cannot base its evaluation of the evidence on the previous judgement. The court in the subsequent criminal trial needs to make a separate evaluation, even if the same evidence has been presented in both trials and even if the accounts given in each case do not differ. This does not, of course, prevent the court from drawing the same conclusions and finding that the evaluation of the evidence reported in the previous judgement also reflects the situation in the subsequent criminal trial. The conclusions must, however, be based on the court's own examination in the subsequent criminal trial without any precedence being given to the previous assessment of the facts of the matter."*

This is followed by a brief discussion of the specific case, where the deciding factor is that the references to the previous judgement could be taken as meaning that there was not a full and independent evaluation of the evidence in the second case. The appeal court's judgement in the second case was therefore set aside.

The Supreme Court's judgement of 23 April 2014, *NJA 2014 p. 323*, concerns a claim for damages for non-financial loss. A person had been "deregistered" as a Swedish citizen by the tax authorities. This meant in practice that he was deprived of his Swedish citizenship. He challenged the decision in a case before the administrative courts. The supreme administrative court declared the decision invalid because it violated the Swedish Constitution.

The judgement presents the background to the case. The Supreme Court then looks at the protection given to citizenship in the constitution, and the significance of citizenship in Sweden. It then outlines the legal principle in Sweden that any right to damages must be specifically provided for in law. But it goes on to say:

> *"There are no provisions giving the individual the right to such compensation following a breach of Chapter 2, Section 7, second paragraph, of the Constitution. A breach of*

this provision is, however, of such a nature that there are compelling reasons for a court to be able to award non-financial damages."

Such are the justifications given for a right to damages in this case. The emphasis appears to be on there being "compelling reasons" for compensation to be awarded here for non-financial loss. The judgement also outlines, again very briefly, the principles for setting the amount of non-financial damages and the actual amount set.

One judge dissented. This dissenting opinion centres on the argument that prevented the judge in question from concurring with the majority – that non-financial damages should not be awarded here without specific provision in law. The dissenting judge concedes that there may be good reasons for damages to be awarded, but does not believe that this is enough to support the conclusion of the majority.

As mentioned earlier, the Swedish Supreme Court judgements that we have reviewed indicate that our criteria for good justifications are generally satisfied.

When it comes to criterion 1 (the justifications should be professionally sound), we must say that the justifications in the judgements we have looked at appear to be highly professional. What some of the judgements have very little information on is what the parties argued before the Supreme Court. This is often limited to a single sentence. In the judgement on the search warrant for *Aftonbladet*'s offices, the claims are presented in rather more detail, and there is even some mention in the court's own discussion of the legal issues. On the other hand, the court's discussion in the judgements shows that it considers counterarguments to the legal positions it takes, giving the impression that the court does not ignore the parties' arguments.

There is no doubt that criterion 2 (the justifications should be functional) is more than satisfied by the first three judgements considered. The argument is logical. It appears complete and very well written in all three judgements. The fourth judgement reviewed – on damages for unlawful deprivation of citizenship – is also well written and easy to follow, but the justifications are very brief. Given the dissent, it would be reasonable to assume that part of the reason for establishing a liability for damages for violations of constitutional rights is that, in ECtHR practice, a breach of the ECHR can trigger a right to compensation for non-financial loss as restitution.[143] In Sweden, the ECHR ranks below the provisions of the constitution. In the light of this, it may appear unexplained whether violations of the constitution should have at least the same tort protection as breaches of the ECHR. But it does still seem unwarranted for the justifications not to be more detailed. The principles for setting the amount of damages have to be relatively discretionary, but in this light too, the justifications are scant. The dissent also makes the justifications for the majority opinion appear overly brief, and gives the impression that not all of the factors to which weight was given may have been included in the justifications.

When it comes to criterion 3 (the justifications should be open, honest and complete), the first three cases are again examples of how this principle is clearly satisfied. The discussion is thorough. Where discretion has been exercised and account has been taken of "equitable considerations", see 3.5 above, this is made clear, along with the basis for this. There is nothing in the case concerning damages for deprivation of citizenship to indicate that the court has attempted to avoid providing a complete account of the considerations included in the discussion. As noted above under criterion 2, however, there is reason to have included these in the justifications. The assumption is that the majority attached importance to the need for consistency in the legal system and to equitable considerations in this regard.

[143] The European Court of Human Rights (ECtHR) is the international court established under the European Convention on Human Rights (ECHR).

The judgements generally indicate that criterion 4 (the justifications should be formulated with the judgement's normative effects in mind) plays a key role and is well satisfied. That is not to say that the key legal principle will always be easy to apply. The judgement on damages for a violation of constitutional rights is an example of this. The judgement drawing a line between adaptation and innovation in copyright law is an example of the precedent being elaborated on further through the concrete legal assessment.

The Supreme Administrative Court

The Supreme Administrative Court (HFD) is the highest court in the pyramid of administrative courts in Sweden. First and foremost, it hears appeals against the rulings of the four administrative appeal courts. In certain circumstances, the court can also test the legality of government decisions as the court of first instance.[144]

Like the Supreme Court, the supreme administrative court is primarily a court of precedent. It is not easy to get through the eye of the needle and have an appeal court decision heard by the court. Of around 8,000 applications for leave to appeal each year, only around 2 percent are granted.

The court's proceedings are written, but there may be oral proceedings in exceptional cases.[145] Cases granted leave to appeal are considered and decided by one of the court's two divisions. Five justices in the division participate in each individual case. The procedure is largely similar to that in the Supreme Court once leave to appeal is granted. Again, a judge referee prepares the case and produces a draft judgement for the division.
The court's president Mats Melin describes the way its judgements are constructed as follows:

> *"For just over a year now, our decisions have, almost without exception, been structured as follows:*
>
> *"After the judgement's 'header' identifying the parties and the decision being appealed, there is the heading 'The court's determination', which contains the actual decision. Next, under the heading 'Background', we present, briefly and as simply as possible, the legal and factual background and how the lower courts viewed the case. The section 'Claims etc.' presents, of course, the parties' claims and, very briefly, what they have invoked as support for their claims. The next section is 'Reasons for the decision'. This normally has three subheadings. The first is 'The matter in hand' (previously sometimes 'What the case concerns'), where we attempt to capture in a sentence or two what the court's review covers. The next subheading is 'Legal rules etc.', where relevant legislation is presented, along with any Swedish and European case law with general implications for the case. Finally, there is the subheading 'The court's assessment', which sets out the actual justifications for the decision. In cases of some complexity, we also have an additional layer of subheadings for specific issues or different aspects of one and the same issue."*[146]

Judgements are made available on the court's website as soon as they are handed down. The format emerges clearly from reading just a few. We have looked at judgements from the past four years. They comfortably satisfy our criteria for good justifications. The justifications for the precedent often consist of fairly general statements on the application of the legal rule

[144] See the supreme administrative court's website: http://www.hogstaforvaltningsdomstolen.se.
[145] *HFD 2013 ref. 72* is an example of a judgement handed down following oral proceedings – see further information on this judgement in the text below.
[146] E-mail from Mats Melin to Tore Schei of 22 February 2017.

in question, aiming at broad application of the underlying legal principle. In some cases, however, the legal solution is more closely linked to the specific facts of the case, such that the legal guidance cannot necessarily be applied to cases that are not identical.[147]

We have looked more closely at four decisions. The first is the court's judgement of 20 June 2013, *HFD 2013 ref. 42*. A.A., a Swedish citizen, was extradited to Finland under a European arrest warrant for the adjudication of crimes committed there. He demanded, with support in law, that any sentence should be served in Sweden. On 30 November 2009, the Finnish appeal court sentenced him to seven years' imprisonment. The judgement became final on 25 January 2011 when the Finnish Supreme Court refused leave to appeal. The Finnish prison authorities calculated that the so-called core period of the custodial sentence would be completed on 4 May 2011, based on the country's rules granting parole halfway through a sentence. A.A. was returned to Sweden on 17 February 2011. Based on Swedish rules, the Swedish prison authorities calculated an earliest date of parole of 5 July 2012, 14 months later than in Finland. The question in this case was whether the Swedish prison authorities should have taken account of the Finnish rules on parole when calculating the date of his parole. The court of first instance, the Stockholm administrative court, interpreted the applicable rules such that the answer had to be yes. The court of second instance, the Stockholm administrative appeal court, found that the matter had to be decided entirely on the basis of Swedish rules, and that the Swedish prison authorities' determination of the date of parole should therefore stand.

The supreme administrative court's judgement takes a broad look at the relevant legal rules. For example, it considers Section 25, third paragraph, of the Act on International Cooperation in the Enforcement of Criminal Judgements, which states that the sentence for a person transferred from another country must not be greater than that passed down by the courts in that country. The act's *travaux préparatoires* are also mentioned. There is a detailed account of the differences between Finnish and Swedish rules on the execution of custodial sentences. It is noted specifically that this difference means that the time to parole following transfer to Sweden increases by a third. Without drawing any firm conclusion, there is next a discussion of whether such an increase is compatible with the aforementioned Section 25, third paragraph, of the Act on International Cooperation in the Enforcement of Criminal Judgements. The court then looks at Article 5(1) of the ECHR, which states that no one should be deprived of liberty other than in specific cases, one being lawful detention following a criminal conviction. The court goes on to consider judgements from the ECtHR and the weight that should be attached to them in this case.

The court concludes:

> *"In the present case, the Swedish Prison and Probation Service's decision means that actual imprisonment is extended by a third. It is open to question whether such an extension would in general contravene Article 5 of the European Convention. When it comes to A.A., however, importance has to be attached to the fact that, at the time of his transfer to Sweden, he had less than three months left until expected parole in Finland. In these circumstances, it is the opinion of the court that extending the actual period of imprisonment by a further year and two months is disproportionate. The Swedish rules on parole cannot therefore be applied in full.*
>
> *"When A.A. was released on 14 July 2011, he had served more than two months more than the time he was to have served in Finland. The appeal is upheld, such that the time of parole in Sweden is set at the aforementioned date."*

[147] For further information on the supreme administrative court, see http://www.hogstaforvaltningsdomstolen.se.

It is clear here that the court has seen an assessment of proportionality as pivotal for its conclusion. It mentions specific and important factors in such an assessment, and these will also provide guidance in other cases. The court asks whether extending imprisonment by a third can be considered disproportionate in general. Such a position would have provided broader guidance, but the court refrains from this. This is understandable. The difference between extending imprisonment by a third where this equates to an extra year or more in prison, and where this adds only days or a couple of months, is such that it is hard to argue against this being a deciding factor.

In the Supreme Administrative Court's judgement of 15 April 2016*, HFD 2016 ref. 25,* the issue was whether a Swedish investment fund was entitled to a certificate of residence from the tax authorities – an official confirmation that the fund was domiciled in Sweden for tax purposes in 2013. This was to be used to avoid taxation of the fund in Spain. Spain and Sweden have a bilateral tax treaty, and if the fund were tax-resident in Sweden, it could not be taxed in Spain. The request for a certificate of residence was turned down by the Swedish tax authorities on the justifications that *"a fund will not in any circumstances be liable to tax on any income in Sweden"*. The administrative court agreed with the tax authorities, while the administrative appeal court found that, although securities funds were no longer required to pay tax on their income in Sweden in practice, they were still Swedish tax subjects with an unlimited liability to tax in Sweden. As a result, a certificate of residence would have to be issued. The Supreme Administrative Court provides a broad account of relevant legal rules and the tax treaty. Its legal review and discussion conclude as follows:

> *"Since 1975, the taxation of Swedish securities funds and their investors has been based on the funds being independent tax subjects with unlimited liability to tax. This still applies, even though actual taxation now takes place only at investor level. This rather unusual arrangement – with the fund liable to tax in principle, but investors taxed in practice – results nevertheless in the same overall tax revenue. If securities funds are considered to be resident here, the distribution of the tax base between states previously following from the treaty is unaffected. If, on the other hand, the revised arrangements for the taxation of fund assets were to be considered to mean that they were no longer resident in Sweden, this would lead to the funds losing the protection that the treaty is intended to provide.*
>
> *"The court is therefore of the opinion that it is most closely in line with the purpose and intentions of the tax treaty, and with the way the OECD's model agreement is interpreted by the majority of states, and with previous legal practice, to attach overriding importance in this case to the fund having an unlimited liability to tax in Sweden and thus being considered resident here for the purposes of the tax treaty."*

The legal discussion is detailed, and it is interesting because it argues openly on the basis of the intentions of the legislature and equitable considerations.

The court's judgement of 13 June 2014*, HFD 2014 ref. 33*, considers whether the owner of a computer with an Internet connection is liable to pay a radio and television licence. This became an issue as a result of radio and television programmes being made available online. The collecting body demanded a licence fee from the owner of a computer with an Internet connection on the justifications that he could receive these programmes. The administrative court and administrative appeal court upheld the decision, and the latter's decision was appealed to the Supreme Administrative Court.

The judgement contains a detailed review of the legal rules and *travaux préparatoires*. The court presents the issue as follows:

"The question is whether the Licence Fee Act's definition of a television receiver as technical equipment designed to receive transmissions or retransmissions of television programmes can now provide a basis for considering a computer with an Internet connection to constitute such a receiver."

The court embarks on its interpretation of this precisely as we would expect. First, it looks at the wording: how it would naturally be understood. Next, it looks at the *travaux préparatoires*. It notes that there are statements in the *travaux préparatoires* that can be understood as lending support to the licence fee covering all apparatus capable of receiving transmissions, while others point to a narrower definition.

The deciding factor in interpreting the law is presented by the court as follows:

"Of crucial importance, however, is that this is a question of determining the scope of restrictive legislation. The question is ultimately whether the individual is liable to pay a licence fee for owning computer equipment with an Internet connection. No such liability has existed before, and the introduction of such a liability should require clear support in law. There is no such clear support in law.

"Against this background, the court finds that the term "designed" cannot be interpreted such that a computer with an Internet connection can be considered designed to receive transmissions or retransmissions of television programmes."

The court adds that a duty to pay a fee under the licensing rules also presupposes that online distribution of programmes can be considered "transmission" in the sense used in those rules. Here, the court finds that the *travaux préparatoires* are clear that online distribution does not constitute "transmission" in the sense used in the rules, and that this should be the deciding factor.

The court's judgement of 8 November 2013*, HFD 2013 ref. 72*, is an example of where it tests a government decision. The government had denied Jehovah's Witnesses state funding under the Act on Funding for Faith-based Organisations, which states that "state funding may only be granted to faith-based organisations that help uphold and strengthen the fundamental values on which our society rests". The court presents the government's reasons for refusing funding as follows:

"The government justifies the disputed decision by arguing that Jehovah's Witnesses, in urging their members not to participate in political elections, fail to meet the requirement in Section 3(1) of the Act on Funding for Faith-based Organisations that they help uphold and strengthen the fundamental values on which our society rests. The matter to be decided by the court is whether the provision in question provides scope for such an interpretation."

The court looks at the act in question, the statutory basis for refusing funding, and the *travaux préparatoires*. It also considers the protection of freedom of religion in the Swedish Constitution and in Article 9(1) of the ECHR, including key ECtHR practice. The court concludes:

"The court finds that a universal and equal right to vote is part of the fundamental values on which our society rests. At the same time, while citizens may certainly be expected to seize the opportunities available to them to participate in the governing of their country, they also have the right not to do so. In Sweden, the right to vote is a right and not an obligation.

"Respect for freedom of religion demands that an assessment of whether a faith-based organisation can be considered to help uphold and strengthen the fundamental values on which our society rests does not involve any further scrutiny and appraisal of that organisation's religious teachings. That such must not happen is explicitly stated in the act's travaux préparatoires (Bill 1998/99:124, p. 64). As stated above, it is also the practice of the European Court for the state's obligation under Article 9(1) of the Convention to remain neutral and impartial is of crucial importance in assessments of this kind.

"The provision in Section 3(1) of the Act on Funding for Faith-based Organisations cannot, in the light of the above, be taken to mean that an organisation whose religious teachings encourage its members not to participate in general elections, without for that matter undermining our constitutional democracy, cannot be considered to satisfy the criterion for the right to government funding.

"The court finds that the government's decision to reject the application from the Jehovah's Witnesses lacks support in law."

The government's decision was set aside.

As mentioned above, the supreme administrative court's judgements comfortably satisfy our criteria for good justifications.

When it comes to criterion 1 (the justifications should be professionally sound), the judgements appear highly professional. They follow a set format, which is very clear from reading just a few.

Criterion 2 (the justifications should be functional) is undoubtedly satisfied by all of the judgements we have looked at. The argument is logical, and the decisions are well written in relatively simple language.

Criterion 3 (the justifications should be open, honest and complete) is clearly met by the judgements. We also note that it is made clear where the judgements involve equitable considerations, see 3.5 above.

Criterion 4 (the justifications should be formulated with the judgement's normative effects in mind) plays a central role in the decisions and is comfortably satisfied. That is not to say that there may not be doubt about the implications of the court's application of the law in similar cases, see the discussion above of *HFD 2013 ref. 42* and the assessment of proportionality referred to there.

3.8.4. The UK Supreme Court

The UK Supreme Court is the highest court for the whole of the UK in civil cases, and for England, Wales and Northern Ireland (but not Scotland) in criminal cases. This authority was previously held by the Appellate Committee of the House of Lords, but in October 2009 it was transferred to a newly formed Supreme Court. Like its predecessor, the Supreme Court is very much a court of precedent. Around 50-60 cases are heard each year. These are cases that raise practically important matters of legal principle, where clarification – and perhaps development – of the law is of particular significance.

The key features of its case procedures are fairly similar to those here in Norway. Cases are considered orally. They are normally heard by a panel of five justices, but particularly important cases may be heard by seven or nine. In only one case to date has the court sat in

plenary session.[148] As in Norway, the oral proceedings are true oral proceedings. The review of the case and arguments are conducted orally. The hearing may last for anything from a few hours to a few days, depending on complexity etc. The lawyers submit skeleton arguments before the hearing, however. These are expected to be read by the justices participating in the appeal hearing, and probably lead to the oral proceedings being somewhat more concentrated than here in Norway. Even more so than in Norway, the oral proceedings have the nature of a seminar, with questions and an exchange of opinions between judges and advocates. As in Norway, the justices do not discuss the matter before the main hearing beyond a brief meeting immediately before it begins. The purpose of this meeting is first and foremost to give the president of the court an idea of what issues the justices consider most important, and what needs to be raised with the advocates in the main hearing.

A conference is held after the main hearing. The least senior justice goes first. This is not a detailed review of the case, but more a brief statement of how the justice sees the case. The other justices then speak briefly in ascending order of seniority. Following the conference, the president of the court appoints one of the panel to draft the judgement. The emphasis here is on conveying what appears most important in the view of the court (or the majority). The choice also takes account of which of the justices is a specialist in the relevant legal field. On this point, there is a difference to the procedure in Norway, where specialist expertise is not taken into account. The justice appointed writes the draft personally, not the court's legal assistants. Once the draft has been distributed, there is often input on changes and additions from the other justices, and it is not uncommon for there to be further discussions and revised drafts. Sometimes supplementary opinions are requested from the advocates, and an additional oral discussion is also possible.[149]

Previously it was normal for each justice to produce his or her own opinion. Today, there is a clear tendency towards uniting around a leading opinion, or at least for a majority to unite around an opinion. This has been a very deliberate change.[150] It can lead to greater clarity on the application of the law that the precedent entails. But it is still not uncommon to have multiple opinions, and one or more dissenting opinions will naturally be prepared if there is disagreement about the conclusion.

There is no doubt that the UK Supreme Court's judgements comfortably satisfy our criteria for good justifications. We will limit ourselves to two examples. First, we look at the *judgement of 24 January 2017* on the Brexit case.[151] The background to the case, of course, is that the British government, as a result of a referendum, wanted to withdraw the UK from the EU. Article 50 of the Treaty of the European Union has rules on the procedure for this. Under this article, formal notice of the intention to withdraw must first be given, and membership of the EU will then end within two years thereof. There were two issues in this case. The main issue was whether such notice could be given without prior parliamentary approval. The second was whether the laws devolving authority to the popularly elected assemblies in Scotland, Wales and Northern Ireland required them to give their approval or be consulted before notice could be given.

A majority of eight justices united around one opinion. It is very thorough, logically constructed and well written. It addresses all of the government's objections to the judgements being appealed. The arguments appear to be complete and open. One might naturally ask whether the majority needed to provide such extensive information and

[148] This was in the Brexit case, see below. On this occasion, 11 of the court's 12 justices took part. The 12th was on sick leave.
[149] Neuberger (2016), paragraphs 41 and 42, and Neuberger (2017), paragraph 33.
[150] Neuberger (2016), paragraph 40.
[151] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union.*

arguments. But the length and depth have to be seen in the light of the case raising fundamental constitutional issues of huge importance, and the detailed dissent – especially the opinion of Lord Reed – warranted all arguments being considered.

Despite the length of the decision and the detail of the discussion, the logical structure and well written arguments make the decision very accessible to informed readers willing to put in some time. There is reason here to draw attention to the press summaries of the Supreme Court's decisions that are prepared by its information department. As stated at the end of these summaries, they are "provided to assist in understanding the Court's decision", which also underlines how the summary does not form part of the justifications for the decision. There is no doubt that the summary contributes greatly to facilitating understanding of the decision in a complex case such as the Brexit case.

As noted above, there is no doubt that the Brexit ruling meets our criteria for good justifications. We see no reason to go into detail here. Regarding criterion 3, we would note that it appears very much to be honest and complete. The judgement does include some exercise of discretion, partly concerning the effects of the positions presented. This exercise of discretion is reasoned. Criterion 4 is also satisfied. The judgement clarifies the constitutional issues, the limits of what the government and its minister are entitled to do, and the limits of the powers devolved to the elected assemblies for Scotland, Wales and Northern Ireland.

The second ruling that we would like to mention briefly, as an example of how a UK Supreme Court judgement is now structured, is the *judgement of 5 April 2017* on two cases concerning indirect discrimination on the justifications of race, age or religion. In both cases, the decision is unanimous.[152] All of the justices concurred fully with the opinion presented by Lady Hale, then deputy president and now president of the court.

In her opinion, she looks first at the legal rules that apply. She next looks at the facts and the proceedings in the two cases, *Essop* and *Naeem*. She then looks more specifically at the legal rules on direct and indirect discrimination and developments in these rules. In paragraphs 24 to 29, she sets out the features of indirect discrimination and discusses these in more detail. She subsequently discusses the legal requirements specifically in the *Essop* case in paragraphs 30-35, deciding in favour of the appellant in paragraph 36. An equivalent discussion of the *Naeem* case follows in paragraphs 37-47, followed by a decision against the appellant in paragraph 48.

There is no doubt that the judgement comfortably satisfies the criteria we have defined for good justifications. The legal rules are explained in detail, both in general and as they apply to these specific cases. In some contexts, the legal rules are complex while also practically important. They apply to employees and employers in general. The thoroughness of the review and the explanation of the legal rules has to be seen in this light. The justifications clearly seem to be complete. There is no reason to believe that anything of relevance has been omitted. The precedential effect is made clear by explaining the rules that are to be followed. In the same way as in the Brexit judgement, there is also a summary which greatly facilitates understanding of the ruling.

[152] *Essop and others v Home Office (UK Border Agency)*; *Naeem v Secretary of State for Justice*.

4. Empirical analysis of clear language[153]

4.1. Introduction

A growing body of economic research is using "big data" to shed light on both macro- and microeconomic issues. Textual data fall into this category, first and foremost because text is unstructured data. This contrasts with, say, standard economic statistics, which come in set tables with rows and columns. Because textual data are an unstructured form of data, a different analytical approach is required. Economists have drawn methodological inspiration from informatics-related disciplines, in particular natural language processing (NLP).[154] There is also a growing literature on central bank communications – see, for example, Blinder, Ehrmann, Fratzscher, de Haan and Jansen (2008).[155]

The methods we use in this paper are very basic compared to the research referred to above. Our work nevertheless dovetails with this research. Economic agents use many different sources to obtain information on what is going on around them, and make decisions. Textual data not only convey information on hard economic facts, but may also be an information carrier *per se*. So it is important for the language to be clear.

Our second criterion above was that the justifications should be functional, with the following underlying requirements:

- *The justifications should be explained logically, setting out the premises, analyses, assessments and conclusion.*
- *The justifications should be written in a language that can be understood and is tailored to those affected by the decision.*
- *The justifications should nevertheless be written efficiently. They need to concentrate on the key factors, with less relevant information stripped away.*

The first requirement, for the justifications to have a logical structure, is naturally the most important. An illogical explanation will never be a good one, even if it is in clear language and efficiently organised.

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[153] Vegard Høghaug Larsen played a key role in the work on the technical analysis in this chapter. He was assisted by Andreas Økland, Fabian van der Burg and Elisabeth Werenskiold in creating the database.

[154] A discussion can be found in Gentzkow, Kelly and Taddy (2017). One example of such an analysis is Larsen and Thorsrud (2015), who use a statistical NLP model to decompose the news in a business newspaper into different topics. The authors then show how variations in these topics can be used to explain fluctuations in the economy. Their hypothesis, quite simply, is that extensive coverage of a topic, such as the oil market, may indicate that something important is happening in that market which could have macroeconomic implications. In similar work, the authors show how the same type of data and statistical method can be used to predict day-to-day share price movements and business cycles, and to create category-specific measures of economic uncertainty – see Larsen and Thorsrud (2017a), Thorsrud (2016) and Larsen (2017).

[155] They apply a measure of clarity to the communications of central banks in the Czech Republic, the EU, the UK and Sweden, and test whether there is a relationship between the clarity of communication and market turmoil (volatility). Another example is Hansen and McMahon (2016), who propose an automated method for differentiating between forward guidance and information on the current state of the economy. There have also been analyses of the impact of monetary policy on the stock market, and of the effect of official central bank communications relative to information provided through the media. For example, Cieslak and Vissing-Jorgensen (2017) conduct a text analysis of FOMC communications and argue that movements in the stock market have a causal effect on monetary policy in the US, while Hayo and Neuenkirch (2012) look at Canada and find that central bank communications have a relatively strong influence on the bond market, while media coverage is more relevant for the stock market. See also Larsen and Thorsrud (2017b).

Bank of England chief economist Andrew Haldane discussed the importance of clear language in his speech “A little more conversation, a little less action”, where he refers to what the Campaign for Plain English had to say about the minutes of the Bank of England’s monetary policy committee:[156]

> *“Earlier this year, the Campaign for Plain English, a militant band of grammarians, turned its attention to the Bank of England MPC’s Monetary Policy Statement. This statement is intended to be a simplified and sanitised account of the MPC’s judgements. The Campaign for Plain English described it as “worthless, impenetrable waffle” and “gobbledygook”. Reading between the lines, I am not sure they liked it.”*

While opinions on the clarity of a text will always depend somewhat on the individual reader, a variety of objective criteria have been developed for measuring readability, and modern information technology permits this to done quickly and easily. There is still an element of subjectivity in how these algorithms are designed. They will often be based on how many words there are in a sentence, how many words have more than three syllables, how many words have more than so many letters, the ratio between verbs and nouns, and the ratio between verbs and nouns on the one hand and adjectives and adverbs on the other. Tests of this kind can also be applied to central bank minutes and supreme court judgements.

These tests have their shortcomings. It is perfectly possible to write a text that scores poorly in readability tests yet still “flows”. The works of the Norwegian author Dag Solstad are an example of this, packed with long unpunctuated sentences, yet widely understood and enjoyed. Many good authors write in such a fashion. But nor is it difficult to find examples of where there is a good correlation between the subjective perception that a text is inaccessible and readability tests reaching the same conclusion – take Marcel Proust’s *In Search of Lost Time* and James Joyce’s *Ulysses*. We imagine that most people will find those books heavy going and that they will be off the scale in any readability test.

President Trump’s speeches and Twitter messages score well in readability tests. But it could be argued that they score poorly on the first component of our second criterion, namely logic. There is not always much connection between the content of the first 70 characters of his Tweets and the last 70.

As mentioned above, these mechanical rules for measuring readability have undergone something of a renaissance due to developments in data technology and “big data”. It is now possible to analyse vast amounts of text very efficiently.

Some of the best-known readability tests include:[157]

- Flesch-Kincaid Grade Level
- Flesch Reading Ease
- Gunning Fog Index

Most of these tests are calibrated to show how many years of education are required to understand the text. Empirical studies of different groups were carried out to see what they actually understood. The Flesch-Kincaid Grade Level and Gunning Fog Index were calibrated in this way. A Flesch-Kincaid Grade Level of 12 means that 12 years of education is needed to understand the text. Flesch Reading Ease, on the other hand, is measured on a scale from 0 to 100, where a score of 100 indicates that the text is extremely easy to read, while a score of 0 suggests that it is impenetrable. Readability tests are used by the US armed forces to ensure that their manuals, instructions and other written material are in a

[156] Haldane (2017).
[157] Flesch (1948), Gunning (1952) and Kincaid et al. (1975).

language tailored to the user group. Pennsylvania was the first US state to require car insurance documents to be simple enough to be understood by those with nine years of education, and this has gradually become more common in many other US states. The idea is that the readability of the text should be tailored to the target group. For 80 percent of Americans to understand a text, its complexity should not exceed a level corresponding to eight years in school.

In 2012, Franco Moretti and Dominique Pestre from Stanford Literary Lab published an analysis of the language of World Bank documents in the period 1946-2012.[158] They showed that the frequency of the word "and" increased from 2.6 percent on average when the World Bank was formed, to almost 7 percent at the end of the period. Professor Paul Romer took over as chief economist at the World Bank in October 2016. He had noticed that 32 percent of World Bank reports were never downloaded and read. He put this down partly to poor writing. Romer wanted the bank's reports to be read. One requirement for this was that they needed to be in clear language. Romer took the frequent use of "and" to be a sign of poor language. He issued a directive that this conjunction should not account for more than 2.6 percent of the words in any report. The directive led to considerable consternation at the World Bank, as reported in *The New York Times* on 15 April 2016.[159] The case was also covered in *The Economist*: [160]

> *"A war of words has flared up at the World Bank. Paul Romer, its new chief economist, has been stripped of control of the research division. An internal memo claimed that the change was to bring the operations department and research arm closer together. But many think that it was because Mr Romer clashed with staff over the Bank's writing style. He had demanded shorter, better-written reports. In the most recent spat, Mr Romer questioned the excessive use of the word 'and'. He proclaimed that he would not clear a final report for publication if 'and' made up more than 2.6 percent of the text. His tenacious approach had, it is said, rubbed some employees the wrong way."*

Why worry so much about how often this conjunction is used? Moretti and Pestre believe that frequent use of the word "and" may reflect lazy writing and a lack of precision. As examples of the misuse of the word, they pull out two quotes from a World Bank report:

> *"...promote corporate governance and competition policies and reform and privatize state-owned enterprises and labor market/social protection reform…"*

> *"There is greater emphasis on quality, responsiveness, and partnerships; on knowledge-sharing and client orientation; and on poverty reduction…"*

They then comment on these two examples:

> *"The first passage—a grammatico-political monstrosity—is a small present to our patient readers; the second, more guarded, is also more indicative of the rhetoric in question. Knowledge-sharing has really nothing to do with client orientation; poverty reduction, nothing to do with either. There is no reason they should appear together.*

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[158] Moretti and Pestre (2012).
[159] See, for example, https://www.nytimes.com/2016/04/15/upshot/at-the-world-bank-a-shortage-of-concrete-language.html?mcubz=3.
[160] *The Economist*'s online edition, May 2017, https://www.economist.com/blogs/graphicdetail/2017/05/daily-chart-20?zid=295&ah=0bca374e65f2354d553956ea65f756e0. The frequency of the word "and" in *The Economist*'s printed edition that week was 1.5 percent.

But those ‘ands’ connect them just the same, despite the total absence of logic, and their paratactical crudity becomes almost a justification: we have so many important things to do, we can’t afford to be elegant; we must take care of our clients, yes (we are, remember, a bank); but we also care about knowledge! and partnership! and sharing! and poverty!”

Moretti and Pestre also look at the ratio between the number of verbs and nouns. This corresponds to what we Norwegians were taught in school about overusing nouns, witness Professor Finn Erik Vinje’s Rule No. 4:

“Never write ‘Kari is undertaking a harvest of apples’ when you could equally well put ‘Kari is harvesting apples’.”[161]

Former Norwegian Supreme Court justice Georg Fredrik Rieber-Mohn wrote in an e-mail to the authors of this paper:[162]

“In this respect, we lawyers are perhaps among the greatest sinners. Few ‘undertake’ as much as lawyers do. We ‘undertake investigations’, ‘undertake journeys’ and so on. Sometimes it may be a natural turn of phrase, but unnecessary nominalisation is rife in the language of law.”

In his speech “A little more conversation, a little less action” in March 2017, Andrew Haldane looks at the readability of a number of key publications, including the minutes of monetary policy decisions at the Bank of England and the Federal Reserve.[163] Our work follows up these analyses by Haldane and by Moretti and Pestre. We use the same algorithms as they did to test the clarity of the language used in central bank minutes and supreme court judgements.

We include the following supreme court judgements:[164]

Denmark: 2012-2016. Number of judgements: 658
Norway: 2007-2017. Number of judgements: 1,458
Swedish Supreme Court: 2012-2017. Number of judgements: 560
Swedish Supreme Administrative Court: 2013-2016. Number of judgements: 339
UK: 2009-2017. Number of judgements: 650
European Court of Justice: 2007-2017. Number of judgements: 462[165]

[161] Vinje (2009).
[162] E-mail of 28 November 2017.
[163] Haldane (2017). The title of Haldane’s speech *“A Little More Conversation, A Little Less Action”* plays on the title of the 1960 Elvis Presley song “*A Little Less Conversation”,* which begins:

A little less conversation, a little more action please
All this aggravation ain’t satisfactioning me
A little more bite and a little less bark…

While Elvis wanted less talk and more action, Haldane believes that central banks need to get better at talking to the people they serve.
[164] The sampling periods for judgements from the various courts vary somewhat. The choice of judgements from each court to some extent reflects how easy they were to access. In Denmark’s case, we decided not to go any further back than 2012, because the Supreme Court has increasingly turned into a court of precedent in recent years. As the UK Supreme Court was not created until 2009, we have only included judgements from that year onwards.
[165] Our sample of judgements from the European Court of Justice covers only plenary session and grand chamber decisions. A total of 462 were handed down, but we analyse only 418 of these. The “missing judgements” are evenly distributed across the period, with the exception of 2016, for which almost half the judgements have been excluded. For the judgements to be analysed, the format of the text needed to be readable in our analytical software. The software was not able to read some of the

EFTA Court: 2010-2017. Number of judgements 138
European Court of Human Rights: 2010-2017. Number of judgements: 156 grand chamber (all countries) and 251 chamber (only the Nordic countries and the UK)[166]

We also look at the following central bank minutes: [167]

Denmark:[168] 2003-2016. Number of decisions: 61
ECB:[169] 2009-2017. Number of decisions: 90
Iceland: 2009-2017. Number of decisions: 67
Norway:[170] 1999-2016. Number of decisions: 137 in Norwegian and 137 in English
Sweden: 2004-2017. Number of decisions: 89 in English and 6 in Swedish from 2016
UK: 2007-2017. Number of decisions: 124

All told, we collected and analysed more than 6,000 decisions.

To obtain results comparable with those of Haldane (2017), we chose Flesch-Kincaid Grade Level as our readability test. We also carried out analyses with other readability tests: Flesch Reading Ease, Smog Index, Gunning Fog Index, word count and sentence count. They did not produce materially different results.

All supreme court judgements are written in the country's own language, and the tests were performed on these languages even though they were developed for the English language. Central banks publish the formal justifications for their decisions in both their own language and English. Could tests developed for English but applied to Norwegian, Swedish and Danish be a serious source of error? We therefore tested the Swedish and Norwegian minutes in selected years both in the original language and in English.[171] The results show that readability scores can vary between the original language and English, but not systematically. Chart 1 below shows readability scores for the Norwegian and English versions of "The Executive Board's assessment" in Norway.

judgements. There may be unclear characters or symbols in the text that the software does not understand. We have not attempted to find out what the underlying problem was.

[166] HUDOC grand chamber decisions for 2010-2017 (all countries). HUDOC grand chamber decisions for 2010-2017 for the Nordic countries (FIN, DK, NOR, SWE) and the UK (no grand chamber decisions in ICE during the period). HUDOC chamber decisions for 2010-2017 for the Nordic countries (FIN, ICE, DK, NOR, SWE) and the UK.

[167] The sampling periods vary from bank to bank, primarily for practical reasons to do with availability.

[168] In Denmark, no minutes of the decisions are made public. We have analysed instead the press releases approved by the Board of Governors.

[169] For the period 2009-2014, we have analysed the "Introduction to the press conference". From February 2015 onwards, we have analysed the "Account of the monetary policy meeting".

[170] For the period 1999-2010, we have analysed the monetary policy assessment and strategy. From 2011 onwards, we have analysed "The Executive Board's assessment". A dashed line has been used until 2011 to reflect the fact that the texts are not formal minutes.

[171] Both banks translate their minutes into English.

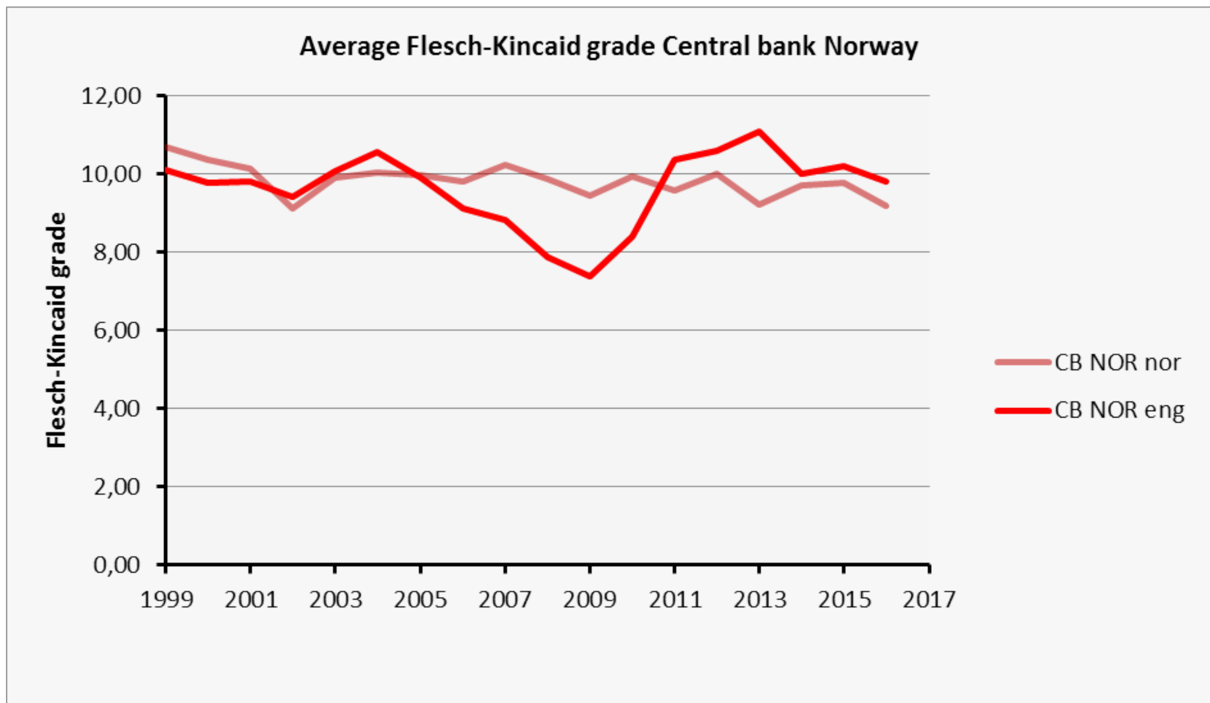


Chart 1. Flesch-Kincaid Grade Level for "The Executive Board's assessment" in Norwegian and English.

4.2. Central banks

How much do they write?

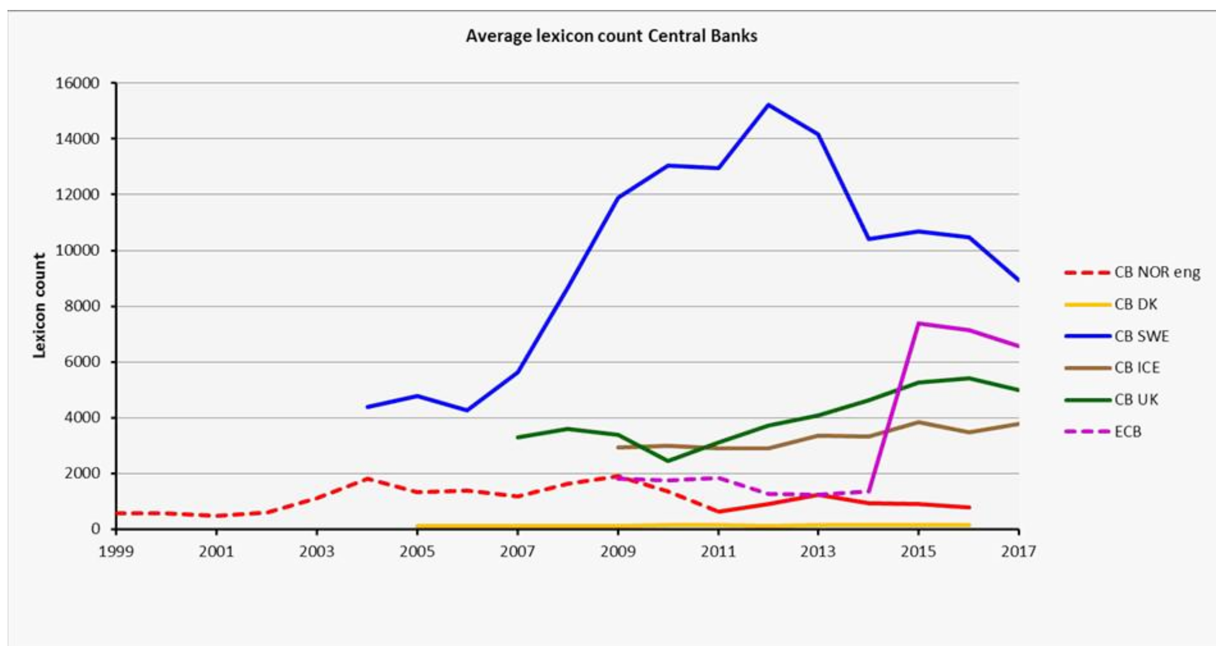


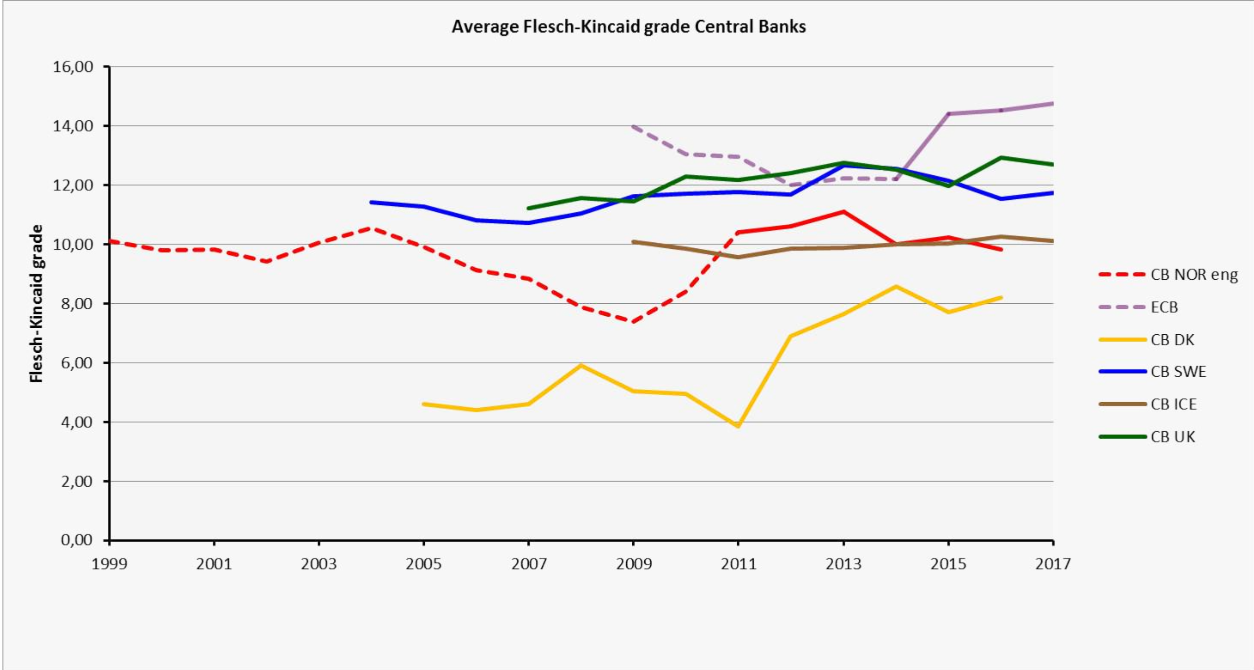
Chart 2. Number of words in central bank minutes.

Chart 2 above shows how many words the various central banks use to explain their monetary policy decisions. The Swedish central bank writes the most, despite members of its Executive Board and members of the Bank of England's MPC making equally long submissions.[172] The minutes of the Swedish bank's rate-setting meetings increased dramatically in length from 2007. The word count has fallen again by around 4,000 since 2013, but the Swedes are still way ahead. The other outlier is the Danish central bank. The length of its minutes is practically on the x-axis, but this is also natural given its monetary policy regime. With a fixed exchange rate against the euro, detailed reasons for changing the key rate in Copenhagen when interest rates change in Frankfurt are not needed.

Norges Bank also provides very brief justifications for its decisions. "The Executive Board's assessment" was introduced in 2011. Previously the Executive Board endorsed a monetary policy strategy, but it was not the Executive Board that approved the text but the staff headed by the governor. The length of the monetary policy strategy texts from 1999 to 2010 is shown as a dashed line in the chart.

The ECB has published minutes since 2015 under the name "Account of the monetary policy meeting". Before 2015, the president's "Introduction to the press conference" was the closest thing to a set of minutes. This text was always discussed by the Governing Council and was a kind of consensus minutes even though it was not formally approved. We have included these texts in the chart with a dashed line. The length of the ECB "minutes" increases from fewer than 2,000 words to around 7,000 when we switch from the "Introduction to the press conference" to the "Account of the monetary policy meeting". It can be seen that the "Introduction to the press conference" was of a similar length to "The Executive Board's assessment" in Norway. The minutes of the Bank of England and the Icelandic central bank were previously of a similar length at just over 3,000 words, but the former have grown rather longer in recent years.

Readability



[172] The minutes of Riksbank and Bank of England MPC meetings are organised differently, see 2.3.2 above.

Chart 3. Flesch-Kincaid Grade Level of the minutes of selected central banks.

Chart 3 shows how many years of education are required to understand the text. The Danish justifications are the easiest to read. Again, this is entirely natural. Interest rate changes in a fixed-rate regime are normally easy to explain. Monetary policy has become more complex in recent years, however, including in Denmark. In 2014 and 2015, the Danish krone came under considerable appreciation pressure. The central bank gradually lowered its key rate into negative territory, and the finance ministry suspended the issuance of government bonds. We can see from the chart that a more complex situation demands more complex language.

Norges Bank and the Icelandic central bank write in a language that requires around ten years' education to understand. This is roughly the same level as the ECB's "minutes" back when they consisted of the "Introduction to the press conference".

Since the ECB began to publish formal minutes, the complexity of its language has increased. More than 14 years' education is now required to understand them. Perhaps it is difficult to agree on a joint text in a committee of 21 members with different cultures, languages and, perhaps, incompletely aligned interests where numerous compromises need to be "written in"?

The Swedish and British central banks also use relatively complex language. Around 12 years' education is needed to understand it.

"… and…"

We have also conducted an analysis equivalent to that in Moretti and Pestre (2012) and calculated the frequency of the word "and" ("og" in Danish and Norwegian, "och" in Swedish).

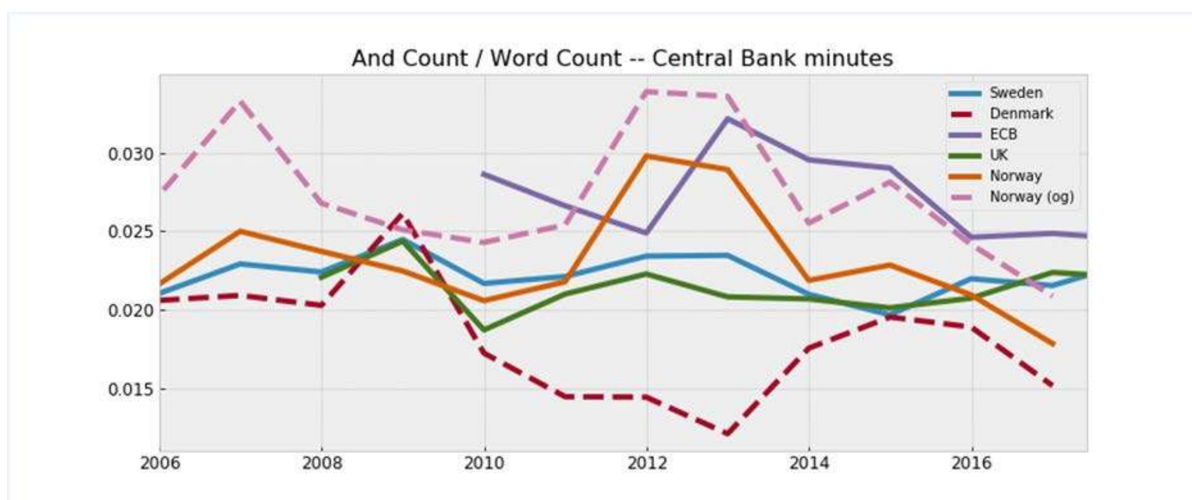


Chart 4. Frequency of the word "and"/"och"/"og" in the minutes of selected central banks.

We can see from Chart 4 that central banks generally use this conjunction at frequencies below 3 percent. There has not been a similar pattern to the World Bank, where its use climbed from below 3 to almost 7 percent.

Readability and transparency

Dincer and Eichengreen (2014) developed 15 criteria for how transparent central banks are. While in our paper we look only at the written justifications given by the decision-making body, Dincer and Eichengreen look at a much broader set of variables for transparency. Each central bank scores between 0 and 1 on each of the 15 criteria. The highest possible score for a fully transparent central bank is therefore 15.[173]

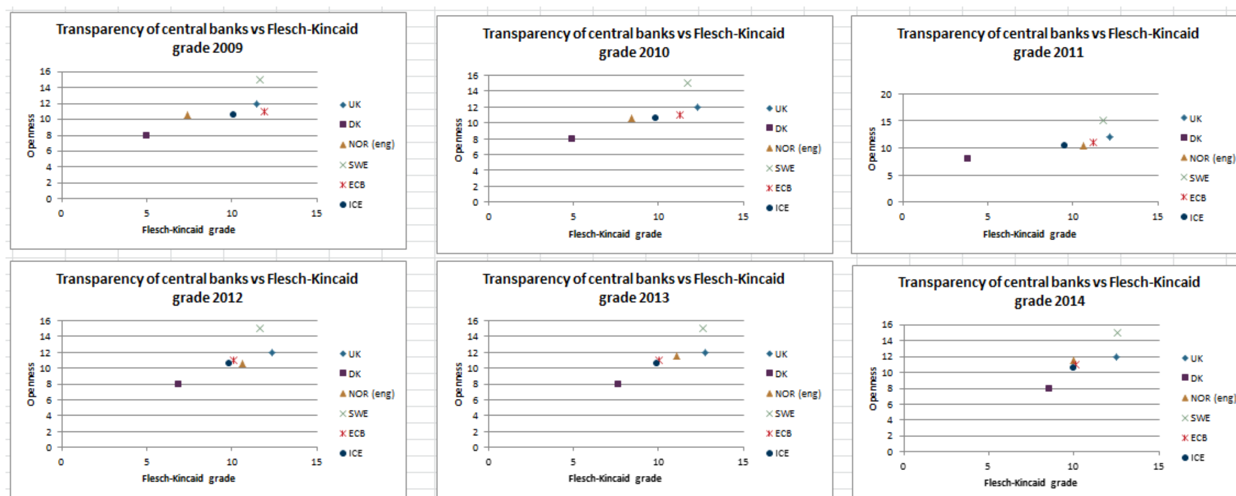


Chart 5. Central bank transparency according to Dincer and Eichengreen (2014) compared with Flesch-Kincaid Grade Level.

In Chart 5, we have placed the Flesch-Kincaid Grade Level on the x-axis and the Dincer and Eichengreen transparency index on the y-axis. Pure “visual econometrics” gives the impression that there is a positive relationship: the more transparent a central bank according to the Dincer and Eichengreen index, the less accessible its language.[174] We do not have any good answer to why this should be so. One possibility is that if a group discusses a matter behind closed doors, the language used can be direct, without worrying about nuances and qualifications. A verbatim transcript of this closed-door discussion could very well have a readability score at the lower end of the scale (Trump, political speeches, tabloids). If, however, the members of the group know that minutes of the meeting will be published, their points will probably be more nuanced and qualified. The arguments will not be as trenchant, and the readability score will deteriorate.

Readability is not one of Dincer and Eichengreen’s 15 criteria. Perhaps a transparency index should include “clear language” in its assessment and so have 16 rather than 15 criteria?

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[173] What are the similarities and differences between Dincer and Eichengreen’s 15 questions about transparency and our four criteria for good written justifications for decisions? A bank’s performance against their questions 1-7 and 13-15 corresponds to our criterion 1. The bank does not need full marks for these questions to satisfy our criterion, but it must be possible to find out how the bank performs against it from open and readily accessible sources, such as the bank’s website. Dincer and Eichengreen’s questions 8 and 10 cover aspects of our criterion 2. The bank must state clearly what its decision is and provide a logical explanation of it. Dincer and Eichengreen do not look specifically at clear language and efficient writing, however, which are also part of our second criterion. Question 9 corresponds to our criterion 3. The central bank needs to explain how it arrived at its decision. Questions 11 and 12 correspond to our criterion 4, namely that the justifications should be written in a way that guides expectations.

[174] The correlation coefficients are not particularly strong – around 0.3 and falling somewhat over time.

4.3. Supreme courts

How much do they write?

When we compare the length of supreme court judgements, see Chart 6 below, we find considerable variations. The European Court of Human Rights (ECtHR) is in a league of its own. The average length of its judgements ranges from 20,000 words in 2011 to more than 30,000 in 2017. The Supreme Court of the UK is a good number two. Judgements in the Scandinavian countries average between 2,000 and 4,000 words, with the Norwegian court writing the most, and the Swedish court the least. The European Court of Justice (ECJ) falls somewhere between the British and Scandinavian courts, with an average word count of between 6,000 and 8,000. The curve for the EFTA Court of Justice is fairly jumpy, which probably reflects the relatively low frequency of cases decided by the Court.

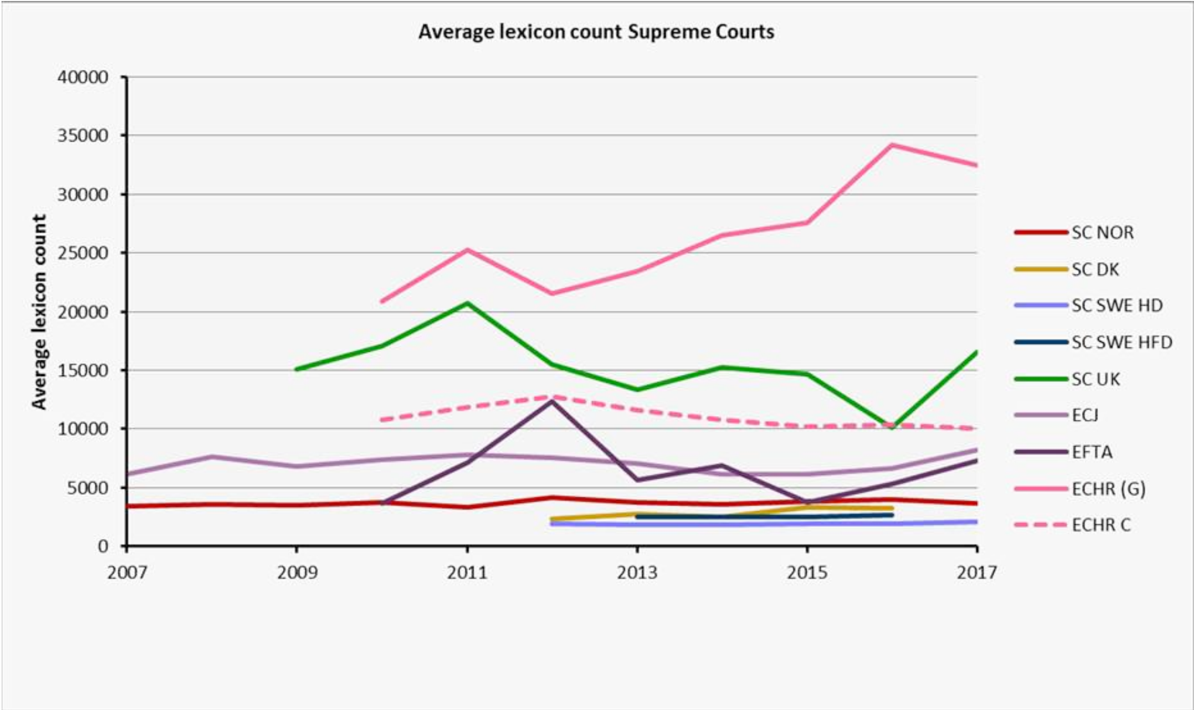


Chart 6. Number of words in supreme court judgements. For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD).

A number of factors need to be borne in mind when drawing comparisons between the judgements of different supreme courts. With all of the courts, of course, the length of individual judgements will depend on the case in hand, for example on the number and complexity of the issues that the court needs to address in its judgement. Among the Norwegian judgements discussed earlier, two extremes are represented by the shipping tax case of 2010[175] and the traffic roundabout judgement of 2002.[176] These contain 22,511 and 1,451 words respectively. That the size and complexity of cases at the supreme courts in every country will have a bearing on the length of their judgements does not, however, mean that we can expect the average complexity of these cases to be the same or similar. This will vary with the size and nature of the portfolio of cases that are heard.

[175] *Rt. 2010 p. 143.*
[176] *Rt. 2002 p. 1704.*

The UK Supreme Court considers fewer cases than its Scandinavian counterparts. As the highest court of a country with a much greater population than any of the Scandinavian countries, the UK Supreme Court also has a much larger volume of cases from which to select those that it hears. This suggests that, on average, cases at the UK Supreme Court will concern legal issues of greater importance in principle or in practice than cases heard by the other supreme courts, which indicates that a higher average complexity.

The Norwegian Supreme Court hears a higher proportion of criminal cases than the others. Civil cases have traditionally been more wide-ranging than criminal cases. There seems to have been a change here, with the criminal cases heard by the Supreme Court now being more focused on issues of legal principle than before, and with globalisation having made the legal issues in criminal cases more complex. The relatively large share of criminal cases in the Norwegian Supreme Court judgements nevertheless indicates that the judgements are generally somewhat less complex than they would be with a smaller share of criminal cases.

It is also worth noting that the selection of court decisions for our comparison is not entirely consistent. In the case of Sweden's Supreme Court and supreme administrative court, we have included only decisions that the courts themselves identify as precedential. This results in a sample consisting of cases that raise particularly important matters of legal principle. On the other hand, these courts hand down not only judgements, but also what they refer to as "decisions" – rulings that do not concern the actual claim or sentence.

To some extent, this also applies to Norway. We have included all decisions reached in chamber, grand chamber or plenary session. There will also be some decisions – five to ten a year – that do not concern the material claims in a case but, for example, procedural issues. The reason for pointing out these aspects of the selection and composition of the cases heard, is to show that there are justifications to be cautious about drawing firm conclusions about what it means when the judgements of one country's supreme court are longer or shorter, on average, than those in other countries.

What might shed light rather more reliably on differences in the length of judgements would be to compare judgements from different supreme courts dealing with the same legal issues. However, finding adequate material for such a comparison is, at best, very difficult. While the same legal issue might come before two countries' supreme courts at a similar point in time, and with a largely identical international legal landscape, the national legal landscape – such as previous decisions by the national supreme court – may still be very different. A case will often also raise multiple issues, and some of these issues may be unique to a particular country.

The conclusion so far has to be that, when comparing the length of judgements in different countries, we need to take into account that differences will depend not only on the way in which the judgements are written, but also on, among other things, general differences in complexity etc. based on case selection and composition. However, it must be stressed that factors such as complexity and screening do not fully explain why judgements in one country are generally longer or shorter than those in another. Judgement-writing traditions in each country clearly also play a major role in how judgements are formulated, including how long or short they are.

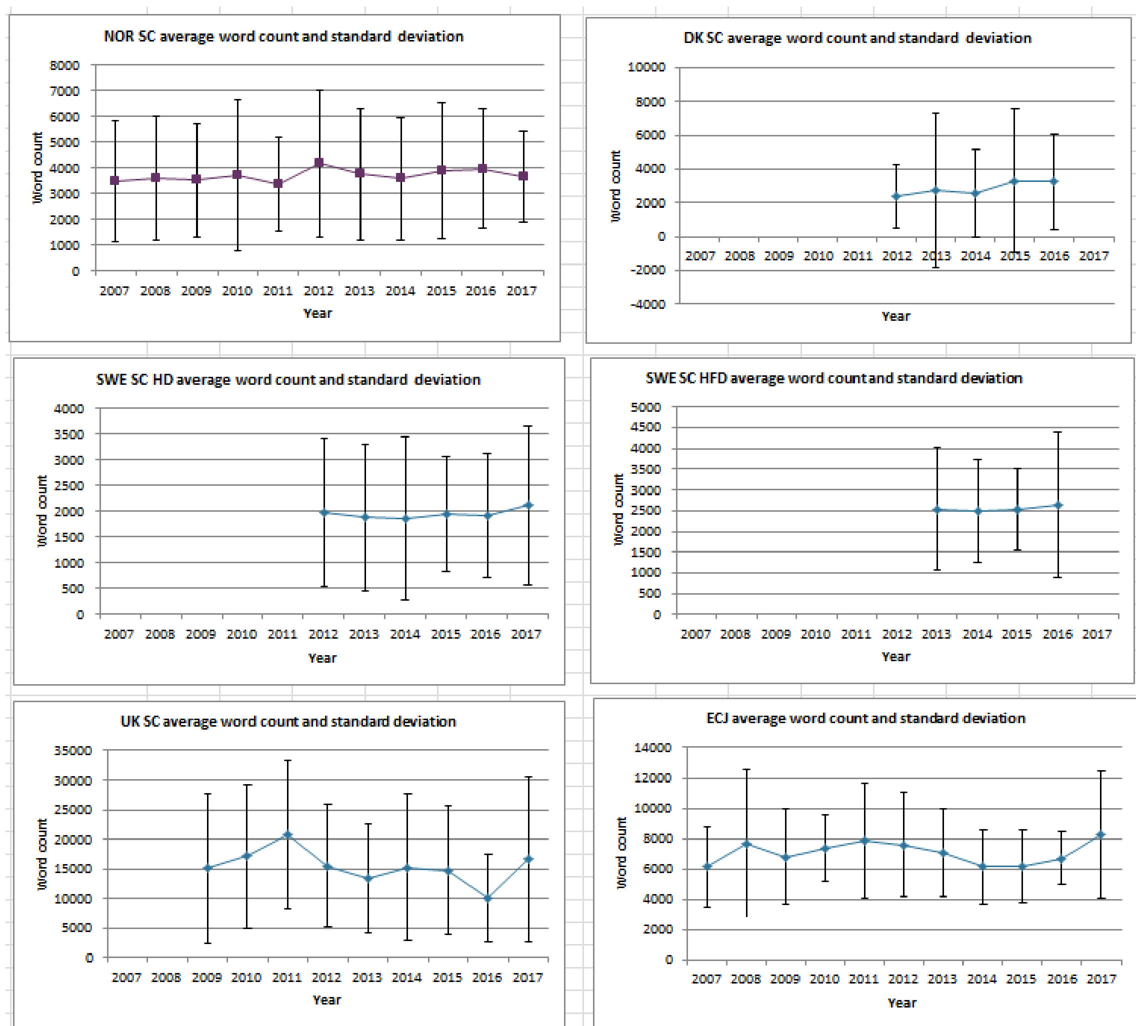


Chart 7. Average number of words and standard deviation in the judgements of selected supreme courts. For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD).

Chart 7 above shows the average length of the judgements of various supreme courts in each year +/- one standard deviation. Two-thirds of judgements will be within the range shown. Taking the UK Supreme Court as an example, we see that the average length of a judgement in 2017 was around 15,000 words. Two-thirds of its judgements were between 4,000 and 30,000 words, while one-sixth were shorter than 4,000 words and one-sixth were longer than 30,000 words.

It can be seen that Supreme Court judgements in the UK are much longer than those in the Scandinavian countries – generally three to four times longer. There are also variations between the Scandinavian countries, with the Norwegian Supreme Court writing longer judgements than those in Denmark and Sweden.

We mentioned earlier some of the factors that may explain differences in the length of judgements from country to country. In addition, in a comparison of the Scandinavian countries, it is worth noting that Norwegian judgements are intended to “stand alone”, while Danish and Swedish judgements normally require the reader to refer to the judgements of the lower courts for the facts of the case and, to some extent, the legal arguments. For the Danish Supreme Court, it should be emphasised that the judgement, by way of introduction,

also contains a comprehensive account of new evidence. We would add that the length of a judgement does not necessarily say anything about how accessible it is for the reader. Here, of course, it is readability – how simple or complex the language is – that is important, see below. But regardless of readability, the longer the decision, the more difficult it will tend to be to identify the key points. A systematic structure for court rulings will, however, also play a role here. Another factor that can make long decisions more accessible is a good summary.

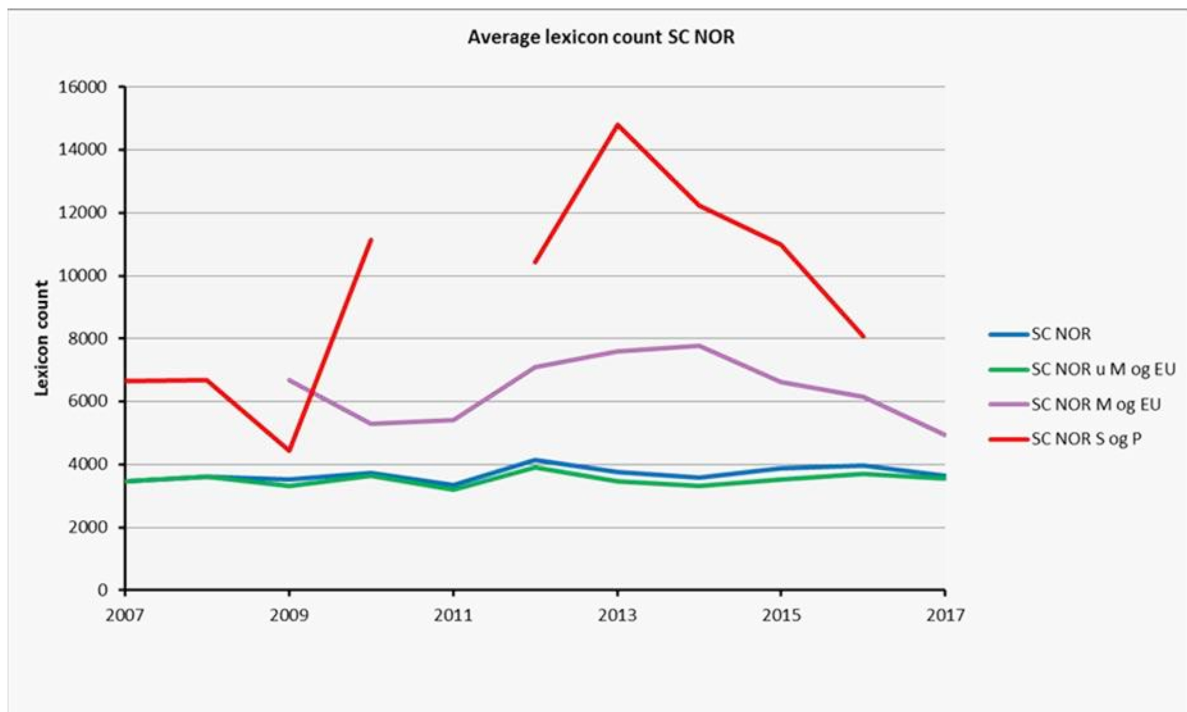


Chart 8. Number of words in Norwegian Supreme Court judgements as a whole (SC NOR), judgements on human rights and EEA issues (SC NOR HR and EEA), judgements excluding those on human rights and EEA issues (SC NOR ex HR and EEA) and judgements handed down in plenary session or grand chamber (SC NOR PS and GC).

Earlier, we made the rather obvious point that the size and complexity of a case will have a bearing on the length of the decision. This is illustrated clearly by Chart 8 above, where we not only measure the length of Supreme Court judgements in general, but also look specifically at plenary and grand chamber cases, and cases raising issues of human rights and EEA law. Plenary session and grand chamber judgements are often much longer than other Norwegian Supreme Court judgements. Some are also longer than the average UK Supreme Court judgement – for example, the shipping tax judgement is far longer than the UK average.[177] Plenary and grand chamber cases concern particularly important matters of principle. These decisions will often also challenge the Storting or the government. This warrants particularly thorough, complete and open justifications, which will naturally have implications for the length of the decision. Judgements on cases raising issues of human rights and EEA law are often also considerably longer than the average Norwegian Supreme Court judgement. Human rights and EEA cases are generally more complex. Again, the decisions may challenge the Storting and the government to a greater extent than normal.

Is the text readable?

[177] *Rt. 2010 p. 143.*

We have used Flesch-Kincaid Grade Level as our test of readability. We have also conducted analyses using other readability tests, but these did not produce materially different results. All national supreme court judgements are written in the language of the country in question. ECJ judgements have been tested on the basis of the English version. All of the readability tests were developed for the English language but have thus been applied to the language of each country. We assume that this has only a limited effect on the reliability of the tests.

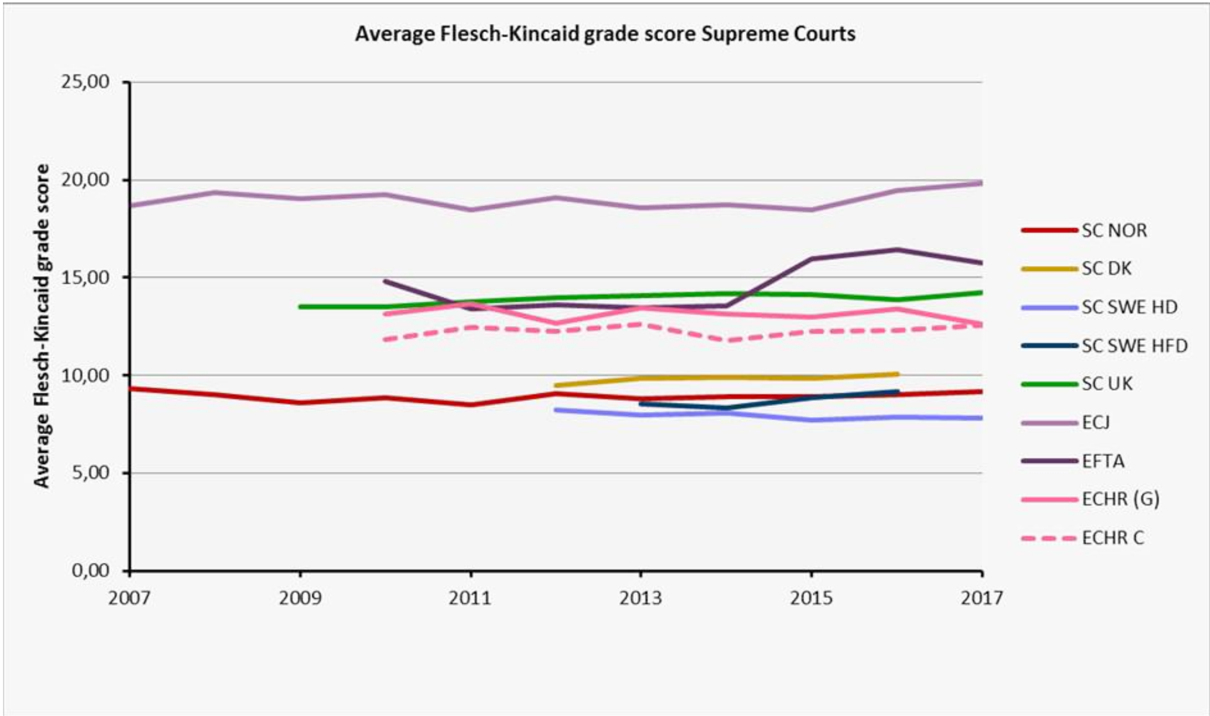


Chart 9. Flesch-Kincaid Grade Level for the judgements of selected supreme courts. For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD).

Chart 9 shows how the national supreme courts, EFTA, ECtHR and ECJ score in the Flesch-Kincaid Grade Level test. The ECJ's judgements are in a league of their own. They present a very high level of complexity for readers, requiring almost 20 years' education to be understood. The Scandinavian supreme courts come out between eight and ten years, with Danish judgements being the hardest to read, and Swedish judgements the easiest. The UK court falls between the two with a score of around 14 – in other words, 14 years' education is required to digest its decisions.

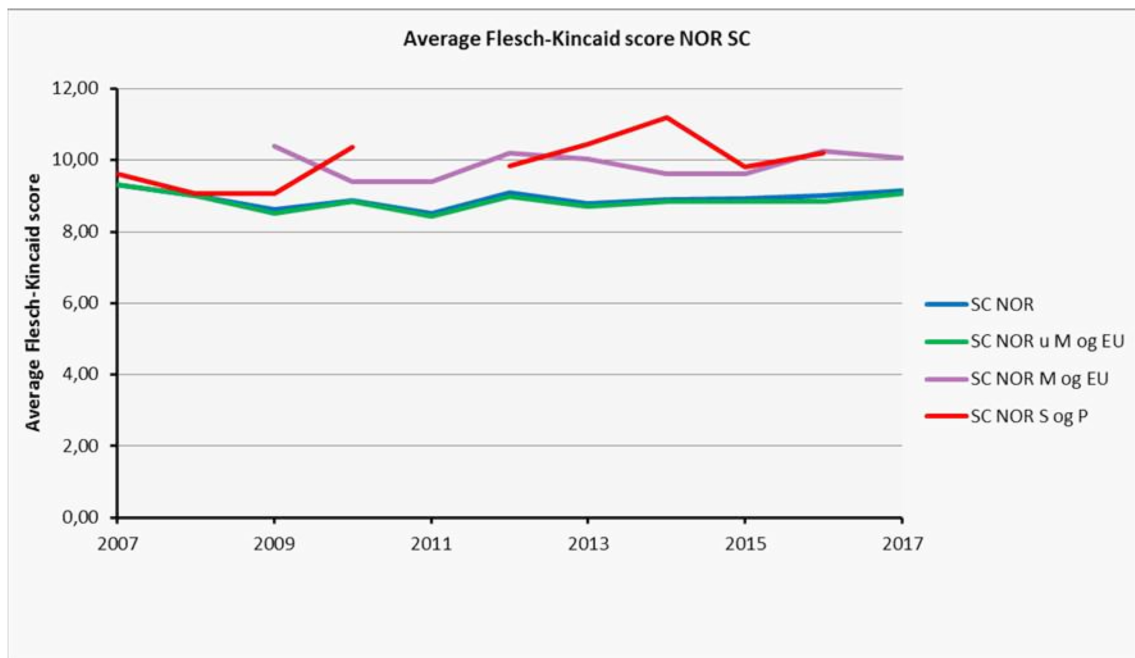


Chart 10. Flesch-Kincaid Grade Level for Norwegian Supreme Court judgements as a whole (SC NOR), judgements on human rights and EEA issues (SC NOR HR and EEA), judgements excluding those on human rights and EEA issues (SC NOR ex HR and EEA) and judgements handed down in plenary session or grand chamber (SC NOR PS and GC).

We have again looked at different types of judgements from the Norwegian Supreme Court, as shown in Chart 10. Plenary and grand chamber judgements and judgements concerning issues of human rights and EEA law score appreciably higher than the average for the court's judgements. We referred above to the length of the shipping tax judgement of 2010 and the traffic roundabout judgement of 2002. Unsurprisingly, it is not only the length of the two decisions that is very different, but also their readability. The shipping tax judgement has a Flesch-Kincaid Grade Level of 13.3, and the traffic roundabout judgement 10.3. This score of 10.3 may seem high given that the decision is important for all motorists – this is a judgement that everyone needs to understand. On the other hand, the readability score for this index illustrates the weaknesses of mechanical analyses of this kind. The word "roundabout" is not hard to read or understand, yet it contains more than six letters and occurs frequently in the judgement, thus pushing up the readability score.

"… and…"

We have also calculated the frequency of the word "and"/"og"/"och" in the judgements of the national supreme courts (excluding the UK) and the ECJ, see Chart 11. In general, it can be seen that the use of the conjunction is moderate. For all of the courts, the frequency is below 2½ percent. Thus we are not looking at frequencies that might lead us to conclude that the language of the decisions lacks precision.

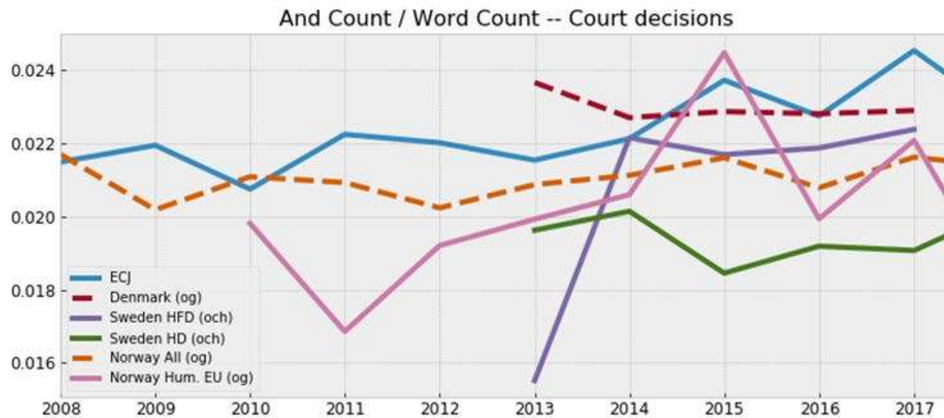
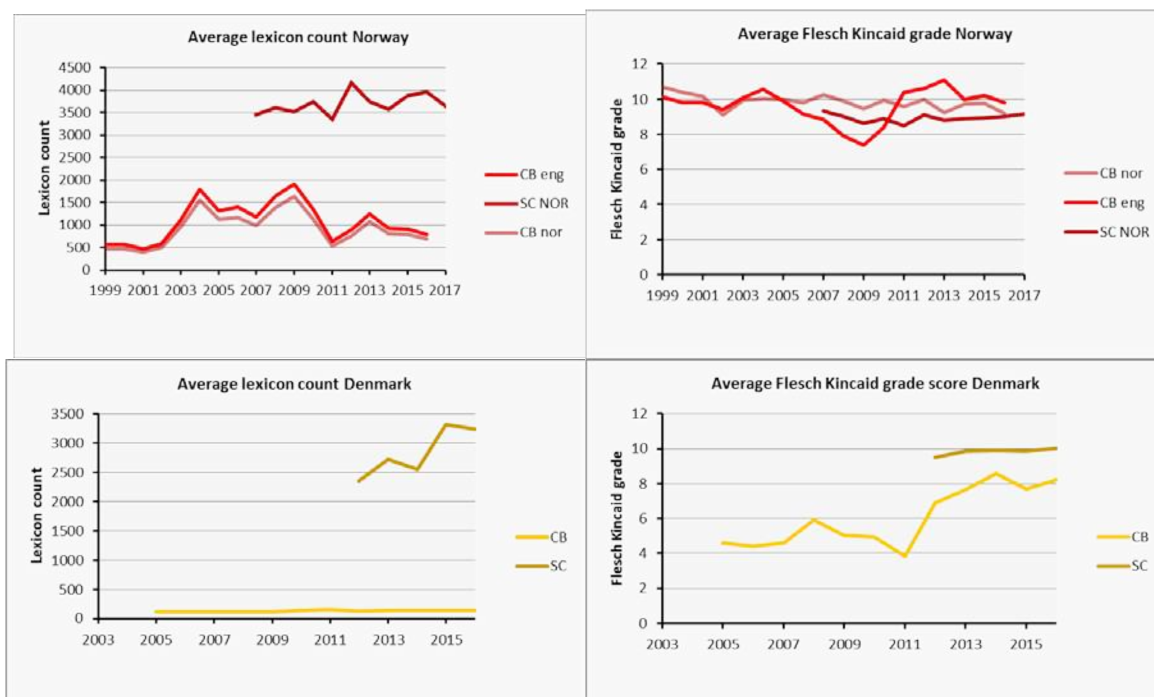


Chart 11. Frequency of the word "and"/ "och"/ "og" in the judgements of selected supreme courts. For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD). For Norway, we show scores both for Supreme Court judgements as a whole (SC NOR) and for judgements on human rights and EEA issues (SC NOR HR and EEA).

4.4. Are there any systematic differences between central banks and supreme courts?

Chart 12 below compares the length (number of words) and readability of the decisions of the central banks and supreme courts of Norway, Denmark, Sweden, the UK and the EU.



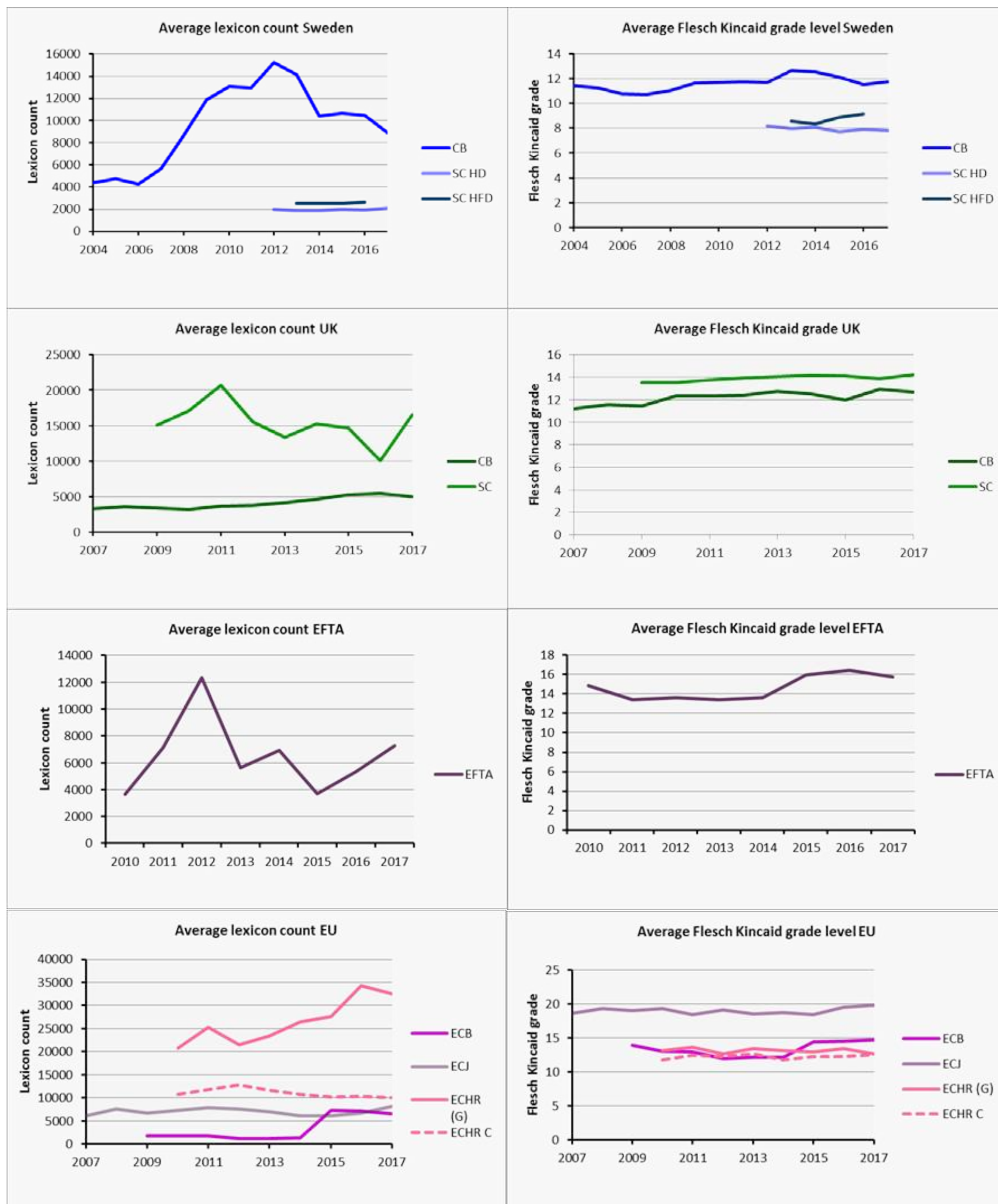


Chart 12. Length (number of words) and readability (Flesch-Kincaid Grade Level) in selected countries. For each country, we look at both the central bank (CB) and the supreme court (SC). In the chart for Norway, CB NOR refers to the Norwegian text of "The Executive Board's assessment", and CB ENG to the English version.

Chart 12 shows that, on average, the supreme courts write more than the central banks. The two EU institutions write at around the same length. Sweden is a clear exception, with the central bank producing much longer justifications than either supreme court.

The supreme courts generally use more complex language than the central banks. The ECJ has by far the most complex language, requiring more than 20 years' education to

understand. In Norway, readability is similar for both institutions. Sweden is again the exception: the Riksbank has a Flesch-Kincaid Grade Level of 12, while the two supreme courts have a score of just eight.

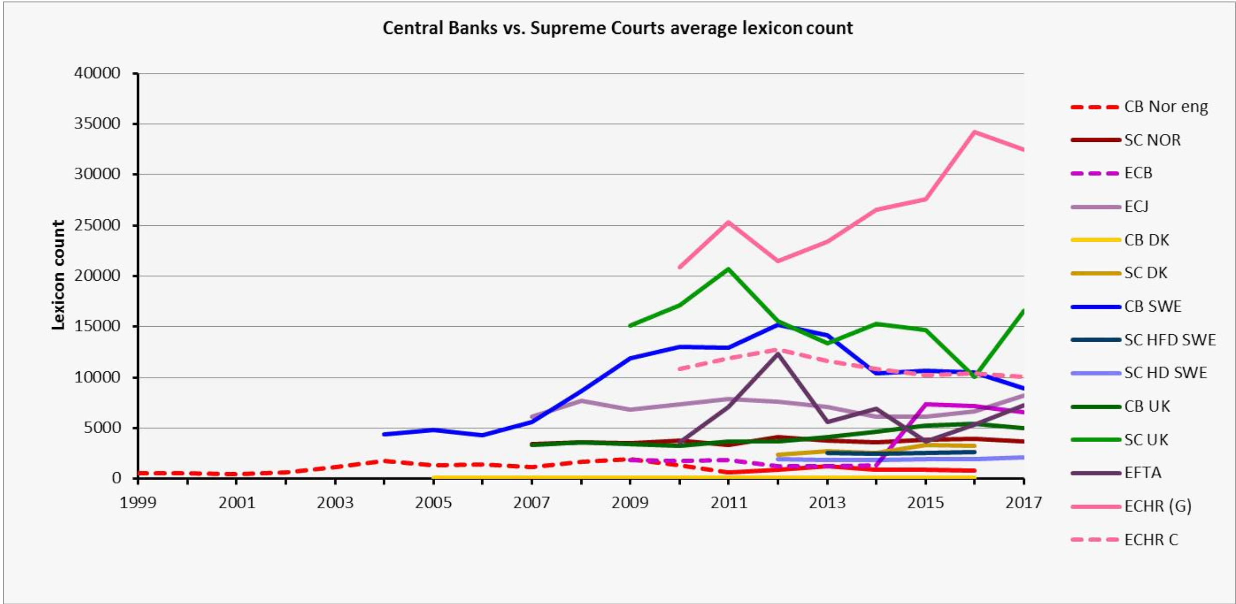


Chart 13. Average number of words in central bank minutes and supreme court judgements in selected countries. For Norges Bank, we consider both the Norwegian version (CB NOR NOR) and the English version (CB NOR ENG). For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD).

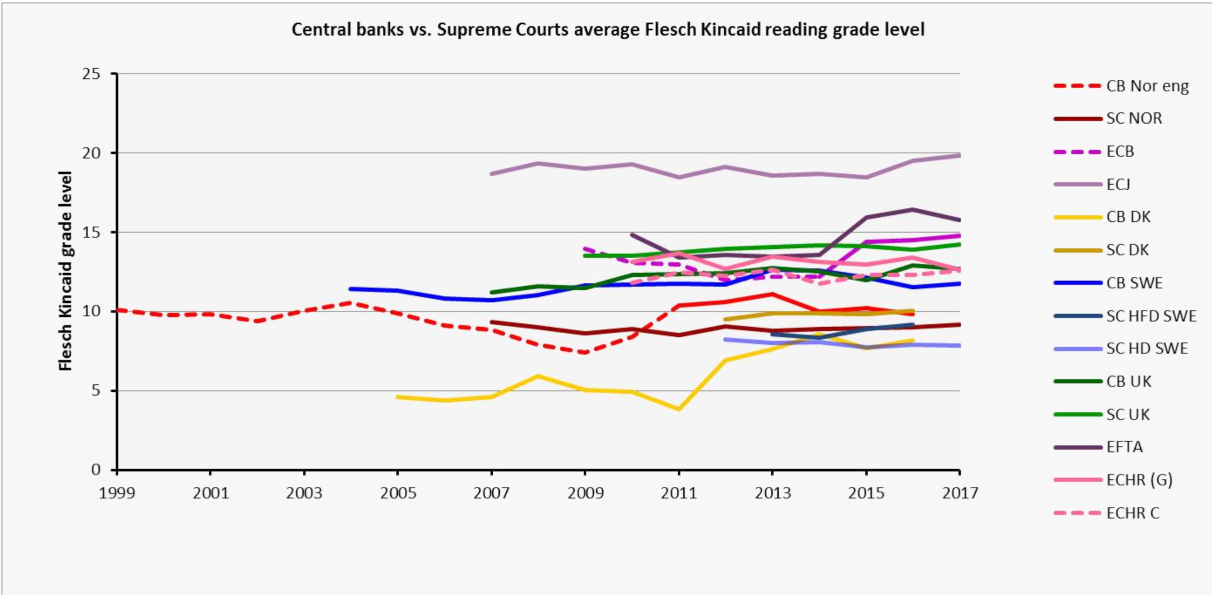


Chart 14. Flesch-Kincaid Grade Level for central bank minutes and supreme court judgements in selected countries. For Sweden, we include both the Supreme Court (SC SWE HD) and the Supreme Administrative Court (SC SWE HFD).

Chart 13 and 14 summarise the results. The ECtHR writes at greatest length, while the ECJ uses the most complex language.

So what would be a reasonable requirement for length and readability? Both central banks and supreme courts need to communicate complex matters. Complex decisions demand complex language. But how complex? Is it possible to write in clear language while still doing the matter justice? We do not attempt to answer this question, but can perhaps provide a few pointers.

Both types of institution derive their powers from legislation passed by national parliaments. Perhaps, therefore, they should use language that is, at the very least, a good match for the country's ultimate decision-making authority? Of the members of the Norwegian parliament – the Storting – in the period 1987-2017, 15 percent had only compulsory education, 8 percent stopped after upper secondary or further education, and 77 percent had higher education. Norges Bank and the Supreme Court of Norway's Flesch-Kincaid Grade Level of 10 should therefore be well suited to the Storting. Whatever their education, members of the Storting will also, of course, be used to reading official documents as part of their job. In so doing, they will build a special ability to grasp the content of such documents.

The Economist is known for its excellent journalism and English. It covers complex issues in the fields of politics, law, economics, science and literature. 11 years of education are required to benefit from its writing. The speeches of politicians in the UK and the US require an average of eight years' education (80 percent of the population), while Donald Trump's speeches during his presidential campaign required just four years at school to understand.[178] This is on a par with the readability of ABBA's lyrics. Elvis's lyrics require six years at school. We mentioned earlier how Pennsylvania was the first US state to require car insurance documents to be written simply enough that they can be understood by those with nine years' education, and this is increasingly a requirement for insurance documents in many other US states.

[178] Haldane (2017).

5. Conclusion

5.1. Central banks and supreme courts

Both supreme courts and central banks derive their authority from laws and powers passed down by popularly elected bodies. They make decisions that affect both individuals and society as a whole. In a democracy, it goes without saying that these decisions need to be reasoned. In this paper, we have formulated criteria for assessing the quality of the justifications for a decision, not the quality of the decision itself. We have looked at the two institutions we know best: supreme courts and central banks.

Central banks explain their decisions in numerous ways. They give speeches, hold press conferences and publish articles and reports. Social media are also increasingly being used. Formal written justifications are accounting for an ever smaller share of central banks' communications and explanations. We have nevertheless concentrated on the written justifications issued by the decision-making body. It is these justifications that detail the powers exercised by the bank and make the institution accountable.

The written justifications can go by various names. The ECB calls them an "Account of the monetary policy meeting", while Norges Bank publishes "The Executive Board's assessment", but they are most commonly referred to as "minutes".

Supreme courts make decisions in the form of judgements. We have looked at the most important of these decisions, those made following oral proceedings in plenary session, grand chamber or chamber. Supreme court judgements are extensively reasoned, and the explanation for the decision lies in the justifications given. The justifications are not supplemented in any way by the justices in the case. For example, there are no press releases elaborating on points made in the justifications. In Norway, the Supreme Court's staff does produce a brief summary of its judgements, which shed some light on the case and the decision. The summaries produced by the staff of the UK Supreme Court, however, show that this can be done in a way that communicates much better the key issues and the key points in the judgement. The justices do not flesh out the justifications given in the judgement in any way. Many nevertheless give speeches and write legal articles, where they may, to a degree, comment on decisions and put them in a wider legal context.

We have developed four criteria for central banks and four criteria for supreme courts. These largely overlap, but have a slightly different emphasis due to the differences between the two types of decision. In both cases, the criteria can be summed up as follows:

Criterion 1: The justifications should be technically sound
When a decision is made, it is reasonable to require information to be provided on who made it, on what legal basis they made it, and whether all procedures have been correctly followed. It may be impractical for all of these details to be included in the justifications for each decision, but the institution must then have information on these procedures etc. on its website to which reference can be made.

Criterion 2: The justifications should be functional
The decision must be explained logically, setting out the premises, analyses, assessments and conclusion. The justifications must be written in a language that can be understood and is tailored to those affected by the decision. The justifications must also, however, be written efficiently. They need to concentrate on the key points. Less relevant information needs to be cut away.

Criterion 3: The justifications should be open and complete

The justifications should also shed light on the path leading to the decision.[179] Which points proved particularly hard? Which considerations led to the decision turning out the way it did, but presented difficulties? The need for transparency would indicate that dissenters should be named, but more important is that the arguments of both the majority and the minority are presented. All relevant factors must be included, along with the weight given to them.

Criterion 4: The justifications should be formulated with the future in mind
A supreme court judgement impacts directly on the parties to the case but also has a more general normative effect. The legal principle established by the decision will also be applied in other cases. It will provide guidance for those applying the law and give them expectations about what will happen in subsequent cases. The same goes for a central bank's monetary policy decisions. The central bank makes decisions on interest rates today, but the decision and the justifications for it will affect expectations about the bank's future behaviour. The justifications need to be written with the decision's normative effects and impact on expectations in mind.

We have looked at supreme court judgements and monetary policy decisions in various countries and assessed them against our criteria.

Criterion 1 is generally satisfied. One minor exception is the Danish central bank, which does not make public which members of its Board of Governors participated in each decision. It can, however, be difficult to track down some information on the institutions' websites.[180]

Criterion 2 is satisfied, but the institutions do so in different ways. We look at three underlying requirements:

- Are the justifications logically constructed?
- Are the justifications written in clear language?
- Are the justifications efficiently organised?

The institutions are good at providing functional justifications for their decisions. However, this has not always been the case. The clearest example of this is perhaps the Danish Supreme Court, which has gone from hearing very large numbers of cases and giving particularly brief justifications, to considering fewer cases and providing more detailed rationales. Norges Bank sticks out here. Its justifications are brief and need to be read in conjunction with the analyses in the monetary policy report, which is approved by the governor rather than the Executive Board, which merely "takes note of" it. Taken together, the two products provide functional justifications for the decision.

There are considerable variations in the language used. It is not a matter of writing as simply as possible. The text needs to be faithful in the sense that the language of the written justifications reflects the language in which the deliberations were conducted. The language should be tailored to the readership, but this is a challenge when addressing multiple target groups – it is difficult to produce a text that meets the needs of both the expert and the general public. The language is generally clear. It is understood. Those with an interest in language will probably take pleasure in reading the judgements of the UK Supreme Court but be less keen on the minutes of the ECB.

[179] Former French Prime Minister Michel Rocard liked to say: "The path is as important as the outcome", see *Financial Times*, 24 May 2017.
[180] One general weakness with these websites is their search engines, which are often more primitive than external ones. It is easier to locate information using the likes of Google than to enter the institution's website and use the search engine there.

Not all justifications are written as efficiently as others. There has been a clear change at the UK Supreme Court. Previously, it was normal for each justice to write his or her own complete opinion, even if there was a consensus on the conclusion. This could make it difficult to determine exactly what the legal precedent was. In order to clarify the precedent and so make judgements more "operational", there has been a conscious transition to producing collective justifications with a leading opinion (or a leading majority opinion and a leading minority opinion) with which the others concur. Lord Neuberger says in his speech "*The Role of the Supreme Court Seven Years On – Lessons Learnt",* Bar Council Law Reform Lecture 2016:

> *"I have been keen to encourage a more collegiate, even a collaborative, approach towards judgment-writing. Although the trend is somewhat variable, there has been a greater tendency towards decisions with single judgments, and a definite increase in the number of jointly authored judgments. I regard this as a beneficial trend. I am not against concurring judgments per se: sometimes they may be appropriate because the author has different reasons for arriving at the same conclusion, or because the decision concerns a topic where more than one judgment would be beneficial as the law is in the process of development. Save in those sort of cases, however, writing a concurring judgment may be a questionable exercise. John Roberts, the US Chief Justice, said that Justices "should be worried when they are writing separately, about the effect on the court as an institution" (Neuberger, 2016)*

Many of the factors that Lord Neuberger alludes to for judgment writing also apply to the writing of minutes written of monetary policy decisions in central banks. Professor Alan Blinder at Princeton believes that a central bank that speaks with a cacophony of voices, has no voice at all, see Blinder (2009). Professor Otmar Issing, the former Chief Economist and Member of the Board of the European Central Bank (ECB) believes that there is also a danger that individual minutes provide an incentive for individual members to put themselves ahead of the institution, see Issing (2005).

The Swedish central bank sticks out here. It provides a collective account of the premises and analysis (in the monetary policy report), but each member of the Executive Board explains his or her own particular vote. This results in a series of monologues rather than a collective explanation. Even if a committee fails to reach a consensus, it can still produce collective justifications. A dissenting opinion can then be explained as the member(s) in question taking a different view of the premises, analyses or assessments, with all of the key factors presented in the main text. Exceptionally, there may be a need for a completely separate presentation of the dissenting opinion.[181] In the Norwegian Supreme Court, this applies particularly to plenary and grand chamber cases reviewing the exercise of authority by government bodies.

Criterion 3 is the one we consider the most challenging, and also the one where we believe there is still some way to go for the institutions' justifications to satisfy our requirements fully. Central banks generally make interest rate decisions at least six times a year. This results in the minutes of different meetings often appearing very similar.

[181] Individual members of the committee may also make "special remarks".

Chart 15. Word clouds for the Bank of England monetary policy committee's meetings of 23 April 2008 (left) and 21 May 2008 (right).

These word clouds for the Bank of England's rate-setting meetings of 23 April and 21 May 2008 illustrate this issue. A word cloud is a diagram where the size of the words reflects how frequently they are used in a text.[182] The two word clouds here are very similar. "Inflation" is used very frequently. But the minutes are not exactly the same. Haldane (2017) calculated the frequency of words used to describe the labour market in Bank of England minutes in the period 1999-2015. It varies between 2 and 8 percent. He also found that the time spent on "recession" in the minutes of the Federal Reserve's monetary policy committee was a good match for the state of the economy in the "real world".

For external readers, it is useful for the justifications to follow a set format. They are then easier to navigate. The different items have a permanent home. If there is a need to emphasise changes, this will emerge from compact formulations or perhaps mere adjectives or code words that acquire a particular significance for external observers who follow the minutes closely, such as the "strong vigilance" beloved of former ECB president Jean-Claude Trichet. We would like the justifications to be better at reflecting the actual decision-making process. What were the most difficult points, where was there particular uncertainty, and where were opinions divided? We are confident that the "Duisenberg principle" is observed: we are wholly convinced that the justifications are honest, and see no evidence of the use of pretexts. But we would prefer the justifications to be richer. There have, however, been moves in the right direction over time. There is a clear tendency for supreme court justices to spend more time clarifying the premises for their exercise of discretion.

In our work on this paper, we have been particularly wary of phrases along the lines of "based on a general assessment". Alarm bells sound whenever we hear them, especially with any frequency, as they are liable to conceal rather than illuminate the true rationale. Their use could reflect a certain lack of intellectual rigour. It may be that the committee has not thought the decision through properly, does not actually have any clear justifications for it, and is relying on some vague sense of intuition. There are doubtless some cases where the individual factors behind a decision are not in themselves sufficient to justify the outcome, and the decision really is based on a "general" assessment. Even here, though, there should still be an account of the premises, how they are understood, and how they have been weighed up.

Criterion 4 is well met in our opinion. There is a tendency for supreme courts to move towards being pure courts of precedent. The cases they hear are those that raise key issues of legal principle. Considerable effort is put into clarifying the precedential effect – the application of the law that is to be normative. Central banks are there to safeguard the value

[182] When building a word cloud, filler words such as articles (a, an, the) and conjunctions (but, and, or) are first removed so that it is the actual key words that are left and are analysed.

of money. They have inspired considerable confidence in their ability to keep this promise. After a period with some uncertainty about the ECB's future monetary policy, confidence was given a huge boost when its president announced that he was "ready to do whatever it takes to preserve the euro. And believe me, it will be enough." The fact that a statement of this kind was able to steady fixed-income markets goes to show that there was confidence in the institution.

Central banks try to explain their reaction patterns. They cannot promise any particular outcome for the economy, nor how interest rates will move. If they do publish interest rate projections, these are conditional forecasts based on developments in other variables. But central banks can publish their way of thinking, the assumptions they work from, and how they weigh them up.

Former Bank of England governor Mervyn King argued that the design of an institution "must reflect history and experience". We have reviewed the justifications given by central banks and supreme courts in a number of countries, and there is no doubt that each institution's way of writing is influenced by its own history. This is what economists call "path dependence". We do wonder, however, whether there is a little too much path dependence, and whether the institutions in question might benefit from looking at trends and learning from other institutions both at home and abroad.

5.2. Can the criteria be applied more generally?

5.2.1. The exercise of authority by public institutions other than central banks and supreme courts

Previously in this chapter, we have made some concluding remarks on whether and how supreme courts and central banks satisfy our criteria for good justifications. It is hard to argue more generally that the criteria we have defined for central bank interest rate decisions and supreme court judgements should also apply to decisions by other public bodies. Different considerations will apply. Some decisions are life-changing; others are barely noticeable even for those directly concerned. Some decisions affect everyone; others apply to only a few people or even just one person. Section 24 of Norway's Public Administration Act sets out rules on when justifications must be given for individual decisions, and Section 25 provides rules on the contents of such justifications. Due partly to the restrictions on the duty to give justifications in Section 24, and partly to further exceptions set out in the Public Administration Regulations, far from all of the power exercised by public bodies needs to be justified. Where there is a duty to give justifications, the requirements for their content do not generally go as far as those for judicial decisions set out in the laws of procedure.

Although we cannot argue more generally that the criteria we have defined for interest rate decisions and supreme court judgements should also apply to other decisions by public bodies, it is still reasonable to conclude that they might offer some guidance on how good justifications should be formulated, at least for decisions with far-reaching consequences. Let us take a few examples.

Example 1. Building permits

If, for instance, permission were to be given to erect a tower block in a designated low-rise area, it is hard to see how the decision should not, as a bare minimum, have to specify the body issuing the permit, the legal basis for the exception, and the reasons for granting it. Where discretion has been exercised, this must be explained. Here too, an explanation along the lines of "based on a general assessment" is unacceptable.

Example 2. Royal pardons

In Norway, the King has the right to pardon those found guilty of a crime, and the number of times he does so each year is in double figures. This is done without any public explanation. Section 24 of the Public Administration Act establishes a general duty to give justifications for individual decisions (which would include royal pardons). However, the last paragraph of Section 24 allows for exceptions in certain areas "when special circumstances so require". Very generally, the King has decided in Section 21 of the Public Administration Regulations that this duty to give reasons does not apply in pardon cases. It is not hard to see how the personal and social considerations on which a pardon will often be based might mean that the decision should not be explained, or at least not publicly. On the other hand, the right to pardon directly affects the relationship between branches of government – the executive and the judicial – and such a general exemption from the duty to give justifications for decisions does not sit comfortably with the key principles of openness and honesty in the exercise of authority (cf. our third criterion).

Example 3. Asylum applications

An asylum seeker whose application is turned down has a right to know why. Could our criteria be applied here? Several thousand asylum applications are submitted every year in Norway.[183] The outcome is life-changing for the applicants. They have a right to adequate and individual consideration of their applications. Cases that raise important matters of principle are generally decided by the so-called Grand Board of the Immigration Appeals Board (UNE).[184] For example, in October 2010 the security situation in Mogadishu was such that the Grand Board believed that most applicants should not be required to return. The Grand Board reconsidered the matter in December 2012.[185] A majority found that the security situation had changed, and that asylum seekers could be sent back. Two members disagreed with this decision. The Ground Board's decision is very detailed. It states that individual asylum seekers from Somalia are to be treated equally and in line with the Grand Board's decision. In this way, it ensured both individual consideration and equality under the law. The Grand Board's decision satisfies all four of our criteria.

5.2.2. The exercise of authority in the private sector

Many decisions of importance for the individual are also made by decision makers other than public bodies – for example when private-sector employers hire and fire employees. In principle, an employer has a free hand when recruiting staff. Applicant A can be chosen over applicants B and C without explanation. There are, however, certain restrictions on this freedom, such as rules to prevent discrimination.[186] In some circumstances, these restrictions might seem to warrant a requirement for an explanation of the decision. When laying off and dismissing staff, employers have clear obligations to the employees and their union representatives. This includes a duty to justify the decision.[187] It seems reasonable that our criteria for good justifications for interest rate decisions and court judgements in particular would also be sound criteria for decisions on employment matters of this kind, albeit not to the extent that a breach of the criteria would necessarily warrant the employer's decision being overturned.

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[183] From 1 January to 30 September 2017, there were 3,052 applications for asylum.
[184] The guidelines for the Grand Board can be found here: http://www.une.no/Global/Styringsdokumenter percent20- percent20faglige/IR-03.pdf. Its rulings can be found here: http://www.une.no/no/Praksis2/Stornemnd/.
[185] http://www.une.no/Global/N1211741227.pdf.
[186] See Chapter 12 of the Norwegian Working Environment Act.
[187] See Chapter 15 of the Working Environment Act.

Example 4. Exclusion from an organisation

Norway is a very organised country. Most of the population are members of one or more organisations. Membership of an organisation may be important or even essential in safeguarding a citizen's personal finances and welfare. This might include membership of a trade union or a sports club. The decisions of such organisations may have far-reaching consequences, such as being barred from membership or from the activities for which they are responsible. It should go without saying in an open society that decisions of this kind must be explained so that those affected have full insight into the reasons for them. Here too, our four criteria offer guidance for good justifications.

Example 5. The Johaug doping case

One important type of ban that can have considerable financial and welfare implications for the person affected is exclusion from sport on the justifications of doping. Being deprived of the opportunity to compete due to a breach of the doping rules will be very stressful for an athlete and could have considerable financial consequences. The effects can be compared with those of the sentence for a criminal offence. The considerations behind our criteria for good justifications for court judgements will apply accordingly.

The world of sport has seen the need to explain decisions of this kind and has established a system of courts for the likes of doping cases, but still has some way to go in establishing a procedure for these cases that can measure up to the official court system in terms of quality and due process. Aspects of this are illustrated by the handling of the doping case against Olympic skier Therese Johaug in 2016-2017 – particularly the proceedings and decision of the "court of appeal". The International Ski Federation appealed the decision of Anti-Doping Norway's Prosecution Committee to the Court of Arbitration for Sport (CAS). The proceedings at CAS are very similar to those in the ordinary courts, but with the important difference that they normally take place behind closed doors.[188] This applied in the Johaug case and has a clear downside when it comes to the important consideration of transparency. The CAS ruling on the Johaug case[189] appears to be thorough, and it largely meets the criteria we have established for good justifications for supreme court judgements, see 3.6 above. It is well written. The ruling extends to 15,900 words, which is four times longer than the average Norwegian Supreme Court judgement, and in line with its longest judgements in plenary session and with the average for UK Supreme Court judgements. The Flesch-Kincaid Grade Level is 9.85, which is slightly higher than for the average Norwegian Supreme Court judgement and much lower than for UK Supreme Court judgements. While the ruling largely satisfies our criteria, this does not apply to the very important third criterion, namely that the justifications should be open, honest and complete. It can be seen from the ruling (paragraphs 193ff) that Johaug claimed that she was, in her circumstances, permitted to "delegate" her anti-doping responsibilities to her doctor. The ruling then states:

> *"A majority of the Panel disagrees with this."*[190]

This can only mean that one of the three arbitrators agreed with Johaug on this point. But the ruling says nothing about the reasons for this minority opinion. Nor is there anything about whether the minority thinks this "delegation argument" should lead to exoneration or merely a shorter ban. There is no information on which member of the panel dissented. There was also disagreement on the sentencing – the length of the ban. It seems reasonable to assume that it was the same member who dissented, and that the reasons can be found in his view

[188] See CAS's Procedural Rules, Article R44.2 "Hearing".
[189] See the arbitral award of 22 August 2017 in CAS 2017/A/5015 and CAS 2017/A/5110.
[190] Paragraph 195.

of the “delegation argument”. In a decision with such far-reaching consequences, this should have been stated explicitly.[191]

5.2.3. Closing remarks

In an article in *Aftenposten* on Sunday, 14 January 2017, Professor Einar Lie wrote about political decisions that are made without proper consideration or explanation. He argues:

> *“Even a bad explanation is better than no explanation – at least the former can be read, criticised, improved or rejected.”*

If decision makers do not wish to state the justifications for their decisions, we cannot be of any help. But when justifications are given, we hope that our criteria will help make them better than they would otherwise have been.

In parts of both the public and the private sector, “big data” and algorithms are being used to develop automated decision-making systems.[192] By no means does decision making of this kind make good written justifications redundant – quite the opposite – and it can be expected to present particular challenges.

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[191] In CAS’s Procedural Rules, Article R59 “Award” states: “Dissenting opinions are not recognized by CAS and are not notified.” This probably explains the shortcomings in the justifications pointed out here. It is common in many European countries for there to be no scope for dissent in many categories of legal decision. CAS’s rulings on doping cases, however, have such a flavour of criminal law that it is a clear failure under our third criterion for dissent not to be recognised, and for dissent not to be explained, and for the dissenter not to be named.

[192] See Bjørn Erik Thon’s article “Algoritmer må temmes” [The algorithms must be tamed] in *Aftenposten*, 30 January 2018.

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Endnote: On finding the best solution (as an economist might see it)

One of the authors of this paper led press conferences on the subject of Norges Bank's monetary policy decisions for six years. Faced with questions along the lines of "Why did you change the key rate?", "Was the decision hard or easy?" and "Did you consider alternatives?", he found it useful to bear in mind the Lagrangian method for optimising a function subject to constraints.[193]

Chart 1 illustrates this method.[194] We have two decision variables, x and y, and a target function z=f(x,y). We want to maximise the target function, but there is a constraint that we need to deal with, namely the relation between x and y given by g(x,y)=c.

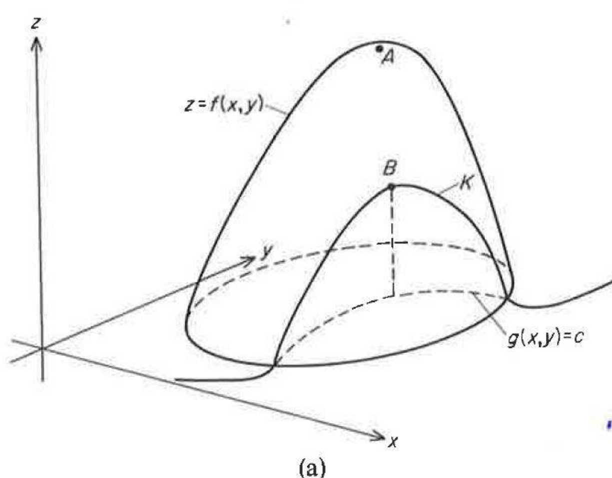

Diagram 1. The "best" result under specific constraints.

In the chart, A is the "best" outcome if we do not take account of this constraint, while B is "best" if we do. The mathematical task of maximising (or minimising) functions subject to constraints is resolved using Lagrange's method. The "best" solution, B, will change if there are changes in the constraints, the relations between the variables or the target function.

We do not use the mathematical terminology above in the main body of this paper. Instead, we talk of *premises*, *analyses*, *assessments* and *conclusion*. The words are different, but the idea is the same. The conclusion depends on the underlying assumptions, relations and priorities. A change in any of these will affect the conclusion. Changes to interest rates need to be explained by changes in one of these elements.

In Norway the topography of the mountainous areas of Jotunheimen and Hardangervidda are very different. In Jotunheimen the peaks are steep and pointed whereas in Hardangervidda, the top of the hill is often far from obvious. The shape of the curve in Diagram 1 can vary in a similar manner. Point B (the "best" solution given the constraints) could be at the top of a steep curve or a flat curve. The curve could be as steep and pointed as some of the peaks of Jotunheimen, or as rounded and flat as the highlands of Hardangervidda. Ragnar Frisch called this property the "sharpness coefficient".[195] This is illustrated in Diagram 2.

[193] Joseph Louis Lagrange (1736-1813) was born in Italy but spent most of his life in France.
[194] Diagram from Sydsæter (1981).
[195] Frisch (1947).

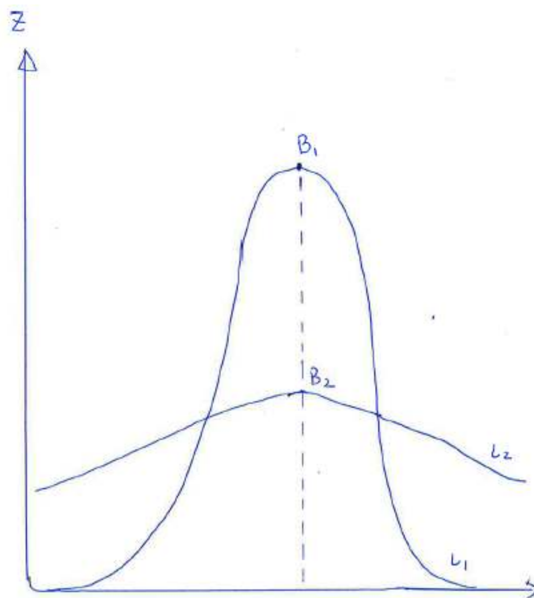

Diagram 2. The "best" result with different "sharpness coefficients".

When asked whether the interest rate decision was difficult and whether alternatives were considered, it was useful to keep Diagram 2 in mind. If we are at a mountaintop in Jotunheimen (line l_1), it is not hard to tell what is the peak and what is the "best" solution. Alternative interest rate decisions will not be considered. If, on the other hand, we are looking for a mountaintop in Hardangervidda, the peak can be harder to identify, because this is a relatively flat area. At the press conference, we would confirm that alternatives were considered.

At the top of a mountain in Jotunheimen, there is little room for error. We can see that line l_1 in Diagram 2 has little tolerance for error. It was easy to find the peak, but the consequences of misjudging the premises or relations will be costly. We could fall a long way from the top and lose a great deal of height. If we have specified an assumption incorrectly or relied on the wrong premise, the consequences will be serious. If the same happens on a mountaintop in Hardangervidda (line l_2), the consequences will be less severe. The tolerance for error is considerable.

The justifications for a decision need to specify the premises, analyses, assessments and conclusion. If the premises change, so will the conclusion. If the way things are considered to fit together changes, so will the conclusion. If the weight attached to different factors changes, so will the conclusion. The justifications should also attempt to communicate whether the deliberations were of the Jotunheimen or Hardangervidda type.

Most decisions are made under uncertainty. When climbing a mountain in fog, it is important to avoid going over the edge. Assume the landscape is as shown in Diagram 3.

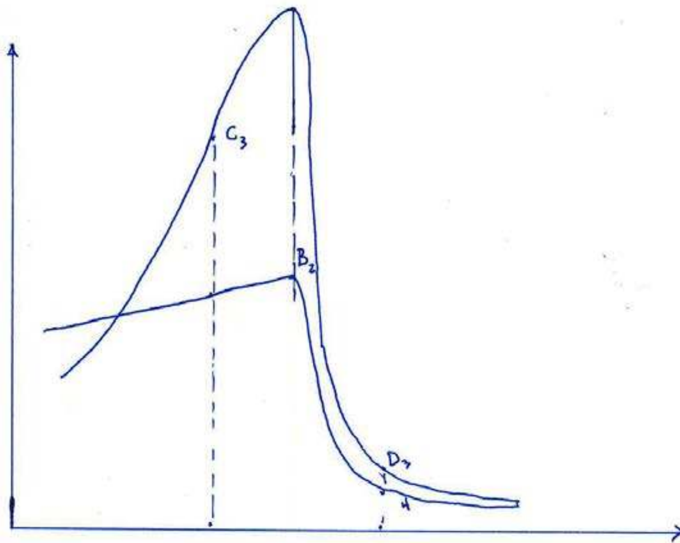

Diagram 3. The "best" result when uncertainty is not normally distributed.

The diagram shows two mountains. In dense fog, most would consider it wise not to try to reach the very top of the sharpest peak, and to avoid falling over the edge by stopping at point C.

It is important that the justifications for a decision communicate the types of uncertainty the committee considered most important, and what they made of it.