



Oslo Metropolitan University

Faculty of Social Sciences

SIW5901 Master's Thesis

STATUS OF HUMAN RIGHTS IN THE EUROPEAN COURT OF HUMAN
RIGHTS AND THE LANDMARK CASE OF STRAND LOBBEN

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Acknowledgment

The Court Lacks Truth

Taras Shevchenko¹

My interest in human rights sparked the work on this thesis. I believe it is crucial to consistently litigate human rights in a coherent manner in order to preserve the intent of defending each person's dignity.

While interning at the European Court of Human Rights as a Ukrainian lawyer and dealing with the devastating impact of war on my family, I have become more convinced than ever that it is crucial to defend human rights. I am now convinced that the defense of human rights is more important than ever before, even since its inception.

In the effort of working with this dissertation, I tried to conduct research that extends beyond just legal boundaries. My perspective on human rights expanded to include a social viewpoint. I believe that it is crucial for everyone to receive protection and for "the truth" to be discovered in court.

I would like to thank my supervisor, Professor Asgeir Falch-Eriksen, for his patient guidance and encouragement throughout my master's thesis. Without his substantial support, I would not have been able to successfully complete it.

I want to thank all the lecturers and examiners at OsloMet who have inspired me and helped me develop my skills and knowledge in international social welfare and health policy.

I am forever indebted to my father, Oleksandr Kotsiuba, a well-known Ukrainian lawyer, co-founder of the Declaration of State Sovereignty of Ukraine in 1990, to give me generous support and encourage me to pursue new opportunities in life. Every day, I remember my gone brother Volodymyr with great sadness and gratitude for his influence on my upbringing. I am committed to embodying his values and ideas in my life. I would like to express my gratitude to my mother Vira for her unwavering love and support. I also want to thank my daughter Liza for providing me with the additional strength and motivation to finish this thesis.

Oslo May 2023

Ruslana Kotsiuba

¹ Taras Shevchenko is a prominent Ukrainian philosopher, poet, prose writer, and artist during the 19th century. He was known for his universal talents and was a symbol of Ukrainian sovereignty and the fight for freedom. The world has erected the second-largest number of monuments in honor of this person as a cultural figure, only surpassed by those dedicated to Jesus Christ.

SUMMARY

In Norway, the right to respect for family life is a crucial topic in both social and legal discussions. This is especially true following the European Court of Human Rights rulings against the Norwegian Child Protection Services from 2019 to 2023. Therefore, the decision made in the Strand Lobben case is essential as it upholds guiding principles for safeguarding the right to respect for family life. Furthermore, it is noteworthy that despite facing external pressures from various global political entities, influential NGOs, and worldwide media, the court maintained its stance in the ruling.

Strand Lobben's conflicting opinions make it an interesting subject of study for social researchers. In addition to the court's main arguments, the ruling includes supporting and opposing views and numerous amicus briefs on how to interpret human rights. This raises the issue of whether the courts can make a coherent decision and whether there is a shared understanding of the purpose of human rights.

The fundamental tenets of human rights theory and cosmopolitan logic stipulate that human rights are universal, inalienable, interrelated, interdependent, and indivisible. This implies that every individual is endowed with equal dignity and rights, and comes from international agreements, such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Convention on Human Rights, provide a standard framework for human rights, which guarantees the right to respect for family life.

Cosmopolitan rationale aims to safeguard the dignity of all members of society by making decisions based on human rights across jurisdictions and without state control, irrespective of political considerations. Cosmopolitan rationale serves as a tool for assessing the validity and legitimacy of rules and ensuring coherency in decision-making.

The ruling by Strand Lobben highlights the dominant perspectives of communitarian and instrumental approaches. Therefore, Article 8 of the European Convention on Human Rights appears to not align with the cosmopolitan rationale. Unfortunately, the arguments presented in the decision are incoherent and lack legal certainty, leaving room for ambiguous interpretations and political influence.

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LIST OF ACRONYMS

CPS	Child Protection Services
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
European Convention on Human Rights,	Convention for the Protection of Human Rights
ECHR	and Fundamental Freedoms
HUDOC	The database provides access to the case law of the ECtHR
Lovdata-pro	The database of legislation of Norway
NGO	Non-governmental organization
Strand Lobben case	Strand Lobben and Others v. Norway
UDHR	Universal Declaration of Human Rights

1. Kappe

1.1 Introduction

The Norwegian Child Protection Services (CPS) has faced criticism from both national and international sources. The European Court of Human Rights (ECtHR) has heard over 40 cases, bringing attention to public service like never before. Many of these cases involved Norway violating children's rights in foster care, particularly the right to respect for family life for both children and parents. One such case is *Strand Lobben and Others v. Norway* (2019), a landmark case with multiple opinions. The judgment includes two concurrent statements, one dissenting opinion, and eleven amicus briefs filed by stakeholders expressing their views. This shows a court willing to contest its standing on how to uphold such a fundamental right as the right to respect for family life. In this project, I have discussed the different opinions against the backdrop of different approaches to human rights, including strategies that do not uphold human rights according to a human rights ethos but through so-called communitarian, instrumental, or civic republican rationales.

This text is developed as the “Kappe” to a journal article titled *“The Right to Respect for Family Life and the Landmark Case of Strand Lobben.”* The Kappe will seek to lay out the broader picture of the research project that led to the journal article's writing and insert the journal article into its more general academic discourse. I will first lay out the backdrop of the research. Second, I will outline the project's research objectives and questions, culminating in the journal article. Third, I will seek to present state-of-the-art knowledge on the intersection between parents' and children's rights and judicial decision-making. Fourth, I will give the theoretical and methodological framework that has driven the project. Fifth, I will summarise the findings and discussion of the project. Sixth and last, I will discuss the academic and practical implications of the results and conclusions.

1.2 Research background

The ECtHR's decision-making procedures were subject to a distinct factor in the public discourse: the significant political influence exerted by prominent non-governmental organizations (NGOs) and the global media (BBS News, 14 April 2016). The President of the Czech Republic even went as far as comparing CPS practices to what Nazi Germany did during their nazi-era (Lohne et al., 2015).

Strand Lobben heads the thirteen similar cases (Secretariat of the Committee of Ministers, 2022) (Appendix 2, Figure 1) for which the ECtHR issued final judgments. In addition, in May 2023, twelve pending CPS cases were under consideration before the ECtHR (The European Court of Human Rights, 2023) (Appendix 2, Figure 2).

In contrast, Norway is known for its commitment to upholding human rights standards through its public services. The country has incorporated nearly all international human rights conventions into its laws, with the European Convention on Human Rights (ECHR) and the Convention on the Rights of the Child (CRC) being given legal precedence over other Norwegian legislation. The Constitution of Norway also includes provisions that protect the right to family life and prioritize preserving a child's natural family (Grunnlov, Last update 12.01.2023).

Furthermore, Norway ranks high in international statistics for human development and the Rule of Law Index, placing second (Human Development Reports, 2022) (World Justice Project, 2022). Moreover, the KidsRights Index ranks Norway in 10th position on how children's rights are respected worldwide (KidsRights Foundation, 2022). Nowadays, Norway is also recognized for its successful, family- and child-friendly policies and for nourishing a positive and productive environment to raise children (UNICEF, 2019).

Despite high ratings, failing to safeguard the right to family life in child protection cases poses a recurring and central human rights challenge in Norway (Norwegian National Human Rights Institution, 2020).

This master thesis is part of a large research project, Cosmopolitan Turn and Democratic Sentiments (CONSENT, 2018), that studies cosmopolitanism and nation-specific drivers in child rights. It is interesting to study why the ECtHR finds human rights violations in cases concerning the Norwegian CPS and how it changes the Norwegian practice, e.g., concerning the number of care orders and visitation.

The Strand Lobben had reached a top level of family politics and regulation across Europe. Consequently, the case raised "*a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance*" (Article 43 § 2 of the Convention). For that reason, it came to the Grand Chamber of the ECtHR and became a "**key case**" by Article 8 in 2019 (European Court of Human Rights, 2020) that we indicate as a landmark case in our study.

Respectively, this judgment sets a precedent, a case law guiding judges to treat new cases. In this regard, a landmark case is a principle that has an impact power establishing a new approach to protecting human rights.

The present research discusses how the ECtHR engages with a parent's rights and frames children as equal rights holders in the case of the Strand Lobben.

1.3 Research Objectives, Questions, and Scope

This research project focuses on analyzing the public discourse surrounding the rights of parents and children to family life, using the Strand Lobben case as a landmark example. The main objective is to identify the different reasons behind the concept of the right to respect for family life and how they are used in decision-making by the ECtHR.

The study aims to determine the prevalence of four types of rationales: cosmopolitan, communitarian, instrumental, and civic republican. Additionally, the research will investigate how the opinions presented in the Strand Lobben case align with a cosmopolitan rationale.

To achieve this objective, the research project formulated three research questions that were pursued throughout the study:

1. What are the decision-making rationalities used by the ECtHR judges to balance the child's and parent's rights according to the European Convention on Human Rights for the Strand Lobben judgment?
2. *Are they coherent or vary in how they resonate and in what direction/rationale they lean?*
3. *From a parent's right perspective, has the ECtHR developed the case law on the example of Strand Lobben in line with cosmopolitan rationale? And, if not, what alternative rationalities have dominated the judgment?*

This study aims to create a master's thesis on time and resources, and it specifically examines the critical case of Strand Lobben. It does not investigate the entire practice of the ECtHR in CPS.

1.4 State-of-the-Art Knowledge

The violation of Article 8 of the ECtHR is a significant concern in Norway and is often discussed in the media, legislation, and courts as a social issue. The country has traditionally presented CPS as a child-centric orientation, as noted by Field (Hestbæk et al., 2023). The Norwegian Constitution is particularly comprehensive in regulating this issue, with provisions on the

protection, participation rights, and the best interests principle that have been applied since the 1950s (Haugli et al., 2019).

Recent research shows that there has been a notable decrease in the amount of aid and support given to children and families who are in vulnerable situations in Norway in terms of child protection (Bufdir, 2022). Claiming the legitimacy of recent changes poses a democratic problem (Skivenes, 2023).

Judgments by the ECtHR against Norway have given rise to considerations from a human rights perspective and differences in understanding the rights at stake (Mørk et al., 2022).

The child's best interests doctrine has become widely used only recently, despite the principle invoked as early as 1988; in some cases, it gained status as the paramount consideration to the extent that it may side-line competing principles in the balancing exercise of adjudication (Jacobsen, 2016). In this line, the ECHR came a long way to acknowledge the deficiencies as a child rights instrument (Fenton-Glynn, 2021): the first focusing on parental rights, the second seeing the situation as competing interests between the child and the parents, and the third recognizing the child's right as a paramount consideration (Mørk et al., 2022).

Literature examines interpretations of the child's best interests by the judiciary from different perspectives. For example, most of the applications before the ECtHR adults bring cases are frequently adjudicated from the standpoint of the adult's rights rather than from the child's (Sanz-Caballero, 2021). Another analysis focuses on what the Court means by a "family unit," and the "child's best interest," showing that respect for the child's family life *de facto* is changing (Breen et al., 2020).

At the same time, children's rights challenge the traditional understanding of families and the relationships between the family and the State; thus, it follows that a child-centric state strengthens its protection of children's rights and challenges parental and family rights (McEwan-Strand & Skivenes, 2018).

How to balance the rights of parents, to privacy and family life, while at the same time ensuring that the health and development of the child are secured, is, in essence, the major question in graduating to the parent-centric (family-unit based) or the child-centric orientation (whereby child's dignity is in focus) (Hestbæk et al., 2023).

The discourse on family life in literature is complex, with diverse and sometimes conflicting viewpoints. Nevertheless, the ECtHR judgment in the Janson case, and the minority dissenting opinion in the Strand Lobben case, highlight the need for the Norwegian case law to give proper attention to children's right to family life as an in-depth examination of the child's best interests is not enough (Haugli et al., 2019).

In the other research, the author analyzes whether the child and parents' right to contact are safeguarded in the care orders; the result reinforces the suspicion that current Norwegian practice may systematically contradict human rights (Gerdt-Andresen, 2021).

The fundamental aspect of professional practice in CPS is the human rights nature of social work. However, after the ECtHR's core judgment of the Strand Lobben, the Norwegian child protection system's increasing complexity and contradictory demands (Olsvik & Saus, 2022).

Interconnections between rights and professional practice demonstrate a general rights-based approach to professional practice in child protection; to become conceptually coherent and have a high amount of explanatory power (Falch-Eriksen, 2018).

From a legal perspective, weighing parents' and child's rights is a so-called balancing exercise that is an interpretation method of the court that was criticized as having no legal certainty. Balancing resolves a conflict between competing principles (rights, interests) which pull into different directions, allowing for bringing the principles into practical concordance (Klatt, 2020). In contrast, balancing is not an alternative to argumentation but a necessary form of rational, practical discourse (Alexy, 2003). In cases before the ECtHR, it demonstrates that "the work of the CPS primarily concerns weighing different human rights up against each other: on the one hand, parents and children's right to family life and maintaining family relationships, and on the other hand, the child's right to protection against neglect, or even violence and abuse; all in all, the legal picture that emerges is both complex and constantly evolving" (Norwegian National Human Rights Institution, 2020).

Concerning political influence and the necessity of expertise, courts are set up to reduce the legal uncertainty inherent in all legislation; they draw legitimacy from fulfilling that purpose; however, such uncertainty also makes room for policy-oriented considerations (Hermansen, 2020).

Legal scholars tend to take a more internal view of judging, in which constitutions, statutes, regulations, and precedents drive how cases are decided, while political scientists usually take an external view of the drivers of judicial decisions, such as a judge's ideology, political influences, and group dynamics within the courts (Lindman, 1989).

In the article on the legitimacy of the decisions from a deliberative perspective, the author builds on approaches to study the rationality of decisions in the legal context (Skivenes & Sørsal, 2018) on theories of argumentation from the tradition of Habermas and Alexy and is based on an evaluation of whether the court's validation of claims meets the discourse ethical standards, adheres to the rules of rational argumentation, and follows the rules for deliberative processes (Helland, 2021).

This research will scrutinize how social science, law, and politics converge in interpreting human rights and incorporating the fundamental value of dignity into our daily routines.

1.5 Human Rights as a Theoretical Framework

The theoretical framework applied in this research project provides a theory of what *cosmopolitan rationale* entails as the normative theory of human rights and, more specifically, what the right to respect for family life works for children and parents provided such a rationale. To explain what carries the opinions within the Strand Lobben judgment when they do not align with a cosmopolitan ethos, we suggest an analytical model with three additional rationales that can help explain what rationality is more prevalent whenever the cosmopolitan is not: communitarian, instrumental, and civic republican rationale (Appendix 2, Figure 3).

To the ECtHR, the primary "law" is the ECHR. This implies that this convention and not others protect the parent's and child's rights. Other human rights instruments can be legal sources but do not constitute the law. Therefore, the ECtHR does not consider the CRC "the law." In Article 1 of the ECHR: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention*". For this project, we are preoccupied with Article 8 of the ECHR. It guarantees that everyone has the right to respect for his private and family life, and there shall be no interference with this freedom.

To understand the *cosmopolitan* approach relevant to this thesis, it is embedded in the ECHR in Articles 1 and 8, where the right to respect for family life is a human right "for

everyone” that belongs to all humans and is relevant to understanding all the freedoms the human rights convention provides. Furthermore, the ECHR protects adults and children equally according to a fundamental principle of equality before the law. In this way, the rights figure through the ECtHR jurisprudence must be understood according to a *rationale* that calls for protecting the individual dignity of every person irrespective of who that person is, i.e., a cosmopolitan rationale. Thus, it means that each and any person carries equal dignity and is bestowed equal protection by the convention. These features indicate the *universal status of human rights*.

The ECHR is a part of the broader “human rights system” created and developed after the Second World War. In the Preamble, the ECHR calls “*to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.*”

The core international human rights instruments of the United Nations, consisting of the number of international treaties together, create the international human rights normative framework and **human rights standard** being *universal, inalienable, interrelated, interdependent, and indivisible* (United Nations Organisation, 2023). According to this approach, *universality* means that human rights are common regardless of political, economic, or cultural systems; *inalienability* refers to the inherency of human rights in all persons and cannot be alienated from an individual; *interrelation* implies that the realization of any one human right is a function of the realization of the other human rights; *interdependency* involves as the level of enjoyment of any one right is dependent on the level of realization of the other rights; *indivisibility* purports that all civil, cultural, economic, political and social rights are equally important, and improving the enjoyment of any right cannot be of the expense of the realization of any other right (United Nations Organisation, 2023).

These principles empirically link to the UDHR: “*All human beings are born free and equal in dignity and rights*” (United Nations, 2015). The United Nations General Assembly “*proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations*” (United Nations Organisation, 1948). From this, the cosmopolitan rationale coincides with using “standard” and “human rights standard.” The cosmopolitan rationale aligns itself with a human rights ethos and the normative theory of human rights.

A significant contribution to cosmopolitan political thought at the beginning of the twenty-first century was made by Jürgen Habermas, drawing on a universalistic conception of human rights and a corresponding interpretation of the development of international law (Cronin, 2011).

According to J. Habermas, despite the abstract meaning of human dignity, it depends on the social recognition of status - the status of democratic citizenship: it means that “only membership in a constitutional political community can protect, by granting equal rights, the equal human dignity of everybody.” (Habermas, 2010). The philosopher depicts “an explicit connection between human rights and dignity,” the role of human dignity as “the moral “source” from which all the basic rights derive their meaning (Habermas, 2010). Furthermore, “human dignity, which is one and the same everywhere and for everyone, grounds “the *indivisibility* of all categories of human rights” (Habermas, 2010). Treating every individual with respect and esteem is a fundamental moral and political principle that fosters parity and reinforces a *cosmopolitan* rationale consistent with the fundamental tenets of human rights.

This idea reflects egalitarian universalism as a core moral value, and it refers to the conception of justice that means they must be distributed equally universally and imply the same for all; human dignity forms the “portal” through which the egalitarian and universalistic substance of morality gets imported into the legal order and professional practices (Falch-Eriksen, 2022).

The concept of equal dignity promotes children’s rights to full development and respect for their views (Pecnic, 2007). The right to respect for family life is operatively expressed for children and parents when in a family differently; however, the dignity of both is equally respected as well as the dignity of each member of a family equally compared to the next family. A parent's rights to family life must thereby communicate with the child’s right to family life to build a complex interconnection of human rights provided a *cosmopolitan* rationale.

The rationale of cosmopolitanism acts as a filter to determine the *validity* and *legitimacy* of rules and as a guide for making coherent decisions. “A justified decision in hard cases often becomes possible only by appealing to a violation of human dignity whose absolute validity grounds a claim to priority. In judicial discourse, the role of this concept is

far from that of a vague placeholder for a missing conceptualization of human rights” (Habermas, 2010).

As we are most interested in the *cosmopolitan* rationale, and the prevalence of it within the Strand Lobben case, we also need the ability to explain what is going on whenever the cosmopolitan rationale is not guiding the judgment. Therefore, we have developed a four-part analytical mode with three additional rationales. These rationales are as follows:

1. *Cosmopolitan* Rationale - aims to uphold the dignity of all members of society, irrespective of their jurisdiction (Rights as trumps).

2. *Communitarian* Rationale - focuses on safeguarding citizens and integrating them into a collective identity (Rights as values).

3. *Instrumental* Rationale - aims to achieve specific objectives successfully (Rights as targets).

4. *Civic Republican* Rationale - seeks to promote the public good, benefiting everyone, with rules democratically decided (Rights as collective self-rules).

1.6 Research Methodology

The complexity of the research question calls for an interdisciplinary approach combining legal- and political science perspectives with social sciences methodologies of thematic analysis of document data and case study research. I analyze opinions in judgments to identify patterns and themes, which I group into an analytical model. The singular judgment case study explores the nuances of applying the right to respect for family life in complex situations. We can use process tracing to uncover the prevalence of different rationales and determine what factors lead to different conclusions.

We obtained the data for this study from various sources. These included the Norwegian public register LovData, United Nations Organization documents, and HUDOC. The latter provides case law from the ECtHR related to child rights reviews and studies and policy documents on "impact" cases.

1.6.1 Limitation of Data and Method

This study specifically examines the significant and influential case of Strand Lobben, which has become a landmark case. However, it does not explore the entirety of the ECtHR’s work related to CPS. Therefore, the list of reasons suggested in the analytical model may not

include every possibility. Additionally, we do not have access to all the opinions presented to the court, so it is unclear which ones were considered and which were rejected.

Also, as a case study, the research conducted in this project will not claim to unveil a general trend of how the court operates but rather provide a picture of how the court can work from within the scope of one judgment. This implies that although the findings are evidence of occurrences of variations within one judgment and unveiling many different rationales within that one judgment, it cannot make a claim that the court consistently operating incoherently. However, as the Strand Lobben judgment is a landmark case, it has repercussions for the development of the court's jurisprudence for years to come.

1.6.2 Ethical issues

This thesis followed the primary ethical considerations in a social science study, including guidance from the Norwegian Data Protection Authority (SIKT) and The National Committee for Research Ethics in the Social Sciences and the Humanities. This article-based thesis does not process data that can violate the privacy of individuals. The study is nevertheless aware of the sensitivity of the topic area in which the investigation takes place, in child protection research. Therefore, due consideration has been taken to induce the study and the presented arguments with the respectfulness needed of the topic domain.

1.6.3 Analytic Strategy

Our analysis of the Strand Lobben case and relevant legal precedents, reviews, and administrative literature has enabled us to identify key themes from the decision. Additionally, we have carefully considered amicus briefs and delved into the underlying rationales to comprehensively understand the case.

1.7 Findings

The Strand Lobben ruling is based chiefly on both *communitarian* and *instrumental* reasoning. The communitarian viewpoint values the preservation of traditional family ties. At the same time, the instrumental perspective prioritizes the reunion of families as a goal. It protects the child's interests in maintaining a family life with a natural or foster family.

In the first case, the judges on the main panel argue that family unity is important and should be respected. They believe it is the authorities' responsibility to help families reunite

as soon as possible. The relationship between parents and children is a crucial part of family life, and any restrictions on parental access could harm this relationship.

In dissenting opinions, the communitarian rationale suggests that preserving family ties is in a child's best interest. Various amicus briefs, including those submitted by Bulgaria, Czech Republic, and Slovakia governments and NGOs like the Alliance Defending Freedom International and the AIRE Centre (Advice on Individual Rights in Europe), emphasize the importance of family unity.

In the second scenario, where the *instrumental* rationale prevails, the judges of the main panel aim to solve problems in a way that reunites natural parents with their children. In addition, when examining the case, it was observed that there was a bias toward finding a violation of Article 8: the intervention by the Norwegian CPS resulted in negative consequences for underage foreign citizens and predetermined the outcome of the case. While the majority of opinions agreed with this outcome, there were dissenting opinions that emphasized the importance of prioritizing the protection of children. In support of this perspective, the governments of Belgium, Denmark, and the United Kingdom submitted amicus briefs stating that Article 8 should not be used to justify endless attempts at family reunification.

Other logics can be considered, although they may not be as significant. The *civic republican* viewpoint suggests that the traditional family is viewed as a benefit to society because it is widely accepted as such. Variations in family dynamics and cultural traditions across different regions can affect the extent of CPS involvement in such matters.

The *cosmopolitan* rationale is based on the belief that the fundamental objective of the CRC is to safeguard and maintain the rights of children as distinct persons. This standpoint was expressed in the opposing viewpoint.

Judging what it takes to safeguard the human dignity of a parent and a child from the Strand Lobben, if to apply the *cosmopolitan* rationale, everyone, a child and a parent, is equal in their rights to respect for family life, and children are equal rights holders. Instead, the court's argument focuses on family unity and reunification to protect a parent's rights, sometimes formally referring to the child's best interests as "paramount," prioritizing them above a parent's right in court reasoning.

As we analyze Strand Lobben's arguments, we anticipate that they will highlight the significance of dignity for parents and children alike to protect their right to family life. Unfortunately, the discussion on the child's right to respect for family life was overlooked in this decision. In order to appeal to dignity, it was important to give proper weight to the child's rights in the argument and fix them in a landmark judgment.

1.8 Discussion

There are varying interpretations of human rights when it comes to Strand Lobben. The problem with conceiving the right to respect for family life according to *communitarian* and *instrumental* rationales does not seem to collide with cosmopolitanism in the argumentation albeit the different rationales are present throughout the judgment.

The ECtHR promotes the *communitarian* approach, but the provisions of the CRC and UDHR are not being implemented in a manner consistent with human rights in a cosmopolitan sense. In addition, the conflicting interpretation of the ECHR and the CRC highlights the importance of having a unified approach to children's rights.

According to the *communitarian* rationale, the interpretation of Art. 8 of the ECHR, which the main panel of judges carries, narrows the right to respect for family life down to the obligation of authorities to take measures to facilitate family reunification on the value of biological ties. Although a cosmopolitan approach has a biological presupposition, it does not allow biological ties to become legal trumps compared to the child's best interests.

However, in the dissenting opinion, the prevalence of *instrumental* rationale is identified as successfully achieving an objective: rebuilding the family because it is the efficient unit of society and using the efficacy of the child's best interests as a mere problem-solving target. The use of instrumental logic neglects the importance of the child's dignity and goes against the liberal normative principles of prioritizing the child's self-interest.

In contrast, *communitarian* logic highlights the significance of rights as values and represents the moral principles of the community. However, children's rights are often overlooked, resulting in children being denied their rights due to their perceived immaturity.

To ensure that human rights are equally distributed to everyone, it is important that we have a clear understanding of what constitutes the right to respect for private and family life. Furthermore, this understanding must be guided by a shared cosmopolitan rationale that

can be used to make decisions across all countries covered by both CRC and Art. 8 of the ECHR.

1.9 Academic and Practical Contribution

This study's results can significantly impact various fields, including research, policy, and society. For the research community, it highlights the importance of empirically examining legal practices as representations of norms rather than blindly accepting a human rights court's authority. This critical evaluation is not a common research practice. Additionally, the study's findings suggest that national policies and laws still have a long way to go before truly incorporating a cosmopolitan ethos that values human rights.

Improving legal and political approaches to align with human rights is vital for judicial decision-making and reducing internal political influence. Integrating the concept of dignity into international judicial decision-making provides coherency and strengthens the legal certainty principle.

The article manuscript, including this master thesis (Part 2), is finalized to submit to *the International Journal of Children's Rights*. The article is written and formatted according to the journal submission guidelines (Appendix 3). This journal focuses both on critical leadership and practical policy development, reflects the perspectives of a broad range of disciplines, and contributes to a greater understanding of children's rights and their impact on the concept and development of childhood.

1.10 Conclusion

The status of human rights in a society can be seen through the extent to which they are upheld in judicial decision-making. This thesis emphasizes the cosmopolitan approach, which upholds all individuals' equal dignity and rights. The UDHR, ECHR, and CRC establish that human rights are universal, inalienable, interrelated, indivisible, and interdependent. This study suggests that human rights should be approached according to the cosmopolitan rationale that prioritizes dignity in family life. National policies should reflect this focus on human rights and incorporate dignity into decisions made by the judicial system. Validity and legitimacy should also be ensured.

1.11 References

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1.12 APPENDICES

1.12.1 APPENDIX 1: Statistics of Judgments by Norway 1959-2022

Violations by Article and by State

1959-2022	Total number of judgments	Judgments finding a violation	Judgments finding no violation	Friendly settlements/Out-of-court judgments	Other judgments ¹	Right to life – deprivation of life	Lack of effective investigation	Prohibition of torture ²	Inhuman or degrading treatment	Lack of effective investigation	Prohibition of slavery/forced labour	Conditional violations ³	Right to liberty and security	Right to fair trial ⁴	Length of proceedings	No enforcement	Right to respect for private and family life	Freedom of thought, conscience and religion	Freedom of assembly and association	Freedom of expression	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried or punished twice	Other Article of the Convention			
																													Total	Total	Total
Lithuania	250	173	58	13	6	3	6				33	10	1		26	36	28	2	1	23	2	3	1		8	7	33		1	1	1
Luxembourg	52	37	12	3					1						1	17	17			4		3	1		3	1	1				
Malta	138	106	20		12	1					4		1		27	13	14	1	2	7		5		27	4	56				2	
Republic of Moldova	675	492	44	5	34	4	17	9	114	65					121	180	13	41	1	45	5	21	18	63	7	160		3	1	12	
Monaco	4	3	1												1	3															
Montenegro	71	65	4		2		1			4	3				6	10	30	6		5		2		5	1	7					
Netherlands	177	98	51	16	12		4	1	10						34	32	8			17		7		2	3	1					
North Macedonia	191	148	15	3	5	2	2	3	6	14					17	57	66	5		10		4	5	11	2	15				1	
Norway	72	45	27												1	12	2			23		6		1	1						
Poland	1,254	1,057	137	42	18	7	9	2	67	15	1				318	130	452	4		127	1	38	1	2	43	5	59			16	
Portugal	373	285	23	56	9	2	6			4					7	42	144	6		18		31		43	2	48					
Romania	1,754	1,541	91	48	74	14	59	2	380	99					125	481	152	55	4	118	4	40	6	29	43	511	1	7	5	21	
Russian Federation	3,500	3,317	121	18	44	363	419	89	1,190	291	45	1	1,494	1,076	209	170	4	395	20	139	128		820	33	700	3	9	10	180		
San Marino	22	14	5	2	1										1	10	3			1	1										
Serbia	244	217	19	1	7		3		7	10					13	33	54	80		18		7		18	2	87	1	2	1		
Slovak Republic	422	378	13	22	9	3	3	1	6	6					62	53	224	2		28		11		41	4	22				1	
Slovenia	377	346	24	4	3		3		21	6					6	27	264	3	1	12		3		267	3	9					
Spain	206	143	56	3	4		1		1	14					5	47	16	1	4	22		11	1	2	5	2				4	
Sweden	157	62	62	28	5		1		1	4	5				2	28	12	1		10		2	1	3	1	6				1	
Switzerland	223	131	84	5	3	1	2		2	1	7				22	39	8		1	27	1	20	2	1	2	8				1	
Turkey	3,900	3,458	100	219	123	143	225	31	348	229					843	991	609	70	6	140	13	426	117	283	20	718	7	15	37		
Ukraine	1,840	1,800	23	4	13	14	78	22	383	131	1				649	622	549	39	2	116	6	22	11	1	480	10	382	6	2	82	
United Kingdom	567	329	146	69	23	2	20	2	17				1	2	70	97	30			1	78	1	15	4	4	35	46	4	2	8	2
Sub-total		21,784	2,085	1,143	770	650	984	188	3,135	1,081	90	13	4,903	5,703	6,144	673	59	1,892	106	1,047	418	10	3,115	357	3,810	18	116	47	529		
TOTAL ⁴					25,674																										

This table has been generated automatically, using the conclusions recorded in the metadata for each judgment contained in HUDOC, the Court's case-law database.

- Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.
- Figures in this column may include conditional violations.
- Cases in which the Court held there would be a violation of Article 2 and/or 3 if the applicant was removed to a State where he/she was at risk. Figures in this column are available only from 2013 onwards.
- Including 94 judgments which concern 2 or more respondent States.



1.12.2 APPENDIX 2: Strand Lobben and others

Figure 1

The group of cases concerns various violations of the biological parent's right to family life in the period between 2011-2018

	Name of applicant	Application no.	Final judgment date
1	J	2822/16	6 December 2018
2	A.S.	60371/15	17 March 2020
3	K.O. and V.M.	64808/16	15 April 2020
4	P. and others	39710/15	7 September 2020
5	H.	14652/16	7 September 2020
6	M.L.	64639/16	22 March 2021
7	F.Z.	64789/17	1 July 2021
8	K.E. and A.K.	57978/18	1 July 2021
9	R.O.	49452/18	1 July 2021
10	M.F.	5947/19	25 November 2021
11	E.H.	39717/19	25 November 2021
12	Abdi Ibrahim	15379/16	10 December 2021
13	A.L. and others	45889/18	20. January 2022

Figure 2

CPS cases under consideration before the ECtHR

1	A.G. v. Norway	(no. 14301/19)	Case communicated to the Government in October 2019
2	Hernehult v. Norway	(no. 20102/19)	Case communicated to the Government in October 2019
3	G.B. v. Norway	(no. 38097/19)	Case communicated to the Government in October 2019
4	D.J. and P.J. v. Norway	(no. 38105/19)	Case communicated to the Government in October 2019
5	A.H. v. Norway	(no. 39771/19)	Case communicated to the Government in October 2019
6	R.A. v. Norway	(no. 44598/19)	Case communicated to the Government in October 2019
7	G.G. v. Norway	(no. 45985/19)	Case communicated to the Government in October 2019
8	K.F. and A.F. v. Norway	(no. 39769/17)	Case communicated to the Government in June 2019
9	D.R. v. Norway	(no. 63307/17)	Case communicated to the Government in June 2019
10	S.E. and Others v. Norway	(no. 9167/18)	Case communicated to the Government in June 2019
11	M.A. and M.A. v. Norway	(no. 48372/18)	Case communicated to the Government in June 2019

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2. Article

The Right to Respect for Family Life and the Landmark Case of Strand Lobben

Ruslana Kotsiuba

Abstract

This article delves into the reasoning behind the European Court of Human Rights decision in the landmark case of Strand Lobben and Others v. Norway. It examines how the court balanced the rights of the child and parent according to Article 8 of the European Convention on Human Rights. Through thematic analysis of the judgment and case study, the author identifies four ideal rationales - cosmopolitan, communitarian, instrumental, and civic republican - that guide the court's decision-making. The article demonstrates which rationale prevails and evaluates the coherency of the decision-making process. Lastly, the article emphasizes the importance of dignity and the cosmopolitan rationale in adhering to human rights standards in legal practice.

Keywords

child's rights – parents' rights – dignity – best interests of the child – the right to respect for family life – the European Court of Human Rights – Strand Lobben.

2.1 Introduction

In recent years, massive attention from civil society and through mass media has focused on the Norwegian Child Protection Services (CPS) and child protection cases on the dockets before the European Court of Human Rights (ECtHR). On the European continent, this is the central catalog of human rights and where its jurisprudence evolves especially employing the court's interpretation of its rights provisions by ECtHR through its case law. The court has jurisdiction to hear allegations of violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR). The court hears cases on receiving individual or inter-state applications upon exhausting all legal remedies within the nation-state. After the court reaches the judgment, the state must amend its legislation to align with the ECHR if it loses the case (European Court of Human

Rights, 2021). Although compliance and dedication to provide change vary, the idea is to allow human rights practices to become increasingly integrated into the nation-state legislative corpus. Thus, judgments and their consequences are obligatory for all member states. In a way, its demands are binding for all domestic authorities, and the national legislation should be amended to correspond to them and create legal harmony.

Norway ratified the European Convention on Human Rights in 1952, and in the period 1959-2022, a total number of 72 judgments has been delivered involving Norway; in 45 of them, the court found a violation of ECHR, and half of those cases (23 from 45) concerns the right to respect for family life (European Court of Human Rights, 2023). The loss of parental rights, at the heart of the right to respect for family life, has become influential in Norwegian law and has changed CPS practices (Christensen, 2020). According to the ECtHR, in 2023, there were over 40 pending cases against the Norwegian CPS, which is an unusually high number for this court. The court has recognized the CPS as interfering with the right to respect for family life, a concern as it is a small domestic public service.

In 2019 there were 23 pending cases against Norway in Strasbourg, one of them, the case of Strand Lobben and Others v. Norway (henceforth the Strand Lobben case), was processed in Grand Chamber Proceeding of the Court (Kolsrud, 2019). Several years before, in 2016, mass demonstrations against Norwegian CPS were held across 19 countries (Norman, 2016). Norwegian CPS was met with much criticism from many different sources. High-level politics, loud protests, and tensions in international diplomatic relations were involved in protesting the judicial proceedings on Norwegian CPS. The President of the Czech Republic even compared the CPS practices to what Nazi Germany did in the 1930s (Lohne et al., 2015)

In that atmosphere of public outrage and political pressure, the Strand Lobben case has become a landmark case in the practice of the ECtHR. The term “landmark case” describes a case of principled importance that will establish new laws and set new precedents (Black’s Law Dictionary, 2023). It means the emergence of new legal concepts or principles and that landmark cases will significantly impact how existing laws can interpret, which has historical and legal significance (Judicial Learning Center, 2023). The Strand Lobben case was not merely about a small aspect of a CPS case but had reached a principled level of family politics and regulation across Europe. The case raised *“a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general*

importance" (Article 43 § 2 of the Convention). For that reason, it was presented for the Grand Chamber, which was meant to be the most significant court proceeding for Europe combined.

Moreover, from a legal perspective, the case has established legal precedent on the European continent and across nation-states, which means the judgment has created reasoning applied to similar cases in the future and work as guidance for judges in child's rights and CPS cases from one country to the next, including Norway. In other words, the general principles relevant to CPS measures set out in the Strand Lobben case judgment are fundamental in case-based reasoning.

As a landmark case, it assumes that courts further utilize the argumentation in their decisions on the national and international levels. The Norwegian Supreme Court's decisions extensively reference Strand Lobben in interpreting the right to respect for family life. The thirteen cases against Norway before the ECtHR already referred to Strand Lobben concerning various violations of the biological parent's right to family life. The Strand Lobben case is thereby consequential for years to come. Also, it means that all signatories to the convention will refer to that case as a legal pointer in decision-making by their domestic authorities and a driver for developing new legislation in the country if a violation of human rights is found.

Examining the reasoning by judges in the ECtHR and the so-called "friends of the court",² we will in this article explore the opinions within the Strand Lobben judgment, both views of judges and amicus briefs, and seek to identify the prevailing rationales that guide the ideas and the decision itself. In this effort, we will seek to discover different arguments that illustrate the prevalence of different normative rationales that all claim to uphold human rights. We will, in this article, *first* present the synopsis of the Strand Lobben judgment.

² The term "amicus" generally refers to an advisor to a judge who is not involved in the trial as a party. The idea behind this is that the amicus is impartial and provides legal expertise or insight. However, in reality, interest groups sometimes misuse their status as "friend of the court" to sway the court in favor of their own interests. Article 36 of the ECHR stipulates third party intervention in § 2: "*The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.*"

There are 11 amicus briefs in the Strand Lobben, which are considered third parties in the trial. These briefs are divided into two categories: those submitted by the State parties of the ECHR and those submitted by other organizations.

Secondly, we will lay out a theoretical proposition for what cosmopolitan rationale entails. *Thirdly*, we will offer a typology of rationales that allows us to identify the prevalence of the rationales and what rationale is active whenever we are not faced with a *cosmopolitan* rationale such as *communitarian*, *instrumental*, and *civic republican*. *Fourth*, based on the suggested analytical model, we discuss the prevalence of different rationales within the judgment in the decision. *Fifth*, and finally, we discuss the coherency or incoherency within the decision itself.

2.2 The Strand Lobben decision, concurrent- and dissenting opinions

In the Strand Lobben case, the ECtHR holds the violation of Article 8 of the ECHR in favor of the biological mother and her child's rights (the applicants) to respect for family life (The European Court of Human Rights, 2019b). The court decision was adopted by thirteen votes to four. There were two rounds of the proceeding. In the first round, the Chamber held no violation of Article 8 (by four votes to three), and in the second round, the referral of the case to the Grand Chamber was granted. As indicated in the judgment §§ 161: "*the particular context concerning Norway, namely that there was widespread criticism both national and internationally of the Norwegian child welfare system, indicating a serious systemic problem*" (The European Court of Human Rights, 2019a).

The first applicant, pregnant in May 2008, requested help to become the best mother possible. She was informed that the parent-child institution was voluntary, and they could leave anytime. After giving birth to a son (the second applicant) on September 25th, the staff grew concerned about her ability to provide the child with proper care. The institution had implemented a system of 24-hour monitoring to ensure close oversight. On October 17th, the decision was made to place the second applicant, who was only three weeks old, in an emergency foster home. The first applicant opposed the emergency decision, claiming that she and her child could live together and were willing to accept support from CPS. A care order was issued on March 2nd, 2009, which specified that there would be two hours of contact between parties six times a year. It was confirmed on April 22nd, 2010, that the baby would remain in foster care. The first applicant lost her parental rights on December 8th, 2011, and the adoption was approved. She requested an evaluation of their ability to provide sufficient care for their family, arguing that her caregiving skills had improved since getting married and having a second child. However, the appeals were rejected.

The applicants filed a complaint with the ECtHR on April 12th, 2013. They claimed that the domestic authorities violated their right to family life by not lifting the care order for the second applicant and taking away the first applicant's parental responsibilities, allowing for his adoption by his foster parents.

The ECtHR found that authorities had failed to perform a genuine balancing exercise between the interests of the children and the biological parents (The European Court of Human Rights, 2019a). The case presents diverse opinions on how the human right to respect for family life should be upheld. The judges were divided into two groups: those who supported the decision and explained their reasons and those who opposed it due to the absence of any ECHR violations. This makes the case attractive to study.

2.3 Method and data

The complexity of the research question calls for an interdisciplinary approach combining legal- and political science perspectives with social sciences methodologies of thematic analysis of document data and case studies. We apply these methods to trace and analyze the prevalence of different decision-making rationales within the Strand Lobben judgment and adjacent documents. Furthermore, we trace within the document the prevalence of rationales that motivates what leads to the various decisions. The case study of a singular decision aims to generate an in-depth interpretation of the right to respect for family life in multi-faced contexts. The data were derived from the public register LovData (www.lovdato.no), UN document data, which provides access to online legal resources, and HUDOC, which offers access to the case law of the ECtHR on child's rights reviews and studies as well as to the policy documents of the court on "impact" cases.

2.4 Human Rights Theory and the Cosmopolitan Rationale

In this article, we will draw on Jürgen Habermas' rationality of adjudication and his analysis of Ronald Dworkin's turn to a deontological concept of rights to explain how judicial decision-making can simultaneously satisfy the requirements of legal certainty and rational acceptability (Habermas, 1996). Combining these two theoretical strands will unveil what we will refer to as the approach to the *cosmopolitan rationale* in our study.

Cosmopolitanism is an intellectual position — or, more precisely, a family of such positions; the central idea guiding these moral assessments and prescriptions is that of

including all human beings as equals and who carry an equal rights claim to equal worth equal dignity (Pogge, 2012). The idea of equal dignity is the conceptual hinge that connects the *morality* of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights (Habermas, 2010).

The historical roots for such an approach are often pinpointed at Immanuel Kant and his approach to moral cosmopolitanism in the 1790s, claiming that all rational beings, irrespective of their race, should be regarded as ends in themselves and as lawgiving members of 'the universal kingdom of ends' (Cavallar, 2012).

After the Second World War, this idea was implemented in the general provisions of the Universal Declaration of Human Rights (UDHR): "*All human beings are born free and equal in dignity and rights*" (United Nations, 2015), and is now in addition to a moral cosmopolitanism also a practical cosmopolitanism through formal human rights norms and human rights instruments. The UDHR presents what the Preamble calls a "common understanding" of human rights and represents what the Proclamation Clause calls "a common standard of achievement for all peoples and all nations" (Brown, 2016). It is a foundational document with the universalistic inclusion of all humanity in a set of morally relevant subjects of political concern and action (Moyn, 2014).

Dignity is a defining concept for interpreting cosmopolitan rationale equal to a human rights standard. Dignity is commonly invoked in declarations of human rights and by oppressed groups appealing for support; dignity is also widely associated with competence – with having capacities and being able to act effectively; respect and supporting someone's dignity involves recognizing them as a whole person, with a history, achievements, needs, concerns, commitments (Sayer, 2017). Dignity is a red line across all human rights; it grounds "the indivisibility of all categories of human rights"; there is a strong connection between rights and dignity because dignity itself is "the moral "source" from which all the basic rights derive their meaning (Habermas, 2010).

According to J. Habermas, despite the abstract meaning of human dignity, it depends on the social recognition of a status closely connected with membership: the status of democratic citizenship (Habermas, 2010). It means that in constitutional democratic political order can be granted equal rights and equal human dignity and protection from human rights

violations. Based on it, dignity as a moral and political concept leads to equality and provides substance for human rights rationale enforcing them.

Appealing to the concept of dignity, it is easier to reach a consensus when negotiating human rights with different cultural contexts, neutralizing unbridgeable differences in this way, judges apply it to introduce a new right or to treat the violation of human dignity in view of discriminations, or a view of the marginalization of social groups. In this sense, it helps better protection of civil rights or construct new one (Habermas, 2010).

Speaking about a “Janus face” of human rights turned simultaneously to morality and law, Habermas writes that they are designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication, and to be *enforced* in cases of violations (Habermas, 1996). Here it assumes that normative connotations are mediated through the concept of dignity going forward, while simultaneously applied contextually here and now, dignity is presupposed prior to any existence of any rights, and the concept of dignity becomes the source of each individual’s rights (Falch-Eriksen, 2022).

The moral concept of dignity guides understanding the law in view of human rights rationale. It comes from Dworkin’s dispute that the mere legality of the legislative procedure legitimates law. He says, “Legal discourse is independent of morality and politics only in the sense that moral principles and political policies must also be translated into the neutral language of law and connected to the legal code. Beneath this unity of the code, however, one finds that legitimate law involves a complex notion of validity. It explains why landmark decisions and important precedents usually admit reasons of extra-legal origin, hence pragmatic, ethical, and moral considerations, into legal discourse” (Habermas, 1996). Thus, it gives us a source of argumentation that got into a court decision and accompanied several rounds of the trial in the Strand Lobben case.

Therefore, if legal discourse is not aligned with a cosmopolitan ethos, the question of the validity and legitimacy of law can raise. But, on the other hand, it also sends us to justify the decision by its coherence. To solve the problem of how judicial reasoning can simultaneously satisfy the principle of legal certainty and the legitimate claim of law, R. Dworkin, according to J. Habermas, looks to an ambitious theory that enables one, especially in complicated cases, to justify the individual decision by its coherence with a rationally reconstructed history of existing law (Habermas, 1996).

In this sense, human rights rationale serves as a filter for the validity and legitimacy of rules, a pointer for coherency in decision-making.

The cosmopolitan approach is embedded in the ECHR in Article 1: *“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention”*. The right to respect for family life is a human right “for everyone” that belongs to all humans and is relevant to all human rights. It assumes that the ECHR equally protects both adults and children. In this way, the rights figure through the ECtHR jurisprudence must be understood according to the human rights rationale that calls for protecting the individual dignity of every person. It means that each carries equal dignity and is bestowed equal protection. In our study, we focus on the rights of a parent.

From this perspective, the right to respect for family life works for children and parents when in a family differently. However, the dignity of both are equally respected. A parent's right to respect for family life must communicate with the child's right to respect for family life and build a complex understanding because of cosmopolitan rationale.

International human rights documents secure the right to respect for family life. According to Article 16 para 3 of the UDHR: *“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”* Therefore, it should operate in composition with safeguarding the child's dignity and best interests. It also means that the authorities should ensure the rights of a parent.

In addition to it, the Preamble of CRC recognizes the primary position of the family: *“the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”*; *“States Parties shall respect the responsibilities, rights and duties of parents... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”* (Article 5).

In this manner, children have the right to respect for family life as equal rights holders. Simultaneously, it speaks about the obligations of parents to provide for children's development. Both children and adults create a family as an environment for the well-being

of all its members, with a surplus focus on children and ensuring them necessary protection and assistance.

In contrast, the European Convention on Human Rights in Article 8 guarantees the right to family life for parents and protects private life against interference. In this view, a well-established case law is created by judges on how to respect for family life and in what way it should be interpreted.

For instance, the case law of the ECtHR refers to the interference in family life caused by measures adopted by the authorities to take a child from the power of the parents to take care of it in a public institution or to place it with a foster or adoptive family requiring balancing the rights of the parents to maintain a family life with their children, and the interests of others, mainly the interest of the child, and in some cases, the interest of the foster or adoptive family (Pascual & Pérez, 2018). In this way, it focuses on protecting the parent's right to respect family life and supporting the family bonds with their children.

Considerations of family unity and reunification in cases of separation are a part of the right to respect for family life. Therefore, both the child's best interests and the aim of family reunification must be included in the balance (Alvik, 2021).

The child's interests can be interpreted differently, claiming the same human rights standard. In a *cosmopolitan* spirit, the point of departure focuses on the above concepts of dignity and equality. Here the idea of best interests is significant for all decision-making, including the judiciary, in any decision-making stage.

According to Article 3 para 1 of the CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Therefore, in broad terms, the CRC should be constitutive to professional practice through decision-making and policy development. In this aspect, child protection services need to become rights-based to develop legal rules complying with human rights and a system of protection that maintains the ethos of a human rights standard (Falch-Eriksen, 2018).

Thus, the main argument when CPS intervenes and revokes family life is that it is in the child's best interests for parents to no longer care for the child temporarily or permanently.

Following the idea that children are holders of negative rights, they have their right to freedom from interference. Children must be protected according to their needs when subjected to detrimental care against the best interest principle. Parents or authorities act as proxies to manage children's negative rights until adulthood. If parents fail to provide non-detrimental care, the state should protect the child's negative right to liberty through intervention. This version of negative rights is cosmopolitan and maintains a human rights standard.

Article 19 of the CRC stipulates the child protection system of each state in order *“to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”* Therefore, it means all states must have a proper child protection system to prevent abuse against children.

Children need special protection that adults do not need. This type of protection differs from the others as children cannot decide how they want to be protected or to raise a legal claim on their behalf. It links to the application of the child's best interests concept. It involves the issue of balancing parental rights to family life with securing the child's rights to health and development and family life.

The right to protection has roots in the individual negative right to liberty. In contrast to adults, children are a special case. In this context, we can say they have future right to personal liberty, as they cannot perform rights or act upon freedom, or carry responsibilities because of biological age, and it concerns positive obligations. A child holds the negative right to liberty, e.g., freedom of speech, family life, or privacy, which is fundamental for a rights-based system, with the right to membership rights and legal remedies. It means that excluding children from carrying rights because of immaturity is not a reason because children have a future right to individual liberty and get only access to it once reaching adulthood. If parents violate a child's negative right to liberty, the state must intervene to repair the child's integrity.

In this way, any decisions by the CPS or the judiciary revoking family life should be taken on **the unity** of understanding the purpose of human rights. It should be a cosmopolitan rationale that is foundational for the protection of the individual dignity of everyone.

Therefore, all decisions taken irrespectively political considerations are based on respect for human rights standard.

Creating unity is the basis for the validity of law (Alexy, 2002). According to J. Habermas, to fulfill the socially integrative function of the legal order and the legitimacy claim of law, court rulings must satisfy simultaneously the conditions of *consistent decision-making* and *rational acceptability*; because these conditions do not easily harmonize, two sets of criteria must be reconciled in the practice of adjudication (Habermas, 1996). It is said both guarantees, *certainty*, and *legitimacy*, must be simultaneously redeemed at the level of judicial decision-making; legal certainty demands decisions that can be consistently rendered within the framework of the existing legal order, while the claim to legitimacy requires decisions that are supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions (Habermas, 1996).

Thus, **the coherency** of decision-making can be seen as rationally acceptable, certain, and consistent. That is the core idea of the courts' coherent judgment when CPS intervenes. However, the general agreement is that the coherence must amount to more than logical consistency amongst propositions. Unfortunately, it is not clear from many coherent accounts precisely what this something more amounts to (Stanford Encyclopedia of Philosophy, 2010). In older studies, coherence is viewed in terms of the unity of principle in a legal system; the place of arguments depends on a postulated requirement of 'coherence' in the law, contending that the coherence of a set of legal norms consists in their being related either in virtue of being the realization of some common value or values or in virtue of fulfilling some common principle or principles (MacCormick, 1994).

A more formal definition of coherence means, for example, a minimally coherent legal system: "A necessary condition for a decision to be legally justified, even in a hard case, is that it coheres with established law or coheres best with established law, or such a decision is the correct one in a sense of being antecedently correct about the law" (Levenbook, 1984). Coherence is not always sufficient to legally justify a decision, and it should be taken into account the nature of coherence, agree on the role of coherence in moral or empirical justification, and has a special and more limited legal justification (Levenbook, 1984).

Based on it, B. Levenbook, in her article, disputes R. Dworkin's role of coherence in legal justification as analogous to its role in the moral and scientific rationale and the reliance

on the concept of coherence. Nevertheless, the idea of coherence as a particular virtue of interpretation in legal reasoning plays an important role. Dworkin's theory is influential; he believes that judges should follow in fulfilling this task - 'law as integrity' - 'instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were created by a single author—the community personified' (Dworkin, 2013). His theory states, "As a standard for a statement's validity, coherence is weaker than the analytic truth secured by logical deduction but stronger than mere freedom from contradiction. Coherence between statements is established by substantial arguments (in Toulmin's sense) and hence by reasons that have the pragmatic property of bringing about a rationally motivated agreement among participants in argumentation. It also explains why the concept of coherence employed in constructive interpretation resists purely semantic characterizations and refers to the pragmatic presuppositions of the argumentative process" (Habermas, 1996).

Judges decide actual cases within the horizon of a present future, and their opinions claim validity in the light of rules and principles that are here and now accepted as legitimate (Habermas, 1996). From a *cosmopolitan* perspective, judicial decision-making must fulfill the requirements of legal certainty and rational acceptability, and it should be ruled coherently. Disagreement is nevertheless a part of court practices and contradiction.

Considering this, rights are perceived as requirements with great importance - overriding the public good or utilitarian considerations; be contrasted with the unqualified process of balancing competing interests and goals - a balancing which is most characteristically exemplified in the economically oriented method of decision-making termed "cost-benefit analysis," or utility-maximization (Harel, 2005, p. 191).

A cosmopolitan rational coherency of court decisions means unity of understanding of human rights standard, where dignity glues the rights in one system, ensuring legal certainty and legitimacy of law. In this way, to have a coherent decision on the right to respect for family life anticipates defining and promoting a jurisprudence including children's and parent's rights simultaneously. Human rights are absolute and are considered as trumps.

2.5 Analytical Model – Competing Rationales.

The reason for developing the analytical model *Figure 1* is to explain what type of rationale is prevalent when it is not purely cosmopolitan and which, in its purest ideal manner, aligns with

what human rights call for. The additional explanations will be called *communitarian*, *instrumental*, and *civic republican*. The list may not be exhaustive. With these rationales, we will construct our analytical model, which will assist us in identifying the prevalence of different grounds across opinions and examine to what extent the court decision is coherent on the issue of the right to family life. Additionally, from these perspectives, we will analyze what family life implies, how dignity is protected, what can be understood as a child’s best interest logic, and how parental and child’s rights are related in family life.

Figure 1: **Analytical Model**

Cosmopolitan Rationale		
Purpose of human rights: Protection of individual dignity of everyone	Law: Universal	Practice of adjudication: “Rights-as-trumps”
<p>Interpretation:</p> <ul style="list-style-type: none"> • The concept of human rights involves upholding the dignity of all individuals regardless of their jurisdiction or societal status • Dignity serves as the foundation for all basic rights, which should be universally applied to all members of society, regardless of citizenship, age, or identity • Children are entitled to the same rights as adults, and the rights of both parents and children should be equally respected • Professional practices, including those of CPS, should be based on a rights-based approach • Decisions should be made impartially and without political considerations, with a focus on respecting human rights and promoting a universal standard of ethics • Failure to align legal discourse with cosmopolitan values can jeopardize the validity and legitimacy of the law • In the context of child protection, decisions should be made based on the child's best interests. 		
Communitarian Rationale		
Purpose of human rights: Protection of citizens and integration into a collective identity	Law: Regional	Practice of adjudication: Rights as values
Interpretation:		

- human rights work if they integrate into a collective identity as a common good and reflect the ethic of the social order
- human rights are seen as the promotion of underlying common values and what is best for the members of the community in a line of self-understanding
- rights call to build solidarity regarding membership rights and a view of belonging to the community
- ethical doctrine is based on the wish to preserve traditional family values, biological family bonds, and the idea of family reunification, and the aim is to maintain public order
- human rights are also respected by well-established case law that is created by judges on how to respect for family life and in what way it should be interpreted
- decision making is based on the leading role of cultural norms in assessing the case and prioritization the mentioned values
- children’s rights are seen as patriarchally subordinate to the householder when decisions are made by the patriarch that leads to the excluding children from carrying rights because of immaturity
- understanding the child’s best interests in the context of kinship ties and birth
- legal discourse is built around the interests of the citizens and the majority to protect national interests when the majority’s considerations and opinions overrule minority rights
- the validity of human rights relies on whether they correspond to the collective self-understanding of the society

Instrumental Rationale

Purpose of human rights:	Law:	Practice of adjudication:
Successful achieving an objective	Any	Rights as targets

Interpretation:

- human rights are called to serve the purpose of contributing to a defined objective, usually because of economic priorities and financial burdens for the society
- human rights depend on the desired outcome and efficacy
- cost-benefit analysis is fundamental for decision-making with an emphasis on effective problem-solving
- children’s rights are implied as a social investment for taking future advantage
- little focus on collective responsibilities beyond the interests of the country

- legal discourse relates to preferences and political priorities and is designed to promote the aim of the policymakers
- the child’s best interests are understood subjectively in the way of the defined purpose, like family reunification with the birth parents in cases where the authorities removed a child
- decisions rely on the discretion of a social worker on how they understand the child’s interest
- protection of the right to respect for family life depends on ranking either a parent’s or a child’s right in view of effectiveness
- law is implemented with the aim of exclusion the costliest measures, such as state intervention in family affairs, depends on the availability of resources for public measures

Civic Republican Rationale

Purpose of human rights:

Ensuring the public good of the community

Law:

National

Practice of adjudication:

Rights as collective self-rules

Interpretation:

- human rights envisage the idea of public good from which everyone benefits, and rules should be designed in a way democratically decided
- human rights are what the majority will approve and value if they match sovereignty and social contract within the community
- decision-making is based on the preferences and values of the self-governing community
- the court reflects the expectations of society’s priorities, and popular sovereignty guides the political agenda
- human rights are respected because of the expectation for all persons to contribute to the common good to be considered part of the community
- the child’s best interests are secured in a manner the nation-state ensures a common good and can receive different degrees of priority
- the right to respect for family life is seen as securing the liberty of an adult (parent) from interference
- child rights depend on the majority’s rulings and choices
- children are excluded from participation and do not influence the rule of law

- legal discourse is defined according to majority rule, not focusing on the protection of minorities

2.6 Analysis – Prevalence of Different Rationales Across Opinions

The cosmopolitan rationale is the one that, in its purest form, aligns with human rights. Cosmopolitanism, or in other words, a *human rights rationale*, is applied from the perspective of securing the dignity of all members of the society dealing with different jurisdictions. It assumes that all decisions are made irrespective of political considerations and are based on respect for human rights.

From the *communitarian rationale*, a shared identity is deemed best for the members of a social community (Habermas, 1996). It indicates membership built on belonging to the community where human rights work if they integrate into a collective identity as the common good and reflect the ethic of the social order. Predisposition to traditional family values reflects its central point.

An *instrumental rationale* provides test cases for securing more effective and streamlined services. From this view, the court's efficacy is prioritized to ensure legal consistency, practicality, and coherency in its rulings. Legal rules are designed to promote the aim of the policymakers (Kornhauser, 2005, p. 70). It is limited by effective problem-solving through cost-benefit analysis whereby ensuring rights depends on economic and political priorities and the specific purpose of policymakers. The interest of the decision-making could be the result-oriented idea to arrange the child's best interest principle in the case law.

How the popular will of a country balances with constitutional or more fixed rights forms can be explained by the *civic republican rationale*. Honohan puts it as a "...politically defined freedom" (Honohan, 2002, p. 207). It envisages the idea of public good from which everyone benefits, and rules should be designed in a way democratically decided.

When we look at the reasonings presented before the court and those laid as the basis for the court's decision, we might find opinions not aligned with a cosmopolitan ethos.

In the **main panel of judges**, an overview of general principles the so-called well-established in the Court's case law leads to the point that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life" in §§ 202

of the Strand Lobben judgment. The Court refers to the precedential argumentation on the interference “in accordance with law,” “necessary in a democratic society,” in the light of the case as a whole, the reasons adduced to justify measure for the purposes of paragraph 2 of Article 8 (§§ 202-203). Finally, it refers to a broad consensus, including in international law, in support of the idea that “in all decisions concerning children, their best interests are of paramount importance,” “in cases involving the care of children and contact restrictions, the child’s interests must come before all other considerations” (§§ 204).

The focus on the importance of biological ties and traditional family values represents a *communitarian* rationale for the importance of the natural ties that are best for the community members. Birth parents and kinship are values that play the role of belonging to the society’s identity. It considers that the right to respect for family life covers the right of biological parents’ rights and should be balanced against the best interests of the child.

We may observe *civic republican rationale* built into the judgment as a fundamental principle for establishing a legitimate rule of law - necessary in a democratic society. On the opposite, the *cosmopolitan* rational holds it as protection of individual rights without a focus on democracy and the restrictions it sets. Children are not excluded from participation and do not depend on the majority’s rulings and choices. If to apply the *civic republican* ground focuses on the priority of the traditional family as a public good accepted by the self-understanding of the “majority.”

The Court mentions that regard to family unity and reunification in the event of separation is inherent considerations to enforce a right to respect for family life. Although the domestic authorities should strike a fair balance between the interest of a child and those of the parents come into conflict, it requires to strike a fair balance between those interests and that, in balancing process interests of the child depending on their nature and seriousness may override those of the parents (§§ 205-206).

Concerning care order, according to the Court’s argumentation, it should be regarded as a temporary measure and should be consistent with the ultimate aim of reuniting the natural parents and the child; the authorities may not base the decision to authorize adoption on the grounds of the absence of bond between the parents and the child; the ties between members of a family and the prospects of their successful reunification depend on their having easy and regular access to each other; the interest of a child not to have their *de facto*

family situation changed may override the interests of the parents to have their family reunited (§§ 208).

The right to respect for family life implies if based on *instrumental* logic, the aim of reuniting the natural parents and the child. Protection in this way depends on the desired outcome “to rebuild” the family as soon as circumstances permit. In contrast, the instrumental rationale is traced if a child’s interests are ranked because of effectiveness. It leads to the decision to leave a child in foster care and limits access to birth parents regarding the best interests principle.

Implementing those core case-law principles to the Strand Lobben case, the Court sums up that the process leading to the withdrawal of parental responsibilities and consent to adoption shows that the domestic authorities did not attempt to perform a genuine balancing exercise between the interests of the child and his biological family, but focused on the child’s interests instead of trying to combine both sets of interests, and did not seriously contemplate any possibility of the child’s reunification with his biological family; there had only been very limited contact between the natural parent and the child; the purpose was not to establish a relationship with a view to the child’s future return to the care of his biological mother (§§ 220-221).

In **concurring opinion** presented by seventh judges, there were two types of opinions annexed to the judgment, on the one hand, those judges who agreed with the outcome of the case lodging their own reasoning, and on the other hand, those of them who voted against the decision because of the absence of any violations of the ECHR.

Judges argue that the Court has held that it is “in principle in a child’s interests to preserve family ties, save where weighty reasons exist to justify severing those ties,” however the child’s *de facto* family life and family ties may be almost exclusively with the foster family rather than the biological parent(s). On the one hand, the Court has been concerned about the impact of time on the prospects of successful family reunification. On the other hand, it may weigh against such reunification. It reflects the purpose of *instrumental rationale* with emphasis on effective “successful” problem-solving.

Judges explain that it should also be recognized (by which time the child had already lived for three years and four months with the foster parents) the balancing exercise between the interests of the child and those of his biological family would almost inevitably have led

to the result of the child remaining with his foster family. Accordingly, the authorities in the present case failed from the outset to pursue the aim of reuniting the child with his mother. Still, they immediately envisaged him growing up in the foster home.

The communitarian rationale is observed in the statement about the child's interests in preserving family ties. *Instrumental* rationality is seen in the aim of family reunification that, over time, can be rejected by the already developed child's ties with his foster family.

The concern about political influence was noted in one judge's opinion agreeing with the main panel but had more to give. He wrote that the fundamental problem dealt with in this case lies not only and not so much in the concrete circumstances of the applicant's case but rather in certain specificities of the Norwegian policy, which underlies the impugned decisions and the process as a whole. He assures that many third-party interveners include those States whose authorities have had to deal with the consequences for their under-age citizens of "the decisions taken by Norway's *Barnevernet*." Here *instrumental* rationale probably works as negative feedback from other states with the Norwegian CPS. The judge also indicates the policy influence on the trial by the popular opinion expressed in protests and amicus briefs that is a reduced version of *civil republican* rationale.

In the **dissenting opinion** of four other judges who voted against the decision, the argumentation focuses on the issue of how to reconcile the "sanctity" of the biological family with the child's best interests. From their perspective, reuniting the biological family gives the impression that its aim might override the child's best interests. They assert two approaches be traced to the history and context of each legal instrument: the ECtHR is rooted in the protection, and balancing, of the rights of everyone within a State's jurisdiction, including those who have formed a family, whereas the CRC is focused on strengthening and protecting children as holders of distinct individual rights. *The cosmopolitan* rationale is reflected in the reference to the protection of the rights of everyone, including both a parent's and a child's right to respect for family life.

In the opinion of the minority judges, the domestic authorities must be allowed a wide margin of appreciation in determining whether the child's best interests require that they be taken into public care. Otherwise, the ECtHR "in effect curtails the margin of appreciation that it is important to preserve." *The civic republican* rationale is seen here in the power of making decisions by national bodies on what is defined in the child's best interest and how popular

opinion guides the agenda expecting to decide what parenthood entails, reflecting the society in general if it expects from the domestic authorities to focus whether on the interests of biological parents or the child.

The dissenting opinion also mentioned that “the majority dislike the outcome of the case at the domestic level and have sought to address the substantive objections or misgivings under the guise of procedural shortcomings.” *The instrumental* rationale is acting because of the negative outcome of the case regarding the withdrawal of parental rights and breach of the biological family for both: a mother and a child.

The motivation part of the judgment includes **amicus briefs** that differ from the judge’s argumentation in the general court considerations. The status of amicus is regulated by the ECHR, being procedural as a third-parties intervention.

The communitarian rationale is revealed in statements about the primary protection of the biological family; the best interests principle is not a “trump card”; biological parents’ rights should be balanced against the child's best interests.

Instrumental rational manifests in reuniting the natural parents and the child are the ultimate aim; allowing the natural parents to represent a child who had a protected family life with foster or adoptive parents does not ensure an effective protection of the child’s rights; in the best interests of the child is to seek to combine the family life between children and the foster parents; positive duty to facilitate family reunification; child welfare services must facilitate family reunification.

The civic republican rationale is recognized because only national decision-makers can carry out the necessary assessment to ensure the public good of the community.

2.7 Discussion: Prevalence of Rationales – Coherently Cosmopolitan or Not

Answering the question of the prevailing rationales that guide the decision-making of the ECtHR for the landmark case of Strand Lobben, different normative grounds illustrate the claim of what upholds human rights.

In the Stand Lobben, CPS violated the right of a parent to respect for family life by appealing to the child’s best interest to be removed the three weeks baby from the mother because of her incapability to care. A mother’s request for assistance in CPS is an essential legal fact that did not get careful consideration and led to breaching her rights. Instead, the

institution focused exceptionally on the interests of children, interpreting them *instrumentally*, ranking and separating them from the other rights. However, the substance of the right to respect for family life is considering a parent's and child's interests.

Further, judging what it takes to safeguard the human dignity of a parent and a child from the Strand Lobben if to apply the *cosmopolitan* rationale, it had no focus that everyone: a child and a parent, are equal in their right to respect for family life. Therefore, children are equal rights holders and create a special case from the CRC. Instead, the court's argumentation formally referred to the child's best interests as paramount, prioritizing them above a parent's right.

Interpretation of Art. 8 of the ECHR narrows to the obligation of authorities to take measures to facilitate family reunification on the value of biological ties between people – *communitarian* rational. In contrast, in the dissenting opinion of judges, the prevalence of *instrumental* rationale is identified as successfully achieving an objective: rebuilding the family, or vice versa, the efficacy of ranking the child's interests.

The Strand Lobben case demonstrates the implementation of opposed approaches to understanding human rights rationale. The fundamental right to respect for family life reveals differences in the vision of human rights rationale within the decision that led to incoherency of adjudication.

The problem with conceiving family life according to *communitarian* and *instrumental* rationales does not collide with cosmopolitanism. The crucial question concerns whether parents' or child's rights and interests should be taken into primary consideration in a case of conflicting interests. Balancing resolves a conflict between competing principles (rights, interests) which pull into different directions, allowing for bringing the principles into practical concordance (Klatt, 2020). In contrast, balancing is not an alternative to argumentation but an indispensable form of rational, practical discourse (Alexy, 2003).

It remains controversial how the child-centric approach will develop in the ECtHR practice and whether it passes the test of enforcing the dignity of each rights-holder. Supporting the communitarian approach by the ECtHR, the provisions of the CRC and the UDHR are not implemented as human rights standards in a cosmopolitan sense.

More precisely, in the example of the Strand Lobben case, we observe applying the concepts of practice utilizing rationality based on *instrumental* ideas with a problem-solving

approach. In this aspect, *communitarianism* prevails in the Strand Lobben judgment, namely in the precedential argumentation of the ECtHR. The competing logic of the ECHR with CRC testifies to the lack of a coherent theory of the child's rights and the need to develop multi-disciplinary competencies for the judiciary.

Regarding this, courts are set up to reduce the legal uncertainty inherent in all legislation, and they draw legitimacy from fulfilling that purpose; however, such uncertainty also makes room for policy-oriented considerations, and one way to promote consistency within a policy domain is to ensure specialization, expertise is needed (Hermansen, 2020).

The coherent system of rights, namely, the right to respect for private and family life, supposes a shared understanding and a *cosmopolitan* rationale to guide reason in decision-making across the countries stipulated by CRC and Art. 8 of the ECHR. Accordingly, family life should be understood because of cosmopolitan ideas related to the universality of human rights standard, common categories of fairness, equality, inalienability, and indivisibility of rights for every human being.

2.8 Conclusion: The Challenge of Lack of Coherency

Based on the theoretical exposition of what human rights entail and what a cosmopolitan rationale demands, the balance struck between the child's- and parent's right to respect for family life in the case of Strand Lobben does not align with the *cosmopolitan rationale*. As a foundational ethos of a cosmopolitan rationale, the cosmopolitan explanation holds the respect and protection of human dignity as a point of departure for interpreting both parents' and child's rights.

Regarding arguments through the developed analytical model of rationales as the filter, the ECtHR decision in Strand Lobben is incoherent, crossing multiple grounds and where the cosmopolitan rationale was not dominating. In this manner, the judgment does not uphold the legal certainty standard and can be interpreted ambiguously and deemed politically determined.

The child's right to respect family life is not embedded in the practice of the ECtHR and will most likely never be. However, it has a "banner status" in the view that Article 8 of the ECHR is the only applicable law for the court to judge and that the CRC can only be a source for the court to reach its decision. With the current court practices in Art.8, the ECHR is currently protecting parental rights and has no clear understanding of the child's right to

respect family life and how it relates to the parent having the same right and with the same core aim of securing dignity. Protecting family life, including the rights of children and parents, is being discussed with the concept of dignity and implementing provisions in the CRC. By adhering to human rights standards, parents can regain their right to family life, and the number of violations of the right to respect for family life by the Norwegian CPS can be minimized.

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