

# Judicial Opinion Writing in the Danish Supreme Court (Højesteret)

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Judicial decisions can be perceived from two perspectives. One perspective is from the sources of law according to which judicial decisions are authoritative sources of law to be interpreted and followed in later cases. This will not be pursued in this article where the second perspective is adopted. From this perspective, judicial decisions are text to be produced to end a case and the task is to present an account of the arrangement for judicial opinion writing which is the topic of this article.

## **1 Decisions**

When a judge (judges) has arrived at a result, that is to say have made up his mind how to decide the case, e.g. the guilty person to be put in prison for 5 years, the defendant to pay 1.000.000 d.kr to the plaintiff, and etc., the opinion justifying the result must be drafted.

The work drafting the judicial opinion is an important part of the activity of a judge since it expresses the view of the court concerning the total legal material. Thus the text of opinion comprises the attitude of the judge (or the judges) to the legal issues decided by the court. From a legal point of view, what goes on in the court hearings, the arguments presented by counsel and what judges think and say during the legal proceedings must be considered as preparatory work to the final judgement including its reasons. The focus on the decision in general and its reasons in particular should not be taken to mean that the process leading to the decision is unimportant or only have the role of preparatory work just mentioned. The stages of presentation of argument by counsel, the deliberations and a judge's thought within the framework of a legal case are of great moment from other perspectives in terms of their social significance independently of, or at least alongside, the result of the case.

How judicial opinions are written vary from court to court, and from country to country in particular. Thus there is reason to present an overview of different types of courts.

## **2 Different Types of Courts**

A description of the work of a judge is best presented in terms of a comparative account of the court in which the work is done since this makes it easier, for example, to compare the work in Højesteret ( the Danish Supreme Court), with the work in other courts. Consequently some elements in this work are briefly mentioned.

(1) Professional assistance to judges: In some courts, the judge works 'alone', that is to say the legal work is exclusively or primarily carried out by judges. If assistance is offered to judges, it is purely technical, (making copies of decisions, providing literature, distribution of materials, etc), and particularly only a modest assistance from younger legal colleagues is offered. In other courts the professional assistance has great practical importance, and may consist of the production of legal minutes, opinion drafts or participation in oral

deliberations. In Högsta Domstolen (the Swedish Supreme Court), and in the Court of Justice of the European Communities (ECJ) career lawyers (who are not judges) assist the judges in their legal work. Højesteret belongs - as Danish courts in general - to courts where a judge works without any special assistance in cases dealt with orally. The leading judge gets a 'judgement's draft' containing a summary form indicating the parties to the case and their contentions. The rendering of the facts of the case and the opinion are left to the judge.

(2) Jurisdiction of cases: Whether a court has jurisdiction to hear cases is very important for its work. At some (supreme) courts, the jurisdiction is sometimes decided by the court,<sup>1</sup> at other courts the jurisdiction is determined by general criteria, and the courts must deal and handle the cases brought before them. There is a mixed procedure with respect to Højesteret. Some cases require *leave of appeal*. This includes cases heard in the County Courts with appeal to the High Courts, and cases decided by the High Courts or the Maritime and Commercial Court in which appeal is not allowed as a rare exception. A special feature is that leave of appeal is not granted by Højesteret but by the Board of Appeal, on the condition that the case concerns questions of *imperative public importance*, cf. the Administration of Justice Act § 371, sec. 1 and § 966, sec. 1. Thus it can be said that Højesteret has a special task with respect to cases of general and public interest. For other cases, that is to say cases heard in the High Courts and the Maritime and Commercial Court, appeal is allowed and in this respect Højesteret functions as an ordinary court of appeal. These cases may be of great economic importance (due to the determination of the amount of the contentions for legal proceedings at the High Courts) but somewhat paradoxically the case may also be without any economic or only a limited economic value due to the fact that proceedings against the state must be lodged with the High Courts, cf. the Administration of Justice Act § 225 and § 227. Thus Højesteret deals with cases of imperative public importance, some cases of public law and some cases of private law with great economic value. This unreasonable combination of cases, which the impending reform of proceedings can change,<sup>2</sup> makes it difficult to create a firm strategy to handle the management of cases.

(3) Expertise: Judges have different qualifications as manifested in the fact that some judges are specialists on certain topics whereas other judges are generalists. With respect to the assignment of cases in Højesteret no attention is paid in principle to whether a judge is a specialist. This may seem incomprehensible to an outsider bearing in mind the effort to appoint judges having diverse legal knowledge and background, cf. the Administrative of Justice Act § 43, line 3.<sup>3</sup> However, what is here of crucial importance is similar to the view within the Swedish Supreme Court "based upon the fundamental philosophy ... that one ought to avoid any kind of specialization within the court. All members of the court must be considered to be equally competent to

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1 On Högsta Domstolen, *See* Bertil Bengtsson, SvJT 1989, p. 206f.

2 Betænkning 1401/2001 om Reform af den civile retspleje (Report on the Reform of Civil Procedure).

3 Domstolsudvalgets betænkning 1319/1996, p. 183f (Report of the Board of Judges).

hear any kind of case”.<sup>4</sup> Other courts, e.g. the European Court of Justice (ECJ), seem to pay attention to this.<sup>5</sup> In my opinion, it is quite right to soft pedal the importance of expert knowledge as a criterion for the assignment of cases. It does not follow that expert knowledge has no importance or must be disregarded.

(4) Individuality v collegiality: The work of a judge can be seen as participation in an institutional undertaking or as a vehicle for expressing personal views where personal responsibility is the crucial element. In Denmark, the former view is prevalent, apart from the writing the opinion: After 1856, Supreme Court decisions were justified but the collegiality was preserved since the opinion had to be the *joint opinion* of the court, regardless of any internal dissenting opinions among the judges. Public dissenting opinions were not introduced until 1936 with a requirement of anonymity which was in force until 1958. Thus whether the view of a judge is within the majority or minority has only been known in the recent past. The opposite view is the British and American tradition which at an early stage has emphasized the individuality of the judge. This model has influenced opinion writing in the International Court of Justice in The Hague while the European Court of Justice adheres to a continental institutional model.

(5) Drafting of Judgement: By this procedural feature I shall focus on the steps involved in opinion writing within the proceedings. Systematically, the drafting (for some judges) may start before the case is heard by the court which means that there is a draft (perhaps several drafts) when the case has been heard or the drafting is postponed until the case has been heard and eventually a preliminary deliberation is held to clarify the basic structure of the opinion. The former drafting can be related to an intensive deliberation among judges concentrating on the issues which according to the drafting are difficult. The latter drafting involves a deliberation of a more introductory nature. The process can be divided into four stages, the judge’s preparation, pleadings, deliberation, and opinion writing to be dealt with in what follows.

The account does not consider all types of courts but takes its starting point in the method of work in the Danish Supreme Court. The method of work is organized differently at other courts on which I shall make some occasional remarks but not present any systematic account.<sup>6</sup>

### 3 Stage 1: Preparation

The term “preparation” is used here to refer to the participation by the individual judge in the deliberation and consideration of a case (as opposed to preparation prior to the date then the case is placed on the court’s docket).

The basis for the judge’s preparation is in the first place the material from the parties: the appealed decision, the contentions, statements of facts and copies of

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4 Anders Knutsson, SvJT 1989, p. 278.

5 H. Ragnemalm, *Juridisk Tidsskrift*, vol. 10, 1998-99, p. 284.

6 My account is based upon my experience as a judge in Højesteret 1999-2002.

decisions, literature, statutes and treaties with preparatory work. This material is distributed to the judges and placed in the judge's study with the claim to be read and analyzed, in many cases this involves the reading of many thousands pages. This requires the technique of reading which perhaps is neglected during students' study of law. It is often physically demanding to read all the pages but it is absolutely crucial to have read all of them. But what is important does not always constitute the major part.<sup>7</sup> The material encircles the mind of the judge as a shield which resembles the "loneliness of the long-distance reader".<sup>8</sup>

The judge's legal preparation may make it necessary to provide for more material concerning points of law. The judges, particularly the leading judge, get the relevant information in order to form an idea how the area of law is described and regulated. The thorough preparation implies that decisions appearing to be significant often must be added to the decisions presented by counsel. It is often expected that the leading judge can present a relatively unbroken sequence of the parliamentary history of the pertinent statutory provisions in order to secure that relevant material is not excluded.

Judges (and clerks) have access to Højesteret's voting records and the records for recent years have been made available to be read on screen. The records have several objectives. First, they give *references* to further material of interest without considering its impact in the case decided, secondly, they may contain *subtle shades of meaning* of legal points of view that can be of value in a pending case, even if they have not been considered in the reported cases, and finally they may contain *views* to issues which are not expressed in the precedent in question but nonetheless may be used in the present case. The starting point for the interpretation of a precedent is the text and its scope is determined by the wording of the judgement. During the deliberation, there may be approval of a view which is not reflected in the opinion but this does not imply that the view – in the court's internal deliberations – can be considered as accepted in the precedent. The voting records can be used as the foundation for assumptions about the view of the judge in the former case and these assumptions can be tested in relation to the memories of the participating judges, but the record as such is not sufficient evidence for the *final* view of the judges since it only presents the views on the question put forward by the participating judges during the voting (so far as it was understood by the reporting clerk).

Records for decisions, not more than 20 years old (or delivered by judges all of whom have not died) are not available to the public, or to the parties' attorneys who may have an interest in the records in relation to the precedents invoked.<sup>9</sup> Thus the judges have access to material which is of great importance for their deliberation and consideration of the case that is not available to the

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7 "And the more insubstantial the contention, the more support it requires", Mohammed Bedjaoui, *Pace Yearbook of International Law*, vol. 3, 1991, p. 37. Bedjaoui was a judge at the International Court of Justice in The Hague (ICJ) 1982-2001, its President 1994-97.

8 "(A) judge at the Court knows the loneliness of the long-distance reader", Bedjaoui, p. 40, who alludes to Alan Silitoe, *The Loneliness of the Long-Distance Runner*, 1959.

9 Torben Jensen, *Retsplejen i Højesteret*, København 2000, p. 423f.. See also Jørgen Mathiassen, *UfR 1976B*, p. 71f.

parties. This is probably a special feature of the Danish Supreme Court.<sup>10</sup> But an element of “secret knowledge” is present: Also without records, judges would *remember* earlier cases, including their proceedings and results, and these memories are part of the experience of judges and absolutely necessary.

There can be different, but not necessarily contradictory, views of the social conditions which form the basis or background of the case, for example the importance of the Nordic model for the organisation of industrial or labour relations, the danger of different types of drugs, market trends in real property in the end of the 1990s. Judges have a view of these conditions but they are seldom illustrated in the evidential material of the case or debated during the deliberations. In cases where these conditions are important the evaluation depends to a large extent upon the assumptions held by the judges. The information about these conditions which sometimes is presented is mostly drawn from the legislative process. In a case on a closed shop agreement, their scope in Danish labour relations was made known by reference to an annex to a bill announced by the former political party *Fremskridtspartiet* (The Progress Party). This can only be seen as a “fixation on Parliament” which explains that a report on the topic put forward by *Dansk Arbejsgiverforening* (the Confederation of Danish Employers) was ignored. General remarks in the legal history behind the statutes are often the source that modifies or challenges the judge’s knowledge about the area of life underlying the case. The social science literature presents an opportunity to influence the assumptions held by judges but it is rarely used.

The purpose of the preparation is in the first place to enable the judge to form an *idea* of the legal questions involved in the case. But an idea is not sufficient. The task is to arrive at a *result*, albeit often a *preliminary* result. The judges, in any case the leading judge, must in advance – that is to say before the oral proceedings – organize the argumentation to be presented in the coming deliberation and consideration of the case, and a continuous registration of material must be made in order to make a clear and concise account and analysis.

It was formerly generally believed that the judges should not discuss their views of the case with colleagues before the proceedings and even before the deliberation and voting.<sup>11</sup> But this has changed and an informal deliberation is generally accepted. However, the time allotted for cases is so short and this narrows the possibility to deliberate. On the other hand if the deliberation takes place just before the proceedings begin its objective is less to develop and test a view and more to test agreement or disagreement on legal points. The judge’s

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10 Secret archives are found at other courts. At ICJ, judges write *notes* about the views of the individual judge on the questions indicated by the President of the Court to be considered in the judgement. About these ‘notes’, Camara says that “this enormous work of legal thinking and writing remains forever secret and inaccessible in the archives of the court”, José Sette Camara, Manuel Rama-Montaldo (edt), *El derecho internacional en un mundo en transformación – Liber amicorum en homenaje al Professor Eduardo Jiminéz de Aréchaga*, Montevideo 1994, p. 1075. Camara was a judge in ICJ 1979-92.

11 Mogens Hvidt, *Festskrift til W. E. von Eyben*, ed. Mogens Koktvedgaard, 1982, p. 41. Torben Jensen, p. 352-53.

attention is directed towards points of disagreement but of course it should not neglect points taken for granted since they may turn out to be debatable.

The leading judge must also prepare a draft of the judgement of the case. This task is much simplified owing to the fact that a Supreme Court judgement is not a completely new judgement but based upon the appealed judgement.<sup>12</sup> The judgement cannot and should not be read in isolation but only gets its meaning in relation to the appealed judgement. However, larger or lesser parts of the appealed judgement have often no bearing for the Supreme Court judgement which means that a person only interested in understanding the legal points considered in the Supreme Court judgement is often forced to read the *entire* appealed judgement which there is no need for.

The draft contains in the first place the technical elements covering the record of contentions and arguments as well as an additional account of the facts with citations from the High Court judgement, citations from new documents, from statutes and preparatory work and precedents, etc., and secondly as a rule a draft of “the result of court and its opinion”, that is to say the draft of reasons. This work should be ready and written out when the leading judge starts to state his view, (or at least, when the judge concludes which can be the next working day).

#### 4 Stage 2: Pleadings

As mentioned, the pleadings are the visible stage of the judge’s work. On the other hand it is the stage where the judge mainly remains passive. Consequently, the public impression of judges is their *silence* and *immobility*.

The preparation described above is primarily used to control that the contentions and arguments correspond to the representation in the draft to the judgement and that nothing comes to light during the pleadings that may justify a correction or an addition to the draft and that nothing is ignored that can be interpreted as a withdrawal or omitted documentation admitting that it is not (particular) pertinent to the case.

It happens that the judge has a preliminary opinion of the case before he hears the pleadings.<sup>13</sup> The preliminary opinion may consist of disconnected elements concerning different points of the case that still fail to be connected in order to arrive at comprehensive view. It is also possible to be in doubt having no inclination for a particular result but this is again a – preliminary and tentative – opinion how the result should be justified. According to the older law, the view was maintained that judges were not entitled to read the documents

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12 From the judge’s perspective, this tradition presents a most welcome simplification of the work. Whether it is a good one is not within the scope of this article, *See* my article, *Domspræmisser og domskoncipering*, *Juristen* (forthcoming).

13 This is not a problem according to a hermeneutical perspective according to which preconceptions are necessary for understanding the case at all.

involved in the case in order to prepare themselves for judging.<sup>14</sup> Today, the preparation is considered to be not only legitimate but necessary. A preconception is at this stage always a preliminary opinion.<sup>15</sup>

The time allotted to the pleadings is a measure of the extent of the case as it was estimated when the case was placed on the court's docket. It is, of course, of strategic interest whether a case is a big or small one, comprehensive and demanding or small and easy to handle. The longer cases may be less demanding since the judges have time to consider the problems alongside the counsel's pleadings.<sup>16</sup>

The practise is that judges do not ask many questions during the pleadings. This also applies to the High Courts and to lesser extent the county courts. This makes it difficult for the attorneys to know the preliminary opinions of the judges concerning the weak and strong points in the case, and the result is that their reasoning is concentrated on the points which for judges are not in doubt while other- seemingly unclear or difficult – points are neglected.

An attorney has a particular strength if the reasoning is presented in such a way that it corresponds to the opinion that a judge *may* announce or write with an analysis of the various alternative forms in which an argument may be put.

After the pleadings some judges will without delay discuss their opinion with colleagues while other judges “do not show their hand”.<sup>17</sup> This depends upon the person and the case.<sup>18</sup>

## 5 Stage 3: Deliberation

Deliberation begins immediately after the closing of the pleadings. Like cardinals electing a pope, the court room is emptied of attorneys, parties and listeners and the public entrance is locked from the outside by the guard. If the end of the work day is not reached at this moment the leading judge immediately rises starting to deliver his deliberation. The deliberation takes place in order of seniority.

The judges are standing when they deliver their opinions. This tradition can be traced to Rettertinget (The King's Court), the court preceding Højesteret,

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14 The view is discussed and rejected by Victor Hansen, *Retsplejen ved Højesteret*, 1959, p. 173-74, who only mentions the preparation concerning an individual case (the appealed judgement and its documentation). See also Torben Jensen, p. 353-54.

15 This is not something special but is found in any *prepared* pleading From ICJ it is reported. “(No) Member of the Court embarks upon the hearings without the appropriate baggage. He will bring to them a mass of impressions formed by his personal reading of the pleadings and any comments he may have exchanged with his colleagues”, Bedjaoui, p. 41.

16 Mogens Hvidt, p. 39.

17 Compare Stephen M. Schwebel, *Suffolk Transnational Law Journal*, vol. 13, 1990, p. 553.

18 In the Norwegian Supreme Court, an informal deliberation takes place after the pleading where the President and then the other judges in the order of rank express their views. Then a judge is appointed, in rotation, to draft an opinion, Andreas Endresen, *Lov & Rett*, 1969, p. 308.



where the King chaired the deliberation.<sup>19</sup> The judge speaks – from a historical perspective – to the absent King. This tradition also explains that judges are wearing their robes when delivering their votes. The ritual dress corresponds to the – still current – special form of deliberation: The votes are delivered in a fixed order, no questions or comments are put and in principle there is no time limit. These conditions for speaking are not found in other places, if at any place at all. Paradise, however, has its limitation. The working day has a fixed timescale, and it is strenuous for all judges if a case is not brought to an end before the next one commences.

The deliberation of the leading judge makes the basis of the court's overall view of the case.<sup>20</sup> The leading judge considers not only the material and points relied upon but also presents material and arguments with respect to other conclusions and reasons for their rejection. It goes without saying that the leading judge justifies his conclusion and concludes by presenting a draft of opinion.<sup>21</sup>

As a rule, the reasoning of the remaining judges is shorter; and this also applies to the judge second to the leading judge. Naturally the deliberation takes more time if there is disagreement. Even if the result is agreed upon, the remaining judges succeed generally to present more – different, supplementary or corrective – distinctions in the argument for the same conclusion. Sometimes, the remaining judges present drafts of their opinions read at the end of their reasoning. Thus the drafts of the opinion are often produced in an anarchist way since the draft presented by the leading judge can freely be replaced with drafts from other judges.

From this context it can be gathered that a deliberation which is expected to commence the very same day as the proceeding has started calls for a preparation by the leading judge (and possibly also by the other judges) that includes not only a draft or outline of reasoning but also a draft of the opinion, which must be present from the very beginning of the deliberations.<sup>22</sup> The leading judge can make changes, if necessary major changes in the draft during the day, and of course can jump to a completely different conclusion. This also applies to the other judges. Sometimes, deliberation and draft of opinion are not influenced by the pleadings and follow the pattern of the lonely preparation by the judge. This immutability is perhaps more marked for the leading judge than for the other judges. It may be difficult for judges to change their view of a case having carefully made up their minds in advance. This also applies to courts with more time at their disposal.<sup>23</sup>

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19 Torben Jensen, p. 17 and p. 354-55.

20 Torben Jensen, p. 357f.

21 The task of the first judge's voting corresponds to the Swedish *reporter* (*referent*). In cases without "oral proceeding", a secretary has presented the case and read a proposal of judgment. Then the reporter "completes and comments" and then the judges deliver their view in order of rank, ultimately the president. The referent's task is distributed "as fairly as possibly among the members of the division of the court", Knutsson, p. 281, cf. p. 277.

22 Torben Jensen, p. 377 note 10. On Swedish practice, Knutsson, p. 288-89.

23 "(O)nce a judge has concentrated all of his efforts for some weeks in figuring out how the questions of the case should be answered, too often he proves reluctant to re-think his

During the preparation, it sometimes happens that a judge has grave doubts about the outcome of the case which hampers the draft of opinion. Alternative drafts are sometimes written in order to justify different results (with the possibility to modify them either during or after the pleadings in relation to set of possible outcomes). Or it is possible to postpone the writing of the draft to take place after the pleadings. This solution is easily practiced when the pleadings end at the same time as the working day since the deliberation will start at the following day which means extra time for preparing the opinion.<sup>24</sup> The doubtful judge may overcome his doubts by having the different justifications of results in print since this often shows what is tenable or not.

If different arguments for the result or dissenting opinions are presented during the deliberation it may happen that they are abandoned immediately after the end of the deliberation – the dissenting judge has been convinced or does not attach particular importance to his particular view, see below.

A judge can not only *be* in doubt but the doubt can be manifested explicitly by reference to the preliminary nature of the opinion. The deliberation of some judges has a more *enquiring* nature discussing the pros and cons of the case in details and postponing their own views until an overall view is hesitatingly reached and submitted in a quiet way. Other judge deliberate in a more *forensic* manner since the argumentation is directed towards a stated result leaving no doubt about its merit and the arguments in its favour are elaborated rather than opposing views considered being wrong.

In contrast to the pleading by counsel, the judge naturally only follows one track, not several co-ordinate tracks or putting the tracks in order of priority. The judge puts the mind and prestige into the opinion.<sup>25</sup>

The deliberations are reported in the voting records, mentioned above. Previously, the report was made by two deputy judges, but now only by a single deputy judge. The report is not controlled by the judges hearing the case. It is often written long after the proceedings on the basis of a tape recording of the deliberations. Its information value varies considerably.

The oral deliberation is the culminating point in the judge's work, but this is of course a personal evaluation. It will take spectators aback to participate in the insight, variation and goal-directed clarification of the legal points involved of which the voting records and judicial opinions only present a pale reflection.

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thoughts when he is confronted with those of his colleagues”, Stephen M. Schwebel, p. 554 (commenting situations where judges after *the oral argument* have exchanged views on the case). Schwebel was a judge in ICJ 1981, President 1997-2000.

24 Mogens Hvidt – Supreme Court Judge 1964, President 1975-81 – records how he being the first judge to deliver his opinion “often with anxiety (has) consulted the hand of the clock moving to 14.00, the closure of the day in court – divided between the desire to deliver my opinion and spend a relatively peaceful afternoon and the desire to wrestle with the problems once more”, Mogens Hvidt, p. 39, on the draft of opinion, p. 41-42.

25 “What results, in a way, is a new adversarial debate, but this time within the Court itself. I say ‘in a way’, because it would be wrong to suggest that the Judges take sides with this or that party, defending one or attacking the other. Far from it because, the subject at issue now is much rather the soundness of each Judge’s analysis rather than the soundness of the parties’ contentions”, Bedjaoui, p. 48.

Without abandoning the demand for broader opinions, what requires consideration is the *condition* of their intellectual richness, - the secrecy of the deliberations.

## 6 Stage 4: Opinion Writing

A ritual change often occurs in the process of passing from the deliberation (formal talks) to the writing of the opinion. This is also the case in Højesteret. As mentioned above, the deliberation takes place in the court room. The passage to the common activity of opinion writing is manifested by the fact that the judges leave the court room, take off their robes and are seated at a table in another room. The President sits at the end of the table, and the leading judge next to the President, the other judges sit as they see fit.

The President chairs the discussion, and there is no order of talking.<sup>26</sup> The discussion continues from the deliberation and opinions voiced during the deliberation are often abandoned or phrased anew. For this reason, the record of voting only presents a fragmentary account for the person interested in knowing what the individual judge had in mind in relation to the final version of the judgement. The result is determined not only by the insight of the judges into the case and the area of law involved but also by their gifts to express their view, to negotiate and their persistence. Human beings are at work.

The starting point for the discussion is generally the draft to the judgement made by the leading judge which can be supplemented with other drafts. Section for section is read, commented and adjusted. There may be sections that are neither accepted nor rejected but put in brackets for subsequent discussion when there is a revised draft. In a similar way inconclusive points can be noticed and postponed to later clarification.<sup>27</sup>

In recent years Højesteret's account of cases has become lengthier. There is a greater inclination to include quotations or records of material not mentioned by the High Courts (or the Maritime and Commercial Court) or material presented to Højesteret for the first time. However, this must be understood in relation to the material contained in the High Court judgement. The reason for the quotation of new material is *not* that the material is *more important* than the material recorded in the appealed judgement but rather its importance as a part of the total material. The quotation of the material shows that it is considered to be relevant, but not necessarily that it is *more* relevant than the High Court material. This also applies when an appealed county court judgement is considered alongside the High Court judgement.

The structure of the opinion follows a fairly common framework, and I shall consider the reasons for the decision. There are different models:

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26 In the Swedish Supreme Court there is also a passage from the deliberation based upon seniority to "a common discussion which can be quite lively and often takes place in a less orderly manner", Knutsson, p. 281. The judges are not hampered by the rigorous and ritual form during the deliberation which is only interrupted by the freedom in the morning- and afternoon breaks.

27 Bedjaoui, p. 52 and p. 54.

Sometimes the opinion starts by exhibiting the *general* provisions, for example the relevant statutory rules supplemented with an understanding of these rules gathered from the preparatory work and other material as background for judging the specific case.

If the legal basis is a precedent, the opinion starts by citing its reason, perhaps by adding an interpretative remark and judge the case accordingly.

By contrast, if the main problem has been the understanding of the nature of the *specific* case it may be reasonable to establish how the case should be understood – what is at issue in the case? – in order to find the general rule and its interpretation for deciding the case. In this model the relations between the elements mentioned in opinion can be more or less connected with the final argument that leads to the result.

A third model has a more narrative or literary nature where the legal basis in general is described, and the evaluation of the elements of the case is intertwined in the description. This is the British-American model.

The main question is if the opinion should express general principles applicable beyond the particular case or only be confined to the decision of the particular case. The answer depends in the first place upon the way the case is prepared and pleaded and the scope of material presented to the court but also upon the attitudes of judges and the possibility to arrive at a joint opinion of the case, in particular with respect to its underlying ‘principle’. This is a much debated theme.<sup>28</sup>

The opinions often refer to statutes and their preparatory works. Preparatory work plays an important role in counsel’s pleadings and in the judges’ preparations and deliberations but often the effort does not pay. This may be connected with the varying value of information contained in the preparatory work. It may also be connected with the fact that the preparatory work deliberately is worked out without any regard to conflicts not dealt with in the statutory text. One can image the use of the formula, “This is left to the court’s discretion” to bring a fatiguing debate to an end within the statutory committee accepting the wording of the statute satisfying nobody, but the dissatisfaction was equally divided among all parties and they all believed to have the courts on their side. It happens that a departmental secretary or a member of the statutory committee later has been raised to the Bench, or that the committee is chaired by a judge and this judge is on the bench in a case to decide the meaning of the text.

Judges have different backgrounds based upon participation in law committees, legal work within particular areas of the law or handling specific tasks in other respects, academic work, lawyer’s practice, and etc. As mentioned above, this is quite immaterial to the assignment of cases, but it is, of course,

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28 On the Swedish discussion, Knutsson, p. 283: “Some people claim that HD should lay down general principles as far as possible in order to fulfil its task to supervise the application of the law and even be permitted to express view on questions that have been involved in the case but do not require to be answered in order to decide the specific issue. By contrast, other people claim that HD should avoid saying more than what is necessary to decide the particular case. The reason adduced for this view is that it is often difficult to assess the consequences of general opinions (...) Doubts of this kind often lead to that general opinions are modified with reservations which to a larger or lesser extent diminish their value as guiding lines for the application of the law”

important for their work in court. During the deliberation and writing of opinion they can draw upon their expert knowledge. However, expert knowledge must be handled with care, and the non-experts must realize that the experts often are more committed than the non-experts.

Former Supreme Court decisions and decisions of the European Courts are mentioned in the judgement, and important passages are cited. County court decisions, High Court decisions or Maritime and Commercial Court decisions are not mentioned in the judgement. Nor is juridical literature mentioned, still less discussed or commented on with respect to its significance for the case. Juridical literature is seen as a source of “inspiration”, which sometimes is of great moment. The judge is introduced to the concepts within the area of law through the juridical literature presenting detailed arguments pro and con for possible decisions. But there are limits to the application of juridical literature. Academic works of fundamental nature are sometimes too general and often decline to “descend” to deal with the issues involved in a particular case. To the extent that the literature fits with – often reasonable – educational demands it often loses its practical focus. Practical and educational considerations are not easy to combine. From the practical man’s perspective, the educational considerations relieve the author of the responsibility and risk to participate in the development of the law. The current comments in the law journals fall more into “a clinch” with the issues of cases but also constitute a more unreliable foundation. Pleadings by counsel may elaborate the literary material which naturally requires the attorney’s own original work, but a pleading can sometimes – less rewarding – be confined to a summary of the literature. It is obvious that a result often corresponds with the literature, but whether the result is *due* to the literature is another question; it is also obvious that there are judgements arriving at *another* result than the one presented in the literature. Opinions do not reflect these considerations.<sup>29</sup> You have to go to Norway to see Danish literature cited in Supreme Court opinions.<sup>30</sup> Persons interested in this matter are directed to the “judgement’s note”, see below.

As mentioned above, several different views of the case are often put forward. As a matter of fact that’s just the beauty of participating in the deliberations to learn that a seemingly simple case can be understood in different ways by various judges, each reasoning conscientiously for his (or her) view without necessarily arriving at different results. The richness of reasoning poses, however, a problem to the opinion writing.

Every collegial court probably shares the norm that it is better to agree than to disagree, and a larger majority is better than a smaller one. There is a tacit but

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29 A foreigner looks at Danish practice: “the role of the juridical literature is very difficult to ascertain; the short court opinions normally do not offer any information about this”, Bertil Bengtsson, TfR 2002, p. 18.

30 See NRt 1991, p. 119 and NRt 1993, p. 1399 both citing Bernhard Gomard, cf. Bengtson, p. 29.

efficacious *effort* towards agreement.<sup>31</sup> This effort faces the resistance due to the fact that judges often have different views in relation to their separate reasoning.

This makes opinion writing a very difficult task. Several solutions are at hand: (1) the different reasonings are to be expressed in several individual reasons (2) a single judge expresses his opinion in draft to be commented critically by the other judges, which they then – after correction by the draftsman – consent to with a general proviso.<sup>32</sup> (3) an effort is made to combine the differences in order to arrive at a joint opinion. Højesteret's practice is based upon the third model, also followed in other Danish courts.

So the question is how to combine *different* views of the case to a *joint* opinion. The simplest way, solving all problems of wording, is of course to convince other judges of the tenability of one's own opinion and its supporting grounds. But what is to be done when attempts – from several judges – to arrive at consensus misfire?

Several solutions are at hand, corresponding to what is used in other deliberations where the participants endeavour intensively to arrive at agreement about the wording of a text. Since this may be of interest in relation to the interpretation of the court's reasoning some examples are mentioned.

(1) Focusing: if various reasons (or various aspects of a reason) lead to the same result, only the reason agreed upon by all is accepted as ground. Thus the remaining reasons are left out in the opinion. It is not stated that a majority (but not all) disagree with the *other* reasons, even if the judges' deliberation may have focused on these reasons, and it is not stated that some judges agree upon the reasons omitted. The case is decided upon a single view, but this is not the only view that has been deliberated during the case, and it is not certain that all participating judges agree that this is the most important view. The harmonization is increased if there is no real agreement on this ground, but the difference is yet of minor importance that all abide with its exclusion.

(2) The bold strokes of the brush: If there is a more widespread disagreement concerning which reasons or aspects of reasons that should constitute the grounds for the decision it is desirable to find ways of expression covering several views. The reason is then expressed without any shades of meaning or the justification is presented in a way that covers several reasons. The bold strokes of the brush makes it possible to write an opinion agreed upon by all judges. Any judge would like to express himself more precisely, but this would dissolve the unity.

(3) Mention everything: If several specific points are emphasized in the exercise of discretion, weighing or interpretation, there may be agreement on the

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31 "The aim is to obtain consensus or the largest possible majority in relation both to the result and to the reasoning", Ole Due, *Understanding the Reasoning of the Court of Justice of the European Communities*, 2001, p. 11. *See also* Bedjaoui, p. 52 and p. 54.

32 The Norwegian model for opinion writing involves a kind of preferential treatment with respect to the leading judge's draft characterized by the draftsman's individual style and thinking and – in connection with this – that the consent of the other participating judges is linked with a minor proviso since they as a rule only consent to "essentials" (provided of course that they do not dissent), Endresen, p. 308. *See also* Jens Edvin Skoghøy, *Tvistemål*, 2001, p. 744f, Tore Schei, *Tvistemålslov*, 1998, bd. 1, p. 473.

central points but disagreement about some aspects consisting in the importance ascribed by judges individually to some further points of supplementary relevance. The solution can here be to mention all points to which importance is ascribed by the judges. For the individual judge, the judgements is not unequivocally based upon that all the points mentioned are necessary or merely relevant but the points must rather be considered as an overall totality of which some points from one perspective are decisive and other points are decisive from other perspectives.

(4) Dissociation: When there is no agreement on the relevance of certain points or the weight of relevant points, the opinion linking up the points can be dissolved or weakened. The disputed points are placed in the verge of the reasoning, e.g. in the introductory summary of the facts of the case and thus included but do not form an integral part of the concluding conclusion.

(5) Weakened conclusion: The reasons are sometimes presented as a logical inference where the fact of the case in connection with the relevant legal understanding leads to the result, e.g. a determinate view of a legal point in civil law. This inference relating the conditions and the result is expressed with “therefore” or other illative expressions. The judges holding that the stated conditions are necessary and sufficient for the result are satisfied with “therefore” whereas other judges disagreeing or doubtful will prefer a weakened expression for the relation, e.g. “taking into account” or “in view of...” The weakened form of inference makes room for the possibility that the result could have been arrived even in absence of the stated conditions and on the other hand that there may be supplementary relevant conditions which cannot be specified.

What applies to the average height of soldiers at the examination of men liable for military service – that no soldier necessarily has this height – also applies to the judgement balanced according to the model aiming at a joint opinion. In reality, the judgement, when read precisely and taken at the words, expresses a view that does not necessarily fit with any view of the participating judges when this is understood to refer to the reasons that a judge would have stated if he were the only judge or only speaking for himself. Joint reasons imply that some judges have to give way. The joint reasons are the court’s “common denominator”,<sup>33</sup> that is to say a paraphrase of individual opinions to something more general which includes the individual opinion. The best result is achieved when the points left out of account are points that only a few judges consider important and the importance is negligible. Thus a “well-balanced result” is a justification where the departure from the individual “real” view is as little as possible for all participating judges.<sup>34</sup> The effort is to achieve a Pareto-equilibrium where any change (perhaps reducing the extent of differences of opinion of some judges) will increase the total extent of difference of opinions. One judge asks, “It is not possible to write ‘must’ rather than ‘ought’?”, and another judge concurs, while three judges disagree, and the wording of the text is not changed unless it is very important for the two judges and quite immaterial for the three judges.

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33 Bedjaoui, p. 58.

34 “With a certain give and take, this is always achieved, for it is the very essence of drafting a judicial opinion”, Bedjaoui, p. 49-50-

The fundamental views are often lost in the harmonised balancing of opinions.

As mentioned above, the joint opinion is neither the only reason, nor perhaps the substantial reason to prefer specific reasons. From the judge's perspective, a solid basis is required for laying down guidelines for the solution of conflicts not yet brought before the court. On the other hand if Højesteret has announced a fundamental principle this has in general been well accepted in the surrounding world. In my opinion, attention must also be paid to the fact that other legal regulation than judicial regulation appears to be grounded on a legal basis that is not as qualified as a well-prepared case is.

A joint opinion can also be achieved through its brevity. The question is asked, "Do we need this word?" And since it is often difficult to see that exactly *this* word is the decisive word, it is deleted, etc. Or more properly the question is asked, "Do we need this sentence?" One keeps an open eye to the truth that if more is written it enhances the possibility not only of disagreement but also that something wrong is written. Brevity is often the result of a quite time-consuming process and the reduction of the text, implied by the described deliberation, is not always without pain for the judge suggesting a broader wording.<sup>35</sup>

The wording arrived at can be difficult to understand for the outsiders, and the court is well aware of this when the judgement later is cited as precedent during the pleading, perhaps supported by the theory's comments to the judgement. The attorney faces a quite daunting task analyzing "the meaning" of a judgement that some of the judges on the Bench recently have put into words, and the attorney may be comforted that it is not easy for the judges either.<sup>36</sup>

Judgements seldom contain a wording which mirrors the process of deliberation carried out by the judges – the initial questions and doubts developing towards a result, arguing the matter pro and con combined with an analysis of the arguments involved. In some cases it is maintained what "the question" is and this turns out to be a simple and easy way to state the problem considered by the judgement. The reasons are not "a report of deliberations" but rather a "report of decisions".

Dissenting opinions distinguish one or more judges from the majority.<sup>37</sup> The dissenting judge often feels a profound need to justify his view to the majority and – looking forward - to the readers of judgement s. The reasons of a dissenting opinion are often more elaborate than the reasons of the usual unanimous judgement. The linguistic style is also more personal. However, the dissenting opinion initiates a process within the majority charging judges with

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35 "The draft judgement ....suffers the fate of a whale attacked by a school of killer-whales which tear chunks of flesh from its body. Sometimes only a skeleton is left for the second reading ", Sture Petré (judge in ICJ 1967-76), *The Future of the International Court of Justice*, ed. Leo Gross, vol. ii, 1976, p. 450-451.

36 Mogens Hvidt, p. 42: When we have grappled for a long time with a linguistic detail, we are reminded what my predecessor sometimes said: "Nobody reading the judgement will care why we used exactly this phrase – and in a fortnight we have also forgotten!" The lesson is, I suppose, that interpretation is concerned with the meaning of the text and not what the judge meant.

37 On this Torgny Håstad, *Festschrift till Per Henrik Lindblom*, Stockholm 2004.



the task to justify the majority opinion. Thus judgements with an elaborate dissenting opinion are often more amplified than judgements without dissenting opinions.<sup>38</sup> The majority thinks twice and maintains its position against criticism.

A planned dissenting opinion can prepare the way for a changed unanimity. The majority “meets the dissenting opinion” and suggests amendments (or asks for proposals) in the majority’s reasons which might persuade the dissenting judge to abandon his dissent. Or the dissent makes by the change of wording a doubting judge in the majority to join the dissent.<sup>39</sup> The dissent’s emphasis of a point agreed upon by the majority (but not found desirable to express) may lead the majority to include it, if the dissenting judge cannot drop the point (since it is “vital” for his view), but the majority’s reasons thus includes a point that perhaps does not fit exactly with the other reasons for the decision. This dynamics is not always applied in such a way that all “parallel” opinions are voiced. The process must have an end. Majority and minority respectively mean what they say and a certain caution must be exercised concluding from one group means to what the other group does *not* mean.

As a rule, the dissenting judges participate in the deliberation of the majority’s reasons and comment of the wording of the majority: it is the text which is “valid”.<sup>40</sup> The majority may remark that a dissenting opinion includes a point agreed upon by the majority, to be expressed in a joint reason, or simply suggest improvements in the wording of the dissenting opinion.

The dissenting opinion may express an uncertainty also found within the majority; perhaps the dissent is *appreciated* by the majority, encouraging the doubting judge to express the doubts as a dissenting opinion in order to avoid that a unanimous decision appears an indisputable decision. The majority’s doubts are expressed in terms of the dissenting opinion.<sup>41</sup> On the other hand it is not necessarily the case that a dissenting opinion signals that the majority has been in doubt. It is a moot point if the insertion of a dissenting opinion is the most suitable way to express the majority’s doubts.

The judges seldom express their own justifications – separate opinions – for the same result arrived at by the other judges. Yet they are found just as there are cases where a judge makes an amendment to the reasons shared in common. These individualizing features play a major role, for example in Swedish practice,<sup>42</sup> and since there is no reason to believe that Danish judges are less

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38 “The process of dissent has an important influence upon the shaping of the majority viewpoint”, Schwebel, p. 556.

39 “Some likely dissenters, on the other hand, consider that all is not lost and believe that, through tabling amendments, they may succeed in having the judgement redrafted more in tune with their own opinion of the case, which may enable them eventually to vote in favour or even win over converts from the other camp”, Bedjaoui, p. 51.

40 Bedjaoui, p. 51-52.

41 The case “can for all judges be extremely doubtful, and the scale nevertheless tips in a similar way for all of them. This kind of doubt is not always expressed in the reasons, and a dissenting opinion may be beneficial as the occasion demands”, Mogens Hvidt, p. 41.

42 Knutsson, p. 285 on the individual judges’ *amendments for one’s own part*.

individualistic minded than Swedish judges, the explanation is probably due to differences in the *organisation of* culture, the Danish culture emphasizing the majority during the deliberations to arrive at *joint* reasons.

## 7 The Judgement

The judgement brings the case to an end. The process towards the judgement shall secure that what is contained in the judgement is thought-through. As a rule, the parties are interested in the conclusion whereas the legal literature is interested in the reasons for the conclusion.<sup>43</sup> The interests of the media and the public may vary.

With respect to the reasons, the discussion continues if Højesteret presents a satisfactory account of the reasons.<sup>44</sup> An attorney has stated a defence of the short form: “Rather a short judgement known to be thought-through than a lengthy judgement written by a junior judge”. For oral pleadings, the view is less adequate since as noticed above there is no risk that the reasons are written by a junior judge. However, if the term is replaced with “the leading judge”, the view is worth consideration. The joint work of the participating judges secures that all judges approximately and to an equal extent concur with the wording used to justify the conclusion. The price is that the wording often does not cover the problems debated during the pleadings and the deliberations of opinion writing. In my opinion, this is a considerable waste of resources without implying a recommendation of a display of confused reasons.

As mentioned, Højesterets’s judgement must be read on the basis of the appealed judgements. The reasons must be understood as a commentary, often a very concise commentary, to the views of the parties cited either in the appealed judgement or in the Supreme Court judgement. If the reasons are read in the light of these ways of reasoning they are often further strengthened. Changes in contentions or in points of fact and law are of course noticed but otherwise Højesteret only seldom reproduces the pleadings, and you have to present in the court room to learn the further elaboration and development involved in the pleadings by counsel.

Neither Højesteret nor other Danish courts put judgements on the net. The publication of judgements is (also in Denmark) a matter for publishing firms. The judgements are as a rule made public in *Ugeskrift for Retsvæsen* (Weekly Law Reports). By agreement with the publishing firm some judges are editors of cases and they determine that some judgements are *not* to be publicised, and also write the introduction to the judgement or “the head”. The editing judges have not necessarily participated in the hearing of the cases.<sup>45</sup>

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43 This is a simplification, Per Magid, *Juristen* (forthcoming). Organisations conducting litigations of general public importance are interested in the reasons, and the legal literature perhaps knows the principle and wants to *See* it applied, e.g. the principle of judicial review.

44 On the fundamental function of elaborate reasons *See* Kirsten Ketcher, *Mod en argumentativ ret*, Jussens Venner, Oslo 2000, p. 272f.

45 Called “rubrik” in the Swedish NJA. The referent writes a draft that it examined by the participating judges, and then left to the editor of NJA, Knutsson, p. 287.

The editors also determine the content of the notes to judgements. If they have not heard the cases, the note is edited on the suggestion by the leading judge. The scope of the notes depends upon the extent of judgements, literature, and etc. presented by counsel in the case, but may also include material adduced by the judges. That the material is mentioned does not imply that *all* judges have voiced their opinion concerning its importance. It is not stated which material is considered to be important, still less *what* importance the material has. The note gives an impression of the deliberation which corresponds to the impression of reading an article in *Ugeskrift for Retsvæsen*, if only the foot notes are read. It is obvious that an elaboration of notes is not the way to arrive at greater insight in the background for the decision.