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Exposé

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In Search of Reasons – Unreasoned Judicial Decisions in Civil Proceedings in Austria, England, and Germany

submitted by
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I. Introduction

According to the German Codes of Procedure,[1] the Federal Courts *shall* give a brief statement of reasons when dismissing the complaint against the second instance court's decision of non-admission of the appeal on point of law ('*Nichtzulassungsbeschwerde'*[2]). Reasoning may be forgone either where it would not contribute to clarifying the prerequisites based on which leave for filing an appeal on point of law ('*Revision'*) is to be granted, or where the court finds for the party filing the leave application[3]. Despite the identical wording of the sections, in practice one Federal Court interprets this rule more leniently than the other Federal Courts: the Federal Administrative Court, the Federal Financial Court, the Federal Labour Court, and the Federal Social Court frequently state reasons for the dismissal of an application of leave. In contrast, the Federal Court of Justice, with very few exceptions, only uses standardised reasoning, which does not reveal the reasons for the refusal of the appeal.[4] Common practice of this Court is to merely state that the prerequisites set out in s. 543 Code of Civil Procedure, which are to be satisfied to have an appeal on point of law permitted, are not fulfilled. The parties complaining against the non-admission of the appeal thus are left with the following resolution of their case:

> The plaintiff's appeal against the non-admission of the appeal in the judgment of the second instance court is dismissed, because the case is neither of fundamental importance nor does the further development of the law or the safeguarding of uniform case law warrant a decision by the Federal Court of Justice (s. 543

[1] s. 544 (6) first part of sentence 2 Code of Civil Procedure, s. 133 (5) first part of sentence 2 Administrative Procedure Code, s. 116 (5) first part of sentence 2 Finance Court Code, s. 72a (5) sentence 4 Labour Courts Act, s. 160a (4) first part of sentence 2 Social Court Act

[2] In Germany, the second instance court either admits or refuses to allow an appeal on point of law to the Federal Court of Justice *ex officio* in its operative part of the judgment. Yet, the Reform of the Code of Civil Procedure in 2001 introduced the remedy against a refusal by the second instance court, called *Nichtzulassungsbeschwerde*. It aims at mitigating the adverse effects a decision by the second instance court to deny the appeal has on the parties, and strengthening the supervisory function of the Federal Court of Justice as a court of *Revision* (BT-Drs. 14/4722, p. 67). The complaint against non-admission of the appeal on point of law differs from an application of permission to appeal under the English legal system in so far that a court has already decided on the issue of admission before the complaint is filed. In that sense, the complaint appears as an appeal against the decision to deny permission of the appeal on point of law by the second instance court rather than an application of permission to appeal itself. Arguably, a decision on the permission of the appeal has already been rendered by the second instance court (without an express application filed by the defeated party). However, the structure of process of the complaint and the effects of the decision are the same as an express application of permission to appeal under English law. Counsel has to lay out why the admissibility criteria of the appeal on point of law are satisfied in the complaint against non-admission (contrary to the opinion of the second instance court) in order to persuade the Federal Court of Justice to admit the case for oral hearings. The decision by the Federal Court of Justice then either admits or rejects the complaint, the oral hearing takes place (or not) and it is final. From a functionalist perspective, this amounts to a comparable type of permission to appeal.

[3] s. 544 (6) second part of sentence 2 Code of Civil Procedure, s. 133 (5) second part of sentence 2 Administrative Procedure Code, , s. 116 (5) second part of sentence 2 Finance Court Code, s. 72a (5) sentence 5 Labour Courts Act, s. 160a (4) second part of sentence 2 Social Court Act

[4] Wendt Nassall 'Nichtzulassungsbeschwerde und Revision' 1st ed. (Munich: C.H. Beck, 2018), p. 87

(2) sentence 1 Code of Civil Procedure). Pursuant to s. 544 (6) sentence 2 of the Code of Civil Procedure further reasons are not given.

As a result, the defeated party tends to grapple with the acceptance of the final outcome of the legal dispute with neither a discernible reasoning nor (ordinary) remedies available against this decision. Moreover, counsel of the party is affected by this as they face the Sisyphean task of having to argue in the dark. If arguments for non-admission are neither disclosed by the Federal Court of Justice nor the second instance court, counsel will need to engage in guesswork when drafting an objection in the event that a party's right to be given an effective and fair legal hearing has been violated (*'Anhörungsrüge')*[5] or a constitutional complaint. Difficulties may also arise for other courts. The Federal Constitutional Court has to discern violations of specific constitutional law when responding to constitutional complaints against judicial decisions without knowing the reasons the lower courts based their decisions on. Second instance courts remain with no guidance as to how to differentiate between cases where permission to appeal was refused and those granted by the Federal Court of Justice.

The phenomenon of sparse to no reasons as a response to leave applications is not exclusive to the German jurisdiction. It is a curious fact that despite their differing views on the duty to give reasons in terms of its existence and scope, German, Austrian, and English courts increasingly refrain from giving reasons in similar circumstances of cases and decisions, either because a statute compels them to or by development of judicial practice. In civil proceedings, this tendency can be observed in default judgments,[6] judgments based on the defendant's acknowledgment or waiver,[7] decisions in cases dealing with legitimate interests of confidentiality, such as national security,[8] decisions on costs,[9] admissibility of evidence,[10] expedition or adjournment,[11] final decisions,[12] order of seizures and injunctions[13] and refusal of appeals if the alleged violations of procedural rights are inconsequential[14] as well as refusals of applications of permission to appeal.[15] The aim of the thesis is explanatory. It deals with the question of why the current judicial practice on abstention from reason-giving is what it is.

[5] According to s. 321a (1) Code of Civil Procedure a party can file an objection in the event that a party's right to be given an effective and fair legal hearing has been violated. This remedy can be lodged in cases when the party concerned assumes a violation precisely because of the lack of sufficient reasoning. However, this objection is considered by the court that allegedly violated the right to be given an effective and fair legal hearing in the first place. Thus, redress is hardly ever granted.

[6] For a discussion of whether 'procedural reasons' contained in English default judgments satisfy the requirement of reasoned judgments for enforcement of a foreign decision from the French perspective, see: Gilles Cuniberti, 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency' (2008) 57 ICLQ 25, 38–39; *Bhatia Shipping and Agencies Pvt Limited v Alcobex Metals Limited* [2004] EWHC 2323 (Comm); § 313b (1) sentence 1 Code of Civil Procedure.

[7] § 313b (1) sentence 1 Code of Civil Procedure.

[8] Uwe Kischel, *Die Begründung : zur Erläuterung staatlicher Entscheidungen gegenüber dem Bürger* (Mohr Siebeck 2003) 221; John Bridge, 'The Duty to Give Reasons For Decisions as an Aspect of Natural Justice' in Dominik Lasok and University of Exeter (eds), *Fundamental Duties: A Volume of Essays by Present and Former Members of the Law Faculty of the University of Exeter to Commemorate the Silver Jubilee of the University* (Pergamon Press 1980) 83; Hock Lai Ho, 'The Judicial Duty to Give Reasons' (2000) 20 Legal Studies 42, 54.

[9] *Eagil Trust Co v Pigott-Brown* [1985] 3 All ER 119; *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* (2000) 1 WLR 377.

[10] For example, § 428 (1) Austrian Code of Civil Procedure sets out that only orders on conflicting applications and those rejecting an application must be reasoned, which conversely means that orders, including those on evidence, do not need to be reasoned.

[11] Ho (n 8) 54.

[12] § 313a (1) sentence 2, (2) Code of Civil Procedure.

[13] § 922 (1) and §§ 936, 922 (1) Code of Civil Procedure.

[14] § 564 sentence 1 and §§ 577 (6), 564 sentence 1 Code of Civil Procedure.

[15] *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 at 205; s. 544 (6) second part of sentence 2 of the German Code of Civil Procedure.

II. Main structure of the thesis

The aim of this comparative research project is to examine the grounds, effects, and consequences of a duty to give reasons and its exceptions from a legal, socio-political, and historical perspective. The thesis seeks to answer the following question:

> *In civil proceedings in Austria, England, and Germany, which judicial decisions need not be reasoned and why? In particular, should the refusal of the permission to appeal, pronounced by either the Austrian Oberster Gerichtshof, the German Bundesgerichtshof or the UK Supreme Court, be one such decision?*

The endeavour to answer this question raises various sub-questions that are considered throughout the three Parts of the thesis.

1. Part I – Giving Reasons

Part I focuses on the philosophical considerations and historical developments within the English and German legal system that led to establishment of a duty to give reasons or the lack thereof. The first chapter within this part (*Chapter 2*) contextualises judicial reasoning as the process to reach a decision as well as the written explanation within the decision itself and defines what does not constitute a reason for the purpose of this thesis. The thesis further employs theories exploring the legitimate use of power in a liberal democracy through reason-giving and the notion of fairness as a timeless philosophical concept. *Chapter 3* seeks to answer comparatively why a judicial duty to give reasons emerged in Germany, a more extensive one in Austria, but none in England.

2. Part II – Exceptions

At the heart of Part II of the thesis lies the question on what grounds is a departure from the duty to give reasons justified in either jurisdiction. This part thus reflects on questions of efficiency, the role of courts and judges, and concepts of authority. Against the historical and socio-political context of each country, *Chapter 4* explores why individual decisions are not reasoned and whether the reasons and underlying principles of these decisions can be grouped together.

3. Part III – Refusals of Permission to Appeal

Part III is devoted to permission to appeal applications and their refusals by the German Federal Court of Justice, the Austrian Supreme Court and the UK Supreme Court. *Chapter 5* analyses to what extent decisions on permission to appeal applications differ in England and Germany, how the courts' practice not to give reasons reflects their intended private or public purpose, and whether the justification behind this practice aligns with the legal culture in Germany, Austria, and England. *Chapter 6* discusses whether the refusal of permission to appeal applications in front of the highest courts in Austria, England, and Germany should be classified as an exception and not be accompanied by explicit reasons for its refusal.

III. Current State of Research on the Topic

The duty to give reasons, in particular its theoretical framework, historical origin and development, philosophical underpinnings and practical disadvantages, has been widely discussed. Which decisions are or should be exempted from judicial reason giving requirements or expectation have only occasionally been the subject of scholarly discourse,[16] but have not been comprehensively dealt with in legal terms. The aim of this research project is, thus, to examine the grounds, effects, and consequences of a duty to give reasons and its exceptions from a legal, socio-political, and historical perspective, and subsequently, to analyse and systematise the practice of (the lack of) judicial reasoning.

German legal scholarship so far has mostly engaged in the discussion whether the issue of efficiency and functioning of the legal system could constitute an adequate counterweight to the duty to give reasons in certain decisions. Especially appellate courts are said to face a high burden in terms of caseload.[17] If these courts were required to give reasons in every decisions – even those dealing with the admission of the appeal on point of law, not the appeal itself – backlogs would intensify to the extent that the appellate courts could not function efficiently, and thus, not fulfil their constitutional obligation to administer justice. Although scholarly views differ on whether the efficiency of the legal system could be considered a constitutional value weighed against the duty to give reasons,[18] scholars often arrive at the conclusion that the duty should apply every decision, including last instance decisions like leave decisions[19] or constitutional complaints.[20] In contrast, the German Federal Constitutional Court opines that the constitutional duty to give reasons does not encompass final instance decisions.[21]

Austrian civil procedural law scholarship mostly draws on the existing scholarship from Germany. However, the 1974 comparative law anthology on reasons for decisions edited by Sprung and König contains the most comprehensive examination of the Austrian legal situation to date as well as essays on the duty to give reasons in civil, criminal and administrative proceedings in various other European countries and before national supreme and international courts.[22] The interest in comparing Germany and Austria, two legal systems that are often grouped together as operating under the Germanic tradition, stems from different features in the historical development of each country's civil procedural code. The Austrian Code of Civil Procedure was primarily characterised by Franz Klein's idea of social civil procedure (*sozialer Zivilprozess*) in 1895. For Klein, the aim of the process was not just the rights of the parties, but above all the interests of the general public. Civil Procedure was an 'indispensable state

[16] HL Ho, 'The Judicial Duty to Give Reasons' (2000) 20 Legal Studies 42, 54.

[17] The Federal Court of Justice in Germany alone faced 4644 appeals on point of law as well as complaints against the non-admission of the appeal on point of law in 2020. The Court resolved 398 appeals on point of law, while 3790 appeals on point of law as well as complaints against the non-admission of the appeal on point of law were still pending before the Court. (*Annual Report and Accounts of the Federal Court of Justice* 6, 23–24 (Germany Federal Court of Justice)).

[18] Kischel argues that efficiency of the legal system does amounts a constitutional principle, which, however, fails to weigh up against the duty to give reasons founded on the cornerstones of a liberal democracy necessary to adhere to the requirements of the German *Rechtsstaatsprinzip* (Uwe Kischel, *Die Begründung* (Mohr Siebeck, 2003)). Hilpert, on the other hand, argues that the efficiency (of the Federal Constitutional Court) is a derivative constitutional value, one that comes from the conception of the institution within the Constitution itself, and s, thus, not *a priori* (Johannes Hilpert, *Begründungspflicht des Bundesverfassungsgerichts? : § 93d Abs. 1 S. 3 BVerfGG im Widerstreit mit verfassungs- und konventionsrechtlichen Vorgaben* (Mohr Siebeck, 2019).

[19] Uwe Kischel, *Die Begründung* (Mohr Siebeck, 2003), p. 203.

[20] Johannes Hilpert, *Begründungspflicht des Bundesverfassungsgerichts? : § 93d Abs. 1 S. 3 BVerfGG im Widerstreit mit verfassungs- und konventionsrechtlichen Vorgaben* (Mohr Siebeck, 2019).

[21] BVerfG, Beschluss der 1. Kammer des ersten Senats vom 8. Dezember 2010 - 1 BvR 1382/10; BVerfGE 50, 287 (289); BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 29. März 2007 - 2 BvR 120/07; BVerfG, Beschluß vom 28.2.1979 - 2 BvR 84/79; BVerfG, Beschluss vom 07.05.2008 - 2 BvR 2306/07.

[22] Sprung/König (eds), Die Entscheidungsbegründung in europäischen Verfahrensrechten und im Verfahren vor internationalen gerichten (1974).

welfare institution,' a 'link in social aid.'[23] The rule of the parties was therefore to be weakened and the judge, as the representative of the general public, was to be granted greater influence over the proceedings. In Germany, on the other hand, the predominant idea of liberal civil procedure modelled after the French model found its way into the Civil Procedure Code of 1877, according to which civil proceedings were a purely private matter for the parties with no further interest for the general public.[24] The conduct of the proceedings - in particular the clarification of the facts, service of pleadings and summons to oral hearings - was left to the parties. As the parties were able to determine the objective of the proceedings, they also had the right to decide on the means of achieving the legal protection they sought. The judge had to accept this and was intended to play a more passive role.[25] The background to this was the idea of limiting judicial power. The citizen facing state authority in a trial was to be protected from arbitrary judgement by procedural law.[26] It was not until the seventies of the last century that Rudolf Wassermann evaluated the practicality of the idea of social civil procedure in Germany.[27] How these two founding ideas influenced the view and standing of the judges in society and impacted the existence of a duty to give reasons or the absence therefore in certain cases, is worth a comparative evaluation.

Within the common law sphere, jurisdictions such as England, Australia, Canada, New Zealand, and the United States seem to agree upon the justifications for giving and not-giving reasons.[28] Yet, an inflexible, justiciable obligation has not been widely accepted or imposed – neither through statute nor at common law – in either one of these countries.[29] Even though giving reasons is generally encouraged, in English and Australian law some instances of judicial *dicta* may in fact point to the acknowledgment of an enforceable duty to give reasons. This somewhat

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[23] Walter Rechberger, Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa, Ritsumeikan Law Review 25 (2008), 103 - translation by the author.

[24] Peter Meyer, Wandel des Prozessrechtsverhältnisses – vom „liberalen" zum „sozialen" Zivilprozess? Juristische Rundschau 1/2004, 1.

[25] Ibid.

[26] Ibid.

[27] Rudolf Wassermann, Der soziale Zivilprozess: zur Theorie und Praxis des Zivilprozesses im sozialen Rechtsstaat (Neuwied, Leuchterhand 1978).

[28] In England: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All E.R. 119 at 121 per Griffiths L.J.; *R. v Harrow Crown Court Ex p. Dave* [1994] 1 W.L.R. 98 at 105–107 per Pill J; in Australia see *Ellis v Hartley* (1901) 27 V.L.R. 31 SC at 35 per Madden C.J.; *Pettitt v Dunkley* [1971] 1 N.S.W.L.R. 376 at 382 per Asprey J.A.; *Soulemezis v Dudley* (1987) 10 N.S.W.L.R. 247 at 257–259 per Kirby P. at 269–274 per Mahoney J.A. and at 270–280 per McHugh J.A.; *Hunter v Transport Accident Commission* [2005] V.S.C.A. 1 CA at [21] and [37] per Nettle J.A. For recent application of the principle in state courts see *Woolworths v Warfe* [2013] V.S.C.A. 22 CA; *Ta v Thompson* [2013] V.S.C.A. 344 CA; *Watson v Meyer* [2013] N.S.W.C.A. 243 CA; for New Zealand see *R. v Awatere* [1982] 1 N.Z.L.R. 644 at 649 per Woodhouse P; *Bell-Booth v Bell-Booth* [1998] 2 N.Z.L.R. 2 at 5–6 per Thomas J.; *Lewis v Wilson & Horton Ltd* [2000] 3 N.Z.L.R. 546 at [85] per Elias C.J.; *Bain v R* [2009] N.Z.S.C. 59; (2009) 19 P.R.N.Z. 524 at [5] per Elias C.J., Blanchard J., McGrath J., Wilson J. and Gault J.; for Canada see *R. v McMaster* [1996] 1 S.C.R. 740 at [26] per Lamer C.J., at [40] per L'Heureux-Dube J.; *R. v Shropshire* [1995] 4 S.C.R. 227 at [50] per Iacobucci J.; *R. v Sheppard* [2002] 1 S.C.R. 869 at [33] and [46], per Binnie J.; *R. v M* (RE) [2008] 3 S.C.R. 3 at [10] per McLachlin C.J; For the US see *Milder v Gulotta* 405 F. Supp. 182 (ED N.Y. 1975) at 215–218 per District Court Judge Weinstein; *NLRB v Amalgamated Clothing Workers of America*, AFL-CIO, Local 990 430 F.2d. 966 (5th Cir. 1970) at [4]–[5] per Chief Judge Brown; *Arizona v Washington* 434 U.S. 497 (1978) at 517 per Marshall J.

[29] For England see: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All E.R. 119 at 121 per Griffiths L.J.; *R. v Harrow Crown Court Ex p. Dave* [1994] 1 W.L.R. 98 at 105–107 per Pill J.; For Australia see: *Public Service Board of New South Wales v Osmond* (1986) 159 C.L.R. 656 at 666 per Gibbs C.J.; *Perkins v County Court of Victoria* [2000] 2 V.R. 246 at [56] per Buchanan J.A.; For New Zealand see: *Commissioner of Police v District Court at Manukau* [2007] N.Z.A.R. 370 HC at [14] per Asher J.*; Canam Construction (1955) Ltd v Lattatte* [2010] 1 N.Z.L.R. 848 HC at [56]–[57] per Keane J.; *Television New Zealand Ltd v West* [2011] 3 N.Z.L.R. 825 at [82] per Asher J.; For Canada see: *R. v McMaster* [1996] 1 S.C.R. 740 at [26] per Lamer C.J., at [40] per L'Heureux-Dube J.; *R. v Shropshire* [1995] 4 S.C.R. 227 at [50] per Iacobucci J.; *R. v Sheppard* [2002] 1 S.C.R. 869 at [33] and [46], per Binnie J.*; R. v M* (RE) [2008] 3 S.C.R. 3 at [10] per McLachlin C.J.; For the US see: *Taylor v McKeithen* 407 U.S. 191 (1972) at 194 per Rehnquist J.; *Furman v United States* 720 F.2d. 263 (2nd Cir. 1983) at 264 per Circuit Judges Friendly, Kearse and Cardmore; *White v Scott* 141 F.3d. 1187 (3rd Cir. 1998); *Arizona v Washington* 434 U.S. 497 (1978) at 517 per Stevens J.; *Renico v Lett* 559 U.S. 766 (2010) at [15]–[17] per Roberts C.J.

out of the ordinary stance under common law was taken in the New South Wales case of *Waterson v Batten.*[30] Here, the President of the New South Wales Court of Appeal stated that the point in question was not if a duty exists, but rather what is its scope. The duty to give reasons was said to derive from a 'duty to act judicially,'[31] which is an 'incident of the judicial process.'[32] Australian legal scholarship also heavily espouses the existence of such a duty and attempts to provide a theoretical foundation within the legal system for it. For example, Bosland and Gill relate the duty to give reasons to the 'open justice principle' as a feature of administration of justice. This principle pivots on the idea that justice must be done in the public sphere.[33] Giving reasons serves the idea of democratic institutional responsibility to the public, because 'those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.'[34] Consequently, in order to enable public scrutiny of judicial decisions and 'thereby maintain confidence in the administration of justice,'[35] which is the rationale of the open justice principle, reasons must be made publicly available. Despite stating that a 'public reason rule' is emerging, Bosland and Gill qualify the duty as to exclude minor interlocutory decisions.[36] In contrast, Beck even goes so far as to consider the duty to give reason an absolute constitutional duty.[37] Thus, the lack of reasoning makes a decision one 'by jurisdictional error,'[38] and therefore, no decision at all. Assuming that the giving of reasons is 'an essential element of the making of a judicial decision' and 'a defining characteristic of courts and of the exercise of judicial power,'[39] the failure to do so impairs the institutional integrity of a court,[40] which gives rise to a jurisdictional error. Furthermore, a denial of reasons may also amount to a denial of procedural fairness, which constitutes a jurisdictional error under Australian common law.[41] Essential aspects of procedural fairness include not only that the losing party needs to know the case against them and has the opportunity to respond to it,[42] but also that the judge has not taken into account matters unknown to the losing party so that the public's confidence in the judiciary's exercise of power stays undisturbed.[43] As this constitutional duty is argued to be absolute, Beck negates an exception in cases of leave applications.[44] On the contrary, precisely because of the characteristics of leave applications, such as a having wide judicial discretion and determining definitively the particular litigation,[45] the 'ordinary safeguards of the administration of justice' need to be observed.

In the English case of *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services),*[46] the Court of Appeal allowed an appeal on the sole ground that the judge had failed to give adequate reasons for his decisions. Henry LJ argued that the 'duty [to give reasons] is a

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[30] 13 May 1988, unreported.
[31] *Pettit v Dunkley* (1971) 1 NSWLR 376 at 387-388, *Soulemezis v Dudley* (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 277.
[32] *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247at 279; *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559 at 566; *Bruton v New South Wales Insurance Ministerial Corp* (1994, unreported, New South Wales Court of Appeal).
[33]Bosland and Gill (n 13) 483; see also *Soulemezis* 'the duty rests on a wider basis: its foundation is the principle that justice must not only be done but it must be seen to be done' per McHugh LA.
[34] Chief Justice Gleeson, 'Judicial Accountability'(1995) 2 Judicial Review 117, 122.
[35] Bosland and Gill (n 13) 509.
[36] ibid 523.
[37] Beck (n 13) 923.
[38] ibid 936.
[39] ibid 924.
[40] *Wainhou v New South Wales* (2011) 243 CLR 597.
[41] Beck (n 13) 937.
[42] *Kiao v West* (1985) 159 CLR 550, 582 per Mason J.
[43] (n 13) 939.
[44] ibid 940.
[45] Coulter v The Queen (1988) 164 CLR 350, 359.
[46] *Flannery v Halifax Estate Agencies Ltd (ta Colleys Professional Services)* (n 17).

function of due process, and therefore of justice.'[47] It serves to ascertain why a party won or lost and 'to concentrate the mind' of the judge so that the 'decision is more likely to be soundly based on the evidence than if it is not'[48]. While recognising the advantages of reason giving laid out by Henry LJ, the Court of Appeal reaffirmed in *English v Emery Reimbold and Strick Ltd* [49] that this is not a universally accepted mandatory requirement under common law. The Court, nonetheless, argued that a general duty could be inferred not from common law, but from the ECHR and its case law, which 'obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument.'[50] One crucial observation was made by the Court of Appeal in this regard. The ECHR case law considers judgments which determined the substantive dispute between the parties whether the form of the judgments was compatible with the fair trial requirement under Article 6 ECHR.[51] The Court of Appeal deduced that 'where a judicial decision affects the substantive rights of the parties […] the Strasbourg jurisprudence requires that the decision should be reasoned.'[52] Consequently, there are cases where 'fairness does not demand that parties should be informed of the reasoning underlying them,'[53] such as interlocutory decisions in the course of case management or awards of costs, even though these can 'have a greater financial significance for the parties than the decision on the substance of the dispute.'[54] Again, while there is extensive scholarly work and case law on the duty to give reasons, the common law does not deal with the nature or structure of judicial decisions in order to find commonly agreed upon exceptions to this duty on the basis of the nature of a decision.

In-depth treatment of the issue of the duty to state reasons in legal proceedings can be found at the European level. While the ECtHR found a violation of the right to a fair trial according to Article 6 European Convention of Human Rights, when domestic courts failed to comply with the duty to give reasons in criminal law proceedings,[55] it acknowledged that this is not the case when denying leave to appeal in civil proceedings.[56] Very limited reasoning may suffice in cases, where the last instance court refuses to accept a case on the basis that the legal grounds for such a case are not made out.[57] The ECtHR upheld cases following the Scandinavian practice containing practically no reasons.[58] Yet, the Court also noted that, although from a practical perspective understandable, it would welcome a diametrically opposed practice from national last instance courts 'in view of the fact that the Convention sets minimum standards of protection of fundamental rights.'[59]

IV. Methodology

The research will not only draw on the legal framework of different jurisdictions, but also on literature from disciplines such as history, sociology and psychology, and political philosophy. The first part of the thesis, for example, contextualises the historical development of judicial reasoning in England, Germany, and Austria. The research project further employs theories

[47] Ibid, para 1.
[48] Ibid.
[49] *English v Emery Reimbold And Strick Ltd* EWCA Civ 605 (EWCA Civ), para 15.
[50] *Ruiz Torija v Spain* (1994) 19 EHRR 553, 562, para 29; see also Garcia Ruiz v Spain (1999) 31 EHRR 589.
[51] *English v Emery Reimbold And Strick Ltd* (n 87), para. 13.
[52] ibid, para 13.
[53] ibid.
[54] ibid, para. 14.
[55] *Moreira Ferreira v. Portugal* (No. 2) [GC], App. No. 19867/12, 11.7.2017.
[56] *Nerseseyan v Armenia* (Appl. No. 15371/07, 19 January 2010).
[57] Ibid.
[58] *Ovlisen v Denmark* 16469/05, 30 August 2006; *Persson v Sweden* 27098/04, 27 March 2008; *Kukkonon v Finland* 47628/06, 13 No. 2 January 2009.
[59] *Nerseseyan v Armenia* (n 38), para. 25.

exploring the legitimate use of power in a liberal democracy through reason-giving and the notion of fairness as a timeless philosophical concept. Besides its interdisciplinary emphasis, there are two focuses in the methodology of this research project, namely empirical analysis and comparative law.

The main practical argument made against implementing or enforcing a duty to give reasons is that the courts would face an increased caseload, thereby impeding the efficiency of the judicial process. In order to assess this argument, statistical research has to be undertaken. It is necessary to review available data of the historic caseload faced based on the courts' annual reports. Potentially, the research project could benefit from interviews with judges conducted on a qualitative basis. The intrinsic connection between the judicial reasoning and the judges themselves necessitates a dynamic analysis stemming from both the theory and practice. The interviews would not be used as the primary evidence but mainly to support the theoretical arguments. It could be important to extract first-hand experience, impressions and accounts through such interviews to enhance the theoretical background.

Comparative law is expected to make an appearance in every one of the parts of the thesis. In the first part, a comparative historical approach will be employed in order to confirm whether the selected legal systems 'share a core understanding of what the duty to state reasons entails,' but also 'some important differences in the way that each of these systems individually conceives of that duty.'[60] This will be done by examining English, German, and Austrian case law regarding a 'duty to give reasons.' In the second part, the thesis tries to identify categories of exceptions to the expectation or duty of judicial reason giving. Here, the difficulty of comparative law lies in the country's different approaches to the hierarchy of norms. While some reasons may limit the scope of the duty to give reasons in one country, these reasons may not be capable of restricting reason giving in the other. For example, if the duty to give reasons amounts to a constitutional principle under German law, this principle can only be restricted by a competing constitutional principle, value, or right according to the hierarchy of norms. However, the efficiency of a legal system may not amount to such a constitutional value capable of limiting the scope of judicial reason giving in Germany, but may very well be the main justification under English law to restrict judicial reasoning. With Austria's founding concept of a social civil proceeding (*sozialer Zivilprozess*) different considerations not to give reasons for a decision may play a role altogether.

[60] Ingrid Opdebeek and Stéphanie De Somer, 'The Duty to Give Reasons in the European Legal Area a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) 2 Rocznik Administracji Publicznej 97, 98.

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