RATIO ET AUCTORITAS

A COMPARATIVE STUDY OF THE SIGNIFICANCE OF REASONED DECISIONS WITH SPECIAL REFERENCE TO CIVIL CASES

BY

GUNNAR BERGHOLTZ

As far back as in the 4th century B.C. the Greek philosopher Aristotle declared that political democracy was a state governed by law. Another characteristic of political democracy is the principle of publicity, as later maintained by *Bentham*: "Publicity is the very soul of justice".[1] Accordingly, laws and legal procedures are of public concern, and it is incumbent on a judge to submit publicly his reasons for judicial decisions. This is the main point, or hypothesis, on which the subject of this study is based.

The following questions are put forward and the answers serve to substantiate the ultimate conclusions:

1. During what period in history was the duty of giving reasons for judicial decisions imposed in the countries investigated (i.e. France, Germany, England, USA, Norway, Denmark, Sweden), and why was this done?

2. What obligation is there today in those countries to offer reasons in accordance with legislation and legal practices?

3. What are the consequences in court practice of failure to state reasons, or of stating reasons bad-in-law, in the cases examined?

4. What can be said about the utility, both general and to the parties to a case, of reason-stating and fact-finding with regard to judicial decisions?

The title of the study, *Ratio et Auctoritas*, signifies the rationality of reason-giving by the courts as opposed to the authority of the judge as such. Historically, the judicial decision clearly evolves from the authority of the decision-maker to the importance of the reasoned decision, with the emerging rule of law and the appearance of the "Rechtsstaat". Roman Law held the authority of the lawyer to be the more important source of law, not the reasons or grounds: *stat pro ratione auctoritas*.[2] The same may be said of early Canon Law—*si cautus sit iudex, nullam causam exprimet*.[3]

As legal procedure developed, with written records and the possibility

[1] Bentham as cited in *Scott* v. *Scott* (1913) A.C. 417, 477.

[2] F. Schultz, *Roman Legal Science*, Oxford 1946, pp. 17, 61. The same goes for J.P. Dawson, *The Oracles of the Law*, Ann Arbor 1968, pp. 103, 108.

[3] Ph. Godding, "Jurisprudence et motivation des sentences de moyen âge à la fin du 18e siècle", *La motivation des décisions de justice*, Brussels 1978, p. 48.

of appealing against a decision, the necessity of having reasons for written decisions made itself felt. In continental Europe and the Nordic countries reasons adduced by the higher or highest court were intended for the courts only, being kept more or less secret from the parties involved and from the general public. During the 19th century, however, in consequence of, *inter alia*, the French Revolution, codes all over Europe, England excepted, prescribed that courts were under obligation to state their reasons for decision. Thus the development started with *Auctoritas* and ended, at least in certain respects, in *Ratio*.

An American legal historian, *J.P. Dawson*, held the view that the Central European duty to give grounds for judicial decisions had meant much for the status of law courts through forcing judges "to participate in reasoned exposition of legal rules and by fixing on them direct responsibility for the reasons they were required to publish".[4] History shows that this duty of the courts grew with constitutionalism and parliamentarism, nourished by the French Revolution and the fall of feudal society.

CONTINENTAL EUROPE, ENGLAND AND THE UNITED STATES

The courts in *France*—e.g. the Parlement de Paris (a court of appeal of higher standing)—were from the beginning of the 14th century forbidden to state the grounds for their decisions and this ended finally with a law of 1810 prescribing reason-giving. A Parlement de Paris judge wrote the following in a manual for the court in 1336:

> For it is not good that anyone be able to judge concerning the contents of a decree or say 'it is similar or not'; but garrulous strangers should be left in the dark and their mouths closed, so that prejudice should not be caused to others ... For no one should know the secrets of the highest court, which has no superior except God and which sometimes decides contrary to the rigor of the law and even contrary to the law, for a cause that is just according to God, its superior, where perhaps it would not be thought just to proceed according to the law. The law does not bind the king, who is superior to and absolved from the laws. This happens from time to time for reasons that should not be stated or disclosed to anyone.[5]

So a duty to state the grounds for judicial decisions came to France only as an aftermath of the French Revolution.

In *Germany*, the emperor created in 1495 a court for the whole Reich.

[4] Dawson, *op.cit.*, p. 88.

[5] Dawson, *op.cit.*, pp. 287 f., citing P. Guilhiermoz, *Enquêtes et procès, Étude sur la procédure et le fonctionnement du Parlement au XIVe siècle*, Paris 1892, p. 221.

In this "Reichskammergericht", reasons for decisions were not given. As Dawson says:

> Protection of the court from spying eyes was then completed by the laconic quality of its final decrees. These were cast in the most formal and cryptic language—appeal dismissed, decree appealed from reversed or modified—and disclosed to the reader no reasons at all.[6]

At the end of the 18th century, some of the German states had by law prescribed compulsory statement of the grounds underlying court decisions, but not until the middle of the 19th century did this become common practice.[7] In 1877, with the "Zivilprozessordnung" (code of civil procedure), all courts had been brought under this obligation.

In *England* Common Law has never required or stipulated reasons for decision. This can for example be seen in a case from 1710, *Inhabitants of South Cadbury* v. *Inhabitants of Braddon*:

> ... The justices are not bound to express reason of their judgment in the judgment, no more than other Courts; and if it was otherwise held in the late Chief Justice's time, it passed without due consideration. The reason of their judgment must be collected from the record ...[8]

The lack of requirement to explain judgment does not seem to have been of much significance, though. English judges of all times have orally given detailed opinions in cases when they have thought it necessary. The question of whether judges should as a matter of duty write opinions first made itself felt in the middle of the 19th century. Possibly, this was in part because the courts in those days began to decide civil cases without jury. The judge was then faced with the task of giving reasons in questions of fact as well. However, the most important reason was the problem involved in case-reporting, this being due to the doctrine of precedent. The requirement that the judge himself should write opinions was eventually dismissed because this would have meant, it was said, too heavy a burden upon him. Typical is the opinion of two barristers of the time:

> We are satisfied that it is not to be expected that judges will alter their mode of composing and delivering judgment. They will deliver them, as heretofore, *ex tempore*, or on consideration, *viva voce* or in writing, as they find

[6] Dawson, *op.cit.*, p. 223.

[7] *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Vol. 2, *Neuere Zeit (1500–1800), Das Zeitalter des Gemeinen Rechts*, Part Two, *Gesetzgebung Rechtsprechung*, Helmut Coing ed., Munich 1976, p. 1349.

[8] (1710) 91 E.R. 515 and *R.* v. *Inhabitants of Audley* (1699) 91 E.R. 448; see also *R.* v. *Inhabitants of Bedel* (1737) 95 E.R. 245, 246.

> convenient, and will in each case state as much or as little of the facts as they think fit.[9]

So the question of giving reasons in writing or otherwise was left to the conscience of the judge, and according to Dawson this was due to tradition:

> It was difficult to erase the practice of 400 years in which the reasons for decision had been freely disclosed by judges but only in oral communication addressed to an expert bar which, like thoughts expressed at the luncheon table, were preserved through being absorbed into common learning.[10]

In the *United States* the question concerned the duty of the higher state courts to write or not to write their reasons for decision. Around 1830, six states had legislation requiring written opinions, as for example in a Connecticut statute of 1805:

> It shall be the duty of the Supreme Court of Errors to cause the reasons of their Judgment to be committed to writing and signed by one of the Judges, and to be lodged in the Office of Clerk of the Superior Court.[11]

The constitution of California has a similar requirement, and the Californian legislature has thought it necessary to prescribe explicit written opinions for the benefit of *stare decisis* as well as the enlightenment of lower courts and the litigants.[12] The Supreme Court of California, in one case at least, judged this rule in the state's constitution as possibly being contrary to the federal constitution because it was said to trespass on the court's powers and independence.[13] In our time, a great number of states have similar legislation.

THE NORDIC COUNTRIES

In *Norway* the Supreme Court in 1863 was forced through statutory law to spell out opinions separately (*offentlig votering*) for each judge sitting on a case. This was brought about only after some 40 years of parliamentary struggle, where the liberal forces wanted legislation on the duty of the Supreme Court to state grounds and the conservatives opposed

[9] Dawson, *op.cit.*, p. 82, citing W.T.S. Daniel, *The History and Origin of the Law Reports*, 1884, p. 119.
[10] Dawson, *op.cit.*, p. 82.
[11] *Op.cit.*, p. 86.
[12] M. Radin, "The requirement of written opinions", 18 *California Law Review* 486 (1930).
[13] *Op.cit.*, p. 490.

it.[14] This reform proved a real success, and as late as 1936 a renowned Norwegian legal scholar remarked:

> Not least for legal science has the public pronouncing of each judge's opinion had the most important significance. In consequence it is no longer necessary to play hide-and-seek with the courts; one gets a full and authentic response regarding what the court and its Justices have meant—to be understood and criticized. The importance of this for the legal community and the relations between legal learning and legal practice can hardly be overrated.[15]

In *Denmark* the discussion about an obligation for the Supreme Court to state opinions started at the beginning of the 19th century. A statute enacted in 1856 required Supreme Court justices to write at least a short joint opinion in every case. But this was seen as inadequate even at the time, and a newspaper put it like this:

> The anonymity of the Supreme Court is nothing but a relict from the days of the Divine Right of Kings, when institutions reached up in the Sky and the wisdom of the authorities came down from Heaven ...[16]

Critical discussion continues. As late as 1957, the Danish Supreme Court, being asked, turned down a parliamentary proposal to introduce public opinion-giving for each judge sitting on a case, that is according to Norwegian practice. Parliament respected the view of the Supreme Court, and did not—except on a minor point—go through with the proposal. Nevertheless, the parliamentary commission handling the matter wrote:

> The commission expects the new statute to lead to the Supreme Court writing opinions so clear and thorough that legal science and the legal community alike, by reading them, will more than hitherto be guided in solving difficult legal problems. For the life of the law it is of the utmost importance that Court opinions should not require much interpretation, but will show directly the reasoning leading to the result.[17]

In the 17th century the leading *Swedish* court—the Svea Court of Appeal—did not write or pronounce opinions. The court only wrote "by reasons of the record" followed by the order itself. When asked by a party, in 1641, for the reasons for its decision, the court declared this to be no concern of the parties, but only of the King and Government,

[14] H. Østlid, "Hvordan offentlig votering ble gjennomført i Norges høyesterett", *TfR* 1955, pp. 170 ff.

[15] P. Berg, "Norges høyesterett 1814–1940", *SvJT* 1941, p. 15.

[16] G. Nørregaard, "Forholdet til offentligheden", *Højesteret 1661–1961*, vol. 1, Copenhagen 1961, p. 457. (The paper in question was *Politiken* 21.1.1886.)

[17] E. Saunte, *Højesteret og Lovgivningsmagten, Anførande vid Højesterets 300-års Jubileum*, Copenhagen 1961, pp. 15 ff.

since these stood above the court.[18] Legal historians hold the view that this was because the court saw itself as the King's own tribunal and therefore no justification was necessary. Other explanations for withholding reasons were to avoid discussion, to hide opposing views within the court, and the court's desire to be seen as an authority.[19]

The major Swedish codification of 1734, however, prescribed for the first time that reasons for decisions were to be given.

HISTORICAL SUMMARY

The question of legitimation of judicial power, discussed in Europe from medieval times onwards, was at first solved by reference to patriarchal authority, to direct Divine right, or to government by election and consent.[20] In earliest times, patriarchal authority was probably soon followed by the legitimation of power by direct Divine right. The Decretists allowed absolute legislative power both to the Pope and the King, and, consequently, power over the administration of the law would also fall into their hands.[21] Where such doctrines played a role, in contrast to earlier customary law, this tallies with the view of the judge as spokesman of the ruler. Any other types of justification were thus thought unnecessary, as was any legitimacy other than the authority itself.[22]

With the Enlightenment, traditional authority was weakened. A need grew to replace it by rational and/or legal authority, and there followed a general demand that the use of power be justified also in the legal field. The lack of reasons given for judicial decisions, already touched on, was seen as a sign of despotic caprice. It is apt to speak, as *Max Weber* did, of a process of rationalization in society.[23]

The belief in reason and secularized natural law also demanded the giving of grounds for judicial decisions, intended to stop judges from

[18] G. Petrén, "Våra första advokater", *SvJT* 1947, pp. 1 ff.

[19] S. Jägerskiöld, "Hovrätten under den karolinska tiden och till 1734 års lag (1654–1734)", *Svea Hovrätt, Studier till 350-årsminnet*, Stockholm 1964, pp. 121 ff.

[20] B. Tierney, *Religion, Law and the Growth of Constitutional Thought 1150–1650*, Cambridge 1982, p. 35.

[21] *Op.cit.*, pp. 14, 22.

[22] H. Schnizer, "Die Entscheidungsbegründung im Kirchenrecht", *Entscheidungsbegründung in europäischen Verfahrensrecht und in Verfahren vor internationalen Gerichten*, Univ.-Prof. Dr. Rainer Sprung ed., Vienna/New York 1974, p. 33: "In the middle ages, it was thought unnecessary to give the subjects any justification for authoritative action".

[23] W. Schluchter, *The Rise of Western Rationalism, Max Weber's Developmental History* (translated with an introduction by Guenther Roth, University of California Press), Los Angeles 1981, pp. 82–138.

falsifying natural law. During the 18th century reasons for judicial decisions were demanded of the courts to permit external scrutiny of the judiciary, and perhaps also as part of the intended separation of powers. The duty to give reasons has played a role in taking ultimate judicial power away from the King and the nobility, and has been a means to help circumscribe the power of government.[24]

Working in the same direction, and possibly of greater importance still, was the process by which jurists became professionals. An important consequence of this was that the individual judge became responsible for his decision. Earlier, the reasons now and then given for judicial decisions had only served the purposes of internal judicial checking by higher courts, and to facilitate their work. The more general duty that came about in the 19th century was probably also connected with a growing tendency towards democracy and the coming of the modern scientific outlook.[25]

THE PRESENT SITUATION

The legal systems in France, the German Federal Republic, England, the USA and the Nordic countries all stress the obligation to give reasons for judicial decisions. While this requirement is not expressed in the constitution or constitutional practices of any of these countries, it can be derived at least implicitly from, e.g., the modern German constitution. Constitutional practice in England and in the federal constitution of the USA formulates no requirement for reasoned decisions in judicial proceedings. Several American states, e.g. California, have requirements for written, reasoned decisions inscribed in their constitutions. Further, an obligation under the Federal Rules of Civil Procedure, Rule 52(a), stipulates that federal district courts must specify findings of fact and conclusions of law. There is, however, no similar obligation for the higher federal courts. As regards the state courts, practices vary.

In England, Common Law does not require reasoned decisions. Nevertheless, in several types of cases, e.g. in family proceedings, specified reasons are demanded.

[24] J. Brüggeman, *Die richterliche Begründungspflicht*, Berlin 1971, p. 122.

[25] The connection between scientific and legal objectivity is underlined in O. Brusiin, *Über die Objektivität der Rechtsprechung*, Helsinki 1949, *passim*.

France

In France, lack of reasons (*défaut de motifs*) is a defect of form (*vice de forme*) of the judgment itself. Defects of form must be distinguished from material defects. This is especially important with respect to the difference between *défaut de motifs* and *défaut* or *manque de base légale.* The latter is not a defect of form, but a material defect, meaning that the court has not stated and described the material and/or ultimate facts of a case in a way that permits a reviewing court to check the conformity of the decision with the law.[26]

The grounds must deal with every point of the claim.[27] They may not be unspecific or merely a formality such as "because the claim is just and well founded, the court decides as follows".[28] They should avoid doubt or hypothesis, and must as a matter of principle allow the reviewing court to check the decision.[29] Lack of grounds may lead to invalidation of the decision due to *défault de motif* following appeal under art. 458 of the new Code of Civil Procedure. This is not unusual in the Cour de Cassation.

It is important to distinguish between an *erroneous* statement of reasons and *absence* of reasons. Absence of reasons may lead to *cassation,* but if the reasons are insufficient, superfluous or erroneous this is not always the case. The court may then affirm the decision while rewriting the reasons for it.

As has been said, *défaut de motifs* does not only cover decisions that totally lack stated reasons. If a court has only partially dealt with one point of the ground for the claim, this will make the decision deficient in terms of stated reasons. *Mimin* gives examples where a court must be especially thorough with respect to its reasons for decision. One concerns reasons for accepting or refuting a counter-claim and another concerns objections on grounds of *res judicata* or statute of limitation.[30]

The concept of *excès de pouvoir* is of theoretical interest and is, like much pertaining to the French legal system, a legacy of the Revolution. During the *ancien régime* the superior courts, the *Parlements*, had abused their power by trespassing on the proper territory of legislation and the executive. The National Assembly abolished them in 1789, and the

[26] J. Voulet, "Le défaut de réponse à conclusions", *Juris-Classeur-Périodique, La Semaine juridique* 1976 I, Doctr. 1912.

[27] F.-M. Schroeder, *Le nouveau style judiciaire*, Paris 1978, p. 15.

[28] *Loc.cit.*

[29] *Loc.cit.*

[30] P. Mimin, *Le style des jugements*, 4th ed. Paris 1978, pp. 381 ff.

following year saw the *Décret sur l'Organisation Judiciaire* which with other legislation created a very strict separation of powers. Underlying these reforms was the general dissatisfaction with the *Parlements*, and probably also some influence from Montesquieu.[31] The result was a limitation of the courts' powers. *Excès de pouvoir* has since been developed to include many different abuses of power. A judicial error alone does not constitute *excès de pouvoir*; something must be added to show that the court has clearly acted outside its jurisdiction. The concept aims at various unjustifiable actions on the part of the court, ranging from inappropriate reasons for decisions to the case where a judge has held a hearing at his home and not in the court-room. Interesting here is that a judgment can be vacated if the reasoning in the opinion amounts to an *excès de pouvoir*, even if the outcome of the case is proper.[32] The judge cannot, for example, in his reasons criticize other decisions in a crude way or attack administrative agencies.[33]

Défaut de base légale can, just as *défaut de motifs*, be a cause of *cassation*. But the latter is, as mentioned, not an error of form but of substance, and is present when the ultimate facts of a case have been stated, described or expressed in an incomplete or obscure way which will prevent the Cour de Cassation from checking the decision and its conformity with the law. In one case of damages it was held to be *défaut de base légale* when the facts showing negligence and causality were not stated in the opinion.[34] In another, a court of appeal dismissed a case, stating that an apartment from which an injury had been said to emanate was being used in a normal way (*utilisation normale*), without saying what this meant. The Cour de Cassation thereupon held that the court of appeal ought to have made plain the ultimate facts, and the decision was vacated with reference to *défaut de base légale*.[35]

By *défaut de motifs* and *défaut de base légale* alike, there is a defect in the stated reasons of the judgment. A confusion of concepts is therefore likely. A distinguishing feature would be that *défaut de motifs* means that some part or point of the decision is lacking in stated grounds, whereas *défaut de base légale* is present even if all the ultimate facts are stated, but with insufficient precision.[36] In decisions of *cassation* on the ground of

[31] A.T. von Mehren, *The Civil Law System*, Englewood Cliffs 1957, p. 141, and P. Herzog, *Civil Procedure in France*, The Hague 1967, p. 439.
[32] Herzog, *loc.cit.*
[33] Herzog, *loc.cit.*, and Mimin, *op.cit.*, pp. 242.
[34] Herzog, *op.cit.*, p. 440.
[35] Voulet, *loc.cit.*
[36] Herzog, *op.cit.*, pp. 440.

défaut de base légale, the Cour de Cassation does point out what is missing in the opinion of the decision under review.[37] In *cassation* due to *défaut de motifs* the court, while referring to the relevant rule of grounds, merely states that the decision lacks reasons. *Défaut de motifs*, as a matter of form, can involve legal reasoning or fact finding, or both. *Défaut de base légale* seems to be a concept solely relating to fact finding. If, therefore, a court as the only stated reason for its decision refers to another case, this means that the insufficiency will be a *défaut de motifs*.

In recent years the French way of opinion-writing, and especially the opinions of the Cour de Cassation, have been criticized.[38] The complaints are directed chiefly against those decisions that modify a well-known and accepted principle or rule of law. The critics' point is that the description of the new rule or principle is too sketchy: the law-finding premise of the decision lacks substance compared with, say, American or English opinions.

The critics observe that the opinions in question only state a rule or principle, but do not elaborate the underlying reasons for it, which must have been discussed during the deliberations.[39] This leads to all the negative consequences of very short and non-revealing reasons. The reason-stating is viewed by the critics as only formal, maybe only a facade.[40] The French way of reason-stating also means that only one basic reason is given, while others are seen as superfluous (*surabondantes*).

The Federal Republic of Germany

In the Federal Republic of Germany all judgments have to be reasoned. This follows directly from the law, and is also a well-established legal principle. Generally speaking, the reasons must justify the whole judgment, but totally irrelevant objections or arguments made by the parties may be omitted without refutation in the court's reasoning.[41] *Pakuscher*

[37] Voulet, *loc.cit.*

[38] A. Touffait & T. Mallet, "La mort des attendues?", *Recueil Dalloz Sirey de Doctrine, de Jurisprudence et de Législation* 1968, pp. 123 ff., and A. Touffait & A. Tunc, "Pour une motivation plus explicite de décisions de justice notamment de celles de la cour de cassation", *Revue Trimestrielle de Droit Civile* 1974, pp. 487 ff. See also Schroeder, *op.cit.*, pp. 11–43.

[39] L.V. Prott, "A Change of Style in French Appellate Judgments", *Logique et Analyse* 1978, pp. 51 ff., and Touffait & Tunc, *op.cit.*, pp. 489 ff.

[40] Touffait & Tunc, *op.cit.*, p. 497.

[41] E.K. Pakuscher, "Die Begründung gerichtlicher Entscheidungen", *Deutsche öffentlich-rechtliche Landesberichte zum X. Internationalen Kongress für Rechtsvergleichung in Budapest 23–28 August 1978*, Tübingen 1978, p. 255.

holds the view that trial courts and courts of appeal do write careful and thoroughgoing opinions. This, he thinks, is due to the possibility of further appeal instituted by parties claiming that the decision lacks stated reasons.[42]

Defects in reason-giving are seen as matters of form. Vacating the judgment and remanding the case because of lack of reasons is a risk only if the defect is serious, e.g. if the reasons are incomprehensible, dim or confused.[43] Laconic or insufficient opinions do not lead to vacating the judgment.[44] Too many reasons can mean that the reviewing court will treat some of them as dicta.

The German Constitutional Court has held that reasons for decision must be so exact and thoroughgoing as to allow the reviewing court to check whether art. 103 of the Constitution (*Grundgesetz*) has been followed.[45] This article states that everyone is entitled to *rechtliches Gehör*, in which the court has a duty to deliberate on what the parties have actually put forward. This interpretation has recently been verified in a case between ex-spouses. The former wife claimed higher maintenance from her ex-husband. The ex-husband raised objections, saying that his former wife's lodgings were free of rent; but the courts discussed only her labour market potential and the ex-husband's rent-free lodgings. After complaint from the ex-husband, the Constitutional Court held:

> If the facts of a case show that facts brought forward by a party have not been deliberated upon by the court or have been ignored in the decision, this means a violation of the right of *rechtliches Gehör*.[46]

This is taken as meaning that the reasons for a court decision must always be so exact and thorough as to allow a reviewing court to check the decision against art. 103 of the Constitution. This is probably true only concerning the ultimate facts of a case. The courts are presumably under no obligation to treat all sorts of legal reasoning from the parties equally: it is sufficient that the court's opinion somehow shows that attention has been paid to the parties' arguments.[47] In practice the right

[42] Pakuscher, *op.cit.*, pp. 262 ff.
[43] Pakuscher, *loc.cit.*
[44] Pakuscher, *op.cit.*, p. 265.
[45] A. Baumbach, W. Lauterbach, J. Albers and P. Hartman, *Zivilprocessordnung*, 41st ed. Munich 1983, p. 795.
[46] BVerfG NJW 1980, 278.
[47] F. Becker, "Die Entscheidungsbegründung in deutschen Verwaltungs-, verwaltungsgerichtlichen und verfassungsgerichtlichen Verfahren", *Entscheidungsbegründung* etc. (*op.cit.* footnote 22 above), p. 129.

to *rechtliches Gehör* means that the court will have to consider what it is that the parties are putting forward. A direct right to an exact answer—*Recht auf Antwort*—on every point is not considered a necessary consequence of art. 103.

Turning to the *Bundesgerichtshof* (BGH), the supreme court in civil cases, if this finds that a decision under review violates sec. 551, p. 7 of the ZPO (the code of civil procedure) because of a lack of reasons for decision, the judgment is vacated and the case is remanded. If, on the other hand, the BGH thinks that the reasons are erroneous, but that the case in question has been correctly decided substantively, it will write its own reasons according to sec. 563 of the ZPO while affirming the decision. In an opinion from 1962 (BGHZ 39, 333) the BGH defined absence of reasons for decision as follows:

- the reasons are vague or insufficient, making it impossible to decide the ultimate facts and legal grounds determining the outcome;
- the motivation is just empty talk (*leere Redensarten*) or for example says only "the objection as to statute of limitation is well founded", or states only the relevlant part of a statute with no further comment;
- there is a total lack of findings as to credibility;
- the same applies even where the defect concerns only a specific point of the claim or a specific objection.

To sum up the most important aspect of German law in this matter, legal interpretation in an opinion must be backed by reasons, even though the court is not obliged to go into every detail of its interpretation.[48]

England

Goodhart has suggested three reasons why the English judge never acts arbitrarily:

> The first is that judges sit in open court; there is no secret evidence and no secret arguments to which they can listen. Each side knows what the other has said to the judge. The second point of great importance is that judges give reasons publicly for their judgments. They are a body of experts explaining to a body of experts why they have decided as they did. The third point is that judges act not as a body, but as individuals. Each is free to dissent.[49]

[48] Baumbach *et al.*, *op.cit.*, p. 1093.

[49] A.L. Goodhart, "Procedure and Democracy", *The Cambridge Law Journal* 1964, p. 55.

So the principle of *audiatur et altera pars*, an openly given opinion and the possibility of dissent, make up the backbone of English justice. Regarding the duty to give reasons, there can be three possible grounds for this: constitutionally, in Common Law or as prescriptions in statutory law. Great Britain has no written constitution apart from Magna Carta and the Bill of Rights of 1688 and constitutional principles have developed through constitutional practice.[50] In a few cases from 1890 and 1891 the constitutional duty to give reasons for judgment is mentioned "though there is no appeal", but legal writers have denied this.[51] In one of these cases, *Allcroft* v. *Bishop of London* (1891) A.C. 666, Lord Bramwell stated the following:

> Then it is said why if his decisions cannot be reviewed is he to state his reasons? Lindley L.J. has given an excellent answer to this. It is that he may be under the necessity of forming a careful opinion, and one that will bear public examination. It is like the constitutional duty of judges who give their reasons for their judgment though there is no appeal; as in the case of your Lordships' House, and as formerly the judges of the superior court gave on motions for new trials, for example, and other cases, and as they do now though there is no appeal.

In our time nobody has voiced a similar opinion: that there is a constitutional duty to state reasons for judicial decisions, and indeed unanimity prevails as to the non-existence of a common law duty to state reasons.[52] This opinion is probably based on, among other things, some cases from the 17th and 18th centuries.[53]

The concept of natural justice is of ancient date and plays an important role not only in the courts of law. Over the centuries the English courts have in cases of judicial review often examined, for example, administrative actions in terms of possible violations of natural justice. Natural justice has long entailed at least two maxims: *audi alteram partem*

[50] J.A. Jolowics, *Fundamental Guarantees of the Parties in Civil Litigation*, Mauro Cappelletti and Dennis Tallon eds., New York 1973, pp. 123 ff.

[51] M. Taggert, "Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?", 33 (1983) *University of Toronto Law Journal* 1, p. 13 with references.

[52] Taggert, *loc.cit.*, M. Akehurst, "Statements of Reasons for Judicial and Administrative Decisions", 33 (1970) *Modern Law Review*, p. 154, and A.D. Lawton, "Zu Entscheidungsbegründung im englischen Recht", *Entscheidungsbegründung* etc., p. 423. Cf. J.W. Bridge, "The Duty to Give Reasons for Decisions as an Aspect of Natural Justice", ch. VIII, pp. 81–95 in *Fundamental Duties*, D. Lasok, A.J.E. Jaffey, David L. Perrott, Christina Sachs eds., Oxford/New York/Toronto/Sydney/Paris/Frankfurt 1979. Bridge tries to show that there exists a duty to give reasons, and he adduces many good and persuasive arguments in favour of it.

[53] Akehurst, *loc.cit.*

and *nemo judex in re sua* (listen to both sides, and no one is to be judge in his own case).[54] The courts have specified these components of the concept in their judicial review. Yet natural justice does not entail a right to demand reasoned decisions, inside or outside the courts, even if this would not be out of the way.[55] Two legislative committees on administrative law, the Donoughmore Committee and the Franks Committee, proposed in 1932 and 1957 respectively a right to reasoned decisions as a third principle of natural justice.[56] But this is still to come. The case of *Fountaine* v. *Chesterton* (1968) 112 S.J. 690 states for example:

> In the absence of any requirement by the law that reasons should be given, the mere failure to give reasons could not establish a decision as being contrary to natural justice.

Many exceptions, normally prescribed in statutes, require reasons for decisions. In some singular cases and types of litigation, where a meaningful appellate review is impossible without reasons for decision, the reviewing court may perhaps ask for reasons. The higher courts always give opinions, so in this respect the problem of the lack of reasons does not exist. *Akehurst* has nevertheless argued that the absence of a duty to give reasons is a serious gap in English law. Discussing this question in connection with due process, *Marshall* points out that if natural justice required reasons for decision, this would have meant many decisions being taken against natural justice, so there can be no such requirement. But Marshall does not find this explanation sufficient.[57]

In some cases, statutory requirements impose the duty to give reasoned decisions. The Magistrate's Court is obliged to do so in domestic proceedings under the Domestic Proceedings and Magistrate's Court Act of 1978. These rules require the reasons to be given at the same time as the judgment or order itself. This statute was commented upon in a case on appeal, *Hutchinson* v. *Hutchinson* (1982) 2 F.L.R. 167, 171. After praising the Magistrate's Court's reasons for decision, Sir John Arnold continued:

> That, as I have said, is admirable in the sense that it makes it very easy for an appellant court to pick up the history of the matter, but it is more, far, far more than in my view is necessary and I should have thought far, far more

[54] P. Jackson, *Natural Justice*, 2nd ed. London 1979, ch. 1, *passim*.

[55] On the other hand both Jackson, *op.cit.*, and Bridge, *op.cit.*, underline the importance of reason-giving.

[56] *Committee on Ministers Powers*, Cmnd 4060, 1932, p. 80, and *Report on Administrative Tribunals and Enquiries*, Cmd 218, 1957, p. 24.

[57] G. Marshall, "Due Process in England", *Nomos* XVIII, pp. 78 ff.

> than magistrates are going to have time to do under the new regime if they are going to comply with the rule of giving reasons at the time of their decision on the one hand, and get through a meaningful day's work on the other. This is therefore a convenient case in which to say that, so far as this court is concerned, if magistrates set out their findings of fact on matters which are in dispute on the evidence and then give their account of the reasoning which led them to their conclusion, they will on the one hand be dealing with the matter in a realistic way, in view of the prescriptions of the new rule, and on the other in a way which is acceptable to this court.

This must amount to saying that the Magistrate's Court should state the ultimate facts of the case only, and the legal reasoning leading directly to the outcome.

Erroneous Reasons

In *Ross-Smith* v. *Ross-Smith* (1963) A.C. 280, for example, Lord Reid, p. 293, mentions an earlier case with erroneous reasoning:

> Before holding that the decision should be overruled I must be convinced not only that the *ratio decidendi* is wrong but that there is no other possible ground on which the decision can be supported.[58]

This shows that a case can be affirmed even if the reasoning is wrong as long as the outcome is right, but only justifiable with other reasons.[59] It has sometimes been said that a case can have been decided on a correct or on an erroneous principle.[60] This means that a correct outcome can be the result even if the principle used is a wrong one.[61]

Decisions with a Lack of Reasons

In Common Law, judgment without accompanying reasons is allowed, and therefore it may be that the lack of reasons has no legal significance. This is probably true to a certain extent, but on appeal, as we have seen, the reviewing court may need the reasoning of the inferior court in order to do its work properly. The High Court or the Court of Appeal may very probably under special circumstances judge a decision without accompanying reasons as an error of law.[62] This may be so especially

[58] Cf. R. Cross, *Precedent in English Law*, 3rd ed. Oxford 1979, p. 10.

[59] Taggert, *op.cit.*, p. 3.

[60] C.H.S. Fifoot, *English Law and Its Background*, London 1932, pp. 25 ff., and *Halsbury's Laws of England*, 4th ed., vol. 26, London 1979, "Judgment and orders", p. 296.

[61] Fifoot, *loc.cit.*, and Halsbury, *loc.cit.*

[62] In any case such a possibility exists regarding judicial review by way of certiorari; see for example S.A. de Smith, *Judicial Review of Administrative Action*, 3rd ed. London 1973, pp. 117 ff.; cf. p. 130.

when the inferior court has been careless regarding the fact finding and consequently the ultimate facts of the case are unclear. The higher English law courts do not, on the other hand, formally or systematically examine the reasons for decisions of lower courts, and hence there exists no really effective remedy for lack of reasons.[63] This is so at least outside the area of judicial review of administrative actions, that is when reviewing judgments of lower courts as opposed to the workings of tribunals or agencies. This is, among other things, because opinions are not formally part of the judgment or order or even the record. Even though English courts, as distinct from those of e.g. France or the Federal Republic, lack systematic sanctions against defective or insufficient reasons for appealed decisions, there are cases where higher courts have found it impossible to review a case without any stated reasons, and have then vacated the judgment and remanded the case.

Montrose says that this question has not been given a thorough treatment in English law.[64] He discusses a case from the Court of Appeal, *Craven* v. *Craven*, at the time only published in *The Times*, June 5, 1957.[65] In this appealed divorce case, the wife had claimed in the County Court that her husband had assaulted her six or seven times. The husband had denied this and explained that it was an accident. The Court of Appeal vacated the judgment and remanded the case in spite of the lower-court judgment being accompanied by a lengthy opinion, because the opinion did not state any "sufficiently precise findings of fact".[66] When the case was tried in the Court of Appeal, Lord Justice Hobson said, *inter alia*, that "it is very often a matter of complaint in this court that there are not sufficiently precise findings of fact",[67] and he also complained about the judge of the lower court:

> He had arrived at no conclusion at all as to what on six or seven occasions had in fact happened ... The Commissioner's duty was to make up his mind one way or the other whether that incident was, as the husband said, an accident, or whether it was, as the wife said, an intentional assault and he had failed to do his duty in that respect. Unless he did make up his mind one way or the other on that primary matter, the court was quite unable to deal with it, nor could any proper judgment be reached on this or any other case which depended on findings of facts.[68]

[63] W.J. van der Meersch, "La motivation des jugements", *Xe Congres de l'Académie Internationale de Droit Comparé, Budapest, August 1978*, Brussels 1978, p. 85.
[64] J.L. Montrose, "Reasoned Judgments", 21 (1958) *Modern Law Review* 80.
[65] Montrose, *loc.cit.*
[66] Montrose, *op.cit.*, pp. 80 ff.
[67] Montrose, *op.cit.*, p. 82.
[68] Montrose, *op.cit.*, p. 81.

As Montrose suggests, the point—contrary to Lord Hobson's view—is not whether the judge has made up his mind about the facts of the case or not, but that he did not express the proven ultimate facts in his opinion.[69] Montrose comments that he could not find a precedent either in favour of or against Lord Hobson's demand for explicitly expressed ultimate facts in the opinion.[70] Montrose emphasizes that this case really constituted a new demand on the lower court:

> In the case of *Craven* v. *Craven* the Court of Appeal have now lifted the latch and introduced a requirement for trial judges to give judgments which are reasoned to the extent of stating the findings of fact on which they rely.[71]

Craven v. *Craven* gave birth to a rule for divorce proceedings in contested cases. A judge who does not give "adequate reasons for his decision" runs the risk of the case being remanded for a new trial.[72] Lack of legal reasons, as opposed to fact finding, in opinions has also been sharply criticized by the Court of Appeal. In a complicated case, *Capital & Suburban Properties Ltd.* v. *Swycher* (1976) 1 Ch.D. 319, Judge Buckley stated on pp. 325 f.:

> The judge unfortunately gave no reasons for his decision. This I consider a most unsatisfactory practice. There are some sorts of interlocutory applications, mainly of a purely procedural kind, upon which a judge exercising his discretion on some such question as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural step, or possibly whether relief by way of injunction should be granted or refused, can properly make an order without giving reasons. This, being an application involving questions of law, is in my opinion clearly not such a case. Litigants are entitled to know on what grounds their cases are decided. It is of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved. And this court is entitled to the assistance of the judge of first instance by an explicit statement of his reasons for deciding as he did. In the present case we happen to know from a transcript of the argument what submissions were made to the judge. We may infer, but we cannot know, that the judge preferred those presented by counsel for the vendors to those presented by counsel for the purchaser. The judge ought not to have spared himself the trouble of expressing his reasons for deciding as he did.

In this case the Court of Appeal thus had to guess as to the reasons and then to try and verify or refute them.[73]

[69] *Loc.cit.*
[70] Montrose, *op.cit.*, p. 82.
[71] Montrose, *op.cit.*, p. 81.
[72] Bridge, *op.cit.*, p. 85, note 50.
[73] See this case, Sir John Pennycuick, p. 329.

The USA

Among the federal courts of the United States of America there exists no duty to give reasons for decisions except in district courts.[74] Under Rule 52(a) of the Federal Rules of Civil Procedure district courts must state findings of fact and conclusions of law in civil cases tried without a jury. This seems to mean that a district court is obliged at least to state the ultimate facts.[75] Concerning state courts, the question is more complex. *Dawson* says that Federal Rule 52(a) mirrors the situation in many states as well.[76] Courts in several states have a constitutional duty to write opinions.[77] Other states have this requirement in ordinary statutory law.[78] Most states, however, have no such requirements, and in the states that do, the rules are either directory or mandatory.[79]

Generally speaking, the rules are possibly interpreted as requiring the courts to write reasons for their decisions where this is necessary for review by a higher court. The rationale of these rules is, as stated earlier in connection with the Constitution of California, the supposed important functions of reasoned decisions.

Due Process of Law

The concept of due process of law has a long history, beginning with Magna Carta in 1215.[80] At first the text ran "*per legem terrae*", but in 1354 this became "*par due proces de lei*". Today due process, in English law, is replaced by natural justice and the rule of law.[81] In the United States, however, due process of law is very much alive. In the federal Constitution, due process is the subject of the Fifth and the Fourteenth amendments. The Fifth states: "no person shall be ... deprived of life,

[74] *Snyder* v. *U.S.*, 674 F. 2d 1359 (10th Cir., 1982). See also Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C.A., p. 30. Cf. the federal cases *Taylor* v. *McKeithen*, 407 U.S. 191, 196 (1972) and *Mildner* v. *Gulotta*, 405 F. Supp. 182, 215 (EDNY 1975) affirmed 425 U.S. 901 (1976).

[75] Cf. 1 F.R.D. 83 and Taggert, *op.cit.*, pp. 8 ff.

[76] Dawson, *op.cit.*, p. 87, note 32.

[77] For example Arizona, Indiana, California, Michigan, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah, Virginia, West Virginia and Washington.

[78] For example Idaho, Illinois, Kansas, Minnesota, Nevada, New York, Tennessee, Wisconsin and Wyoming.

[79] Cf. from Indiana, *Cichos* v. *State*, 210 N.E. 2d 363 (1965). In Louisiana, with legal roots in the French tradition reason-giving has been considered necessary in some cases, see for example *Dorr* v. *Jouet*, 20 La. Ann 21, 1868 and *Erdal* v. *Erdal*, 21 So. 2d 337, 1946.

[80] Ch. A. Miller, "The Forest of Due Process of Law: The American Constitutional Tradition", *Nomos* XVIII, pp. 4 ff.

[81] Marshall, *op.cit.*, p. 69.

liberty, or property without due process of law", and the Fourteenth: "nor shall any state deprive any person of life, liberty, or property without due process of law".

The important thing about this concept, *Miller* says, is the idea that citizens shall be protected from arbitrary governmental action.[82] Due process has at least two sides, a substantive and a procedural. The substantive side deals with government actions permissible against a person; but what is more important in this context is the procedural side especially if, according to due process of law, the giving of reasons for decisions is considered necessary. This question will be discussed with reference to three cases, two of which concern reason-giving by the courts, and the third reasons for decisions in matters of judicial review of administrative action. The question has been treated differently depending on the setting. In the first two cases, due process appears not to require reasons for decision, but in the third the opposite would seem to obtain, at least as a dissenting opinion.

In *Mildner* v. *Gulotta*,[83] 1975, the United States Supreme Court affirmed the decision of a federal court without stating any reasons. Two Federal Court Justices had found that, in judicial proceedings, there was no right to "reasons" or "new findings". It was also pointed out that the arguments from one of the parties—supporting the requirement for reasons—dealt only with case law relating to judicial review of administrative action, and this, it was said, was to be treated differently from judicial proceedings proper.

This case on review was followed by a long dissenting opinion from Weinstein J., a member of the federal bench deciding the case before it reached the Supreme Court. Weinstein argued that even in judicial proceedings a requirement for reasons must be met.[84] He offered arguments to show that reasons were necessary for the parties and the judicial community, and added that reason-giving forced the judge to analyse the case and articulate the foundation of the decision. Concluding this part of his opinion, Weinstein states:

> All judges are aware that this sometimes convinces us that our original, tentative, conclusion was unwarranted.

Further on, Weinstein argues the necessity for administrative agencies to give reasons analysable on judicial review, and he shows that in this

[82] Miller, *op.cit.*, p. 3.
[83] 405 F. Supp. 182 (EDNY 1975) affirmed 425 U.S. 901 (1976).
[84] *Mildner* v. *Gulotta*, pp. 251 ff.

area the courts demand reasons. Therefore, he concludes, such a requirement ought to be laid on the courts, too.

From *Mildner* v. *Gulotta* one may conclude that in judicial proceedings there is no explicit requirement that reasons for decisions be given even if, as Weinstein argued, there are good grounds for such a demand. In the other case, *Harris* v. *Rivera*, the Supreme Court stated as a dictum:

> Although there are occasions when an explanation of the reasons for a decision may be required by the demand of due process, such occasions are the exceptions rather than the rule.[85]

In this instance the court also referred to an earlier case, *Connecticut* v. *Dumschat*,[86] saying that the need for reasons is less urgent if other procedural safeguards have minimized the risk of unfairness. This is most often the case in traditional criminal and civil cases, a conclusion which is substantiated by two further cases, also mentioned in this instance in support of the notion that due process very rarely demands "explanations of the reasons for a decision".[87]

In *Board of Regents* v. *Roth*,[88] concerning judicial review, university teacher David Roth had been hired on probation with no right to extended employment. After the probation period, Roth did not get renewal and when he asked the university board for reasons, he got no answer. Roth suspected that his dismissal was occasioned by his previously having criticized the university administration, and he therefore demanded judicial review in a federal district court on grounds of, *inter alia*, his right to free speech. Also, he stated that he had not been heard and that this, and the lack of reasons for the decision, were contrary to due process of law.

The district court held that the university board had to hold a hearing and to give Roth the reasons for its action. The Court of Appeal affirmed this decision, albeit with one dissenting judge. The majority of the Supreme Court thought otherwise. Under the Fourteenth amendment, which only protected "liberty" and "property", Roth had no right to extended employment.[89] One of the two dissenting justices, Mr Justice Marshall, contrary to the other justices, treated the issue as directly involving a right to receive reasons for the university's action, and in his opinion discussed such a right in different situations. Marshall

[85] *Harris* v. *Rivera*, 425 U.S. 339, 344 (1981).
[86] *Op.cit.*, p. 344 note 11.
[87] *Morrissey* v. *Brewer*, 408 U.S. 471, 488–489 (1972) and *Wolf* v. *McDonnell*, 418 U.S. 539, 564–565 (1974).
[88] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).
[89] *Op.cit.*, p. 569.

seems to have understood a right to reasoned decisions to have been entailed in the due process clause, and he argues with reference to the duty to give reasons:

> It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. 'Experience teaches ... that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.' [*Silver* v. *New York Stock Exchange,* 373 U.S. 341, 366 (1963).] When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Justice Marshall ends his opinion by voicing the arguments of Professor Gellhorn:

> In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice *Jackson* saying: 'Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice—blunders which are likely to occur when reasons need not to be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own ...' [Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law, 70, 73 (1961).]

The majority of the Supreme Court, however, decided the issue in the negative, pointing to the substantive side of due process, that is the concept of "liberty" and "property", while Justice Marshall laid his emphasis, as we have seen, on the procedural side.

Erroneous Statement of Reasons

In principle, an erroneous opinion or statement of reasons does not have any legal consequences for a case. The judgment may, on review, be affirmed by a higher court, even if only the decision, but not its reasons, is acceptable. This principle is stated in *Corpus Juris Secundum*:

> The appellate court will affirm judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent from the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such

> ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.[90]

If the decision is wrong, the reasons do not matter, and if the decision is right it does not matter if it is based on "an insufficient, unfounded, unsound or erroneous ground, reason or theory".[91]

Absence of Reasons or Incomplete Statements of Reasons

A duty to provide reasons for federal court decisions is only a faint possibility according to due process of law, and for federal district courts conforming to Rule 52(a). Despite this, as will be shown below, the higher federal courts may require reasons and will then not accept their absence. Again, the important point is whether, in reviewing the case, the higher court can check the decision of the lower court. If this is not meaningfully possible because the reasons for the decision have not been given, the reviewing court may remand the case, even if there is no formal duty for the lower court to state its reasons.

In *Scovill* v. *United States Mfg.*, the court stated that one of the intentions behind the new Rule 52(a) was to substitute "a considered opinion on the facts or law" for fact finding and conclusions of law.[92] The importance of fact finding is underlined in the case of *Forness*,[93] 1942, where it is stated that careful fact finding is the best way for the court to avoid mistakes in its work. The case also shows that (ultimate) facts are to be established at district court level, and that courts of appeal on review are bound by the fact finding of district courts, except where there are clearly erroneous findings. The purpose of fact finding is to enable the court to state at least the ultimate facts of a case, and this means, *inter alia*, that "there must be findings, stated either in the Court's opinion or separately, which are sufficient to indicate the factual basis of the ultimate conclusion".[94] If the district court cannot do its

[90] *Corpus Juris Secundum*, vol. 5, No. 1641(1), p. 654. Cf. *Standard Accident* v. *Roberts*, 132 F. 2d 794 (8th Cir., 1942). *Southard* v. *Southard*, 305 F. 2d 730 (2nd Cir., 1962) and *Massachusetts Mutual Life* v. *Ludwig*, 426 U.S. 479 (1976); cf. also P. Herzog & D. Karlen, "Attacks on Judicial Decisions", *International Encyclopedia of Comparative Law*, vol XVI, ch. 8, TTubingen/The Hague/Boston/London 1982, p. 33.

[91] *Corpus Juris Secundum*, *loc.cit.*

[92] *Scovill Mfg. Co.* v. *United Stated Electric Mfg. Corp.*, 31 F. Supp. 115, 117 (SDNY 1940).

[93] *United States* v. *Forness*, 125 F. 2d 928, 942–943 (2nd Cir., 1942). Cf. "The Law of Fact: Findings under the Federal Rules", 61 *Harvard Law Review* 1434 (1948). This article deals with the possible functions of Rule 52(a).

[94] *Snyder* v. *U.S.*, 674 F. 2d 1359 (10th Cir., 1982).

fact finding properly, framing the relevant questions of a case, the appellate court will be unable to make a review, and this may lead to the appellate court remanding the case for renewed, proper fact finding. This problem has been stated as follows:

> Findings must be sufficiently detailed and exact so as to permit an intelligent review. An intelligent review must be based on substance, not on guess.[95]

In another case a similar requirement ran:

> It is not the function of an appellate court to read the transcripts of the evidence for the purpose of determining the essential facts before applying the law of the case ... On the present state of the record before us, that is exactly what we would be required to do in order to dispose of the case on this appeal.[96]

This case was remanded for proper treatment in accordance with Rule 52(a).

Fact finding is supposed to decide the factual ground of the decision, and this means that all the relevant questions of a case must be dealt with. However, this does not require special fact finding for every detail of relevance. If the fact finding is inadequate, the decision is not acceptable, because the reviewing court cannot decide if the record supports the outcome or not. If, through the record, it is possible for the reviewing court to make a complete and fair resolution of the issues, then the case will not be remanded.[97] Usually, all facts mentioned in the record and relevant to the outcome are presumed to have been given due consideration by the lower court, even if they are not mentioned in any formal opinion.

As we have seen, the federal courts of appeal in the United States have no formal obligation to write opinions, but nevertheless they do so. One of the main tasks of appellate court work, it is said, is, with the help of opinions, to declare the law. The courts of appeal have, in their rule-making function, the power to decide when they themselves should write opinions. Here, Rule 21 of the United States Court of Appeal, Fifth Circuit, specifies the circumstances under which a decision from a lower court can be affirmed without an opinion of the appellate court. These circumstances are, e.g., that the fact finding is not clearly errone-

[95] *Commercial Standards Insurance Co.* v. *Liberty Plan Co.*, 283 F. 2d 893, 894 (10th Cir., 1960).
[96] *Woods Construction Co.* v. *Pool Construction Co.*, 314 F. 2d 405, 407 (10th Cir., 1963).
[97] *Hoobs* v. *Wisconsin Power & Light Co.*, 250 F. 2d 100 (7th Cir., 1957).

ous, no error of law has been committed, and the court also considers an opinion would be valueless as precedent.[98]

In *N.L.R.B.* v. *Amalgamated Clothing Workers*, the whole opinion is devoted to the meaning of Rule 21 in facing a threatening flood-tide of appeals. In a *per curiam* opinion, Chief Justice Brown explains the rule and the functions of reasons in appellate court opinions. The reasons, according to Brown, fulfil several good functions, but the most important are: to explain the outcome of the case, i.e. why this outcome and not another one, and to make law, that is judge-made law:

> Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly judge-made law—grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. All judges know that in some cases this latter factor may almost completely transcend the importance of the case which is the vehicle bringing the question forward.[99]

Finally Brown in his opinion underlines that Rule 21 should never be used to avoid or hide troublesome issues:

> The Court recognizes that it must—the word is must—never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues.[100]

There is, however, scant consensus on the question of whether an opinion is necessary from an appellate court. This has been recently demonstrated in the Supreme Court. In *Taylor* v. *McKeithen* the hard issue concerned the range of four voting districts for the State Senate of Louisiana.[101] Possibly to stop the impact of coloured voters, the boundaries had been drawn in a certain way. The Attorney General of the United States opposed this, referring to some recent changes in the Voting Rights Act, and the federal district court appointed a special investigator to hold a hearing. The investigator came up with a proposal which was accepted by the district court, but the Louisiana Attorney

[98] *N.L.R.B.* v. *Amalgamated Cloth. Wkrs. of Amer., AFL-CIO*, L. 990, 439 F. 2d 966, 968 note 2 (5th Cir., 1970).
[99] *Op.cit.*, p. 972.
[100] *Loc.cit.*
[101] *Taylor* v. *McKeithen*, 407 U.S. 191 (1972).

General put forward a counter-proposal. The district court found that the counter-proposal "would operate to diversify the negro voting population", whereas the proposal of the court's investigator "would at least give the blacks 'a fair chance' in two out of four districts". On appeal, the Court of Appeals, Fifth Circuit, overruled the decision of the district court and accepted the counter-proposal without giving any reasoned opinion. The Supreme Court, granting certiorari, found that the appellate court's decision could be motivated in different ways and the majority of the Supreme Court wanted an opinion from the appellate court to clarify the matter:

> Because this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals, we grant the petition for writ of certiorari, vacate the judgment below, and remand the case to the Court of Appeals for proceedings in conformity with this opinion.[102]

Three out of the nine justices were of dissenting opinions, and Justice Rehnquist, as he then was, wrote speaking for the dissenters:

> The short recitation of specific facts in the Court's opinion makes it clear that the issues in this case, as viewed by both petitioners and respondents, are well developed in the record. The federal questions adverted to by the Court in its opinion are undoubtedly important ones. They are either presented by the proceedings below on this record, or they are not; this Court, in exercising its certiorari jurisdiction, may wish to consider such problems as presented in this case at this time, or it may not. While an opinion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential. I do not believe that the Court's vacation of the judgment below with a virtually express directive to the Court of Appeals that it write an opinion is an appropriate exercise of this Court's authority.[103]

Rehnquist goes on to say that there was no obligation for federal appellate courts to give reasons for their decisions, and that the case under review was not contrary to Rule 21, which had been created by the appellate court in question. He continued by stressing that appellate courts needed all the help they could get to manage "the flood-tide of appeals", and ended his dissenting opinion:

> If there are important questions presented in this record, this Court should address itself to them. Instead of doing that, it calls upon the Fifth Circuit to write an amicus curiae opinion to aid us. I think decisions as to whether opinions should accompany judgment of the courts of appeals, and the

[102] *Op.cit.*, p. 194.
[103] *Op.cit.*, p. 195.

> desirable length and content of those opinions, are matters best left to the judges of the court of appeals. I therefore dissent from the order of vacation and remand.[104]

In *Northcross* v. *Memphis Board of Education*, the Court of Appeals for the Sixth Circuit, seemingly against the standard rule, did not grant fees to the attorneys on the winning side.[105] The Supreme Court evidently could not understand this:

> Since it is impossible for us to determine whether the Court of Appeals applied this standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment below insofar as it relates to the denial of attorney's fees, and remand to the Court of Appeals for further proceedings consistent with this opinion.[106]

Finally, something must be said about lack of reasons for decisions in state courts. An almost self-evident principle seems to prevail, viz. that higher state courts demand reasons in appellate review if reasons are necessary for them to try the case in a meaningful manner.

In *Siravo* v. *Siravo,* a Rhode Island case concerning maintenance, the judge of first instance was considered erroneous in not giving his reasons for disbelieving information laid by one disputing party but not contested by the other.[107] As a consequence, the case was remanded.

In *Hoult* v. *Kuhne-Simmons* from Illinois the reviewing court expressed its dissatisfaction as follows:

> Parenthetically, we regret that the trial court neglected to state the reasons for his holding. They would have been helpful on review. As we—and other courts—have noted upon prior occasions, trial courts should enumerate the reasoning that underlies their decisions. Everyone is entitled to know why a court does what it does—the litigants, the attorneys, the public at large, reviewing courts, and legal history in general.[108]

This case was remanded for another reason, namely that new grounds were put forward by one party in the appellate court, and these ought to be tried at trial-court level first.

Also, in *Love* v. *Bachman,* Maryland, the appellate court voiced its irritation at being forced to guess at the decisive reasons of the lower court.[109] Finally, in an opinion given when remanding a case, the Supreme Court of Delaware held that the parties had a right to know

[104] *Op.cit.*, p. 196.
[105] *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973).
[106] *Op.cit.*, pp. 428 f.
[107] *Siravo* v. *Siravo*, 424 A. 2d 1047 (RI 1981).
[108] *Hoult* v. *Kuhne-Simmons Co.*, 381 N.E. 2d 403 (Ill. 1978).
[109] *Love* v. *Bachman*, 308 A. 2d 404 (Sp. CA. App. Md. 1978).

the reasons for a judicial decision and that the appellate court could not do its job properly if the lower court had omitted its reasons.[110] In another opinion from the same court, reasons for decisions were said to be a part of a court of law as an institution, meaning that "proper judicial action" by a court entails stating reasons for decisions as well.[111]

The Nordic Countries

Norway

According to *Tvistemålsloven* (the Act on Civil Procedure) and Norwegian tradition, the judge is not forced to state his findings, but may state just the result, i.e. the ultimate facts of the case. If the case, however, is centred around a specific question of law or fact, the court will have to justify its result.[112] *Tvistemålsloven* does not express a mandatory requirement that legal reasoning be formally stated in every case,[113] but if the sort of question just mentioned is contested, or unclear, reasons must be given, and they should be thorough.[114] Note that both lack of fact finding and incomplete legal reasoning may be considered to be errors of law, leading to vacation of the judgment and remanding of the case.

A reviewing court can affirm a decision without stating reasons, but when reversing a decision, the court gives its reasons for altering the outcome.

According chiefly to Norwegian case law, *manglende domsgrunner* (lack of motivation) can lead to remand. For example, interpretation of the law or of precedent(s) ought to be accompanied by reasons, which should show whether the court is weighing a principle or merely considering the closer circumstances of the case.[115] It is not enough for the court to state an ambiguous interpretation of law, at least not if one of the possibilities is erroneous. The reasons for the decision must make it clear whether it is based on a certain interpretation.[116] Further, they must show that the case has been decided on "correct legal principles"

[110] *General Motors* v. *Cox*, 303 A. 2d 55, 57–58 (Del. 1973).
[111] *Ademski* v. *Ruth*, 229 A. 2d 837, 838 note 1 (Del. 1967).
[112] H.M. Michelsen, "Domskrivning i sivile saker", *Ret og Rettssal, Et Festskrift til Rolv Ryssdal*, Oslo 1984, p. 396.
[113] Michelsen, *op.cit.*, p. 237, and A. Bratholm & J. Hov, *Sivil Rettergang*, Oslo 1981, p. 396.
[114] Michelsen, *op.cit.*, pp. 237 ff.
[115] 1950 NRt 393.
[116] 1951 NRt 1159 and 1952 NRt 1152.

(*riktige rettslige prinsipper*) with reference to case law.[117] Even reasons with so-to-speak general defects, for example vagueness, are noted with disfavour by the reviewing court.[118]

Thus is can be concluded that Norwegian law attaches a systematic import to reasons for decision and fact finding.

Denmark

In Denmark, the courts traditionally write short and very "concrete" opinions. An explanation for this practice is that the courts would otherwise have difficulties in foreseeing the consequences of their decisions.[119] Another reason has been touched upon by Danish Supreme Court Justice Tamm, who has referred to the fact that Danish civil law is still largely uncodified, and that precedents have by no means the same influence as they do in Anglo-American Common Law. So in the absence of a more pronounced precedental influence and a wholly codified civil law, reasons for decisions must be rooted in the common-sense of the concrete situation and in practicability.[120] A scholar has explained this phenomenon by suggesting that Danish courts administer what he calls "concrete justice" (*den konkrete retfaerdighed*), and this can accordingly be seen in the reasons for their decisions.[121]

On review erroneous reasons have no other consequence than the higher court writing its own reasons. The same applies when reasons are not stated in civil cases. Such deficiencies lead only to criticism from the reviewing court in, for example, the following way:

> It cannot be accepted that a judgment from a court of first instance, contrary to what is prescribed in *Retsplejeloven* (the Code of Procedure), sec. 218, is not accompanied by reasons.[122]

The question still remains, however, whether vacation of the judgment and remanding of the case is at risk on grounds of lack of reasons (*manglende begrunnelse*) only. Annulation of judgment is not mandatory in these cases, and probably no such case in civil litigation has been published since *Retsplejeloven* came into force in 1918. (Criminal procedure is here, of course, a totally different matter.) For civil procedure, reparation is preferred to annulation. Matters of form, on the whole,

[117] 1978 NRt 871.
[118] 1956 NRt 1227.
[119] *Juridisk grundbog*, vol. 2, 2nd ed. Copenhagen 1981, p. 343.
[120] H. Tamm, "Om affattelse af domme", *UfR* 1947, p. 255.
[121] B. Gomard, *Civilprocessen*, 2nd ed. Copenhagen 1984, p. 398.
[122] 1929 UfR 370.

are given significance by Danish courts only if deficiency of form has influenced the outcome of a case.[123]

Sweden

According to *Rättegångsbalken* (the Code of Procedure), a judgment shall be reasoned. The reasons must contain both the fact finding and the legal reasoning.[124] The Code of Procedure does not explicitly demand of the court to state whether, for example, credibility-findings or legal reasoning have been decisive, but nonetheless the courts regularly explain this. The ultimate facts of a case must at any rate be stated by the court; otherwise it is impossible to tell how the court has decided the case. Views on how to write reasons for decisions are divided, except that it is commonly agreed that the court is not obliged to state more than is necessary to decide the issue crucial for the outcome. Contrary to, for example, Anglo-American courts, a Swedish court, which could base its decision on either of two lines of reasoning or both, chooses just one, usually the simpler.

Erroneous reasons and lack of legal reasoning have no consequences other than that the reviewing court rewrites the reasons. Deficient fact finding may lead to an incomplete motivation, but this too can be corrected by the reviewing court. If, on the other hand, the fact finding is gravely defective, this may, as a rare exception, be of consequence for a case on review: if the deficiency makes it impossible for the reviewing court to examine the case and so to check the judgment, vacation and remand are possibilities open to the reviewing court. However, support for this contingency is but weak in Swedish procedural law.[125]

CONCLUSIONS AS TO THE PRESENT STATE OF AFFAIRS

The duty to state reasons for decisions manifests itself today with few exceptions as a statutory duty, and also as critical comments from reviewing courts, sometimes followed by vacating of judgment and remanding of the case even if the Code of Procedure in question does not explicitly prescribe these sanctions. The common bases for this

[123] Gomard, *op.cit.*, pp. 166 ff., and J. Mathiassen, "Om formelle mangler", *Juristen & Økonomen* 1976, pp. 220 ff.

[124] N. Gärde, Th. Engströmer, T. Strandberg and E. Söderlund, *Nya rättegångsbalken*, Stockholm 1949, p. 186.

[125] 1983 NJA 581, 1987 NJA B 3, and 1987 RH 69.

practice are everywhere the same: the sheer utility of reasoned decisions.

Of all the legal orders discussed above, only English Common Law and the American federal appellate courts have no rules requiring the stating of reasons for decisions. There would seem to be at least two grounds for explicit rules. Their mere existence will pave the way for the courts' complying with their, viz. the legislator's, intent. Such a legal rule or norm also serves as a specific point of reference for a reviewing court which, when criticizing a lack of reasoning, may declare it to be a breach of this rule. On the other hand, it is in the last instance the courts themselves that decide the scope of such rules, though the legislator can connect some legal consequence or other to breaches. Yet the types of rules here under discussion can now and then be seen as improper interference with the courts' legitimate and traditional freedom and, besides, a rule of mandatory stating of grounds, if covering a largeish area of different court decisions, must of necessity be rather vague. As a matter of principle, such a rule can only prescribe that the fact finding and legal reasoning of the court be complete. In the grounds of legal decisions form and substance, procedural form and substantive law, meet. Therefore it is wrong to see the grounds as a matter of form alone. The form influences the substance, and, as it has been rightly said in an English case, a defect in motivation is "a material matter of form".[126]

Erroneous Statement of Reasons

In civil procedure, at least, an erroneous statement of reasons only leads to the reviewing court rewriting the written grounds with the right reasons. A quite small exception to this rule is seen in French law. When part of a court's opinion is found to be an *excès de pouvoir*, the decision may be declared void (*cassée*) even if the outcome of the case can be considered to have been the right one. This peculiarity of French procedure, that is to vacate judgment based on certain inappropriate arguments as expressed in the opinion, has of course a historical background.

Omission of Reasons

Regarding the legal reasoning behind the decision, the specific requirements differ from country to country. One thing, however, they have in common is the necessity of stating the ultimate facts of a case.

[126] *Re Poyser and Mill's Arbitration* (1964) 2 Q.B. 467, 468.

Procedure and Reasoning

It would be an over-simplification merely to conclude that the requirement to state reasons has a stronger position in those countries where it is prescribed by law and where breach leads to consequences in the handling of the case. While this is true, the answer may change if the whole range of the law of procedure is taken into account. For instance, a weakness in the reason-giving requirement may be compensated for: the reason-giving can assume a different standing and significance through other rules of procedure. So, to decide the point, one has to look at the respective procedures in general.

Somewhat idealized, the three types of procedure of present concern are: *cassation*, *revision* and *appell*.[127] The meaning of these concepts is basically tied to the highest court of each system, where the differences are most clearly seen. In a system of *revision*, the highest court tries only questions of law. In the system of *cassation* it considers only whether judgments are in conformity with the law, and those that are not can be vacated (*cassés*). A system of *appell* on the other hand, through its highest court, tries both questions, law and fact. Generally speaking, Germany, the United States and England have systems of *revision*, while France as its supreme court has the well-known Cour de Cassation. For civil procedure, the Nordic countries, to a certain extent, have *appell* systems, but always with some rules of certiorari.

Evidently, the Cour de Cassation only tries the legality of the decision, or rather, its conformity with the sources of law. For this task it is necessary that the lower court has stated both the legal norm applied and at least the ultimate facts in a rather precise way. If it has not, a check by the Cour de Cassation is rendered impossible. In cases of deficient fact finding, the unsatisfactory reasons would amount to *manque* or *défaut de base légale*, and other deficiencies could mean a *défaut de motifs*. Consequently, a judgment is impossible to try unless it is accompanied by clear statements of the facts and of the legal reasoning, however short these may be.

In a system of *revision*, where the highest court tries questions of law only, it is often difficult to separate these from questions of fact, and sometimes such courts will try mixed questions of law and of facts. To be tried, the judgment must be accompanied by at least the ultimate facts and some hints as to the legal reasoning behind the decision. In *appell*, finally, as a minimum, the ultimate facts must have been stated by the

[127] "Appell" comes from the Latin "appelare", and is here a name for a system where the highest or the higher courts try questions both of law and of fact.

lower court, again, of course, to allow a meaningful trial by the highest court.

In the system of *cassation*, then, the judgment itself and the reasons lie at the heart. Defects in form are of direct relevance for the Cour de Cassation, which so-to-speak tries the judgment itself including its grounds. In the system of *revision*, these are of less overwhelming importance, while in the system of *appell*, the ultimate facts are of the greatest importance, even if the appellate court reviews the whole case, questions of law and of fact alike.

Despite different tendencies in the different codes of procedure, the treatment of reasons and fact finding accords well with them, forming part of the respective systems to which the codes belong. Thus in a system of *cassation*, deficiencies in the written grounds are destructive to review, and indeed to the judgment itself. In a system of *revision* this is not always the case, and in the *appell* system it is even less so.

Only Norway is in a sense an exception to this coherence within the treatment of defective and/or lacking reasoning and fact finding in different procedural systems. In civil cases, Norway has a procedure of *appell*, but the treatment of deficient reasons is in some other respects similar to what happens in a system of *cassation*, i.e. the matter is determined by the higher courts in somewhat the same way as in France.

CONCLUDING REMARKS ON THE GENERAL SIGNIFICANCE OF REASONS FOR JUDICIAL DECISIONS

All in all, it may be argued that the Rule of Law is greatly promoted by a procedural trinity:

1. the audiatur principle (*audiatur et altera pars*), which in England and America forms part of natural justice and due process of law;
2. explicit reasons and fact finding;
3. the right to appeal.

Explicitly stated reasons play an important role in ensuring that the court has acted on the audiatur principle and, when the reasons are bad-in-law, the right to appeal is the remedy. Consequently, other basic principles of procedural law limit the questions before the court: the audiatur principle ensures that the parties to the case are informed of relevant rules and facts and, lastly, the reasons and fact finding of the court show the parties what material has been considered and why. This underlines the significance of the obligation to state reasons and findings on the practical level of legal procedure. Yet the stating of reasons

has several functions, and its utility can also be made explicit on the level of legal theory.

The stating of reasons for decision has a justifying function, since justification means giving proper reasons for legal decisions. The reasons are guides to the judge, before a decision is taken, as well as tools for subsequent justification and legitimation. It is from this perspective that the functions or value of facts found and reasons given must be understood. Reasons and reasoning in judicial decision-making are of societal utility as well as of significance with regard to the parties to a dispute.

Morally, the reasons constitute a justification of power, and that power can be used only within the bounds of its justification. Western democracy assigns a central position to the individual. This is manifest in the constitutions of different countries. The individual is to be treated with respect, and a person's self-respect is for the good of society. Hence the authorities are under an obligation to give full information to an individual who is adversely affected by their decisions. The reasoned decision is the means of setting the faculty of reason against power.

Constitutionally, a reasoned decision helps to integrate law and justice in society and to differentiate between legislation and legitimate judicial decision-making. This is accomplished by the courts having to specify why they are acting in a certain manner, since the reasons given make it possible to see whether the courts are trespassing on legislative territory. A democracy works through a hierarchy of decision-making from the parliament downwards. Arguments reveal how the courts implement legislation and, consequently, whether what is termed the democracy of legislation actually works. The opinions of the courts also form part of the democracy of judicial decision-making. Judges have to justify their use of power, and the obligation to state reasons limits that power.

The Rule of Law and the objectivity of judicial decision both benefit from the practice of reason-giving. A judge's obligation to justify his judgment using only legitimate arguments will affect the outcome of the case to a certain extent. Judges maintain that certain outcomes of cases "won't write" and that they therefore have to seek outcomes that would.[128] This may be interpreted as an interaction between the justify-

[128] For example J.M. Landis, *The Administrative Process*, Yale 1938, p. 106: "Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend". Cf. E.L. Haines, "Obligation of Magistrates to Give Reasons

ing reasons for a decision and its outcome. Even the concept of "justice" or, at least, that of the Rule of Law (*Rechtssicherheit*), requires reason-giving from a conceptual point of view, since the principle of universality demands that whoever treats two persons unequally must state why. This represents a deepening of the maxim of justice: it is not enough for justice to be done—justice must be seen to be done.

Scrutiny and criticism are much helped by stated reasons. Reasoned decisions are subject to criticism and checking by the inner workings of the court, by the media and by the general public and also, through being debated, become the vehicles of change and improvement.

Interpretation of laws is accomplished by reasoned decisions which can create principles of practice and motivated exceptions from those principles; and the interpretation is centralized through the highest courts.[129]

The ability to make new rules is much helped forward by reasoned decisions.[130] Opinions may be the material out of which new legislation will emerge.

The doctrine of precedent is, of necessity, dependent on reasons for decisions, and these create precedents in at least four ways: (1) the availability of reasons inclines other courts to follow the decision; (2) reasons make it easier to follow a precedent; (3) reasons operate with the force of authority; (4) the reasoning may back up substantive reasons for later court decisions.

Dissenting opinions fulfil many of the most important functions of judicial opinions. They work as checks and balances within the court, enhancing its capacity, including vigilance against judicial lethargy.[131] They have also been declared to be powerful weapons against error, helping to delimit actual law in a certain case.[132] Individual cases benefit from the possibility of dissent because judges can work more carefully and can better consider the weight of different legal arguments. The

for Judgment", *Canadian Bar Journal* 1:55 (1958), p. 57, R. Traynor, "Some Open Questions on the Work of State Appellate Courts", 24 *Chicago Law Review* 211 (1957), p. 218, A. Ulman, *A Judge Takes the Stand*, New York 1933, p. 197, and M. Waline, "La motivation des décisions de justice", *Studia in honorem G. Andredis*, Athens 1973, pp. 545 ff.

[129] D.A. Thomas, "Sentencing: 'The Case for Reasoned Decisions'", *Criminal Law Review* 1963, pp. 246 f.

[130] Dawson, *loc.cit.*, suggests for example that the "power to make new rules was mainly due to the requirement of reasoned opinions".

[131] K. Nadelman, "The Judicial Dissent: Publication v. Secrecy", 8 *American Journal of Comparative Law* 415 (1959), p. 430, and J.W. Carter, "Dissenting Opinions", 4 *Hastings Law Journal* 118 (1953).

[132] Carter, *op.cit.*, p. 119.

reader of a decision with dissent will usually obtain a more accurate idea of the problem involved than he will from the same decision without a dissent. As regards the parties concerned, the reasoned opinion provides information and the possibility of checking, which clearly can be decisive when considering whether to appeal.

Crude legal realism does not think much of legal opinions. At worst, they are regarded as rationalized "hunches" on the part of the judge, explaining nothing and being a mere pretence, not giving the real reasons for a decision. The present standpoint, however, is that reasons given are justificatory, both guiding the judge towards the outcome and justifying it.[133] The arguments vindicating this derive from legal debate as well as from legal practice.[134] English, American and Nordic jurisprudential theories (on among other things goal-reasoning and policy-reasoning in judicial decisions) can also be taken into account.[135] Common-law cases with discursive decisions have been used in order to present theories explaining the functions of judicial reasons.[136] These well-arti-

[133] Thomas, *loc.cit.* Cf. A. D'Amato, *Jurisprudence, A Descriptive and Normative Analysis of Law*, Dordrecht/Boston/Lancaster 1984, pp. 60 f.; see also footnote 128 above.

[134] Cf. footnotes 128 and 133 above.

[135] In this context, one can mention some theses developed by A. Peczenik, *Rätten och förnuftet*, 2nd ed. Stockholm 1988, cf. the summary on pp. 155 ff.:

1. A legal opinion is rational, and in this sense right, if it would be accepted unanimously by lawyers who think coherently, that is, support their conclusions with an extensive set of certain, presupposed, proved and/or otherwise reasonable premises.

2. Reasonable premises are of the following kinds: "certain", i.e. taken for granted by all people or at least all normal people belonging to the culture under consideration; "presupposed", i.e. taken for granted within a particular practice belonging to the culture under consideration, e.g. within the legal paradigm; "proved", i.e. following from a consistent set of certain and/or presupposed premises; finally, not disproved and thus hypothetically assumed ones.

3. The legal paradigm includes the assumption that legal reasoning is supported by valid law. It also contains fundamental juristic views on the authority of the sources of the law and legal reasoning-norms. Finally, it includes some fundamental evaluative views, first of all concerning legal certainty and justice (cf. A. Aarnio, "Paradigms in Legal Dogmatics, Towards a Theory of Change and Progress in Legal Science, in A. Peczenik, L. Lindahl and B. van Roermund, eds., *Theory of Legal Science, Proceedings of the Conference on Legal Theory and Philosophy of Science*, Lund, Sweden, December 11–14, Dordrecht/Boston /Lancaster/Tokyo 1984, pp. 25 ff,; A. Aarnio, *The Rational and the Reasonable*, Dordrecht /Boston/Lancaster/Tokyo 1987, pp. 17 ff). Cf. A. Peczenik, *The Basis of Legal Justification*, Lund 1983, *passim.*

[136] See J. Bell, *Policy Arguments in Judicial Decisions*, Oxford 1985, and J.A.G. Griffith, *The Politics of the Judiciary*, London 1978. Both Bell and Grittifh criticize the courts, and their criticism is grounded in the reading of opinions. Cf. also N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, *passim*, and by the same author, "Coherence in Legal Justification", *Theory of Legal Science* (*op.cit.* footnote 135 above), pp. 235 ff., and finally R.S. Summers, "Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification", 63 *Cornell Law Review* 1978, *passim.*

culated theories constitute powerful arguments against the standpoint of some legal realists; so do the cases themselves. The question may be asked: Why should judges take so much trouble with their opinions and even change their minds about the outcome in the process of opinion-writing, if the reasons were nothing but their hunches dressed up in judicial clothing? The arguments for the justificatory perspective are more convincing than the so-called realsistic arguments. The case is stated for legal rationality against regarding legal decision-making, either as whim, caprice, or as an expression of political interests. The following two observations can be made.

First, the practice of reason-giving supports the view that legislation, precedents and other source material constrain not only the reasons given for a decision, i.e. its justification, but also the judge's findings. Although, as emphasized in the theory of science, genesis and justification are not one, in legal reasoning the process of finding and justifying interact and converge.[137]

Secondly, having in mind the values, principles and goals of justice and the Rule of Law, when passing judgment on a court decision the crucial question becomes whether the reasons given do or do not provide a well-founded and legally valid justification of the decision.

In this perspective the other question, namely how the reasons given did in fact originate and whether they are the judge's real reasons, becomes of relatively less importance. Thus, if the reasons given are well-founded and valid it does not matter whether they are the judge's "real" reasons. If, again, the reasons are not well-founded or not legally valid it still does not matter. In either case, the reasons actually given will be judged on their own merits.

Thus it appears that the concept of "legally valid reasons" is crucial. This conclusion can be borne out by an exemplification of cases. For instance, it makes sense to argue that a discursive opinion, with reasons and many details, will show whether the reasoning is valid or invalid. The emphasis, then, is shifted by way of reason-stating from genetic and psychological matters to the paramount importance of rational and explicit justification.

[137] Cf. D. Göldner, *Verfassungsprinzip und Privatrechtsnorm in der verfassungskonformen Auslegung und Rechtsbildung*, Berlin 1969, pp. 93–95, and T. Eckhoff & N.K. Sundby, *Rettssystemer*, Oslo 1976, pp. 218–220.