A Conventionalist Analysis of the Preconditions of Knowledge in Legal Dogmatics and the Foundations of Legal Orders

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1 Philosophical Foundation

The purpose of this study is to form *a theory of knowledge in legal dogmatics*, which is treated here as a part of the *humanities* and the *social sciences*. The title of my dissertation is adopted from the terminology of *Immanuel Kant*, whose views I agree with in considering the object of legal dogmatics to be the ideal states of affairs of a society.[1]

The modality of the language of legal dogmatics is normative, not descriptive in the scientific sense. In terms of the philosophy of *Leibniz*, the kingdom of ends can be seen as a certain possible world, an *ideal world* determined by legal norms. If a sentence in legal dogmatics is true, it is a fact of this ideal world, not of the actual world. In a special sense, it can be said that legal dogmatics tells about or describes a society; it tells how and with which content the community defines its ideals. Roughly speaking, this is the picture of the object of legal dogmatics presented by *Jaakko Hintikka* and adopted by *Georg Henrik von Wright*.

My principal philosophical orientations are the following: the view of the universal character of a common language as the medium of knowledge; coherentism; holism; the conventionalistic basis of the knowledge of institutions and norms; the strict separation between alethic and deontic modalities; and the direct connection between morality and law. Compared with the theory of law of

1 This paper is the summary of my dissertation*: The Kingdom of Ends. A Conventionalist Analysis of the Preconditions of Knowledge in Legal Dogmatics and the Foundations of Legal Orders*. Originally in finnish: Päämäärien valtakunta. Konventionalistinen analyysi lainopillisen tiedon edellytyksistä ja oikeusjärjestelmän perusteista. Suomalaisen lakimiesyhdistyksen julkaisuja A-sarja n:o 211, Vammala 1996 (Serie A, number 211, printed in Vammala 1996, the publications of Finnish Society of Lawyers).

Hans Kelsen, which is based on strict boundaries between legal dogmatics, ethics and the natural sciences, I accept the separation of legal dogmatics from the natural sciences as a logical difference but not the categorical distinction between law and morality.

2 Conventionalism

The study takes as its general philosophical starting point the *Wittgensteinian* view on language as the common conceptual basis of all information shared by the members of a society. As Wittgenstein pointed out, there cannot be any private language. Even less can there be any private law (in the philosophical sense). Law is a social and conceptual matter, and a member of society must follow the rules of language to be able to use language correctly. On the other hand, these rules are imposed by the same members of society. This is one form of the *conventionalist circle*. The common practice of the members prescribes the rules of language; there are no metaphysical rules to follow. Practice is not the same thing as rules, but it *will indicate them*. Rules are conceptual and exist on the societal level, whereby it is impossible to reduce them to the beliefs of the individual members or even to the beliefs of all the members together. Language is a social event. On the level of language and the basic concepts of the social sciences, the conventionalist circle will provide the conditions for the right understanding of concepts. As *Eerik Lagerspetz* has shown, the institutions of a society can be reduced to the *shared and common beliefs* of its members.

On the level of law and justice, the rules of language are merely the starting point. A common language is a necessary, but not a sufficient, condition for *common knowledge* in a society. On this level, there are no metaphysical rules which might serve as the origin of the rules of morality and law, nor is it possible to identify rules with practice. One cannot find real or correct rules through empirical research; they cannot be derived from constant principles but only by *rational argumentation*. The concepts of law and legal dogmatics are adopted by self-regulation and, significantly, the content of rules is adopted in the same way. The concepts of knowledge are parts of a common language; they depend on mutual beliefs. Similarly, the rules of behavior in society are enacted by the members themselves. These conclusions lead us already to a situation in which we are close to adopting some main axioms of the doctrines of *social contract* and *legal positivism*. The adoption of the rules of morality and law is a stronger commitment than the adoption of common concepts and the rules of language, for the former are binding and enforcing.

3 Critique of Legal Realism

The principles of philosophical conventionalism mean that we have to oppose both the constructions of natural law theories and the principles of legal realism. However, this does not mean that we cannot be influenced by natural law theories. The idea that law is the embodiment or formal manifestation of morality is an obvious connection to these theories. In fact, the idea of a social

contract is their "child". In this study, however, I have chosen to focus on legal realism.

There are two main versions of this basic attitude towards the theory of knowledge in the field of legal dogmatics. *American legal realism*, or pragmatic instrumentalism, is based on behaviorism, which identifies law with the actual decisions of courts, and because of this axiom it has to face serious problems which it cannot answer satisfactorily. The other version, *Scandinavian legal realism*, especially in the form of the later legal theory of *Alf Ross*, is more sophisticated. One can call it *psychological realism*. However, despite its advanced stage of development, the theory includes fatal philosophical flaws. My argument is that it is not possible to reach a satisfactory theory of knowledge using Ross's theory.

Ross's picture of sciences in general is philosophically *positivistic*, and his ontology is *nominalistic*. To be scientific, a sentence of legal dogmatics must tell about and describe something in perceivable reality, which presumes the *reduction* of abstract concepts to sense perceptions. Ross wants to define that "piece of reality" which is the object of the sentences of legal dogmatics. This is already a fallacy as such. At the same time, Ross wants to avoid the obvious problems of American legal realism. His theory is not behaviorism in the proper sense, and he attempts to solve this problem with the concept of *ideological behaviorism*. The object of the research of legal dogmatics is the *legal ideology of judges* in a society. This ideology is the internal, not the external aspect of their decisions. Hence, the object is a part of discernible reality, a psychological phenomenon outside the language. Against this background, it is easy to understand that Ross adopts the *correspondence* theory of truth. A sentence is true if and only if there is a piece of reality of which the sentence gives a correct picture. The sentence is satisfied if this relation exists. All the true sentences of legal dogmatics constitute the correct picture of the valid law in a society at a certain moment.

Ross's most serious problem is that his methodology, epistemology and ontology are not consistent. They are not parts of a uniform theory of knowledge. Actually Ross's ontology would force him to use empirical methods. If the object of research is defined as a part of perceivable reality as such the only possibility to obtain information about it is to observe it directly perceive and to use empirical methods. Knowledge is information *a posteriori*. Hence, Ross would have to change legal dogmatics to legal sociology. However, he clearly wants to avoid this conclusion. The source of knowledge is not empirical research but the normal sources of law. This solution forces Ross to a fateful conclusion. He wants to study independent reality outside conceptual language, but at the same use the sources of information *a priori*. Hence, his general method is to use inferences known as *metaphysical fallacies*. The purpose of norm-sentences is not to descibe psychological states.

Ross's theory also includes a paradox, which I call the *paradox of correspondence*. According to the correspondence model of truth in the natural sciences, a sentence is true if there exists a state of affairs which is the object of the sentence. One can also say that the perceivable state is an argument for the sentence. The main thing is that the truthfulness of a sentence is determined by the state. In Ross's model the state is sooner determined by the sentence. The

psychological state, the ideology of a judge, is determined by the sentences in law books and, most importantly, by the sentences of legal dogmatics. The other end of the correspondence relation, the object of the sentence, is unnecessary and useless.

Ross applies his theory in the analysis of the *concept of right*. Ross's analysis, especially the older one, is very useful as such but his philosophical foundation is unnecessary and fallacious. In accordance with nominalism he concludes that the concept or a sentence telling about a right has no *semantic reference*. There is nothing to refer to, nothing to be the other end of the correspondence-relation. The concept can only have a regulatory function. Ross analyzes the concept of right and concludes that it can be reduced to a certain group of legal fact-legal consequence relations. This is also directly connected to his ontology, the ideology of judges and their decisions. The concept of right includes a large group of such relations.

In the famous article *Tû-Tû* Ross tries to show that the concept of right is also an unnecessary element in judicial inferences. The primitive *Noît-kif*-people believed that if one killed a totem-animal, Tû-Tû, bad luck would result. If there was Tû-Tû a purgation ceremony became necessary to banish this bad luck. Ross argued that the concept of Tû-Tû was unnecessary and useless; one can instead make the direct conclusion, that if one kills a totem-animal a purgation ceremony becomes necessary. Similarly in modern legal dogmatics it is said that if one borrows money one becomes a debtor and one's the creditor collects the debt (Tû-Tû appears); and if one is the debtor (Tû-Tû exists) one has to pay off the loan. Instead of using the words "debtor" and "debt", one can conclude directly: If one borrows money (the legal fact), one has to pay it back (the legal consequence).

Ross's analysis is clearly positivistic and *atomistic*. He wants to find out the most concrete and perceivable elements in the concept of right. He wants to reduce the unnecessary abstract concepts to these concrete elements. My argument is that this aspiration is fallacious. Not only do rights lack semantic reference, but so do legal norms, rules and principles. Nor can one observe legal facts in the way Ross supposes. It is not possible to understand and identify the fact of borrowing and paying if one does not first understand what is meant by the concepts of debt, debtor and creditor. Legal facts, as well as decisions of courts, are *institutional facts* which can be understood only by understanding the concepts and ideas of debt, debtor and creditor. The right and fruitful approach is *holism*, not atomism. Observing legal facts or consequences as such is irrelevant, for such facts are determined by the conceptual framework of abstract norms, legal concepts and the system of legal dogmatics. On the other hand it is clear that the actual interpretations and applications of a right affect the idea of the right. This is an example of the conventionalist circle and the *reflective equilibrium*.

The reasons for the fallacies can be found in the philosophical foundations of Ross's theory. Nominalism forces Ross to embrace atomism. This is not a fruitful, but a strange, foundation for legal dogmatics. Ross makes the same categorical mistake as *Axel Hägerström* before him. He adopts a ready-made philosophy of knowledge of natural sciences, takes it as granted, and tries to apply it to legal dogmatics. Because of this he is forced to try to change legal

dogmatics and make it more scientific. Normal legal dogmatics could not fulfill the requirements of the philosophy adopted by Ross. Another, better approach would be to change the philosophical foundation of legal dogmatics. I argue that the philosophy of knowledge must be the conceptual framework used in normal legal dogmatics. Successful research points to its conceptual foundation. The philosophical foundation must be *transcendental* in relation to legal dogmatics in pracice. Historically, this was also the way philosophical positivism was constituted by the physics and other successful natural sciences on practice.

4 The Conceptions of Knowledge and Truth

As an axiomatic point I have adopted a strict distinction between alethic and deontic modalities. Logically it is not possible to make valid inferences from 'is' to 'ought' or in the opposite direction. This means that I accept the *Hume's principle* as it is traditionally known. That denial is valid both in relation to one state of affairs and to different states. Hence, it is neither possible to make a valid inference from true sentences describing actual jurisdiction to sentences about valid law, nor from enactments of parliament.

The distinction adopted also means that it is not possible to identify 'ought' with something actually existing or happening. One cannot define concepts in a way that unites 'is' and 'ought' in the same concept, e.g. as its different dimensions. That means also a fallacious deduction. When we talk about norms, about 'ought', we do not mean any actual feelings, ideology or actual condemning. Besides all varieties of legal realism I reject *emotivism*.

Ilkka Niiniluoto has also defined a conception of knowledge of legal dogmatics which is based on the correspondence-theory of truth. A norm proposition about law is true in a society if and only if the society has approved the norm. Niiniluoto means the *actual approval* of the society. This means that Niiniluoto identifies ought with an actual phenomenon. There are two main problems with this conception. First, one must use empirical methods to research that approval if one wants to gain information on valid law. That means, as a matter of fact, the abandonment of normal legal dogmatics. Second, reference-relation proper applies only to unconditional norm propositions. However, they use often conditional utterances and recommendations in legal dogmatics. Niiniluoto's theory would place those sentences into a wholly different category than the propositions which is fatal. Uncertainty is often the characteristic of norm sentences. They cannot be understood as proposals to approve a new rule. Other way we would change the subject of the sentences.

The approval which is relevant to legal dogmatics cannot be any actual phenomenon but only a conceptional acceptance. As *Aulis Aarnio* has said the basis of the truthfulness of norm sentences is *rational acceptability*.

My own philosophical foundation in this subject is the *coherence theory* of *knowledge* and partly of *truth*. A sentence is a possible truth if and only if it is coherent with other sentences which are already accepted. As a *criterion* coherence is enough in relation to knowledge. However, as a criterion of truth it is not enough. The main problem of coherence theory is that coherence is dependent on a system, that is, it can exist only in relation to a certain system.

What is the criterion for choosing the *right system*? Besides, within the framework of a system there are usually many possibilities, many possible truths. What are the criteria for determining the right or the best choice? Coherence is a negative criterion whith which one can rule out sentences. However, we need positive criteria, as well, legal arguments, to make a choice between possible norm-sentences.

On the general level of the social sciences, there are two important answers to these questions, both of which are partly right and defective. The classical authors and advocates of the *Enlightenment* relied on the basic rights of human beings and permanent principles of *rationality*. *Kant* and *Hegel* also adopted this answer. As the heir of romanticism German hermeneutics, especially in the figure of *Hans-Georg Gadamer*, emphasizes the importance of the *tradition* of a society and criticizes the Enlightenment. My strategy is to make a *synthesis* from these arguments. Basic rights (substantial principles) and the formal principles of rationality are necessary but not enough. The answer to the above mentioned questions of the right system and the right choice can be given only by knowing and understanding the given tradition of a society. Tradition gives the necessary positive criteria.

In the issue of truth a fruitful foundation is given by *Hegel*. I focus my attention on his material truth-conception which is known as the *Hegelian truth-conception*. Hegel thought that things, acts and written texts were materializations of the conceptual spirit of the society. The actual is true if and only if it is identical with its sense or essence. That is why he said: *What is rational is actual: and what is actual is rational*. Instead of spirit we can also talk about common language and tradition. However, I reject Hegel's absolutism, determinism and the dialectical method.

The truth-conception constituted by the elements mentioned above I call *institutional truth*. A sentence, a decision of a court and a concept is true or the right one in a society if it is a part of a coherent conceptual system and if it is in accordance with the tradition of that society.

The synthesis mentioned above together with the conventionalism adopted also yield the preconditions to solve the problem of *objectivity*. It is important to separate ethical *absolutism* and the argument of objectivity. With the help of this distinction it is possible to consider judgements both objective and *relative*. Absolutism claims that there are certain principles or values which are valid in all societies and at all times. This is also the foundation of *Dworkin's* doctrine of the one right answer. Relativism claims that there can be objective truths only in relation to a certain society. This is also my contention. A sentence can be true only in a certain society at certain time, but it can be true nevertheless. I claim that a sentence or a judgement of legal dogmatics can be objective when its content is to tell about the valid law of a society. Then it tells about a society, not about subjective feelings or judgements. Even when it is based on evaluations it can be objective. In accordance with Kant the general norms can be understood as the rational generalizations of maxims of behavior or values. The strength of objectivity depends on the acceptability of a sentence and acceptability depends on the plausibility of the arguments.

5 The Social Contract

I adopt the concept of social contract in the modern *Rawlsian* meaning as one of the main concepts of my theory of law. That means that contract is understood in the *hypothetical* and the *analytical* sense. The tautological axiom of contractarianism is: *If there is a legal order, there is a social contract.* In addition, the contract is understood also in the *normative sense*, which is perhaps the most important sense in this study. One important function of the contract is to give criteria for justifications and criticism of legal rules.

The functions of contractarianism are to bring together the substantial principles of justice to form a coherent whole and to show the inner and immediate connections between morality, justice and law. The assertion of a valid rule entails acceptability of that rule. My claim is that the *valid rules* of law *are* the *embodiments of justice* and the conclusions of rational but non-deductive and non-empiristic ethical inferences. The crucial idea is that the norms of a society are adopted by the members of that society, who regulate themselves.

One central concept of contractarianism is the *natural state*, or the original position. Its function is to form a *method* to point to the main principles of justice. The natural state is an imaginary situation, a choice- and negotiation situation. Participants decide on the principles for the society they are founding and which they are going to obey. How they can decide their own rules? Rawls' answer is the *veil of ignorance*. The participants do not know their own positions in the society. They only have all the information needed to form the principles. Anyone of them can get any position and become any member of the society. So they have to choose such principles that everyone can accept every position. Rawls supposes that this method grants the fairness of the chosen principles. The advantages and sacrifices of every position are balanced and all positions of the members are in equilibrium with each other.

From the point of view of law and legal dogmatics the main merit of this method is that with it we can test and justify the principles of justice we adopt. I suppose that the exact rules are grounded on these principles, and so we can test and justify rules too. I call this method a special point of view, the *impartial viewpoint*. I suppose that this is also the viewpoint of *legal argumentation*. It is also the viewpoint of courts and parliament when enacting statutes. The choice-situation in natural state is a clear exemplar to the idea of parliament.

We can specify this viewpoint by using the analysis of *David Gauthier*. I suppose that members of any society are both egoistic and altruistic. Especially in the field of *economics* the participants in any exchange seek maximum benefits and minimum costs. On the other hand they have to make sacrifices and mutual concessions to reach a consensus and balance. It is a necessary precondition of any voluntary agreement. Exchange and bargaining have to be beneficial to all participants. This is the foundation of rationality and continuity of the market. Continuous success compels the rational participants to behave correctly.

One can ask if explicit rules of economic exchange are necessary or even useful. Does the rationality of the market not regulate the market itself? The self-regulating or perfect market is an *ideal* in the same way as the kingdom of ends.

I take it as granted that this ideal is the goal of the market, but it is still an ideal only. The real market in real life is not such. There are always many different *disturbing factors* and *irrationality* in the real market. Not even rational plans always materialize. Basically, these are reasons for the need for rules and the necessity of regulating. I see contracts as the specific forms of *co-operation*. Hence, the rules of contract law are the conditions of this co-operation. The foundation is the inner rationality of the market, but the enforcing rules of law are necessary because of disturbances. We can call these two sides of rationality the *means-ends rationality* (rationality in the narrow sense) and the *reasonability*. These are also independent of one other. One cannot reduce rightness to goodness. This is also the foundation of the three separate forms of justice, *commutative*, *distributive* and *retributive justice*, described up by *Aristotle*.

From this point of view we can understand better the basic concepts, principles and rules of *contract law* and the *law of property*. I have analyzed some main doctrines of these areas of law: e.g. the principles of interpretation of contracts, the principle of loyalty and the doctrines and rules of invalid contracts, breaches of contract, adjustment and the rules of relations to external persons. The last are the embodiments of the principles that no third person is allowed to benefit at the expense of the parts of a contract, and that it is not allowed to make contracts at the expense of third persons. I am convinced that this analysis gives a better understanding of these rules and doctrines.

6 Knowledge of Law

There are three dimensions of rationality of knowledge, of which I have already mentioned two. By rationality in the narrow sense I mean *practical rationality*, the means-ends rationality. An act is rational if it is a necessary, sufficient or useful means to reach an adopted goal. Goals can be personal, which refers to *intentional* rationality, or collective, e.g. economic or cultural goals. This can be called collectivistic rationality or *utilitarianism*. *Consistency* means the logical relations between sentences, especially between conclusions. In the area of normative language this is the form of rationality which is the interest of *deontic logic*. With rational as *reasonable* I refer to the *justification* of knowledge, and it is this rationality on which I focus in the following.

Knowledge on a general level is often called a *true and justified belief*. This means that the concept of knowledge entails a belief, truthfulness and justification. Sentences "I know, that", "I assert, that" or "It is so, that" entails sentences "I believe, that", "It is true, that" and "It is justified to say, that". Justification refer to *arguments*. The central thing is the relation between a *conclusion* and its arguments. This relation is non-logical; it is not a deduction. Arguments *support* the conclusion *substantially* .

The element of truth is problematic. I think we have to pay serious attention to the objections of skepticism, although we do not have to accept them as such. Besides, skepticism is internally connected to the principle of universalism of language. We can analyze the problem by examining the famous *problem of Gettier*. The main idea of Gettier's famous examples was to show that the

above-mentioned preconditions of knowledge are not enough; they are not sufficient conditions, and something more is needed. The problem is that although one can show logical problems in the inference, the conclusion can be right. I claim that the whole problem is irrelevant. In science one cannot check if the conclusions are right. We only have our justifications and we have to rely on them. How the things are "there" we can never know.

Analogous problems are those of truth and *efficiency* as one dimension of the concept of valid law. First I take it as granted that there are no separate objects to refer by norm sentences or norms, and it is useless to try construe them. Second, it leads to logical problems in defining the concept of *validity* in a way that includes the efficiency of rules. Validity means that it is correct to say that things *ought to be* in a certain way. The same concept cannot include an assertion as to how something *is*. The actual jurisdiction can be an *argument* of an assertion on valid law. However, the relation between a conclusion and its arguments is a non-logical relation, as I mention above, and they cannot be included in the same concept. The same problem exists between the conclusion, the assertion on valid law and the normally used *formal arguments*. A claim of valid law cannot entail an assertion on a formal source of law, e.g. that certain statute-text have been enacted.

The truth problem has led us to the significant observation that *valid law* is necessary on a different logical level than the *sources of law*. This means also that we have to argue against the axiom of classical legal positivism that law is the same thing as statutes. There is a *logical gap* between the two. It is the logical gap between a conclusion and its arguments. The system of valid law is logically independent of the source systems, e.g. the system of statutes. That is why there can be statutes or paragraphs within them that contradict each other and yet valid law can be consistent. The principles of interpretation are one sign of this difference of level.

I have divided legal justification into *formal* and *substantial*. Formal justification refers here to the use of formal and official sources of law, such as statutes, the travaux préparatoires and precedents. I presume that well-founded conclusions based on these are also in most cases substantially acceptable. That supposes that the methods of enacting statutes are in accordance with the principles of the choice-situation mentioned above. This presumption means that *in most cases formally justified conclusions can also be substantially justified*. However, there will be always some cases in which this is not true. I presume that formal justification has precedence over the substantial. Hence, the conclusion is: There are always some cases in which it is not possible to make formally correct conclusion yet which are also substantially acceptable. I take it as granted that the substantial reasons determine interpretation within the limits described by the paragraphs of statutes.

As mentioned above, the central problem of coherentism is the question of how to identify the right system. From the point of view of legal dogmatics, it is a problem of the choice of the *right system of valid law* and its *correct content*. There can be many different and acceptable inferences and conclusions of valid law which are inconsistent with each other. Because of the adopted principles of contractarianism and legal positivism it is clear that the criteria for choosing the right system is given by the *doctrine of the sources of law*. Statutes, as the most

important and dominating sentences, show the system that has been adopted as the valid law in a society. Enacting statutes is also the special method which society uses when prescribing its own rules.

In the continental countries of Europe the *sentences of statutes have a privileged position*; they mainly determine the content of valid law. It is necessary to observe them when making conclusions in legal dogmatics. One cannot ignore them when arguing. Sentences that repeat the sentences of statutes are normally directly the sentences of valid law. As a general rule, all other assertions and interpretations should be in accordance with them. The system of valid law is presumed to be coherent and consistent. Nevertheless, it is possible to deviate from the sentences of statutes. However, when deviating the sentences of statutes are still seen as the starting point. I call this epistemic attitude which has a dominating position in legal dogmatics *formal foundationalism*. It is formal because the criteria for choosing the right system is not immediate perceptions or axioms taken as granted.

However, this foundationalism is in *tension* with the ethical *coherentism*. Formal foundationalism is uniform with the ideas of the Enlightenment, legal formalism and traditional legal positivism. Coherentism, especially united with the idea of reflective equilibrium, is uniform with traditionalism and substantial justice. I said before that I have tried to reach a synthesis on the grounds of the Enlightenment and traditionalism. Similarly I seek the synthesis also in the level of law by trying to resolve the tension between formalism and the demands of substantial justice.

I think in the area of legal dogmatics this tension is a characteristic of legal dogmatics and jurisdiction. That is why it is not a harmful but a fruitful tension. There are certain compulsory texts and orders, but, it is also expected that scholars and judges make good, well-founded and substantially acceptable conclusions and decisions. Thus, this is also a tension between formal and substantial justification.

There are also *two forms of rationality* in the area of judicial inference. I call the formal rationality which includes only the formal sources and conventional principles of interpretation *narrow* rationalism. The other form includes also the substantial reasons, normally *principles* (rights) and *goal-reasons* when making decisions and interpretations of legal dogmatics. This is *wider* rationalism.

7 The Formalistic Nature of Legal Rules

Above I have concluded that in most cases formally justified conclusions can also be substantially justified, but there are always some cases in which it is not possible to make formally correct conclusions which are also substantially acceptable. This is a problem of justice and the interpretation of statutes. I have earlier presented three forms of justice, commutative, distributive and retributive. Now we need a fourth form of justice, also drawn up by *Aristotle*. It is the *epieikeia*. This means that although a certain rule is formally correct and substantially perfectly acceptable as such, it can, in a certain situation or actual case, lead to conclusions which are not acceptable.

We can examine this problem with the help of a simple example and by using an analysis done by *Frederick Schauer*. There is a rule that forbids driving a car faster than 80 km/h on a certain road. The justification for that rule is obvious. It is prescribed because of the traffic safety. However, in the normal jurisdiction and when obeying the normal principles of interpretation there will always be cases when the conclusions are not in accordance with that substantial justification of the rule although they are formally correct. In some cases the rule is *under*- and in some cases it is *over-inclusive*. In wintertime the circumstances might be such that driving 50 km/h might be dangerous, and there might be circumstances in the summertime in which driving 100 km/h is perfectly safe. In the first case, the driver has not broken the rule although he has driven dangerously; in the second case, he has broken the rule although he has driven safely. In both cases the conclusions are "wrong" in a certain sense. They are substantially wrong because they are not in accordance with the justification of the rule in those cases.

Basically, the "wrongness" of the conclusions derives from two main reasons. First, it is a problem of *power distribution*. There is a tension between the authority which enacts general statutes and the authority which makes individual decisions. If the decision-making authority makes always only formally correct decisions, he wholly accepts the prior authority of the statute-giver. This happens at the cost of the "wrong" decisions. If, instead, one makes only decisions which are substantially correct, the decision-maker actually abandons the rule and the prior authority of the statute-giver. Decisions are made directly and only on account of the substantial justification. The former is the *rule-based*, the latter the *all-things-considered model*. The former method is in tension with the claim of acceptability of decisions, and the latter is in tension with the principles of the self-regulation of the people and the distribution of power between the authorities. The rule-based model is in accordance with formal justice, predictability and certainty, while the all-things-considered model is in accordance with substantial justice which is the foundation of all laws. So, this is also a question of the possibilities and limits of controlling the decisions of the judiciary before-hand.

Second, natural *language is formalistic*. This is internally connected with the first reason. The idea of positive law is bound to the formalism of language. In most European countries it is considered important that the general statutes are in a central position and they are given and accepted by a parliament which is elected in the general elections. In this kind of a system we are bound to language as the only possible medium and instrument. Words and concepts are categorical and formalistic. We try to divide reality with the help of definitions into "squares" or "boxes", and for this reason the conclusions and decisions are also formalistic in relation to actual cases. Making only really individual decisions is the same thing as abandoning all rules. The general method of subsumption is formalistic.

However, the *epieikeia-problem is not the same in every cases*, and it is easy to notice that the statute-giver has often observed this problem. Power is often expressly given to the applier to consider different conclusions or consequences in the paragraphs of statutes; loose phrases and principles are often used on purpose. In less important and so-called mass or routine cases the rule-based

model is the normal method, but in more important cases courts are usually empowered to use wider consideration. That means that "wrong" decisions as a consequence of the rule-based model have to be accepted in the routine cases. On the other hand, in the all-things-considered model one has to accept, that it is not possible to determine beforehand the decisions of the courts.

We can also try to solve the *epieikeia*-problem or make a synthesis from the decision-making models described. It is possible to take one of the models as the basis and try to modify it with elements of another. It seems to me that *Dworkin* starts with the all-things-considered model tries to observe the statutes and incorporate them into this model. He calls this model the *integrity-model*. He interpretes statutes on the condition of the substantial principles of justice. From the point of view of continental of Europe, the position of statutes is too weak. My solution and that of *Schauer* are logically different, although its result is not far from Dworkin's.

My strategy is to relativize traditional legal positivism. This means that the prior basis is positivism and the rule-based model. The new model is the *presumptive positivism*. The "presumption" means first the precondition already adopted whereby well-founded, formally justified judicial conclusions are in most cases also substantially acceptable. Secondly, it means that as a general rule the formal sources of law determine the content of valid law and the decisions of courts.

The formal sources, especially *statutes have a distinct priority*, but this position is not unexceptional. There are always situations and cases in which it is not possible to reach a formally correct and substantially acceptable solution. On the other hand, it is impossible to give beforehand exception rules for every possible exceptional situation. There will always be the *need to make real exceptions*, unconventional interpretations, and interpretations and decisions against clear words of statutes. This is easy to show in the praxis of the Supreme Court of Finland. The need is based normally on the demands of the principles of justice or the goal-reasons. The real problem is how high the *threshold* of these exceptions is. In any case, it is self-deception to think that those exceptions are impossible or needless. The height of the threshold depends on the changeable tradition of legal interpretation. In Finland this tradition has been very strict and formalistic.

It is important to point out that the possibility of exceptions does not mean arbitrariness or injustice. I assume the reasons for the exceptions are objective, i.e., normally conventional substantial principles of justice or goal-reasons. Quite often the substantial reasons are the justifications of the rule being applied. Sometimes the words of a paragraph necessarily lead to a conclusion which conflicts with the justification of the paragraph. This is also the embodiment of the above mentioned difference between narrow and wider rationalism. Normally decisions seem to be made by the rules of narrow rationalism, whereas exceptional conclusions are made by the rules of wider rationalism. Actually, this involves a *paradoxical element*. From the point of view of wider rationalism the "exceptions" mentioned are not any exceptions at all. They are normal and logical conclusions from substantial grounds. They are exceptions only in relation to the narrow rationalism.

This arrangement is clear, e.g. in the *adjustment* of contracts. By the rules of narrow rationalism it is clear that adjustment means exceptions in relation to the words of contracts. Using the rules of wider rationalism, the case i different. Adjustment means confirming the content of co-operation by the principles of justice. A central function of adjustment is to return the lost balance between the partners of a contract. From this point of view, adjustment is not against the principle *pacta sunt servanda* but in accordance with it.

This paradox also relativizes the difference between the forms of rationality mentioned. I claim that normally the conclusions and decisions which seem to be made only according to the rules of narrow or formal rationalism are actually made according to the rules of wider rationalism. I think it is necessary to use wider rationalism; in most cases it seems that only narrow rationalism is used. In these cases formally correct conclusions are also substantially acceptable. It is not necessary to present explicitly the substantial considerations when the result is in accordance with formal rationality. The actual substantial considerations remain hidden. On the other hand, I think it is important to notice that there is a need for specific and larger arguments when deviating from the normal inference.

In any case, the distinction mentioned is also a norm or a demand for well-founded interpretation and the judiciary. Narrow rationalism is not enough; rather wider rationalism is always needed. The acceptability of a conclusion inferred from formal grounds must always be considered. If a conclusion is not acceptable, it is a different thing and the next stage is to consider whether it is possible to make an exceptional conclusion or decision and what the preconditions for it are. The principles of freedom and equality may prefer exceptions, but they may also prefer keeping the formally correct conclusions. On the other hand, I am convinced that becoming aware of this distinction will lower the above-mentioned threshold.