

FORMAL INCORRECTNESS AND THE
INVALIDITY OF A LEGAL TRANSACTION

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When the negotiations for peace in Vietnam began in Paris, the first difference of opinion that arose was about the form of the council table: should it be rectangular or circular? A Finnish newspaper expressed fears that the peace negotiations might founder on *mere formalities* right at the outset. But what really was the situation? Was the dispute only about the geometrical shape of the table (an external matter) or did the causes of the disagreement lie deeper? On close examination the answer turns out to be relatively clear. The controversy was not about the shape of the table after all, but about who could be recognized as a negotiating party and in what rank.

This episode throws an interesting light on the way in which we talk about “formalities” and their meaning for “substantive” decisions. Referring to the formalities very often seems to be a way to transfer the discussion from the real—substantive—disagreement to another level. In what follows I shall try to show that the principles revealed in our illustration have, with necessary reservations, an application to jurisprudential methods of arguing as well.¹ Talking about the form of contracts, obligations, etc.,

¹ Scandinavian legal writings on formal provisions: J. W. Chydenius, *Om tolkning af rättsärenden* (On interpretation of legal transactions), Helsinki 1909; Y. J. Hakulinen, *Kiinteistön luovutuksen muodosta sekä julkisen kaupanvahvistajan asemasta ja tehtävistä* (About the form of alienation of a real estate and the position and function of notary public), 2nd ed. Vammala 1949; Hjalmar Karlgren, *Avtalsrättsliga spörsmål* (Essays on the law of contracts), 2nd ed. Lund 1954; Osvi Lahtinen, “Oikeustoimen muoto-ongelmasta” (About the problems of the form of a legal act), *Lakimies* 1957, pp. 134 ff.; P. J. Muukkonen, “Kiinteistökaupan muotovirheeseen vetoamisen kohtuuttomuudesta erään oikeustapauksen valossa” (About the immoderation of referring to a formal incorrectness of a real-estate deal in the light of a legal act), *Defensor Legis* 1962, pp. 1 ff., *id.*, *Muotosäännökset, varallisuus- ja oikeudellisia sopimuksia koskeva tutkimus* (Formal Provisions. A study of the law of contracts), Vammala 1958, *id.*, “Formal provisions and their detrimental consequences”, 5 *Sc.St.L.*, pp. 88 ff. (1961); Lennart Vahlén, *Formkravet vid fastighetshöb, särskilt dess inverkan på regler om förutsättningar och fel* (Formal provisions with regard to sales of immovables, in particular their effect on the rules on underlying assumptions and on non-conformity to the contract), Stockholm 1951; Matti Ylöstalo, “Formkrav och billighet” (Formal provisions and equity), *F.J.F.T.* 1961, pp. 297 ff.

which sometimes seem to be rather overemphasized in juridical discussion, prevents one from noticing some highly essential facts about legal decision-making. The way in which we conventionally think about incorrectness of form is of such a nature as to distort the picture we have of the factors that determine the decision-making and are characteristic of normative behaviour.

The opinion predominant in Finland is based on some premises that are relatively easily recognized. The question is not really about implicit assumptions that we are not conscious of but rather about a more or less established doctrine of formal incorrectness. This is true at least of jurisprudence in Finland. I attempt to examine critically some grounds of this doctrine in this study. I must forgo an historical review, an exposition of the motives that have in course of time moulded the doctrine into its present form, even though such a review would be of considerable interest. I must also leave out of account the question: What are the contents of an individual formal provision in Finnish law? To make my starting point clear I have chosen three problems of civil law that are quite common in practice and will perhaps serve to illustrate clearly the main features of the subject matter in question:

1. The heirs to the estate of a deceased person have made the division of the inheritance (in the way permitted by law) but the instrument of partition *lacks the signature* of one of the heirs.

2. *One of the witnesses* in a properly concluded real-estate transaction is *disqualified*.

3. A will, properly signed by the testator, *lacks the signature of one of the witnesses*.

According to the conventional conception there exists a formal incorrectness in all three cases (under Finnish law). From this (again) it follows that the legal transaction in question is (in the situations described above) *invalid*: it does not produce the legal consequences typical of it. The consequence that does not arise in the examples is the change of owner, i.e. the transfer of the ownership that a formally correct legal transaction would have called forth.

All those concerned have to observe the formalities when the formal provision is laid down in statutory law, and also the expressions of their wills must be *substantially* in accordance with the requirements—this is considered as a more or less absolute point of departure. The mere volition, no matter how firm it is,

is not a fact sufficient to create the legal consequences which were aimed at. Thus the observance of the formal provision is—according to the predominant conception—a *part* of the complex of facts to which the legal consequences are attached. One can also say that the formal provisions, for their part, show the conditions of applying the norm. It is important to notice that formalities are considered as facts *equivalent* to, e.g., volition. The prevailing conception could be described by saying that the formal incorrectness as a cause of invalidity has a value *per se*: it is a legal fact in the proper meaning of the term.² If for simplicity's sake we describe the relation between legal fact and consequence as a deontic "if so" relation we can put the statement above into the form:

$$(I) \quad S[(p \& q \& m) \rightarrow v].^3$$

In the formula the sign *S* is an ought-operator, *p* and *q* are for "material" legal facts (like volition) and *m* describes the behaviour presupposed by the formal provision (e.g. signature).

Correspondingly we can write—meaning a case where there is a formal incorrectness in the legal transaction (e.g. a missing signature)—

$$(II) \quad S[(p \& q \& \sim m) \rightarrow \sim v].$$

Here from $\sim m$ it follows that the legal consequences do not come into existence ($\sim v$). This feature which is predominant in the doctrine of formal incorrectness I propose to call the coupling "formal incorrectness/invalidity". In legal writing this coupling

² Cf. Hakulinen, *op. cit.*, p. 23, and Muukkonen, *Formal Provisions*, p. 196, where we read: "When we separate the function of presentation of proof and validity we come to the result, too, that if the actual formal provision is not observed the contract is invalid although the concluding of a contract and its contents might be proved true in another way also." See also Chydenius, *op. cit.*, p. 30.

³ Formula (I) is not the only way of expressing symbolically the relation between a legal fact and a legal consequence. Another way would be, e.g.:

$$(p \& q \& m) \rightarrow S(v)$$

or even more precisely:

$$(x) [p \& q \& m(x) \rightarrow S v(x)]$$

I have chosen formula (I) because it is very simple—it shows how I understand the problem—while the possible formal difficulties do not have an effect on the problem discussed in this paper. See, e.g., G. H. von Wright, *An Essay in Deontic Logic and the General Theory of Action*, Amsterdam and Helsinki 1968, pp. 76 ff.

After having read my manuscript, Professor Alexander Peczenik drew my attention to these various alternatives, and I wish to thank him very much for doing so.

has been strengthened by certain other assumptions. Perhaps the most important of these is the prohibition against resorting to equity when interpreting the formal provision—a principle very strongly emphasized by Finnish authors.

Professor Muukkonen, who has thoroughly treated various problems concerning formal incorrectness, particularly emphasizes in his doctoral thesis the fact that a formal provision is an indivisible whole: so long as all separate formalities in a formal provision are not observed the formal provision has not been observed. Looking at the question from a critical point of view, different parts of a formal provision cannot be placed into different positions.⁴ On the other hand, one cannot try to weaken the “real” contents of the formal provisions through interpretation by referring to considerations of equity. No considerations of appropriateness or equity have any room in an exposition of the contents of formal provisions. If we do not consistently apply the demand for a strict interpretation we are, according to this opinion, bound to lose control: once you begin to use a flexible way of interpretation you cannot stop it any more. The rule of law demands that in each case we, on the one hand, openly recognize the existence of formal incorrectness and, on the other, form the necessary conclusions.⁵

This cautious attitude to the interpretation, i.e. the prohibition against paying regard to equitable considerations, looks strange when we admit—as we very often do—that formal provisions might be interpreted narrowly. Muukkonen points out that it is not always possible to persist in the demand for a strict interpretation. As far as separate formalities are concerned—e.g. validity concerning witnessing—you may give up the demand for a strict interpretation. Sometimes—very seldom, though—you can even by means of interpretation add a formality (e.g. witnessing) to the formal provisions, although it was not originally mentioned in the text of the statute concerned.

Muukkonen writes: “At a certain stage one transgresses the demand for a strict interpretation. The formal provisions are given a wider scope than can be tolerated. It is impossible to say exactly when the transgression takes place. The question has to be considered separately in each case.”⁶ But has the starting point itself

⁴ Muukkonen, *Formal Provisions*, pp. 146 f.

⁵ Muukkonen, *Formal Provisions*, pp. 214 ff., and *id.*, *Defensor Legis* 1962, pp. 12 ff.

⁶ *Formal Provisions*, p. 230.

been denied? Have the considerations of "equity" entered through the back door after having first been thrown out through the front door? It seems to be so, for the question remains open on what grounds it is permissible to depart from the demand for a "strict interpretation" in some cases.

In this context I do not touch upon the problem—interesting from the point of view of legal philosophy—of what kind of a figure of thought the so-called strict interpretation actually is. I merely point out the logical problems involved in it.⁷

However, if the invalidity is coupled as a consequence to the formal incorrectness, the results—as far as the formal provisions "proper", as mentioned above, are concerned—may be unsatisfactory in individual cases. Formal and substantive justice may come into conflict with each other. Perhaps we have to declare invalid a legal act which is correct as to its substance because of a trivial formal defectiveness. Lately the so-called doctrine of formal incorrectness has also taken this into consideration. To prevent the conflict there has been developed a sort of auxiliary construction: a prohibition in some cases against pleading invalidity on the ground of a formal incorrectness.

The Finnish legislation—unlike some other legal systems (e.g. the German civil code)—does not recognize any possibility of eliminating the consequences of a formal incorrectness except in certain special cases. The prohibition against pleading invalidity because of formal incorrectness has been developed in legal writing. The idea has for the first time been expressed by Muukkonen in Finnish legal literature. Agreeing with him, Professor Ylöstalo has elaborated the idea on some points.⁸

The figure of thought is (seemingly) very clear:

formal incorrectness (*M*)→invalidity (*P*)

→prohibition against invoking a formal incorrectness (*K*)

The conclusion that I will later describe with the chain of symbols [*M-P-K*] leaves many relevant aspects of the problem open. First there arises the question: Why have we chosen the invalidity to be (in many cases) the consequence of a formal incorrectness? What

⁷ See, e.g., Ulrich Klug, *Juristische Logik*, 2nd ed. Berlin-Göttingen-Heidelberg 1958, or Ota Weinberger, *Rechtslogik*, Vienna 1970.

⁸ Muukkonen, *Formal Provisions*, pp. 219 ff., *id.*, *Defensor Legis* 1962, pp. 12 ff., and Ylöstalo, *op. cit.*, pp. 301 ff. The viewpoints of equity have not been taken into consideration on a large scale—especially earlier—and primarily two reasons have been referred to: (a) if we take the moderation into account it leads to heterogeneity and judicial insecurity, and (b) different people may—and do—have quite a different conception of the limits of the "moderate formal provision". See Muukkonen, *Formal Provisions*, pp. 215 f.

makes us in the cases mentioned above think of the formal incorrectness as a ground for invalidity?

The answer has sometimes been that invalidity as a consequence has, e.g., preventive effects. A strict approach to formal provisions strengthens legal security by guaranteeing that—at least on the average—people make “real” legal transactions.⁹ This answer seems to me extremely vague already on the mere ground that our knowledge about the effect of the setting of a norm upon human behaviour is very limited. The problem may be roughly divided, as far as formal provisions are concerned, into two parts: (a) How does the very act of setting a formal requirement—the circumstance that a particular form has been decreed for a legal transaction—affect the activities of the individuals? Does this fact alone raise the average qualitative level of legal transactions? (b) How does the existence of the invalidity as a consequence direct human behaviour?

We may assume (this is likely to standardize people’s behaviour as contracting partners), though it is not at all certain, that, by attaching the consequence of invalidity, that effect will be essentially increased. We are discussing more or less the same matter as we do in criminology when referring to the preventive effect of the punishment. In private-law matters we know about the effect of the prevention even less than in criminal jurisprudence.

A further question in the prevailing doctrine is the following one: What do we mean when we say that a legal transaction is invalid but, in accordance with the view presented by Muukkonen and Ylöstalo, the matter that caused the invalidity (a certain state of affairs prevailing) cannot be invoked? If we understand that invalidity means an absence of legal consequences and if, on the other hand, we admit that we are not able to invoke the existing formal incorrectness, there is a strange paradox: the legal transaction has no legal consequences (it is invalid) but the absence of the consequences cannot be enforced by any authoritative measures. Hence: as a matter of fact the legal transaction has *de facto* its normal consequences.

So the chain of conclusions [M–P–K] seems to be unnecessarily complicated. Would it not be simpler to understand the matter as meaning that if there is a legal incorrectness we need in addition to material matters (e.g. volition) some complementary matters with no clear precision under which the legal transaction has its

⁹ Muukkonen, *Formal Provisions*, p. 214.

normal consequences. In other words, the facts at issue are in the case of a formal incorrectness more complicated than usual. But we have no special reason—except if we want to strengthen a certain construction—to label the situation “invalid”. Formally the matter could be put in the following form:

- (III) $S [(p \& q \& m) \rightarrow v]$ and
 $S [(p \& q \& \sim m \& t) \rightarrow v]$.

Each expression can be interpreted in the same way. Both describe a situation where certain facts have the consequence (v). There is now no possibility for a reaction on the ground of a formal incorrectness.

A sort of key question in evaluating the prevailing doctrine of formal incorrectness is: Under what state of affairs is the possibility of an invalidation as a reaction excluded? The same thing can be expressed in another way: What is the actual meaning of the statement in the classical doctrine of formal incorrectness that the formal incorrectness cannot be invoked if the result of invalidation would be “inequitable”? Does the thought of equity weaken the whole chain of conclusions [$M-P-K$] that look clear and logical?

I shall begin my examination of this question by presenting some thoughts by Osvi Lahtinen¹ about the meaning of formal incorrectness for the invalidity of a legal transaction. Lahtinen’s main problem can be presented in the following way: Why is invalidity as a consequence of a formal incorrectness linked especially to a certain external factor? Lahtinen thought he could best answer this question by first inquiring into the reasons that (presumably) make the legislators provide for the form of a legal transaction.

This, of course, is another matter than the question discussed above of what sort of effect the giving of a formal provision has on human behaviour. The purpose (functions, as Lahtinen says) of formal provisions has been often treated, though in the main from the standpoint of positive law.²

A form provided for in the law can have, *inter alia*, the following purposes:

- (1) Increasing the possibilities of proof. This is thought to be

¹ Lahtinen, *op. cit.*, pp. 134 ff.

² See Lahtinen, *op. cit.*, p. 135, and Muukkonen, *Formal Provisions*, p. 203, note 132 with a representative list of references.

of importance in legal transactions the consequences of which extend far in terms of time and may possibly only begin after a relatively long time.

(2) Separating the final legal transaction from the preliminary measures necessary for it, such as the negotiations for a contract.

(3) Confirming the truth of a legal transaction.

(4) Promoting the mature and firm consideration of the partners to the legal transaction. A form prescription is thought to prevent overhasty transactions. This again is linked to the efforts to prevent grounds for invalidity from coming up.

(5) Technical advantages, mainly with a later registration.

Additionally, all these purposes of the transaction in view (together or separately) may promote legal security and predictability.

Some of these purposes need not have been consciously the direct aim of a certain formal provision. This again makes the purposes of formal provisions problematic. It is difficult to define which specific purposes were in the minds of the legislators. But on the other hand we may consider indisputable the fact also emphasized by Lahtinen: it is possible to prescribe that a formal provision shall be observed when and only when there is a reasonable cause for it. Modern legislators do not enact formal provisions only for form's sake. The purposes of formal provisions that are mentioned in my list above, like all other (imaginable) purposes, are part of the system of rational objectives which lies in the background of our legal system. Certain purposes may be emphasized in particular situations, but the aims described above cannot be totally absent—if we assume that legislators behave rationally and logically.

On the basis of this assumption concerning purpose Lahtinen presents an interesting idea of the problematics of formal incorrectness, an idea that has received less attention than it deserves. His starting point is that a formal provision—in his opinion a form is every factor in addition to the volition—is only a *means* by which the legislators try to carry into effect the purposes described above or other purposes that can be compared to them. Lahtinen says that if people by nature made their transactions in a satisfactory and expected way under all circumstances, no legislation concerning the form would be necessary. One has to require the use of a form only when it is to be assumed that without it some transactions would not be as satisfactory as they should. A formal provision is unnecessary if the transaction is going to fulfil the expected purposes anyway. The form assists in

fulfilling the functions of the transaction concerned. It has an *instrumental value*.

From this idea it follows that formal matters (signature, witnessing, incompetence, and so on) cannot be understood as a part of those facts to which the consequences characteristic of a legal transaction are attached. Formalities are not "legal facts", but we should consider as "legal facts" the state of affairs aimed at by formal functions (firm consideration, plainness, proof, possibility for registration, and so on), Lahtinen writes. In other words, if the expressions of one's will are correctly formed, if the consideration has been firm, if it is possible to have an undisputed proof of a legal act, then it is totally irrelevant whether this state of affairs has been realized through the observance of formal provisions or through the fact that a formal error, e.g. non-competence as a witness, has been unnoticed. In a case like this it seems to be unnatural to operate by means of a reference to a formal incorrectness with the effect that a legal act is invalidated. To make this point clear I will give an example: A person with two heirs has left an estate of 10,000 FM, all of which has been converted into money. The heirs divide this estate in mutual understanding and each of them gets 5,000 FM. The partition instrument, however, lacks the signature of one of two witnesses. If a party was allowed to invoke a formal incorrectness in this case, the form would have the meaning of a mere primitive ritual. It would not have any rational basis.

The picture of the problem of formal incorrectness sketched by Lahtinen appears, in the light of the relation (legal fact/legal consequence), as follows when put in a formalistic way:

(IV) $S [(p \& q \& r \& s) \rightarrow v]$.

The line of symbols describes the "facts" aimed at by the functions of the form, namely firm consideration, plainness, proof, possibility for registration, and so on. The difference from the prevailing doctrine of formal incorrectness is revealed—on the formal level—if we compare scheme IV with schemes I and II, given at the beginning, where $m / \sim m$ appears as one factor.

Lahtinen has used his construction for two purposes: (a) for the interpretation of the formal provisions and (b) the settling of the conflict between the substantive and formal law. About the interpretation he says that the formal provisions of a legal transaction are generally drawn up in such a way that there is no obscurity about their contents and legal consequences in a case

where these provisions are not observed. It is not always like that, though. And then we can make use of the idea that the formal provision is a means for carrying into effect certain functions of form. If a separate formality cannot supply any function that is considered relevant, it is impossible to give it any significance when valuing the question of the validity of a legal transaction. According to Lahtinen relevant functions are the purposes that are explicitly expressed and also the purposes that are traceable to the nature of the matter.

Concerning the settlement of the conflict between the substantive and formal justice, Lahtinen says that if a formally correct legal transaction contains, e.g., a mistake, it is in accordance with his construction to declare the transaction invalid. The form has failed in its function; by means of it we have not attained the expected result. The difference from the prevailing way of thinking lies in the fact that in this case Lahtinen does not link invalidity to the doctrine of form. According to Lahtinen we must—and this is so, too, in a case where a transaction was conducted in a formally correct way—ask: Have the facts aimed at by the legal transaction (in a substantive sense) been carried into effect? If so, we should not give any significance to the formal incorrectness in the case at bar. The legal transaction is valid.

The advocates of the prevailing doctrine of formal incorrectness have criticized Lahtinen's construction. In what follows I propose to consider only one detail of the criticism, the argument that Lahtinen has not been able to demonstrate, on the basis of his construction, those relevant functions that determine the interpretation or the application of a formal provision in an individual case.³ Lahtinen points out that they are traceable to the nature of the matter. It is very interesting to compare the prevailing doctrine and Lahtinen's construction with each other from that standpoint. In what way do they actually differ from each other, and are the differences after all so big as they are—on both sides—thought to be?

The prevailing doctrine of formal incorrectness can be presented, as we may recall, by the help of the formula: $[M-P-K]$. According to Lahtinen we can write: formal incorrectness—the

³ See Muukkonen, *Formal Provisions*, pp. 202 ff., where among other things he writes: "Especially here [i.e. separating the relevant and non-relevant functions: note of the writer] lies the weakness of the study, especially when we think of the practicability. It is very difficult to say which function is relevant." Muukkonen does not seem to notice that exactly the same weakness lies in his own idea of moderation (author's note).

function is carried into effect—the legal transaction is valid. The result seems to be the same from this point of view: the legal transaction calls forth the consequences aimed at. The difference seems rather illusory. According to the prevailing opinion a formal incorrectness calls forth, “in principle”, invalidity, whereas according to Lahtinen it is possible to declare a legal transaction “directly” valid. The difference would seem to lie only in the technique of expression.

Does the real difference lie perhaps in the fact that, according to the advocates of the prevailing doctrine, “equity” is the ground why a plea of formal incorrectness is forbidden, whereas—according to Lahtinen—a transaction should be considered valid when the relevant functions of a legal transaction are carried into effect? We can also ask: Is there any difference when we evaluate the consequences on grounds of equity and when we reach conclusions from the nature of the matter as to relevant functions?

First, it should be pointed out—although it may be self-evident—that jurisprudential concepts are rather indistinct. Actually they are flexible as to their content. Therefore we cannot blame Lahtinen for having failed to demonstrate the distinctive marks of the “relevant functions”.⁴

It is interesting to notice that one of the greatest fallacies in legal writing is that we try to find definitions for concepts even where no useful definition can be given. This tendency, the belief that it is possible to define general concepts, explains many of the classical doctrinal controversies in legal writing. One fact is forgotten: define a matter today, and tomorrow there will come somebody else who will define it in another way. In this respect modern linguistic philosophy has a great deal to teach jurisprudence. Here I would merely refer to the tradition of linguistic philosophy started by Wittgenstein in England.

The matter stands in a clearer light if we examine the problem of legal decision-making and argumentation. The character of legal decision-making is structurally open. As has often been emphasized in recent Scandinavian legal writing, decision-making is an activity with different values where we try to give a “rightful” decision on a particular problem. In reality, the decision is based upon many types of factors: legal text, expressions in the legislative material, precedents, the opinions of legal writers, and various pragmatic matters (e.g. “the nature of the matter”, “policy

⁴ Cf. Muukkonen, *Formal Provisions*, pp. 219 f., where he has proposed different criteria to demonstrate when an “immoderate situation” is prevailing.

considerations"). It is precisely these pragmatic matters that form the substance of decision-making. This is revealed in what follows. As we know, in many cases when a decision is made the assumed consequences of different alternative decisions are taken into consideration. Among the alternatives at hand we choose those that in regard to their consequences are most naturally appropriate to the system of purposes to which the decision-maker feels he is bound. Decision-making has thus strongly teleological characteristics (teleology is here to be understood in the general sense of goals). When the judge has to decide upon a legal controversy on the basis of the evidence presented to him and to judge, e.g., the consequence of an incorrectness in a legal transaction, he always makes a sort of *holistic estimate of the situation*. He weighs the different factors affecting the decision in the light of the ideology he approves of and of the knowledge he has gathered. The result of the complex mental process, which is difficult to characterize, is the decision of a legal controversy. The exact definitions of concepts and doctrinal constructions developed by legal writers are of only secondary importance.

An entirely different matter: (a) How does the judge (decision-maker) himself understand his action, how far is he conscious of the central features of his own decision-making? Our information as to our own activity is often relatively superficial, and jurists are no exceptions in this. (b) How do we *de facto* state reasons for the decision from the point of view of legal techniques? Here we may—and do—make use of the technique which emphasizes the logical characteristics and hides the normative side of the matter from the outsider.

We are now ready to give an answer to the question whether there is a difference between the prevailing doctrine of incorrectness and the way of thinking that I call "Lahtinen's construction". It is not a matter of finding out whether the concepts equity (in the prevailing doctrine) and "the nature of the matter" (in Lahtinen's construction) have the same contents and therefore can be defined by the help of the same criteria. This kind of attempt is bound to fail, for as a matter of fact the whole problem is put wrongly and based upon an erroneous conception of the terms used in our language. But we get further light on the matter if we examine *the role of the formal provisions (and formal incorrectness) in the process of judicial decision-making*.

When the judge has to solve the question *whether the facts aimed at with the functions of a formal provision can be con-*

sidered to have been carried into effect in spite of a formal incorrectness, he can choose between alternative decisions; only some very vague matters—which follow from the ideology of the prevailing system—restrict his decision-making.⁵ I have already pointed out that the decision-maker has to take into consideration also the reasonableness and moderation of the result expected. From the nature of the matter, i.e. from the characteristics of the case in question, he has to conclude what significance (emphasis) any given factor is to be given. If the plea of formal incorrectness leads, according to the judge's ideology, to an inequitable result, it is apparent—or at least conceivable—that he will not be “too strict” about the incorrectness. The formal incorrectness is not, in that particular case, relevant, owing to the so-called “nature of the matter” in the light of the concept and purpose system accepted by the judge.

From the viewpoint of the decision-making we might describe Lahtinen's conception in that way. The prevailing doctrine of formal incorrectness starts from the principle that a party is forbidden to plead formal incorrectness if it had a material inequity as a result. In other words: if the formal incorrectness is accorded no significance in the decision-making, i.e. if in the judge's opinion the following conditions must prevail,

(V) $S [(p \& q \& \sim m) \rightarrow v]$,

the viewpoints of equity have been taken into consideration. But in a case where the formal incorrectness is considered relevant, that is to say

(VI) $S [(p \& q \& \sim m) \rightarrow \sim v]$,

the judge has regarded the total state of affairs as being such that the invalidation does not cause immoderate consequences for one partner of a legal transaction.

Both views seem to lead to the same standpoint after all. It is permissible, I assume, to interpret the matter in a way that “inequity” in the sense of the prevailing doctrine means precisely that the facts of a legal transaction (the prevailing state of affairs

⁵ See, e.g., P. O. Bolding, *Juridik och samhällsdebatt*, Stockholm 1968, Stig Jørgensen, *Ret og samfund*, Copenhagen 1970, and on the Finnish judicial theory, e.g., Kaarle Makkonen, *Zur Problematik der juristischen Entscheidung. Eine Strukturanalytische Studie*, Turku 1965, L. D. Eriksson, “Rättslig argumentering och den dialektiska logiken”, *F.J.F.T.* 1966, pp. 445 ff., *id.*, “Samhällstillsänd juridik”, *F.J.F.T.* 1968, pp. 397 ff., and Aulis Aarnio, “Om rättsvetenskapens satser”, *F.J.F.T.* 1969, pp. 554 ff.

in its entirety)—including the state of affairs aimed at with the functions—*are not proper*. The idea of “equity” seems to lead to an approval of Lahtinen’s basic ideas when they are made more precise. We have just to pose the question “why” concerning the fundamentals of the prevailing doctrine. Thus we notice that according to both ideas the formal provisions (and the formal incorrectnesses) constitute only one part of the vast and complex entity of factors on which the judge actually bases his decision on a legal dispute.

The differences between the prevailing doctrine of incorrectness and Lahtinen’s ideas seem to have been exaggerated. The apparent reason is that neither the prevailing doctrine nor Lahtinen has linked the problem of formal incorrectness to the problem of the legal decision-making. They have not been aware of the fact that the whole problem of invalidity is a problem of legal decision-making, and in that context the different methods of classification and analysis of invalidity have a relatively peripheral position.

Neither the advocates of the prevailing doctrine nor Lahtinen have noticed that from the viewpoint of decision-making the consequences of formal errors come up especially in cases where an action has been brought into court. Observance/non-observance of the form has an important effect upon what kind of function each of the parties to a controversy has as to the presentation of evidence. Assume an action in court concerning a real-estate transaction which is formally correct but was not substantially so, because the purchaser was duped into making the deal. The parties have to give a reliable explanation about the substantive incorrectness according to the normal rules of presentation of evidence. The problem of the form is not at issue. Let us take another example and assume that instead of a substantive incorrectness there is a formal incorrectness: the witness was incompetent, but in other respects the deal was correctly conducted. If a party now pleads invalidity because of formal incorrectness, the decision depends—as we have seen above—upon whether it can be *proven* that the plea of invalidity is equitable/*inequitable*. In other words: the parties must give an explanation according to the rules of the legal procedure as to whether the legal facts aimed at (firm consideration, plainness, etc.) were carried into effect in the way expected in spite of the incorrectness. In a clear and simple case—e.g. an oral real-estate deal or a will lacking the signature of the testator—the evidence function of formalities does not

come up. In that case it seems to be natural, without arguing the question further, to link the consequence of invalidity to the formal incorrectness. But when we have very complicated borderline cases, e.g. the incompetence of a witness in a substantially correct legal transaction, the position of the formal incorrectness in the decision-making is revealed. This kind of a method for dealing with "borderline cases" seems to me to be also more generally useful when examining the fundamentals of the juridical concepts. By means of it we learn to understand our own conclusions and their hidden conditions. A critical attitude to the premises of our own acting is—so I believe—a necessary ground for a fruitful discussion of the essential practical and theoretical problems of jurisprudence.