The concept of legal competence

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1 Introduction

In everyday language the term 'competence' has at least two different meanings: 'competence' can mean *proficiency* or *authorization*. A person can be a competent decision maker in the sense that as a rule he makes good and right decisions, but he can also be competent in the sense that he has the authority to make certain kinds of decision. 'Competence' understood as authorization is a normative concept, in the sense that a person has competence by virtue of a norm and that the exercise of competence changes a person's normative position. Our concern here is of course with competence in the sense of authorization.

I use, as the reader will have noticed , the term 'legal competence' and not the term 'legal power' to designate the concept in question, and in doing so I follow what might perhaps be called a Scandinavian tradition within the philosophy of law. As Lars Lindahl has pointed out, British and American writers prefer the term 'power', while Scandinavian, Continental-European and Latin American writers speak rather of 'competence'.

Why should the concept of legal competence interest lawyers and legal philosophers? The answer is that we need a competence concept in order to adequately

analyze and discuss questions of legal (in)validity. For, as we shall see, competence is a necessary condition for validity: only a competent person can change a legal position.

I should like to point out at the outset that we are not primarily interested here in the conditions that must be fulfilled for a person to be said to have competence, but in what it *means* that he has competence: we want to know what that person has who has competence. That is to say, we want a legal consequence definition of the concept of competence. The competence concept thus conceived can be sought out in at least two different ways: we can (i) study the way legal practitioners make use of the concept in their argumentation, r we can (ii) study what legal scholars and philosophers have said about the concept. I believe the latter alternative is preferable, as it is rather unclear how legal practitioners conceive of the competence concept, if they make use of it at all. Let us therefore begin by taking a brief look at what some distinguished legal scholars have said about this concept.

Wesley Hohfeld distinguished eight legal concepts that he thought of as being fundamental in legal thinking. Among these concepts was the concept of legal competence, or, as Hohfeld said, the concept of legal *power*:

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings), or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.

Hans Kelsen, too, analyzed the concept of legal competence (*Ermächtigung*). The following statement illustrates his views on this concept:

"Die normative Funktion des Ermächtigens bedeutet: einem Individuum die Macht verleihen, Norme zu setzen und zu anwenden. Eine Moralnorm ermächtigt den Vater, seinem Kind verbindliche Befehle zu geben. Eine Rechtsnorm ermächtigt bestimmte Individuen Rechtsnormen zu erzeugen oder Rechtsnormen anzuwenden. In diesem Fällen sagt man: das Recht verleihe bestimmten Individuen eine Rechtsmacht... Ein nicht dazu ermächtigtees Individuum kann nicht Recht erzeugen oder Recht anzuwenden. Seine Akte haben objektiv nicht den Charakter von Rechtserzeugung oder Rechtsanwendung, auch wenn sie subjektiv in dieser Absicht erfolgen. Ihr subjektiver Sinn ist nicht ihr objektiver Sinn. Diese Akte haben – wie man sagt – keine Rechtswirkung, sie sind nichtig, d.h. rechtlich nicht vorhanden."

Another legal philosopher who concerned himself with the concept of legal competence was Alf Ross, who stated the following about this concept:

"Competence is the legally established ability to create legal norm (or legal effects) through and in accordance with enunciations to this effect. Those enunciations in which competence is exercised are called actes juridiques, or acts-in-the-law, or in private law, dispositive declarations. Examples are: a promise, a will, a judgment, na administrative license, a statute. An act-in-the-law is, like moves in chess, a human act which nobody can perform as na exercise of his natural faculties.... Since a norm of competence ultra vires (outside the scope of the com-petence) no legal norm is created. This is expressed by saying that the intended act-in-

the-law ins invalido r that no-compliance with a norm of competence results in invalidity."

H.L.A. Hart also took an interest in the concept of legal competence, or, as he said, the concept of legal power. Criticizing John Austin's theory of law, he pointed out that it could not account for the existence of power-conferring rules, that is, rules that "…provide individuals with facilities for realizing their wishes, by conferring legal power upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."

We see that these authors are generally in agreement about at least the following three points: (1) *one who has competence has a possibility of changing legal positions*. To be sure, one could say with several of the writers quoted above, that the competent person has an *ability* or a *power* (*Macht*) to change legal positions. I choose, however, to say that he has a *possibility*, because I believe the terms 'ability' and 'power' primarily have to do with physical and mental qualities, while the term 'possibility' could be used to designate, for example, a relation between a person and an event, and therefore may well be used in norm-ative as well as non-normative language.

(2) *There is a close relation between the concepts of competence and (in)validity*. At least Kelsen, Hart and Ross seem to think that competence is a necessary condition for validity, but the same can probably be said of Hohfeld, too. In saying that the competent person has the possibility of changing legal positions, they indicate that to their minds only valid acts change legal positions. In many cases of (in)validity the question arises whether or not the agent was competent.

(3) *The agent changes legal positions by performing a special kind of act*. In the quotations above only Ross says explicitly that it is a question of a special kind of act, namely an act-in-the-law, but it seems that the other writers, too, believe that competence is exercised by the performance of a special kind of act. I will call this type of act a C-act (a competence-exercising act).

It should be emphasized, though, that the agent does not have competence in general terms, but only in a certain, defined respect. For our purposes it is therefore convenient to conceive of the competence relation a two-place relation: it is always a certain person who has competence in a certain respect. In this respect, the concept of competence resembles concepts like 'owner', 'father', and 'brother'. An owner is the owner of something, a father is a father of someone, and a brother is a brother of someone. A statement of the type

(1) *p* has competence

is consequently elliptical and should be understood in the following way:

(1*) *p* has the competence to bring about that *x*,

where *x* stands for a statement formulated in terms of Hohfeld's fundamental legal concepts. This makes it possible to distinguish between those cases where agent, by performing a C-act, (i) brings about the intended change of position, (ii) brings about some other change of position, and (iii) does not bring about any change of position at all. When the agent, by performing a C-act, brings about the intended change of position, we say that he *exercises his competence*.

In light of the said, I propose the following tentative

definition of the concept of competence (*p* is any person, *LP* is any legal position, and *a* is any C-act):

(D.1) *p* has the competence to change *LP* if, and only if, there is an *a* such that *p* has the possibility, by performing *a*, of changing *LP*.

The concept of competence thus conceived constitutes a lowest common denominator for the competence concepts of positive law, such as *Geschäftsfähigkeit*, *Prozessfähigkeit*, and *Kompetenz*. The difference between the (general) concept of competence expressed in (D.1) and the competence concepts of positive law just mentioned is that the content of the latter are more specific in that they concern only, say, private law or the law of procedure.

2. To Have Competence

To have competence, then, is to have the possibility, by performing a special kind of act, to change legal positions. To gain a better understanding of the nature of this possibility, we may distinguish between (i) competence as permission, (ii) competence as a practical possibility, and (iii) competence as (what we might call) a hypothetical possibility. Let us treat these notions in this order.

To conceive of competence as a special case of *permission* is simply a mistake. Writers who maintain that competence should be analyzed in terms of permission seem to be saying either (a) that competence *is* a permission, or (b) that competence *presupposes* permission. The first alternative is difficult even to understand, and the second alternative does not comport with the facts. For we all know that a thief can sell stolen goods to a bona fide purchaser without being permitted to do so, and a person who is authorized to act on behalf on another can – but may not- act

contrary to his instructions.

To conceive of the competence person's possibility to change legal positions as a special case of practical possibility does not comport with the facts wither. Lindahl suggests that Hohfeld thought of the competent person's ability or possibility to change legal positions along the lines of a practical possibility, but I believe instead that Hohfeld – like almost every lawyer – thought of this ability or possibility along the lines of a hypothetical possibility.

I believe instead that the correct understanding of the concept of possibility used in the definition of the competence concept above is alternative (iii): to have competence is to have a *hypothetical possibility* in the following sense: *if* the agent (in an adequate situation) performs a C-act (and thus goes about it in the right way), he *will* bring about the intended change of position. And this is fully consistent with his not having the practical possibility to perform the C-act, perhaps because of physical impediment. I therefore suggest the following, final definition of the concept of legal competence:

(D.2) *p* has the competence to change *LP* if, and only if, there is an *a* and an *S* such that if *p* in *S* performs *a*, and thus goes about it in the right way, *p* will, through *a*, change *LP*.

3. To Exercise Competence

To have competence is one thing, to *exercise* it is another thing. There are, however, a number of different ways in which a person can change legal positions, and the trick is to distinguish between those changes that result from the agent's exercise of his competence and those changes that result from his exercise of his general ability or power of

changing legal positions. To begin with, we need to distinguish between competence and *Deliktsfähigkeit*, that is the possibility of changing one's legal position by committing a crime or tort. The reason is that whereas competence has been conferred on a person in order to give him the possibility of changing legal positions, the possibility of committing a delict is only a side effect of theaim of preventing certain types of act from ever being performed. Second, we need to distinguish between competence and the possibility of changing one's legal position in regard to taxes and social benefits, among other things, by moving from one city to another. For the reason the law makes people's legal position to a certain extent dependent on their place of domicile is not that one wants to give them the possibility of bringing about the intended change of position by moving, but that it is generally reasonable that a person pays his taxes etc. where he lives. Thus, the same reasons that speak for *Deliktsfähigkeit* being kept out of the concept of competence also speak for certain other ways changing legal positions being kept outside of this concept.

We have seen *why* we should delimit the concept of competence. There remains the question *how* we should go about doing that. I suggest that what is important is the agent's *mode of action* when bringing about the change of position. We can express this by saying that theagent exercises his competence by performing a C-act. More specifically, the performance ofa C-act constitutes a sufficient as well as a necessary condition for the legal effect. Hence if (and only if) we know when a person has performed a C-act, we know when he exercises (or tries to exercise) competence. That is to say, C-acts are our only clues in the search for legal

effect; and this means that it is important that we are clear about their characteristics.

What, then, is a C-act? I suggest that a C-act is an action that depends for its legal effect on having been performed with the (actual or imputed) intent to bring about the said effect. As Neil MacCormick puts it, "[p]ower is conferred by a rule when the rule contains a condition which is satisfied only by an act performed with the (actual or imputed) intention of invoking the rule." On a broad understanding of the concept of a declaration of intention, we might say that the agent exercises his competence by performing a declaration of intent, a *Willenserklärung*.

4. Types of Competence

There are different types of legal competence. The most common and also the most conspicuous distinction is doubtless that between *autonomous* competence, which is a competence to change legal positions in a way that binds the competent person himself, and *heteronomous* competence, which is competence to change legal positions in a way that that binds others. This distinction exists in two different versions, and it is also somewhat unclear in other respects. Kelsen, for example, makes a distinction between two ways of creating norms. Alf Ross, on the other hand, makes a distinction between private autonomy and public authority, which distinction rests, or seems to rest, on four distinct criteria of distinction. I believe, however, that we are justified, in treating Kelsen's and Ross' distinctions as version of the same distinction, and that the important issue is whether or not the agent can obligate other persons without their consent.

The distinction between autonomous and

heteronmous competence thus conceived is clearly morally relevant. Whereas a person's competence to obligate himself rarely gives rise to moral difficulties, a person's competence to obligate others typically does. In the final analysis, the existence of heteronomous competence concerns the question of the legitimacy of the legal system and therefore the relation between law and morality.

Other writers make a distinction between norm-creating and regulative competence. Like the distinction between autonomous and heteronomous competence, this distinction exists in two different versions and is also somewhat unclear in other respects. Crudely put, *norm-creating* competence is a competence to create norms, whereas *regulative* competence is competence to change legal positions without creating norms. As examples of norm-creating competence one might mention legislative power; as examples of regulative competence, one might mention the government's competence to declare a state of emergency and its competence to appoint judges, and a clergyman's competence to marry a couple.

While the distinction between norm-creating and regulative competence is less interesting from a moral point of view than the distinction between autonomous and heteronomous competence, it is more interesting from a theoretical point of view. What is really interesting about this distinction is the precise nature of regulative competence. Joseph Raz maintains that regulative competence governs the application of pre-existing norms. But, one might ask, to what extent, if any, can one change a legal position without creating, modifying, or repealing a legal competence. But perhaps we gain little by delving deeper into this problem.

For it is true that physical violence and the birth and death of human beings, and why, one might ask, should precisely those acts where the agent exercises regulative competence be seen as especially problematic? I am thus inclined to believe that it suffices to note that to exercise regulative competence is to change legal positions, not by creating norms, but – normally – by uttering legally relevant performatives, which does not exclude that the competent person can create norms by uttering a performative.

Finally, it is worth noting that having competence does not entail having a right. A judge may have competence to try certain types of case while being under on obligation to exercise this competence when a case of the relevant type is brought before him, and we have seen that a thief has the competence to sell stolen goods to a bona fide purchaser even though he is not permitted to do so. In neither case does the competent person have a right. This is enough to show that having competence does not entail having a right.

5. Norms that Confer Competence

So far we have not said anything about how competence is conferred n the agents. It is obvious that the competent person receives his competence from the legal order, and it is reasonable to assume that legal norms of some type confer it on him. The question is whether or not we have to reckon with a special type of legal norms, whose sole function is to confer competence on persons. More specifically, we should ask whether norms that confer competence should be understood as *duty-imposing norms* addressed to legal officials, or as special *competence norms*

whose sole function is to confer competence, and which are addressed directly to the competence-holders. A duty-imposing norm conferring competence would be addressed to the legal officials, imposing a duty on them to recognize as legally valid certain changes of legal positions brought about in a certain way in a certain situation by a certain category of persons. That is, such a norm would confer competence on a person, *p*, by imposing an obligation on another person, *q*, to recognize that *p*, by performing a certain type of act, *a*, in a certain type of situation, *S*, changes a legal position, *LP*. A competence norm, on the other hand, would be addressed to the competence-holders themselves, saying that they, by performing a certain kind of act in a certain kind of situation, can bring about a certain change of legal positions. That is, such a norm would confer competence on *p* by giving *p* the possibility, by performing *a* in *S*, to change *LP*. As should be clear, the former type of norm would confer competence on a person indirectly by imposing a duty on the legal officials, whereas the latter type of norm would confer competence on him directly without imposing a duty on anyone.

My view is that norms conferring competence are best understood as duty-imposing norms addressed to legal officials, and that so-called competence norms are best understood as fragments of such duty-imposing norms. The reason is that duty-imposing norms but not competence norms are (complete) norms in the sense that they give (complete) reasons for action.