CAPABILITIES, POWERS AND COMPETENCES

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1. Introduction

In the jurisprudential literature, the notions of legal power and legal competence are usually not well distinguished, if they are distinguished at all. For instance, in his classic paper on the subject, Hohfeld (1913) only writes about (legal) powers, not about competences. Spaak (1994), following Lindahl (1977), claims that the terms 'competence' and 'power' are used for the same thing by authors on the European continent, respectively from the Anglo-/American tradition. To confirm this theory, Hart (2012), MacCormick (1981) and Raz (1972) wrote about powers. Lindahl and Reidhav (2017) remain in the Swedish tradition by claiming that powers and competences are the same. Kurki (2017), finally, considers competences to be a subset of powers.

The present article tries to articulate the distinction between the two notions. Moreover, it also aims to embed them in social ontology and the theory of actions. More about that soon.

Obviously, a theory of powers and competences should use the words 'power' and 'competence' by and large in their ordinary meanings. However, these ordinary meanings are ambiguous, and arguments that develop well-defined notions must unavoidably deviate from some forms of parlance. The argument in this article should be read as a plea to use the words 'power' and 'competence' in a particular well-defined way, and does not aim to capture all aspects of how these notions are used in legal practice or the jurisprudential literature. I do not care much about words. The distinctions that the argument makes matter; the precise words that are used for them do not.

The distinction between powers and competences is blurred by the fact that the word 'power' is ambiguous. In its broader meaning, 'power' stands for the capability to do something. This meaning is used in, for instance the sentence 'Making it to the finale of Wimbledon turned out to be beyond Jaap Hage's power.' In its narrower meaning, it stands for the capability to bring about legal consequences by means of a 'juridical act'. This meaning is used in, for instance, the sentence 'It lies within the power of the Constitutional Court to declare this provision null and void.' I will call these latter powers 'legal powers'. The notion of a legal power is related to the notion of a legal competence, although important differences remain.

This article consists of two main parts. The argument of the first part is bottom-up: it starts with a discussion of actions and capabilities to act, and defines powers as capabilities to act (sections 2-4). Then follows a brief discussion of juridical acts, because the performance of juridical acts is one important way to exercise powers. The power to bring about legal consequences by means of a juridical act, the legal power, is a special case of power in the broader sense (section 5). Legal competences are necessary for the existence of legal powers. This is the argument of the first part of this article and at the same time the master argument of the article as a whole (section 6). The

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second part consists of a number of applications of the theory about competences and powers that was developed in the first part. These applications are also used for distinguishing my view from other views (section 7). The article is concluded in section 8.

The master argument of the article can be formulated without connecting it to social ontology and with only a modicum of theory of action. However, that would leave the argument open to objections based on misunderstandings of what capabilities, actions and intentions are. By embedding the basic argument in a setting of social ontology and action theory, I hope to avoid at least some of these objections.

2. Actions, capabilities and attribution

Let me start the argument at the bottom, with events. An event is a change in the set of all facts. Examples of events are that it stopped raining, that the stock market plummeted, that Liverpool FC won the UEFA Champions League 2018/19, that a baby was born, that the victim of a car accident died in the hospital, that Maria and Mateo got married, that Luigi hit a homerun in baseball, and that Christina took a walk.

Some of these events are actions. From the examples above, the events that Luigi hit a homerun and that Christina took a walk are certainly actions. That Maria and Mateo got married is perhaps also an action, just as winning the Champions League. Being born and dying are less obvious actions, although disagreement is still possible. If it stops raining and if the stock market plummets, we consider that as events, but not as actions.

These examples are meant to illustrate that sometimes it is not obvious whether an event counts as an action. Actions are not a natural kind that we discover in a mind-independent reality. Consciously or unconsciously, we single out particular events as actions. Often, people do this in similar ways; they agree on what events count as actions. If that is the case, events that are generally recognized as actions *are* or *count as* actions. Actions are socially defined, and I use the phrase 'counts as' to highlight this social construction of actions.[1]

If an event is an action, there is also an agent: no action without an agent and no agent without an action. Because being an action is a matter of social reality, the same holds for being an agent. If we consider getting married as an action of the marrying persons, we attribute the status of agents to these persons. If winning the Champions League is an action, the team that performed this action counts as an agent. If we attribute the status of an action to being born, we attribute the status of an agent to the baby that was born. If we do not want to do the latter, we should refrain from the former.

Having identified actions and agents as elements of social reality, it is time to turn to capabilities. Capabilities are important for my argument, because – as I will later define – powers are nothing other than capabilities. If, as I will argue, capabilities are a matter of status attribution, powers are for the same reasons a matter of status attribution.

Having a capability means being able to perform some kind of action. For instance, having the capability to walk means being able to perform actions of the type walking. The presence of such a

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[1] In social reality there is no difference between what something is and as what something counts. Everything in social reality is what it counts as.

capability can be established if an agent actually performs the kind of action in question. If somebody walks, this proves that she could (had the capability to) walk. If somebody commits arson, this shows that he is capable to do so. Actions are always actions of some particular kind. Therefore, the performance of an action of some type is definitive proof that the agent had the capability to perform that kind of action.[2]

Often, however, we ascribe capabilities to agents even though the relevant actions have not been performed yet. We know that Elisabeth can take the train to Moscow, although she never did that. Moreover, we know that our children can finish a particular kind of education, because we have seen them perform so many other actions that require the same kind of skills. Also these capabilities are a matter of attribution; they do not exist in a mind-independent reality, but we attribute them to agents because of other characteristics of these agents.

No matter whether we conclude to the presence of a capability from an action that we see as its exercise, or whether we conclude that an agent must have a certain capability because of other characteristics he has, in both cases capability is a matter of attribution. Such attribution is based on facts that are believed to be present, such as the exercise of the capability, or the possession of other capabilities, but the capabilities are not identical to these facts. They are facts that are added to, supervene on, other facts - performance of actions, or performance on other tasks – in social reality.

Just like necessity and possibility, capability is a matter of constraints.[3] These constraints may be physical, as when a person lacks the capability to stand up because he is tied to a chair. They may be psychological[4], as when a person with an anxiety cannot bring herself to travel by airplane. They may also be geographical as when Jean, who is in France, lacks the capability to cross a bridge in Melbourne.

On purpose, the last example concerns a borderline case. Some would object that Jean is capable of crossing this bridge in Melbourne; he only has to travel to Melbourne to do so. The obvious rejoinder to this objection is that at present Jean lacks the capability, but that he may gain this capability by travelling to Melbourne. To that, it can be objected again that Jean already has the required capability, and that the trip to Melbourne is only necessary to exercise it.

The exchange of arguments can go into even more detail, but the message that should be retained is that the answers to questions about capabilities cannot to be found in nature only. Human practices are also relevant. What constraints do we take into account in determining whether somebody is capable to do something? Is geographical location one of them? And psychological limitations and, if so, what limitations? Does laziness also count as a limitation on capabilities? To find out what basic capabilities a person has, we should not only study the hard facts, but also our social practices (Hage 2017). Sometimes our practices are ambiguous, or in flux, and then there may be no one right answer to the question what a person is capable of.

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[2] Notice that even if a capability is established from its exercise, the presence of the exercise itself is a matter of status attribution. We ascribe to a human being the status of an agent, because we ascribe to some event the status of a particular kind of action, such as walking. Moreover, given these status attributions, we can conclude that the agent apparently had the capability to walk.
Notice, however, that if an agent has the capability to perform some kind of action, for instance walking, this does not imply that the agent can perform all actions of this kind. Being able to walk does not imply the capability to walk on water. However, an agent who cannot walk, cannot walk on water either.

[3] An extended argument why possibilities and necessities depend on constraints can be found in (Hage 2015, 2017).

[4] This not meant as the claim that the physical and the psychological are completely different domains. On the contrary: what is psychological is - at least in some sense - also physical. But that is a different topic.

People have some capabilities because, given the facts and our social practices, we attribute these capabilities to them. We will call these capabilities 'basic capabilities'. Next to basic capabilities, there are also 'derived capabilities'. These exist because the possession of a more basic capability implies[5] the possession of the derived capability. Walking is a way of moving; therefore the capability to walk implies the capability to move. Firing a gun will cause a person to be hurt; therefore, the capability to fire the gun is also the capability to hurt this person. Signing a contract counts – under suitable circumstances - as the transfer of a home; therefore, under these circumstances, the capability to sign the contract also is - counts as - the capability to transfer the home.

Derived capabilities are the result of some underlying capability, basic or itself also derived, and a 'link' that attaches the derived capability to its underlying capability. This link can be causal, but it can also be a rule.[6] If the link is causal, I will speak of causal capabilities; if the link is based on a rule, I will speak of rule-based capabilities. An example of a causal capability would be Dieter's capability to open the door. This capability is based on Dieter's capability to turn the key and the causal laws that make the door open as soon as the key is turned. An example of a rule-based capability would be that Charlène has the capability to reduce her tax obligations. This capability depends on Charlène's capability to move from Belgium to Monaco and on the tax laws of Belgium and Monaco, more in particular the differences between them.

3. Kinds of rules and kinds of powers

We have distinguished three 'sources' of capabilities: attribution for basic capabilities, and causal links and rules for derived capabilities. All capabilities, no matter what their source is, are sometimes called 'powers'. Here I will also use the term 'power' for a capability. These are powers in the broader sense, which must be distinguished from a subcategory, legal powers. In the following, I will use the term 'power' without the addition 'legal' for powers in this broader sense, that is for capabilities. I will return to legal powers later. In this section and the following, I will focus on powers in general, and in particular on rule-based powers, because these are most easily confused with competences.

There are different kinds of rules, depending on the kinds of consequences to which they lead. These differences are reflected in different kinds of powers. All rules attach 'new' facts to 'old' ones, and they can do this in two main ways.

Some rules make that facts of one kind go together in time with facts of another kind. Elsewhere (e.g. Hage 2018, 93), I called these rules 'static rules'. Counts as-rules, such as the rule that - under suitable circumstances - signing a contract counts as undertaking an obligation or as the transfer of a good, are typical examples.

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[5] The notion of implication is on purpose left vague here. As an approximation the following 'definition' may be helpful: Capability A implies capability B, if and only if capability B is typically assumed to exist whenever capability A is assumed to exist. The double use of the word 'assumed' signals that the existence of a capability, whether basic or derived, is always a matter of attribution.

[6] In this connection, the word 'rule' is used in the broad sense of a connection between kinds of facts (including capabilities) based on a social practice which may, but need not, be the law. More on this conception of rules in (Hage 2018, 57-70).

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Some other rules attach facts to the occurrence of an event. I have called these rules 'dynamic rules', because these rules deal with the succession of facts in time (Hage 2018, 94-96). The law contains many dynamic rules, such as the rule that attaches the liability to be punished to the occurrence of crimes, rules that deal with the succession of roles (e.g. the role of chairperson) or possessions in case somebody passes away, and rules that attach the existence of obligations to torts or to contracts.

Both static and dynamic rules underlie powers. If signing a contract counts as the transfer of real estate, the power to sign the contract implies the power to transfer real estate. (Legally, it is more complicated because competences play a role, but that is for later.) If there is a rule that attaches the status of commander-in-chief of the American army to the status of being the President of the USA, the power to marry the President implies the power to marry the commander-in-chief. If unlawfully causing damage to somebody else leads, according to the rules of tort law, to liability for damages, the power to unlawfully cause damage to somebody else implies the power to become liable for damages. And, finally, because of the rule that validly created statutes lead to valid legal rules, the power to create a statute implies the power to make law.

For many, only the last example will be a real example of a power. It is true that only the last example illustrates a *legal* power. A legal power is defined as the power (that is: a capability) to bring about legal consequences by means of a juridical act. I will return to the importance of juridical acts in connection to legal powers and competences, but in the next section I first will pay some more attention to the ways in which facts, including the existence of powers, depend on rules.

I cannot move to the next section, however, before having pointed out that an agent never needs the power to do something in order to do it. Two examples can illustrate this. Andrew has the power to walk and exercises this power by walking. Andrew can do this because he has legs, sufficient muscle power and sufficient strength of will to walk, and there are no physical or mental impediments that withhold him from walking. All these combined factors, positive or negative, which make that Andrew walks, also - and for the same reason - make that Andrew can, has the capability, or has the power to walk. The power does not add anything to what makes Andrew walk.

If we consider a juridical act, and the exercise of a legal power, the story is similar. If Parliament makes a new legal rule, there were a number of factors present that made Parliament do this. These factors include the presence of legal rules giving Parliament the competence (to be explained later) to legislate, but also the possibility for MP’s to vote, perhaps to be physically present and no doubt many other factors. These factors make Parliament do something (create a new rule) and at the same time and in the same way enable Parliament to do so. Parliament has the power to create new rules, and this power has the same ground as the actual rule-making action. The power does not add anything to the causes of what Parliament does. If we say that Parliament exercises its power to create new rules, we say nothing other than that Parliament makes new rules. The power-talk is an unnecessary addition. As will see, the story is different for competences; competences do add to other factors to make particular kinds of action (juridical acts) possible.

4. Directly and indirectly rule-based facts

In section 6, I will argue that a major difference between powers, including legal powers, and competences is that competences are directly rule-based, while powers are at most indirectly rule-

based. To facilitate this argument, I will say a little about facts and entities that are directly or indirectly rule-based.

A fact is directly rule-based if there is a rule that attaches the existence of this fact to one or more other facts. A non-legal example is based on the semantic rule that unmarried men of marriageable age are (called) bachelors. If Harry is 35 and still (or again) unmarried, this semantic rule makes Harry into a bachelor. The fact that Harry is a bachelor has been attached by a semantic counts as-rule to the facts that Harry is 35 (and therefore of marriageable age) and unmarried. The new fact is an instantiation of the rule conclusion, and therefore this fact is based directly on the rule.

Not only does the application of this rule create a new fact, it also creates a new thing, namely a bachelor. This does not mean that this particular bachelor, Harry, did not exist before the rule was applied, but merely that Harry's status as a bachelor depends on the rule. Suppose that a particular society does not attach any significance to men of a certain age being unmarried, and therefore also has no special word for such men. Suddenly – say, because of an influential vlog – this changes. Not only has it become important whether a man of marriageable age is married, but also a special word for such men, 'bachelor', has become popular. This sudden change in social reality has created a lot of bachelors, while before there were only unmarried men. Physically, not much has changed[7], but social reality has been enriched with a lot of new bachelors.

Law abounds with examples of facts that are directly rule-based. I will take an example from the Charter of the United Nations (Art. 2, Section 3):

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This provision creates a rule of public international law, even though the provision calls it a 'principle'. If this rule is applied to some Member State of the UN, say France, it imposes on France the duty to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. In other words, this rule attaches the duty to the fact that France is a Member of the UN. A new duty has entered into existence because of the rule, and at the same time a new fact, namely that France has this duty. Moreover, the duty and its existence follow directly from the rule – they are mentioned in the rule conclusion – and are therefore directly rule-based.

Let us now take a look at facts and things that are indirectly rule-based. The simplest way to do so is by means of an example. Contract bridge leagues in many countries award so-called 'masterpoints' to players who have achieved particular results. How many points a player gets for a particular achievement is determined by rules of the national league. These masterpoints are collected in a record, that keeps track of the total amount of masterpoints a player has. To my present knowledge, masterpoints do not lead to much other than the honour and status of the players who collected them. However, one can imagine that a player who has gathered sufficient points is granted the honorific title of 'bridgemaster'. The rules of the national bridge leagues determine how many points are needed for this title.

Let us fill in some details. Remember, all of this is pure fiction. In Belgium, a player needs 5000 master point in order to be a bridgemaster; in the Netherlands a player needs 'only' 4000 points. Suppose that both in Belgium and the Netherlands there are two players with 4500 masterpoints

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[7] A change in social reality is brought about by a change in minds, which is in turn brought about by a change in the physical carriers of minds, typically brains. This means that changes in social reality typically are accompanied by changes in brains. For my present purposes, this is a side-path however.

each, and one player with 5100 masterpoints. There are no other players that might qualify for the title of bridgemaster.

Although the situations in Belgium and the Netherlands are in a sense equal, the difference in rules between the two countries makes that there are three bridgemasters in the Netherlands (fact 1) and only one in Belgium (fact 2). As a result, there are more bridgemasters in the Netherlands than in Belgium (fact 3). It is obvious that the facts 1-3 all depend on the rules concerning the assignment of masterpoints and of the title of bridgemaster. Therefore, these three facts are in a sense all rule-based. However, neither the Netherlands nor Belgium has rules with as conclusion that there are so-many bridgemasters, or that one country has more bridgemasters than another country. So, although the facts are rule-based, they are not directly based on any rule.[8] They are only indirectly rule-based.

Similar phenomena also play a role in law. The rules of a particular jurisdiction determine at what age minority ends. The fact whether a particular person is a minor is therefore directly rule-based. The rules defining minority indirectly also determine how many minors there are at a particular moment. However, this number of minors is not directly based on a legal rule, but only indirectly. The point that I want to make in the next section is that the fact that an agent has the power to do something by means of a juridical act is in a similar way indirectly rule-based.

5. Juridical acts

There are many ways in which legal rules can provide agents with the power to bring about legal consequences. One way is if a legal rule makes that some kind of action also counts as an action of another kind. In that case, the power to perform the former kind of action also is (counts as) the power to perform the latter kind. For example, the power to create legislation is also the power to make law.

A second way is if a legal rule makes that one kind of fact goes together with another kind of fact. In that case, the power to bring about the former kind of fact goes together with the power to bring about the latter kind. In this way, the power to become the President of the USA goes together with the power to become the Commander in Chief of the US army.

A third way is if a legal rule attaches consequences to an action. In that case, the power to perform that kind of action is also the power to bring about these consequences. For example, the power to commit a tort goes together with the power to incur an obligation to repair the damage.

All three cases have in common that the rule that creates the power does not have as its consequence that this power exist. The rule leads to a legal consequence and indirectly provides an agent with the power to bring about this consequence. That is precisely the point that I want to make: powers brought about by legal rules are always the indirect consequences of these rules.

On purpose, I have chosen three examples that do not deal with the legal power that most people have in mind: the power to bring about legal consequences by means of a juridical act. I will argue that the situation with regard to juridical acts is no different from the situations dealt with in the

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[8] This may be disputed, because the facts are based on rules of arithmetic. However, the point I wanted to make is that the facts in question are only indirectly based on the rules concerning masterpoints and concerning the title of bridgemaster. Analogously, it will turn out to be possible to distinguish between facts that are directly based on legal rules, and which are only indirectly based on legal rules (although perhaps directly on non-legal rules).

three examples I have given. There are no rules which directly give agents the power to bring about legal consequences by means of a juridical act.

Juridical acts are special in the sense that they involve the capability (power), within important limits, to bring about the legal consequences that the agent intends to bring about. Actions by means of which agents use this capability are called 'juridical acts'. In Germany the notion of a juridical act, a *Rechtsgeschäft*, is limited to private law, where the performance of a juridical act tends to be an exercise of autonomy. However, these private juridical acts have close relatives in public law, for example in the form of legislation, of administrative dispositions, and of judicial verdicts. These juridical acts are essential for a proper understanding of legal powers, legal competences, and the difference between them.

The notion of a juridical act is almost as ambiguous as the notions of a competence or a power. The following definition can therefore not do full justice to the use of the notion in legal theory, doctrine or practice. Nevertheless, I find it satisfactory.

A juridical act is an action performed with the intention to bring about particular legal consequences, to which the law attaches consequences that are to a substantial extent determined by what the agent intended to bring about.[9]

Some comments can perhaps avoid misunderstandings.

1. The intention with which a juridical act is performed is not a conscious state of mind or a mental event, such as a decision (cf. Halpin 1997, 60-68). It is as much the result of attribution as the action itself.[10] Members of society, including judges, attribute a particular intention to a person to whom they also attribute agency, and in doing so they can take everything into account which they deem relevant. However, if there is a recognizable conscious mental state, this will typically play an important role in the attribution of an intention.

2. Although the definition does not mention it, a typical juridical act will consist of the expression of an intention. If intention were taken to be a state of consciousness, the intention itself and the expression thereof would be different things. However, if intention is a matter of attribution, intention and the expression thereof may conceptually be closer than is often assumed. This becomes clear if one considers a juridical act where the intention and its expression are almost indistinguishable, as when somebody thoughtlessly buys a leaf of bread from a vending machine. Another example, provided by Lindahl and Reidhav (2017) is that unsold goods belonging to a company are thrown into a container outside the company's premises. Here the implicit intention is to abandon the ownership on these goods. One way to express this closer relation is to say that the intention is 'read off', rather than inferred, from its expression.[11]

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[9] There is some obvious affinity here with Halpin's view that if a power is exercised, the decision of the power holder influences legal positions. Cf. Halpin 1997, 60.

[10] Thanks to Hester van der Kaaij who insisted on this while writing her PhD-thesis (Van der Kaaij 2019). It took me some years to realise that she was right after all.

[11] Much more can be said about the close relation between an intention and the action that expresses the intention. The possibility that entities without consciousness, such as legal persons or artificially intelligent agents, express intentions would be a case in point. A full discussion of this topic deserves at least a full book and the present remarks are no more than a suggestion that it is perhaps better not to distinguish too sharply between an intention and its expression.

3. The intended legal consequences are the starting point for the legal consequences which the law attaches to a juridical act. However, not all intended legal consequences will necessarily become real. Moreover, there will typically be more legal consequences than only the intended ones. In the latter case, the content of the juridical act - the intended consequences - will normally determine the additional consequences to a large extent. For example, if the intended consequences make a contract into a sales contract rather than a lease contract, this determines the supplementary law that also becomes applicable.

4. In legal practice it is sometimes assumed that a juridical act has taken place, even though it has become clear that the required intention was absent.[12] The typical reason to do so is to protect justified reliance. Given the present definition of a juridical act, these situations do not involve juridical acts. This does not exclude that, for reasons of legal certainty, the legal consequences are precisely those that would have existed if the juridical act had taken place. The juridical act is not a necessary condition for these consequences.

There is a trade-off in concept-formation here. It is possible to assume that a valid juridical act exists, every time the law assigns to some event all the consequences that the juridical act would have had. For instance, in order to promote legal certainty, the law assumes a valid contract every time there was justified reliance that the relevant intention was present, even if this intention was actually lacking. It is also possible to promote conceptual consistency and deny the existence of a juridical act if the crucial intention was lacking. To protect justified reliance, the law can still assume that the consequences of a juridical act set in, even though the juridical act itself is not recognised as valid. Above, I have chosen for this second option.

Given the definition of legal powers in terms of juridical acts, and the definition of juridical acts in terms of the relation between agent's intention and legal consequences, legal powers are by definition powers to bring about the legal consequences that one intends to bring about. However, a rule that brings about the intended consequences, has as its consequence that the intended consequences become real, and nothing else. More in particular, the rule does not assign a legal power. Therefore, also in the case of juridical acts, powers are an indirect effect of legal rules, not a direct effect. Why do some people nevertheless believe that there are rules to confer powers upon legal agents and that juridical acts are exercises of this pre-given power? The answer may be that they confuse legal powers with legal competences.

6. Competence

Not everybody can - has the power to - perform every kind of juridical act. For example, the legislator as such cannot conclude a sales contract, a private citizen cannot issue an administrative disposition, a court cannot legislate (although it may be able to create law), and an administrative organ as such cannot judge individual cases (although some administrative organs may have a subsidiary judicial function).

Moreover, even if a kind of agent has the power to perform juridical acts of a particular kind, there may be sub-kinds of agents that lack the relevant power. For example, human agents can typically

[12] Another complication might be that the required competence was lacking. See the next section.

enter into contracts, but very young children, or persons with a mental handicap, may lack this power.

There are even more special cases: an insolvent agent may lack the power to alienate the goods he still owns; sale between spouses may be impossible (to prevent fraudulent sales contracts); persons who lack the relevant nationality may not be appointed as judges, and so on ...

The law uses different labels to deal with these impossibilities, but a very important group of them are dealt with under the heading 'lack of competence'. Competences are particularly relevant for an agent who lacks them, because without the required competence a juridical act with a particular content will be invalid (null and void). If, in the Netherlands, a private citizen performs a marriage, the 'marriage' will be invalid. If an insolvent person tries to transfer his car to somebody else, the transfer will be invalid. If the legislator makes the last will of a private citizen, there will be no valid last will.

For every juridical act it holds that the agent performing it needs the competence to perform this kind of juridical act, with this particular content. The law uses the mechanism of withholding competence as a means to control the legal consequences that can be brought about by means of juridical acts. In public law in many countries, the principle of legality brings about that an agent lacks the competence to perform juridical acts in the sphere of public law, unless the agent was granted this competence by written law.[13] In private law, it is typically the other way around: every legal subject has by default the competence to perform many private juridical acts with any content (belonging to that kind of action), unless the competence was explicitly withheld. However, sometimes an explicit attribution of competence is also required in private law. For example, one cannot transfer ownership or any other right without the competence to do so, and this competence is typically attached to having the right that is to be transferred (the *nemo plus …*-, or the *nemo dat*…-principle). Because this attribution of the competence to transfer is usually taken for granted ('unwritten law'), the necessity to have this competence is not always obvious. However, if the competence is lacking - e.g. when a non-owner sells something - it becomes clear that it was necessary to have the competence which the law attaches to ownership.

So, the general idea is that for every juridical act with a particular content, there is a precondition that the agent who performs the action needs a competence to perform this particular kind of juridical act, with this content. Moreover - and here comes the contrast with powers – competences are typically directly granted by a legal rule. That this is done directly means that the rule has the consequence that somebody has this competence. For instance, there is a rule that grants Parliament – perhaps in cooperation with some other State organ- the competence to create statutes. Or, there is a rule that grants owners of a good the competence to alienate this good. Or, there is a rule that grants courts the competence to issue binding decisions in cases brought before them. Where powers are not directly rule-based, competences typically are.[14]

Finally a brief reply to the possible objection that the law sometimes allows a juridical act to be valid, even if the agent performing it lacked the required competence. Just like in the case of lacking

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[13] Notice that such a competence is not a permission, although a competence without matching permission makes little sense.

[14] 'Typically', because facts in social reality, including the existence of competences, can always exist because they are broadly accepted without an intervening rule. However, even then there is a contrast between powers and competences, because powers cannot exist purely because they are accepted, without any support in other facts. Elaboration of this interesting contrast would go beyond the scope of this article, however.

intention, we have two possibilities here. The one is to adhere to common legal usage and accept an incoherent theory of juridical acts and competences. The other one is to stick to the coherent theory and to argue that the law perhaps rightly assigns the legal consequences of a valid juridical act to a case, but that the proper way to construct this is to say that these consequences do not flow from a juridical act.

For instance, if a good is transferred by a person who lacks the required competence, the beneficiary of the alleged transfer may have become the new owner. One way to construe this is to assume that in some cases, in particular when the beneficiary of the transfer acted in good faith, a transfer can also be valid without the relevant competence. The other way is to assume that the beneficiary has become the new owner, but that this ownership is not the result of a valid transfer, but – for instance- of a rule that protects contract parties who act in good faith. Here, this second option is chosen.[15]

The argument leading to a distinction between powers and competences is finished now. In summary, powers in the broad sense are capabilities to perform particular kinds of actions. Legal powers are a subcategory of powers in the broad sense. Their distinguishing characteristic is that they are exercised by means of a juridical act. Legal powers are forceful instruments and the law limits their number. One important way to do so is to require a legal competence for the valid performance of a juridical act, and to withhold this competence where the power to bring about intended legal consequences is not desirable. The existence of the relevant competence is a necessary condition for the valid performance of a particular kind of juridical act with a particular content, and in that way also for the possession of the legal power to bring about this content. In contrast to powers, competences are factors that contribute to the juridical acts based on them. Saying that an agent exercised a legal competence to bring about legal consequences says more than merely that the agent brought about these consequences.

7. Examples

Super-Tramp

To obtain a better understanding of the theory that was developed in the sections above, I will discuss a number of examples. MacCormick introduced the example of Super-Tramp who always committed offences in early winter in a town with a tolerably comfortable jail, in order to get convicted and imprisoned.[16] The point of this example was to refute the theory that every way of acting in knowledge of the law and with a view to making the law's provisions serve one's ends, can be viewed as an exercise of legal power.

I think it is fair to translate the phrase ‘exercise a legal power’ as ‘perform a juridical act’. Given this translation, MacCormick was correct in claiming that Super-Tramp did not perform a juridical act. Going by Dutch law, the main legal consequence of committing an offence would be the liability to be punished. This liability does not come into existence because of the intention to bring it about.

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[15] As Hegel allegedly claimed: ‘Wenn die Tatsachen nicht mit der Theorie übereinstimmen – umso schlimmer für die Tatsachen.’ (If the facts do not match the theory, all the more worse for the facts.) This may sound stupid, but for non-realist domains, where the facts are mind-dependent, it may be a very brief formulation of a deep insight.

[16] MacCormick 1981, 75.

The legal consequences of Super-Tramp's behavior are not determined by the intention with which this behavior was performed. Therefore, the offences committed by Super-Tramp were no juridical acts, and Super-Tramp did not exercise a legal power. A consequence would be that he did not need any competence to perform his offences.

Notice, by the way, that the imprisonment of Super-Tramp is no legal consequence of his offences. The only legal consequence is the liability to be punished. It depends on the behavior of the public prosecutor and the judiciary whether this liability will be actualized. In terms of the theory exposed above: it depends on whether there is a causal link between the offence and the imprisonment. If this causal link exists, Super-Tramp has the causal power to become imprisoned.

As this Super-Tramp example illustrates, the intention to bring about legal consequences by means of actions that can be subsumed under legal rules does not make these actions into juridical acts. Intentions are relevant, but the mere intention to use legal rules in order to create legal consequences does not suffice. Something more, even something completely different is needed.

Moving house

An example that is related to the Super-Tramp case, but slightly different in an illuminating manner, is the case of moving house.[17] Suppose that Charlène lives in Belgium and that she has to pay a high tax on her yearly income. If she would move house to Monaco, that would result in reduced tax obligations. This means that Charlène can intentionally modify her legal obligations.

Because Charlène can modify her legal obligations, she has by definition the power to do so. She can exercise this power intentionally, that is: she can move to Monaco with a view to reducing her tax obligations. However, just like in the Super-Tramp case, the fiscal consequences do not depend on Charlène's intentions. This means that modifying tax obligations by moving house is not a juridical act, and that no competence is required for it.

However, there is an important difference with the Super-Tramp case. In the latter case, the link between the underlying action (committing an offence) and the derived action ('earning' an imprisonment) was based on a causal link. In the case of moving house, the link is based on a rule, or - more precisely - on the difference between the tax rules of Belgium and of Monaco. This means that Charlène's power to reduce her tax obligations is rule-based, but in an indirect manner. There is no single rule with as its consequence that Charlène's tax obligations have been reduced; the reduction is based on the comparison of the legal consequences of two different rule sets. So there are two major differences between the Super-Tramp case and the case of moving house. One difference is that in the former case the power to earn imprisonment was based on a causal link, while in the latter case the power to reduce tax obligations was based on rules. The second difference is that in the former case, the power was directly based on a causal link – the offences caused the imprisonment – while in the latter case, the power to reduce tax obligations was indirectly based on the tax rules of Belgium and Monaco.

Administrative dispositions

Administrative dispositions are juridical acts by means of which organs of the administration establish legal consequences for concrete cases. Their nature varies from imposing parking fines and

[17] This example was inspired by Raz 1972 and the subsequent discussion in Kurki 2017.

establishing tax obligations to issuing permits and granting social security benefits. In all of these cases, the legal consequences depend on the intentions of the decision making organ. Administrative dispositions are juridical acts and can only be made by agents who have the necessary competence.

If the required competence is lacking, for instance if a tax inspector writes a parking ticket, the disposition is invalid, null and void. At least, that is what the theory requires. Legal practice is often different. Dispositions made by an organ that lacked the competence to do so are often merely avoidable, or sometimes outright valid. The reasons why this is the case may vary, but often legal certainty has much to do with it. If somebody enjoyed a social security dole for months, it will often not be possible to decide that the payment of this dole was unjustified and that the beneficiary must repay all the money. The same holds if an industrial plant was built on the assumption that the required licenses were all granted.

If an administrative disposition remains valid, even if the agent making it lacked the required competence, the agent apparently had the power to make this disposition. Not the legal power, to be sure, because for legal powers the relevant competence is a necessary condition. However, the agent had a power in the broader sense, because she succeeded in making the disposition with its legal consequences.

This example illustrates that the law sometimes gives agents powers to do things which would normally be done by means of a juridical act, but which can in exceptional cases also be done with the help of rules that protect justified expectations or other forms of legal certainty. In the present example, the juridical act was invalid because of a lack of competence. Other reasons why the juridical act is invalid, such as a lack of an appropriate intention, can also be overcome by such additional rules.

House search

House search is an example that is mainly mentioned to point out a common confusion. In the investigation of a crime, the police can under suitable circumstances search a house that is somehow related to the crime, for instance the home of a suspect. The word 'can' in the previous sentence may be a source of confusion, because it wrongly suggests the presence of a capability or power.

Of course, the police can only search a house if they are capable of doing so. That is a basic physical capability, based on direct attribution. However, that is not what is typically meant by saying that the police 'can' search a house. What is meant by this 'can' in not a capability or power in the broader sense, let alone a legal power , but that the police are allowed or permitted to do so.

Permissions are sometimes confused with legal powers, and - it is true - permissions and legal powers sometimes go hand in hand.[18] A legal power typically only makes sense if the holder of this power is also permitted to exercise it. For instance, if all people would have the legal power to contract with the usual legal consequences, this would be almost useless if all people were also prohibited to contract. However, sometimes it makes sense to prohibit behavior that was legally empowered. An example is when a museum that owns of an important work of art is forbidden to transfer the work in order to prevent the work from leaving the public domain. Such a prohibition typically leaves the competence to transfer intact and perhaps also the power to transfer.

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[18] Perhaps the most important point that Hohfeld (1913) made in his work on basic legal concepts is that there is an important difference between the deontic concepts claim, duty and permission (I use modern terminology) and the ‘anankastic’ - Von Wright’s (1963, 10) term - concepts of power and liability.

However, there is a complication here. A juridical act may lead to consequences that are forbidden or that conflict with the public order. Think for example for a contract with a hired killer, or a permit for a nuclear plant that creates an irresponsible safety risk for society. It is possible that the law does not allow these legal consequences to set in: the juridical acts lack their normal consequences. This can be construed in two ways. One way is to assume that a conflict with the existing legal order may be a reason to hold a juridical act to be void and without consequences. The other way to construe this is to assume that the legal consequences set in *pro tanto*, and that a normative conflict results between the pre-existing legal order and the newly created legal consequences. If this conflict is solved in favour of the pre-existing legal order, then all things considered, the new consequences do not set in. (See also the discussion of legislation, below.)

No matter how this is construed, in the end the legal consequences of the (attempted) juridical acts do not set in. The agent apparently lacked the legal power to bring these consequences about. So permission may be relevant for (legal) power. However, neither one of the constructions makes use of the notion of competence, and permission and competence remain unrelated.

As is well-known from a James Bond movie, secret agents need a license - that is a permission - to kill, but killing is not a juridical act, and the capability to kill is therefore not a *legal* power. This means that the license to kill is not and does not include a competence to kill. However, permissions typically do go together with powers. The reason is that permissions are the opposite of prohibitions and are often given to make an exception to a prohibition. This is only useful for actions that the agent can perform. For instance, it makes little sense to give an agent permission to walk on water, or to hold her breath for five minutes.

The house search example illustrates that permissions should not be confused with legal powers or their underlying competences. Moreover, it inspires the observations that permissions often - namely in the case of non-juridical acts - concern actions for which no legal power exists, but for which the agent usually has a power in the broader sense (a capability).

Legislation

Legislation is a juridical act by means of which the legislator, typically an agent consisting of more than one person, intends to make laws and where the law attaches the validity of these laws to the legislative action. As legislating is a juridical act, an agent can only have the legal power to legislate if she has the relevant competence. This should all be straightforward now.

Legislating is nevertheless an interesting example with regard to the distinction between legal powers and competences because of a limitation on the power of legislators. This limitation is that a legislators cannot make laws that conflict with fundamental rights.[19] Because of this limitation, the legislator does not have the power to make such laws. As legal powers are a special case of powers in the broader sense, this also means that the legislator lacks the legal power to make such laws.

This raises the issue of competence. The requirement of competence is a tool used by the law to limit the number of legal powers. Fundamental rights have, amongst others, the same function. Can we therefore say that human rights function as restrictions on competence and that the legislator therefore lacks the competence to make laws that conflict with fundamental rights? In that case we conclude from the absence of a legal power that the relevant competence was lacking. At the same

[19] It is assumed here that this is indeed impossible and that legislation in conflict with fundamental rights is null and void, rather than merely avoidable.

time, we conclude from the absence of a competence that there is no legal power. If legal reasoning with regard to powers and competences works in this way, does that not show that competences are nothing other than legal powers?[20]

This objection against the distinction between legal powers and competences is even strengthened by the facts that legal competences are often assigned implicitly, and that we can only conclude that a competence must have been lacking from the fact that an attempted juridical act did not lead to the intended consequences.

The objection does not cut ice, however. Even if, very theoretically, a legal power and a legal competence always go together, this does not show that they are the same things. As a matter of fact, they could not be the same things, because legal competences are directly assigned by a legal rule, while powers - including legal powers - cannot be directly assigned by a legal rule. (See section 4.) We must therefore conclude that competences and powers cannot be the same.

However, perhaps every limitation on a legal power may be caused by a lack of competence. If that were the case, there would still be a very close connection between legal competence and legal power, because there would only be two kinds of cases: those with a legal power and a legal competence, and those without a legal power and without a legal competence.

There is no univocal answer to the question whether this close connection between legal powers and competences exists. The law uses several mechanisms (personhood, capacity, competence, superior law) to limit legal powers. Perhaps the difference between these mechanisms does not make a difference and can only be explained from the historical development of the mechanisms.

From a logical perspective, it makes perhaps little sense to distinguish between these mechanisms as they have all the same effect: lack of legal power. For instance, if a legislator cannot make rules that conflict with fundamental rights, should we then say that the legislator lacked the competence to do so, or should we say that the intended rules are null and void because of a rule conflict? The theoretical difference seems to make no practical difference: legislation that conflicts with fundamental rights is - let us assume - invalid, and the precise reason does not matter. From this point of view, there is something to be said against distinguishing between different kinds of invalidity.[21] Every cause may be called a lack of competence.

However, from the point of view of a person who wants to argue that particular legislation does not lead to valid rules, it may be useful to have a repertoire of different kinds of reasons to substantiate that conclusion. Then it may also be useful to distinguish between the ground for invalidity that an agent was never assigned the competence to legislate and the ground that the result of the legislation violates fundamental rights. Having a conceptual difference between lack of competence and a rule conflict may make it easier to distinguish between different kinds of reasons. So, even if legal powers and competences would always go together, it would still make sense to distinguish them. First, because competences need to be assigned directly by the law, while powers cannot be assigned directly by the law. Second, because the distinction between legal powers and competences makes it easier to identify different kinds of reasons why juridical acts may lack the intended consequences.

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[20] Thanks to Visa Kurki for suggesting this objection to me.

[21] Even then there is a distinction between kinds of validity that still makes sense, namely the distinction between source validity and validity as existence in social reality ('binding force'). For this distinction (and even a third kind of validity), see (Hage 2018).

Contracting

The doctrine of juridical acts was developed out of contract doctrine and for many, contracts will still be the juridical acts *pur sang*. Most human beings have the competence to contract, even without an explicit rule stating so. That may be one of the reasons why the requirement of a competence, next to the notion of a legal power, has escaped many.

In the examples above, we have already encountered two important phenomena related to the distinction between powers and competences: powers without a competence (administrative dispositions) and competences without powers (legislating). Moreover, we have seen the difference between competence and power on the one hand, and permission on the other hand (house search). All of these issues also play a role in contracting. It is not necessary to repeat the discussions, and I will confine myself by pointing out how these issues play a role in contracting.

Power without competence. The doctrine of justified reliance plays a crucial role in contract law. It is sometimes presented as if there were two grounds for the existence of a valid contract, exchange of expressions of a shared intention, or justified reliance. However, here we have chosen for a coherent doctrine of juridical acts which prefers to keep justified reliance outside the doctrine of contracting (and juridical acts in general).

Competence without power. Most legal subjects are competent to contract but not all intended contracts are valid. There are several reasons for this, including lack of matching intentions, undesirable content, and a prohibition to contract. In all of these cases, the power to contract was lacking, although the necessary competence was present.

Prohibited contracts. Sometimes the conclusion of particular contracts is forbidden. Sale of drugs may in many countries be a case in point. Contracts with hired killers are another example. If concluding a particular kind of contract is legally forbidden, the contract may still be valid. For example, if you buy something in a shop after mandatory closing time, the sales contract will still be valid. The sanction is punishability, or in some cases liability for damages. However, if a contract belongs to a kind that was forbidden, this may be a reason that the contract is invalid (null and void). In that case, the contracting parties lacked the power to conclude such a contract, even though they were competent to do so.

8. Conclusion

In this paper I have argued that it is possible to distinguish two notions that play a role in the debate on powers and competences. My main point is that the two notions are really different. They are not two words for the same thing, neither are competences a subset of powers, or the other way around. In the end, I do not care which words are used to denote the two notions, but - not very originally - I have adopted the words ‘power’ and ‘competence’. I am aware that my use of these two words deviates in a number of ways from common parlance, to the extent that common parlance exists in this field.

The structure of my basic argument is as follows: I use the word ‘power’ in a broad sense for all capabilities to do something. In this broad sense, powers are not particularly connected to juridical acts or to law. Powers are a social phenomenon, although they have a basis in physical reality. They can be based directly on acceptance or recognition, but they can also depend on other powers, in combination with causal laws or with rules. For law, the latter - rule-based - powers are the more interesting category. Some of these rule-based powers are based on legal rules and are exercised by

means of juridical acts. Juridical acts are actions to which the law attaches legal consequences that are to a large extent determined by the intention in the juridical act. Powers exercised through the performance of a juridical act are called 'legal powers'. The law limits the possibilities for agents to create legal consequences by means of juridical acts by requiring a competence to do so. Examples are the competence to issue administrative dispositions, to give judicial verdicts, to legislate, to contract, or to alienate goods. By withholding the relevant competence from a category of agents, the law can make it impossible for these agents to perform that particular kind of juridical act, and indirectly also to exercise the corresponding legal power. So, competences are necessary conditions for the existence of legal powers.

This basic argument has been embedded in a theoretical framework that deals with the existence of powers and of intentions in social reality, and with the distinction between facts and entities that are directly or indirectly rule-based. It was complemented by a discussion of a number of examples, some of which played an important role in earlier debates on the nature of powers and competences.

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