

Explicating the Concept of Legal Competence

Torben Spaak

1 Introduction

In everyday language the term ‘competence’ can mean *proficiency* or *authority*. 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. My concern here is with competence in the sense of authority.¹ The concept of legal competence, thus conceived, 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.

In this article, I argue (i) that we need a concept of legal competence to be able to discuss questions of legal validity and invalidity in a clear and fruitful way. I also defend an explication of the competence concept, according to which (ii) a person, *p*, *has* the competence in regard to a legal position, *LP*, if, and only if, there is an action, *α*, and a situation, *S*, such that if *p* in *S* performs *α*, and thus goes about it in the right way, *p* will, through *α*, change *LP*; and (iii) *p exercises* his competence by performing a special type of act, which is such that it depends for its legal effect on having been performed with the (actual or imputed) intent to bring about the said effect. In addition, I argue (iv) that we should distinguish (a) between autonomous and heteronomous competence, and (b) between norm-creating and regulative competence.

I begin with a few words about concepts and the explication of concepts in general (Sections 2 and 3). I then turn to consider the concept of legal competence, beginning with a look at what some distinguished legal scholars have said about this concept (Section 4), and proceeding to consider a difficulty in their (and mine) understanding of the concept that arises when the concept is applied to the

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¹ 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 be called a Scandinavian, perhaps even a European, tradition within the philosophy of law. See Lars Lindahl, *Position and Change* (Dordrecht 1977) 194.

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