NORMS OF COMPETENCE IN SCANDINAVIAN JURISPRUDENCE

BY

TORE STRÖMBERG

It may perhaps be convenient to explain the use of the word competence in the above title. In Wesley Newcomb Hohfeld's scheme of fundamental legal conceptions the term competence does not appear.[1] There we find instead the word power. It is very likely that in this connection the word competence sounds somewhat strange to English ears. In his work *The Concept of Law* the Englishman H. L. A. Hart uses the term power in the same sense as Hohfeld did.[2] There he disputes John Austin's theory on juridical law as consisting only of the commands of the Sovereign connected with a threat of something disagreeable in case of disobedience.[3] Unlike Austin, Hart objects that law does not contain only rules of action but also, as an essential element, rules of a kind which he calls power-conferring rules:

> Just as there could be no crimes or offences and so no murders or thefts if there were no criminal laws of the mandatory kind which do resemble orders backed by threats, so there could be no buying, selling, gifts, wills, or marriages if there were no power-conferring rules; for these latter things, like the orders of courts and the enactments of law-making bodies, just consist in the valid exercise of legal powers.[4]

We observe that the power created by power-conferring rules is named a *legal* power by Hart. He lays stress upon the fact that the power is founded not on fear but on a respect for authority. It is something other than the factual power that, according to Austin, makes the commands of the Sovereign into law. However, the term power is ambiguous. By a legal power I can mean among others the legal freedom to do something that is not forbidden, e.g. to take up a bushel of water from the open sea. Both Hohfeld and Hart have meant something else, namely a power to cause by an utterance of will a legal alteration, e.g. the power of the English Parliament to legislate or the power of two adult persons to contract with each other. For this kind of legal power it may be rational to reserve the term (legal) competence.

In Scandinavian legal theory the term competence (in Danish *kompetence*, in Norwegian *kompetanse*, in Swedish *kompetens*) has become naturalized. The authors use it not only in their own language but also when they write in

[1] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, New Haven 1923.
[2] H. L. A. Hart, *The Concept of Law*, Oxford 1961.
[3] See John Austin *The Province of Jurisprudence Determined* (1932), edited by H. L. A. Hart, London 1954.
[4] Hart, *op. cit.*, p. 32.

English. On the other hand, the Scandinavian statutes have not adopted the term.

The idea of legal competence is a fundamental ingredient in the legal ideology and it surely has its roots far in the past. The idea of a special type of norm as the basis of legal competence does not seem to be equally old and in every case it has not found a clear expression in juridical science before modern times. Only in our times have the norms of competence been the object of profound logical analysis.

In the Scandinavian theory of law the norms of competence were brought to the fore in the middle of this century and since then they have a firm position in reasoning about the structure of legal norms and about a logical classification of them. Thereby different opinions have appeared not only on the contents and the ideal form of the norms of competence but also on the need for them as an independent category of norms. In these respects a Danish, a Norwegian and perhaps also a Swedish line can be distinguished. One of the aims of this short essay is to make plain the dissimilarities in the views of the different authors. I think that the best way to do this is to describe, firstly, a certain conception as a sort of model and then to compare the opinions of each author with this model.

Law in the juridical sense determines the relations among men. That is a commonplace. Law is not possible without communication, without exchange of thoughts, among men. The communication occurs almost exclusively with the aid of the spoken or the written language. With the help of words the content of the legal norms is transmitted among the members of a society. Therefore it must be possible to express the contents of a norm in words. Yet the possibilities of the language are numerous. What from a linguistic point of view appear as two separate norms or as two separate kinds of norms are in fact sometimes the very same norm or else norms of the same kind. Thus it has become possible to form on linguistic grounds more types of norms than is logically necessary, and this has also occurred. So, for instance, both rules of rights and rules of duties have been created, although rules of the one of the two types would have been logically sufficient (cf. Hohfeld's scheme on the fundamental legal conceptions and their mutual relations). In consequence of this the question has emerged in the theory of law, whether and to what extent the number of existent types of norms may be "reduced". Even if we *can* reduce them yet it is not sure that we *will* do so. There may be a practical need for a distinction of types of norms which are characterized not only by their content but also by their linguistic form.

I have pointed out these circumstances because the model which I intend to use as a standard in my description of the conception of the norms of competence in Scandinavian jurisprudence is a concept which is partially

determined by the linguistic form of the norm. Then, according to the model, whether a norm is one of competence or another norm depends partly on the form given to a norm. Is this manner of defining a type of legal norm appropriate? I think it is, and I will try to explain why.

A proposition (in the logical sense), either a statement or a norm, must be expressed by a sentence (in the linguistic sense) which is called a principal sentence or a principal clause. To the principal clause may be joined one or several subordinate clauses, but this is not necessary. Since legal norms are always conditional it is always possible to form such a norm with a principal clause together with one or more conditional clauses. The normative, the determinative, in the norm then is always the content of the principal clause, i.e. the legal consequence. The conditional clause represents the facts which satisfy the conditions on the entrance of the legal consequence. For a classification of the norms on the basis of logical criteria the legal consequence is more relevant than the legal facts. A division based on the nature of legal facts is also to be found, namely the division of the legal system into separate parts as law of contracts, law of torts, and so on. This division is in fact very important, and it has its counterpart in the division of the legal science into separate disciplines. However, a competence is a legal consequence of a certain situation and a distinction between norms of competence and other kinds of norms ought consequently to be based on the nature of the legal consequences.

From this starting-point I choose as a model for the concept "norm of competence" a norm determining that *a competence* arises or exists on certain conditions. As a linguistic phenomenon the norm then is recognized inasmuch as the principal sentence contains one or more words denoting the idea of competence. If it does not do so then, according to the model, the norm is not one of competence.

Let us choose an example of a relatively simple norm of competence: If a person is ordained as a minister in the Swedish Church he acquires a competence—in compliance with the marriage ritual of this church—to marry a man and a woman to each other.

In this norm three essential criteria can be distinguished:

1 The *conditional* sentence contains the claim that the competent person shall belong to a certain class of person (clergymen in the Swedish Church).

2 The *principal* sentence allots to the person a special kind of competence (the capacity of creating a matrimonial bond between a man and a woman).

3 The *principal* sentence makes the competence dependent on the execution of a defined physical act (the pronouncing of certain words in a certain situation).

In short the norm of competence says that a certain person is able to bring about a certain legal effect by executing a certain physical act. Even more briefly it can be said that the norm decides *who* can produce *what* and *how* he can do it.

In most statutory rules nothing is said about the manner in which the competence ought to be exercised. Then it is understood that the competence is exercised by an enunciation that the legal effect enters, a kind of utterance that in modern logical terminology is called a performative.[5] A Swedish statutory rule, for instance, that gives to a judge the competence of appointing an administrator of a bankrupt's estate, does not tell how that shall be done. Everybody finds it self-evident that the judge shall do this by saying or writing that he appoints Mr X as an administrator of the estate of the bankrupt Mr Y. The requisite procedure in other respects may also be a complicated and minutely regulated one, as it is in the enactment of legislation by a parliament or in the election of its members. In these cases the procedure is determined not by the rule which establishes the competence but by other rules. The above-mentioned marriage ritual is also a complex procedure. In this ritual some steps are obligatory for the validity of the act, whereas others are irrelevant from this point of view.

It is necessary that a competence is exercised only by the execution of a defined act which can easily be distinguished from other kinds of acts. Otherwise it would be impossible to establish, for instance, whether a man and a woman are spouses or not. Matrimony itself cannot be observed but the facts by which matrimony is considered to have arisen can be observed. Consequently the requirement that a defined procedure be observed is an obligatory element in a complete norm of competence. The fact that prescriptions as to competence in codes and statutes seldom are complete is a different matter. It even occurs that such a prescription is absent altogether or, in other words, is tacitly presupposed.

In the example of a norm of competence such as the one chosen above the requisite procedure is placed in the principal sentence as an element of the legal consequence. Yet there are authors who conceive the procedure as a condition for exercising the competence, and for this reason it is natural to ask whether the correct place for the procedure is perhaps in a conditional sentence and not in the principal sentence.

Let us put the procedure in a subordinate sentence and see what the result is! The norm then may have the following appearance: If a person is ordained

[5] On the notion of performative, see J. L. Austin, *How to Do Things with Words*, Cambridge, Mass. 1962. See also Karl Olivecrona, *Law as Fact*, 2nd ed. London 1971, pp. 217 ff. (Legal Performatives).

as a minister in the Swedish Church and if—in compliance with the marriage ritual of this church—he declares a man and a woman to be spouses, ---? What will the rest be like? Apparently the legal consequence will be that the man and the woman become spouses.

If we compare the norm expressed in this way with the supposed model for a norm of competence, we find that the legal consequence is not the same. It does not contain the idea of competence and according to the model it is consequently no norm of competence. Of course, for all practical purposes it functions in the same way as a norm of competence and is thus equivalent to such a norm. But what are we to call the norm in its changed linguistic shape? I have called imagined qualities such as matrimony or spouse, legal qualities, and in consequence I call the norm *a norm of qualification*. The legal consequence in the norm is the coming into being of a legal quality.

Without changing the purport of the norm as a guide to human behaviour a norm of competence can evidently be transformed into a norm of qualification, provided that the two kinds of norms are defined as has been said above. Apparently this applies to all norms of competence. The transformation can, no doubt, also be done in the opposite direction. Substantially, the norm is the same independently of the transformation. This is no more peculiar than that a statement can be expressed in different terms. It is true that from logical points of view there is no hindrance to calling a norm a norm of competence whether it appears in the one form or in the other. That I nevertheless prefer not to do so is because there are many norms of qualification which cannot be transformed into norms of competence. The definition of these would be unnecessarily circumstantial if it were to exclude those norms which substantially coincide with norms of competence. Norms of qualification which cannot be transformed into norms of competence are, e.g., the following: If a child is in the common custody of its parents, both of them are its trustees (the Swedish Code of Parenthood, ch. 11, sec. 1). — A building is an accessory to the landed property (and is consequently real estate; the Swedish Code of Land, ch. 2, sec. 1). — A purchase made between two merchants in their profession is a purchase in trade (the Swedish Sale of Goods Act, sec. 4).

It is true that these other norms of qualification could theoretically be made superfluous by incorporating their contents with other norms which are connected with them, but this would be extremely unpractical, and no legislator would entertain such an absurd idea. By sacrificing the term norm of qualification we would lose a valuable instrument for the classification of legal rules.

But now *in medias res*! In Scandinavian jurisprudence the first elaborated theory about norms of competence was shaped by the Danish scholar Alf Ross (1899–1979). The main sources of his views on these norms are his now

classical two works *On Law and Justice*[6] and *Directives and Norms*.[7] In the latter he described the norms in question as follows:

> Competence is the legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect. Competence is a special case of power. Power exists when a person is able to bring about, through his acts, desired legal effects.
>
> The norm which establishes this ability is called a *norm of competence*. It states the conditions necessary for the exercise of this ability. These conditions usually fall into three groups: (1) those which prescribe what person (or persons) is qualified to perform the act which creates the norm (*personal competence*); (2) those which prescribe the procedure to be followed (*procedural competence*); and (3) conditions which prescribe the possible scope of the created norm with regard to its subject, situation and theme (*substantial competence*).[8]

Ross' statement that a norm of competence establishes a competence seems to agree with the supposition in the above model that the norm is characterized by its legal consequence, which is the origin of a legal competence. Even so the later part of the quotation arouses uncertainty as to Ross' conception of the logical structure of the norm. It prescribes conditions, he declares, namely for the *exercise* of the competence (i.e. not for its origin), and the conditions fall into three groups. Only the first of these groups ("personal competence") is to be found as a condition in my model. The two others have been referred to the legal consequence.

If we go back to Ross' analysis of the norms of competence in *On Law and Justice*, we understand more clearly why it is difficult or impossible to link up his conceptions of these with the dichotomy conditions–legal consequence. According to Ross the norm of competence properly is an indirectly expressed norm of conduct. It is a directive saying that such directives which have been created in conformity with a declared mode of procedure shall be regarded as norms of conduct.[9] This means, for instance, that the norm on the legislative power says to me that I shall obey the statutes promulgated in virtue of this power. Thus, as a norm of conduct the norm of competence has no content of its own but borrows its content from one or more other norms, it becomes what we can call a supernorm. Ross also meant that the norms of competence can in this way be reduced to norms of conduct.[10] This opinion is in harmony with his aiming at extreme realism and his identifying of the legal order with a social reality to which the ideology of law served only as a "scheme of interpretation".[11]

[6] Alf Ross, *Om ret og retfærdighed*, Copenhagen 1953 and 1966. (Also published in English: *On Law and Justice*, London 1958.)
[7] Alf Ross, *Directives and Norms*, London 1968.
[8] Ross, *Directives and Norms*, p. 130.
[9] Ross, *Om ret og retfærdighed*, p. 45 (*On Law and Justice*, p. 32).
[10] Ross, *op. cit.*, p. 197 (p. 162), *Directives and Norms*, p. 120.
[11] Ross, *Om ret og retfærdighed*, pp. 26 f., 41 (*On Law and Justice*, pp. 17 f., 29).

However, a norm of competence according to Ross contains a pattern of conduct in another sense, and therefore he called it also a norm of procedure.[12] "Secondly, it must be observed that any well-developed legal system, being institutional and dynamic, contains not only *norms of conduct*, which prescribe how to act, but also *norms of competence*, which provide how new valid and binding norms may be created through the performance of *actes juridiques*."[13]

Ross' views on the norms of competence have had some influence on Danish as well as Norwegian authors. Like Ross, the Norwegian scholar Torstein Eckhoff makes a trisection, though not, as Ross did, of the competence, but of the questions concerning competence, which he "after the pattern of Ross" names personal, material and procedural questions.[14] He conceives the norm of competence as a combination of claims, but here he is more lucid than Ross in that he regards the claims not as conditions *on the exercise* of the competence but *on the origin of the validity of a legal act.*[15] Yet he makes some reservation to his thesis. As to matter, Ross and Eckhoff probably have meant the same, but by his choice of words Eckhoff makes clear that a person can have a legal competence without being entitled to exercise it either at all or beyond certain limits. In this case the validity of a legal act is not excluded by the fact that the competent person was not allowed to make use of his competence to bring about the legal effect.

Among Scandinavian authors, the Norwegian Nils Kristian Sundby (1942–1978) is the one who has treated the norms of competence most exhaustively. In his great treatise *Om normer* (On Norms)[16] he devoted about 100 pages to the concept of competence and to the norms of competence. The pattern from Ross can be discerned also in Sundby. The latter made use of a trisection, not of the conditions for the exercise of a competence nor of the questions concerning competence, but of the norms themselves, which, employing a somewhat divergent terminology, he divided into personal, material and formal norms of competence.[17] Like Eckhoff, he conceived these norms as prescriptions of conditions for the validity of a legal act.[18] He added that the norms in a certain sense are thereby provided with a sanction, namely nullity. This sanction enters when someone does not "obey" a norm of competence and thus "breaks" it. Sundby also differed from Ross in that he set up norms

[12] Ross, *op. cit.*, pp. 45, 251 (pp. 32, 207).
[13] Ross, *Directives and Norms*, p. 118.
[14] Torstein Eckhoff, *Rettskildelære* (The Doctrine on Sources of Law), 3rd ed. Oslo 1980, p. 39.
[15] *Op. cit.*, pp. 37–39, 45 f. See also Torstein Eckhoff and Nils Kristian Sundby, *Rettssystemer* (Systems of Law), Oslo 1976, pp. 99, 103.
[16] Nils Kristian Sundby, *Om normer*, Oslo 1972.
[17] *Op. cit.*, pp. 358–62.
[18] *Op. cit.*, pp. 357, 363.

of qualification as a special category of norms. He even devoted a chapter of 40 pages to this category. He made it include the norms of competence, which constituted, as he saw it, norms of qualification of a special type: "They are a sort of norms of qualification determining the linguistic actions which are to be accepted as valid acts of creating norms."[19]

Sundby's characterization of the norms of competence as conditions for validity seems to lead to the conclusion that the linguistic form was insignificant to him for the concept of norm of competence, and thus that, irrespective of its linguistic form, such a norm was at the same time a norm of competence and a kind of norm of qualification.

The coupling together of competence and legal validity by Eckhoff and Sundby—which seems to me to be quite correct—has caused some trouble in cases where a pretended transgression of the limits of a competence does not result in an absolute nullity but only in a possibility for a party to get an act nullified on due demand, and also in some exceptional cases where not even this possibility exists. In my opinion these problems are due to the fact that the texts of codes or statutes are not always logically satisfactory.

Not surprisingly Ross' influence has been stronger in Denmark than in Norway. The Danish scholars Preben Stuer Lauridsen and Svend Gram Jensen both share Ross' opinion that the legal system can exhaustively be described as norms of conduct and norms of competence, and they find no use for the norm of qualification concept. Lauridsen criticises Sundby's and my own classifications of norms and declares the norm of qualification concept to be superfluous. Concurring with Ross he claims that norms of competence can be reduced to norms of conduct (norms of duty).[20] Since Gram Jensen, like Lauridsen, does not use the concept of norm of qualification he does not consider the form to be significant for the designation of a norm as a norm of competence. Transformed into a norm of qualification (according to my terminology) the norm is in the eyes of Gram Jensen still a norm of competence. Yes, he takes one step further and considers this shape of the norm to be its most correct expression.[21] From a logical point of view there is, as far as I can see, no objection to that.

The question just touched upon—if norms of competence may be reduced to norms of conduct—is in Scandinavian jurisprudence somewhat unclear. The question is properly two questions, which are not always kept apart. One of them is whether a single norm of competence can be made superfluous by replacing it by a norm of conduct. In many cases the answer must be in the affirmative. Assume that a rule gives to all ordinary policemen the right (= the

[19] Translation from *op.cit.*, p. 151.
[20] Preben Stuer Lauridsen, "Om jus og normer" (On Jus and Norms), in *TfR* 1978, pp. 123 f.
[21] Svend Gram Jensen, *Hvad er retfærdighed?* (What is Justice?), Copenhagen 1983, pp. 21, 28 f.

competence) to order drivers of motor-cars to stop for certain checks. The same normative and practical result can be attained by a rule obliging drivers to stop on an order from a policeman. Yet the latter rule presupposes a rule of the legislators' competence to give prescriptions to drivers. Can this other rule of competence in its turn be replaced by a rule of conduct? And so on. Finally we thus are confronted with the other question, i.e. whether all norms of competence in a legal system can be eliminated.

A declaration by Alf Ross indicates that he answered this question in the affirmative: "Furthermore, any norm of competence may be transcribed as a norm of conduct, whereas the converse does not hold."[22] The Swedish scholar Karl Olivecrona (1897–1980) touched upon the same question, but he was not so categorical and he did not take up a definite position: "It is perhaps thinkable to give to all legal rules an equally simple form and thus express them as rules of action and nothing else."[23] Among other authors, Sundby shares the opinion of Ross,[24] whereas Eckhoff seems to be more circumspect.[25]

The problem of a total reduction of norms of competence leads us to Hans Kelsen's theory of a basic norm and to H. L. A. Hart's theory of a rule of recognition.[26] Is it necessary to presuppose such an ultimate norm and—if it is—is it necessary that this norm is a norm of competence? Is it otherwise possible to conceive of a legal system as being valid and its rules as being binding in the usual sense among lawyers and among people in general? Is it not necessary for the ability to perform the action logically and temporally to precede the execution itself of the action? If God created the universe, are we not inclined to imagine that he possessed the power to do so before that? Can we deny this question without abolishing the idea of power in our thinking? And are we willing to do that?

To sum up: There are various views on norms of competence in Scandinavian jurisprudence.[27] I think, however, that all authors agree with the opinion that this type of rule is an important instrument in the hands of the legislator and an indispensable element in the organisation of society. In legal science and in legal education it is also indispensable. To examine this instrument and to improve it are tasks worthy of the general theory of law.

[22] Ross, *Directives and Norms*, p. 120.

[23] Translation from Karl Olivecrona, *Rättsordningen. Idéer och fakta* (The Legal Order. Ideas and Facts), Lund 1966, p. 165.

[24] Sundby, *Om normer*, pp. 393–96.

[25] Eckhoff and Sundby, *Rettssystemer*, p. 106.

[26] Cf. Eckhoff, *Rettskildelære*, p. 39.

[27] The supposed "model" in this paper is in accordance with the representation of norms of competence in the following two works of the present author:

Tore Strömberg, "Om kompetensnormens definition" (On the Definition of the Norm of Competence), in *Festskrift till Ivar Agge* (Writings in Honour of Ivar Agge), Stockholm 1970.

Tore Strömberg, *Inledning till den allmänna rättsläran* (An Introduction to the General Theory of Law), 8th ed. Lund 1981.