Maastricht Working Papers
Faculty of Law

Basic Concepts of European Private Law

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2006-7

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© Bob Brouwer and Jaap Hage
Published in Maastricht, October 2006

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This paper is to be cited as Maastricht Faculty of Law Working Paper 2006/7

BASIC CONCEPTS OF EUROPEAN PRIVATE LAW[1]

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1. The project

Legal systems are in some respects like a building or a set of buildings. Not only because, like buildings, they are partly the result of conscious design, but also because they exhibit parts that are to some extent independent of each other, but that nevertheless hang together in a whole that may be more or less harmonious.

They are like buildings also in the sense that they are made out of 'building blocks'. These building blocks themselves may consist of lower level building blocks, which may consist of even lower level building blocks … and so on, until the lowest level is reached. Think in this connection of a legal system that consists of different fields of law (e.g. contract law), where each field consists of a number of doctrines (e.g. freedom of contract, irrevocable offer, efficient breach), which are in turn built by means of lowest level rules (e.g. the rule that the offeror of an irrevocable offer does not have the competence to revoke the offer), which can in turn be analysed in terms of lowest level concepts such as 'duty', 'competence', etc. In this paper we refer to the lowest level elements as basic components of law or basic legal components. A *basic* legal component is one that does not contain any other component as a component part. A *non-basic* legal component, on the other hand, does contain another component.

Although different legal systems have different doctrines, the components of which they are built may be of the same types. This is a real possibility especially if the legal systems are related and the components are chosen on a sufficiently low level. In fact, the research project outlined in this paper rests on the following hypothesis:

[1] The authors should like to thank Bram Akkermans and Siegfried van Duffel for their useful comments on a draft version of this paper.

The private law of the different European countries can be reconstructed in terms of a limited set of the same basic concepts.

The first purpose of the project is to test its underlying hypothesis. To do so, it will be necessary to identify the different basic concepts and to show how central doctrines of private law from different European systems can be expressed in terms of these concepts.

If the project's underlying hypothesis is correct and we manage to identify a set of basic concepts, we will have a tool that can be used for several research lines in the field of European private law. One of these lines is the discussion about the harmonization of European private law, namely about the possibility and the desirability of such harmonization.[2] A necessary precondition for a fruitful discussion is agreement about what harmonization would amount to. Under what circumstances can it be said that different parts of different legal systems (parts which may be concepts, rules, doctrines or even whole subject areas like contract law) are identical or normatively equivalent? [3] The availability of a set of basic concepts is a useful, if not indispensable tool for the analysis of legal fields and for the determination whether and, if so, to what extent they are identical or normatively equivalent. The second purpose of the project is therefore to make operational the notions of identity and normative equivalence of legal systems or parts thereof.

One step on the way towards the harmonization of European private law – a step that is also important in other respects – is the comparative description of the private law of different European legal systems. Such a comparative description presupposes a neutral conceptual framework in terms of which the description can be given (a *tertium comparationis*).[4] The third purpose of the project is to show how the set of basic legal concepts can function as the core of a neutral framework by means of which comparative European private law is conducted.[5]

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[2] See e.g. Smits 2002.

[3] The distinction between identity and normative equivalence is roughly the following. Two parts of different legal systems are normatively equivalent if they have the same normative consequences. (Alchourrón and Bulygin 1971, 80; Brouwer 1999, 222-224). The notion of identity is stronger and implies identity of meaning.

[4] The idea of using a set of basic concepts, in particular the set of Hohfeld, to facilitate comparative law was also suggested in Van Hoecke 1996. Van Laer 1997 is an extensive study of the use of so-called comparative concepts.

[5] This third purpose is related to the methodological side of the Trento project, namely to achieve descriptions of legal systems that are as 'neutral' as possible.

And finally, the set of basic legal concepts can be used to formulate proposals for a common European private law or parts thereof. This brings us to the fourth purpose of the project, namely to show how the set of basic legal concepts provides a basis for proposals for a common European private law. In this way, the project can contribute to the establishment of a common frame of reference for the European law of obligations, as promoted by the European Commission.[6]

This paper takes the first steps towards identifying the basic legal components and shows how these components can be used to express some central non-basic legal components.

2. Some methodological considerations

In the following sections, we outline a set of basic legal concepts in terms of which European private law can be expressed. Before we embark on the exposition of these concepts, some caveats are in place.

First, we wish to draw attention to some fundamental distinctions. It is necessary to bear in mind that there is a difference between concepts or types (e.g. the concept of an obligatory norm, the obligatory norm as a type) and the instances of these concepts. The norm 'The owner of this property shall pay his taxes' is an obligatory norm, an instance of the concept 'obligatory norm' (or, as is often said, a *token* of the *type* 'obligatory norm').[7] Furthermore, there is a distinction to be made between the instance of a norm (e.g. 'The owner of this property shall pay taxes') and the concepts that are used to formulate this norm (e.g. the concept of owner and the concept of shall (obligatory)). A set of concepts should not be confused with a set of rules or norms. The adoption of a set of basic concepts has relatively little influence on the law that is modelled by means of these concepts. The choice of a type of brick has some influence on the buildings that are made out of them, but the main design decisions are independent of the brick type. The same applies to the basic concepts of the law: they have some influence on the contents of the law, but this influence is small in comparison to the choice of rules formulated in terms of them. The elaboration of a set of basic concepts should therefore not be mistaken for the first step towards conceptual jurisprudence (*Begriffsjurisprudenz*).[8]

Cf. http://www.jus.unitn.it/dsg/common-core/approach.html#3.

6 Cf. COM(2004), 651; http://europa.eu.int/comm/secretariat_general/regdoc/liste.cfm?CL=en.

7 On the type-token distinction, see Quine 1987, 216f.

8 On Begriffsjurisprudenz, see Marx 1977 and Larenz 1983, 19f.

Second, we should like to emphasize that there are several ways to develop a set of the basic legal components. For some legal theoreticians – namely those who defended an imperative theory of law – there is in fact only one basic legal component: the imperative or obligatory norm.[9] Others have more refined theories. In Hohfeld's theory on fundamental legal conceptions,[10] for instance, there are eight basic legal components (i.e. duties, rights, privileges, no-rights, powers, disabilities, liabilities and immunities). This diversity of points of view draws attention to a methodological problem: what are the criteria of adequate identification of the different types of basic legal components?[11] We do not take an essentialist stance with respect to the basic legal concepts. What good concepts are depends on the function of these concepts in a theory. Nor do we follow an ordinary language approach. Instead, we try to improve on the often ambiguous terminology that is used in legal doctrine to refer to the basic concepts of private law. Given our theoretical aims, the rational reconstruction of the set of basic concepts is guided by the following regulative ideals:

1. The set of basic concepts should allow for correct representations of the contents of private law. A representation ought to capture the meaning of the object that is being represented. If in the reconstruction of private law by means of a set of basic legal components an essential part of the contents of the law is lost, then the conceptual framework is defective.
2. The set of basic concepts should be comprehensive. The ideal of comprehensiveness requires that the theory be rich enough to model all kinds of private law.
3. The set of basic concepts should be non-redundant (parsimonious). The ideal of non-redundancy requires that the theory does not contain more concepts than is necessary.[12] This ideal does not exclude, however, that some non-basic concepts – such as 'right *in personam*' – are defined in terms of basic concepts, but are used in modelling the law as though they were basic concepts. This can be done on the understanding that these pseudo-basic concepts are always used in the sense corresponding to their analysis in the 'real' basic concepts.

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[9] Proponents of this view were John Austin (Austin 1832) and Karl Engisch (Engisch 1971, 20f.).

[10] Cf. Hohfeld 1913.

[11] Cf. Brouwer 1990, 8f.

[12] It may, for instance, be argued that Hohfeldian correlatives are exact equivalents, so that for instance the power of A to bind B is nothing more or less than the liability of B with respect to A. If so, either power or liability is redundant. Cf. section 11.

The law makes use not only of technical legal terms, but also of a large number of terms and concepts that belong to the ordinary language vocabulary. Obviously, it is not well possible to express the full law of a country in terms of a small set of basic concepts. The project does not aim to do so, but is confined to such technical legal concepts as 'irrevocable offer', 'property right', 'usufruct', 'natural obligation', etc. We will work on the assumption that the extra-legal terms of the different legal systems (or, better, languages) can be translated into each other without substantial complications. Where this assumption turns out to be incorrect, it will need reconsideration.

Rules play a central role in the law, not only because they guide our conduct, but also because they create conceptual networks. For instance, rules that define what counts as a material good or as copyright play a central role in private law, because legal consequences are attached to their applicability. The basic concepts that we are primarily interested in are the concepts that function in the formulation of rules. However, it is not possible to develop a theory of basic concepts without a proper understanding of how rules operate in creating conceptual networks. Therefore, a central part of this paper is devoted to the operation of rules. Moreover, in our analysis we focus on a specific type of conceptual constructs ('placeholder concepts') that are not basic concepts but that play a central role in the conceptual network of the law. A proper understanding of these placeholder concepts is crucial for the identification of the basic concepts.

3. Language and the world[13]

The basic concepts of private law are not isolated from other, non-legal basic concepts. To get our conceptual framework started, something must be said about these general concepts. When people use language, they use it as a tool that has many purposes; or, to put it differently, language can be used to perform different kinds of speech acts. Two important kinds of such speech acts are making a statement and performing a legal act (*Rechtsgeschäft*).[14] Statements are made by means of full descriptive sentences, such as 'The computer is on my desk', 'It's raining', 'The building collapsed' and 'The defendant bought the car from the plaintiff'. If a descriptive sentence is true, the state of affairs, process or event

[13] Much of this section was inspired by the first chapters of Von Wright 1963.

[14] We take it that legal acts also occur in legal systems such as the English, which do not work with this abstract notion but do accept related notions such as power or competence.

expressed by it obtains and is then called a *fact*. If the sentence is false, the state of affairs, process or event does not obtain and is not a fact.[15]

Utterances of sentences used for performing legal acts do not express a state of affairs, process or event but are themselves acts, a subtype of events. The persons who perform these acts aim at bringing about a legal state of affairs. If you offer me a car for € 5000 and I say to you that I accept your offer, it is not my intention to describe what I do, but (depending on the legal system) to perform my part in bringing about a contractual bond between you and me, or to cooperate in the transfer of the ownership of the car.

The law is, in a sense, a world apart. Some states of affairs, processes and events can obtain only in the world of the law. The existence of a contractual bond is such a state of affairs, as is being an owner in the legal sense. The law determines what processes or events bring the legal state of affairs into existence, and what processes or events terminate that state of affairs. One may become an owner of fruit by the process of its growing, and the owner of a chair by making or buying it. One may lose ownership of a ship by the process of its destruction in a storm, or by the event of selling and transferring it. For our purposes it is important to keep in mind that the law 'causes' some states of affairs to come to obtain or to disappear again.[16] The legal world is not static, but changes continuously. *Events* and *processes* are changes in the set of legal states of affairs.[17]

Some events are acts. *Acts* are events that are attributed to a person. An example of an act is John transferring the ownership of his bike to Jane. All acts belong to, are tokens of, several *action types*. For instance, the act by which John transfers the ownership of his bike to Jane necessarily belongs to the action type 'transfer of ownership'. At the same time, however, the act may be performing a contract (John sold the bike to Jane), breaking a promise to Mary (John promised to transfer the ownership of the bike to Mary), an act of fraud against John's creditors, and many other things. As shown in the following section, human action is regulated by prescriptions and prohibitions of action types, not individual acts.

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[15] A more extensive discussion of speech acts in general can be found in Searle 1969. Application and modification of Searle's theory with special application to the law can be found in Hage 2005, 164f.

[16] This theme is elaborated in MacCormick 1974.

[17] For the purposes of this article there is no need to elaborate on the distinction between events (that happen or occur) and processes (that are going on). From now on we will therefore simply use 'event' to refer to both of them.

4. Legal norms

A legal norm is a state of affairs composed of three elements.[18] The first element is an action type, such as polluting the environment, or walking. The second element is a deontic operator, namely 'ought to', 'ought not to', 'permitted to do' or 'permitted to refrain from'. The third element is a set of one or more persons addressed by the duty or permission. This third element is often implicit, if the duty or permission holds for everybody. It is also possible that a duty or permission holds for a smaller but still indefinite set of persons, such as all inhabitants of a region, all males, or all car drivers. And, finally, there are duties and permissions for one or more individuals, such as the duty for John to repay his debt, and the permission for Peter, Paul and Mary to prepare the church fancy fair.[19] Here are some examples:

1. It is permitted to enter the building

   action type: enter the building
   deontic operator: permitted to do
   norm addressees: everybody

2. John should keep the environment clean

   action type: keep the environment clean
   deontic operator: should (ought to)
   norm addressees: John

3. It is forbidden for car drivers to drive on the left-hand side of the road

   action type: drive on the left-hand side of the road
   deontic operator: ought not to
   norm addressees: car drivers

[18] In the literature, the notion of a norm is used in several senses. See for instance, Von Wright 1963 and Kelsen 1979. In this paper we focus on norms that prescribe or permit behaviour. Power-conferring norms will be discussed under the heading of legal rules.

[19] There may be a duty (or permission) for some but not all persons of a certain group (e.g. 'One of you ought to pay the victim'). This type of norm frequently gives rise to problems of coordination. Normally, therefore, the purpose of this kind of norm is better served by a duty for all ('Each of you ought to pay the victim') and the provision that as soon as one of them pays, the duty of the others is cancelled.

4. It is permitted to refrain from voting

action type: voting
deontic operator: permitted to refrain from
norm addressees: all voters

Legal duties concern action types, not individual acts. The purpose of legal duties is to guide human behaviour. They can do so only if they deal with future behaviour. An individual act has already been performed and can no longer be guided, while future individual acts cannot be identified by a definite description and therefore cannot not be referred to in a norm formulation.[20] However, legal duties can be used to evaluate individual acts as legal or illegal. If an act violated a legal duty, it was normally illegal;[21] if it did not violate a legal duty, it was legal.[22]

If an action type is not prohibited, it is permitted to do acts of that type. This does not mean that all acts of the action type are permitted; it merely means that the fact that an act belongs to the type is *in itself* no reason why it is illegal. The act may belong to another action type that is forbidden. For instance, there is no prohibition against pushing buttons, and in this sense it is permitted to push buttons. However, if pushing a particular button is a way to torture a person, it is not permitted (it is forbidden) to push this button.

We use the term *norm* as a synonym for a duty or permission. As described above, there are prescriptive and prohibitive norms (duties) and permissive norms (permissions to do and permissions to refrain from doing). From these four, we use the notion of a prescriptive norm (a duty to do) as a primitive; the other three norm types can be defined in terms of prescriptive norms, namely as prescriptions to refrain from some action type (prohibitions) and the absence of prescriptions (permissions to do and permissions to refrain from doing). This gives us our first basic concept of European private law.

5. Semantics

In semantics (the study of meaning) it is customary to define the meaning of some words – in particular nouns, verbs and adjectives – in terms of other words. A traditional example is that

[20] Brouwer 1990, 140-142.

[21] The qualifier 'normally' was inserted because an act that violated a legal duty may in exceptional circumstances have been legal because of a ground of justification.

[22] More on evaluation by means of norms in Taylor 1961, 32f.

‘man’ means ‘rational animal’.[23] A legal example is that ‘obligation’ means ‘duty with a corresponding claim right’. Under ideal circumstances, both definiendum (what is defined) and definiens (the definition) mean exactly the same, so that things that can be classified under the definiendum can be classified under the definiens, too, and vice versa.

It often occurs, however, that the definiens consists of a number of terms, most but not necessarily all of which should be applicable if something is to be classifiable under the definiendum. A dog, for instance, normally has four legs, and this characteristic might be included in the definition of ‘dog’ (e.g. a dog is a four-legged animal that barks and is friendly to humans). However, there can be dogs with three legs, so having four legs is not a necessary condition for being a dog. In the law a similar phenomenon occurs. Normally, an obligation entails that there is a duty that can be enforced. However, a so-called natural obligation cannot be enforced. Despite that fact, natural obligations have so much in common with normal obligations that they are classified as obligations nevertheless. In these cases – where the definiens does not consist of necessary characteristics but specifies the characteristics of a normal species of the genus – we speak of *stereotype concepts*.[24]

The elements of a concept’s definition are normally also conditions for the concept’s applicability. For instance, if there is no duty, there cannot be an obligation. However, not all conditions for the applicability of a term or concept are necessarily part of the concept’s meaning. This is very clear in the law, where the conditions for becoming an owner do not coincide with the meaning of the concept ‘owner’. Obviously, it is not part of the meaning of this concept that one can become the owner of a good by inheritance. Nor is it the case that the combination of all possible ways of becoming an owner forms the meaning of the concept of ownership.

The fact that a concept is applicable and something can be classified as an instance of that concept normally has particular consequences. To again use ownership as an example: if somebody is an owner, this implies that he has the power to transfer ownership to somebody else. Moreover, the lack of the power to transfer ownership normally means that one is not the owner. However, the availability of the power to transfer is not part of the meaning of the concept ‘owner’. It is possible to understand what ‘owner’ means without being able to spell out all or even most of the legal consequences of ownership. In general, it holds that the

[23] See e.g. Leech 1974, 95f and, from a more philosophical perspective, Carnap 1956.

[24] Cf. Putnam 1975 and Smith 1990.

meaning of a word or concept does not necessarily coincide with the consequences of its applicability.

We find that the applicability of a concept goes together with a number of circumstances. Some of these circumstances form the meaning of the concept, while others belong to the conditions of applicability without being part of the meaning, or they belong to the consequences of the concept's applicability, again without being part of the meaning.

In this paper, we identify a set of basic concepts in terms of which the technical concepts of European private law can be expressed. Characteristic of a basic concept is that it cannot be specified in terms of other, more elementary concepts. Concepts that can be specified exhaustively in terms of more elementary concepts are called *compound concepts*. One example of a compound concept from the Dutch law of obligations is the notion of an obligation itself. Arguably,[25] if there rests an obligation upon A towards B to do X, *this means that* A has the legal duty to do X and that B has a claim right[26] against A concerning this duty. Another example of a compound concept from the Dutch law of obligations is the concept of a 'fault'. That a person is at fault means that she has committed an illegal act and that this act can be attributed to this person.

As mentioned above, it is often the case that a concept can be specified in terms of other concepts, but that this specification is not exhaustive. The concept of ownership provides a case in point. Such concepts are called *stereotype concepts.* In section 8, we discuss placeholder concepts, which are not alternatives for compound concepts or stereotype concepts, but rather conceptual constructs that make it possible to ignore the difference between these two concept types.

6. Rules

The possibility for legal acts to bring about changes in the world of the law rests on the existence of rules. If the acceptance of an offer leads to a contract, this is because there exists a rule to the effect that an offer followed by the acceptance of that offer creates a contract. This is illustrative of the role that rules play in the law. Rules create connections between concepts (e.g. 'fault' means 'attributable illegal act'), between events (e.g. by making one event also count as another: writing a letter counts, under certain circumstances, as making an offer), between states of affairs (e.g. the state of affairs that one is married implies the state of

[25] Cf. Hage forthcoming.

[26] More on claim rights in section 9.2.

affairs that one ought to take care of one's spouse) and between events and states of affairs (e.g. the event of concluding a marriage contract leads to the state of affairs of being married).

We distinguish four main types of rules, namely:

- *Meaning rules*. These specify the meaning relations between compound and stereotype concepts on the one hand, and the concepts that are constituents of their meanings on the other hand. An example is the already mentioned rule that a 'fault' is an attributable illegal act.
- *Counts-as rules*. These specify under what circumstances a kind of event also counts as another kind of event. An example of a counts-as rule is the rule that making a certain declaration (e.g. 'Do you want to buy my car for € 2000?') counts, under the suitable circumstances, as making an offer.
- *Causal rules*. These bring about that an event has a state of affairs as its consequence. An example of a causal rule is the rule that if one commits a tort, this event leads to a legal obligation to pay damages. Obviously, the causation in question is a special legal form of causation and not causation in the traditional physical sense.
- *Constitutive rules*. These bring about that some state of affairs normally goes together with another state of affairs. An example of a constitutive rule is that if one is under a legal obligation towards somebody else to do something, the other person normally is competent to transfer the claim right that is part of the obligation.

In the case of legal acts, counts-as rules and causal rules are closely connected. A counts-as rule indicates what behaviour counts as the legal act in question, while the causal rule indicates what the legal consequences of this legal act are. We shall briefly return to this connection between counts-as rules and causal rules in the following section.

It may seem that this fourfold division overlooks rules that prescribe or permit behaviour.[27] Obviously, there are such rules. We propose to analyse them as rules that have as a result the existence of a duty, a prohibition or a permission (a normative state of affairs), and therefore are constitutive or causal rules. For instance, the rule that when it gets dark, car drivers ought to turn on their car lights generates the normative state of affairs (duty) that car drivers ought to turn on their lights when it gets dark. And given the case that John is driving as it is getting

[27] The three kinds of rules distinguished above would all count as *constitutive rules* in the sense of Searle 1969. Searle opposes these constitutive rules to so-called *regulative rules*. In our view, regulative rules are either causal or constitutive rules (in our sense), which bring about the existence of a norm. More on norms, which in our terminology are not rules, in section 4.

dark, the rule generates the normative state of affairs (duty) that John ought to turn on his lights.

7. Legal acts

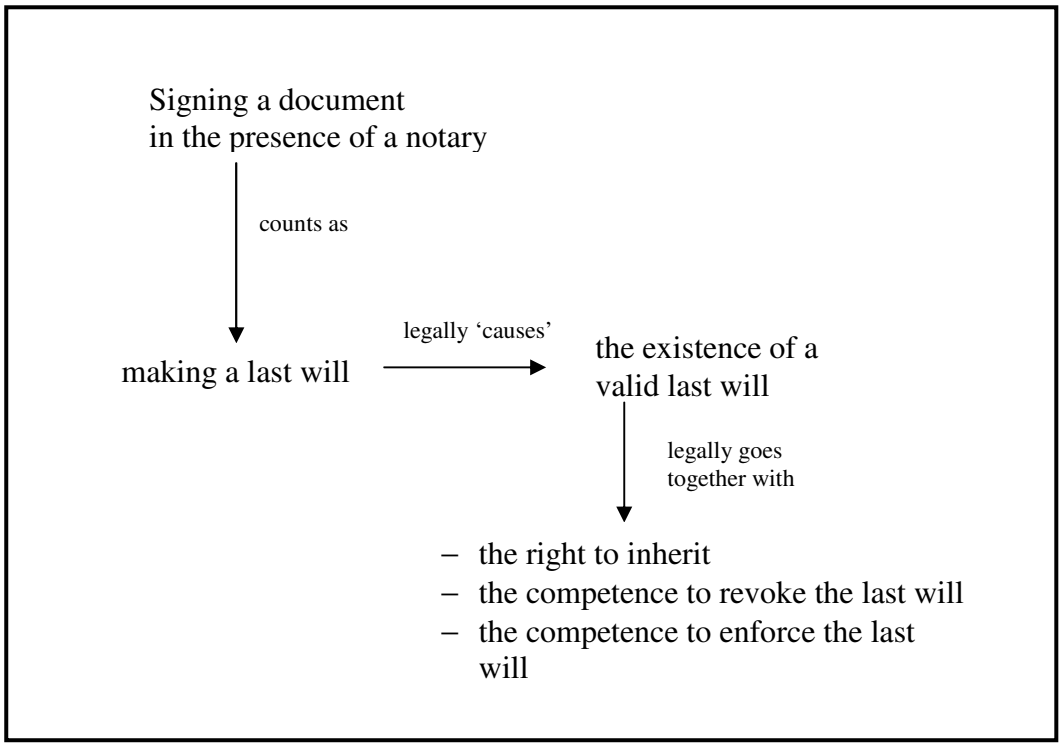
One of the more complex phenomena in the law is the legal act. The basic idea is quite simple: a legal act is an act performed with the intention to create legal consequences, where the consequences take effect *because of* the intention to create them. The existence of legal acts is made possible by legal rules. These rules do three things. They:

1. indicate who is competent to perform a legal act of a particular type;
2. define what precisely counts as a legal act of this type (how the legal act is to be performed);
3. attach legal consequences to the legal act.

An example of a legal act is making a last will. A legal system contains constitutive rules that specify who is competent to make last wills. In the Netherlands, for instance, generally speaking only human beings who are 16 years or older have this competence (article 4:55 of the Dutch Civil Code). There are also counts-as rules that specify how last wills can be made and that bring about that particular physical acts, for instance signing a particular type of document in the presence of a notary, count as making a last will (article 4:93 and following of the Dutch Civil Code). And there is a causal rule that attaches a legal consequence to the making of a last will, namely that a valid last will exists. This latter state of affairs leads via constitutive rules to additional legal consequences, for instance that a person mentioned in the last will has a right to part of the estate of the testator when the latter dies and that the testator is competent to revoke the last will (article 4:42 Dutch Civil Code).

The following figure depicts the functions of the different types of rules with regard to the legal act of making a last will[28]:

[28] The figure does not represent the competence-conferring rules.



As this example illustrates, the counts-as rule specifies what counts as the making of a last will. Signing a document in the presence of a notary counts under suitable circumstances as making a last will. This means that the signing of the document is at the same time also 'another' act, namely making a last will.[29] The causal rule brings about that an event (the making of a last will) legally 'causes' the existence of a valid last will. The existence of a valid last will in its turn has a number of legal consequences, specified by constitutive rules.

Performing legal acts requires the competence to do so. The issue of competence arises because legal acts do not exist outside the law. They are a creation of the law and one of the things the law must do is determine who is capable of performing such acts. Being competent is a legal status that has no physical counterpart. This status is assigned to an actor by a rule, in general because the actor has particular characteristics. For instance, in Dutch law there is a rule that assigns to the owner of a good the status of being competent to transfer the ownership of that good. This constitutive rule attaches the state of affairs that a person x is competent to transfer the ownership to the state of affairs that person x is owner. By

[29] The question whether an act is identical to the 'same' act under another description that refers to the act's consequences (e.g. shooting and killing) has been debated in the philosophy of action. A similar discussion is possible about the issue whether an event is identical to the same event under a different description that refers to the event's consequences. We refer the interested reader to Ginet 1995 and Lombard 1995 and the references there.

distinguishing between actors who are competent and actors who are not competent, the law may limit the set of persons who are capable of performing legal acts of a certain type.

Competences may be generic or more or less specific. A person may have the generic competence to perform legal acts of a private law nature, without having the specific competence to perform a certain kind of legal act. For instance, persons who are fifteen years old may have the generic competence to perform legal acts and be competent to buy a sandwich, but may not be competent to make a last will. Furthermore, one may have the competence to perform a certain type of legal act (e.g. making contracts), without having the more specific competence to perform a certain kind of that type of legal act (e.g. a contract that transfers ownership).

A competence does not imply the permission to do what one is competent to do, although a competent person will normally be permitted to use the competence, because otherwise the competence would not make much sense. The sanction of incompetence is normally that an act performed by an incompetent actor is void. It does not count as a valid legal act of the type in question. In case a specific competence is needed to perform a certain kind of legal act, being competent in a more generic sense has no other legal consequences than that the validity of the legal act is not lacking because of generic incompetence.[30] On the other hand, if a more specific competence is not required, the generic competence suffices and the actor is able to bring about the legal consequences of the legal act if he follows the rules that specify how it can be performed.

Because the concept of competence cannot be defined in terms of other concepts, we treat it as one of the basic concepts.

8. Placeholder concepts as exemplified by ownership

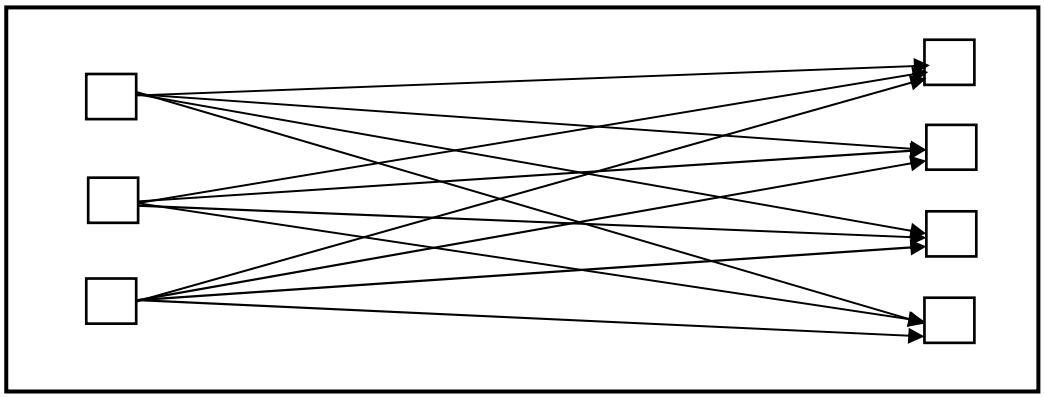
In section 5, we distinguished compound and stereotype concepts as well as the basic concepts that this paper aims to identify. Although the distinctions between these different kinds of concepts can be made in theory, it is not very easy to apply them in practice. Concepts do not come labelled as ‘basic’, ‘compound’ or ‘stereotype’. Moreover, the distinction between on the one hand characteristics that are part of a concept’s meaning, and on the other hand the conditions for and consequences of the applicability of the concept, is

[30] The present analysis of competence is confined to the competence that is necessary to perform legal acts. The law also uses the notions of competence and incompetence to refer to, respectively to limit the possibility of certain legal states of affairs. For instance, somebody or something may be incompetent to be the bearer of legal rights or duties.

easier to make in theory than in practice. To avoid the complications that follow from the difficulties associated with applying these distinctions, we can make use of a conceptual construction, namely that of the *placeholder concept*.

The idea behind the construction of a placeholder concept is that the role of a number of legal concepts is to function as an intermediary in legal arguments from the conditions in which these concepts are applicable to the consequences of the concept's applicability. Let us take the concept of ownership as an example. The law knows several ways to obtain ownership, such as creation of a good, inheritance or transfer of the right. Moreover, the law attaches many legal consequences to the existence of ownership, such as the duty for everybody except the owner not to destroy the owned good, and the competence of the owner to transfer the ownership or to create a more limited right (e.g. mortgage) with respect to the owned object.

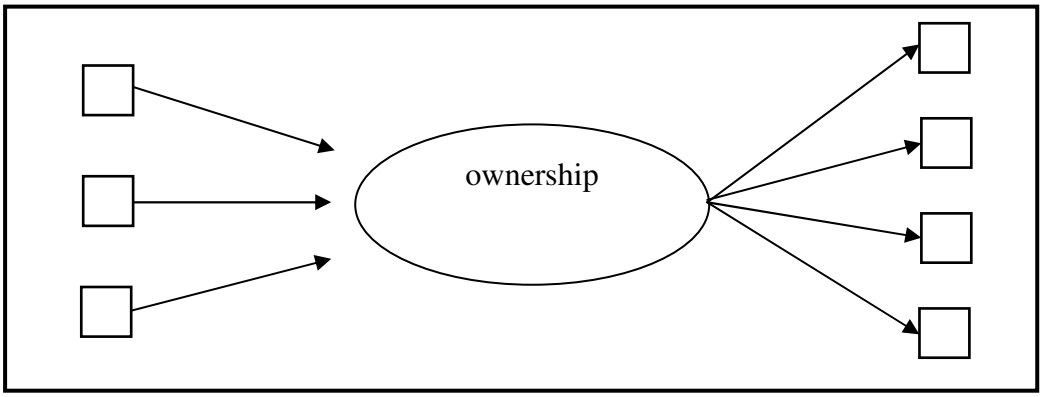
In theory, the legal consequences of the existence of ownership might be attached to all the different ways in which ownership is acquired. For instance, one might have the rule that if one has inherited a good, all other persons have the duty not to destroy this good. In this way it is possible to do without the concept of ownership altogether, because all the legal consequences that are traditionally attached to the existence of such a right are then attached to all different ways of what would traditionally be ways of acquiring ownership.[31]



It is more economical, however, to work with an intermediate concept – the concept of ownership – that forms the intermediary between the rules that specify under which circumstances particular legal consequences obtain, and the rules that specify which legal consequences obtain if the conditions of the former rules are satisfied. A schematic example may illustrate this point. Let us assume that there are three ways to acquire ownership and that there are four legal consequences attached to the existence of such a right. If a legal system

[31] Cf. Ross 1957, MacCormick 1974, Brouwer 1999, Hage 2004.

uses the concept of ownership, it needs seven rules (three causal rules plus four constitutive rules) to regulate this subject (see the figure below). If the concept of a property right is lacking, it takes twelve (three times four) rules to make the same regulation (see the figure above).



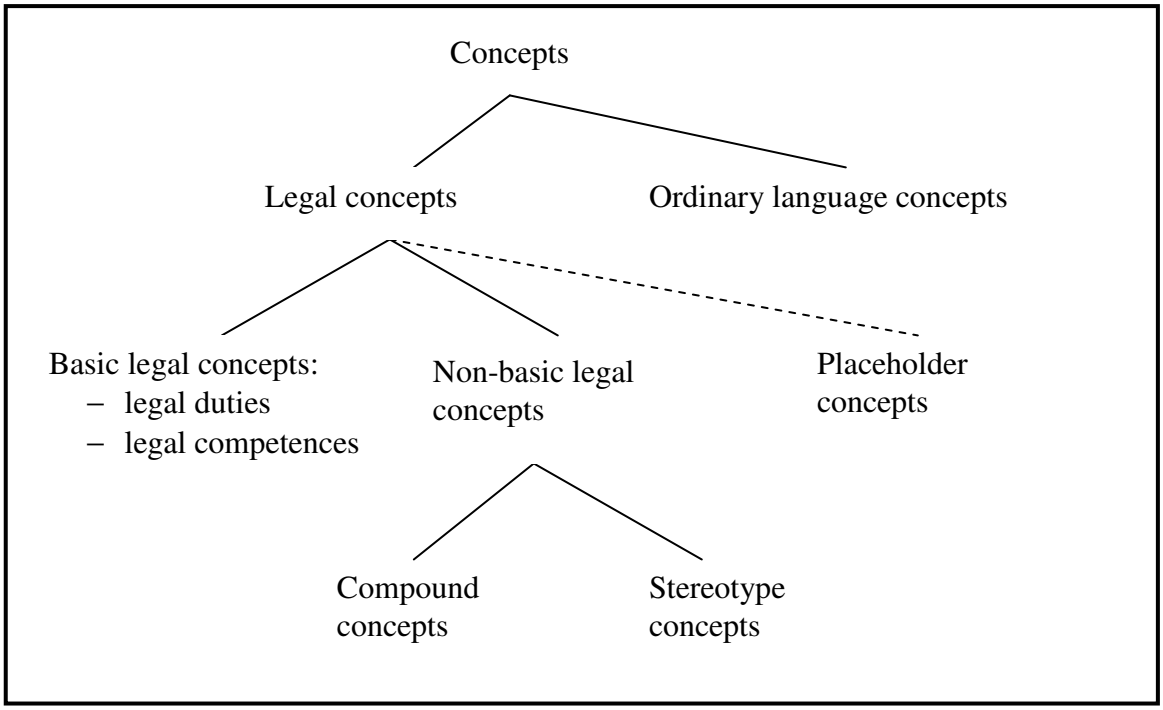
From a logical point of view, the intermediate concept is empty: it is nothing more than a placeholder in an argument from the conditions that specify when this concept is applicable to the consequences of the concept's applicability. The 'real' law is embodied in the rules that specify the conditions and the consequences of the concept's applicability. In theory, any one of these rules might change without a change in the intermediate concept, which is nothing more than a placeholder in an argument.

When we look at the meaning of 'ownership', the situation is obviously different. The concept of ownership in its various guises has always and everywhere been connected with a particular content and with particular ways of acquisition. The details of what counts as ownership may vary with time and place, but the main lines remain the same, under penalty of becoming a different concept. It may be very difficult to specify precisely what the conditions for ownership are, especially if these conditions need to be both necessary and sufficient, but this does not detract from the fact that there is a number of conditions that are characteristic of ownership, and usually most of them are satisfied if something is owned.

For the purposes of our present project, however, the logical view of ownership as a placeholder in arguments from the conditions to the consequences of being an owner is more useful than the semantic view according to which ownership is connected to particular characteristics. According to this logical view, the existence of ownership can be treated as a placeholder that comes about as a legal consequence if particular conditions are satisfied, and to which in its turn particular legal consequences are attached. The rules that specify the conditions of applicability and the final legal consequences are what really count. The concept of ownership, if it is treated as a placeholder concept, is no more than a name that makes it

easy to represent particular lines of legal reasoning. By treating a concept as a placeholder, it becomes possible to ignore the difficult question which characteristics of a concept belong to its proper meaning, and to confine the analysis of legal concepts to a specification of the conditions under which the placeholder concept is applicable and the consequences of this applicability. The 'meaning' of the concept is in this way replaced by the rules that specify these conditions and consequences.

The following scheme gives an overview of the different kinds of concepts that we have identified thus far. The interrupted line to the placeholder concepts indicates that placeholder concepts are not really a subcategory of the legal concepts, but that they are merely a convenient way to analyse legal concepts. In particular it is important to realize that basic and non-basic concepts form mutually exclusive categories, but that placeholder concepts are means to analyse non-basic concepts (and perhaps even basic concepts).

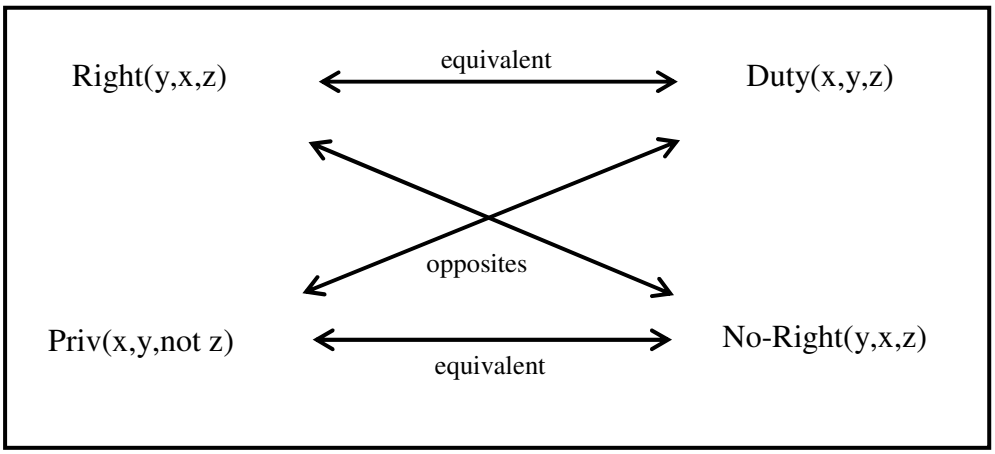


9. The Hohfeldian concepts

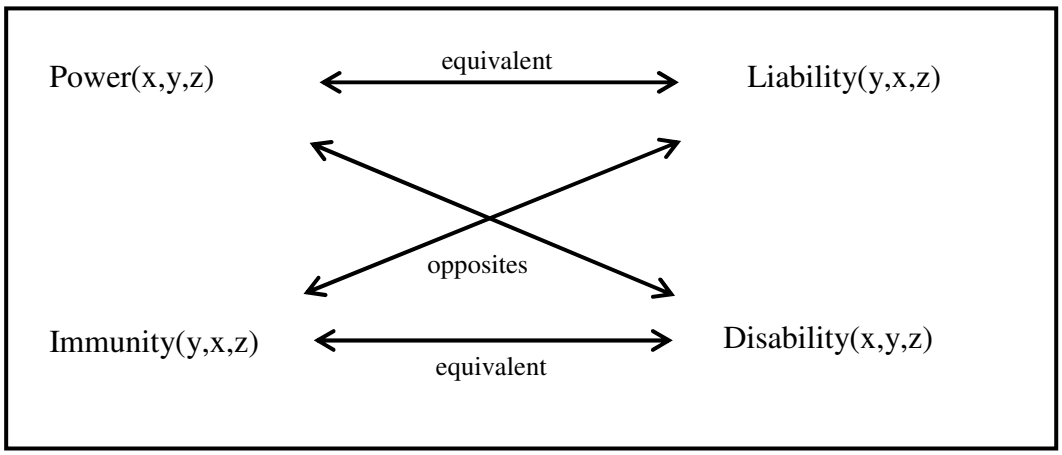
The power of our two basic notions (i.e. duty and competence) can be illustrated by comparing them to the set of fundamental legal 'conceptions' as developed by Hohfeld. Hohfeld distinguished eight related conceptions, some of which are often denoted by the ambiguous term 'right'. These eight conceptions are those of a right, no-right, privilege, duty, power, disability, immunity and liability. Characteristic of Hohfeld's analysis is that he treats all of these conceptions as relational. For instance, a right is always a right of some person

against some person and an immunity is likewise always the immunity of somebody against somebody.

The eight conceptions are related, namely by means of the relations of opposition and correlation. If two conceptions are correlated (equivalent), the applicability of one entails the applicability of the other, and vice versa. If two conceptions are opposed, the applicability of the one entails the non-applicability of the other, and vice versa. If we designate the direction of the relation by means of the order of the persons and the action type involved, so that 'Duty(x,y,z)' means that x has a duty towards y to do z, 'Right(y,x,z)' that y has a right towards x that x does z, 'Priv(x,y, not z)' that x has the privilege towards y not to do z and 'No-Right (y,x,z)' that y has no right towards x that x does z, then the relations between the first set of four conceptions can be depicted as follows:



The relations in the second set of four conceptions are depicted in the following figure:



Some examples may illustrate these conceptions. Suppose that x has contracted with y and is as a consequence under the obligation towards y to pay € 100 (z). Under these circumstances,

y has a right[32] against x to be paid € 100. The right of y and the duty of x are but two sides of the same coin. If x is not under a duty to pay € 100 to y, x has the privilege towards y not to pay this amount of money. This privilege is nothing other than the absence of the duty.[33] Similarly, the no-right of y towards x with regard to the payment of € 100 is nothing other than the absence of the right of y towards x with regard to that payment. In a sense, therefore, we do not need the conceptions of the privilege and the no-right. They are superfluous, because their contents may be expressed by using the concepts of duty and right and the logical operator for negation.

Suppose that y has made an offer to x to buy one of x's paintings for € 200, which x can accept or refuse. By accepting the offer, a sales contract will be concluded. This can be expressed by saying that x has the power over y to accept the offer (z). In the given example there are rules that determine that acceptance of the offer will bring about a contract and that the contract will bring about a set of further legal consequences, including the duty for y towards x to pay €200. The power to accept therefore implies, among other things, the power to create this duty. Seen from the perspective of y, the same situation can be described by saying that y is liable to the acceptance of the offer by x and therefore liable to be brought under the duty to pay €200 to x. If x has no such power over y, one can speak of a disability of x to accept the offer, which implies the disability to bring y under this duty. In such circumstances, y is immune against x accepting the offer and immune against x bringing him under the duty. Again, strictly speaking the conceptions of a disability and immunity are superfluous. The first of these concepts may be expressed by the negation of power, and the second by the negation of liability.

9.1 Duties

Now let us see how the Hohfeldian concepts compare with the set of two basic concepts we defined above. We shall start with the concept of a duty. There are many legal duties, such as the duty to drive on the right-hand side of the road, the duty not to pollute the environment excessively, the duty not to kill human beings, the duty not to interfere with somebody else's property and the duty to repay one's loans. Some of these duties exist in order to protect the general interest – such as the duty not to pollute the environment excessively and the duty to drive on the right-hand side of the road – while other duties are there to protect the interests of

[32] More about rights in section 9.2.

[33] The Hohfeldian notion of a privilege is strongly related to our notion of a permission. The crucial difference is that permissions are not relational, while Hohfeldian privileges are.

one or more specific persons, such as the duty to repay one's loans and the duty not to interfere with somebody else's property.

If, but not necessarily only if, a duty exists to protect somebody else's interests, this other person can be given legal means to enforce this duty. For instance, if A has the duty to repay his loan to B, B will normally have legal means to enforce A's duty. This need not be the case, however. In the case of a so-called natural obligation, A may have a duty in the interest of B, whereas B has no legal means to enforce this duty.[34] If A has a legal duty and B has legal means to enforce this duty, we say that B has a *claim right* towards A to the effect that A fulfils his duty.[35]

The first thing to notice is that not all legal duties are relational in the sense that they are duties towards somebody else. An example is the duty to wear a helmet when driving a motorcycle. Apparently, Hohfeld's analysis does not capture all basic legal concepts. However, as soon as we accept that the law also uses a non-relational notion of a legal duty, the question arises whether the relational notion of a duty makes sense. Suppose that A has both the legal duty to wear a helmet and the legal duty to pay B € 100. In both cases, A has a duty to do something. Are these duties different as regards a duty to do something, because in the first case there is no correlated right-holder, while in the second case there is? We readily admit that the two cases are legally different, but in our opinion this difference is not a difference *in the kind of duty*. The difference is that in the latter case there is somebody with a right corresponding to the duty, while in the former case there is no such person. The duties in themselves are essentially similar. Thus, the second thing to notice is that the relational analysis of legal duties as provided by Hohfeld is misleading, because it suggests that the *basic concept* of a legal duty is relational.

Does this mean that legal duties as analysed by Hohfeld (that is, duties with correlated rights) do not exist? We think the answer is negative, because Hohfeldian duties can be, and actually are, defined by legal systems as compound concepts, namely as combinations of legal duties and corresponding claim rights.

9.2 Rights

If our analysis of legal duties is correct, Hohfeld must be wrong in his view that legal duties are the correlatives of legal rights: not every legal duty has a legal right as its correlative. This

[34] In Dutch law, gambling debts are such 'natural obligations'.

[35] Claim rights should be distinguished from rights that do not imply claims on other persons, such as political rights.

means that the analysis of rights cannot be based exhaustively on legal duties and that rights need an analysis of their own.

What, then, is a legal right? Let us begin by excluding fundamental human rights – such as the right to freedom of speech – as a proper analysis of such rights is beyond the scope of this paper, and seems to be quite complicated.[36] Second, we must, at least prima facie, distinguish between rights against other persons (*iura in personam*) and rights on certain 'things' (*iura in rem*).

Before continuing with an analysis of rights against persons and on things, we want to point out a complication, namely that the meaning of the concept of a right cannot well be distinguished from the conditions under which a right exists and the consequences attached to the presence of a right. As we have seen, this complication can be circumvented by analysing the concept of a right as a placeholder concept, defined by the rules that specify the conditions under which rights come into existence and the consequences of their presence. These rules are rules of particular legal systems and the details differ from system to system. This means that there is probably no placeholder concept of a legal right that is completely identical in the different legal systems. Consequently, the best we can do is try to give an analysis of the notion of a right in a specific legal system in terms of our basic concepts. Given our background in the Dutch legal system, we take this system as the starting point of our analysis.

Let us start with rights on 'things', and confine ourselves, to keep matters relatively uncontroversial, to the ownership of material goods. Suppose that A has the ownership of a book. This implies that A is permitted to use the book, to damage it and even to destroy it. Other persons, who do not have the ownership of the book, are not permitted to use, damage or destroy the book. In other words, they have the legal duty not to use, damage or destroy the book. This duty can be lifted by a permission granted by A, who is apparently competent to grant such a permission. Moreover, A has the competence to transfer the ownership of the book to somebody else. This leads us to the beginning of an analysis of ownership:

[36] See Alexy 2002, especially Chapter 4.

If A has the ownership of a material good G, amongst others the following legal consequences hold:

- all other persons have prima facie[37] the legal *duty* not to use, damage or destroy G, or to interfere with A's use and enjoyment of G;
- A is *permitted* to use, damage or destroy G;
- A has the *competence* to grant other persons the *permission* to use, damage or destroy G;
- A has the *competence* to transfer the ownership of the book to somebody else.

A placeholder concept is defined not only by the rules that specify the legal consequences of its existence, but also by the rules that specify when such a state of affairs obtains and/or under which circumstances it comes into being. The following rules give a very partial specification of the ways in which the state of affairs that A is the owner of G can come about:

- if A has made G from material that did not belong to somebody else, A is the owner of G;
- if A has inherited G, A is the owner of G;
- if the ownership of G was transferred to A by the former owner of G, A is the owner of G.

The states of affairs that A has inherited G and that the ownership was transferred to A can themselves be analysed as placeholder concepts that need specification by means of rules. In general it holds that rules that specify placeholder concepts may refer to other legal states of affairs that need to be specified by additional rules. One of the presuppositions of our project is that every such a chain of specifications can 'bottom out' on a specification in terms of the limited set of basic concepts and ordinary language concepts.

Rights against persons can also be analysed as placeholder concepts, the precise conditions and consequences of which are specified by the legal system in which they are used. Having such a claim right is a placeholder to which legal rules attach a number of legal consequences, usually including consequences that make it possible to enforce the fulfilment of a legal duty. These legal consequences may include that the right-holder has a competence to start

[37] The clause 'prima facie' is meant to express that the prohibition against interference is amenable to exceptions. The nature of these exceptions, which has to do with the defeasibility of rule application, is outside the scope of this paper. Details can be found in e.g. Hage 1997 and 2003.

proceedings (an action), a judge has the duty to condemn the debtor to pay the money, if so requested by the right-holder, and the competence to compensate when the right-holder has not only the right to be paid by his debtor but also a duty to pay this debtor. They may also include the specific competence to alienate the claim right.

9.3 Powers

Hohfeld's notion of a power seems similar to our notion of competence. We prefer the term 'competence' because it is less ambiguous. There is, however, an important difference between Hohfeld's powers and our competences, because the powers are relational, while competences are not. This is reflected in the fact that a power has a correlate in the form of a liability, while such a correlate is lacking for competences in our sense.

Let us give an example to illustrate this difference. The owner of a good has the power to enforce his right against – in principle – all other persons. This means that all these other persons are liable to have such an enforcement exercised against them. At first sight, this liability seems uninteresting, being nothing other than the power looked at from the side of somebody who possibly undergoes the consequences of the exercise of this power. From this perspective, only one thing – the power – can be looked at from different sides. In fact, it is this perspective that we have adopted and that made us decide to adopt a non-relational notion of competence.

There is something to be said in favour of the relational notion of power, however. Sometimes people are exempt from the consequences that the exercise of a power would normally have. If A leases his car to B, he can no longer enforce his ownership against B by forbidding B to use the car. B has, to use Hohfeld's terminology, an immunity and A lacks the power to enforce his right against B if B uses A's car, a power A would normally have. According to Hohfeld, such an immunity is the opposite of a liability, and the correlate of a disability (the lack of power). This suggests that the notion of a liability has meaning independent of the notion of a power, namely as the opposite of an immunity. The relational concept of power, according to which a power of A against B excludes an immunity of B against A, accounts for this relation between a power and an immunity. If we propose to use a non-relational notion of competence, we must give an account of how immunities can be expressed in terms of our set of non-relational basic concepts. In order to do so, we must interrupt our discussion of the Hohfeldian concepts for an account of the 'logic' of legal rules.

10. Intermezzo: the 'logic' of rules[38]

Most legal rules attach consequences to the occurrence of a particular event or to the presence of particular states of affairs (see section 6). To which event or state of affairs the consequences are attached is specified in the rule conditions; what the attached consequences are, is specified in the rule conclusion. Apparently, the 'logic' of rules – how they work – is quite simple: if the conditions of the rule are satisfied, its consequence occurs; otherwise, it does not occur, at least not because of the rule. Upon closer examination, however, the operation of rules turns out to be more complicated. It is, in exceptional circumstances, possible to apply at least some rules by analogy, which means that the rule's consequences occur in a case, even though its conditions are, strictly speaking, not satisfied in that case. It is also possible – again in exceptional circumstances – not to apply a rule to a case, even though the rule's conditions are satisfied. This may happen, for instance, if the rule conflicts with a rule that has precedence over it, or if application of the rule would be against the rule's purpose.

For our present purposes, we are most interested in the possibility to make an exception to a rule, where an exception is taken to occur if a rule's conditions are satisfied and the rule is nevertheless not applied. Exceptions are always confined to particular cases; they have no impact on a rule's validity. An invalidating circumstance is not the same as an exception to a rule. For instance, if we make an exception to the rule that it is forbidden to steal for somebody who stole a loaf of bread to avoid starvation, this does not mean that the rule that forbids stealing has become invalid. The rule remains valid, even though we do not apply it in a particular case. Moreover, exceptions do not imply that the rule reads differently than it would seem at first sight. The rule that forbids stealing does not read that it is forbidden to steal, except if one steals a loaf of bread to avoid starvation. It still reads that it is forbidden to steal, even if one makes an exception to the rule in some cases of stealing bread.

Exceptions to rules do not occur just like that; there must be a reason to make an exception. What counts as such a reason depends, in the case of legal rules, on the legal system in which the rule exists. Legal systems tend to have rules that specify, not necessarily exhaustively, when to make exceptions to rules. The so-called *lex specialis* conflict rule is an example of such a rule. It says that if a more general rule conflicts with a more specific rule in a particular case, the more specific rule should be applied and there is an exception to the more general

[38] A more elaborate informal discussion of the operation of rules can be found in Schauer 1991. A logically more precise discussion is Hage 1997.

rule. Another example is the rule that permits a judge not to apply a valid rule if the application of that rule in a particular case would reasonably be unacceptable.

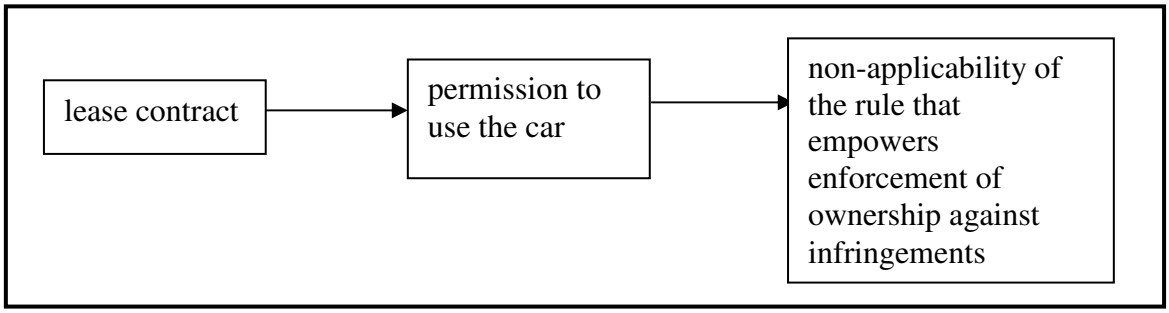
11. The Hohfeldian concepts continued

11.1 Immunities

The existence of immunities can be analysed in terms of exceptions to rules. Part of the analysis of ownership is the existence of a rule that forbids persons other than the owner to use the owned object. Another part of the analysis is the existence of a rule that empowers the owner to enforce his right against those who make infringements.

If the owner of a car A leases his car to B, A creates for B with regard to the car an exception to the rule that non-owners are forbidden to use owned objects. As a consequence, B is permitted to use the car, even though the car is still owned by A. As a further consequence, B's use of the car is no longer an infringement of A's ownership. Yet another consequence is that the conditions of the rule that owners can enforce their property rights against those who infringe upon it, are not satisfied in the case of A, B and the car.

As this example illustrates, there is no need for a relational notion of power to account for the phenomenon that some people are immune against the exercise of the right of ownership. The immunity of B is a direct consequence of the non-applicability of the rule that empowers A to enforce his ownership, and an indirect consequence of the permission that B had to use the car, which was granted to him by means of the lease contract. Diagrammatically:



In this example, the immunity of B is the result of the non-applicability of the rule that grants the power to enforce the ownership (there is no infringement).

Immunities can also be a result of exceptions to rules that create competences. An example from Dutch law is the regulation of the situation in which somebody makes a declaration that seems to be a legal act, but without the intention necessary for the performance of such an act. Normally the person who made such a declaration is competent to adduce absence of the

intention and to invoke nullity of the declaration. However, art. 3:35 of the Dutch Civil Code states that if the declaration was made towards somebody who in good faith relied on the declaration, this competence is absent. The rule of this article indicates that in cases of reliance in good faith, there is an exception to the rule that assigns competence to invoke nullity because of a lack of relevant intention. Again, it turns out that we do not need a relational notion of power to account for the presence of an immunity. Our non-relational notion of competence, in combination with the possibility to make an exception to the competence-assigning rule, suffices to account for the immunity of the relying party against the general competence of the declaring party to invoke absence of intention. The exception to the rule brings about that the competence, which exists in general, does not exist in this particular case.

11.2 No-right, privilege, disability, liability

We have argued that the notions of competence, right, duty and immunity need not be relational, and that the notions of right and immunity can be analysed in terms of our primitive set and are therefore not basic notions themselves. We have not yet discussed the Hohfeldian notions of no-right, privilege, disability and liability, and we do not intend to do so extensively. The reason is that these notions are not independent, but merely express the absence of, respectively, a right, duty, power and immunity. They are what Hohfeld called 'opposites' of rights, duties, powers and immunities. What we wrote about these latter notions need only be read in a negative way to apply to the former notions.

12. Conclusion

We have set out the main lines of a project that aims to develop a set of basic concepts in terms of which the private law of European countries can be expressed. The availability of such a set should facilitate the comparative study of European systems of private law and be helpful for efforts to harmonize these systems.

As hypothesis for such a set of basic concepts, we propose the set consisting of the notions duty and competence. The existence of duties and competences are basic legal states of affairs that owe their existence to rules. To show the feasibility of this hypothesis, we used this set to analyse the notions of a legal act, a claim right and an immunity. Moreover, we discussed the Hohfeldian alternative to our set and argued why our set should be preferred to Hohfeld's.

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